

Country report **Italy**

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In the new series National Reports at the Family & Law forum (<https://www.familyandlaw.eu/>) a first series of national reports is published.

FL-EUR (<https://fl-eur.eu/>), Family Law in Europe: An Academic Network, was established at a Founding Meeting in Amsterdam on 1-2 February 2019. FL-EUR currently unites over 35 prominent experts, both academics and public officers, in the field of family & law from 32 European jurisdictions. The purpose of FL-EUR is close academic cooperation amongst the experts, and between the experts and other stakeholders in the field of family and law, aimed at:

1. accumulation and dissemination of knowledge of both family law in the books and in action;
2. promotion of comparative and multidisciplinary research and education in the field of family and law;
3. learning from one another's experiences; and finally,
4. providing up-to-date comparative data for European, supranational and national bodies.

The FL-EUR members selected 'Empowerment and Protection of Vulnerable Adults' as its first working field, since this is a highly topical field of law. Ageing societies in Europe are confronted with an many legal issues arising out of the empowerment and protection of vulnerable adults. Based on initial quick scans of all jurisdictions, FL-EUR's coordinating group has drafted a questionnaire in close cooperation with the FL-EUR's members. The coordinating group consists of Prof. Masha Antokolskaia, Prof. Nina Dethloff, Prof. Jane Mair, Prof. Maria Donata Panforti, Prof. Wendy Schrama, Dr. Katrine Kjørheim Fredwall, Prof. Frederik Swennen, Prof. Paula Távora Vítor, Dr. Velina Todorova and Prof. Michelle Cottier. They are supported by the Secretary Rieneke Stelma-Roorda.

Country reports for all jurisdictions have been produced by country reporters. The country reports have been reviewed by at least one Member of the Coordinating Group. Language and contents of the countries reports fall under the responsibility of the country reporters. The reports are representing the law as it stands in 2022.

THE EMPOWERMENT AND PROTECTION OF VULNERABLE ADULTS

ITALY

Claudia Morgana Cascione

SECTION 1 - GENERAL

- 1. Briefly describe the current legal framework (all sources of law) regarding the protection and empowerment of vulnerable adults and situate this within your legal system as a whole. Consider state-ordered, voluntary and *ex lege* measures if applicable. Also address briefly any interaction between these measures.**

The Italian system for the protection of adults deprived, in whole or in part, of autonomy and capacity for discernment provides for a number of measures and instruments.

The Italian Civil Code regulates the following protection measures:

- *support administration* – [*amministrazione di sostegno*] (art. 404 ff. of the Civil Code);
- *full guardianship* – [*interdizione giudiziale*] (art. 414 of the Civil Code);
- *curatorship* – [*inabilitazione*] (art. 415 of the Civil Code).

It also provides for:

- *legal guardianship* – [*interdizione legale*], as an accessory penalty to a final sentence of life imprisonment or imprisonment for non-culpable offences, for a period of not less than five years;
- *natural incapacity* – [*incapacità naturale*], which is the situation of an adult, not subject to protection measures, who is in a state of inability to understand or will when entering into a contract or unilateral act (art. 428 of the Civil Code).

The traditional system of protection measures in the Italian legal system was based on the two “state ordered” measures of *full guardianship* – [*interdizione giudiziale*] and *curatorship* – [*inabilitazione*].

Under the Civil Code, a *full guardianship* – [*interdizione giudiziale*] may be pronounced on a person of full age or an emancipated minor who is in «a condition of habitual mental infirmity that renders them incapable of providing for their own interests» (art. 414 c.c.).

Curatorship – [*inabilitazione*], on the other hand, may be pronounced for those whose infirmity is not so serious as to give rise to full guardianship or for those who «through prodigality or the abuse of alcoholic beverages or narcotics, expose themselves or their family to serious economic prejudice» (art. 415 c.c.).

Interdizione and *inabilitazione* are “rigid” protection measures, resulting in the total (in the first measure) and partial (in the second) loss of capacity.

With the order pronouncing the *full guardianship* – [*interdizione*], the tutelary judge appoints a *guardian* – [*tutore*] for the incapacitated person, who replaces him/her in the performance of acts of ordinary and extraordinary administration (except for the possibility of derogation for certain acts of ordinary administration, established in the judgment pronouncing the *full guardianship* – [*interdizione*], art. 427 of the Civil Code).

In case of *curatorship* – [*inabilitazione*], the protected person, who can independently perform acts of ordinary administration, is supported by a *curator* – [*curatore*], who assists him in performing acts of extraordinary administration.

Law no. 6 of 9 January 2004 introduced in Italy the *support administration* – [*amministrazione di sostegno*], which is currently the most suitable instrument for ensuring variable protection according to the person’s concrete assistance needs.

The traditional figures of *full guardianship* and *curatorship* were criticised from numerous points of view (the complexity and onerousness of these procedures, the rigidity of the subjective prerequisites, the standardised nature of these measures), but above all because they compressed the adult’s autonomy in pervasive terms, to the point of preventing him from contracting a valid marriage (art. 85 c.c.).

The purpose of the *support administration* – [*amministrazione di sostegno*] is to protect, with the least possible limitation of the legal capacity, persons affected by an infirmity or by a physical or psychic impairment that determines the impossibility, even partial or temporary, of looking after their own interests (art. 404 c.c.). This is a measure that can be constructed by the judge in consideration of the person’s actual needs; moreover, the beneficiary retains full legal capacity for all acts that do not require the assistance of the *support person* – [*amministratore di sostegno*] (art. 409 c.c.).

The introduction of this measure has made the recourse to *full guardianship* – [*interdizione giudiziale*] and *curatorship* [*inabilitazione*] residual in Italy, given that the *support person* may also be appointed when the person is in a situation of “habitual insanity” or is affected by prodigality or addicted to alcohol or drugs (that is, he finds himself in conditions that could give rise to guardianship or curatorship).

For what concerns voluntary measures, in Italy there is not a regulation for *continuing power of attorney*; in 2017, with law n. 219 legislation has come into force on *advance medical treatment directives*, whereby the adult can decide, in advance and in anticipation of future incapacity, on the medical treatment and care to be undergone. He may also appoint a trusted person for this purpose.

2. Provide a short list of the key terms that will be used throughout the country report in the original language (in brackets). If applicable, use the Latin transcription of the original language of your jurisdiction. [Examples: the Netherlands: *curatele*; Russia: *oneka - opeka*]. As explained in the General Instructions above, please briefly explain these terms by making use of the definitions section above wherever possible or by referring to the official national translation in English.

Full guardianship – [interdizione giudiziale]: protection measure, court ordered, and aimed at adults who are incapable of looking after their own interests due to their habitual mental insanity.

Curatorship – [inabilitazione]: protection measure placed in favour of an adult who, due to (a) insanity not so serious as to give rise to full guardianship; (b) prodigality; (c) habitual abuse of alcoholic beverages or drugs, exposes himself and his family to serious economic harm.

Support administration – [amministrazione di sostegno]: protection measure with the aim of providing assistance to a person who, as a result of an infirmity or physical or mental impairment, is unable, even partially or temporarily, to provide for his own interests.

Legal guardianship – [interdizione legale]: an accessory penalty to a final sentence of life imprisonment or imprisonment for non-culpable offences, for a period of not less than five years.

Legal capacity – [capacità di agire]: the ability to hold rights and duties and to exercise those rights and duties.

Natural incapacity – [incapacità naturale]: the *de facto* situation of an adult, not subject to protection measures, who is in a state of inability to understand or will when entering into a contract or unilateral act.

Guardian – [tutore]: person, appointed by the tutelary judge, for the care of the adult subject to full guardianship, who replaces the incapacitated person in the performance of all legal acts.

Curator – [curatore]: person, appointed by the tutelary judge, entrusted with the care of the adult under curatorship.

Support person – [amministratore di sostegno]: person, appointed by the tutelary judge, entrusted with the care of the beneficiary of support administration.

Advance directives for medical decisions – [disposizioni anticipate di trattamento, DAT]: guidance given, in anticipation of future incapacity, on medical treatment, diagnostic tests and therapeutic choices.

Trusted person – [curatore]: the person indicated in the DAT to represent the person concerned in relations with the doctor and healthcare facilities.

Tutelary judge – [giudice tutelare]: judge established in every Italian court with the task of supervising guardianships, curatorships and support administrations. His functions are described in art. 344 of the Civil Code.

- 3. Briefly provide any relevant empirical information on the current legal framework, such as statistical data (please include both annual data and trends over time). Address more general data such as the percentage of the population aged 65 and older, persons with disabilities and data on adult protection measures, elderly abuse, etc.**

No updated statistical data available at national level.

- 4. List the relevant international instruments (CRPD, Hague Convention, other) to which your jurisdiction is a party and since when. Briefly indicate whether and to what extent they have influenced the current legal framework.**

Italy signed the Hague Convention on 31 October 2008.

By law no 18 of 3 March 2009, the Italian Parliament authorised the ratification of the United Nations Convention on the Rights of Persons with Disabilities and its Optional Protocol signed by Italy on 30 March 2007.

The Italian law ratifying the Convention at the same time established the National Observatory on the condition of persons with disabilities, which has, among other things, the task of promoting the implementation of the Convention and drawing up the detailed report on the measures adopted.

In 2016, the Committee on the Rights of Persons with Disabilities examined the report sent by Italy on the implementation of the Convention on the Rights of Persons with Disabilities (<https://www.ohchr.org/en/press-releases/2016/08/committee-rights-persons-disabilities-considers-initial-report-italy?LangID=E&NewsID=20413>).

First of all, the Committee Experts congratulated Italy on its National Observatory on the Status of Persons with Disabilities and accompanying plan to implement the Convention, which was an excellent way to harmonize laws and policies. However, the experts also expressed some concerns, starting with the regional differences in Italy and the unequal access of people with disabilities to services. Moreover, despite the system of support administration introduced to facilitate independent decision-making by persons with disabilities is clearly in line with the Convention, experts urged Italy to review its system of support persons in particular to facilitate independent decision-making by persons with disabilities and to recognise sign language.

5. Briefly address the historical milestones in the coming into existence of the current framework.

In the traditional system of protection measures regulated in the civil code (*full guardianship* and *curatorship*), no autonomous space was carved out for vulnerable persons (to whom the aforementioned measures could be applied, only in the presence of the requisites of psychic or physical incapacity required by the relevant rules). Moreover, the traditional system of incapacity was the subject of extensive criticism, for its “authoritative, invasive, segregative, custodialistic and patrimonialistic approach”.

The tendency towards an ageing population and the increase in situations of disability and functional dependence, has not found an adequate response in traditional protection measures, characterized by a substantial rigidity, in terms of assumptions and effects.

For a long time, the protection of persons who are not incapacitated, but lack, even in part, full self-sufficiency, has been left without a satisfactory response at the regulatory level, since it has not been possible to resort to traditional instruments except in pathological cases.

Moreover, traditional measures, as is well known, imply a loss of autonomy for the subject which, especially in the case of the elderly and the disabled, can lead to an acceleration of the decay process.

The insufficiency and rigidity of traditional protection measures have led to a rethinking of the protection of vulnerable adults; in this sense, the starting point has been the Hague Convention on the International Protection of Adults.

The main legislative interventions of the last few years, as well as the doctrinal orientations and decisions of the courts on the subject, appear to be dominated by the concern to reconcile the need for protection - linked to vulnerability - with respect for the dignity and self-determination of the subject. Protection does not mean the eradication of the person from the decision-making process; instead, it implies the obligation to seek the participation of the vulnerable person in the decisions and acts of life that he or she is capable of carrying out.

In this sense, the introduction of the *support administration* – [*amministrazione di sostegno*] has been emblematic: in fact, the support person can operate in a series of situations that go beyond a condition that can be qualified as “insanity” and, consequently, all subjects who - beyond a declared state of incapacity - are concretely unable to look after their own interests, due to a weakening of cognitive or sensory capacities or a physical handicap, can benefit from it.

In contrast to *full guardianship*, which, by depriving the beneficiary of capacity, is likely to increase the risk of social marginalisation, the *support administration* provides for and guarantees a greater involvement of the protected person in management and care choices; moreover, the “customisation of the

decree of appointment” of the *support person* allows for a concrete adjustment to the needs of the administration (Cass., 26.10.2011, no. 22332).

The measure seems to be a ductile and elastic instrument (unlike the rigid and totalising institutes of *full guardianship* and *curatorship*, which are now of residual value in the new perspective of protection of vulnerable adults), of help that translates into terms of assistance, without, however, in any way prejudicing the personality of the subject, who is not excluded from the civil consortium (Trib. Modena, Sez. II, 24.2.2005).

6. Give a brief account of the main current legal, political, policy and ideological discussions on the (evaluation of the) current legal framework (please use literature, reports, policy documents, official and shadow reports to/of the CRPD Committee etc). Please elaborate on evaluations, where available.

The Italian system of protection measures, even after the introduction of the support administration, remains anchored to a concept of “incapacity” and a logic of “protection”, not in line with the different trends taking place in other legal systems (see the recent Spanish law 8/2021). Moreover, it does not offer adequate protection to the weak and vulnerable adults, in line with the CRPD. In fact, in 2016, the Committee on the Rights of Persons with Disabilities stated that in Italy both *full guardianship/curatorship* and *support administration* «are based on a concept of protection in the best interest of the person, in contrast with art. 12 CRPD, which disposes for the recognition of full legal capacity of all persons with disabilities without exceptions, as well as for the provision of support to decision making in the respect of the person’s will», asking then for the overcoming of full guardianship and curatorship and some changes to the law on the support administrator, aimed in particular at moving from the concept of replacing the person in decision making, in his/her best interest, to the concept of supporting the person in decision making, in respect of his/her will, however expressed.

Currently, in Italy, there is a lively debate about the adequacy and legitimacy of *full guardianship* and *curatorship*, which has also materialised in draft laws (see below, 7). The debate, which started a few years after the introduction of support administration, culminated in the proposal of the Commission “Persona e danno”, coordinated by Prof. Paolo Cendon (2007), which was also used as the basis for subsequent regulatory proposals aimed at the abolition of *full guardianship* and *curatorship*.

The main criticisms levelled at traditional measures are:

- (a) the “expropriatory nature” of *full guardianship*: the incapacitated person is placed in a legal status equivalent to civil death. With *full guardianship*, in fact, the person is declared legally incapable of acting, which entails the total expulsion of the same adult from the possibility of performing any transaction producing effects: not a contract, not a purchase, not marriage, nor any act of a personal nature. The so-called

- “protection” provided by the old institutions betrays, in reality, punitive and exclusionary values that are no longer tolerable in an evolved society.
- (b) Lack of therapeutic value: the formal incapacitation of the person, in all his or her being, is not accompanied in law and in practice with projects of re-socialisation and empowerment; and the only interests safeguarded by the old institutions are the economic and patrimonial interests of family members and relatives.
 - (c) Lack of transparency of the procedure of *guardianship* and weakness of the formal guarantees granted to the incapacitated person: in fact, he remains on the margins of the judgement and despite the fact that the code of civil procedure recognises his capacity to stand trial personally, this rule is de facto disappplied.
 - (d) The “practical irrevocability” of the measure: despite the possibility of revocation of the measure, there are few cases of actual revocation today.

7. Finally, please address pending and future reforms, and how they are received by political bodies, academia, CSOs and in practice.

In recent years, several bills have been presented to reform the current framework of protection measures:

- Bill No. 1985, presented on 23 January 2014
- Bill No. 1480, announced on 9 September 2019
- Bill No. 1972, released on 8 October 2020

They aim to repeal the measures of *full guardianship* – [*interdizione giudiziale*] and *curatorship* – [*inabilitazione*], with the revocation of the current ones and transformation into support administration. The latter measure is streamlined and modified to become the only form of protection for vulnerable adults.

The aforementioned bills, although ambitious in intent, were not examined by the Houses of Parliament

SECTION II – LIMITATIONS OF LEGAL CAPACITY

- 8. If your system allows limitation of the legal capacity of an adult, please answer questions 8 - 13; if not proceed to question 14. All reports should address questions 14 and 15.**
- a. on what grounds?**
 - b. how is the scope of the limitation of legal capacity set out in (a) statute or (b) case law?**

- c. **does limitation of the legal capacity automatically affect all or some aspects of legal capacity or is it a tailor-made decision?**
- d. **can the limited legal capacity be restored, can the limitation of legal capacity be reversed and full capacity restored and, if so, on what grounds?**
- e. **does the application of an adult protection measure (e.g. supported decision making) automatically result in a deprivation or limitation of legal capacity?**
- f. **are there any other legal instruments,¹ besides adult protection measures, that can lead to a deprivation or limitation of legal capacity?**

In the Italian legal system, limitations of legal capacity are determined by mental impairments, in relation to which the protection measures of *full guardianship* – [*interdizione giudiziale*] (see, infra, III A); of *curatorship* – [*inabilitazione*] (see, infra, III B); and of *support administration* – [*amministrazione di sostegno*] (see, infra, III C) have been created.

The intensity of the disturbance determines the recourse to *full guardianship* – [*interdizione giudiziale*] or *curatorship* – [*inabilitazione*]: the former can be activated in the case of “habitual insanity”; the latter can be applied for in the case of a less serious disturbance. *Support administration* – [*amministrazione di sostegno*], which in many cases overlaps with the other two measures in terms of its prerequisites, is a measure created for those who “due to infirmity or physical or mental impairment find themselves unable, even partially or temporarily, to provide for their own interests”.

The three measures also have different consequences in terms of legal capacity:

- the person subject to full guardianship completely loses his legal capacity;
- the person under curatorship partially loses his legal capacity, not being able to perform autonomously acts of extraordinary administration (i.e., those that may alter and modify the structure and consistency of the assets or that may generate a risk of alteration thereof). For the performance of such acts, he is assisted by the curator;
- the beneficiary of the support administration loses legal capacity only in relation to the acts expressly indicated in the act appointing the support person (while he/she retains it for all the others).

¹ Rules that apply regardless of any judicial incapacitation, if that exists, or of the existence of a judicially appointed guardian which might affect the legal capacity of the person or the validity of his/her acts

If the prerequisites of the measures have ceased to exist, they may be revoked, with consequent restoration of legal capacity; if, during the proceedings for revocation of guardianship and curatorship, it emerges that the person needs a support administration, the tutelary judge makes the decision of appointing a support person.

Beside the aforementioned protection measures, the Italian legal system also provides for *legal guardianship* – [*interdizione legale*], which is the loss of legal capacity as an accessory penalty to a final sentence of life imprisonment or imprisonment for non-culpable offences, for a period of not less than five years.

9. Briefly describe the effects of a limitation of legal capacity on:

- a. property and financial matters;**
- b. family matters and personal rights (e.g. marriage, divorce, contraception);**
- c. medical matters;**
- d. donations and wills;**
- e. civil proceedings and administrative matters (e.g. applying for a passport).**

The total loss of legal capacity implies the impossibility for the adult to validly perform legal acts; and in fact, for the person under full guardianship, a *guardian* – [*tutore*] is appointed to replace him in carrying out acts of ordinary and extraordinary administration.

“Strictly personal” acts cannot be performed by either the incapacitated person or the guardian: the incapacitated person, in fact, cannot:

- contract a valid marriage (art. 85 c.c.);
- make wills or donations;
- recognize children.

Even for civil proceedings and administrative matters (e.g. applying for a passport or other documents), the application must be done by the guardian.

The partial loss of legal capacity implies the impossibility for the adult to validly perform acts of extraordinary administration. The person under curatorship can perform autonomously acts of ordinary administration: a *curator* – [*curatore*] is appointed to assist him in carrying out acts of extraordinary administration. The adult under curatorship may contract a marriage, may make a will, may recognize a natural child. Without the curator's assistance, he may not sue, borrow, receive capital, make releases, alienate or mortgage his property, or do any other act beyond mere administration. He is incapable of making acts of donation, except, in their special forms, nuptial donations.

For what concerns administrative matters (e.g. applying for a passport or other documents), the application must be made by the person concerned assisted by the curator at the time of the declaration of the absence of obstructive causes.

In case of *support administration*, the adult is limited in acting autonomously only for those acts indicated in the decree appointing the *support person* – [*amministratore di sostegno*]. For the other acts the beneficiary retains legal capacity.

10. Can limitation of legal capacity have retroactive effect? If so, explain?

Full guardianship – [*interdizione giudiziale*] and *curatorship* [*inabilitazione*] have no retroactive effect: they take effect from the day of publication of the judgment (art. 421 c.c.)

11. Which authority is competent to decide on limitation or restoration of legal capacity?

Tutelary judge – [*giudice tutelare*]

12. Who is entitled to request limitation or restoration of legal capacity?

Proceedings for *full guardianship* – [*interdizione*] and *curatorship* – [*inabilitazione*] may be brought by the same incapacitated person, the spouse, the domestic partner, relatives up to the fourth degree, relatives in law up to the second degree, the guardian or representative or the public prosecutor (art. 417 c.c.).

In the case of *support administration*, in addition to the persons entitled to request guardianship and curatorship, the public prosecutor may initiate the proceedings.

13. Give a brief description of the procedure(s) for limitation or restoration of legal capacity. Please address the procedural safeguards such as:

- a. a requirement of legal representation of the adult;
- b. participation of family members and/or of vulnerable adults' organisations or other CSO's;
- c. requirement of a specific medical expertise / statement;
- d. hearing of the adult by the competent authority;
- e. the possibility for the adult to appeal the decision limiting legal capacity.

Beyond the peculiarities of individual proceedings, the Code of Civil Procedure contains common rules for *full guardianship*, *curatorship* and *support administration* judgments.

The recent reform of civil proceedings ('Cartabia Reform', Legislative Decree No. 149 of 10 October 2022) repealed the previous provisions of the Code of Civil Procedure (Art. 712 ff.) concerning guardianship, curatorship and support administration proceedings, replacing them with a new provision, art. 473 *bis*.52 c.c.p.

The application shall be made by direct appeal to the court of the place where the person against whom the action for guardianship or curatorship is brought has his residence or domicile.

It is the presiding judge who must appoint the Judge-Rapporteur and fix the hearing for the appearance before him of the applicant, the incapacitated person and the other persons indicated in the application, whose information he considers useful.

At the appearance hearing, the judge-rapporteur, with the participation also of the public prosecutor, shall proceed to examine the person against whom disqualification or incapacitation is sought.

On this occasion, the opinion of the other persons cited is heard and they are questioned on the circumstances that are considered relevant to the decision. The further taking of information may also be ordered here *ex officio*.

All the powers of inquiry that are provided for in Art. 419 of the Civil Code may be exercised

The hearing to determine whether or not an adult can be declared incapacitated must be held in the presence of the court.

In the event that the person cannot appear due to a legitimate impediment, or if appearing in person would cause serious prejudice, the judge, with the assistance of the public prosecutor, goes to the place where he is to question and evaluate him.

After assessing each circumstance, he may order the hearing to take place with the aid of remote audiovisual connection, identifying the appropriate means to ensure the absence of any conditioning.

An appeal may be filed against the judgement ordering the measure; the protected person may also appeal.

14. Give a brief account of the general legal rules with regard to *mental capacity* in respect of:

- a. property and financial matters;**
- b. family matters and personal rights (e.g. marriage, divorce, contraception);**
- c. medical matters;**
- d. donations and wills;**
- e. civil proceedings and administrative matters (e.g. applying for a passport).**

The Italian civil code contains a provision, art. 428, concerning so-called *natural incapacity* (i.e., lack of mental capacity).

The provision provides that:

«Acts performed by a person who, although not under guardianship, is proved to have been for any cause, even transitory, incapable of understanding or of volition at the time when the acts were performed, may be annulled at the request of the same person or of his heirs or successors in title, if serious prejudice to the author results.

The annulment of a contract may not be pronounced except when, because of the harm that has been or may be caused to the person incapable of understanding or of acting or because of the quality of the contract or otherwise, bad faith of the other contracting party results».

The rule thus emphasises a form of *de facto* incapacity in which the contracting party finds himself at the time of the conclusion of the deed.

It distinguishes between unilateral acts and contracts.

- ⇒ For unilateral acts, for the purposes of avoidance, the incapacitated person's injury must be proved.
- ⇒ For contracts, on the other hand, it is necessary to prove the bad faith of the other contracting party.

Case law has specified what is to be understood by "*mental incapacity*" within the meaning of article 428 of the Civil Code: although it does not presuppose the absolute and total incapacity of the subject, it must nevertheless take the form of an impairment of the intellectual faculties, such as to hinder a serious evaluation of the act and the formation of a conscious will.

«For there to be natural incapacity of one of the contracting parties, at the time of the conclusion of the contract, it is not sufficient that the normal process of formation and expression of the will is in some way disturbed, as may happen in the case of serious illness, but it is necessary that the subject's intellectual or volitional faculties are, due to the illness, disturbed to such an extent as to prevent a serious evaluation of the content and effects of the transaction, which must be rigorously and specifically proven» (*ex plurimis*, see Cass., 26.5.2000, no. 6999).

15. What are the problems which have arisen in practice in respect of your system on legal capacity (e.g. significant court cases, political debate, proposals for improvement)? Has the system been evaluated and, if so, what are the outcomes?

One of the main critical aspects of the Italian system is that it appears to be founded on a rigid capacity/incapacity dichotomy, to which corresponds the person's suitability or otherwise to operate validly in the legal world.

The traditional system of capacity and protection measures does not appear suitable to provide protection to the whole range of subjects who suffer a mere impairment of their intellectual faculties or have physical and sensory deficits or who are not autonomous in the performance of certain functions. For these subjects (e.g., the elderly, the disabled) there is the alternative either of activating a protection measure (which ends up depriving them - totally or partially - of legal capacity) or of leaving them without protection (moreover, in the absence of an adequate public assistance system for "functionally dependent" subjects in the Italian legal system).

Certainly, the support administration measure offers more flexible protection and can be modelled in relation to the specific needs of the beneficiary; however, the Italian legal system is still anchored to a logic of "protection and not, instead, of support for disability and dependency".

SECTION III – STATE-ORDERED MEASURES

Overview

- 16. What state-ordered measures exist in your jurisdiction? Give a brief definition of each measure.² Pay attention to:**
- a. can different types of state-ordered measures be applied simultaneously to the same adult?**
 - b. is there a preferential order in the application of the various types of state-ordered measures? Consider the principle of subsidiarity;**
 - c. does your system provide for interim or ad-hoc state-ordered measures?**

The "state ordered" measures in Italy are: **A) full guardianship – [interdizione giudiziale], B) curatorship – [inabilitazione] and C) support administration – [amministrazione di sostegno].**

As will be described in more detail, *full guardianship – [interdizione giudiziale]* is the most 'severe' of the protection measures, which may be required for individuals with a condition of habitual mental infirmity. The person subject to guardianship is totally deprived of the capacity to act, to the extent that acts performed by him/her are voidable. A *guardian – [tutore]* is appointed to the

² Please do not forget to provide the terminology for the measures, both in English and in the original language(s) of your jurisdiction. (Examples: the Netherlands: full guardianship – [curatele]; Russia: full guardianship –[opeka]).

incapacitated person, for replacing him/her in the performance of all acts of ordinary and extraordinary administration.

Curatorship – [*inabilitazione*] may be pronounced for persons with an insanity that is not so serious as to give rise to guardianship, prodigality, alcohol or drug abuse. The protected person is assisted by a *curator* – [*curatore*], who assists him in the performance of legal acts.

Support administration – [*amministrazione di sostegno*], a measure introduced in Italy in 2004, is, compared to the first two, a more flexible measure and more adaptable to the needs of the subject, who “has lost all or part of his autonomy”. In fact, the acts for which the intervention of the representative is necessary are not established *a priori* by law, but are identified each time by the judge in the decree appointing the *support person* – [*amministratore di sostegno*]. It is a measure that can be constructed on a case-by-case basis and with specific prescriptions as a response to the most diverse needs of each person deprived or limited in autonomy.

The *support administration* does not necessarily presuppose a less serious pathology than that which would justify *guardianship* or *curatorship*, since the three protection measures are not placed in a relationship of subsidiarity, directly proportional to the degree of the incapacitated person’s infirmity, nor in terms of mere quantitative difference (the “degree” of pathology).

It is possible that, on the basis of the same preconditions (e.g., pathological disorder, as well as, prodigality, drug or alcohol abuse) *support administration*, *guardianship* or *curatorship* may be requested.

The discretionary line between the three institutions, starting from the famous Constitutional Court ruling (Corte Cost., 9.12.2005, n. 440), issued shortly after the introduction of the new measure, is instead drawn, according to a functional criterion, on the basis of the principles of “the most adequate protection” and “the least possible limitation”.

In practice, however, as support administration is better adaptable to the specificities of different human cases, it is evident how the traditional, far more invasive institutions are now residual, remaining however applicable.

A) **Full guardianship – [interdizione giudiziale]**

Start of the measure

Legal grounds and procedure

17. What are the legal grounds to order the measure? Think of: age, mental and physical impairments, prodigality, addiction, etc.

Full guardianship – [*interdizione giudiziale*] may be pronounced on «**an adult or an emancipated minor** who is in a condition of **habitual mental**

infirmity that renders them **incapable of providing for their own interests»** (art. 414 c.c.).

Minors in the last year of their minority may also be subject to the measure: it is possible for the *interdizione* to be pronounced in advance, in the last year of the subject's minority, providing that the effects of the pronouncement remain suspended and its effectiveness is deferred until the subject comes of age (art. 416 c.c.).

Briefly, the requirements for a pronouncement of guardianship are:

⇒ **Condition of habitual insanity:**

According to settled case-law, the condition of habitual mental infirmity does not require the ascertainment of a specific pathology of a mental nature, an alteration of the mental faculties resulting from pathologies of a physical nature being sufficient.

Mental insanity must be:

- Habitual: i.e., it must constitute a permanent condition, even if not necessarily continuous.
- current: since no previous episodes are relevant in the face of a significant improvement in the weak subject;
- serious: since the alteration of the psychic faculty must be such as to determine an absolute defect of capacity.

⇒ **Incapacity to provide for his own interests.**

The state of habitual mental infirmity must be such as to determine the absolute incapacity of the person to provide for his own interests. This incapacity must be absolute, otherwise the other measures for the protection of the incapacitated person may apply.

18. Which authority is competent to order the measure?

Tutelary judge – [giudice tutelare]

19. Who is entitled to apply for the measure?

Proceedings for *full guardianship – [interdizione]* may be brought by the same incapacitated person, the spouse, the domestic partner, relatives up to the fourth degree, relatives in law up to the second degree, the guardian or representative or the public prosecutor (art. 417 c.c.)

If the person is under parental responsibility or has one of his/her parents as curator, the measure may only be instituted at the request of that parent or the public prosecutor.

20. Is the consent of the adult required/considered before a measure can be ordered? What are the consequences of the opposition of the adult?

The consent of the adult is not required for the measure to be ordered; during the proceedings it is required the examination by a medical expert of the person for whom the measure is sought.

21. Provide a general description of the procedure for the measure to be ordered. Pay attention to:

- a. a requirement of legal representation of the adult;
- b. availability of legal aid;
- c. participation of family members and/or of vulnerable adults' organisations or other CSO's;
- d. requirement of a specific medical expertise / statement;
- e. hearing of the adult by the competent authority;
- f. the possibility for the adult to appeal the order.

The application for *full guardianship – [interdizione]* is made by an appeal addressed to the Court of the place where the person against whom the application is made has his residence or domicile. (art. 473 bis.52 c.c.p.)

The person for whom the measure is sought may stand trial in person and perform all acts of the proceedings alone. If it is considered appropriate, a *provisional guardian* may be appointed (art. 419 c.c.).

Interdizione may not be pronounced without an examination of the person for whom the measure is sought.

During the hearing, the judge proceeds to examine the person, hear the opinion of the other persons summoned, questioning them on the circumstances he considers relevant to the decision.

The judge may be assisted in this examination by a technical adviser. He may also, of his own motion, order the evidence useful for the purposes of the judgment, question the next of kin and take the necessary information.

A *guardian – [tutore]* is appointed at the outcome of the judgment.

The judgement may be appealed by all those who would have been entitled to bring the action, even if they did not participate in the judgement, and by the *guardian* appointed by the same judgement.

22. Is it necessary to register, give publicity or any other kind of notice of the measure?

The decree appointing the *guardian – [tutore]* or the *provisional guardian [tutore provvisorio]* and the judgment declaring *full guardianship – [interdizione]* must immediately be recorded in the appropriate public register and communicated within ten days to the officer in charge of civil status for entries in the margin of the birth certificate (art. 423 c.c.)

Appointment of representatives/support persons

- 23. Who can be appointed as representative/support person (natural person, public institution, CSO's, private organisation, etc.)? Please consider the following:**
- a. what kind of requirements does a representative/support person need to meet (capacity, relationship with the adult, etc.)?**
 - b. to what extent are the preferences of the adult and/or the spouse/partner/family members taken into consideration in the decision?**
 - c. is there a ranking of preferred representatives in the law? Do the spouse/partner/family members, or non-professional representatives enjoy priority over other persons?**
 - d. what are the safeguards as to conflicts of interests at the time of appointment?**
 - e. can several persons be appointed (simultaneously or as substitutes) as representative/support person within the framework of a single measure?**
 - f. is a person obliged to accept appointment as representative/support person?**

The representative function may be performed by a person:

- either indicated by the beneficiary himself in anticipation of his own possible future incapacity, by public deed or authenticated private deed
- or chosen by the surviving parent, also by will.

In the absence of such indication or in the presence of serious reasons, the tutelary judge appoints the *guardian – [tutore]*, preferably appointing:

- the spouse who is not legally separated
- the party to the civil partnership;
- the domestic partner;
- the father, mother, child, brother or sister;
- a relative up to the fourth degree.

In the absence of such persons, the tutelary judge shall identify another suitable person.

There are some persons excluded from appointment: pursuant to Article 350 of the Civil Code, guardians may not be appointed and, if appointed, must relinquish their office if they:

- do not have free administration of their assets;
- have been excluded from guardianship by written provision of the parent who last exercised parental responsibility;

- have or are about to have a dispute with the beneficiary from which a considerable loss to the protected person's estate could result, or if such dispute involves an ascendant, descendant or spouse of the person to be appointed;
- are bankrupt and have not been removed from the bankruptcy register;
- persons who are *ex officio* discharged, as indicated in art. 351 of the Civil Code;
- persons who have presented a special request for dispensation, pursuant to art. 352 of the Civil Code.

During the measure

Legal effects of the measure

24. How does the measure affect the legal capacity of the adult?

The effect of the *full guardianship – [interdizione]* is the loss of the protected person's legal capacity, in relation to both ordinary and extraordinary acts of administration. Pursuant to art. 427 of the Civil Code, however, in the judgment pronouncing the *interdizione*, or in subsequent orders of the judicial authority, it may be specified that certain acts of ordinary administration may be performed by the protected person without the intervention of the guardian or with the latter's assistance.

Acts performed by the *person subject to full guardianship – [interdetto]* after the judgment may be annulled at the request of the guardian, the protected person, his heirs or successors in title. Acts performed after the appointment of the provisional guardian are also voidable if the appointment is followed by the pronouncement of *full guardianship*.

Full guardianship also hinders the possibility of contracting marriage, the recognition of children born out of wedlock and the possibility of making will.

Powers and duties of the representatives/support person

25. Describe the powers and duties of the representative/support person:

- a. can the representative/support person act in the place of the adult; act together with the adult or provide assistance in:
- b. property and financial matters;
- c. personal and family matters;
- d. care and medical matters;
- e. what are the criteria for decision-making (e.g. best interests of the adult or the will and preferences of the adult)?
- f. what are the duties of the representative/support person in terms of informing, consulting, accounting and reporting to the adult, his family and to the supervisory authority?

- g. are there other duties (e.g. visiting the adult, living together with the adult, providing care)?**
- h. is there any right to receive remuneration (how and by whom is it provided)?**

The *guardian – [tutore]* has:

- the legal representation of the incapacitated person;
- the care of the health, safety and cleanliness of the incapacitated person;
- the administration of the assets;
- the performance of acts of ordinary and extraordinary administration;
- the power to give the consent to medical treatments.

In particular, the *guardian – [tutore]*:

- Can autonomously: perform acts of ordinary administration of the property of the protected person; purchase movable property necessary for the use, household economy; undertake obligations necessary for the maintenance of the protected person and for the ordinary administration of his property.
- Needs the authorization of the tutelary judge for the following acts (art. 374 c.c.): purchase of property; collection of capital; consent to the cancellation of mortgages; assumption of obligations; acceptance or waiver of inheritances; acceptance of gifts; conclusion of leases exceeding nine years; bringing legal proceedings.
- Needs the Court's authorisation on the opinion of the tutelary judge to (art. 375 c.c.) for: alienating property; establishing pledges or mortgages; concluding compromises or settlements; promoting division judgments.

The following are acts prohibited to the guardian: the guardian and vice-guardian may not, even at public auction, make themselves purchasers directly or through intermediaries of the property and rights of the incapacitated person. They may not lease the property of the incapacitated person without the authorisation and the precautions laid down by the tutelary judge. Nor may the guardian and vice-guardian become assignees of any reason or claim against the incapacitated person (art. 378 c.c.).

The guardianship office is free of charge.

The tutelary judge, however, taking into account the size of the estate and the difficulties of administration, may award the guardian an equitable allowance. He may also, if special circumstances so require, authorise the guardian to be assisted in the administration, under his/her personal responsibility, by one or more salaried persons (art. 379 c.c.).

26. Provide a general description of how multiple representatives/support persons interact, if applicable. Please consider:

- **if several measures can be simultaneously applied to the same adult, how do representatives/support persons, appointed in the framework of these measures, coordinate their activities?**
- **if several representatives/support persons can be appointed in the framework of the same measure, how is authority distributed among them and how does the exercise of their powers and duties take place (please consider cases of concurrent authority or joint authority and the position of third parties)?**

The *tutulary Judge* may appoint, in addition to the guardian, a *vice-guardian* – [*protutore*] to represent the incapacitated person in the event of a conflict of interest between the latter and the guardian. The *vice-guardian* – [*protutore*] may also replace the guardian for urgent acts in the event of the latter's absence or abandonment of office; in this case, he also must promote the appointment of the guardian.

Safeguards and supervision

27. Describe the organisation of supervision of state-ordered measures. Pay attention to:

- a. **what competent authority is responsible for the supervision?**
- b. **what are the duties of the supervisory authority in this respect?**
- c. **what happens in the case of malfunctioning of the representative/support person? Think of: dismissal, sanctions, extra supervision;**
- d. **describe the financial liability of the representative/support person for damages caused to the adult;**
- e. **describe the financial liability of the representative/support person for damages caused by the adult to contractual parties of the adult and/or third parties to any such contract.**

The guardian's activity is subject to various controls, provided for by law, and implemented by the tutulary judge.

The *guardian* must keep regular accounts of his administration and render an account of it every year to the tutulary judge. The judge may submit the annual account to the examination of the *vice guardian* and of some close relative or kin of the protected person (art. 380 c.c.)

The judge, taking into account the particular nature and extent of the assets, may require the *guardian* to give security, determining the amount and manner of security.

He may also release the *guardian* in whole or in part from the security he has given (art. 381 c.c.).

The *guardian* shall administer the property of the protected person with the diligence of a good family man. He shall be liable to the protected person for any damage caused to him in violation of his duties (art. 382 c.c.)

The tutelary judge may remove the *guardian* from the office if:

- has been negligent
- has abused his/ her powers
- has proved incapable of providing for it
- has become unworthy of filling the role (art. 384 c.c.)

28. Describe any safeguards related to:

- a. types of decisions of the adult and/or the representative/support person which need approval of the state authority;**
- b. unauthorised acts of the adult and of the representative/support person;**
- c. ill-conceived acts of the adult and of the representative/support person;**
- d. conflicts of interests**

Please consider the position of the adult, contractual parties and third parties.

As pointed out [*supra*, n. 25] there are some acts that the guardian can't perform without the authorization of the tutelary judge or without the authorization of Court on the opinion of the tutelary judge.

Acts performed without the necessary authorisations are voidable on request of the guardian, the incapacitated person and his heirs or successors in title.

On the other hand, acts prohibited to the guardian (listed in art. 378 c.c.) are voidable at the request of the incapacitated person, his heirs or successors in title, but not of the guardian.

In the event of a conflict of interest between the guardian and the protected person, the vice- guardian, appointed for this purpose by the tutelary judge, decides.

End of the measure

29. Provide a general description of the dissolution of the measure. Think of: who can apply; particular procedural issues; grounds and effects.

The *full guardianship* – [*interdizione*] may be revoked at the request of the spouse, relatives within the fourth degree or relatives-in-law within the second degree, the guardian, the protected person himself or the public prosecutor if the cause that determined it ceases to exist. (Article 429 c.c.).

However, it must be the tutelary judge who assesses whether the cause for *interdizione* has ceased to exist and, if so, informs the public prosecutor. The court hearing the revocation proceedings may assess the need to appoint a *support*

administrator once the *interdizione* has ceased and transmit the acts to the tutelary judge.

B) Curatorship– [inabilitazione]

Start of the measure

Legal grounds and procedure

17. What are the legal grounds to order the measure? Think of: age, mental and physical impairments, prodigality, addiction, etc.

Curatorship – [inabilitazione] is the legally declared state of reduced legal capacity of a person of full age.

Prerequisites for *inabilitazione* are:

- ⇒ **insanity**, the state of which is not so serious as to justify full guardianship;
- ⇒ **performance of prodigal acts** that expose the weak person or his/her family to serious economic prejudice;
- ⇒ **abuse of alcoholic or narcotic substances** that exposes the weaker party or his/her family to serious financial loss;
- ⇒ **blindness or deafness** from birth or early childhood if the weak person has not received a suitable education.

18. Which authority is competent to order the measure?

Tutelary judge – [giudice tutelare]

19. Who is entitled to apply for the measure?

Proceedings for *curatorship – [inabilitazione]* may be brought by the same protected person, the spouse, the domestic partner, relatives up to the fourth degree, relatives in law up to the second degree, the guardian or representative or the public prosecutor (art. 417 c.c.)

If the person is under parental responsibility or has one of his/her parents as curator, the measure may only be instituted at the request of that parent or the public prosecutor.

20. Is the consent of the adult required/considered before a measure can be ordered? What are the consequences of the opposition of the adult?

The consent of the adult is not required for the measure to be ordered; during the proceedings it is required the examination of the person for whom the measure is sought.

21. Provide a general description of the procedure for the measure to be ordered. Pay attention to:

- a. a requirement of legal representation of the adult;
- b. availability of legal aid;
- c. participation of family members and/or of vulnerable adults' organisations or other CSO's;
- d. requirement of a specific medical expertise / statement;
- e. hearing of the adult by the competent authority;
- f. the possibility for the adult to appeal the order.

The procedure for *curatorship* – [*inabilitazione*] is the same as for guardianship (see, *supra* n. 21): the procedures are, in fact, regulated jointly by the same provision, art. 473 *bis*. 52 c.c.p.

A *curator* – [*curatore*] is appointed at the outcome of the judgment.

22. Is it necessary to register, give publicity or any other kind of notice of the measure?

The decree appointing the *curator* – [*curatore*] or the *provisional curator* [*curatore provvisorio*] and the judgment declaring *curatorship* – [*inabilitazione*] must immediately be recorded in the appropriate public register and communicated within ten days to the officer in charge of civil status for entries in the margin of the birth certificate (art. 423 c.c.).

Appointment of representatives/support persons

23. Who can be appointed as representative/support person (natural person, public institution, CSO's, private organisation, etc.)? Please consider the following:

- g. what kind of requirements does a representative/support person need to meet (capacity, relationship with the adult, etc.)?
- h. to what extent are the preferences of the adult and/or the spouse/partner/family members taken into consideration in the decision?
- i. is there a ranking of preferred representatives in the law? Do the spouse/partner/family members, or non-professional representatives enjoy priority over other persons?
- j. what are the safeguards as to conflicts of interests at the time of appointment?
- k. can several persons be appointed (simultaneously or as substitutes) as representative/support person within the framework of a single measure?
- l. is a person obliged to accept appointment as representative/support person?

The representative function may be performed by a person:

- either indicated by the beneficiary himself in anticipation of his own possible future incapacity, by public deed or authenticated private deed
- or chosen by the surviving parent, also by will.

In the absence of such indication or in the presence of serious reasons, the tutelary judge appoints the *curator*, preferably appointing:

- the spouse who is not legally separated
- the party to the civil partnership;
- the domestic partner;
- the father, mother, child, brother or sister;
- a relative up to the fourth degree.

In the absence of such persons, the tutelary judge shall identify another suitable person.

There are some persons excluded from appointment: pursuant to Article 350 of the Civil Code, curators may not be appointed and, if appointed, must relinquish their office if they:

- do not have free administration of their assets;
- have been excluded from guardianship by written provision of the parent who last exercised parental responsibility;
- have or are about to have a dispute with the beneficiary from which a considerable loss to the beneficiary's estate could result, or if such dispute involves an ascendant, descendant or spouse of the person to be appointed;
- are bankrupt and have not been removed from the bankruptcy register;
- persons who are *ex officio* discharged, as indicated in article 351 of the Civil Code;
- persons who have presented a special request for dispensation, pursuant to article 352 of the Civil Code.

During the measure

Legal effects of the measure

24. How does the measure affect the legal capacity of the adult?

The effect of the *curatorship* – [*inabilitazione*] is the limitation (and not the total loss) of the protected person's legal capacity. The incapacitated person may perform acts of ordinary administration alone, but requires the assistance of the *curator* – [*curatore*] for acts of extraordinary administration. It means that both the assisted person and the curator have to sign together the acts.

Acts in excess of ordinary administration performed by the protected person may be annulled, after the judgment, at the request of the protected person, his heirs or assignees.

Powers and duties of the representatives/support person

25. Describe the powers and duties of the representative/support person:

- **can the representative/support person act in the place of the adult; act together with the adult or provide assistance in:**
 - **property and financial matters;**
 - **personal and family matters;**
 - **care and medical matters;**
- **what are the criteria for decision-making (e.g. best interests of the adult or the will and preferences of the adult)?**
- **what are the duties of the representative/support person in terms of informing, consulting, accounting and reporting to the adult, his family and to the supervisory authority?**
- **are there other duties (e.g. visiting the adult, living together with the adult, providing care)?**
- **is there any right to receive remuneration (how and by whom is it provided)?**

The main function of the *curator* – [*curatore*] is to assist the incapacitated person in the administration of his or her property, carrying out preventive control over acts of extraordinary administration. The curator is not in charge of the incapacitated person's personal care and does not represent him/her.

In particular, one must distinguish between:

- Acts requiring the assistance of the curator (art. 394(2) c.c.): collection of capital; bringing legal proceedings as plaintiff or defendant.
- Acts that require the consent of the curator and of the tutelary judge (art. 394(3) c.c.): acts exceeding ordinary administration.
- Acts that require the authorisation of the court upon the opinion of the tutelary judge (art. 375 c.c.): alienation of property; establishment of pledges or mortgages; conclusion of compromises or settlements; promotion of division judgments.
- Acts prohibited to the curator: the curator may not, even at public auction, make himself purchasers directly or through intermediaries of the property and rights of the incapacitated person. He may not lease the property of the protected person without the authorisation and the precautions laid down by the tutelary judge. Nor may the curator become assignees of any reason or claim against the incapacitated person (art. 378 c.c., recalled by art. 394 c.c.).

26. Provide a general description of how multiple representatives/support persons interact, if applicable. Please consider:

- a. **if several measures can be simultaneously applied to the same adult, how do representatives/support persons, appointed in the framework of these measures, coordinate their activities?**

- b. if several representatives/support persons can be appointed in the framework of the same measure, how is authority distributed among them and how does the exercise of their powers and duties take place (please consider cases of concurrent authority or joint authority and the position of third parties)?**

Generally, only one curator is appointed for the protected person; a *special curator* – [*curatore speciale*] may be appointed if the curator is unable or absent or if there is a conflict of interest between the curator and the protected person.

Safeguards and supervision

27. Describe the organisation of supervision of state-ordered measures. Pay attention to:

- a. what competent authority is responsible for the supervision?**
- b. what are the duties of the supervisory authority in this respect?**
- c. what happens in the case of malfunctioning of the representative/support person? Think of: dismissal, sanctions, extra supervision;**
- d. describe the financial liability of the representative/support person for damages caused to the adult;**
- e. describe the financial liability of the representative/support person for damages caused by the adult to contractual parties of the adult and/or third parties to any such contract.**

The curator's activity is subject to various controls, provided for by law, and implemented by the tutelary judge.

If the curator refuses his or her consent to an act, he or she may appeal to the tutelary judge who, if he or she considers the refusal unjustified, appoints a *special curator* to assist the person in performing the act.

Termination of the office of curator may occur by:

- exoneration or replacement, if the office has become excessively burdensome (art. 388 c.c.);
- removal, ordered ex officio by the tutelary judge if the curator is guilty of negligence or has abused his powers or proved incapable of doing so or has become unworthy of the role (art. 384 c.c.);
- lapse of time, set by the legislator at 10 years but not valid for the spouse, cohabitee, ascendants or descendants (art. 426 c.c.).

28. Describe any safeguards related to:

- a. types of decisions of the adult and/or the representative/support person which need approval of the state authority;**

- b. unauthorised acts of the adult and of the representative/support person;**
- c. ill-conceived acts of the adult and of the representative/support person;**
- d. conflicts of interests**
- e. Please consider the position of the adult, contractual parties and third parties.**

As pointed out [*supra*, n. 25] there are some acts that the curator can't perform without the authorization of the tutelary judge or without the authorization of Court on the opinion of the tutelary judge.

Acts performed without the necessary authorisations are voidable on request of the curator, the incapacitated person and his heirs or successors in title. On the other hand, acts prohibited to the curator (listed in art. 378 c.c.) are voidable at the request of the incapacitated person, his heirs or successors in title, but not of the curator.

End of the measure

29. Provide a general description of the dissolution of the measure. Think of: who can apply; particular procedural issues; grounds and effects.

As for *full guardianship, curatorship – [inabilitazione]* may be revoked at the request of the spouse, relatives within the fourth degree or relatives-in-law within the second degree, the curator, the protected person himself or the public prosecutor if the cause that determined it ceases to exist. (Article 429 c.c.).

C) *Support administration – [Amministrazione di sostegno]*

Start of the measure

Legal grounds and procedure

17. What are the legal grounds to order the measure? Think of: age, mental and physical impairments, prodigality, addiction, etc.

The protection measure of the *support administration – [amministrazione di sostegno]* may be ordered in respect of a person «who, as a result of an infirmity or physical or mental impairment, is unable, even partially or temporarily, to provide for his or her own interests» (art. 404 c.c.).

The rule thus provides for two requirements:

- ⇒ a subjective requirement: **physical or psychic impairment**
- ⇒ an objective requirement: **the impossibility of providing for one's own interests.**

As stated in art. 1 of the Law establishing the *support administration – [amministrazione di sostegno]* (l. 9/2004), the measure «has the aim of protecting, with the least possible limitation of the capacity to act, **persons deprived wholly or partially of autonomy in the performance of daily life functions** by means of temporary or permanent support interventions».

Thus, the measure can also be applied, beyond the existence of a specific infirmity or pathology, in all cases in which the subject is deprived of autonomy in performing the functions of daily life.

18. Which authority is competent to order the measure?

Tutelary judge – [giudice tutelare]

19. Who is entitled to apply for the measure?

The following may file an action for the appointment of a *support person [amministratore di sostegno]* (art. 406 and 417 c.c.):

- Public Prosecutor;
- beneficiary of the measure (even if minor, or subject to guardianship or curatorship);
- spouse;
- person permanently cohabiting;
- relatives within the fourth degree;
- relatives in law within the second degree;
- guardian of the incapacitated person;
- curator of the protected person;

- civil partner in favour of one's partner.

In addition, «the persons in charge of the health and social services directly involved in the care and assistance of the person, when they are aware of facts such as to make the opening of the support administration proceedings appropriate» are obliged to lodge an appeal. (art. 406 (3) Civil Code).

They will have to submit the appeal pursuant to art. 407 c.c. to the tutelary judge, or, alternatively, they will have to inform the Public Prosecutor of the circumstances known to them by means of a special report. In the latter case, it will then be the Public Prosecutor's Office that will assess whether to file the appeal.

20. Is the consent of the adult required/considered before a measure can be ordered? What are the consequences of the opposition of the adult?

The consent of the beneficiary of support administration is not required; however, the needs and requests of the beneficiary must be taken into account in the procedure for appointing the support person.

The beneficiary may appeal against the judge's decree declaring the opening of the support administration. Indeed, it is quite possible that the judge who ordered the appointment of the support person did not make a correct assessment of the person's infirmity or impairment in relation to the interests he or she has to provide for.

Opposition to the decree appointing the support administrator takes place pursuant to Article 739 of the Code of Civil Procedure. The objection must be lodged within 10 days of the decree of appointment.

Following opposition, if successful, the measure may be revoked, the support administrator may be replaced or the scope of his or her functions may be changed.

- 21. Provide a general description of the procedure for the measure to be ordered. Pay attention to:**
- a. a requirement of legal representation of the adult;**
 - b. availability of legal aid;**
 - c. participation of family members and/or of vulnerable adults' organisations or other CSO's;**
 - d. requirement of a specific medical expertise / statement;**
 - e. hearing of the adult by the competent authority;**
 - f. the possibility for the adult to appeal the order.**

Pursuant to Articles 404 and 407 of the Civil Code, proceedings for the appointment of a *support person* – [*amministratore di sostegno*] are brought by means of an appeal to be filed with the court (the tutelary judge's office) of the place of residence or domicile of the potential recipient of the measure.

The appeal must contain:

- the indication of the territorially competent tutelary judge;
- the generalities of the appellant and the beneficiary;
- the indication of the beneficiary's residence, domicile and habitual abode;
- the name and domicile of the relatives and cohabitants, as identified in Art. 407 c.c.
- the reasons for requesting the appointment of the support administrator, specifying the acts of a personal or patrimonial nature that must be carried out urgently.

It is also useful, though not necessary, to provide a description of the person's living conditions and make an initial recognition of the person's income and assets, in order to immediately outline the support project that must then be finalised by the tutelary judge.

If there are no particular reasons for urgency, the tutelary judge, having read the appeal, fixes by decree the date of the hearing for the beneficiary's examination and for summoning the applicant and the other persons (relatives, cohabitants, etc.) indicated in art. 406 c.c.

The appeal and the decree must be notified, by the appellant, to the beneficiary; both acts must be notified to the other persons indicated in the appeal.

The preliminary investigation phase may end with the hearing of the beneficiary, the appellant and relatives (if present) and with the mere acquisition of the documentation attached to the appeal; however, the tutelary judge, by virtue of the wide preliminary investigation powers granted to him/her by art. 407 c.c., may order, also *ex officio*, any further investigation, also by ordering a technical expert's report on the beneficiary's capacity and autonomy.

The tutelary judge must hear in person the person to whom the proceedings relate by going, if necessary, to the place where the person is and must take into account, compatibly with the person's interests and protection needs, the person's needs and requests.

The tutelary judge then issues a reasoned and immediately enforceable decree.

Article 405(5) of the Civil Code provides that the decree appointing the *support person* must contain the indication of:

- 1) the generalities of the beneficiary and the support person;
- 2) the duration of the appointment, which may also be indefinite;

- 3) the purpose of the assignment and the acts that the support person is empowered to perform in the name and on behalf of the beneficiary;
- 4) the acts that the beneficiary may perform only with the assistance of the support person;
- 5) the limits, including periodical ones, of the expenses that the support persons may incur with the use of the sums that the beneficiary has or may have at his disposal;
- 6) the frequency with which the support person must report to the judge on the activities carried out and on the beneficiary's personal and social living conditions.

If there are particular reasons of urgency, the tutelary judge, immediately after the filing of the appeal, may adopt, also *ex officio, inaudita altera parte*, the measures necessary for the care of the person and for the preservation and administration of the assets, to this end also appointing a *provisional support person*. In such a case, the hearing for the beneficiary's hearing will be set at a later date and, once all the appropriate preliminary investigations have been carried out and the protection measure may be confirmed or revoked by final decree.

22. Is it necessary to register, give publicity or any other kind of notice of the measure?

The decree opening the *support administration*, the decree of closure and any other measure taken by the tutelary judge during the course of the *support administration* must be immediately recorded by the Registrar in the appropriate register.

The decree opening the *support administration* and the decree of closure must be communicated, within ten days, to the officer of the civil registrar for the annotations in the margin of the beneficiary's birth certificate. If the assignment is for a fixed term, the annotations must be deleted at the end of the term indicated in the opening decree or in the possible extension decree.

Appointment of representatives/support persons

- 23. Who can be appointed as representative/support person (natural person, public institution, CSO's, private organisation, etc.)? Please consider the following:**
- a. **what kind of requirements does a representative/support person need to meet (capacity, relationship with the adult, etc.)?**
 - b. **to what extent are the preferences of the adult and/or the spouse/partner/family members taken into consideration in the decision?**

- c. **is there a ranking of preferred representatives in the law? Do the spouse/partner/family members, or non-professional representatives enjoy priority over other persons?**
- d. **what are the safeguards as to conflicts of interests at the time of appointment?**
- e. **can several persons be appointed (simultaneously or as substitutes) as representative/support person within the framework of a single measure?**
- f. **is a person obliged to accept appointment as representative/support person?**

The tutelary judge chooses the *support person* – [*amministratore di sostegno*] “with exclusive regard to the care and interests of the beneficiary”.

Article 408 of the Civil Code identifies a preferential order to be followed by the tutelary judge in this assessment:

- first of all, any designation of the support administrator already made by the beneficiary, in anticipation of his/her future incapacity, by public deed or authenticated private deed must be taken into account; similarly, any preference expressed by the beneficiary in the course of the proceedings must be taken into account, provided that he/she retains adequate capacity of discernment.
- In the absence of designation or in the presence of serious reasons (when, for example, the designated person is unfit to carry out the task), the tutelary judge, by reasoned decree, may appoint a different support person; in making this choice, the tutelary judge shall prefer, if possible, one of the following subjects:
 - the spouse who is not legally separated
 - the person permanently cohabiting;
 - the father, mother, child, brother or sister;
 - the relative up to the fourth degree;
 - the person designated by the surviving parent by will, public deed or authenticated private deed;

Moreover, in case of expediency, or - if the beneficiary’s designation exists - in the presence of serious reasons, the tutelary judge may appoint a third party of his choice. To this end, he may draw, for example, from special lists set up at the judicial offices containing the names of professionals in legal and economic matters available to perform the task.

Operators of public or private services who are in the care or charge of the beneficiary may not act as support persons.

During the measure

Legal effects of the measure

24. How does the measure affect the legal capacity of the adult?

Pursuant to art. 409 c.c. «*The beneficiary shall retain the capacity to act for all acts that do not require the exclusive representation or the necessary assistance of the support administrator.*

The beneficiary of the support administration may in any case perform the acts necessary to meet the needs of his/her daily life».

Powers and duties of the representatives/support person

25. Describe the powers and duties of the representative/support person:

- a. can the representative/support person act in the place of the adult; act together with the adult or provide assistance in:**
- b. property and financial matters;**
- c. personal and family matters;**
- d. care and medical matters;**
- e. what are the criteria for decision-making (e.g. best interests of the adult or the will and preferences of the adult)?**
- f. what are the duties of the representative/support person in terms of informing, consulting, accounting and reporting to the adult, his family and to the supervisory authority?**
- g. are there other duties (e.g. visiting the adult, living together with the adult, providing care)?**
- h. is there any right to receive remuneration (how and by whom is it provided)?**

The duties of the *support person* are determined in the decree of appointment. They may concern the following two areas (alternatively or jointly):

- ⇒ the **care of the person**, intended both as health care (any health choices, relations with medical staff, expression of informed consent, etc.) and as the management of relational and social aspects (choice of place to live, initiation of psychotherapy or support in the search for employment, etc.)
- ⇒ the **care of assets**, referring to the income and asset management of the beneficiary (administration of movable assets - salaries, pensions, securities portfolio, etc. - or of real estate), aimed at preserving the beneficiary's financial resources and meeting his ordinary and extraordinary needs.

Depending on the beneficiary's health conditions and residual autonomy, the *support person* - [*amministratore di sostegno*] may be vested by the tutelary judge

with a role of exclusive representation (fully replacing the subject) or of mere assistance (working alongside the subject in making decisions).

In performing his duties, the support person shall take into account the needs and aspirations of the beneficiary (art. 410 c.c).

The support administrator must promptly inform the beneficiary about the acts to be performed as well as the tutelary judge in case of disagreement with the beneficiary.

As for the guardian, the support person's appointment is essentially free of charge, although the tutelary judge, considering the size of the beneficiary's assets and the difficulty of the administration, may pay the support person a fair indemnity. In practice, it is common for administrators to be awarded a fee by the court.

At the same time as filing the annual statement, the support person may petition the tutelary judge to request recognition of this indemnity. The definition of the amount of the indemnity is reserved solely to the discretion of the tutelary judge.

26. Provide a general description of how multiple representatives/support persons interact, if applicable. Please consider:

- a. if several measures can be simultaneously applied to the same adult, how do representatives/support persons, appointed in the framework of these measures, coordinate their activities?**
- b. if several representatives/support persons can be appointed in the framework of the same measure, how is authority distributed among them and how does the exercise of their powers and duties take place (please consider cases of concurrent authority or joint authority and the position of third parties)?**

The Italian legislator did not expressly provide for the possibility of appointing two support persons for the same beneficiary, so this would be excluded.

However, some courts have recognised the possibility (and advisability) of appointing more than one support person:

- when the appointment is difficult (when, for example, the management of the beneficiary's assets and person requires specific skills that it is difficult for a single figure to have);
- in the light of the special circumstances of the beneficiary (when the exclusion of the co-administrator could have detrimental effects on the beneficiary);
- due to the personal commitments of the co-support administrators: the support person cannot always ensure the continuous presence of the beneficiary,

- in order to avoid the emergence or procrastination of a conflict of interest between the beneficiary and the support person.

Even the possibilist opinion, however, sets limits by recognising that “in order to avoid that the appointment of a co-administrator turns out to be an obstacle to the concrete and prompt performance of the measure, it appears appropriate to differentiate the powers conferred on each co-administrator in order to guarantee to the same, albeit in common agreement between them, an operational autonomy through a subdivision of the task” (Trib. Genova, 17.12.2015. In the same sense Trib. Ravenna, 06.03.2020).

Safeguards and supervision

27. Describe the organisation of supervision of state-ordered measures.

Pay attention to:

- what competent authority is responsible for the supervision?**
- what are the duties of the supervisory authority in this respect?**
- what happens in the case of malfunctioning of the representative/support person? Think of: dismissal, sanctions, extra supervision;**
- describe the financial liability of the representative/support person for damages caused to the adult;**
- describe the financial liability of the representative/support person for damages caused by the adult to contractual parties of the adult and/or third parties to any such contract.**

The tutelary judge may at any time amend or supplement the decisions taken in the decree appointing the support administrator.

The support person must report to the judge on the activities carried out and on the personal and social living conditions of the beneficiary.

In the event of disagreement, harmful choices or acts, or negligence in pursuing the interest or meeting the needs or requests of the beneficiary, the latter, the public prosecutor or the other persons referred to in article 406 c.c. may appeal to the tutelary judge, who shall adopt the appropriate measures by reasoned decree.

The tutelary judge may order the replacement of the support person.

28. Describe any safeguards related to:

- types of decisions of the adult and/or the representative/support person which need approval of the state authority;**

- b. unauthorised acts of the adult and of the representative/support person;**
- c. ill-conceived acts of the adult and of the representative/support person;**
- d. conflicts of interests**
- e. Please consider the position of the adult, contractual parties and third parties.**

Acts performed by the support person in breach of the provisions of the law, or in excess of the scope of his office or of the powers conferred on him by the court, may be annulled on application by the support person, the public prosecutor, the beneficiary or his heirs and assignees.

Acts performed personally by the beneficiary in breach of the provisions of the law or of those contained in the decree establishing the support administration may also be annulled at the request of the support person, the beneficiary, or his heirs and assignees.

End of the measure

- 29. Provide a general description of the dissolution of the measure. Think of: who can apply; particular procedural issues; grounds and effects.**

When the beneficiary, the support person, the public prosecutor or any of the persons referred to in article 406 c.c., consider that the conditions for the termination of the support administration, or for the replacement of the administrator, have been established, they shall address a reasoned request to the tutelary judge.

The tutelary judge shall proceed by means of a reasoned decree, having acquired the necessary information and ordered the appropriate investigative measures.

The tutelary judge also provides, also *ex officio*, for the declaration of termination of the support administration when it has proved unsuitable for the full protection of the beneficiary. In such a case, if he considers that proceedings for guardianship or curatorship should be brought, he shall inform the Public Prosecutor so that he may do so. In this case, the support administration shall cease with the appointment of a provisional guardian or curator pursuant to article 419 c.c., or with the declaration of *full guardianship – [interdizione giudiziale]* and *curatorship [inabilitazione]*.

Reflection

30. Provide statistical data if available.

No updated statistical data available.

31. What are the problems which have arisen in practice in respect of the state-ordered measures (e.g. significant court cases, political debate, proposals for improvement)? Have the measures been evaluated, if so what are the outcomes?

As already pointed out (*supra*, 6 -15), the main problem of traditional protection measures is their “rigid” character, as well as the total or partial deprivation of the protected person’s capacity. The protective intent ends up translating, especially in the case of full guardianship, into a deprivation of the subject’s faculties, with heavy consequences in terms of social marginalisation and discrimination. The Italian measures of guardianship and curatorship have appeared less and less in line with the conclusions drawn by the European Court of Human Rights (in the cases ECHR, *Salontaji-Drobnjak v. Serbia*, app. no. 36500/05, dec. 13.10.2009; ECHR, *Stanev v. Bulgaria*, app. no. 36760/06, dec. 17.1.2012; ECHR, *X and Y v. Croatia*, app. no. 5193/09, dec. 3.11.2011) and, above all, with the principles set out in the CRPD which, in Art. 12 (2), enshrines a principle of participation, centred on the notions of support and sharing in the decision-making process.

As specified in General Comment no. 1 «The right to equal recognition before the law implies that legal capacity is a universal attribute inherent in all persons by virtue of their humanity and must be upheld for persons with disabilities on an equal basis with others».

With the introduction of the support administration, as already specified, in Italy a more ductile instrument was introduced that can be modelled in relation to the specific needs of persons deprived in whole or in part of autonomy.

Although the measure has been warmly welcomed, there remain some problematic issues concerning the protection of vulnerable persons.

Firstly, the boundaries between the three protection measures are not clearly defined, the application of which does not depend on the seriousness of the infirmity, as it is possible to opt - in the case of mental infirmity - either for full guardianship or for support administration. Precisely because of the difficulty of coordinating the measures, bills are pending to repeal the institutions of full guardianship and curatorship and to establish support administration as a single measure.

Secondly, despite the pliability of the measure introduced in 2004, the logic of incapacity and substitution in the decision-making process remains, albeit limited to certain acts and with the “least possible limitation of the subject’s capacities”.

Moreover, the complex system of protection measures in Italy does not appear to be suitable to provide adequate support to those subjects who, although not incapacitated, are unable to autonomously manage some activities of daily life (due to physical or psychic impairments or disorders) or have a mere weakening of their intellectual faculties.

The example of the elderly is emblematic in this respect. The general ageing of the population (especially in Italy which, after Japan, is the country with the longest life expectancy in the world), brings with it an exponential increase in the number of elderly persons who, no longer entrusted to family care and not adequately assisted by public welfare systems, frequently find themselves in a situation of loss of functional autonomy which the Italian system is not always able to cope with. Obviously, if advancing age brings with it disabling neurodegenerative diseases (Alzheimer's disease), traditional measures will be applicable.

On the other hand, if advancing age brings with it not an infirmity, but a mere difficulty in managing certain affairs or a diminution of certain faculties, the applicability of the support administration is debated.

In this regard, the Italian case law on the subject aims at emphasising the profile of the necessity of the measure: since the actual prerequisites of incapacity and non-self-sufficiency do not exist, the support administration would be a "superfluous and unnecessarily burdensome" measure, as well as being extraneous to the real need to protect the person partially deprived of autonomy (see Trib. Varese, 18.6.2010; Trib. Vercelli, 16.10.2015; Trib. Modena, 16.3.2018).

Courts have correlated the need for the measure to "a situation of fragility and discomfort as a result of the applicant's critical faculties and her ability to congruously assess the possible consequences of her economic and financial initiatives also due to her advanced age" (ex multis, Cass., 5.2.2016, no. 2346; Cass., 23.12.2021, no. 41407).

Therefore, as the example of the elderly shows, protection measures remain (even in the case of the support administration), anchored to the logic of protection resulting from the loss of capacity. What is missing in the Italian legal system is a culture of support for situations of dependency, for fragility that requires help and not protection.

SECTION IV – VOLUNTARY MEASURES

Overview

32. What voluntary measures exist in your jurisdiction? Give a brief definition of each measure.³

In the Italian legal system is not regulated the voluntary measure of continuing power of attorney, in anticipation of future incapacity. Article 408 of the Civil Code gives any interested party the possibility of appointing a support person in anticipation of his or her possible future incapacity. This is not, however, a continuing power of attorney, but rather a preferential criterion in the choice of a support person if the relevant procedure is initiated.

Law no. 2019 of 22 December 2017 introduced, at art.4, the discipline of the *Advance Directives for medical decisions - [Disposizioni anticipate di trattamento, (DAT)]* with which the declarant states his or her “end of life” guidelines in the event of an irreversible loss of capacity to make decisions.

Advance Directives - [Disposizioni anticipate di trattamento (DAT)]

- 33. Specify the legal sources and the legal nature (e.g. contract; unilateral act; trust or a trust-like institution) of the measure. Please consider, among others:**
- a. the existence of specific provisions regulating voluntary measures;**
 - b. the possibility to use general provisions of civil law, such as rules governing ordinary powers of attorney.**

The *advance directives for medical decisions - [Disposizioni anticipate di trattamento (DAT)]* have been introduced in the Italian legal system by l. 219/2017, which currently constitutes its main legal source (art. 4).

- 34. If applicable, please describe the relation or distinction that is made in your legal system between the appointment of self-chosen representatives/support persons on the one hand and advance directives on the other hand.**

The peculiarity of the trusted person, who may be appointed at the same time as the advance directives, is that he constitutes a 'person of trust', with the primary task of representing and enforcing the grantor's wishes in his relations with the doctor and health care facilities in the event of his or her inability to communicate with them.

³ Please do not forget to provide the terminology for the measures, both in English and in the original language(s) of your jurisdiction. (Examples: the Netherlands: full guardianship – [curatele]; Russia: full guardianship –[opeka]).

35. Which matters can be covered by each voluntary measure in your legal system (please consider the following aspects: property and financial matters; personal and family matters; care and medical matters; and others)?

The advance directives are related only to medical treatments.

Article 4 of l. 219/2017 defines DAT as «*the act whereby any person of full age and capacity may, in anticipation of possible future incapacity to self-determine, express their convictions and preferences regarding health treatments, as well as their consent or refusal with regard to diagnostic or therapeutic choices and individual health treatments, including artificial nutrition and hydration*».

Start of the measure

Legal grounds and procedure

36. Who has the capacity to grant the voluntary measure?

Advance directives may be made by all persons who are:

- ⇒ of age
- ⇒ capable of being of sound mind.

So, minors and persons subject to *full guardianship* - [*interdizione giudiziale*] cannot validly draw up advance directives.

The position of the person under *curatorship* - [*inabilitazione*] is controversial: however, since he or she can express informed consent on his or her own, it is considered that he or she may also express advance directives without the assistance of the curator.

As regards, on the other hand, the person for whom *support administration* has been ordered, the beneficiary may validly express his advance directives only if, in the decree appointing the support administrator, he has not been deprived of the exclusive competence to make health care decisions.

37. Please describe the formalities (public deed; notarial deed; official registration or homologation by court or any other competent authority; etc.) for the creation of the voluntary measure.

The DAT can be expressed alternatively

- at the notary's, either by public deed or by private deed in which the person writes his wishes himself and has the signatures notarised. In both cases the notary keeps the original;
- at the civil status office of the municipality of residence (by private deed);

- at the competent health facilities in the regions that have regulated the collection of DATs (by private deed);
- at Italian consular offices, for Italian citizens abroad (in the exercise of notarial functions).

It is permitted that, if the physical condition of the patient does not allow the written form to be used, the DAT may be expressed also by means of video recording or devices enabling the disabled person to communicate.

In the same form, renewal, amendment or revocation of the advance directives may take place at any time.

38. Describe when and how the voluntary measure enters into force. Please consider:

- a. the circumstances under which voluntary measure enters into force;**
- b. which formalities are required for the measure to enter into force (medical declaration of diminished capacity, court decision, administrative decision, etc.)?**
- c. who is entitled to initiate the measure entering into force?**
- d. is it necessary to register, give publicity or any other kind of notice of the entry into force of the measure?**

A national DAT database has been set up at the Ministry of Health, in which all the DATs expressed are registered and promptly updated in the event of renewal, amendment or revocation. The national database ensures that DATs can be consulted by the doctor treating the patient in situations of inability to self-determine.

DATs are transmitted to the national database by the persons who have collected them and can be consulted by:

- the doctor treating the patient in a situation of inability to self-determine
- the granter
- the trusted person by him.

Access to the database is through digital authentication

Advance directives are intended to be implemented only in the event of the granter's incapacity for self-determination, i.e. when he or she is no longer able to express valid consent or informed refusal to diagnostic tests or medical treatment. Accordingly, the DAT will have to be implemented in the event of a guardianship judgment or appointment of a support person if the decree of appointment establishes the inability of the beneficiary to decide on healthcare treatment.

Appointment of representatives/support persons

- 39. Who can be appointed representative/support person (natural person, public institution, CSO's, private organisation, etc.)? Please consider:**
- a. what kind of requirements does a representative/support person need to meet (capacity, relationship with the grantor, etc.)?**
 - b. what are the safeguards as to conflicts of interests?**
 - c. can several persons be appointed (simultaneously or as substitutes) as representative/support person within the framework of one single measure?**

The grantor may indicate a *trusted person* – [*fiduciario*] to act on his/her behalf and represent him/her in relations with the doctor and healthcare facilities.

The *trusted person* – [*fiduciario*] must be of legal age and of sound mind: acceptance of the appointment takes place by signing the DAT or by a subsequent deed that is attached to it. The *trusted person* – [*fiduciario*] may renounce the appointment by a written deed to be communicated to the grantor; conversely, the trusted person's appointment can be revoked by the grantor at any time, without any obligation to state reasons and in the same manner as for the appointment.

Where the trusted person is missing or has renounced the appointment or is deceased, or has become incapacitated, the DAT shall remain effective with regard to the grantor's convictions and preferences. The tutelary judge appoints a trusted person or invests the support administrator with such duties if necessary, hearing, in the relevant proceedings, the spouse or the party to the civil partnership, or, if none, the children, or, if none, the relatives in the ascending line.

During the measure

Legal effects of the measure

- 40. To what extent is the voluntary measure, and the wishes expressed within it, legally binding?**

The doctor is obliged to comply with the advance directives for medical treatments.

However:

- The grantor may not demand medical treatment contrary to the law, professional ethics or good clinical - care practices.
- The DAT may be disregarded, in whole or in part, by the doctor himself, in agreement with the trusted person, if they appear clearly incongruous or do not correspond to the patient's current clinical condition, or there are therapies that could not be foreseen at the time of signature, capable of offering real possibilities of improving the living conditions.

41. How does the entry into force of the voluntary measure affect the legal capacity of the grantor?

For the measure to become effective, it is necessary for the person to have lost the capacity to self-determine; the (total or partial) loss of legal capacity is subject only to a possible pronouncement of guardianship, curatorship or support administration.

Powers and duties of the representative/support person

- 42. Describe the powers and duties of the representative/support person:**
- a. can the representative/support person act in the place of the adult, act together with the adult or provide assistance in:
 - property and financial matters;
 - personal and family matters;
 - care and medical matters?
 - b. what are the criteria for decision-making (e.g. best interests of the adult or the will and preferences of the adult)?
 - c. is there a duty of the representative/support person to inform and consult the adult?
 - d. is there a right to receive remuneration (how and by whom is it provided)?

The trusted person's task is to ensure the execution of the advanced directives. The duty of the trusted person is to ensure scrupulous compliance with the wishes expressed in the DAT and to be able to stand in for the grantor and represent him/her in relations with the doctor and healthcare facilities.

No remuneration is envisaged for the trusted person.

- 43. Provide a general description of how multiple representatives/support persons interact, if applicable. Please consider:**
- a. if several voluntary measures can be simultaneously applied to the same adult, how do representatives/support persons, appointed in the framework of these measures, coordinate their activities?
 - b. if several representatives/support persons can be appointed in the framework of the same voluntary measure how is the authority distributed among them and how does the exercise of their powers and duties take place (please consider cases of concurrent authority or joint authority and the position of third parties)?

The law textually provides for the appointment of only one trusted person. It is not possible for the grantor to appoint several trusted persons to act jointly or severally.

The granter may, however, draw up a list of persons in successive order, so that in the event of revocation, death, or supervening incapacity of the previous one, the next one takes over.

44. Describe the interaction with other measures. Please consider:

- a. if other measures (state-ordered measures; *ex lege* representation) can be simultaneously applied to the same adult, how do the representatives/support persons, acting in the framework of these measures, coordinate their activities?**
- b. if other measures can be simultaneously applied to the same adult, how are third parties to be informed about the distribution of their authority?**

In case of *support administration* and in the presence of *advance directives*, the *support person* will enforce his beneficiary's wishes.

More problematic is the issue of the support person's powers in the absence of advance directives; in fact, Article 3 of the law provides that the support administrator with exclusive power of representation in the healthcare field, in the absence of advance treatment provisions, may refuse, without the tutelary judge's authorisation, the treatment necessary to keep the person administered alive.

The constitutional legitimacy of the aforementioned provision has been addressed by the Constitutional Court, which has provided a constitutionally oriented interpretation (Const. Court, 13.6.2019, no. 144).

As is well known, the tutelary judge, through the decree of appointment, identifies the acts that the support person may perform in the name and on behalf of the beneficiary, including those of a medical nature, in order to be able to ensure the best possible protection for the same.

In the absence of advance directives, the support person may express refusal of the proposed treatment, but this power must be specifically conferred by the tutelary judge, since the circumstance that the support person has exclusive representation in the healthcare field is not relevant.

The beneficiary's wishes will therefore be reconstructed, his clinical picture will be assessed and the tutelary judge will shape the support person's powers, extending them if necessary to adapt to the needs of the concrete case and pursue the purpose of the institution of support administration: to aim is to ensure the best possible protection of the beneficiary's living conditions.

Safeguards and supervision

45. Describe the safeguards against:

- a. unauthorised acts of the adult and of the representative/support person;**
- b. ill-conceived acts of the adult and of the representative/support person;**
- c. conflicts of interests**

In the event of a conflict between the trusted person and the doctor, Article 3(5) of the law prescribes that the decision is referred to the tutelary judge on the

appeal of the legal representative of the person concerned, or of the persons referred to in art. 406 of the Civil Code or the doctor or the director of the healthcare facility.

- 46. Describe the system of supervision, if any, of the voluntary measure. Specify the legal sources. Please specify:**
- a. **is supervision conducted:**
 - **by competent authorities;**
 - **by person(s) appointed by the voluntary measure.**
 - b. **in each case, what is the nature of the supervision and how is it carried out?**
 - c. **the existence of measures that fall outside the scope of official supervision.**

The tutelary judge takes decisions in case of conflict between the doctor and the trusted person.

End of the measure

- 47. Provide a general description of the termination of each measure. Please consider who may terminate the measure, the grounds, the procedure, including procedural safeguards if any.**

The appointment of the trusted person may be revoked by the granter at any time, in the same manner as for the appointment and without any obligation to state reasons.

Reflection

- 48. Provide statistical data if available.**
- 49. What are the problems which have arisen in practice in respect of the voluntary measures (e.g. significant court cases, political debate, proposals for improvement)? Has the measures been evaluated, if so what are the outcomes?**

One of the main problems concerning advance directives concerned their “knowability”, and, in particular, the transmission of DAT from municipalities or notaries to healthcare facilities. In fact, a number of decrees implementing the law have been issued in this regard.

Article 1, paragraph 419 of the 2018-2020 Budget Law had provided that «*within 180 days from the date of entry into force of this law*» - the Ministry of Health must issue a decree to establish «*the procedures for registering DATs in the database*».

The main problem stems in fact from the diversity of the methodologies for collecting advance directives in the various municipalities; furthermore, the mechanisms for the functioning of the database have not been clearly defined.

The function of the DAT database is to

- collect copies of advance treatment dispositions
- ensure that they are promptly updated in the event of renewal, amendment or revocation
- ensure full accessibility of the DAT both by the doctor treating the patient, in situations of inability to self-determine, and by the granter and any trusted person appointed by him.

The database also records a copy of the appointment of the trusted person, if any, and the acceptance or renunciation of the latter or the subsequent revocation by the disposer.

The Consiglio di Stato intervened on this point, in Opinion No. 01991/2018, stressing the importance of giving adequate publicity to the establishment of the national database and not to nullify the innovative scope of the provisions contained in Law No. 219/2017.

On 17 January 2020, the Ministry of Health adopted a Regulation for the operation of the database intended for the registration of advance treatment directives (DAT); it regulates the operation and information content of the aforementioned database as well as the methods of access to it by the entitled parties.

SECTION V – EX LEGE REPRESENTATION

Overview

50. Does your system have specific provisions for *ex lege* representation of vulnerable adults?

Italian legal system has a specific provision for *ex lege* representation: art. 32 of the criminal code provide for *legal guardianship – [interdizione legale]*, as an accessory penalty to a final sentence of life imprisonment or imprisonment for non-culpable offences, for a period of not less than five years. It is not linked to grounds such as age, mental and physical impairments, prodigality, addiction. So, it goes beyond the scope of the present report.

There are no other forms of *ex lege* representation in the Italian legal system; even in the discipline of the matrimonial property regime (community of property), there is no provision for one spouse to act on behalf of the other.

Instead, acts of ordinary administration may be performed by the spouses separately; acts of extraordinary administration must be performed by both spouses jointly.

Start of the ex-lege representation

Legal grounds and procedure

51. What are the legal grounds (e.g. age, mental and physical impairments, prodigality, addiction, etc.) which give rise to the *ex lege* representation?
52. Is medical expertise/statement required and does this have to be registered or presented in every case of action for the adult?
53. Is it necessary to register, give publicity or give any other kind of notice of the *ex-lege* representation?

Representatives/support persons

54. Who can act as *ex lege* representative and in what order? Think of a partner/spouse or other family member, or other persons.

During the ex-lege representation

Powers and duties of the representatives/support person

55. What kind of legal or other acts are covered: (i) property and financial matters; (ii) personal and family matters; (iii) care and medical matters. Please specifically consider: medical decisions, everyday contracts, financial transactions, bank withdrawals, application for social benefits, taxes, mail.
56. What are the legal effects of the representative's acts?

Can an adult, while still mentally capable, exclude or opt out of such *ex-lege* representation (a) in general or (b) as to certain persons and/or acts?

57. Describe how this *ex lege* representation interacts with other measures? Think of subsidiarity

Safeguards and supervision

58. Are there any safeguards or supervision regarding *ex lege* representation?

End of the ex-lege representation

59. Provide a general description of the end of each instance of *ex-lege* representation.

Reflection

60. Provide statistical data if available.

61. What are the problems which have arisen in practice in respect of *ex lege* representation (e.g. significant court cases, political debate, proposals for improvement)?

Specific cases of ex lege representation

ex lege representation resulting from marital law and/or matrimonial property law

62. Does marital law and/or matrimonial property law permit one spouse, regardless of the other spouse's capacity, to enter into transactions, e.g. relating to household expenses, which then also legally bind the other spouse?

63. Do the rules governing community of property permit one spouse to act on behalf of the other spouse regarding the administration etc. of that property? Please consider both cases: where a spouse has/has no mental impairment.

ex lege representation resulting from negotiorum gestio and other private law provisions

64. Does the private law instrument *negotiorum gestio* or a similar instrument exist in your jurisdiction? If so, does this instrument have any practical significance in cases involving vulnerable adults?

Articles 2028 et seq. of the Civil Code govern the *negotiorum gestio* – [*gestione di affari altrui*], stating that a person who, without being obliged to do so, knowingly assumes the management of another person's affairs is obliged to continue and complete them until the person concerned is able to do so himself.

SECTION VI – OTHER PRIVATE LAW PROVISIONS

65. Do you have any other private law instruments allowing for representation besides *negotiorum gestio*?

In the Italian private law system, there are certain instruments that allow one to act on behalf of other parties:

- Articles 1387 et seq. of the Civil Code regulate the institution of *representation* – [*rappresentanza*] by which a subject (represented) grants another subject (representative) the power to replace him in the performance of one or more legal activities; depending on whether the effects are produced in the hands of the represented or the representative it is defined as, respectively, direct (art. 1388 c.c.) or indirect and, in the latter case, a further transaction is necessary to allow the effects to be produced in the sphere of the represented. A unilateral act, called a *power of attorney* – [*procura*], which must have the same form as the act which the agent is called upon to perform, is necessary for the conferment of the power of representation.

- Articles 1703 et seq. of the Civil Code govern the *agency contract* – [*contratto di mandato*] whereby one party undertakes to perform one or more legal acts on behalf of the other.

66. Are there provisions regarding the advance planning by third parties on behalf of adults with limited capacity (e.g. provisions from parents for a child with a disability)? Can third parties make advance arrangements?

In Italy, Article 1, paragraph 3 of Law No. 112 of 22 June 2016 (the so-called 'Dopo di Noi') regulated «*special funds, made up of assets subject to a restriction of destination and governed by a trusteeship contract also in favour of non-profit organisations of social utility (...) operating mainly in the charitable sector (...), in favour of persons with severe disabilities*».

The law therefore introduced a trust contract aimed at creating funds for disabled beneficiaries.

These special funds must have as their exclusive purpose «the social inclusion, care and assistance of persons with severe disabilities»; to this end, the trusteeship contract must describe «the functionality and specific needs of the persons with severe disabilities, in whose favour they are established»; it must also indicate «the care activities necessary to ensure the care and satisfaction of the needs of persons with severe disabilities», as well as the obligations and reporting procedures to be fulfilled by the trustee, the person in charge of monitoring the obligations imposed on the trustee, the final term of the duration of the funds (coinciding with the date of the death of the person with severe disabilities) and

the destination of the residual assets. Substantial tax benefits are provided for these funds.

The recipients of the regulations are the “severely” disabled, for whom permanent, continuous and global assistance is required.

The deed of trust must establish who will be the person in charge of monitoring the envisaged obligations, and sets the term of the trust. The trustee can be either a trusted person close to the person with severe disabilities who is the beneficiary of the trust, or a non-profit organisation, provided, however, that it operates mainly in the charitable sector.

SECTION VII – GENERAL ASSESSMENT OF YOUR LEGAL SYSTEM IN TERMS OF PROTECTION AND EMPOWERMENT

67. Provide an assessment of your system in terms of *empowerment* of vulnerable adults (use governmental and non-governmental reports, academic literature, political discussion, etc.). Assess your system in terms of:

- a. the transition from substituted to supported decision-making;**
- b. subsidiarity: autonomous decision-making of adults with impairments as long as possible, substituted decision-making/representation – as last resort;**
- c. proportionality: supported decision-making when needed, substituted decision-making/representation – as last resort;**
- d. effect of the measures on the legal capacity of vulnerable adults;**
- e. the possibility to provide tailor-made solutions;**
- f. transition from the best interest principle to the will and preferences principle.**

In the Italian system of protection measures, the shift from a logic of substitution to one of support in the decision-making process of vulnerable adults was marked, as repeatedly stressed, by the introduction of the *support administration*.

With this measure, Italy tried to place itself in line with the most modern national and supranational trends and to adapt the system of protection measures to the principles of the “least restrictive alternative” (art.1, l. 6/2004), of flexibility and proportionality and of the “maximum safeguard of the subject’s self-determination” (Corte Cost., 10.5.2019, n. 114).

The exponential increase of support administrations and the concomitant decrease of full guardianships and curatorships (the number of which is currently small), demonstrates the greater suitability of the institution to meet the needs of vulnerable adults who, regardless of an overt state of incapacity, need support in

the performance of daily functions, in the management of their affairs and require assistance (and not substitution) in the decision-making process.

Despite the unquestionable progress made in the Italian system of protection of persons without autonomy by the introduction of the support administration, some provisions continue to clash with the model outlined by the CRPD.

In fact, in 2016, the Committee on the Rights of Persons with Disabilities stated that in Italy «both the legal institutions of guardianship/curatorship, which are still in force, and the current legal institution of support administration are based on a concept of protection in the best interest of the person, in contrast with art. 12, which disposes for the recognition of full legal capacity of all persons with disabilities without exceptions, as well as for the provision of support to decision making in the respect of the person's will», asking then for the overcoming of full guardianship and curatorship and some changes to the law on the support administrator, aimed in particular at moving from the concept of replacing the person in decision making, in his/her best interest, to the concept of supporting the person in decision making, in respect of his/her will, however expressed.

The rationale of the CRPD and, in particular, Article 12, is to support the person with disabilities in making decisions, respecting his or her wishes. The law on support administrators, on the other hand, is still based on the concept of protection of the best interests and uses negative concepts such as “incapacity”.

- 68. Provide an assessment of your system in terms of *protection of vulnerable adults* (use governmental and non-governmental reports, academic literature, political discussion, etc.). Assess your system in terms of:**
- a. protection during a procedure resulting in deprivation of or limitation or restoration of legal capacity;**
 - b. protection during a procedure resulting in the application, alteration or termination of adult support measures;**
 - c. protection during the operation of adult support measures:**
 - **protection of the vulnerable adult against his/her own acts;**
 - **protection of the vulnerable adult against conflict of interests, abuse or neglect by the representative/supporting person;**
 - **protection of the vulnerable adult against conflict of interests, abuse or neglect in case of institutional representation of persons in residential-care institutions by those institutions;**
 - **protection of the privacy of the vulnerable adult.**

The critical aspects of the measures of full guardianship and curatorship were repeatedly highlighted during the questionnaire: ‘rigid’ character, non-flexibility,

total or partial deprivation of capacity. These measures, born with a protective intent, end up resulting in a total exclusion of the subject from civil society, with considerable repercussions in terms of social marginalisation, discrimination and rehabilitation difficulties.

The support administration, on the other hand, although characterised by flexibility, has demonstrated over time not a few critical issues that have been highlighted by doctrine and professional associations. In the Dossier - *Abuse in support administrations: two years of investigations, scandalous silences, questions* (published by “La voce di Trieste” on 16 April 2013) it was highlighted: «Even people capable of managing themselves are subjected to a support administration; the measure is taken against their will or even without their knowledge on the basis of inadequately verified reports by some social and health operators; the court does not entrust the role of support administrator to relatives or suitable and freely available friends, but to lawyers, accountants or to the aforementioned operators, and even with fees at the expense of the administered person; these administrators receive from the judge totalitarian powers, similar to those of full guardianship, which go so far as to deprive the alleged beneficiary not only of the administration of his property but also of the management of his own health and even of his correspondence». (https://issuu.com/cris.paderi/docs/dossier_abusi_ads_la_voce_di_trieste_2013).

The proposal for Guidelines put forward by UNASAM (Unione Nazionale delle Associazioni per la Salute Mentale) is intended to remedy the various critical issues encountered in the implementation of Law 6/04, seeking to shed light on the correct application of the rule itself:

- the institution has turned into a “profession” remunerated through the payment of a monthly fee (authorised by the tutelary judges);
- there are also too many cases in which “there is no fiduciary relationship between the beneficiary and the support person who acts in full autonomy on the management of financial resources and does not deal with the beneficiary’s life project, his aspirations and real needs”.

Upstream, it is contested that, in practice, the support administration has lost its distinctive features compared to full guardianship and curatorship, depriving the beneficiary of the right to express an opinion, make a decision, and self-determine. Moreover, the support administrator’s tendency to substitute himself for the beneficiary is in clear conflict with Article 12 CRPD.

(see the text of the proposal: <http://www.unasam.it/wordpress/wp-content/uploads/2021/07/PROPOSTA-LINEE-GUIDA-PER-APPLICAZIONE-LEGGE-6-DEL-2004-ISTITUTIVA-DELLAMMINISTRAZIONE-DI-SOSTEGNO-2.pdf>)

To the criticisms made, a response was provided by Prof. Paolo Cendon (father and creator of the support administration in Italy), who reiterated how the

'dysfunctionality' in the protection of vulnerable persons only concerns the concrete application of the institutions. The law, on the other hand, demonstrates the will to put the person at the centre, thus also being in line with the provisions of the CRPD. In particular, the law provides that:

- the limitation of capacity, where necessary, must be as minor as possible (Art. 1);
- the frail person may apply for support administration for him/herself, even if he/she is under full guardianship;
- The tutelary judge must hear the person in person, going to the person's place, and must take into account, compatibly with the person's interests and protection needs, the person's needs and requests (Art. 407);
- the choice of the support person is made with exclusive regard to the care and interests of the person of the beneficiary; it is the person himself who may designate his future support person (Art. 408);
- even those in great difficulty can always perform the acts of daily living (Art. 409);
- the support person must take into account the needs and aspirations of the beneficiary, he must inform him about everything, in case of conflict the person concerned can appeal to the tutelary judge (art. 410);
- the beneficiary can always request revocation of the support person (art. 413)