

Country report **Portugal**

Authors: **Prof. Paula Távora Vítor**



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.

LEGAL PROTECTION AND EMPOWERMENT OF VULNERABLE ADULTS

PORTUGAL

Prof. Paula Távora Vítor

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 current legal framework regarding the protection and empowerment of vulnerable adults may be found across the Portuguese legal system, in several branches of the Law. The Constitution of the Portuguese Republic includes two articles that directly refer to Vulnerable adults - (Article 71 (Disabled citizens) regarding the rights of “citizens with disability” and article 72, regarding the rights of “elderly people”. According to the English translation of the parliament website (www.parlamento.pt), “1. Citizens with physical or mental disabilities fully enjoy the rights and are subject to the duties enshrined in the Constitution, save for the exercise or fulfilment of those for which their condition renders them incapable. 2. The state undertakes to implement a national policy for the prevention of disability and the treatment, rehabilitation and integration of disabled citizens and the provision of support to their families, to educate society in such a way as to make it aware of the duties of respect and solidarity towards them, and to undertake the charge of ensuring that their rights are effectively fulfilled, without prejudice to the rights and duties of their parents or guardians. 3. The state shall support disabled citizens’ organisations.”. (1. Os cidadãos portadores de deficiência física ou mental gozam plenamente dos direitos e estão sujeitos aos deveres consignados na Constituição, com ressalva do exercício ou do cumprimento daqueles para os quais se encontrem incapacitados; 2. O Estado obriga-se a realizar uma política nacional de prevenção e de tratamento, reabilitação e integração dos cidadãos portadores de deficiência e de apoio às suas famílias, a desenvolver uma pedagogia que sensibilize a sociedade quanto aos deveres de respeito e solidariedade para com eles e a assumir o encargo da efetiva realização dos seus direitos, sem prejuízo dos direitos e deveres dos pais ou tutores; O Estado

apoia as organizações de cidadãos portadores de deficiência.). Article 72, under the title “The Elderly”, states that “1. The elderly have the right to economic security and to conditions in terms of housing and family and community life that respect their personal autonomy and avoid and overcome isolation or social marginalisation.; 2. The policy for the elderly shall include measures of an economic, social and cultural nature that tend to provide elderly persons with opportunities for personal fulfilment by means of an active participation in community life.”. (Artigo 72.º - Terceira idade 1. As pessoas idosas têm direito à segurança económica e a condições de habitação e convívio familiar e comunitário que respeitem a sua autonomia pessoal e evitem e superem o isolamento ou a marginalização social. 2. A política de terceira idade engloba medidas de carácter económico, social e cultural tendentes a proporcionar às pessoas idosas oportunidades de realização pessoal, através de uma participação ativa na vida da comunidade.) Both articles belong to the category of Fundamental Rights. Other constitutional rules may be extremely relevant regarding vulnerable adults– such as the Principle of Equality (and its demands of non-discrimination) – Article 13 of the Constitution – the Principle of Universality – Article 12 of the Constitution – of the right to civil capacity expressly included as a fundamental right in the Constitution.

The Portuguese Civil Code (that entered into force in 1967) is the main set of rules that regulates the status of vulnerable adults. In 2018, Law No. 49/2018, August 14th has operated a relevant reform, erasing the former dualistic regime of interdição and inabilitação (full and partial guardianship) and created the new monistic protection measure of acompanhamento (custodianship) – article 138-156 of the Civil Code.

In 2012, Law No. 25/2012, July 16th introduced two important voluntary instruments in the field of health care: living wills and continuing health care powers of attorney.

In 2017, before the Civil Code Reform, Decree-Law No. 129/2017, October 9, has also created a system of personal assistance to persons with disability or incapacity who need support in order to live independently (Independent Life Support Model).

Finally, the new Mental Health Law (Law n. 35/2023, July 21st), has entered into force in 2023. The previous regime has been reformed in order to comply with the demands of international law.

It should also be mentioned, that other branches of Law also include provisions that Other sources in Social Security Law, Criminal Law, etc.

- 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.

- Acompanhamento (Direct translation: accompaniment; English translation used: custodianship – reason for the choice: the new protection measure is supposed to be inspired in the German Betreuung and the official English translation of Betreuung is custodianship). It is a state-ordered measure.
- Maior acompanhado – adult under custodianship
- Acompanhante – custodian (support person)
- Diretivas antecipadas – Advanced Directives
- Testamento Vital – Living will (it is an advanced directive)
- Procuração de cuidados de saúde – Health care power of attorney (it is a continuing power of attorney)
- Mandato com vista a acompanhamento – Mandate for custodianship purposes (it is a continuing power of attorney)

There is no official national translation in English of these key terms.

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.

In 2021, the resident population aged 65 and older was 2.449.743 (www.pordata.pt). Portuguese population is in 2021 10.347.892 (www.ine.pt).

As for the disabled population, according to the available data, in 2001, 636.059 suffered from hearing impairments, 84.172, from visual impairments, 163.569. As for mental impairments reached 227.420 and cerebral palsy counted 15.009 persons. Other disabilities presented the number of 146.069 citizens. (www.pordata.pt).

According to APAV, in 2021, 1594 elderly persons were victims of crimes. 70% were female and the perpetrator was a child (26, 2%) or the

spouse (16,5%)

(https://www.apav.pt/apav_v3/images/pdf/FI_VCPI_2020.pdf).

There is not yet statistical data on adult protection measures.

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.

Besides the general Human Right Treaties that are still relevant in this context (Universal Declaration of Human Rights, European Convention of Human Rights), one should stress the Oviedo Convention (e Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and lline – 1997) and the EU Charter of Fundamental Rights (2000).

It should be borne in mind that the discussion surrounding the Draft Additional Protocol concerning the protection of human rights and dignity of persons with mental disorder with regard to involuntary placement and involuntary treatment has also influenced the current discussion regarding the reform of the new Mental Health Law (Law n. 35/2023, July 21st), that entered into force in 2023.

Although mere recommendations, the Recommendations No. R(99)4 and CM/Rec(2009)11 of the Council of Europe have been extremely relevant in the shaping of the system.

Finally, the UNCRPD was approved and ratified by Portugal in 2009.

In terms of PIL, the Hague Convention of 13 January 2000 on the International Protection of Adults was signed, ratified and entered into force in 2018.

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

The 19th century Civil Code of 1867 has been replaced in 1966 by the present Civil Code, that entered into force in 1967. The original regime of the Civil Code of 1966 included two protection measures (*interdição* – full guardianship - and *inabilitação* – partial guardianship), always implied the incapacitation of the vulnerable adult, the nomination of a guardian (representative) or curator (who authorized the persons acts). In 1977, the Civil Code has undergone a substantial reform, in order to adapt to the principles of the new Democratic Constitution of 1976 (Portugal's current Constitution),

namely the Principle of Equality and the Fundamental Rights enshrined in the Constitution. The regime of vulnerable adults has not been deeply modified though, apart from a few references to the equality of parents as guardians of adult children.

In 2012, a new piece of legislation brought into the foreground the new demands of prospective autonomy, by introducing Health Care Advanced Directives in the system: Living wills and health care power of attorney (Law n.º 25/2012, July 16th). In 2008, the UNCRPD was signed and ratified by the Portuguese State and in 2016, in the Concluding observations on the initial report of Portugal (20 May 2016), “The Committee notes with deep concern that in the State party a large number of persons with disabilities are subjected to full or partial guardianship and therefore deprived of such rights as the right to vote, marry, form a family or manage assets and property. The Committee is also concerned that the current revision of the State party’s Civil Code continues to provide for restrictions on the legal capacity of persons with disabilities”

(<http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPPRiCAqhKb7yhsgS19RWfPJldrCFmmb%2B7m2uf3umNkn3cwAWe215iI7iCJux52QJuVAnUJ17zmsxLyafE6KaNIHHACRVshYrXXu%2B7wovG5b30Jv3gw3YOpueL>). In 2018, the Civil Code was reformed. It aimed to meet the demands of the UNCRPD, although some of its options fall short from this purpose (as it will be further analysed).

- 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 current legal Framework results from a very recent reform (it entered into force in 2019). The previous regime had been criticized by legal literature (Raul Guichard Alves, Paula Távora Vítor, Geraldo Rocha Ribeiro,

Filipe Venade de Sousa¹) and there were previous attempts to reform it². The current regime results from a Legal Policy Study³ that aims to provide the *mens legislatoris* regarding each legal provision. Before this Legal Policy Study, the Family Law Center of the Faculty of Law of the University of Coimbra, by command of the Ministry of Justice, had already presented a Law Reform Proposal and Explanatory Report⁴.

One must bear in mind that, despite the urge to reform the previous regime being detected from the 1990's and the fact that it could not comply with the constitutional demands of protection of fundamental rights being already a major obstacle to its continuation, the UNCRPD has been the paramount reason why the reform has been held. As mentioned before, in the Concluding observations on the initial report of Portugal (20 May 2016), “The Committee notes with deep concern that in the State party a large number of persons with disabilities are subjected to full or partial guardianship and therefore deprived of such rights as the right to vote, marry, form a family or manage assets and property. The Committee is also concerned that the current revision of the State party’s Civil Code continues to provide for restrictions on the legal capacity of persons with disabilities” (<http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPPRiCAqhKb7yhsgS19RWFpJldrCFmmb%2B7m2uf3umNkn3cwAWe215iI7iCJux52QJuVAnUJ17zmsxLyafE6KaNIHHACRVshYrXXu%2B7wovG5b30Jv3gw3YOpueL>).

¹ Raúl Guichard Alves, Alguns aspectos do instituto da interdição, in *Direito e Justiça*, vol. IX, Tomo 2, 1995, Paula Távora Vítor, *A Administração do Património das Pessoas com Capacidade Diminuída*, Coimbra: Coimbra Editora, 2008, pp. 37 ss., Geraldo Rocha Ribeiro, *A Protecção do Incapaz Adulto no Direito Português*, Coimbra: Coimbra Editora, 2010 in particular pp. 85 ss, 123 ss., 196 ss e 215 ss., Jorge Duarte Pinheiro, As pessoas com deficiência como sujeitos, de direitos e deveres. Incapacidades, e suprimento — a visão do Jurista, in *Revista O DIREITO*, ano 142.º - III, p. 474 and Alexandra Chícharo das Neves, Críticas ao regime da capacidade de exercício da pessoa com deficiência mental ou intelectual – a nova concepção da pessoa com deficiência, in *Revista do Ministério Público*, Ano 35, N.º 140, Sindicato dos Magistrados do Ministério Público, outubro/dezembro 2014, p. 91 ss, Filipe Venade de Sousa, A Convenção das Nações Unidas sobre os Direitos das Pessoas com Deficiência no Ordenamento Jurídico Português – Contributo para a Compreensão do Estatuto Jusfundamental, Almedina, 2018.

² 1999-2000 “Comissão de Juristas” project “regime de protecção jurídica dos maiores em situação de incapacidade”; 2003-2005, Grupo CID – Crianças, Idosos e Deficientes/Cidadania, Instituições e Direitos (Ministry of Social Security and Labour); 2004-2005, Direção-geral de Saúde, project of regulation the administration of the assets of the mentally ill; 2009-2010 (?), Coordenação de Saúde Mental, project of regulation the administration of the assets of the mentally ill.

³ ANTÓNIO MENEZES CORDEIRO, *Da situação jurídica do maior acompanhado, Estudo de política legislativa relativo a um novo regime das incapacidades denominadas dos maiores*, (in http://www.smmp.pt/wp-content/uploads/Estudo_Menezes-CordeiroPinto-MonteiroMTS.pdf)

⁴ Paula Távora Vítor e Geraldo Rocha Ribeiro, Proposta de Lei sobre a Condição Jurídica das Pessoas Maiores em Situação de Incapacidade. Revisão do Código Civil, Centro de Direito da Família, 17 de janeiro de 2017 (in http://www.centrodedireitodafamilia.org/relatórios/2017/*proposta-de-lei-sobre-condição-jur%C3%ADdica-das-pessoas-maiores-em-situação-de)

The Reform of 2018 aimed, therefore, to comply with the demands of the UNCRPD. However, the success of this task has not been completely accomplished. Indeed, as it will be further explained, it may be argued that the universal capacity paradigm and the support model (Article 12 UNCRP) have yet to be implemented, since the limitation of legal capacity is still possible and it is still possible to find substitute-decision making.

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

In the first version of this report, the reform of the Portuguese Mental Health Law (that was still pending) has been referred, as follows: “Regarding the situation of vulnerable adults, one must also stress the undergoing reform of the Mental Health Act (Bill No. 24/XV/1⁵) that also has in mind adaptation of several aspects of the regime of capacity, mental health care and placement to the demands of the UNCRPD, namely taking into considerations the General Comment 1 of the Committee on the Rights of Persons with Disabilities regarding involuntary placement. It also took into account the Comprehensive Mental Health Action Plan 2013-2030, the European Framework for Action on Mental Health and Wellbeing and the Additional Protocol to the Convention on Human Rights and Biomedicine concerning the protection of human rights and dignity of persons with regard to involuntary placement and involuntary treatment within mental healthcare services – Council of Europe 2021. See also, the Opinion 105/CNECV/2019 of the National Council of Ethics for the Life Sciences, regarding Compulsory Treatment and the Rights of Mentally Ill Persons, July 2019⁶.

This reform was preceded by Decree-Law No. 113/2021, December 14, that has reformed the organization of mental health services and that aimed to provide an adequate structure that could guarantee the rights of the beneficiaries of mental health services”.

In July 2023, the new Mental Health Act has been approved (Law n. 35/2023, July 21st) and entered into force in the following month.

Meanwhile a new (non-official) discussion regarding forced sterilization of persons with disabilities has been opened. This discussion was fueled by the new proposal of a Directive of the European Parliament and of the Council on combating violence against women and domestic violence and by the findings of the European Disability Forum, that identifies Portugal as one of the UE countries in which forced sterilization is allowed.

⁵ DAR II série A n.º 65, 2022.07.22, da 1.ª SL da XV Leg (pág. 13-36)
(<https://debates.parlamento.pt/catalogo/r3/dar/s2a/15/01/065/2022-07-22/13?pgs=13-36&org=PLC>)

⁶<https://www.cnecv.pt/pt/deliberacoes/pareceres/105-cnecv-2019>.

SECTION II – LIMITATIONS OF LEGAL CAPACITY

- 8. Does your system allow limitation of the legal capacity of an adult? N.B. If your legal system provides such possibilities, please answer questions 8 - 15; if not proceed with question 16.**
- a. on what grounds?**

Art. 138 CC (Civil Code) establishes the general requisites to establish a support measure. This support measure may or not encompass limitation of legal capacity. This depends on the appreciation of the particular situation at stake. In general terms, Art. 138 CC defines that the adult who, by reasons of health, disability or because of his/her behaviour is unable to exercise fully, personally and in conscience his/her rights or, in the same way, fulfill his/her duties may be subject to support measures – and the support measure of *acompanhamento* (*custodianship*) may lead to a limitation of legal capacity. The new regime has abandoned previous legal references to “psychic anomaly”, “deafness”, “muteness”, “blindness”, “prodigality” or “abuse of alcohol or narcotics”.

It should be borne in mind that the “new” elected grounds (“health”, “disability” or “behavior”) may be too wide and must, therefore, be interpreted according to the new paradigm introduced by the UNCRPD and only be summoned when respecting the principles of proportionality and subsidiarity.

It should also be mentioned that in the course of the preparation of the 2018 Reform, the political discourse has often made an association between ageing and diminished capacity (See the Resolution of the Council of Ministers No. 63/2015, August 25th) – an association that must be rejected given the dangers of an ageist approach when determining a support measure, including restricting legal capacity.

Besides the grounds elected (“health”, “disability” or “behaviour”), one must pay attention to the functional demand of article 138 too: the inability to exercise fully, personally and in conscience his/her rights or, in the same way, fulfill his/her duties. This means that the support measure of *acompanhamento* and the limitation of legal capacity that may be involved should only be implemented in situations in which it is necessary in the concrete situation and it must result in a “real advantage” to the adult person (cf. article 892 (1), *a*) of the Civil Procedure Code).

- b. how is the scope of the limitation of legal capacity set out in (a) statute or (b) case law?**

The rule is absence of limitation of capacity (which is expressly stated in the preamble of the project that resulted in the Reform – Bill N.º 110/XIII, p. 3). Indeed, when someone becomes an adult (at 18 years old) the rule is full

capacity to exercise rights (agency) (Article 130 CC). The measure of *acompanhamento* does not imply limitation of capacity.

Regarding the exercise of personal rights and daily life transactions, Article 147 (1) CC states that they can be freely performed, unless a legal provision or a Court decision determines otherwise. This legal precept is not easy to understand, since the rule (capacity of adults) is already enunciated in general terms (article 130 CC) and it seems that this specific rule is introduced in order to open the aforementioned exceptions (“unless a legal provision or a Court decision determines otherwise”).

As far as we understand it, a Court decision may only limit legal capacity to act (including regarding daily life transactions) when the acts of the adult are subject to the authorization of the support person (article 145 (2) *d* CC). It is the only case that necessarily implies that the adult cannot “freely” exercise his/her rights.

As far as personal rights are concerned, it should be borne in mind that any limitation has to take into account the fact that international instruments that bind the Portuguese State are reluctant to restrict them – be it the Oviedo Convention (Article 6 (3), in particular) or the UNCPRD (article 23).

However, it is still possible to find examples of Court decision to limit legal capacity, not only its exercise, but also to hold rights.. Article 147 (2) CC presents us with a list of (examples of) “personal rights”, mostly regarding family matters. Many of them are referred to again in specific provisions that admit its restriction by Court decision, such as:

- **Right to marry:** the right to marry may be restricted by the Court and in that case it becomes an impediment and the consequence is that marriage is annulable (article 1601, b) CC)
- **Right to enter into a *de facto* union:** the right to enter into a *de facto* union may also be restricted by the Court and the consequence of not complying is the fact that such relation will not benefit from legal protection (art. 2, Law No. 7/2001, 11 May).
- **Right to procreate:** Article 147 (2) CC refers to a “right to procreate”. The Portuguese legislature has not addressed the issues related to the sterilization or to the use of contraception by the adult. The only direct reference in a legal provision that may be considered is the one that pertains to the capacity to access assisted reproductive technology (Article 6 of the Law of Medically Assisted Procreation, Law N.º 32/2006, July 26th). In such situations, a Court decision that decrees *acompanhamento* may also restrict this access.

The inclusion of the “right to procreate” in Article 147 (2) CC should be interpreted according to the UNCPRD, namely to its Article 23 (1) *b*) and thus to impose the recognition of the right of the adult *to* decide freely and responsibly on the number and spacing of their children and to have (...) the means necessary to enable them to exercise these rights are provided”.

- **The right to voluntary acknowledge fatherhood:** this right is subject to restrictions by Court decision, but that cannot be considered tailor-made. Indeed, article 1850 (1) CC considers that there is a deprivation of the capacity to acknowledge fatherhood whenever there is a “limitation to the exercise of personal rights” by the Court decision. It is therefore a deprivation of capacity regarding a specific act that is the consequence of the limitation of the exercise of rights that – although personal - may pertain to very different kinds of matters. It is, therefore, a limitation of legal capacity that does not obey to the principle of proportionality and adequacy (Article 18 of the Constitution).
- **Right to care and educate their own children** – Article 147(2) mentions this right, but Article 1913, b) CC includes the possibility of inhibition of the exercise of parental responsibilities in the Court decision that has decreed *acompanhamento*.
- **Right to make a will** – this right may be limited in the Court decision that has decreed *acompanhamento* (art. 2189.º, al. b)).
Right to make a health care advanced directive – this right is not referred to as an example in Article 147(2) Cc. However, art. 4, b) of Law No. 25/2012, 16 July, used to draw an implication from the limitation of the right to make a will. It considered that whenever there was this limitation, there was also lack of capacity to make health care advanced directive. This provision has been revoked by the new Mental Health Law (Law n. 35/2023, July 21st).

c. does limitation of the legal capacity automatically affect all or some aspects of legal capacity or is it a tailor-made decision?

No, the limitation of legal capacity is tailor-made, as a rule. However, there are some provisions, as mentioned above in b.) (right to acknowledge fatherhood and right to make an advanced directive) which imply limitations of capacity regarding particular acts that automatically derive from limitations of capacity regarding different acts.

d. can the limited legal capacity be restored and on what grounds?

Yes, capacity can be restored or the degree of its limitation can be modified. Indeed, according to article 149 (1) of the Civil Code, the measure of *acompanhamento* may be terminated (and thus the limitation of capacity associated) or modified (including the limitation of capacity associated) by Court decision that recognizes the causes of termination or modification. The

effects of such decision may retroact to the date referred to in the decision in which the causes for termination or modification occurred (article 149 (2) of the Civil Code). The grounds for such termination or modification are connected to the modification of the requisites of Art. 138 CC (Civil Code). (See answer to question 8. a.)

It should be borne in mind that the Court has to review the decision that decreed the support measure every five years or within the time lapse determined by the decision - Art. 155 CC (Civil Code).

e. does the application of an adult protection measure (e.g. supported decision making) automatically result in a deprivation or limitation of legal capacity?

No, and as a rule it should not do it. The rule is that an adult is fully capable – by reaching 18 years old (art. 130 CC) and only, as an exception, and justified under the principle of necessity (article 145 CC) and subsidiarity (article 140 (2) CC) may a limitation of legal capacity be decreed by the Court.

f. are there any other legal instruments,⁷ besides adult protection measures, that can lead to a deprivation or limitation of legal capacity?

Yes. The deprivation of the right to vote may occur in the following situations:

Right to vote for the Parliament – Law No. 14/79, 16 May (article 3, b));

Right to vote for local authorities – Organization Law No. 1/2001, August 14 (article 3, b)); Right to vote in a referendum - Organization Law No. 4/2000, August 24 (Article 36, b)). In all these Acts, there is deprivation of capacity for the ones who are placed in psychiatric hospitals or declared as not capable to vote by a medical committee of two physicians.

It may also be argued that, by establishing that those over 60 years old may not freely choose their matrimonial regime and are imposed the regime of separation of assets, Article 1720, b) CC is also creating a deprivation of legal capacity.

⁷ 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

**9. Briefly describe the effects of a limitation of legal capacity on:
a. property and financial matters;**

Limitation of capacity may imply that the *acompanhante* (Support person) will have to authorize certain acts of the adult (Article 145, d) CC).

The acts performed by the adult that do not respect what was determined in the Court decision may be annulled (Article 154 (1) CC).

This consequence will operate differently depending on the moment when such acts are performed. Therefore it must be considered whether the acts were performed i) after the Court decision that has determined the support measure of *acompanhamento* was registered; ii) after the Court procedure regarding the determination of the support measure was announced; iii) before the Court procedure regarding the determination of the support measure was announced.

- i) after the Court decision that has determined the support measure of *acompanhamento* was registered

In this situation, there are no additional demands to annul the act (Article 154 (1), a) CC). The mandatory registration of the Court decision (Article 153 CC) provides adequate publicity. Therefore, the interest of the adult prevails above any interest of a third party, even when he/she was acting in good faith. It is considered that the position of third parties and legal certainty are protected by the given publicity.

- ii) after the Court procedure regarding the determination of the support measure was announced.

These acts may be annulled but only i) after the Court's final decision determining the support measure; and ii) if these acts are harmful to the adult person (Article 154 (1), b) CC). It should be borne in mind that it is only relevant to annul a specific act the "final decision" that has determined the limitation of capacity regarding the aforementioned act.

As for the fact that these acts "are harmful" to the adult person, that should be determined taking into account the moment they are performed. Supervening damages are not a risk directly connected to the situation of the adult person (namely an alteration of circumstances). This risk should not be borne by third parties and it could even be contrary to the interest of the adult – it would possibly further isolate him/her and his/her actual ability to act due to the fear of such (unpredictable) consequences by third parties.

(Paulo Mota Pinto, *Valor jurídico dos atos do maior acompanhado*, in *Colóquio O Novo Regime do Maior Acompanhado*, Coimbra, Instituto Jurídico, 2019, pp. 87 ff.).

- iii) before the Court procedure regarding the determination of the support measure was announced
In this situation, the law is even more demanding (Article 154 (3) CC). It refers to the legal regime of temporary mental disturbance (Article 257 CC).
Those acts may only be voidable depending on the fulfilment of some legal requirements: (i) the declaration of intent is made in a state of mental disturbance, which prevents either the ability to understand it or the free exercise of will; (ii) as long as that situation is notorious or known by the other party. This notoriety is appraised taking into account the standard of a *person who acts with normal diligence* (Article 257 (2) CC). It is, therefore, not necessary that a support measure is actually determined in order to annul these acts. Actually, not even the fact that it is decreed is relevant as proof of lack of capacity in the moment the act was performed. Regarding *time limit and who is entitled to file a petition* to annul the act in these cases, see 14. a.

As for (i) and (ii), this provision does not refer *who is entitled to file a petition* to annul the act. The sole reference may be found in the Code of Civil Procedure. According to Article 903 of the Code of Civil Procedure, the *acompanhante* may request the annulment after the transit *in rem judicatem* of the Court decision regarding the acts performed after the reporting and the orders referred to in article 894 of the Code of Civil Procedure (to banking institutions, financial intermediaries, Civil Registry Offices, Land Registry Offices Commercial Registry Offices, management bodies of companies and other entities). It should be understood that this is the regime for the acts that were performed i) after the Court decision that has determined the support measure of *acompanhamento* was registered; ii) after the Court procedure regarding the determination of the support measure was announced.

As for the *time limit* to file the annulment petition, it is defined in Article 154 (2) CC – one year from the registry of the Court decision. It should be understood that this is the regime for the acts that were performed after the Court procedure regarding the determination of the support measure was announced. The ones that were. As for the acts that were performed after the Court decision that has determined the support measure of *acompanhamento* was registered, the rule of Art. 125 (1), a) (annulment of acts of minors) should apply by analogy – one year from the moment the act is known from those who can file such petition(Paulo Mota Pinto, *Valor jurídico dos atos do maior acompanhado*, in Colóquio O Novo Regime do Maior Acompanhado, Coimbra, Instituto Jurídico, 2019, pp. 87 ff).

Regarding other matters, the general regime of voidable acta will apply (Articles 287 ff. CC).

b. family matters and personal rights (e.g. marriage, divorce, contraception);

- **Right to marry:** the right to marry may be restricted by the Court and in that case it becomes an impediment and the consequence is that marriage may be annulled (article 1601, b) and 1631 CC)
- Right to file for divorce: when the adult is under *acompanhamento*, it is the adult him/herself who may file for divorce. There is no limitation of capacity to act. However, if the support person (*acompanhante*) has been granted representation powers, he/she can file for divorce, after obtaining Court authorization. Whenever the *acompanhante* is the other spouse, divorce may be filed on behalf of the adult by any relative in the direct line (parents, children), up to the third degree in the collateral line (siblings, uncles, nephews) or by the Public Prosecutor's Office (Article 1785 (2) CC).
- **Right to enter into a *de facto* union:** the right to enter into a *de facto* union may also be restricted by the Court and the consequence of not complying is the fact that such relation will not benefit from legal protection (art. 2, b) Law No. 7/2001, 11 May).
- **Right to procreate:** Article 147 (2) CC refers to a “right to procreate”. The Portuguese legislature has not addressed the issues related to the sterilization or to the use of contraception by the adult. The only direct reference in a legal provision that may be considered is the one that pertains the capacity to access to assisted reproductive technology (Article 6 of the Law of Medically Assisted Procreation - MAP, Law N.º 32/2006, July 26th). In such situations, a Court decision that decrees *acompanhamento* may also restrict this access.
 - o The consequence of not complying with this rule falls upon the ones who perform the MAP technique – there is criminal liability and the punishment may be imprisonment (between 2 and 8 years) (Article 35 Law N.º 32/2006, July 26th), a fine may be applied (Article 44 (1) c) and 44 (2) Law N.º 32/2006, July 26th) and even additional sanctions (Article 45 Law N.º 32/2006, July 26th)
- **The right to voluntary acknowledge fatherhood:** this right is subject to restrictions by Court decision, but that cannot be considered tailor-made. Indeed, article 1850 (1) CC considers that there is a deprivation of the capacity to acknowledge fatherhood whenever there is a “limitation to the exercise of personal rights” by the Court

decision. In such cases, the voluntary acknowledgement of fatherhood may be annulled (Article 1861 CC).

- **Right to care and educate their own children** – Article 147(2) mentions this right, but Article 1913(1), b) CC includes the possibility of inhibition of the exercise of parental responsibilities in the Court decision that has decreed *acompanhamento*. In such cases, the adult who is a parent may have his/her rights regarding the child completely limited or they can be limited only regarding the representation and the administration of the assets of the child (Article 1913 (2) CC).

c. medical matters;

- **Right to make a health care advanced directive** – this right is not referred to as an example in Article 147(2) Cc. However, art. 4, b) of Law No. 25/2012, 16 July, used to draw an implication from the limitation of the right to make a will. It considered that whenever there was this limitation, there was also lack of capacity to make health care advanced directive. This provision has been revoked by the new Mental Health Law (Law n. 35/2023, July 21st).

As far as other medical matters are concerned, there is specific regulation on some matters. For instance, Law No. 12/93, April 22, regarding Organ transplants determines that organ collection in incompetent adults by reasons of psychic anomaly demands judicial authorization (Article 8 (5)). The consent is given in writing by the donor or by who is his/her representative (Article 8 (6)). The representative will be the support person (*acompanhante*) when a support measure has been decreed by the Court.

And, in article 142 Criminal Code, the fact that the pregnant woman is “psychically incapable” determines that the consent for abortion should be given by the *acompanhante*, or, in his/her absence, subsequently, by ascendant, descendant or “by any relatives in the collateral line”.

d. donation and wills;

- **Right to make a will** – this right may be limited in the Court decision that has decreed *acompanhamento* (art. 2189, b) CC). A will made by someone who is not capable is null and void (art. 2190 CC).
- There is not a specific regime for donations. If the *acompanhante* (Support person) is to authorize these acts of the adult (Article 145,

d) CC) and the adult performs them without this authorization, such donations may be annulled (Article 154 (1) CC). (See a.)

e. civil proceedings and administrative matters (e.g. applying for a passport);

When there is limitation of legal capacity and there is an *acompanhante* who has representation powers, the latter will act on the behalf of the adult in the procedure. If not, the Public Prosecutor's Office is attributed with the defence of the adult (Article 21 of the Civil Procedure Code (CPC) and Articles 2 (1), b) and i) and 9 (1), c) and d) Law No. 68/2019, 27) August.) In the absence of a general representative, a general curator may be nominated (Art 17 CPC).

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

Yes. According to Article 900 (1) of the Civil Procedure Code, the Court decision may determine the date when from the measures were considered convenient.

And article 903 CPC states, that after the transit in rem judicatem of the decision, the *acompanhante* may request the annulment of the acts that took place after the reporting and the orders referred to in article 894 of the Code of Civil Procedure (See 9. a.).

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

Both the limitation and the restoration of legal capacity are decided by Court (Art. 139 (1) CC and 891 ff. Civil Procedure Code)

The fact that only Courts are competent to decide on limitation or restoration of legal capacity and that a court procedure is always necessary is intrinsically linked to the fact that a restriction of fundamental rights is at stake and there are constitutional demands of Court intervention (Art. 18 Portuguese Constitution) v. Paula Távora Vítor, *A Administração do Património das Pessoas com Capacidade Diminuída*, Coimbra: Coimbra Editora, 2008, pp. 153 ss.).

The competent Court is the Court from the domicile of the adult (the defendant), according to general rules (Article 80 Civil Procedure Code).

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

According to article 141 (1) CC, *acompanhamento* (and the limitation of legal capacity that may be associated) may be requested by the adult him/herself or, upon his or her authorization, by the spouse, by the de facto union partner or by any relative who is a successor or, regardless of such authorization, by the Public Prosecutor's Office.

The reference to the relatives who are successors is not connected to the succession rules per se, but rather with the proximity of the family ties involved (See Article 2133 CC).

It should be noted that those who request the *acompanhamento* should indicate "the facts that ground" the entitlement to file the petition (v. article 892 of the Civil Procedure Code).

The aforementioned authorization, however, may be supplied by the Court when the vulnerable adults cannot provide it in a free and conscious way or when there are relevant circumstances that justify it (article 141 (2) CC).

From a procedural point of view, the request to supply the authorization may be filed at the same time as the request of *acompanhamento* (See also art. 892 (2) of the Civil Procedure Code)

As for the Public Prosecutor's Office, the authorization is not needed, because it will act *de motu proprio*, given its duty to protect vulnerable persons (Law No. 47/86, October 15th, in particular article 3 (1) a)).

Those who are entitled to request *acompanhamento* (and the limitation of legal capacity that may be associated) are also those who are entitled to request the termination of *acompanhamento* (and the restoration of legal capacity, if that is the case) (article 149 CC).

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.

a. a requirement of legal representation of the adult;

It is mandatory that the adult is represented in Court by an attorney (Article 40 (1), a) of the Civil Procedure Code). This occurs because this is a procedure that regards the civil status of the adult and such procedures are attributed a value (30 000,00 +0,01 euros) (Article 303 (1) of the Civil Procedure Code) for appeal purposes. The threshold beyond which a decision be appealed to the Supreme Court is 30 000,00 +0,01 euros (Article 44.º Law No. 62/2013, August 26).

b. participation of family members and/or of vulnerable adults' organisations or other CSO's;

There is no such legal requirement.

c. requirement of a specific medical expertise / statement;

Article 892 (1), e) of the Civil Procedure Code mentions among the elements that should be added to the petition filed those that refer to the "clinical situation alleged".

Furthermore, it is possible (although not mandatory) to nominate one or several experts (Article 897 (1) of the Civil Procedure Code. It is a possibility and not a necessity, because those elements (including a report from medical experts) may have already been added in the petition.

Whenever determined by the judge, the experts will elaborate a report that will indicate the medical condition of the adult, its consequences, the date when it begun, means of support and of treatment recommended (Article 899 (1) of the Civil Procedure Code). When in doubt, it may be authorized by the judge an additional exam in a specialized medical clinic and the adult may be committed for a period that will not last more than one month. Other proof may also be requested (Article 899 (2) of the Civil Procedure Code). This may include a social report.

d. hearing of the adult by the competent authority;

The hearing of the adult by the Court is mandatory. It should be a “personal and direct hearing” by the judge. If necessary, the judge will meet the adult at the place where he/she can be found (Article 897 (2) of the Civil Procedure Code).

The purpose of this hearing is to ascertain the situation of the adult and the adequacy of the measures (Article 898 (1) of the Civil Procedure Code).

The judge questions the adult and the person who requested the measure, the representatives of the adult and the experts will be present. Any of them may suggest questions (Article 898 (2) of the Civil Procedure Code).

The judge may determine that part of the hearing is conducted only with the presence of the adult (Article 898 (3) of the Civil Procedure Code).

e. the possibility for the adult to appeal the decision limiting legal capacity.

It is possible to appeal the decision up to the Supreme Court (Article 901 of the Civil Procedure Code).

Those entitled to file for the appeal are the one who requested the measure, the adult and the support person (*acompanhante*).

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

a. property and financial matters;

The legal regime of temporary mental disturbance applies (Article 257 CC).

Acts performed in this situation may only be voidable depending on the fulfilment of some legal requirements: (i) the declaration of intent is made in a state of mental disturbance, which prevents either the ability to understand it or the free exercise of will; (ii) as long as that situation is notorious or known by the other party. This notoriety is appraised taking into account the standard of a *person who acts with normal diligence* (Article 257 (2) CC). It is, therefore, not necessary that a support measure is actually determined in order to annul these acts. Actually, not even the fact that it is decreed is relevant as proof of lack of capacity in the moment the act was performed. Those entitled to request the annulment is the adult him/herself (Article 287 (1) CC) and the time limit to file the petition is one year from the moment the lack of mental capacity has ceased (Article 287 (1) CC)

b. family matters and personal rights (e.g. marriage, divorce, contraception);

- **Right to marry:** there is an impediment to marry if there is what this provision names “notorious dementia” and even “during lucid

intervals” (article 1601, b) CC). This is not a clinical term, though. “Dementia” is understood as impairment of mental capacity. (Guilherme de Oliveira, Manual de Direito da Família, Coimbra, Almedina, 2022, pp. 94, 95) The consequence is that marriage may be annulled (article 1601, b) and 1631 CC)

- **Right to enter into a *de facto* union:** the right to enter into a *de facto* union is restricted in case of what this provision names “notorious dementia” and even “during lucid intervals”. The consequence of not complying is the fact that such relation will not benefit from legal protection (art. 2, b) Law No. 7/2001, 11 May).
- **Right to procreate:** Regarding the capacity to access assisted reproductive technology, if there is lack of mental capacity and if it hinders “free and informed consent”, as the Law demands (Article 20 of the Law of Medically Assisted Procreation - MAP, Law No. 32/2006, July 26th),
 - o The consequence of not complying with this rule falls upon the ones who perform the MAP technique – a fine may be applied (Article 44 (1) d) and 44 (2) Law N.º 32/2006, July 26th) and even additional sanctions (Article 45 Law N.º 32/2006, July 26th)
- **The right to voluntary acknowledge fatherhood:** there is lack of capacity to voluntarily acknowledge fatherhood if the adult is “under notorious mental disturbance at the time of the acknowledgement” (article 1850 (1) CC). In such cases, the voluntary acknowledgement of fatherhood may be annulled (Article 1861 (1) and (2) c) CC).
- **Right to care and educate their own children** – In case of lack of *de facto* capacity of the adult to fulfill the duties towards his/her children, the Public Prosecutor’s Office, any relative of the child or the person who is the caregiver of the child (either *de facto* or *de iure*) may request the inhibition of parental responsibilities (Article 1915(1), b) CC). In such cases, the adult who is a parent may have his/her rights regarding the child completely limited or they can be limited only regarding the representation and the administration of the assets of the child (Article 1915 (2)CC).

c. medical matters;

Right to make a health care advanced directive - Article. 4, c) of Law No. 25/2012, 16 July, considers that there is also lack of capacity to make health care advanced directive when the adult is not competent to give conscious, free, and informed consent.

As far as other medical matters are concerned, there is specific regulation on some matters. For instance, Law No. 12/93, April 22, regarding Organ transplants determines that organ collection in incompetent adults by reasons of psychic anomaly demands judicial authorization (Article 8 (5)). The consent is given in writing by the donor or by who is his/her representative (Article 8 (6)). In the absence of a support measure (*acompanhamento*), there is no representative. The Public Prosecutor's Office should intervene (Article 4 (1), b) and i) Law No. 68/2019, 27 August – Statute of the Public Prosecutor's Office). And, in article 142 Criminal Code, the fact that the pregnant woman is “psychically incapable” determines that the consent for abortion should be given, in the absence of *acompanhante*, by ascendant, descendant or “by any relatives in the collateral line”.

d. donations and wills;

Regarding donations, the legal regime of temporary mental disturbance applies (Article 257 CC) (see a.)

Regarding wills, Article 2199 CC (named “temporary mental disturbance” – *incapacidade acidental*) determines that the will made by a person who was not capable/competent to understand the meaning of the declaration or was not acting with free will, due to any cause, even temporary, can be annulled.

e. civil proceedings and administrative matters (e.g. applying for a passport).

In cases of diminished mental capacity, the Public Prosecutor's Office is attributed the defense of the adult (21 of the Civil Procedure Code (CPC) and Articles 2 (1), b) and i) and 9 (1), c) and d) Law No. 68/2019, 27) August.) In the absence of a general representative, a general curator may be nominated (Art 17 CPC).

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?

The approach of several Courts has been in many ways more conservative than the one of the legislator. The legislator, although permitting the removal

of legal capacity, has coined it as an exception. A number of Court decisions, however, have failed to understand that, have not followed this direction and have made it the rule. Indeed, we may find Courts not only removing legal capacity, but doing that in the most extreme way, reproducing the previous regime of full guardianship, by decreeing full incapacity (See Decision of the Lisbon Court of Appeal 25.01.2022), even if under a new cloak and renouncing even to the possibility to tailor it, according to a principle of necessity. It has also been understood that granting powers of representation would mean to remove legal capacity within that sphere. Again, this conception stems from the old understanding of capacity (See, however, decision of the Lisbon Court of Appeal 11.12.2019, that despite admitting general representation considers that the support person is bound to give advice to the adult in order to help her to decide about accepting gifts and donations).

There are also developments regarding former Article 4, b) of Law No. 25/2012, 16 July, that drew an implication from the limitation of the right to make a will, by considering that whenever there was this limitation, there was also lack of capacity to make health care advanced directive. Since this connection was not easy to justify (making a will or making a living will are two fundamentally different acts), the reform of the Mental Health Act revoked Article 4, b) of Law No. 25/2012.

SECTION III – STATE-ORDERED MEASURES

Overview

16. What state-ordered measures exist in your jurisdiction? Give a brief definition of each measure.

Since the 2018 Reform, the Portuguese system became monistic – that means that there is only one state-ordered measure – *acompanhamento* (Custodianship). (See I. 1.)

Pay attention to:

- a. can different types of state-ordered measures be applied simultaneously to the same adult?**

There is only one type of state-ordered measure (*acompanhamento*).

b. is there a preferential order in the application of the various types of state-ordered measures? Consider the principle of subsidiarity;

There are no various types of state-ordered measures.

The *only* state-ordered measure *acompanhamento* of the system is very flexible and it may assume different shapes. It is decreed according to a principle of necessity (Article 145 (1) CC) and its configuration does not depend on what was requested and it may be defined by the Court (Article 145 (2) CC). The principle of necessity is a dimension of the principle of proportionality *lato sensu*. In the Portuguese legal system, it is demanded by the Constitution and its regime regarding the limitation of fundamental rights (Article 18 of the constitution) and by international instruments adopted by the Portuguese State (Article 12 (4) UNCRPD and Principle 5 da Recommendation n. R (99) 4 of the Council of Europe – *Principes concernant la protection juridique des majeurs*).

c. does your system provide for interim or ad-hoc state-ordered measures?

Yes. At any moment of the Court procedure, the Court may determine “provisional or urgent” measures, “necessary to provide for the person or assets” of the vulnerable adults (Art. 139 (2) CC). This creates the possibility to anticipate the final measure.

Additionally, the Civil Procedure Code (article 891 (2) CPC) also determines that “cautionary measures” (such as the freezing of bank accounts) may be justified. They may be requested initially with the petition (Art. 892 (1), b) CPC) or subsequently up until the final decision.

When determining these measures, the Court should take into account the principle of subsidiarity (Paula Távora Vítor, Art. 139, *Código Civil Anotado*, vol. I, Coimbra, Almedina, 2019, p. 171).

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.

Art. 138 CC (Civil Code) establishes the general requisites to establish a support measure. This depends on the appreciation of the particular situation at stake.

In general terms, Art. 138 CC defines that the adult who, by reasons of health, disability or because of his/her behavior is unable to exercise fully, personally and in conscience his/her rights or, in the same way, fulfill his/her duties. (See supra 8. a.)

18. Which authority is competent to order the measure?

Acompanhamento is a Court-ordered measure (Article 139 (1) CC; Articles 891 ff. CPC). And so are the provisional, urgent or cautionary measures (Article 139 (2) CC; article 891CPC).

19. Who is entitled to apply for the measure?

According to article 141 (1) CC, *acompanhamento* may be requested by the vulnerable adult or, upon his or her authorization, by the spouse, by the de facto union partner or by any relative who is a successor or, regardless of such authorization, by the Public Prosecutor's Office. The aforementioned authorization, however, may be supplied by the Court when the vulnerable adults cannot provide it in a free and conscious way or when there are relevant circumstances that justify it (article 141 (2) CC).

“Cautionary measures” may be either requested by those mentioned by those mentioned in Article 141 CC or ex officio by the Court (article 891 (2) CPC). They may also be requested initially with the petition (Art. 892 (1), b) CPC) or subsequently up until the final decision.

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?

Yes, whenever the one who requests *acompanhamento* is not the vulnerable adult or the Public Prosecutor's office, the authorization (consent) of the adult must be provided.

Therefore, when the one who requests the measure is the spouse, the de facto union partner or by any relative who is a successor, the authorization (consent) is a legal demand. The aforementioned authorization (consent), however, may be supplied by the Court when the vulnerable adults cannot provide it in a free and conscious way or when there are relevant circumstances that justify it (article 141 (2) CC).

- 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.**

All the answers to these questions may be found above in 13. a.-f. since any limitation of capacity may only take place in the same procedure of the determination of the support measure (*acompanhamento*).

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

The publicity to be given to the whole procedure, since its beginning until its final decision is limited to what is "strictly necessary" to defend the interests of the vulnerable adults – since his/her right to privacy is at stake – or third parties and it is decided, case by case, by the Court (Art. 153 (1) CC and 893 (1) CPC). The plaintiff has a role to play in this decision, since the most adequate solution regarding publicity may be mentioned in the petition (art. 892 (1), d) CPC).

As for the final decision, articles 1920.º-B e 1920.º-C CC apply (Art. 153 (2) CC and art. 902 (2) CPC), which means that these decisions are mandatorily registered in order to be raised against third parties.

It is also possible that other type of orders or communications are made (either of the final decision or prior to this moment) – for instance to banks, civil registry offices or corporations, either regarding the final decision or previously (in the context of provisional measures – art. 139(2) CC. Article 893 (2) CPC foresees the publication in an official site to be regulated by Government Ordinance.

- 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.)?**

According to Article 143 (1) CC, the support person (*acompanhante*) may only be a natural person, adult and fully capable to exercise his or her rights.

Therefore, first of all, the *acompanhante* should be above 18 years old (See Article 130 CC that establishes the age of majority).

As to the fact that he/she has to be fully capable to exercise his or her rights, one must stress that even if the support person (*acompanhante*) him/herself has been subject to a support measure of *acompanhamento*, that does not mean that his/her legal capacity has been limited. Therefore, when nominating the support person (*acompanhante*) rather than ascertain if any measure is in force, it should be a better solution to evaluate his/her de facto capacity.

Even though Article 143 (2) CC provides us with a list of preferred support persons, however it is not mandatory that there is a particular relationship with the adult. However, whenever there has not been a choice of the *acompanhante*, the Court will designate him/her, according to the “paramount interest of the beneficiary” (Article 143 (2) CC). This criterion should be interpreted according to the UNCRPD, and abide not to the best interest of the adult, but rather to his/her “wishes and preferences”, to reasons of personal proximity and to his/her personal needs. (Paula Távora Vítor, Art. 143, *Código Civil Anotado*, vol. I, Coimbra, Almedina, 2019, p. 179)

b. to what extent are the preferences of the adult and/or the spouse/partner/family members taken into consideration in the decision?

As a rule, the support person is chosen by the vulnerable adult or by his or her legal representative (parent or guardian of the minor) and appointed by the Court (Article 143 (1) CC).

The appointment of the support person by the adult has been defended by legal literature for long. The law seems to mention merely the possibility of appointment, but one must consider that the refusal of someone as support person, adequately expressed, should be considered (Paula Távora Vítor, Art. 143, *Código Civil Anotado*, p. 178).

This choice may be expressed in the petition (v. article 892 (1), c) of the Civil Procedure Code). But the will expressed in a previous moment should also be considered. (Paula Távora Vítor, Art. 143, *Código Civil Anotado*, p. 178).

The appointment of the support person by the legal representative is another possibility opened by Article 143 (1) CC. The legal representatives in the Portuguese system are those who have the exercise of parental responsibilities may be (the parents, but also other persons to whom these rights and duties have been assigned by the Court - 1903, 1904-A, 1907 CC) or the guardian of minor children – articles 1878 and 1935 – or, in case representation powers are granted - art. 145 (2), b) – the *acompanhante* (support person of the adult). Only the first two should be considered here (that function only during minority – article 124 CC), since the

acompanhante refers to a situation in which a support measure of the adult has been decreed.

It should be understood that the possibility of the legal representative appointing the support person (Article 143 (1) CC) is exercised in the course of the procedure to decree the support measure, when it is filed while the beneficiary is still a minor (Article 131 CC) (Paula Távora Vítor, Art. 143, *Código Civil Anotado*, p. 179).

The law also refers to the possibility of parents or the person who has the exercise of parental responsibilities to appoint the future support person in a will or an official deed or certified document (Article 143 (2) d) CC).

There is a third possibility, that may be added: when the support person (*acompanhante*) is only attributed powers of administration of assets (Article 145 (2), c) CC). Since, according to Article 145 (5), c) CC, the provisions regarding the administration of minor children apply (Articles 1967 ff. CC), it should be borne in mind that Article 1968 admits that a third party who is the donor or the bequeather of certain assets may designate who will administer those assets.

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?

Article 143 (2) establishes a list to which the Court will resort whenever the support person has not been chosen by the vulnerable adult or the legal representative. This is not a closed list, since the last para. (i)) uses an open concept – the support person may be “other suitable person”. No reference is made to (and there is no legal regulation of) professional support persons.

The fact that the provided list is open and that there is not a strict ranking, does not prevent us from recognizing a criterion of proximity in the enumeration:

- the spouse (not separated). The spouse is legally encumbered with the duty of cooperation – Article 1674 CC –, that may translate into a duty of care;
- the de facto union partner;
- any parent;
- the person designated by the parents or the person with parental responsibilities in a will or an official deed or certified document
- adult children. This reference should extend to other descendants, such as grandchildren;
- any grandparent. This reference should extend to other ascendants, such as great-grandparents;
- the person appointed by the institution that houses the vulnerable person;
- the principal of the mandate to whom representation powers have been conferred upon.

As far as we understand it, this mandate should refer to a particular kind of mandate – “mandate for custodianship purposes” (*mandato com vista a acompanhamento*) – Article 156 CC;

- another suitable person.

d. what are the safeguards as to conflicts of interests at the time of appointment?

At the time of the appointment the law refers generally that the support person must be “the person whose designation better safeguards the paramount interest of the beneficiary” (Art. 143 (2)). The issue of “conflict of interests” is only autonomously addressed regarding the “measure in action”.

e. can several persons be appointed (simultaneously or as substitutes) as representative/support person within the framework of a single measure?

According to Article 143 (3), several support persons (*acompanhante*) may be appointed, with different functions and the attributions of each one should be specified, according to the possibilities offered by the Law.

This means that to different *acompanhantes* may be granted (i) a different set of powers and duties (representation powers or duties of care) or (ii) the same type of powers, regarding different matters (to take care of personal issues or of patrimonial issues, for instance) or even (iii) concurring powers.

It should also be mentioned that, according to Article 145 (4) CC, the Court may dismiss the constitution of a body that belongs to the support measure – the council of the family. Indeed, even though, as a rule, this organ should not be erased from the support measure structure, it is not always easy to find members that could be part of this organ and that the function of control may be adequately performed by a second *acompanhante*.

f. is a person obliged to accept appointment as representative/support person?

Article 144 creates two different categories as far as the obligation to accept the appointment is concerned: (i) the spouse, the descendants and the ascendants; (ii) other support persons.

According to Article 144 (1) CC, the spouse, the descendants and the ascendants can neither refuse to accept the appointment nor be exonerated. As to the descendants, however, there is an exception: they may request their exoneration after five years “as long as there are other equally suitable

descendants” to be the support person (Article 144 (2) CC). One must bear in mind that the spouse has a duty of cooperation, that can be translated into a duty of care (Article 1674 CC) and that children (but not other descendants) have also a duty of aid towards their parents (Article 1874 CC).

All the other support persons (including the de facto union partner) may refuse to accept the appointment on the grounds of article 1934 CC (the grounds for such refusal in case of guardianship of minors) or be replaced, at their request and without additional demands, after five years (Article 144 (3) CC).

Regarding exoneration, Article 152 CC establishes that as far as the grounds are concerned the regime of guardianship of minors applies (Article 1950 CC). Article 1950 CC determines that the petition of exoneration may be filed by the guardian, at the Family Law Court, when any of the grounds for non-acceptance arises later or, three years after the acceptance if these grounds could already be found. Regarding the measure of *acompanhamento*, this article was to be adapted – the right for the support person to file a petition of exoneration remains, but the competent Court has to be the Court that decreed the measure and Article 144 (3) CC puts aside the need to justify the exoneration request, once the time lapse of five years has passed.

During the measure

Legal effects of the measure

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

As a general rule, it does not affect the capacity of the adult.

Furthermore, according to article 143 CC a different set of powers that may have implications in the legal capacity of the adult may be granted to the support person.

As far as we understand it (Paula Távora Vítor, Art. 145, *Código Civil Anotado*, p. 184) and contrary to the previous regime, granting powers of representation to the support person (article 145 (2) b) CC) should not affect the legal capacity of the adult and concurring action may be accepted. However, when the support person has the power to authorize the acts of the adult (article 145 (2), c) CC), then his/her legal capacity is diminished (and acting without authorization has implications in terms of validity of such acts) – see answer to question 9. a.

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;**

It is possible to grant: (i) powers of representation to the support person (article 145 (2) b) CC) and thus he/she will act in place of the adult; (ii) powers to administer the assets (article 145 (2) c) CC); (iii) power to authorize the acts of the adult (article 145 (2) d) CC); (iv) other kind of (not defined) powers may be granted, that may encompass to provide assistance (article 145 (2) e) CC), namely regarding decision-making or to take the necessary steps to avoid situations of danger.

- c. personal and family matters;**

Regarding personal and family matters, the rule is not allowing representation (when legal capacity is at stake, as a rule, it is legal capacity to enjoy rights and not agency, therefore not admitting representation, nor acting together). Regarding the right to file for divorce, one may find an exception: the petition may be filed by the adult or by the *acompanhante* with representation powers, after obtaining Court authorization (Art. 1785 (2) CC). Whenever the *acompanhante* is the other spouse, divorce may be filed on the behalf of the adult by any relative in the direct line (parents, children), up to the third degree in the collateral line (siblings, uncles, nephews) or by the Public Prosecutor's Office (Article 1785 (2) CC). Another exception may be found, this time regarding assistance. According to Article 1708 (3), an adult under custodianship (*maior acompanhado*), whose *acompanhante* has representation powers regarding inter vivos acts of disposal or whose inter vivos acts of disposal depend on authorization by the *acompanhante*, can only enter into a prenuptial agreement when expressly authorized by the *acompanhante*.

- d. care and medical matters;**

It is possible to grant: (i) powers of representation to the support person (article 143,2, b) CC) and thus he/she will act in place of the adult;(ii) power to authorize the acts of the adult (article 143 (2) c) CC); (iii) other kind of (not defined) powers may be granted, that may encompass to provide assistance (article 143 (2) d) CC), namely regarding decision-making;

- e. what are the criteria for decision-making (e.g. best interests of the adult or the will and preferences of the adult)?**

According to Article 146 (1) CC, the performance of the support person must ensure the welfare and recuperation of the adult and he/she must act with the “diligence of a *bonus paterfamiliae*, given the concrete situation”. Such criterion seems to be more closely related with the “best interests” standard. However, the interpretation of the law according to the Principle of autonomy and with the paradigm shift undertaken by the UNCPRD may sustain the idea that the “will and preferences” of the adult should be privileged. Paula Távora Vítor, Art. 146, *Código Civil Anotado*, p. 187. Article 146 (2) foresees a “duty of permanent contact” (see supra 25. d.). This duty may enable the *acompanhante* to perform his/her duties more informed about the will of the adult, thus promoting the adult’s autonomy.

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?

According to article 151 (2) CC the support person should report (“accounting”) to the adult person and to the Court when his/her function terminates or whenever the Court determines, during the measure. Taking into account that the support measure may encompass non-patrimonial matters and that the new regime is centered in the person and his/her well-being, “accounting” has to be interpreted in a broader way and include relevant information about the person (and not only his/her assets), namely information about the goals of the measure (ensure the wellbeing and recuperation of the adult – articles 140 and 146 CC).

g. are there other duties (e.g. visiting the adult, living together with the adult, providing care)?

According to article 146(2) CC the support person must keep permanent contact with the adult and must visit him/her, at least monthly, or whenever the Court finds it fit. This is however an excessively demanding duty (“permanent contact”) for certain situations, taking into account that the measure is so flexible that it can be only for limited purposes that do not demand such degree (or periodicity) of contact.

h. is there any right to receive remuneration (how and by whom is it provided)?

According to article 151(1) CC, the support person does not receive remuneration, but the expenses made are paid according to the status of the adult and of the support person. This (being paid according to the status of the adult and of the support person) is not as objective criterion that would lead to a reimbursement of the real expenses. Furthermore, it does not cover the real effort (time spent, abilities and resources used) that could be implied

by the exercise of such duties. It must be borne in mind that the support person in Portugal is not a professional.

It should also be noticed that as far as the regime of guardianship of minors is concerned, the guardian as well as the administrator have the right to receive remuneration (Articles 1942 and 1971CC). Taking into account the fact that Article 145 (4) of the regime of *acompanhamento* determines that the rules of guardianship of minor will apply in case representation powers are granted to the *acompanhante*, it may be argued that, only in this situation, remuneration may be granted. Paula Távora Vítor, Art. 151, *Código Civil Anotado*, p. 196.

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?**

There is only one state-ordered measure.

- 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)?**

According to Article 143 (3) CC, in the framework of the same measure, may be designated several support persons and different functions may be attributed to each of them.

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

There is not an organised system of supervision of state-ordered measures, however one may identify a duty to report (accounting) of the support person (article 151 (2) CC) (see supra 25. c.) and a duty of the Court to revise the measure (Article 155 CC).

The revision of the measures has to be periodically undertaken, according to the time period defined in the Court decision, and, at least, every five year (Article 155 CC). This means that the shortest time lapse between revisions is five years, but also that the Court decision may establish a smaller period. It should be understood that the revision takes into account not only clinical data, but also information that relates to the social situation of the adult.

Indeed, only this comprehensive approach is able to provide a picture of the actual situation and of the necessity, adequacy and proportionality of the measure, in a given moment.

This provision obeys to one of the demands of article 12(3) UNCRPD, that determines that measures “apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body”. In the Portuguese system, this authority is the Court.

Pay attention to:

a. what competent authority is responsible for the supervision?

If the aforementioned duties are understood as part of a weak supervision system, the Court is always the competent authority either to receive the report of the support person (together with the adult person) or to revise the measure and ultimately to draw consequences regarding the support person (article 151 (2) CC and 155 CC).

b. what are the duties of the supervisory authority in this respect?

The Court receives the report of the support person (article 151 (2) CC) and has also the duty to revise the measure according to the timing defined by the Court decision and at least every five year (Article 155 CC).

c. what happens in the case of malfunctioning of the representative/support person? Think of: dismissal, sanctions, extra supervision;

In case of malfunctioning of the representative, there is the possibility of dismissal.

According to Article 152 CC, the (adapted) regime of dismissal of the guardian of minors applies. Therefore, Article 1948 applies. According to this article, dismissal may be in order when the guardian/*acompanhante* “does not fulfill the duties he/she is encumbered with or is unable to exercise them” or when there is a supervening fact (after he or she was invested in the position) that would hinder his/her appointment.

According to Article 1949, those entitled to request the dismissal of the guardian are the Public Prosecutor’s Office, any relative of the pupil or anyone who is the caregiver of the child (either *de facto* or *de iure*). The request is made in the Juvenile Court, after the council of family is heard. In order to adapt this provision to the regime of *acompanhamento*, one should consider those entitled to request the dismissal of the support person are the Public Prosecutor’s Office, any relative of the adult and anyone who is responsible for the adult, either *de facto* or *de iure*. These latter can be

another support person (See Article 143 (3) CC) or the principal in the “mandate for custodianship purposes” (See Article 156 CC). The council of family shall only be heard if its constitution has not been dismissed (Art. 145 (4) CC). As for the Court where the dismissal is applied for, it cannot be the Juvenile Court, but rather the Court that decreed the measure.

d. describe the financial liability of the representative/support person for damages caused to the adult;

In the absence of a specific legal rule, the rules of the guardianship of minors apply (when powers of representation are granted, as determined by Article 145 (4) CC, or even by analogy in other cases, it may be argued). According to Article 1945, the guardian of the minor/support person is liable for damages caused due to fault.

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.

First of all, the fact that someone is under custodianship (*acompanhamento*) and that a support person (*acompanhante*) has been nominated, does not mean that the liability for damages caused by the adult should be assumed by the *acompanhante*, because (i) the adult can be him/herself liable; or (ii) even if the adult is not liable, the *acompanhante* is not encumbered with the adult’s surveillance. Indeed, the measure of *acompanhamento* can be very flexible and this may not be one of the *acompanhante* ‘s tasks.

Regarding liability for torts, it should be stressed that its dismissal does not depend on the existence of a support measure, but rather on the *actual capacity* of the adult.

According to Article 488 CC, a person is not liable for torts when, at the moment the fact occurred, he/she was, for any cause, not “capable to understand and want” (lack of cognitive or volitional capacity), unless if he/she has willingly placed him/herself in that state. In such cases, Article 489 CC determines that when the person is not liable for torts, he/she may be sentenced to pay for damages, for equity reasons, if it is not possible to obtain it from the persons who were encumbered with his/her vigilance.

The *acompanhante* may be one of these persons, if the Court decision has included it among his/her tasks (See Article 145 (1), e) CC – when other kind of (non defined) powers are granted).

In case of liability for accidents caused by vehicles, even though it is a case of objective liability (in the absence of fault), Article 503 (2) CC determines

that the rule of Article 489 CC regarding persons who are not liable for damages⁸.

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;

Some decisions of the support person need the authorization (ex ante), but not the approval (ex post) of the Court.

- Since the (adapted) regime of guardianship of minors applies, in case representation powers (Article 145 (1) b) CC) have been granted to the *acompanhante* (Article 145 (4) CC), so does the list of acts that must be subject to Court approval. Since 2001, this authorization is provided, not by the Court, but by the Public Prosecutor's Office - article 2 (1), b) Decree Law No. 272/2001, 13 October.

Therefore, Article 1938 CC applies. The acts of the guardian/support person that need authorization are:

- All the acts for which the parents of a minor need authorization (Article 1889 (1) CC): to dispose or encumber assets; to vote in the general assembly the dissolution of corporations; to start exploring the commercial or industrial establishment that the child has inherited or been donated; to enter in a general partnership or in an ordinary limited partnership or in a legal partnership with share capital; to renounce an inheritance or bequest; to rent assets for a time period superior to 6 years; to agree or to request the division of common asset or the liquidation of net assets;
- To acquire (movable or immovable) assets with money of the pupil/adult
- To accept inheritance, donation or bequest or agree regarding partition out of a Court procedure;
- to take out loans or pay debts, unless those that regard the maintenance or are necessary for the administration of the assets
- To initiate legal proceedings, unless destined to collect periodical installments or those whose delay may be harmful;

The authorization depends on the previous hearing of the family council (Article 1938 (2) CC).

⁸ See Geraldo Rocha Ribeiro, Os deveres de cuidado e a responsabilidade do acompanhante perante o beneficiário — um primeiro ensaio, Julgar, 2020.

Besides these rules that come from the regime of guardianship of minors, there is a special rule in the regime of *acompanhamento* that demands (specific) Court authorization to dispose of immovable assets (Article 145 (3) b) CC). This is, therefore, a special rule when confronted with articles 1937 (Banned Acts) and 1938 (Acts that require authorization) CC.

All the aforementioned acts are patrimonial acts. Former Article 148 CC added another act that requires Court authorization – it stated that the internment of the adult depended on this express authorization. Only in cases of emergency, would it be immediately allowed and later ratified by the judge. The new Mental Health Act has revoked this article.

b. unauthorised acts of the adult and of the representative/support person;

Unauthorized acts of the adult may be annulled, as explained supra – 9.

a.

Unauthorized acts of the support person may be annulled ex officio by the Court (while the measure is in force) or by request of the adult up until five years after the measure has ceased. The heirs of the adult may also request the annulment as long as they do it in the aforementioned period (Article 1940 (1) and (2) CC – regime of the guardianship of minors adapted). If the support person explores the commercial or industrial establishment without authorization, he/she is liable for the damages caused (Article 1940 (4) CC – regime of the guardianship of minors adapted).

c. ill-conceived acts of the adult and of the representative/support person;

The fact that an act is ill-conceived is relevant as far as the annulment of the acts of the adult are concerned. Indeed, as it has been mentioned above in 9. a., after the Court procedure regarding the determination of the support measure is announced, acts of the adult may be annulled but only if these acts are harmful to the adult person (Article 154 (1), b) CC).

The acts that are ill-conceived, but are not related to the limitation of capacity determined in the Court decision or that are not caused by a limitation of his/her mental capacity, cannot be annulled. Indeed, to perform ill-conceived acts are a risk that even an adult with diminished capacity may take.

Regarding the ill-conceived acts of the support person, in the absence of a specific legal rule, the rules of the guardianship of minors apply (when powers of representation are granted, as determined by Article 145 (4) CC, or even by analogy in other cases, it may be argued). According to Article 1945, the guardian of the minor/support person is liable for damages caused due to fault.

d. conflicts of interests

In case of conflict of interests, the support person must abstain to intervene in that matter (Article 150 (1) CC). However, since the lack of action of the support person may create a void in terms of protection, it must be borne in mind that the general duty of care of the support person demands that he/she will take the necessary steps to avoid such situations (even though under the respect for the principle of subsidiarity), including, when necessary, the support person should request the Court authorization to act or the appropriate measures (Article 150 (3) CC).

In cases in which the support person fails to comply with the aforementioned obligation of *non facere*, the law determine that the support person suffers the consequences of article 261 CC (Article 150 (2) CC) – the rules of “negotium a semet ipso” (“negócio consigo mesmo”). Therefore, interpreting article 261 CC according to this situation, the transactions performed in such conditions are voidable, unless (i) the adult person has “expressly consented” – which depends, of course, on the adult’s *de facto* capacity to do so; (ii) when the nature of the transaction excludes the possibility of conflict of interests. Given that the regime of voidable acts is to be applied, the general rules regarding who can claim and the deadline to do it (one year) are the general ones (Article 287 CC).

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.

According to article 149 (1) CC, the dissolution of the measure occurs when the grounds to order it have ceased. It may also be modified when the grounds that justified it have also changed. As far as we understand it, these “grounds” have to be interpreted in a broad sense – not only the reasons of “health, disability or behavior” mentioned in article 138 CC have to be considered, but also the *need* to continue applying the measure has to be ascertained. Indeed, the principles of necessity, adequacy and subsidiarity (See article 140 CC) will always be in favour of the least restrictive measure at any time.

The dissolution (or the modification) of the measure will operate *ex tunc*, retroact to the date in which the aforementioned “ground” has ceased (or been modified) (article 149 (2) CC). This may encompass to regain full legal capacity.

The ones who can apply for dissolution (or modification) of the measure are the ones who can request the measure to be decreed (article 141 ex vi article 149 (3)CC) as well as the adult person him/herself (article 149 (3)CC).

The dissolution (or the modification) of the measure may occur at any moment (article 904 (2) Code of Civil Procedure) and it has to follow the same procedure to decree the measure (article 904 (3) Code of Civil Procedure).

Reflection

30. Provide statistical data if available.

No 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 far as case law is concerned, several Courts decisions still look up to traditional “guardianship” as model, by often attributing general representation powers to the custodian without any specification (See Decisions of the Lisbon Court of Appeal 11.12.2019 and 4.03.2021) However, Superior Courts have been more flexible in understanding the new demands of the system.

- Take into consideration the will of the person nominating the support person
(Decision of the Lisbon Court of Appeal 4.06.2020; Decision of the Coimbra Court of Appeal 3.11.2020; Decision of the Oporto Court of Appeal 22.03.2021)
- Possibility to nominate more than one support person (tailor the measure) (Decision of the Guimarães Court of Appeal 20.01.2022 and Decision of the Évora Court of Appeal 17.06.2021)
- Special focus on procedural issues:
 - (i) issues of autonomy from a procedural point of view – authorization to request the measure (Decision of the Évora Court of Appeal 17.06.2021; Decision of the Lisbon Court of Appeal 2.07.2020)
 - (ii) mandatory nature of the hearing (Decisions of the Coimbra Court of Appeal of 26.04.2022 and 4.06.2019, Decision of the Évora Court of Appeal 13.01.2022; Decisions of the Guimarães Court of Appeal 28.05. 2020, and Decisions of the Lisbon Court of Appeal of 11.12.2019 and 16.09.2019)
 - (iii) publicity given to the claim (Decision of the Oporto Court of Appeal 28.01.2021)

It should be stressed that the Constitutional Court has already dealt with some matters of the regime of *acompanhamento*.

Recently, several rulings of the Constitutional Court (Ruling No. 720/2022⁹, Ruling No. 507/2022¹⁰, Ruling No. 506/2022¹¹) debated the issue of the constitutionality of the demands of publicity (Article 153 CC, Articles 893(1), 904 (3) CPC), but did not rule these provisions unconstitutional.

In 2020, Ruling No. 477/2020¹² the procedural issue of the termination of the procedure with the death of the adult during it (Article 904 (1) CPC), but did not rule it unconstitutional.

From the law-makers' point of view, it should be stressed that the reform of the Mental Health Act) has revoked article 148 of the Civil Code, that referred to the internment (*internamento*).

The meaning of the word *internamento* has been highly debated (Geraldo Rocha Ribeiro; Inês Espinhaço Gomes; Paula Távora Vítor)¹³. Several interpretations have been considered: that it referred to the placement in a clinical facility as determined by the Mental Health Law – in its former version (A. Menezes Cordeiro, *Da situação jurídica do maior acompanhado, Estudo de política legislativa relativo a um novo regime das incapacidades denominadas dos maiores*, p. 125); that it referred to placement in a clinical facility when other health care issues were at stake ; that it referred to the determination of residence. This provision was problematic because it determined a relevant intrusion in the private life of the adult, without defining requirements, as any legal restriction of fundamental rights ought to do. However it has been revoked by Law n. 35/2025, July 21st.

One last issue should also be mentioned that Article 145 (2), a) CC, when defining the powers that can be granted to the support persons, determines that the support person may exercise parental responsibilities or the means to supply it, the guardianship of minors. This provision should not be considered when determining the content of the support measures, because it is contrary to the new regime – it imposes a regime fit to respond to the interests of minor children, not adequate to be applied to adults, who benefit from a presumption of capacity. Paula Távora Vítor, Art. 145, *Código Civil Anotado*, p. 185.

SECTION IV – VOLUNTARY MEASURES

Overview

⁹ <http://www.tribunalconstitucional.pt/tc/acordaos/20220720.html>

¹⁰ <http://www.tribunalconstitucional.pt/tc/acordaos/20220507.html>

¹¹ <http://www.tribunalconstitucional.pt/tc/acordaos/20220506.html>

¹² <http://www.tribunalconstitucional.pt/tc/acordaos/20200477.html>

¹³ Geraldo Rocha Ribeiro, O internamento “civil” na relação jurídica de maior acompanhado, In Anomalia Psíquica e Direito (org. M. J. Antunes), Instituto Jurídico, 2020, 143-192, Inês Espinhaço Gomes, O internamento do maior (des)acompanhado à luz da Constituição, Julgar, 41, 2020, 79-98, Paula Távora Vítor, Art. 148, *Código Civil Anotado*, p. 191, 192.

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

There are three voluntary measure in the Portuguese system. The first one, more general, has been introduced by the 2018 Reform. Article 156 determines the regime of the “mandate for custodianship purposes” (*mandato com vista a acompanhamento*).

The *mandato com vista a acompanhamento* is a mandate (a contract) that an adult concludes, in view of possible need of a support measure, to provide for the management of his/her interests (Article 156 (1) CC).

There are also voluntary measures in the health care field – advance directives (*diretivas antecipadas*), including living wills (*testamento vital*) and health care powers of attorney (*procuração de cuidados de saúde*). These measures have been introduced earlier, in 2012, by Law No. 25/2012, of 16 July.

Advanced directives (including living wills) are defined as the unilateral document, freely revocable at any moment by its author, in which a competent adult expresses in advance his/her conscious, free and informed will, regarding health care that he/she wishes to receive or not to receive, in case he/she is no longer able to freely and autonomously express his/her will (Article 2 (1), Law No. 25/2012)

The health care power of attorney is a continuing power of attorney. Article 11 of the Law No. 25/2012, states that any person may nominate an attorney for health care matters, by granting representation powers to decide about the health care that the granter is to receive or to not receive when the granter is no longer able to freely and autonomously express his/her will.

33. Specify the legal sources and the legal nature (e.g. contract; unilateral act; trust or a trust-like institution) of the measures. 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.**

“Mandate for custodianship purposes” (*mandato com vista a acompanhamento*)

The “mandate for custodianship purposes” is regulated in a single article - Article 156 CC. The legal nature of this measure is a contract and it creates obligations to act on the behalf of the principal to the attorney. According to article 156 (2) CC the general regime of the mandate applies (when a matter is not regulated otherwise, one should add).

Living will (*Testamento Vital*)

The living will is regulated in Law No. 25/2012. It is a unilateral act, in which the will of the adult is expressed.

Health care power of attorney (*procuração para cuidados de saúde*)

The health care (continuing) power of attorney is regulated in Law 25/2012. It is a unilateral act, in which powers of representation are granted to an attorney. However, and even though the acceptance by the attorney is not demanded, when the power of attorney is registered in the official registry (National Registry for Living Wills), the Registry informs the attorney of the existence of the health care power of attorney and sends him/her a copy (Article 16 (3) Law No. 25/2012).

Ordinary mandates may be used, however, are terminated if a Court decision decrees the *acompanhamento* of the principal (or of the attorney), when, regarding the acts that are encompassed by the mandate, that decision grants representation powers to the support person or when it demands the authorization of the support person (Article 1174, b) CC).

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.

Both the “mandate for custodianship purposes” and the “health care powers of attorney” appoint representatives/support persons. The living will is an advanced directive. However, it is possible to find in the same document two instruments combined: living will and health care power of attorney.

As far as the relation between the different measures is concerned, depending on the particular configuration of each one, they may coexist. Law No. 25/2012 addresses the relation between a living will and a health care power of attorney. In case of conflict, the living will prevails over the will of the attorney (Article 13 (2) Law No. 25/2012).

As far as the relation between the “mandate for custodianship purposes” and other voluntary measures is concerned, the Law does not address it. It should be understood, however, that in case of conflict between the mandate and the living will, the living will should prevail – given the previous option of the legislator to make prevail an advanced directive over an appointed representative/support person.

If there is conflict between the health care power of attorney and the mandate, in the absence of other reference, it should be analysed the content of each measure and, if it is concurring, the most recent instrument should prevail. Paula Távora Vítor, Art. 156, *Código Civil Anotado*, p. 205, 206.

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)?

Mandate for custodianship purposes

This measure may cover a wide range of matters. Article 156 (1) mentions that it is a measure fit for the “management of interests” of the adult. This means that it can cover property and financial matters, personal and family matters, care and medical matters as well as others matters. The possibility to tailor its content is referred to in Article 156 (2) CC, that states that the mandate specifies the rights involved, the sphere of the (possible) representation as well as other elements or conditions of exercise. It should be borne in mind that the “mandate for custodianship purposes” may entail granting representation powers or not.

Living will

According to Art. 2 (2) of Law No. 25/2012, the content of the living will may include the determination of: refusing artificial life support; refusing of futile, useless or disproportionate treatment, regarding the health situation and the medical practice, namely regarding basic life support and artificial nutrition and hydration, that only delay natural death; receiving palliative care; not being subject to experimental treatments; authorizing or refusing participation in clinical trials.

Article 10 (2) of the new Mental Health Act (Law n. 35/2023, July 21st), that has aimed to adapt advance directives to the specificities of mental health decisions, expressly mentions that living wills may address issues such as placement, coercive measures, electroconvulsive therapy and psychotropic medication.

Health care power of attorney

According to Article 12 (1) of Law No. 25/2012, the health care power of attorney grants representation powers regarding health care matters.

Start of the measure

Legal grounds and procedure

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

Mandate for custodianship purposes

The granter of the voluntary measure is identified by Article 156 as an adult (Article 156 (1) CC). That would exclude minors, but it leaves the question of whether an adult under custodianship (*acompanhamento*) can conclude such contract.

Taking into account that this support measure does not imply lack of legal capacity and if there are limitations, they may regard only a particular sphere of acts or matters, it should be allowed to an adult under custodianship, as

long as he/she has enough legal and de facto capacity, to grant this measure. Paula Távora Vítor, Art. 156, *Código Civil Anotado*, p. 204.

Living will

Article 4 of Law No. 25/2012 determines that, in order to make a living will, the author has to be an adult, competent to give conscious, free and informed consent.

The new Mental Health Act has revoked the former demand of not being subject to a custodianship (*acompanhamento*) measure that limits the right to make a will.

Health Care Power of Attorney

Article 11 (2) of Law No. 25/2012 determines that Article 4 of Law No. 25/2012 is to be applied both regarding the capacity of the granter and of the attorney. Therefore, the granter has to be an adult, competent to give conscious, free and informed consent.

The new Mental Health Act has revoked the former demand of not being subject to a custodianship (*acompanhamento*) measure that limits the right to make a will.

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.

“Mandate for custodianship purposes”

Article 156 CC does not make any demands regarding the formalities for the creation of the “mandate for custodianship purposes”. Therefore, the general rule determines that in the absence of such legal demands, the formalities (or the absence of them) can be freely chosen (Article 219 CC).

If, however, the mandate grants representation powers, there is a power of attorney associated. According to article 262 (2) CC, the power of attorney shall respect the formalities demanded for the acts that the attorney should perform. This is a difficult demand to determine in general, since the “mandate for custodianship purposes” may encompass a wide range of matters and acts.

Living will

Article 3 (1) of Law No. 25/2012 determines that this document should be written, signed in presence of a clerk of the National Registry for Living will or of a notary. The document shall include: complete identification of the author; place, date and hour of the signature; clinical situations in which the living will enter into force; options and instructions regarding the medical treatment to be received or refused; declarations or renovation, alteration or revocation (Article 3 (2) of Law No. 25/2012).

If there is the intervention of a physician (that, as a rule, is merely optional), his/her identification and signature may be included in the document (when decided by the author or the physician).

However, in case of living wills that address mental health issues, article 10 (3) of the new Mental Health Act (Law n. 35/2023, July 21st) establishes also the demand of medical declaration of capacity to give conscious, free and informed consent, whenever the document is made in the National Registry of the Living Will and not in the notary.

There are official models of advanced directives (that the author may use) approved by the Ministry of Health.

Health Care power of attorney

According to Art 12 (2) CC, the general rules regarding formalities of the power of attorney apply. Article 262 (2) CC states that the power of attorney shall respect the formalities demanded for the acts that the attorney should perform. When it comes to giving informed consent for medical interventions, the general rule determines that in the absence of specific legal demands, the formalities (or the absence of them) can be freely chosen (Article 219 CC). Therefore, one could conclude that there are no specific demands as to the formalities of the health care power of attorney. However, the same reasons that demand a written form for the advanced directive (legal certainty; adequate reflection), would also apply here.

38. Describe when and how voluntary measures enter into force.

“Mandate for custodianship purposes”

a. the circumstances under which voluntary measures enter into force;

Article 156 CC is not very clear regarding the entry into force of this mandate.

According to it, the mandate is concluded in view of possible need of a support measure (Article 156 (1) CC). However, that is a reference to the situation of vulnerability that justifies this particular kind of mandate, rather than to its entry into force.

It can be accepted that it (i) shall either be effective immediately and remain in force in the event of the granter’s incapacity, or (ii) enter into force in the future, in the event of the granter’s incapacity. Let us not forget that Article 156 (2) CC states that the “conditions of exercise” may be specified by the granter – that may encompass determining the circumstances under which the mandate 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.)?

There is no reference to any formalities regarding the entry into force of the mandate.

However, Article 156 (3) CC states that when decreeing the measure of *acompanhamento*, the Court takes hold of the mandate (in its entirety or partially) and takes it into account when defining the sphere of protection and appointment of the support person. Only in these cases, will there be a Court decision, though.

c. who is entitled to initiate the measure entering into force?

There is no express reference to who is entitled to initiate it. However, two references are relevant: (i) since the granter may specify the “conditions of exercise” (Article 156 (2) CC), that may also encompass to define who is entitled to initiate the mandate; (ii) whenever there is a Court decision considering the mandate when determining the measure of *acompanhamento* (Article 156 (3) CC), the Court itself may identify the need to initiate it.

d. is it necessary to register, give publicity or to any other kind of notice of the entry into force of the measure?

There is no reference to any of these demands of publicity.

Living will

a. the circumstances under which voluntary measures enter into force;

According to Article 3 (1), c) of Law 25/2012, the granter identifies “the clinical situations in which the advanced directives enter into force”. There is no additional reference to these circumstances, but, and taking into account the definition of the advanced directives, when the author “is no longer able to freely and autonomously express his/her will” (Article 2 (1), Law No. 25/2012), than the clinical team has to take it into account (see below 38., c.).

It should be considered, however, that in case of emergency or immediate danger of death of the patient, the clinical team does not have to consider the advanced directives, whenever the access to them would cause a delay that would increase the risks for the life or health of the author (Article 6 (4) of Law 25/2012).

b. which formalities are required for the measure to enter into force (medical declaration of diminished capacity, court decision, administrative decision, etc.)?

There is no reference to any formalities regarding the moment of entry into force of the living will. However, the respect for the formalities demanded for its constitution (and namely the clear and unequivocal expression of the will of the author) is a condition to enter into force (Article 16 (1) Law No. 25/2012).

c. who is entitled to initiate the measure entering into force?

According to Article 6 (1) of Law 25/2012, the fact that the author or his/her health care attorney hand over the advanced directive to the clinical team that provides health care.

However, the clinical team is also obliged to respect it, if the document has been registered in the official Registry – National Registry for the Living Will – (Article 6 (1) of Law 25/2012) without the need of any other intervention.

d. is it necessary to register, give publicity or to any other kind of notice of the entry into force of the measure?

The entry into force of the measure is not subject to publicity, however the publicity given in the National Registry for the Living Will (Articles 15 and 16) is relevant regarding its entry into force, because the clinical team is also obliged to respect it, if the document has been registered in this official Registry (Article 6 (1) of Law 25/2012). It should also be noted that the physician who is responsible for the care of an adult who is not able to freely and autonomously express his/her will must ascertain the existence of an advanced directive in the National Registry of the Living Will (Article 17 (2) Law No. 25/2012). In such case, it must be included in the medical file (Article 17 (2) Law No. 25/2012).

Health care power of attorney

a. the circumstances under which voluntary measures enter into force;

The definition of health care power of attorney provides us to the only reference of the circumstances relevant for its entry into force: the representation powers are to be used “in case the granter is unable to personally and autonomously express him/herself” (Article 12 (1) Law No. 25/2012).

b. which formalities are required for the measure to enter into force (medical declaration of diminished capacity, court decision, administrative decision, etc.)?

There is no reference to any formalities regarding the moment of entry into force of the power of attorney. However, the respect for the formalities demanded for its constitution (and namely the clear and unequivocal expression of the will of the granter) is a condition to enter into force (Article 16 (1) Law No. 25/2012).

c. who is entitled to initiate the measure entering into force?

There is no reference to who is entitled to initiate the entry into force of the power of attorney. However, it must be understood that, since the health care power of attorney is to be used “in case the granter is unable to personally and autonomously express him/herself” (Article 12 (1) Law No. 25/2012), then the attorney should be the one who presents him/herself acting when the situation arises.

d. is it necessary to register, give publicity or to any other kind of notice of the entry into force of the measure?

The entry into force of the measure is not subject to publicity, however the publicity given in the National Registry for the Living Will (Articles 15) is relevant.

Indeed, and even though the register is not a condition for the entry into force of the power of attorney (Article 16 (1) Law No. 25/2012), the fact that it has been registered plays an important role: the physician who is responsible for the care of an adult who is not able to freely and autonomously express his/her will must ascertain about the existence of a power of attorney in the National Registry of the Living Will (Article 17 (2) Law No. 25/2012). In such case, it must be included in the medical file (Article 17 (2) Law No. 25/2012) and the decisions of the attorney must be respected by the health care professionals file (Article 13 (1) Law No. 25/2012).

Appointment of representatives/support persons

39. Who can be appointed representative/support person (natural person, public institution, CSO's, private organisation, etc.)?

Mandate for custodianship purposes

a. what kind of requirements does a representative/support person need to meet (capacity, relationship with the grantor, etc.)?

Article 156 CC does not make any kind of requirements regarding the representative/support person, nor regarding categories of persons that act as such.

The regime of the regular power of attorney must be considered, though. According to Article 263 CC, it is demanded the de facto capacity (cognitive and volitional ability) demanded by the kind of acts to be performed.

b. what are the safeguards as to conflicts of interests?

There are no specific safeguards.

c. can several persons be appointed (simultaneously or as substitutes) as representative/support person within the framework of one single measure?

Yes. Although Article 156 does not refer to this possibility, the general regime of the mandate admits several mandates whose object are the same legal acts and that there are as many mandates as the number of persons designated, unless they act jointly (Article 1160 CC) and it establishes that, as a rule, they must act jointly (Article 1166 CC).

Health Care Power of Attorney

a. what kind of requirements does a representative/support person need to meet (capacity, relationship with the grantor, etc.)?

Article 11 (2) of Law No. 25/2012 determines that Article 4 of Law No. 25/2012, both regarding the granter and the attorney. Therefore, the attorney has to be an adult, not subject to a measure of *acompanhamento* that limits the right to make a will (See above 8. B.); competent to give conscious, free and informed consent.

There are some restrictions as to the categories of persons who can be attorneys. Article 4 (3) of Law No. 25/2012 determines that the following persons are banned: (a) clerks of the National Registry for the Living Will and clerks from the notary's office that intervened in the act; (b) owners or managers of the institutions that provide health care. Article 4 (4) of Law No. 25/2012 admits an exception: when the persons in (b) have a family relation with the granter.

b. what are the safeguards as to conflicts of interests?

There are no specific safeguards.

c. can several persons be appointed (simultaneously or as substitutes) as representative/support person within the framework of one single measure?

Yes. Article 4 (5) of Law No. 25/2012 states that the granter may nominate a second attorney to substitute the first, in case of impediment.

The living will is not considered, because it does not imply appointing a representative /support person.

During the measure

Legal effects of the measure

40. To what extent are the voluntary measure and the wishes expressed within it legally binding?

All the voluntary measures in the Portuguese system are legally binding.

Mandate for custodianship purposes

It results from Article 156 (3) CC that when decreeing the measure of *acompanhamento*, the Court takes hold of the mandate (in its entirety or partially) and takes it into account when defining the sphere of protection and appointment of the support person.

Besides, one has to take into account that, regarding third parties it is as legally binding as a general mandate would be – it grants powers to the attorney and the third parties who enter into legal transactions with him/her are subject to its implications (See Articles 1178 CC – that refers that the attorney acts on the behalf of the granter and Article 1180 CC – that consider the situation in which powers of representation have not been granted and the attorney acts in his/her own name).

Living Will

The rule is that the living will is legally binding. According to Article 6 (1) of Law 25/2012, if the document has been registered in the official Registry – National Registry for the Living Will – or if the granter or his/her health care attorney hand over the advanced directive to the clinical team that provides health care, they should respect its content, unless the law determines otherwise. Article 6 (2) of Law 25/2012 determines these exceptions.

Advanced directives should not be legally binding whenever (i) it is proven that the granter does not wish to maintain them; (ii) the will of the granter is not updated considering the evolution of the therapeutic means; (iii) they do

not correspond to the de facto circumstances that were taken into account when it was concluded.

These facts are registered in the clinical file by the person responsible for the health care and communicated to the health care attorney (when existent) and to the National Registry of the Living Will (Article 6 (3) of Law 25/2012). It should be considered, however, that in case of emergency or immediate danger of death of the patient, the clinical team does not have to consider the advanced directives, whenever the access to them would cause a delay that would increase the risks for the life or health of the author (Article 6 (4) of Law 25/2012).

In terms of content, an advanced directive that falls into the following situations is considered non-existent (and therefore not legally binding): (i) advanced directives contrary to the law, to public policy or that determine acts contrary to good practice; (ii) advanced directives that when respected could deliberately provoke the non-natural and preventable death of the granter, as in the cases of articles 134 – homicide at the request of the victim - and 135 of the Criminal Code – incitement to suicide or assisted suicide; (iii) situations in which the granter did not correctly, clear and unequivocally express his/her will (Article 5 Law No. 25/2012).

Finally, there is also a time limit regarding the effects of the advanced directive. Article 7 (1) Law No. 25/2012 determines that it is effective for a period of five years from its signature; it can be renovated, when the granter confirms it (obeying to the same formalities demanded for its conclusion) (Article 7 (2) Law No. 25/2012); but it remains in force in case of lack or limitation of the granter's capacity in the aforementioned period (Article 7 (2) Law No. 25/2012). In case of expiration, the National Registry should inform the granter and the health care attorney (when existent) up to 60 days before the aforementioned period ends (Article 7 (2) Law No. 25/2012).

Health Care power of attorney

Article 13 (1) Law No. 25/2012 determines that the decisions taken by the attorney, within the limits of his/her representation powers, must be respected by those who are health care givers of the granter.

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

None of the voluntary measures of the Portuguese system affects the legal capacity of the granter.

Powers and duties of the representative/support person

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

Mandate for custodianship purposes

- 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?**

This measure is very flexible. This measure may cover a wide range of matters. Article 156 (1) mentions that it is a measure fit for the “management of interests” of the adult. This means that it can cover property and financial matters, personal and family matters, care and medical matters as well as others matters. The possibility to tailor its content its referred to in Article 156 (2) CC, that states that the mandate specifies the rights involved, the sphere of the (possible) representation as well as other elements or conditions of exercise. It should be borne in mind that the “mandate for custodianship purposes” may entail granting representation powers or not. Therefore, we may have a representative (who acts in the place of the adult) or a support person, who acts together with the adult or provides assistance.

- b. what are the criteria for decision-making (e.g. best interests of the adult or the will and preferences of the adult)?**

There is no specific reference in the Law. However, a systematic approach (and the fact that we are considering a voluntary measure) should lead us to consider the demands of the UNCRPD and the standard for decision-making of “the will and preferences of the adult”.

- c. is there a duty of the representative/support person to inform and consult the adult?**

It is not established in the Law, however, in order to be coherent with the standard for decision-making of “the will and preferences of the adult”, these actions would have to be taken.

- d. is there a right to receive remuneration (how and by whom is it provided)?**

It is not established in the Law, however, the general regime of mandate establishes that, even though the rule is that the mandate is gratuitous, there is an exception when the attorney is to perform acts that fall within his/her professional capacity. In such cases, remuneration is determined, in the following order (i) by the parties; (ii) or by the professional rates; (iii) or by the ways and costumes; (iv) or though equity. (Article 1158 CC).

Health care power of attorney

- 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?**

This measure only refers to care and medical matters and its definition demands its core are representation powers. As mentioned above, according to Article 12 (1) of Law No. 25/2012, the health care power of attorney grants representation powers regarding health care matters.

- b. what are the criteria for decision-making (e.g. best interests of the adult or the will and preferences of the adult)?**

There is no specific reference in the Law. However, a systematic approach (and the fact that we are considering a voluntary measure) should lead us to consider the demands of the UNCRPD and the standard for decision-making of “the will and preferences of the adult”.

- c. is there a duty of the representative/support person to inform and consult the adult?**

It is not established in the Law, however, in order to be coherent with the standard for decision-making of “the will and preferences of the adult”, these actions would have to be taken.

- d. is there a right to receive remuneration (how and by whom is it provided)?**

The living will is not considered, because it does not imply appointing a representative /support 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?**

It is possible to have several voluntary measures simultaneously applied to the same adult. The law does not address their relation, but it must be

considered (i) the content of each one - for instance, the mandate for custodianship purposes may address other personal matters or even health care matters that do not coincide with the ones included in a health care power of attorney; (ii) if several measures address the same issues and provide the same powers, a conflict may arise. In such cases, in case of conflict, the most recent measure should prevail (Paula Távora Vítor, Art. 156, *Código Civil Anotado*, p. 206).

- 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)?**

In the framework of the same voluntary measure, it is possible to find more than one representative/support person.

As mentioned above, although Article 156 does not refer to this possibility, the general regime of the mandate admits several mandates whose object are the same legal acts. There are as many mandates as the number of persons designated. However, if they act jointly, they will act in the framework of one mandate (Article 1160 CC). The Law establishes that, as a rule, several attorneys must act jointly (Article 1166 CC).

Article 4 (5) of Law No. 25/2012 only admits that the granter may nominate a second attorney to substitute the first, in case of impediment.

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?**

When addressing the interaction of voluntary measures with other measures, one has to consider a systematic approach and state that, as a rule, the principle of subsidiarity determines that a voluntary measure will prevail over heteronomous measures (either legally or judicially imposed).

In particular, as far as the interaction of the mandate for custodianship purposes and the support measure of *acompanhamento* is concerned, Article 156 has to be taken into account. Article 156 (3) CC states that when decreeing the measure of *acompanhamento*, the Court takes hold of the mandate (in its entirety or partially) and takes it into account when defining the sphere of protection and appointment of the support person.

It may be argued that Court may consider that (i) the mandate is sufficient to address the situation of the adult and, therefore, the principle of subsidiarity determines that a state-ordered measure is not justified; (ii) concurring or joint authority may be granted to the *acompanhante*.

In case of conflict between both representatives/support persons, the principle of subsidiarity would determine that the voluntary measure should prevail.

Paula Távora Vítor, Art. 156, *Código Civil Anotado*, p. 207, 208.

As far as advanced directive (living will included) and the health care power of attorney are concerned, the Civil Procedure Code (Article 900 (3)) determines that the court decision that determines the measure of *acompanhamento* should expressly mention the existence of a living will or health care power of attorney and ensure the respect for the previously expressed will of the adult.

Therefore, one may conclude that, as a rule, the voluntary measures prevail when determining the sphere of protection and the appointment of the *acompanhante* and if conflict arises between representatives/support persons, the principle of subsidiarity would determine that the voluntary measure should prevail. Paula Távora Vítor, Art. 156, *Código Civil Anotado*, p. 207, 208.

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**

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

There are no safeguards specifically determined by the Law.

First of all, the capacity of the adult is not limited and, therefore, there are not unauthorised acts by him/her.

When a representative goes beyond his/her powers of representation, general rules of mandate determine that the attorney may act without obeying to the instructions of the granter when its reasonable to suppose that the granter would approve of his/her action if the granter was aware of the circumstances that he/she could not be informed of in a timely manner (Article 1162 CC). However, this rule takes into account a granter who is a person whose cognitive or volitional abilities are not limited and who can (even tacitly) approve the performance of the attorney (Article 1163 CC). This rule can only summoned in the context of adults with diminished capacity if we consider the intervention of a third party (the Public Prosecutor's Office, most likely) to control and approve these acts.

As for ill-conceived acts of the adult, the regime of temporary mental disturbance may apply (see above 14. a.)

Regarding ill-conceived acts and conflict of interests, the general rules of contractual liability may apply. It should be borne in mind that, as far as the general rules of mandate are concerned, the attorney is not responsible for the non-compliance of third parties with their obligations, unless at the time he/she has concluded a contract knew or should know about their insolvency (Article 1183 CC).

- 46. Describe the system of supervision, if any, of voluntary measures. 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.**

There is not a system of supervision regarding voluntary measures. It may be argued, however, that if anyone is aware of any abuse and especially those who have a duty to protect the person, be it the *acompanhante* or a caregiver, should inform the Public Prosecutor's Office of such situations, so that this organ can take appropriate measures. The Public Prosecutor's Office is defined by its Statute as the protector of vulnerable people, including adults with diminished capacity (Article 2, i) Statute of the Public Prosecutor's Office).

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.**

Mandate for custodianship purposes
According to Article 156 CC, the mandate for custodianship purposes may terminate when it is revoked – either by the granter or by the Court. The rule regarding the granter is that this mandate is freely revocable (Article 156 (2) CC). One should bear in mind, however, that some situations of diminished capacity do not allow it de facto. In such situations it should not be allowed that a third party (the *acompanhante*) would revoke it on the behalf of the granter. Only revocation by the Court should be admitted. Paula Távora Vítor, Art. 156, *Código Civil Anotado*, p. 207.

The revocation by the Court may happen when, according to Article 156 (4) CC, it is “reasonable to presume” that was the will of the granter. Additionally, it could also be argued that there is a case of tacit revocation. Since Article 156 (3) CC states that when decreeing the measure of *acompanhamento*, the Court takes hold of the mandate (in its entirety or partially) and takes it into account when defining the sphere of protection and appointment of the support person, *a contrario* the Court may only take the mandate partially into consideration. There is no legal reference to the position of the attorney as far as the termination of the mandate is concerned.

Living will

According to Article 8 (1) of Law No. 25/2012, the advanced directives may be revoked (or modified), in their entirety or partially, at any moment, by the granter.

The formalities for its modification are the same formalities demanded for its constitution (Article 8 (2) of Law No. 25/2012).

The granter may also revoke (or modify) the advanced directives, at any moment, by oral statement to the health care provider. This should be registered in the patient’s clinical file, in the National Registry for the Living Will and the health care attorney (when existent) should be informed (Article 8 (4) of Law No. 25/2012).

Health care power of attorney

According to Article 14 (1) of Law No. 25/2012, the health care power of attorney can be freely revoked by its granter.

The attorney may also renounce to it. In such cases, he/she should inform the granter in writing (Article 14 (2) of Law No. 25/2012).

It is also possible for the Court that decrees the *acompanhamento* to revoke the health care power of attorney (Article 14 (3) Law No. 25/2012), although it can be argued this possibility should be adequately and thoroughly justified, given the fundamental options of the system and the obedience to the principles of autonomy and subsidiarity.

Reflection

48. Provide statistical data if available.

No data 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 measure been evaluated, if so what are the outcomes?

The new Mental Health Act (Law n. 35/2023, July 21st), that entered into force in August 2023, has adapted the regime of advanced directives and health care powers of attorney to the specificities of mental health care choices (Article 10, Law n. 35/2023, July 21st). Namely, it addresses decisions regarding placement, coercive measures, electroconvulsive therapy and psychotropic medication.

This article (Article 10, Bill No. 24/XV/1) establishes also the demand of medical declaration of capacity to give conscious, free and informed consent, whenever the document is made in the National Registry of the Living Will and not in the notary.

In other advanced directives, there is not such demand – and that can be criticized.

Even though it has not raised much debate, it should be noticed that there is room for a few developments in the regime of the mandate for custodianship purposes, since its regulation has many loopholes.

SECTION V – EX LEGE REPRESENTATION

Overview

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

N/A

51. What are the legal grounds (e.g. age, mental and physical impairments, prodigality, addiction, etc.) which give rise to the *ex lege* representation?

There are not general provisions regarding *ex lege* representation. Out of the matrimonial property regime, there are, however, some provisions that grant powers of representation *ex lege* to some persons.

Article 142 Criminal Code determines that when the pregnant woman is “psychically incapable” determines that the consent for abortion, in the absence of the *acompanhante*, should be given by ascendants, descendants or “by any relatives in the collateral line”. Therefore, in this case, the ground is a mental impairment.

Article 101 (1) of the Copyright Code also grants to the heirs of the author the power to resolve the edition contract, in case the author has no possibility to finish the work. In this case, the definition is even more general.

52. Is medical expertise/statement required and does this have to be registered or presented in every case of action for the adult?

No.

53. Is it necessary to register, give publicity or to give any other kind of notice of the *ex-lege* representation?

No.

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.

There are not general provisions regarding *ex lege* representation. As mentioned above in the examples given, the *ex lege* representatives in Article 142 Criminal Code are the ascendants, descendants or “any relatives in the collateral line”.

In Article 101 (1) of the Copyright Code the *ex lege* representatives are the heirs of the author (even before the author’s death).

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.

In the case of Article 142 Criminal Code, the consent to a medical intervention is covered.

Article 101 (1) of the Copyright Code refers to a decision in an area that refers to a personal matter that has financial implications – to revoke an edition contract.

56. What are the legal effects of the representative’s acts?

They are legally binding.

57. 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?

This matter is not regulated.

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

It can be stated that in both cases presented, *ex lege* representation works in the absence of the *acompanhante* (this is express in article 142 Criminal Code), however the principle of subsidiarity would sustain that, if the absence of this support person, a legal procedure to appoint him/her would not be needed in case only these decisions were at stake. *Ex lege* representation would be sufficient.

Safeguards and supervision

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

There is no legal regulation of safeguards.

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

There is no legal regulation of its end. Both cases are thought of to a single act.

Reflection

61. Provide statistical data if available.

Not available.

62. 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)?

Nothing worth noting.

Specific cases of ex lege representation

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

63. 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?

Yes. The rule is that one spouse may freely incur into debts, without the consent of the other (Article 1690 CC). These debts do not legally bind the other spouse (Article 1692), unless they fall into specific categories of debts: the ones incurred by any of the spouses, before or after marriage, related to household expenses; the ones incurred after marriage by the manager spouse, in the common interest of both spouses, within the limits of their powers of administration (and also those incurred before marriage if matrimonial regime is the regime of general community); the ones incurred in the exercise of commerce, unless is proven that they were not in the common interest of the couple (except if the matrimonial regime is the regime of separation of assets); debts that encumber donations, inheritance or bequests if these assets are common assets under the matrimonial regime chosen (Article 1691 (2), b), c), d), e) and (3) CC).

The aforementioned debts are common debts and the other spouse is liable for them (regardless of his/her capacity) and, therefore, common assets are liable for them and, in case there are no common assets or they are no sufficient, the assets of each spouse (Article 1695 CC).

64. 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.

Yes. The rule is that each spouse has the administration of personal assets (Article 1678 (1) CC) and that both spouses administer common assets (Article 1678 (3) CC).

However, there are several exceptions: common assets may be administered by only one spouse and personal assets of one may be administered by the other spouse.

Common assets that are administered by only one spouse (Article 1678 (2) CC):

- Income labour (a)
- Royalties (b)
- Common assets owned only by that spouse before marriage or that result from donations or inheritance;(c)
- Common assets donated or bequeathed to both spouses, but excluding the administration of the other (d)
- Movable common assets exclusively used as work instrument by that spouse (e)
- Common assets, when the other spouse cannot administer them, because he/she is in a remote or unknown location or he/she is by any other reason hindered to provide for it, unless this spouse has granted a power of attorney to manage those assets (a maiori ad minus argument, since the law only refers expressly personal assets) (f)
- Common assets, when the other spouse has granted the power to manage them (a maiori ad minus argument, since the law only refers expressly personal assets) (g)

Personal assets that are administered by the spouse who is not the owner (Article 1678 (2) CC):

- Movable personal assets exclusively used as work instrument by that spouse (e)
- Personal assets, when the other spouse cannot administer them, because he/she is in a remote or unknown location or he/she is by any other reason hindered to provide for it, unless this spouse has granted a power of attorney to manage those assets (f)
- Personal assets, when the other spouse has granted the power to manage them (g)

The case of Article 1678 (2) f) CC is the one that may respond to situations of mental impairment of one of the spouses. Indeed, when the Law mentions that the spouse is “by any other reason hindered” to provide for the administration of assets, one may conclude that one of the most important reasons is his/her lack of mental capacity.

If the spouse who administers those assets intentionally caused damages to the couple or to the spouse mentally impaired, he/she will be liable for those damages (Article 1681 (1) CC).

In case the property of the spouse mentally impaired is endangered because of the poor administration of the other, it may be requested the simple separation of assets (Article 1767 CC). The separation may only be requested by one spouse against the other (Article 1768 CC). In case there is support measure of *acompanhamento* in force, the request may be filed by the support person with representation powers after Court authorization has been given (Article 1769 CC).

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

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

Yes. *Negotiorum gestio* is regulated in articles 464 ff. CC. It is the situation in which someone assumes the management of another person's matters and acts on behalf and for the benefit of that person (the *dominus negotii*) without his/her authorization.

This instrument is often used to provide for the interests of adults with diminished capacity, mainly by family members or other close persons.

Despite its relevance, the general regulation of the *negotiorum gestio* presupposes a *dominus negotii* that has enough capacity to perform some acts relevant for the regime. The regime of *negotiorum gestio* has been adapted to the situation of a *dominus negotii* with diminished capacity by the new Mental Health Act¹⁴. It addresses the administration of assets of beneficiaries of mental health care.

SECTION VI – OTHER PRIVATE LAW PROVISIONS

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

¹⁴The proposal of the Family Law Center addressed this issue since 2017. Paula Távora Vítor e Geraldo Rocha Ribeiro, Proposta de Lei sobre a Condição Jurídica das Pessoas Maiores em Situação de Incapacidade. Revisão do Código Civil, Centro de Direito da Família, 17 de janeiro de 2017 (in <http://www.centrodedireitodafamilia.org/relatórios/2017/>“proposta-de-lei-sobre-condição-jur%C3%ADdica-das-pessoas-maiores-em-situação-de)

Yes. Powers of attorney (Articles 262 ff. CC) and representative mandates (Articles 1178 ff. CC) grant powers of representation and may play a role regarding adults with diminished capacity.

67. 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?

There is no specific regulation regarding this kind of advanced planning, besides the possibility granted to parents or the person who has the exercise of parental responsibilities to appoint the future support person (*acompanhante*) in a will or an official deed or certified document (Article 143 (2) d) CC).

However, it must be considered the possibility of making donations with encumbrances associated – for instance, the donee, by accepting the donation, also accepts to provide care on the behalf of a third party (the adult with diminished capacity).

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

- 68. 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.**

As far as the empowerment is concerned, the 2018 Reform has been a very relevant step in the road towards compliance with the human rights of vulnerable adults, namely with the demands of the UNCPRD.

The system is flexible enough to allow non- restrictive approaches that put the adult at the center of the discourse and promote the adult's autonomy, namely by providing a new voluntary measure, by allowing the adult him/herself to request the support measure or to authorize this request by others and to appoint him/herself the support person of his/her choice. However, the transition from substituted to supported decision-making is not entirely clear. Indeed, besides still referring to the possibility to grant the *acompanhante* the exercise of parental responsibilities (Art. 145 (2) a CC), the law still allows the *acompanhante* to be attributed not only representation powers, but also general representation powers (Art. 145 (2) b CC). And the case law has resorted to this solution, often translating the content of the previous regime using the new terminology, but actually mimicking the old guardianship.

As far as the design of the measure is concerned, the kind of powers that are more in line with the UNCRPD are the ones referred to in the law as "other interventions" (Art. 145 (2) e CC). This vague concept allows to grant a variable set of powers, to adapt them to the purposes of the support model. And indeed, the law mentions one of the dimensions of the principle of proportionality when it refers that the *acompanhamento* "is limited to the necessary" (Art. 145 (1) CC).

As to the way it functions, and even though the Law seems to point to an objective criterion to lead the *acompanhante*'s work – the diligence of a *bonus paterfamilias* (Art 146 (1) CC)- an interpretation according to the UNCRPD should lead us to interpret it according to the UNCRPD and to the principle of will and preferences. Some of our case law already expresses this approach.

Nevertheless, the coherence of the system (international demands – UNRPD – and constitutional demands) determines that the principle of subsidiarity prevails. And even the Law makes that option, although not very clearly. According to the CC, the measure of *acompanhamento* is not to be applied if its purpose can be guaranteed by informal means, such as the familial duties of support ("duties of cooperation and assistance") Article 140 (2) CC. This is, however, only one manifestation of the principle of subsidiarity, a principle that demands that the least restrictive and intrusive means are applied, when possible, to address the situation of diminished capacity. But the reference made by the Law (i) regards only the support measure of *acompanhamento* and it should refer to the way that the entire system of support of vulnerable adults works; (ii) only mentions the "duties of cooperation and assistance", but it should also (and primarily) refer to the voluntary measures (the mandate, advanced directives, continuing powers of attorney), that should prevail over any other measures.

As far as the legal capacity of adult is concerned, the new support measure of *acompanhamento* does not lead necessarily to it. As a rule it should not do it. Here again some Court decisions have again turned to the framework of old guardianship and declared "general incapacity", adopting a strikingly contrary approach to the universal capacity paradigm. As explained above,

capacity may still be limited in the Court decision (Art. 145 (2) b) CC), and even regarding personal acts.
(All the sources supra, where each of these issues was addressed)

69. 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.**

As far as the protection of vulnerable adults is concerned, it should be stressed that, in order to impose a support measure, it is necessary for a Court procedure as Courts are the gatekeepers of fundamental rights. Indeed, even when deprivation or limitation of capacity are not at stake, at least an interference with the adult's private life is.

It should be stressed the authorization of the adult as a precondition to the procedure (when he/she is not the plaintiff) and the mandatory nature of the hearing, besides the possibility to resort to medical statements and examinations, as well as social reports.

The fact that this same procedure is to be followed when alteration or termination of *acompanhamento* is at stake guarantees the same level of protection (Article 904(3) CPC).

The protection of the adult during the operation of the support measures swings between merely replicating the previous regime of guardianship, when it comes to the annulment of this/her own acts (Article 154 CC) and not presenting specific solutions regarding other matters (solutions that have to be found in the regime of the guardianship of minors and general rules of tort and contract law (as mentioned above).

The context of residential-care institutions has not been adequately addressed by the new regime. Indeed, the law even refers to "the person appointed by the institution that houses the vulnerable person" (Article 143 (2) g) CC) in the list of possible *acompanhantes*. It seems that the regime of the Civil Code ignores the particular situations of abuse in this environment. It should be

mentioned that, in the past, public psychiatric hospitals in Portugal organized internal rules regarding the administration of the assets of the patients placed whose rules often ignored the existence of a judicial decisions and that even determined the use of the patient's property to improve these facilities. The regulation of the administration of the assets of the mental health patients was to be regulated since the Mental Health Act was enacted in 1998. In 2023, a new Mental Health Act (Law n. 35/2023, July 21st) entered into force and it has regulated this issue in its article 13.

As far as the privacy of the vulnerable adult is concerned, there are no particular provisions, however it is a constitutional demand (article 26 (1) CRP) and the principle of equality (Article 13 of the Constitution) determines that there must be no discrimination regarding it. Integrated by the UNCPRD (and by its demands as to the equal treatment of persons with disabilities), even in the relationship with the support person, its respect is to be imposed.

(All the sources supra, where each of these issues was addressed)