

## Country report **Ukraine**

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

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

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

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

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

# THE EMPOWERMENT AND PROTECTION OF VULNERABLE ADULTS

## UKRAINE

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### 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 legal system of Ukraine as a whole can be described as continental and monistic. The monistic status of Ukraine, meaning that the ratified international treaties are considered a part of the national legislation, is laid down in Article 9 of the Constitution.<sup>1</sup> The Law on International Treaties of Ukraine establishes that if a conflict between the domestic act and international treaty occurs, the latter prevails.<sup>2</sup> International treaties, however, cannot contradict with the provisions of the Constitution, which has the highest place in the hierarchy of legal sources.

The national legislation of Ukraine is in several areas systematised in thematic codes. The Civil Code and Civil Procedural Code are examples of such systematisation. The Civil Code establishes the substantive law conditions for measures of legal protection of vulnerable adults, such as deprivation and limitation of legal capacity to act as well as appointment of state-ordered guardians for vulnerable adults. It also lays down material requirements for some voluntary measures, namely, the appointment of a support person.

Whilst substantive law conditions for deprivation of legal capacity are laid down in the Civil Code, the procedural requirements are established in the Civil Procedural Code. The Civil Procedural Code regulates such issues as the period for

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<sup>1</sup> Конституція України від 28.06.1996 № 254к/96-ВР [Constitution of Ukraine] Article 9, <https://zakon.rada.gov.ua/laws/show/en/254%D0%BA/96-%D0%B2%D1%80#Text>.

<sup>2</sup> Закон України «Про міжнародні договори України» від 29.06.2004 № 1906-IV [The Law on International Treaties of Ukraine] Article 19, <https://zakon.rada.gov.ua/laws/show/en/1906-15#Text>.

which the person can be deprived or limited in the exercise of legal capacity; who may apply for a measure; and what evidence shall be demanded by court.

The issues related to the empowerment of vulnerable adults are regulated, *inter alia*, in the Social Service Act and the Civil Code. The Act provides a wide range of so-called basic social services that can be provided to vulnerable adults in need of them.<sup>3</sup> Empowerment of adults is, therefore, both private and social law issue within the Ukrainian jurisdiction.

Many other legislative acts touch upon the issues of the exercise of rights of persons deprived of or limited in their enjoyment of legal capacity to act. Such domestic acts include but are not limited to the Family Code, Fundamentals of the Legislation of Ukraine on Healthcare, and the Law on Peculiarities of Providing Public (Electronic Public) Services. Many national legislative acts (including the Constitution) incorporate prohibition for persons deprived of legal capacity to occupy some public positions, such as judges and/or certain types of public servants.

The decisions of the Constitutional Court are an essential source of domestic law. In particular, the Constitutional Court has the powers too officially interpret the Constitution and to decide if the national legislation or an international treaty contradicts the Constitution. The issues of protection of vulnerable adults have been several times addressed in the case law of the Constitutional Court.

In the judgment of 1 June 2016, the Constitutional Court considered the national law provisions that allow to “voluntary” hospitalisation of a vulnerable adult deprived of legal capacity to a psychiatric care facility, based on the guardians’ consent alone and, thus, possibly, against the will of the adult. The Constitutional Court deemed that hospitalisation in such cases might result in factual deprivation of the right to liberty. As deprivation of liberty shall not be done in an arbitrary manner, the Court rendered unconstitutional the provisions, allowing guardians to “voluntary” place a vulnerable adult, deprived of the legal capacity, into a psychiatric care facility against his or her will.<sup>4</sup>

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<sup>3</sup> Закон України «Про соціальні послуги» від 17.01.2019 № 2671-VIII [Social Service Act] Article 16, <https://zakon.rada.gov.ua/laws/show/2671-19#Text>.

<sup>4</sup> Рішення Конституційного суду України у справі за конституційним поданням Уповноваженого Верховної Ради України з прав людини щодо відповідності Конституції України (конституційності) положення третього речення частини першої статті 13 Закону України "Про психіатричну допомогу" (справа про судовий контроль за госпіталізацією недієздатних осіб до психіатричного закладу) від 01.06.2016 № 2-рп/2016 [Judgment of the Constitutional Court in the case on legal supervision of persons deprived of legal capacity’s hospitalisation to psychiatric care institutions], <https://zakon.rada.gov.ua/laws/show/v002p710-16#Text>. See also Рішення Конституційного суду України у справі за конституційним поданням Уповноваженого Верховної Ради України з прав людини щодо відповідності

In the judgment of 11 October 2018, the Constitutional Court dealt with the limitations of the Law On Citizens' Appeals, which allowed authorities not to consider the observations, complaints or proposals submitted by persons deprived of legal capacity. The Constitutional Court considered it unconstitutional that only guardians of persons deprived of legal capacity may submit observations, complaints and proposals. The limitations were deemed disproportional for attaining the legitimate interest of authorities not to be overwhelmed by the number of appeals.<sup>5</sup>

The European Court of Human Rights' decisions are mandatory. In accordance with the Law on the Execution of Judgments and Application of the Case Law of the European Court of Human Rights, courts and administrative authorities must refer to the European Court of Human Rights judgments.<sup>6</sup> Some of the judgments, such as *Nataliya Mikhaylenko v. Ukraine* (Application no. 49069/11, Judgment of 30 May 2013), play an important role in protecting vulnerable adults within the country.

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Конституції України (конституційності) положення третього речення частини першої статті 13 Закону України "Про психіатричну допомогу" (справа про судовий контроль за госпіталізацією недієздатних осіб до психіатричного закладу) від 20.12.2018 № 13-р/2018 [Judgment of the Constitutional Court in the case on hospitalisation of persons deprived of legal capacity to mental health institutions], <https://zakon.rada.gov.ua/laws/show/v013p710-18#n37>.

<sup>5</sup> Рішення Конституційного суду України у справі за конституційним поданням Уповноваженого Верховної Ради України з прав людини щодо відповідності Конституції України (конституційності) окремих положень частини другої статті 8, другого речення частини четвертої статті 16 Закону України "Про звернення громадян" (справа про звернення осіб, визнаних судом недієздатними) від 11.10.2018 № 8-р/2018 [Judgment of the Constitutional Court in the case on appeals of persons deprived of legal capacity], <https://zakon.rada.gov.ua/laws/show/v008p710-18#Text>.

Other issues related to restoration of legal capacity to act were raised before the Constitutional Court, however, the Court refused to decide on the merits in the case. See Ухвала Конституційного суду України про відмову у відкритті конституційного провадження у справі за конституційним поданням Уповноваженого Верховної Ради України з прав людини щодо відповідності Конституції України (конституційності) окремих положень частини першої статті 39, пункту 1 частини першої статті 207, частини першої статті 240, частини четвертої статті 241 Цивільного процесуального кодексу України та частини першої статті 42 Цивільного кодексу України від 21.05.2014 № 61-у/2014 [Decision of the Constitutional Court in case 61-у/2014 of 21.05.2014], <https://zakon.rada.gov.ua/laws/show/v061u710-14#Text>.

<sup>6</sup> Закон України «Про виконання рішень та застосування практики Європейського суду з прав людини» від 23.02.2006 № 3477-IV [On the Execution of Judgments and Application of the Case Law of the European Court of Human Rights] Articles 18-19, <https://zakon.rada.gov.ua/laws/show/en/3477-15#Text>.

- 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. 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.**

Passive legal capacity or legal capacity to have rights - *цивільна правоздатність* – *tsivilna pravozdatnist*: defined in Article 25 of the Civil Code as the possibility to be a bearer of civil rights and obligations that every natural person has.

Active legal capacity or legal capacity to act - *цивільна дієздатність* – *tsivilna diezdatnist*: defined in Article 30 of the Civil Code as the ability of a person to acquire and exercise rights and fulfil obligations independently, by means of his/her own actions.

*Deprivation of legal capacity* - *визнання особи недієздатною* – *viznannya osobi nediyezdatnoyu*: *the procedure laid down in the Civil and Civil Procedural Code resulting in a formal declaration by a court that a person does not enjoy the legal capacity to act and that a full guardian shall be appointed.*

*Limitation of legal capacity* - *визнання особи обмежено дієздатною* - *viznannya osobi obmezhenno diyezdatnoyu*: *the procedure laid down in the Civil and Civil Procedural Code resulting in a formal declaration by a court that a person enjoys the legal capacity to act only partially and that a partial guardian shall be appointed to act together with the person.*

*The procedure entailing limitation of the right to visiting gambling facilities or participation in gambling* – *обмеження особи у відвідуванні гральних закладів та участі в азартних іграх* – *obmezhennya osobi u vidviduvanni gralnyh zakladiv ta uchasti v azartnix igrah*: *a procedure foreseen in Part IV, Chapter 2<sup>2</sup> of the Civil Procedural Code of Ukraine, established to protect adult and persons, closely related to them, from the negative consequences of gambling.*

Full guardian or guardian - *опікун* – *opikun*: a state-appointed legal representative of an adult, fully deprived of the legal capacity to act, and an adult, recognised by a court as missing. The term is also used to describe legal guardians of minors below the age of 14.

Partial guardian - *піклувальник* – *pikluvalnik*: a state-appointed legal representative of an adult, partially deprived of the legal capacity to act, and of a minor aged

from 14 to 18 years. The term can be translated as guardian, but to make the distinction between *opikun* and *pikluvalnik* explicit, the term partial guardian will be used in the text instead.

Guardianship Authority - *орган опіки та піклування* - *Organ opiki ta pikluvannya*: state's local authorities. They have various functions, related to managing the property of incapacitated adults; advising courts on the appointment of guardians (*opikun*) and partial guardian (*pikluvalnik*), supervision of the actions of guardians and so on.

Support person - *помічник-потічник*: a person, chosen by a fully legally capable adult that has difficulties in exercising his or her rights due to the state of health.

Special procedure - *окреме провадження* – *okremeye provadzennya*: defined in Article 293 of the Civil Procedural Code as a type of non-litigious civil proceedings where civil cases are considered to confirm the presence or absence of legal facts.

**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.**

The available statistical information is provided in the table below.<sup>7</sup>

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<sup>7</sup> Державна служба статистики України, Населення України 1990-2022 [Ukrainian population 1990-2022], <https://www.ukrstat.gov.ua/>; Міністерство соціальної політики України, Демографічні тенденції в Україні потребують комплексного підходу на державному рівні [Demographic trends in Ukraine require a complex approach at the state level] 2018, <https://www.msp.gov.ua/news/14711.html>; ВУЕ (VUE) (encyclopaedia), Населення України [Population of Ukraine] 2022, [https://vue.gov.ua/%D0%9D%D0%B0%D1%81%D0%B5%D0%BB%D0%B5%D0%BD%D0%BD%D1%8F\\_%D0%A3%D0%BA%D1%80%D0%B0%D1%97%D0%BD%D0%B8#.D0.A1.D0.B5.D1.80.D0.B5.D0.B4.D0.BD.D1.96.D0.B9\\_.D0.B2.D1.96.D0.BA](https://vue.gov.ua/%D0%9D%D0%B0%D1%81%D0%B5%D0%BB%D0%B5%D0%BD%D0%BD%D1%8F_%D0%A3%D0%BA%D1%80%D0%B0%D1%97%D0%BD%D0%B8#.D0.A1.D0.B5.D1.80.D0.B5.D0.B4.D0.BD.D1.96.D0.B9_.D0.B2.D1.96.D0.BA); Радіо Свобода, У Держстаті розповіли, скільки в Україні людей з інвалідністю [Statistical Authority provide an information on the number of people with disabilities in Ukraine] 2021 <https://www.radi-osvoboda.org/a/news-ukraina-invalidnist-statystyka/31324501.html>; Міністерство соціальної політики України, Особам з інвалідністю [Persons with Disabilities] 2020, <https://www.msp.gov.ua/timeline/invalidnist.html#:~:text=%D0%A1%D1%82%D0%B0%D0%BD%D0%BE%D0%BC%20%D0%BD%D0%B0%2001%20%D1%81%D1%96%D1%87%D0%BD%D1%8F%202020,%D1%96%D0%BD%D0%B2%D0%B0%D0%BB%D1%96%D0%B4%D0%BD%D0%BE%D1%81%D1%82%D1%96%20%D1%82%D0%B0%20163%2C9%20%D1%82%D0%B8%D1%81;>

Year	2016	2017	2018	2019	2020	2021
Number of the population (average)	42 672 500	42 485 473	42 269802	42 027 809	41 745 385	41 148 884
% of persons older than 65	15,5	No data	No data	No data	17,2	No data
Total number of persons with disabilities	2 603 319	2 635 600	2 659 700	2 703 000	2 703 000	No data
Number of persons with disability type I	240 591	235 400	226 300	222 300	222 300	No data
Number of persons with disability type II	900 478	899 200	891 100	900 800	900 800	No data
Number of persons with disability type III	1 306 151	1 341 900	1 375 700	1 416 000	1 416 000	No data
Number of decisions on deprivation of legal capacity	3 626	2 863	2 659	2 460	2 349	2 805
Number of decisions on limitation of legal capacity	239	169	109	106	79	79

Державна служба статистики України, Соціальний захист населення України в 2019 [Social Security of the Ukrainian Population in 2019], [https://ukrstat.gov.ua/druk/publicat/kat\\_u/2020/zb/07/zb\\_szn\\_2019.pdf](https://ukrstat.gov.ua/druk/publicat/kat_u/2020/zb/07/zb_szn_2019.pdf); Державна служба статистики України, Соціальний захист населення України [Social Security for the Population fo Ukraine] 2018, [https://ukrstat.gov.ua/druk/publicat/kat\\_u/2018/zb/07/zb\\_szn\\_2017.pdf](https://ukrstat.gov.ua/druk/publicat/kat_u/2018/zb/07/zb_szn_2017.pdf); Лист Міністерства соціальної політики України [Letter of the Ministry of Social Security of Ukraine] 14/02 2018 No. 16/o/133-18/171, [https://dostup.pravda.com.ua/request/31092/response/64384/attach/2/16%200%20133%2018%20id1464540.pdf?cookie\\_passthrough=1](https://dostup.pravda.com.ua/request/31092/response/64384/attach/2/16%200%20133%2018%20id1464540.pdf?cookie_passthrough=1); Лист Державної судової адміністрації України [Letter of the State Court Administration of Ukraine] 25/8 2022 No. інф/К399-22-431/22 щодо судової статистики [re court statistics].

Number of criminal court cases concerning domestic violence	No data-	No data	No data	626	1 877	2 500
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**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.**

For the purpose of this survey, it is worth listing the following treaties Ukraine is a party to:

International instrument	Ukraine's signature	Ukraine's ratification
United Nations International Covenant on Economic, Social and Cultural Rights	20 March 1968	12 November 1973
United Nations International Covenant on Civil and Political Rights	20 March 1968	12 November 1973
United Nations Convention on the Rights of Persons with Disabilities	24 September 2008	4 February 2010
Additional Protocol to the United Nations Convention on the Rights of Persons with Disabilities	24 September 2008	4 February 2010
Hague Protection of Adults Convention	13 January 2000	Not ratified
United Nations International Convention on the Elimination of All Forms of Racial Discrimination	7 March 1966	7 March 1969
United Nations Convention on the Elimination of All Forms of Discrimination against Women	17 July 1980	12 March 1981



United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment	27 February 1986	24 February 1987
Convention for the Protection of Human Rights and Fundamental Freedoms	09 November 1995	11 September 1997
European Social Charter (revised)	07 May 1999	21 December 2006

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

The institute of deprivation of legal capacity has existed in Ukraine’s legal system for a long time. The Civil Code of 1922 included provisions on depriving persons of their legal capacity to act in cases when they cannot manage their affairs due to mental disorders/intellectual disability or when they excessively waste the property in their position. The possibility of limiting legal capacity, rather than fully depriving of it, was not foreseen in this Code.

In 1963, the new Civil Code was adopted. The Code recognised both the possibility of deprivation and limitation of legal capacity to act. If persons due to mental disorders or intellectual disability could not understand the significance of their actions or manage them, they could be declared by the court as legally incapable of acting. The Code of 1963 specified that state-ordered measures – appointment of a guardian – shall start simultaneously with the deprivation of legal capacity to act.

Deprivation of legal capacity for the sole reason of excessive waste of property was abolished in the Civil Code of 1963. However, it became possible to limit the legal capacity to act due to the adult’s abuse of alcohol or drugs, that brings the family of the adult in a difficult financial situation. The person with the limited legal capacity had a partial guardian appointed. The limitation of legal capacity to act meant that a person could only enter into ordinary everyday transactions, such as buying food. The persons, whose capacity to act was limited, could not receive their income or manage their property.

The current Civil Code of Ukraine was adopted in 2003. The Civil Code of 2004 has the first time formally recognised the status of a support person, a person self-appointed by a capable adult, in the framework of a voluntary measure. One of the essential changes compared to the previous Code was the alteration of the reasons

for the limitation of legal capacity to act. In accordance with Articles 36 and 39 of the Code, there are now possibilities to either limit or fully deprive the legal capacity to act for persons with mental disorders or intellectual disabilities. The previous versions of the Code provided in relation to such persons only for full deprivation of legal capacity to act.

The list of the reasons for the limitation of legal capacity to act was also altered compared to the previous Civil Code. Apart from alcohol and drugs abuse, the abuse of toxic substances and - since 2012 - gambling was recognised as reasons for the limitation of legal capacity to act. The capacity to act of these groups of persons can be limited if they put themselves, their families or other persons they are legally obliged to carry for, in a difficult financial situation. The persons with limited capacity to act retain the possibility to enter into ordinary everyday transactions. However, compared to the previous Code, the novelty was that with the consent of the partial guardian they obtained the possibility to also act in other cases. For instance, with the consent of the partial guardian, a person with limited capacity can receive his or her income independently. The persons with the limited legal capacity to act are also responsible for fulfilling the obligations they entered with the partial guardian's consent.

As mentioned earlier, the Civil Procedural Code of 2004 contains a number of procedural rules governing deprivation and limitation of person's legal capacity to act. Two important milestones are worth mentioning here. Firstly, the original version of the Civil Procedural Code did not allow a person deprived of legal capacity to act to demand restoration of legal capacity. It used to be either the guardian or the Guardianship Authority, who could initiate the restoration procedure in court. However, in 2017, the Civil Procedural Code was revised. Currently, Article 300.4 of the Civil Procedural Code allows a person deprived of legal capacity to act or members of this person's family to ask the court to restore the legal capacity. The second significant reform is that the previous legislation allowed total deprivation of legal capacity for an indefinite period of time. However, as it stands, total deprivation of legal capacity is only possible for a period of two years.

Among other important milestones, the adoption of the Social Services Act in 2019 should be mentioned. The act provides a list of so-called basic social services, many of which aim to empower vulnerable adults. However, many state social service standards were developed before this act's adoption.

**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.**

It cannot be stated that the current discussions about the rights of persons with disabilities, the elderly, or vulnerable adults are heated and polarised. The main concerns have been the issues of using appropriate terminology and defining the persons with disabilities.<sup>8</sup> Various aspects of accessibility, in particular, in labour law relations or education, have also been highlighted in the debates.<sup>9</sup> The discussions resulted in some legislative changes. One of them is that the disability-first language in legislation was substituted with person-first language: references to disabled persons were substituted in the legislation to persons with disabilities to emphasise the value of the personhood and use more respectful language.

In 2015, the UN CRPD Committee delivered its first concluding observation on Ukrainian's rapport. The Committee criticised Ukraine on several points directly related to the current questionnaire. The major criticism relates to equal recognition of persons with disabilities before the law. It was found that Ukrainian law

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<sup>8</sup> See e.g. O.O. Anin, *Особливості соціального захисту осіб з інвалідністю у системі державного соціального захисту України*, 4 *Юридичний науковий електронний журнал*, 685–689 (2021).

<sup>9</sup> О.В. Паровишник, *Забезпечення прав інвалідів в Україні: теоретичні і практичні засади адміністративно-правового регулювання* (Київ, Право 2016); Н. К. Стульпінас, *Гідна праця інвалідів в Україні в контексті здійснення плану дій Ради Європи щодо забезпечення прав та повноцінної участі інвалідів у суспільному житті, (2006–2015 роки) та Конвенції ООН про права інвалідів*, 6(8) *Актуальні проблеми навчання та виховання людей з особливими потребами: збірник наукових праць* 417–424 (2009); Н. О. Зезека, *Особливості надання послуг з працевлаштування осіб з обмеженими можливостями державною службою зайнятості України*, 6(8) *Актуальні проблеми навчання та виховання людей з особливими потребами: збірник наукових праць* 395–401 (2009); Е. М. Кучменко, *Працевлаштування осіб з обмеженими фізичними можливостями: проблеми на ринку праці*, 6(8) *Актуальні проблеми навчання та виховання людей з особливими потребами: збірник наукових праць* 380–387 (2009); В. М. Абрамова, *Проблеми реалізації конституційних прав на освіту і на працю осіб з обмеженими можливостями*, 6(8) *Актуальні проблеми навчання та виховання людей з особливими потребами: збірник наукових праць* 374–380 (2009); Л. В. Котова, *Правове регулювання праці осіб з інвалідністю*, 3(44) *Юридичний вісник* (2017); М.Ю. Кузнецова, *Міжнародно-правовий механізм захисту прав людей з обмеженими можливостями*, 7 *Юридичний науковий електронний журнал*, 109–112 (2020); О. М. Галицький, Р. В. Гришова, *Світовий досвід реалізації державної політики підтримки осіб з інвалідністю та його імплементація в Україні*, 6 *Інвестиції: практика та досвід*, 122–127 (2019); В.П. Мельник, *Міжнародно-правове регулювання соціального захисту осіб з інвалідністю у сфері реабілітації та праці: теоретико-правовий підхід*, 1 (22) *Прикарпатський юридичний вісник*, 63–67 (2018).

was non-compliant with Article 12 of the UN CRPD. The Committee asked to replace guardianship and compulsory mental health treatments with a system of supported decision-making and recognise the full legal capacity of all persons. Similarly, the Committee urged to adopt measures against the institutionalization of persons with disabilities.<sup>10</sup> As will be seen throughout the survey, the Ukrainian legal system still allows for full deprivation and limitation of legal capacity based on mental capacity and mental disorders.

Due to Russia's aggression towards Ukraine, the questions of accessibility for persons with disabilities and the elderly in the time of emergency became even more topical. This issue has been particularly highlighted in the practice of the UN treaty bodies.<sup>11</sup>

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

In 2021, the Government adopted the Plan to Implement the Convention on the Rights of Persons with Disabilities Until 2025.<sup>12</sup> This plan can be seen as a major pending reform of Ukrainian legislation. For the implementation of Article 12 of the UN CRPD; the Plan suggests focusing on the following areas:

- Investigating possibilities for persons deprived of or limited in exercising the legal capacity to enter marriage or to apply for divorce.
- Providing for better protection of adults, deprived of legal capacity, through improving their access to courts (exemption from paying specific fees) and enabling change of guardians or partial guardians upon the person's request.
- Studying the experience of other countries in order to develop a national system of supported decision-making for persons with disabilities, and to analyse whether the substituted decision-making can be abolished in some areas.

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<sup>10</sup> UN CRPD Committee, Concluding Observations in relation to the initial report of Ukraine, CRPD/C/UKR/CO/1, 4 September 2015, paras 26-27, 30-31.

<sup>11</sup> Committee on the Rights of Persons with Disabilities Holds Meeting with States Parties on the Situation of Persons with Disabilities in Ukraine and in Countries where they Fled Following the Russian Aggression, 17 August 2022, <https://www.ohchr.org/en/press-releases/2022/08/committee-rights-persons-disabilities-holds-meeting-states-parties-situation>.

<sup>12</sup> Розпорядження Кабінету Міністрів України «Про затвердження Національного плану дій з реалізації Конвенції про права осіб з інвалідністю до 2025 року» від 07.04.2021 № 285-р. [National Plan for Implementation of the Convention on the Rights of Persons with Disabilities Until 2025]: <https://zakon.rada.gov.ua/laws/show/285-2021-%D1%80#Text>.

The suggested changes are supposed to implement the comments received from the UN CRPD Committee; it remains to be seen how the pending suggestion will be implemented.

## **SECTION II – LIMITATIONS OF LEGAL CAPACITY**

**8. If your system allows the limitation of the legal capacity of an adult, please answer questions 8 - 13; if not proceed to question 14. All reports should address questions 14 and 15.**

- a. on what grounds?**
- b. how is the scope of the limitation of legal capacity set out in (a) statute or (b) case law?**
- c. does limitation of the legal capacity automatically affect all or some aspects of legal capacity or is it a tailor-made decision?**
- d. can the limited legal capacity be restored, can the limitation of legal capacity be reversed and full capacity restored and, if so, on what grounds?**
- e. does the application of an adult protection measure (e.g. supported decision making) automatically result in a deprivation or limitation of legal capacity?**
- f. are there any other legal instruments,<sup>13</sup> besides adult protection measures, that can lead to a deprivation or limitation of legal capacity?**

- a. Ukrainian legislation allows both limitation and deprivation of legal capacity of adults. The limitation of legal capacity can take place in two separate cases.

Firstly, in accordance with Article 36.1 of the Civil Code, the legal capacity to act can be limited if the following grounds exist:

1. A person has a mental disorder; and
2. The disorder substantially limits the person's ability to understand the significance of his or her actions and (or) to manage these actions.

Secondly, the legal capacity to act can be limited in accordance with Article 36.2 of the Civil Code if the conditions listed below are met:

1. A person is addicted to alcohol, drug or toxic substance or to gambling; and

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<sup>13</sup> 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.

2. Due to the addiction, he or she puts him or herself, his or her family, or other persons, he or she is legally obliged to maintain, in a difficult financial situation.

Criteria for deprivation of legal capacity to act are regulated in Article 39 of the Civil Code. A person can be deprived of legal capacity to act if:

1. He or she has a chronic and long-lasting mental disorder,
  2. Due to the disorder, the person cannot understand the significance of his or her actions and manage them.
- b.** The scope of limitation of legal capacity is regulated in the statutory law and, to some extent, in the case law (i.e. of the Constitutional Court). The Civil Code of Ukraine is the primary but not exclusive source of regulation.
  - c.** The limitation of legal capacity automatically affects most areas of legal relations. Several judgments of the Constitutional Court, mentioned as the answer to question 1, indicate that the limitation or deprivation of legal capacity should not amount to total loss of all rights, as it might be considered unconstitutional.
  - d.** The limited or deprived legal capacity can be restored. The conditions for restoring the legal capacity are recovery from or significant improvement of the mental disorder, as a result of which the functions (understanding the significance of one's actions and ability to manage them) are restored. If the capacity was limited due to alcohol, drug, toxin addiction or gambling, for the restoration of legal capacity, the person must recover from the addiction.<sup>14</sup>
  - e.** The sequence of the events is the other way around. The court first makes a decision on deprivation or limitation of legal capacity and only after that applies the protective measure and appoints a full guardian or a partial guardian. However, the appointment of a support person or other informal means for supported decision-making does not signify that the person is deprived or limited in legal capacity to act.
  - f.** No instruments allow to render of all legal acts of the person as void or voidable. However, a specific transaction of a person can be declared void.
  - g.** Article 225 of the Civil Code of Ukraine allows declaring a transaction void in case a person could not understand the significance of his or her actions and/or manage them at the time of making the transaction.

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<sup>14</sup> Цивільний кодекс України 16.01.2003 № 435-IV [Civil Code] <https://zakon.rada.gov.ua/laws/show/435-15#Text>, Articles 38 and 42; Цивільний процесуальний кодекс України від 18.03.2004 № 1618-IV [Civil Procedural Code] <https://zakon.rada.gov.ua/laws/show/1618-15#Text> Article 300.

9. Briefly describe the effects of a limitation of legal capacity on:
- a. property and financial matters;
  - b. family matters and personal rights (e.g. marriage, divorce, contraception);
  - c. medical matters;
  - d. donations and wills;
  - e. civil proceedings and administrative matters (e.g. applying for a passport).

- a. Limitation or deprivation of legal capacity has profound effect on exercise of property and financial rights. Suppose the person was deprived of legal capacity. In that case, the person has no right to enter any transaction related to property and finances. The guardian shall decide on all matters related to property and finances.<sup>15</sup>

If the legal capacity is limited, the person retains his or her right to enter into ordinary everyday transactions, such as buying food or transport ticket. However, in accordance with Article 37 of the Civil Code, any other transactions require the consent of the partial guardian. The partial guardian can, in particular, consent (in writing) that persons with limited legal capacity receive their income independently. Yet, if such written consent has not been obtained, the partial guardian would have the right to receive the income of the person with limited capacity and disposed of it on behalf of that person.

- b. As to the deprivation of legal capacity before the marriage or founding a family: a person who is deprived of legal capacity to act cannot marry. Marriage concluded with such a person shall be considered void.<sup>16</sup> Similarly, a person deprived of legal capacity to act cannot be an adoptive parent.<sup>17</sup>

The Family Code of Ukraine distinguishes between the strictly personal duties (such as those related to distribution of responsibilities within the family and taking care of the spouse) and the property-related duties. If a person is deprived of legal capacity to act during the marriage, the strictly personal duties cease to exist. Yet, the property-related duties shall be executed by the person's guardian.<sup>18</sup> The marriage of the person declared incapable is not dissolved automatically. However, guardians

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<sup>15</sup> Civil Code, Article 41.

<sup>16</sup> Сімейний кодекс України від 10.01.2002 № 2947-III [Family Code] <https://zakon.rada.gov.ua/laws/show/2947-14#Text>, Articles 24.2 and 39.4.

<sup>17</sup> Family Code, Articles 211-212.

<sup>18</sup> Family Code, Article 15.

have the right to apply for divorce, if it is in the best interests of the vulnerable adult.<sup>19</sup>

Although the Family Code often contains specific provisions regarding those deprived of legal capacity to act, it is sometimes less clear concerning persons with limited legal capacity. For instance, the Family Code does not determine whether persons whose capacity to act was limited can decide to enter the marriage on their own or the consent of a partial guardian is required as well, as prescribed by Civil Code for civil transactions in general. Similarly, the sources are silent as to whether persons with limited legal capacity can apply for divorce on their own, or the consent of partial guardians is required. The marriage, entered in by persons with limited legal capacity, and by any other person can be declared void, if a person was not able to understand the significance of his or her actions and manage them at the time of entering into marriage.<sup>20</sup> These general criteria are equally applied to persons, whose legal capacity to act has been limited, meaning that the marriage of these persons can be declared void. The persons fully deprived of legal capacity and with limited capacity to act cannot be adoptive parents.

- c. The Civil Code of Ukraine and the Fundamentals of the Legislation of Ukraine on Healthcare regulate consent to and refusal of a patient for any medical intervention. The general rule is that consent is a precondition for providing medical care. However, the legislation contains some rules when consent is not required, such as in emergency situations or when compulsory treatment is imposed.<sup>21</sup>

The full guardian of the person deprived of legal capacity to act shall consent or refuse medical interventions for the person.<sup>22</sup> In such cases medical interventions are not generally considered as involuntary. If a person does not want to receive somatic treatment and the guardian consents, the intervention is still generally regarded as voluntary. Interestingly, the Constitutional Court ruled that placement of a person, deprived of legal capacity to act, by a guardian to a psychiatric care institution as a “voluntary” patient is violating the non-constitutional right prohibiting arbitrary deprivation of liberty.<sup>23</sup> However, similar judgments concerning other (somatic) medical decision-making have not

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<sup>19</sup> Family Code, Article 110.5.

<sup>20</sup> Family Code, Article 40.2.

<sup>21</sup> See e.g. Civil Code, Article 248; Основи законодавства України про охорону здоров'я від 19.11.1992 № 2801-XII [Fundamentals of the Legislation of Ukraine on Healthcare] <https://zakon.rada.gov.ua/laws/show/2801-12#Text>, Article 43.2.

<sup>22</sup> Fundamentals of the Legislation of Ukraine on Healthcare, Article 41-44<sup>1</sup>.

<sup>23</sup> Judgment of the Constitutional Court in the case on legal supervision of persons deprived of legal capacity's hospitalisation to psychiatric care; Judgment of the Constitutional Court in the case on hospitalisation of persons deprived of legal capacity to mental health institutions.



been delivered. The Constitutional Court's reasoning is motivated by the deprivation of liberty safeguards rather than the right to privacy and self-determination. This motivation, to some extent, may limit the scope of the application of these judgments in other areas, where deprivation of liberty does not take place.

If the capacity to act is limited, consent of the person and partial guardian is required.<sup>24</sup> The question as to whether the person with limited legal capacity can also refuse medical intervention on his or her own is not explicitly regulated in the national legislation. Article 43.4 of the Fundamentals of the Legislation of Ukraine on Healthcare and Article 284.4 of the Civil Code explicitly establish the right to refuse medical treatment for persons with full legal capacity only.

- d. The Civil Code limits the possibility of persons who do not have full capacity to act to make a valid will: these persons cannot make a will.<sup>25</sup>

Ukrainian legislation contains separate rules on accepting inheritance. The persons whose capacity is deprived or limited are presumed to consent to accept inheritance.<sup>26</sup>

In the cases when a person with limited capacity to act decides to refuse the inheritance, the consent of a partial guardian and Guardianship Authority is required.<sup>27</sup> The guardian can refuse inheritance on behalf of the person deprived of legal capacity if a Guardianship Authority approves such an action.<sup>28</sup>

- e. Guardians shall represent the interest of the persons deprived of the legal capacity to act in civil proceedings.<sup>29</sup> The partial guardian can represent the interests of the persons limited in the exercise of the capacity to act, but the person can still participate in the legal proceedings if the court decides so.<sup>30</sup>

As a general rule, the person deprived of legal capacity is considered incapable of deciding on other matters, including administrative ones. However, the Constitutional Court ruled that the provisions of the Law On Citizens' Appeals provisions, allowing authorities to ignore the complaints or proposals of persons deprived of legal capacity, were unconstitutional.<sup>31</sup> The limitations were deemed disproportional for

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<sup>24</sup> Fundamentals of the Legislation of Ukraine on Healthcare, Articles 43-44<sup>1</sup>.

<sup>25</sup> Civil Code, Article 1234.

<sup>26</sup> Civil Code, Article 1268.

<sup>27</sup> Civil Code, Article 1273.

<sup>28</sup> Civil Code, Article 1273.

<sup>29</sup> Civil Procedural Code, Article 59.

<sup>30</sup> Civil Procedural Code, Article 59.

<sup>31</sup> Рішення Конституційного суду України у справі за конституційним поданням Уповноваженого Верховної Ради України з прав людини щодо відповідності

attaining the legitimate interest of authorities not to be overwhelmed by the number of appeals. Therefore, the authorities should review the complaints or proposals submitted by the person deprived or limited in the exercise of the capacity to act.

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

As a general rule, the deprivation or limitation of the legal capacity enters into force from the moment mentioned in the court's decision.<sup>32</sup> Article 40.2 of the Civil Code contains one exception from this general rule: the court may decide about retroactive effect only when the validity of a marriage or specific civil law transactions may depend on a person's legal capacity to act. The court must also consider the evidence from forensic medical experts. Similar possibilities to decide in retrospect about the limitation (as opposed to deprivation) of legal capacity to act are absent.

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

The courts of general jurisdictions are competent to decide on limitation or deprivation of legal capacity to act.<sup>33</sup>

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

A member of the person's family, the Guardianship Authority, or a psychiatric care institution can apply for limitation or deprivation of capacity to act.<sup>34</sup> In addition, if the application concerns deprivation of legal capacity, close relatives such as spouses, children, parents and siblings who do not live with the person may also apply. For limitation of legal capacity, only a family member who lives in the same household is considered to be a person's family.

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Конституції України (конституційності) окремих положень частини другої статті 8, другого речення частини четвертої статті 16 Закону України "Про звернення громадян" (справа про звернення осіб, визнаних судом недієздатними) від 11.10.2018 № 8-р/2018 [Judgment of the Constitutional Court in the case on appeals of persons deprived of legal capacity], <https://zakon.rada.gov.ua/laws/show/v008p710-18#Text>.

<sup>32</sup> Civil Code, Articles 36 and 40.

<sup>33</sup> Civil Code, Articles 36 and 39; Civil Procedural Code, Article 1.

<sup>34</sup> Civil Procedural Code, Article 296.

A legal capacity can be restored upon the application of the person him- or herself, a family member, the guardian, the partial guardian or the Guardianship Authority.<sup>35</sup>

**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. Ukrainian legislation establishes a special type of proceedings – the so-called special proceeding [*okremye provadgennya*] – for limitation or deprivation of legal capacity. Full and partial guardians are considered to be legal representatives of the adults, who have them. The legislation does not lay down any other requirements for legal representation, such as having legal counsel. However, persons whose capacity is questioned have the right to receive free legal aid.<sup>36</sup>
- b. In cases concerning limitation or deprivation of capacity to act, the applicant shall be present during the proceedings.<sup>37</sup> As to family members, it was explained above that although the applicants can sometimes be family members, not all applicants have this status. In cases where the capacity is deprived, participation of the Guardianship Authority is mandatory. The public prosecutor (*procuror*) must also participate in the proceedings.
- c. For the cases of limitation or deprivation of legal capacity to act, the court must appoint a forensic medical examination.<sup>38</sup> If a person evades the expertise, he or she can be physically forced to undergo it.

The legal capacity of the person, who was previously deprived of legal capacity can only be restored on the basis of medical expert report.<sup>39</sup>

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<sup>35</sup> Civil Procedural Code, Article 300.

<sup>36</sup> Закон України «Про безоплатну правову допомогу» від 02.06.2011 № 3460-VI [Free Legal Aid Act] <https://zakon.rada.gov.ua/laws/show/3460-17#Text>, Article 14.

<sup>37</sup> Civil Procedural Code, Article 299.

<sup>38</sup> Civil Procedural Code, Article 298; see also Постанова Верховного суду України «Про судову експертизу в кримінальних і цивільних справах» від 30.05.1997 № 8 [Resolution of the Plenum of the Supreme Court of 30 May 1997 No. 8 “About forensic examination in criminal and civil cases”], para. 14.

<sup>39</sup> Civil Procedural Code, Article 300.

The Code does not explicitly establish such a requirement for restoring limited legal capacity.

- d. The Civil Procedural Code establishes that the person whose capacity is impugned should participate in the proceedings. However, the legislation established the exceptions from the rule: this general rule can be waived with reference to the person's state of health.<sup>40</sup> Yet, the European Court of Human Rights' practice on Article 6 of the ECHR has significantly affected the legal system (see question 1). Acknowledging the value of Article 6 of the ECHR, the Supreme Court of Ukraine emphasised that there is a narrow margin of appreciation in deciding on participation in the procedure of the person, whose capacity is the subject of a court procedure. The person must be notified about the court proceedings, his or her rights and obligations shall be explained, and the person shall have the possibility to receive free legal aid. Recently, the Supreme Court established that there should be real and well-grounded evidence of danger to the person of participating of such person in legal proceedings. Even if such evidence exists, the courts should allow the possibility for the person to participate in the proceeding via video link. Moreover, if a person is deprived of liberty due to a mental disorder, the courts should check whether the deprivation of liberty took place lawfully.<sup>41</sup>
- e. Ukrainian legal system guarantees the rights to any participant of the case or anyone whose interest the decision concerns to appeal the decision on the limitation or deprivation of legal capacity.<sup>42</sup> However, in accordance with Article 357.1(5) of the Civil Procedural Code, if the appeal was signed by a person who is deprived of legal capacity, it shall be returned. Yet, the Supreme Court recognised that this limitation of the right to a fair trial may be disproportional.<sup>43</sup> Therefore, the person who is deprived of his or her legal capacity can appeal the decision.

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

- a. property and financial matters;**
- b. family matters and personal rights (e.g. marriage, divorce, contraception);**
- c. medical matters;**

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<sup>40</sup> Civil Procedural Code, Article 299.

<sup>41</sup> Постанова Верховного Суду від 07.10.2020 справі № 195/1605/16-ц. [Judgment of the Supreme Court of 26 February 2020, case No 199/6241/18] <https://zakononline.com.ua/court-decisions/show/87985039>.

<sup>42</sup> Civil Procedural Code, Article 352.

<sup>43</sup> Judgment of the Supreme Court of 26 February 2020, case No 199/6241/18.

- d. **donations and wills;**
- e. **civil proceedings and administrative matters (e.g. applying for a passport).**

The distinction between mental capacity and legal capacity is not traditionally used within the legal system. Mental capacity is rarely assessed separately. However, there are occasional exceptions. Such include the possibility to declare a civil transaction void in a court in cases when a person could not understand the significance of his/her actions and/or control them at the time of making the transaction. The Supreme Court has interpreted the provision as requiring an absolute inability to understand the significance of actions and control them, meaning that the threshold for contesting such transactions, especially when capacity is not impugned, is very high.<sup>44</sup> The transactions concerning property, financial matters, donation and wills could be thus declared void if a person totally lacked mental capacity at the time the transaction was made. However, in most other cases, the legislation does not specifically prescribe an assessment of mental capacity.

**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?**

As mentioned throughout this section, significant attention was given to the criticism addressed to Ukraine by the European Court of Human Rights. The criticism primarily concerned the right to a fair trial, especially when the person whose capacity is limited or deprived could not appeal the court decision or restore capacity. The existing national reforms have primarily addressed the right of the persons deprived of and limited in their legal capacity to be heard, as well as a review of the decisions concerning deprivation of legal capacity. For instance, as it stands, the deprivation of legal capacity shall be reviewed every two years; it is not supposed to be prolonged automatically, as the previously existing legislation allowed.

In 2015, Ukraine received criticism from the UN Committee on the Rights of Persons with Disabilities for its guardianship system that presupposes substituted decision-making. Still, as it stands, there are no intense debates about abolishing the

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<sup>44</sup> Ухвала Верховного Суду України від 02.10.2019 у справі № 496/4851/14-ц [Decision of the Supreme Court of 02.10.2019 in case No. 496/4851/14-ц] <https://reyestr.court.gov.ua/Review/84814298>.

guardianship system and establishing the system providing voluntary support only.

### **SECTION III – STATE-ORDERED MEASURES**

#### *Overview*

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

There are several state-ordered measures aimed at protecting vulnerable adults.

- a. Firstly, as described in the previous Section, the legal system allows for deprivation [*viznannya osobi nediyezdatnoyu*] or limitation of legal capacity [*viznannya osobi obmezhenno diyezdatnoyu*]. If the capacity is deprived, the court must appoint a guardian [*opikun*]. When the capacity is limited, the court must appoint a partial guardian [*pikluvalnik*]. Thus, full guardianship and partial guardianship are two most widely uses of the existing state-ordered measures created to protect vulnerable adults.

If the person is recognised as missing [*viznannya osobi bezvistno vidutnyuyu*], there is a possibility to appoint a guardian for that person's property.<sup>45</sup> However, since care for the person is not provided, the measure will not be discussed in any further detail.

The Civil Procedural Code of Ukraine allows for a particular type of restrictive measure, namely, limitation of visiting gambling facilities or participation in gambling [*obmezhennya osobi u vidviduvanni gralnyh zakladiv ta uchasti v azartnix igrakh*] to protect an adult or his/her family members.

Compulsory psychiatric care can be viewed as another measure to protect vulnerable adults. This measure is established in accordance with

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<sup>45</sup> Civil Code, Article 44.

the Act on Psychiatric Care.<sup>46</sup> The national legislation provides for possibilities of both in-patient or ambulatory (outpatient) compulsory psychiatric care. In-patient compulsory psychiatric care [*statsionarna psihiatrichna dopomoga*] is applicable if a person has a serious mental disorder and commits – or manifests real intentions to commit – actions that represent an immediate danger to her or others or is unable to independently satisfy his or her basic life needs at the level that ensures her vital activities. Ambulatory compulsory psychiatric care [*ambulatorna psihiatrichna dopomoga*] can be provided when persons are diagnosed with a serious mental disorder, and as a result of a disorder, they can cause significant harm to their health if psychiatric care is not provided.

Finally, the legislation provides some possibilities for compulsory hospitalisation of persons with hazardous infectious diseases. However, such a measure's purpose is primarily protecting society. Due to this, the measure will not be discussed in any further detail.

- b. Deprivation and limitation of legal capacity are not simultaneously applicable measures. However, compulsory mental health treatment can be applicable to a person whose capacity is deprived or limited or to a person who is fully legally capable. Limitations of visiting gambling facilities and participation in gambling can be introduced, *inter alia*, for persons whose capacity is limited.
- c. The Ukrainian legal system has no interim or ad-hoc state-ordered measures.

### ***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.**

Section II of the report discusses the legal grounds for deprivation and limitation of legal capacity (see in particular question 8), and the grounds will not be reiterated here. Courts shall always decide on the matter the appointment of a full or a partial guardian if capacity is deprived of or limited. At this point, it is worth mentioning that the procedure according to which the full guardian [*opikun*] and partial

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<sup>46</sup> Закон України «Про психіатричну допомогу» від 22.02.2000 № 1489-III [Psychiatric Care Act] <https://zakon.rada.gov.ua/laws/show/1489-14#Text>.

guardian [*pikluvalnik*] shall be appointed is laid down both in the Civil and Civil Procedural Codes and subordinary legislative acts, such as the Rules on Guardianship. The Rules on Guardianship were enacted in 1999, and shall not contradict the acts of Parliament, such as the Civil Code.<sup>47</sup> Yet, under the Rules, the partial guardian shall be appointed exclusively on requests of the persons unable to realise their rights (and for the persons not limited in their legal capacity). However, the Civil Code explicitly establish a different procedure – the courts shall appoint full and partial guardians. It is interesting and surprising that the Rules on Guardianship were not made consistent with the Civil Code. The Rules on Guardianship refer to another measure – voluntary assistance (discussed in Section IV of the report), but instead of support persons, they refer to partial guardians.

The material legal grounds for compulsory psychiatric care depend on the type of psychiatric care. For inpatient psychiatric care [*statsionarna psihiatrichna dopomoga*], it is that a person has a serious mental disorder and commits – or manifests real intentions to commit – actions that represent an immediate danger to her or others or is unable to independently satisfy his or her basic life needs at the level that ensures her vital activities.<sup>48</sup> For ambulatory compulsory psychiatric care [*ambulatorna psihiatrichna dopomoga*] it is that a person has a serious mental disorder, and as a result of a disease, he or she can cause significant harm to their health if psychiatric care is not provided.

Limitation of visiting gambling facilities or participation in gambling [*obmezheniya osobi u vidviduvanni gralnyh zakladiv ta uchasti v azartnix igrakh*] is permissible when the gambling puts the person's family or the person himself or herself in an economically difficult situation.<sup>49</sup> Such situations include the inability to pay children's maintenance for more than three months, debt that exceeds a certain amount of money, or the need to receive financial aid to pay for the costs of living in an apartment.

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<sup>47</sup> Наказ Державного комітету України у справах сім'ї та молоді, Міністерства освіти України, Міністерства охорони здоров'я України, Міністерство праці та соціальної політики України «Про затвердження Правил опіки та піклування» від 26.05.1999 № 34/166/131/88 [Rules on Guardianship] <https://zakon.rada.gov.ua/laws/show/z0387-99#Text>, para. 3.4.

<sup>48</sup> Psychiatric Care Act, Article 14.

<sup>49</sup> Civil Procedural Code, Article 300<sup>3</sup>.



### **18. Which authority is competent to order the measure?**

The courts of general jurisdiction decide about the deprivation and limitation of legal capacity and, thus, the appointment of full or partial guardians.<sup>50</sup> If vulnerable adult has no full or partial guardian, for example, because they died or lost their legal capacity, the Guardianship Authority will fulfil the functions of full or partial guardian until the appointment of the new one.<sup>51</sup> However, if the vulnerable addict is placed into an institutional care and full or partial guardian is not appointed, the institution will become the full or partial guardian.<sup>52</sup>

### **19. Who is entitled to apply for the measure?**

The list of applicants entitled to apply for appointing of guardians or partial guardians is the same as the list persons entitled to apply for deprivation or limitation of legal capacity. See: answer to question 12. Only parents, spouses, or children (as well as their official representatives) of the person who is addicted to gambling are entitled to apply for the restrictions of visiting gambling facilities or participating in gambling.<sup>53</sup>

### **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?**

Consent of the vulnerable adult is not required for the application of state-ordered measures. For the appointment of a full or a partial guardian, see question 17. Interestingly, if a minor is placed under a minor guardianship measure, the minor's opinion must be considered.<sup>54</sup> However, consent or consideration of the opinion is not explicitly required for a vulnerable adult. Yet, both the Constitution and ECHR protect the right to private life, which means that the interference with it shall be proportionate, and less restrictive measures shall be applicable in the first place. Whether or not the domestic courts interpret this provision as a requirement to consider the opinion of a vulnerable adult, is unclear due to the absence of the case law on this point.

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<sup>50</sup> Civil Code, Articles 36 and 39.

<sup>51</sup> Civil Code, Article 65.

<sup>52</sup> Civil Code, Article 66.

<sup>53</sup> Civil Procedural Code, Article 300<sup>2</sup>.

<sup>54</sup> Civil Code, Article 63.

**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.**

As to deprivation and limitation of legal capacity, which results in the appointment of a guardian, see question 13.

- a.** Concerning compulsory mental health treatment, the limitation of visiting gambling facilities or participating in gambling does not presuppose a mandatory requirement for legal representation. However, in cases concerning compulsory mental health treatment, the prosecutor and a legal representative – full or partial guardian – must be present. The presence of a psychiatrist is also required by law.<sup>55</sup>

Free legal aid can be available to persons in the proceeding concerning placement in compulsory psychiatric care.<sup>56</sup> However, such possibilities are limited in the cases of the limitation of visiting gambling facilities and participation in gambling.
- b.** There are no mandatory requirements for family members unless they are otherwise parties to the proceeding or CGO's to participate in the proceedings.
- c.** Medical expertise is always compulsory for cases concerning compulsory medical treatment to establish the presence of a mental disorder.<sup>57</sup> In the procedures concerning limiting visiting gambling facilities or participating in gambling medical expertise is not explicitly required by law.
- d.** As a general rule, the person to whom state-ordered measures are applied must be heard.<sup>58</sup> The requirement to be heard, however, does not per se mean that person's opinion is binding for the court. As explained in question 20, it is unclear to what extent the person's opinion is considered in practice.
- e.** There is a possibility to appeal the decision of the court of first instance to a Court of Appeal.<sup>59</sup>

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<sup>55</sup> Civil Procedural Code, Article 341.

<sup>56</sup> Free Legal Aid Act, Article 14.

<sup>57</sup> Psychiatric Care Act, Articles 3 and 11,

<sup>58</sup> Civil Procedural Code, Articles 341 and 300<sup>4</sup>.

<sup>59</sup> Civil Procedural Code, Article 352.

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

All courts' decisions are made public. However, personal data must be concealed.<sup>60</sup> Courts may be obliged to send their judgments to various organs. For instance, the decisions concerning the limitation of visiting gambling facilities or participating in gambling shall be forwarded to the authorities responsible for organisation and supervision of gambling.<sup>61</sup> The decision concerning deprivation of legal capacity or limitation of legal capacity shall be sent to the Guardianship Authority and the voter's register.<sup>62</sup>

*Appointment of representatives/support persons*

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

- a. **what kind of requirements does a representative/support person need to meet (capacity, relationship with the adult, etc.)?**
  - b. **to what extent are the preferences of the adult and/or the spouse/partner/family members taken into consideration in the decision?**
  - c. **is there a ranking of preferred representatives in the law? Do the spouse/partner/family members, or non-professional representatives enjoy priority over other persons?**
  - d. **what are the safeguards as to conflicts of interests at the time of appointment?**
  - e. **can several persons be appointed (simultaneously or as substitutes) as representative/support person within the framework of a single measure?**
  - f. **is a person obliged to accept appointment as representative/support person?**
- a. Any natural person that has reached the age of majority and has full legal capacity can be appointed as full or partial guardian.<sup>63</sup> It is also required that the person is not deprived of the parental right; and that there is no

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<sup>60</sup> Закон України «Про доступ до судових рішень» від 22.12.2005 № 3262-IV [Act on Access to Courts' Decisions, 2006] <https://zakon.rada.gov.ua/laws/show/3262-15#Text>, Articles 3 and 7.

<sup>61</sup> Civil Procedural Code, Article 300<sup>d</sup>.

<sup>62</sup> Civil Procedural Code, Article 300.

<sup>63</sup> Civil Code, Article 63.

conflict of interest between the prospective full or partial guardian and the vulnerable adult.<sup>64</sup> For a person placed into institutional care (medical or social care for adults), the functions of the guardian will be provided by this institution, if another guardian has not yet been appointed. Notably, the Guardianship Authority may apply to a court to dismiss a full or partial guardian if a person is placed into institutional care.<sup>65</sup> In such cases, the institution will remain the full or partial guardian. The possibilities for the CSO or private organisations to act as full or partial guardians are not directly foreseen in the legislation.

The legislation does not provide for the possibility of having a supporting person within such measures as compulsory psychiatric care or when the limitations connected with gambling are imposed. However, those with full legal capacity may have a voluntary support person appointed. This possibility is discussed in Section IV. Additionally, the administration of the psychiatric care facilities has rather broad obligations to ensure that the rights of the persons who receive such care are protected— and in some cases, can act as a full or partial guardian. Because the obligations are broadly formulated, it is difficult to answer whether this support is individually adjusted in each case and what kind of support is provided, if any.

- b.** See the answer to questions 17 and 20. Article 60 of the Civil Code requires courts to request the opinion of the Guardianship Authority as to possible full or partial guardians. The legislation does not explicitly state the requirements to solicit the opinion of family members or vulnerable adults. Such requirements may derive from the principle of proportionality and the right to private life, yet, whether a similar interpretation is made in judicial practice is unclear.
- c.** The legislator demands priority for family members to be appointed full or partial guardians.<sup>66</sup> Family members with the closest connections and the most potent abilities to perform the tasks should be prioritised. No other ranking of the family members or other persons is established by national law. The legislator does not provide any further guidance on how the assessment of the closest connections shall be made, which means that courts often rely on the opinion of the Guardianship Authority.

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<sup>64</sup> Civil Code, Article 64. Additional requirements are established by the subordinate legislative acts, which include that a person should not have a mental disorder that requires treatment in psychiatric care or drug addiction institutions or be convicted of a serious crime. Additionally, if they previously acted as guardians or partial guardians, and, due to their fault, these protection measures were terminated, they should not be appointed in these rolls again. Rules on Guardianship, para. 3.2.

<sup>65</sup> Civil Code, Article 75.

<sup>66</sup> Civil Code, Article 63.

- d. In accordance with the Civil Code, the person, whose behaviour and interests are in conflict with the interest of the vulnerable adult, cannot be appointed as full or partial guardian. Apart from this broad formulation, the legislation does not establish any further safeguards.
- e. Several full or partial guardians can be assigned to one person.<sup>67</sup> Limitations of number of these actors are not established.
- f. Full and partial guardians are appointed upon their applications. They cannot be appointed against their will.<sup>68</sup>

### *During the measure*

### *Legal effects of the measure*

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

The appointment of a guardian means that a person is deprived of the legal capacity to act. Under the Ukrainian law limitation of legal capacity always precedes the appointment of a guardian of a partial guardian. The substance of the deprivation of legal capacity to act is discussed *inter alia* as an answer to question 8. Appointment of a partial guardian signifies limitation of legal capacity to act; the substance of limitation of legal capacity was also discussed in conjunction with question 8. The compulsory mental health treatment or limitations of visiting gambling facilities and participation in gambling are not supposed to affect legal capacity in other relations than those directly connected with the measures. The person obviously will not be able to make valid decisions to refuse psychiatric care or gamble.

#### **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:**
  - **property and financial matters;**
  - **personal and family matters;**
  - **care and medical matters;**
- b. **what are the criteria for decision-making (e.g. best interests of the adult or the will and preferences of the adult)?**
- c. **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?**

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<sup>67</sup> Civil Code, Article 63.

<sup>68</sup> Civil Code, Article 63.

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

- a. The guardians and partial guardians act on behalf of a person. Their powers during deprivation or limitation of capacity have been previously discussed as the answer to question 9.
- b. The legislator has not been entirely transparent about full or partial guardians' decision-making criteria. Full and partial guardians are obliged to act to protect the civil rights and interests of the vulnerable adult, which can be seen as a criterion close to best interest assessment.<sup>69</sup> Guardians act on behalf of the vulnerable adult and are under no explicit obligation to consider his or her will and preferences. Partial guardians, however, act together with the vulnerable adult, meaning that the actions of partial guardians will be invalid without reaching consensus with the vulnerable adult. However, similarly, without reaching consensus with the partial guardian, the transactions of the adult with limited legal capacity will be invalid. Therefore, it cannot be stated that the partial guardians are always obliged to act in accordance with the wishes and preferences of the vulnerable adult.
- c. Guardians and partial guardians must report their activities to the Guardianship Authority yearly. Generally, the reports shall be submitted before 1 February, but the Guardianship Authority may alter this rule and oblige to report earlier. The reports should include information on how full/partial guardians acted to protect the rights of the vulnerable adults and how they ensured that the property of these persons was preserved.<sup>70</sup> Additionally, the Guardianship Authority must approve certain transactions in order to validate them and, therefore, must receive information about these transactions. The consent of the Guardianship Authority should be provided to all transactions that need notarial authentication regarding valuable assets, as well as to issuing any written commitment on behalf of a vulnerable adult, or giving up his or her property rights.<sup>71</sup> Guardians are under no explicit obligation to inform, consult or report to the vulnerable adults or family members about the activities.

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<sup>69</sup> Civil Code, Article 67 and 69.

<sup>70</sup> Rules on Guardianship, para 4.11.

<sup>71</sup> Civil Code, Article 71.

- d. Guardians have broadly formulated obligations, which include taking care of the person of the vulnerable adult, creating conditions where a person can satisfy his or her needs in care and medical treatment, and having necessities for living.<sup>72</sup> Partial guardians must ensure accessibility of medical treatment and that person has satisfying living conditions.<sup>73</sup> The duties of caring for education and development are laid upon the full and partial guardians of the underaged but not upon those with vulnerable adults in their care. Guardians also have a right to demand to return the person if someone is holding him or her without legal grounds.<sup>74</sup> Additionally, guardians are obliged to care about preserving the property of the person deprived of legal capacity. It means that guardians shall make necessary purchases and arrangements to preserve property or care for the person deprived of legal capacity from the income of the vulnerable adult.<sup>75</sup>
- e. The Civil Code establishes that the government determines the grounds and the size of the remuneration for full' and partial guardians' services.<sup>76</sup> As it stands, the government has not determined the ground or the size of the payments, making them challenging to receive. The Rules on Guardianship – a document adopted by specific ministries and before the adoption of the Civil Code – state that full and partial guardians must act free of charge.<sup>77</sup>

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

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

As mentioned above, full and partial guardians cannot be appointed simultaneously – an adult can have either full legal capacity, or be limited in its exercise, or

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<sup>72</sup> Civil Code, Article 67.

<sup>73</sup> Civil Code, Article 69.

<sup>74</sup> Civil Code, Article 67.

<sup>75</sup> Civil Code, Article 72.

<sup>76</sup> Civil Code, Article 73.

<sup>77</sup> Rules on Guardianship, para 4.12.

be fully deprived of legal capacity. However, a person with limited legal capacity can have several partial guardians. A person whose capacity is deprived can have several full guardians.<sup>78</sup> How these actors should act together is not regulated by the current legislation. In academic literature, it is considered that full or partial guardians should have an agreement with one another as to how to act.<sup>79</sup>

### *Safeguards and supervision*

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

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

- a. Guardianship Authorities are responsible for supervision. The local authorities create these authorities.<sup>80</sup>
- b. A Guardianship Authority supervises the activities of full and partial guardians, *inter alia*, through inspections, put differently, visits to the persons whose capacity is limited or deprived. Such inspections are supposed to be provided regularly, at least once a year, and the general public's representatives shall be engaged in these inspections.<sup>81</sup> Additionally, supervision in the form of hearing complaints may take place.<sup>82</sup> Suppose a Guardianship Authority finds that full or partial guardians are not fitted for the task or violate the rights of the persons in their care. In these cases, the authority can suggest that a court dismisses the guardian or partial guardian and appoint another person.<sup>83</sup> Indirectly,

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<sup>78</sup> Civil Code, Article 63.

<sup>79</sup> І. Дзюба, М. Зеленіна, *Опіка та піклування в цивільному праві України: Проблемні питання визначення опікунів та піклувальників*, 3 (2) Право і суспільство, 51 (2017).

<sup>80</sup> Civil Code, Article 56; Rules on Guardianship, para 4.14.

<sup>81</sup> Rules on Guardianship, para 4.14.

<sup>82</sup> Civil Code, Article 79; Rules on Guardianship, para 4.13.

<sup>83</sup> Civil Code, Article 75 and 60.



a Guardianship Authority may supervise the activities of full and partial guardians via providing consent to certain deeds; these are listed as the answer to question 25 c above. The Guardianship Authority can also establish a protection regime for the property of the person deprived or limited in the exercise of legal capacity, if adult has property in other areas of the country.<sup>84</sup> As mentioned earlier, guardians and partial guardians should report activities to the Guardianship Authority once a year (see answer 25 c).

- c. Suppose guardians or partial guardians are not fulfilling their obligations or violating vulnerable adults' rights. In these cases, there are several options. Firstly, any interested person, such as a family member or vulnerable adults themselves, may apply to the Guardianship Authority or a court to complain about the actions.<sup>85</sup> Secondly, the Guardianship Authority may apply to a court to dismiss the guardian or partial guardian.<sup>86</sup> There are no other administrative sanctions prescribed. The Criminal Code of Ukraine establishes the possibilities for criminal liability in case of abuse of the obligations that led to damage to a vulnerable adult.<sup>87</sup>
- d. The general provisions of the Civil Code and the Rules on Guardianship establish possibilities to demand compensation for the financial losses caused by (former) full or partial guardians who unduly fulfilled their obligations.<sup>88</sup> The Guardianship Authority is entitled to claim the damage on behalf of the person if he or she cannot claim the damage themselves.
- e. Guardians bear full financial responsibility for the transactions they enter on behalf of vulnerable adults. They also have tort liability for the actions of the persons deprived of legal capacity unless they can prove they are not responsible for the damages caused, considering their encompassing obligations.<sup>89</sup> Persons with limited capacity to act bear their own financial responsibility in the contractual relationship and are liable for the damages they inflicted.<sup>90</sup>

## **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;**

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<sup>84</sup> Civil Code, Article 74.

<sup>85</sup> Civil Code, Article 79.

<sup>86</sup> Civil Code, Article 75.

<sup>87</sup> Кримінальний кодекс України від 05.04.2001 № 2341-III [Criminal Code] <https://zakon.rada.gov.ua/laws/show/en/2341-14#Text>, Article 167.

<sup>88</sup> Civil Code, Chapter 82; Rules on Guardianship, para 4.16.

<sup>89</sup> Civil Code, Articles 41 and 1184.

<sup>90</sup> Civil Code, Article 37.

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

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

- a. See answer to question 25 c.
- b. Unauthorised acts of adults who are deprived of legal capacity are seen as void automatically (unless they concern petty domestic transactions that a guardian can authorise).<sup>91</sup> Unauthorised acts of adults whose capacity is limited are voidable and can be recognized void by a court.<sup>92</sup> Unauthorised actions of full and partial guardians, when they acted without the consent of a Guardianship Authority, are automatically considered void. However, there is a possibility of recognising the transaction as valid in a court.<sup>93</sup>
- c. See question 27 c concerning full and partial guardians The person deprived of legal capacity cannot be considered liable for ill-conceived acts. A person with limited legal capacity bears general civil law responsibility for ill-conceived transactions (see question 27 e).
- d. See questions 23 d and 27 c.

***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.**

See questions 11-13 and 27 c.

***Reflection***

**30. Provide statistical data if available.**

Statistical data are not available. For data concerning the number of decisions on deprivation or limitation of legal capacity, see question 3.

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<sup>91</sup> Civil Code, Article 226.

<sup>92</sup> Civil Code, Article 223.

<sup>93</sup> Civil Code, Article 224.

**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?**

Regarding the limitation and deprivation of legal capacity to act, see the discussion that answers question 15. Regarding full and partial guardianship, the answers provided in Section III indicate a lack of the means to supervise the full and partial guardians effectively. One of the possible reasons for this is that the criteria for decision-making are not explicitly established. It is unclear whether full or partial guardians should act according to the vulnerable adult's best interests, or according to the adult's wishes and preference. And if the latter is the case, how shall guardians determine and follow those wishes and preferences. The obligation to inform the persons whose capacity is deprived or limited, as well as the manner in which such information shall be provided, are also not specified. The obligations of full and partial guardians regarding property and financial matters are formulated rather broadly, making it difficult for the courts and Guardianship Authorities to detect the undue activities of the guardians. Similarly, there is no legal obligation to provide any education to full and partial guardians.

The opinion of the vulnerable adult concerning their appointment of guardians is not decisive, and the duty of the courts to act in accordance with this opinion is not explicitly stated. The role of full and partial guardians is often seen as charity for persons with disabilities, rather than a role for which one receives substantial support from the state. The possibilities of receiving remuneration are obscured in the legislation.

The major concern is that both full and partial guardianship measures are not particularly tailored to vulnerable adults' needs. It is hardly possible to see how guardianship could aim at support, rather than substitute an adult in his or her decision-making. Neither does this institute attempt to empower a person with mental disabilities by helping to develop his or her existing capacities.

There has been a substantial discussion on the effectiveness of deprivation of liberty safeguards for persons deprived of legal capacity. Question 1 highlights that the Constitutional Court considered the national law provisions that allow "voluntary" hospitalisation of a person deprived of legal capacity to psychiatric care based on the guardians' consent alone arbitrary and non-constitutional. The provision was altered. However, the legislator decided that now the Guardianship Authorities should authorise the "voluntary" placement in psychiatric care institutions instead of the courts and the guardians. In 2018, the Constitutional Court

repeated its legal position and recognised such “voluntary” arrangements as arbitrary and non-constitutional.<sup>94</sup>

## **SECTION IV – VOLUNTARY MEASURES**

### *Overview*

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

There are several voluntary measures established in the national legal system. In this questionnaire, we will distinguish between those measures established based on the agreement of the private actors, and primarily based on the civil law provisions, and those based on the social care legislation. We will start the inquiry with the so-called civil law voluntary measures, which are listed below:

- a) Power of Attorney [представництво за довіреністю, *predstavnitstvo za dovorennistyuu*]

An ordinary power of attorney is a document given by a legally capable person – a principal – to another person – an attorney – authorising the attorney to represent the principal’s interest in various types of civil and public law relations.<sup>95</sup> Power of attorney can thus be seen as an essential instrument giving the possibility to appoint a self-chosen representative to act before public authorities or private entities.

- b) Support person [помічник, *pomichnik*]

As explained in Section I of this questionnaires, one of the novelties of the Civil Code of 2003 was the formal recognition of the role of support persons. Any legally capable adult who, due to the state of his or her health, cannot exercise the right or obligation on their own can select a support person. The person, who requires assistance, can then request the Guardianship Authority to register the selected person as support person and provide certificate confirming the support person’s status.<sup>96</sup>

- c) Lifelong care [довічне утримання (догляд), *dovichne utrimannya (doglyad)*]

An agreement on lifelong care is a contract in accordance with which a person (grantor) provides to another person (carer) some property that

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<sup>94</sup> Judgment of the Constitutional Court in the case on hospitalisation of persons deprived of legal capacity to mental health institutions.

<sup>95</sup> Civil Code, Article 244.

<sup>96</sup> Civil Code, Article 78.

has significant value (such as a house, apartment, or car) in exchange to the promise that the carer will maintain and care for the grantor until the grantor's death.<sup>97</sup> The grantor can thus choose the person, who will provide the voluntary care and maintenance for him or her.

- d) Accompanying personal assistant [супроводжуюча особа, *suprovodguyucha osoba*]

The national legislation allows persons with severe disabilities to be accompanied by personal assistants. The list of persons entitled to have accompanying personal assistants is foreseen in Article 4 of the Law of Ukraine on the Fundamentals of Social Protection of Persons with Disabilities.<sup>98</sup> Yet, the exact functions of social assistants are not regulated in the national legislation. Such assistance is provided based on the arrangement between the person with a disability and accompanying personal assistants.

**33. Specify the legal sources and the legal nature (e.g. contract; unilateral act; trust or a trust-like institution) of the measure. Please consider, among others:**

- a. the existence of specific provisions regulating voluntary measures;**  
**b. the possibility to use general provisions of civil law, such as rules governing ordinary powers of attorney.**

Most of the mentioned above civil law voluntary measures, except the provisions accompanying personal assistance, are regulated in the Civil Code of Ukraine. The Civil Code defines the legal essence of voluntary measures and how they should be implemented. The legal rights of the accompanying personal assistants are established in the Fundamentals of Social Protection of Persons with Disabilities. Notably, although the Civil Code of Ukraine is a legislative act that has an important bearing on the topic of the present discussion, other normative acts regulate the issues. For instance, the Ministry of Justice decrees regulate how the valid power of attorney must be signed and validated.<sup>99</sup> Another example of subordinate legal acts is that the local authorities can also establish how assistants are supposed to be registered.

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<sup>97</sup> Civil Code, Article 744.

<sup>98</sup> Закон України «Про основи соціальної захищеності осіб з інвалідністю в Україні» від 21.03.1991 № 875-XII [Law on the Fundamental of Social Protection of Persons with Disabilities] <https://zakon.rada.gov.ua/laws/show/875-12#Text>, Article 4.

<sup>99</sup> Наказ Міністерства юстиції України «Про затвердження Порядку вчинення нотаріальних дій нотаріусами України» від 22.02.2012 №296/5 [Notary Deed Ordinance] <https://zakon.rada.gov.ua/laws/show/z0282-12#Text>.

The Civil Code foresees the possibility of using a power of attorney, supporting persons and agreement for lifelong for persons with full legal capacities, thus, making it impossible for persons deprived or limited in their legal capacity to use the measures.

**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.**

Although the legal system of Ukraine provides the possibility for appointing self-chosen representatives or support persons, as it stands, the institute of advanced directives has not yet been introduced to the legal system.

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

The legislation of Ukraine is not explicit as to the issues that cannot be delegated with the help of an ordinary power of attorney. The legislative acts only require that a power of attorney should explicitly specify the actions delegated to the attorney.<sup>100</sup>

Yet, Article 272 of the Civil Code prescribes that matters of a strictly personal nature cannot be delegated and shall be dealt with by persons themselves. Therefore, a power of attorney allows an attorney to represent a person in matters related to finances and property, as well as in any other matters that do not have a strictly personal nature. However, such matters as concluding marriage or making a testament are considered strictly personal and cannot be delegated to the attorney.<sup>101</sup> The Civil Code classified the right to medical assistance, including the consent to medical intervention, as a matter of strictly personal nature.<sup>102</sup> Therefore, a power of attorney shall not suffice to consent to or refuse a medical treatment on behalf of the principal.

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<sup>100</sup> Notary Deed Ordinance, Chapter 4, para. 2.

<sup>101</sup> Family Code, Article 28.4

<sup>102</sup> Civil Code, Article 284.

Support person's powers are regulated in Article 78 of the Civil Code. It states that support persons have the right to receive different financial benefits, such as salary or pension, as well as correspondence on behalf of the person who requires assistance. Support persons are also entitled to enter into ordinary domestic transactions on behalf of the person and represent a person before those public authorities that provide general service functions to the population. Support person can also represent the vulnerable adult person before the courts, but separate power of attorney is required in such cases.

Regarding the agreement on lifelong care, the carer under Articles 749-750 of the Civil Code shall provide all types of care and material support established in the contract. Carers must also take care of the burial of the grantor when they die, even if this obligation is not foreseen in the agreement on lifelong care. The contract can oblige carers to provide a place to live for a grantor or a third person. Suffice it to mention that in the practice of the Supreme Court of Ukraine, it is considered that if carers provide only financial support but do not personally care for the person, the obligation under the agreement on lifelong care will be breached. The Supreme Court also considered that the carer must be personally present to provide care for the grantor.<sup>103</sup>

The obligations of accompanying personal assistant are not directly regulated by law. The legislation provides such assistants with certain rights. They include priority in various types of customs, discount or free-of-charge access to public transport, and receiving priority services ahead of the queue at all cashier desks or organisations that provide services to the population.<sup>104</sup> These assistants, thus, do not have any prescribed obligations related to the issues of finances or personal nature.

### ***Start of the measure***

Legal grounds and procedure

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

All the civil law voluntary support measures have a private law character, meaning they are based on the parties' agreement and not on the state authority decision to attribute the measure. Below, we describe how these measures enter into legal force.

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<sup>103</sup> Постанови Верховного Суду від 18.08.2021 справа № 645/3284/19 [Judgment of the Supreme Court of 18 August 2021, case No 645/3284/19] <https://zakononline.com.ua/court-decisions/show/99088261>.

<sup>104</sup> Law on the Fundamental of Social Protection of Persons with Disabilities, Article 38

The principal gives an ordinary power of attorney. It shall have the same form as the transaction it is granted for (it often means that a power of attorney needs a notarial deed). For the cases when a power of attorney is given to enable the attorney to receive a salary, other similar incomes or correspondence, it shall be done in writing and certified by the official representative of the place where the principal work, studies, lives or receives healthcare services, or the representative of the post office.

There are two ways the support persons can be appointed and registered. Firstly, the person who needs assistance can apply for such appointment and registration to the local authorities. Secondly, a special portal for state e-services has been created. A person who requires assistance can send the application for appointment and registration of support person through such portal.<sup>105</sup>

The lifelong care agreement must be concluded in the form of a notarial deed.

No formalities are needed in order to establish relationships between the vulnerable adult and the accompanying personal assistant. The adult must just show a certificate specifying his or her group of disabilities in accordance with the Ukrainian legislation.<sup>106</sup>

**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.**

An ordinary power of attorney is usually a notarial deed. However, other valid ways of certifying power of attorney exist for military servants, principals receiving medical care, and those living in places where a notary is unavailable. The head or the deputy head of an organisation where the grantor receives treatment or provides military service can certify its validity. For those who live in places where the notary services are not accessible, the person who received such an assignment from the local authorities can certify some of the powers of attorney.<sup>107</sup> Powers of attorney that only concern receiving income or correspondence can be approved by the office where a person works, receive treatment, or lives.

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<sup>105</sup> ПорталДІЯ (Єдиний державний вебпортал електронних послуг і Реєстру адміністративних послуг) [The Unified State Web Portal of Electronic Services and the Register of Administrative Services] <https://guide.diiia.gov.ua/view/reiestratsiia-pomichnyka-diiiezdatnoi-fizychnoi-osoby-iaka-za-stanom-zdorovia-ne-mozhe-samostiino-zdiisniuuvaty-svoii-prava-i-vykon-871e4afa-23f4-4566-870c-56cd38f1b731>

<sup>106</sup> Law on the Fundamental of Social Protection of Persons with Disabilities, Article 4.

<sup>107</sup> The powers to certify a power of attorney for this group cannot concern the real estate management, shares in a company, or the right to use the vehicles.



The registration of support persons is conducted based on the decision of the executive organ of the local authority.

An agreement on lifelong care must be done in a form of a deed certified by a notary.

The legislation does not prescribe the procedure for establishing the accompanying personal assistant.

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

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

A power of attorney enters into force when the parties agree on it in a form prescribed by law. As described above, depending on the substance of a power of attorney, the law may require a simple written document (such as for receiving various incomes, correspondence or notarial deeds). A notary shall register those powers of attorney concluded as notarial deeds in the State Register for Powers of Attorney.

A support person is appointed upon the application to the executive committee of the local authority. The documents that shall be provided with the application include certificates concerning the state of health of the vulnerable adult and of the support person (to ensure that the latter can fulfil the functions). The period for deciding is one month, and the procedure is free of charge. If the authority consents that the support person can be appointed, it will register support person and issue a certificate.

As mentioned above, the agreement on lifelong care shall be concluded as a notarial deed. It may also require additional official registration if the real estate is the object of the contract.<sup>108</sup> Rights and obligations foreseen in the agreement become relevant after the agreement is concluded in the form prescribed by law.

There is no need to register an accompanying personal assistant. The legislation does not regulate the measure explicitly.

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<sup>108</sup> Civil Code, Article 745.

*Appointment of representatives/support persons*

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

As to an ordinary power of attorney, any legally capable person can be an attorney. The legislation allows having several attorneys.

The law does not state any specific requirements for a support person, except for that he or she should be fully legally capable. The documents that should be attached to the application for registration of the support persons include the documents concerning the state of health and moral properties of the support person. It can be assumed that the support person should have a good state of health to fulfil the assignment and moral qualities that allow performing the task. The legislation does not expressly limit the number of support persons a vulnerable adult can have. The local authority's legal acts may establish other requirements a support person.

The carer in the agreement on lifelong care can be a legally capable natural or legal person. Several carers under the contract can perform their tasks jointly.

As to accompanying personal assistants, no explicit requirements as to the personality of this type of assistant are established. However, only one person can have the rights prescribed by law to this kind of personal assistant at the time.

*During the measure*

*Legal effects of the measure*

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

All the civil law measures are voluntary, which means that they are based on the free and voluntary consent of the person who needs support and the supporting person. Both parties are free to terminate the measure in the situations foreseen in the legislation or contract.

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

None of the measures influences the legal capacity of the grantor.

Powers and duties of the representative/support person

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

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

Ukrainian legislation requires that an ordinary power of attorney includes information about the powers of the attorney. The attorney can act on the principal's behalf concerning property and finances but not on matters of strictly personal nature, including concluding and termination of marriage or decisions about medical interventions. The criteria for decision-making are not specified others than that the delegated activities must be lawful, specific, and such that they can be fulfilled. The list of the rights and obligations of the attorney is not specified in the legislative acts. The parties decide upon the issue of remuneration in the agreement.

As specified above, a support person has three main competencies: to receive various types of income or correspondence, enter into ordinary domestic transactions, and represent the person before authorities and organisations. Support persons' obligations, in contrast to his/her competencies, are not specified in the legislation. However, it can be assumed that support persons must fulfil their functions diligently. Support persons' service presupposes remuneration.

The carer in the agreement on lifelong care has an obligation related to caring for the grantor's person, including providing full material support to the grantor, such

as at least three meals per day, necessary medicines, clothes, reparation and social care.<sup>109</sup> Therefore, the criterion for decision-making is decent care for the grantor unless other criteria are specified in the contract. As remuneration, the carer received the property of the grantor.

As explained above, the issues of duties, functions and appointment of the accompanying assistants are not regulated by law. The parties are free to establish their obligations in a contract.

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

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

Various civil law voluntary measures can exist simultaneously. The same vulnerable adult can give an ordinary power of attorney to one or several attorneys; have one or more support person registered and have a personal assistant accompanied him or her. The vulnerable adult and multiple attorneys and or support persons are free to contractually regulate the distribution of the tasks and the cooperation between the attorneys and the support persons. In some cases, support persons may need power of attorney to perform certain functions.

**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?**

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<sup>109</sup> Постанова Верховного Суду від 24.06.2021 справа № 644/1566/19 [Judgment of the Supreme Court of 24 June 2021, case No 644/1566/19] <http://iplex.com.ua/doc.php?reg-num=97926385&red=1000037ec7ac698adc30f531529443f3587708&d=5>; Постанова Верховного Суду від 28.10.2019 справа № 536/2258/17 [Judgment of the Supreme Court of 28 October 2019, case No 536/2258/17] [https://verdictum.ligazakon.net/document/85325071?utm\\_source=biz.ligazakon.net&utm\\_medium=news&utm\\_content=bizpress05&\\_ga=2.46336487.1101378585.1660306204-716183225.1595329699](https://verdictum.ligazakon.net/document/85325071?utm_source=biz.ligazakon.net&utm_medium=news&utm_content=bizpress05&_ga=2.46336487.1101378585.1660306204-716183225.1595329699)

- 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?**

Ordinary power of attorney and having a support person require full legal capacity and cannot be combined with state-ordered measures. If full or partial guardianship is established on the grantor, the guardians will represent the grantor, but the agreement does not cease to exist.

### *Safeguards and supervision*

**45. Describe the safeguards against:**

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

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

As to the ordinary power of attorney, the safeguards provided in the legislation are primarily related to the appointment of the attorney rather than the attorney's further actions. The safeguards comprise the notary's obligation to make sure that the attorney is legally and mentally capable and reached the age of majority.<sup>110</sup> Should there be any doubts concerning the capacity of the future attorney to fulfil his or her role, the notary must request the Guardianship Authority, whether the future attorney's legal capacity was limited or deprived. As to unauthorized or ill-conceived acts after a power of attorney was made in the form of a notary deed, an additional safeguard was created for those transactions that an attorney enters on behalf of a person in the form of a notary deed. Suppose the notary who certifies such a deed is uncertain whether the attorney is authorised to act on behalf of the principal. In that case, the notary may submit the request to the principal to clarify the authorization.

The legislation contains minimal safeguards against undue actions of support persons in the civil law sense. The only safeguard that is explicitly regulated is the possibility of the Guardianship Authority to refusing to appoint and register a support person.

The Civil Code contains specific safeguards against undue actions of a carer in a lifelong care agreement. These include the prohibition for a carer to sell, donate or

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<sup>110</sup> Notary Deed Ordinance; Закону України «Про нотаріат» від 02.09.1993 № 3425-ХІІ [Act on Notary] <https://zakon.rada.gov.ua/laws/show/3425-12#Text>, Article 43.

exchange property provided in accordance with the agreement on life-long care while the grantor lives. The property transferred under the agreement cannot be sold compulsorily under an enforcement order during the grantor's lifetime. The fact that the property loss, destruction or damage does not terminate the agreement can be also seen as a safeguard against undue action of a carer.

Safeguards against undue actions of the accompanying personal assistant and social services are provided for in the legislation.

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

**Specify the legal sources. Please specify:**

**a. is supervision conducted:**

- **by competent authorities;**
- **by person(s) appointed by the voluntary measure.**

**b. in each case, what is the nature of the supervision and how is it carried out?**

**c. the existence of measures that fall outside the scope of official supervision.**

As the principal is a legally capable person, he or she supervises the actions of the attorney him/herself. When an attorney acts on behalf of a principal, it must be checked whether a power of attorney has authorised the attorney for such actions. For instance, if the attorney represents the principal's interests in a court, the court must check that the attorney is authorized to act. A notary who certifies a power of attorney has certain control functions related to checking whether a future attorney has legal capacity. A principal can also recall power of attorney. However, there are no mechanisms allowing authorities (on their initiative) to check if the attorney's obligations are fulfilled diligently.

The legislation does not provide for any specific supervision of the actions of the support person. As vulnerable adults who have support person are fully legally capable that are supposed to conduct supervision themselves.

There are possibilities for judicial control of the agreement of lifelong care. In cases when it is alleged that the carer does not fulfil his or her obligations diligently, the vulnerable adult can apply to court for enforcement of due performance of obligations or for termination of the contract and restoration of the property to him/her.

No mechanisms for controlling accompanying personal assistants are established in Ukrainian law.

### *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.**

An ordinary power of attorney is terminated in the following cases when: it expires; a principal terminates (recalls) it; the attorney refuses to represent the principal; a principal dies, is declared by court fully or partly legally incapable, or is declared missing; and an attorney dies, is declared by court fully or partly legally incapable or a legal person is terminated.

The support person's powers cease to exist when a vulnerable adult makes a written application to the local authority, stating that the person no longer requires a support person. The support person's powers are also terminated in case the vulnerable adult or the support person dies. The functions cease to exist in case the support person and/or the vulnerable adult is deprived or limited in their capacity to act.

The agreement of life-long care terminates by death of the vulnerable adult or by court decision in cases when the carers do not diligently fulfil their obligations or one of the parties' requests termination.

As to accompanying personal assistance, the way the measure is terminated is not foreseen in the legislation. This means that the assistance is terminated upon death of either of the parties or the parties' agreement.

Precise normative regulation of the termination of measures is the key to preventing human rights abuses. Among the described voluntary measures, the most problematic is the life-long care agreement. Therefore, judicial control in case of termination is absolutely necessary.

### *Reflection*

**48. Provide statistical data if available.**

The statistical data are not available.

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

The discussion in Section IV of the rapport indicates that in Ukrainian law, the functions and obligations of the support person and accompanying personal assistant are almost unregulated. Similarly, the safeguards against abuse of these actors and other actors involved in voluntary support measures are poorly regulated. Most of the existing safeguards are formal and concern whether there are powers in the broad sense to conclude an agreement. This legislative design provides few possibilities for the vulnerable adult to successfully protect his or her interests. The mechanisms for supervision of the actual actions of the voluntary supporters are mostly limited to judicial supervision. Judicial supervision as the primary form of control may be challenging for many vulnerable adults whose factual access to court can be restricted due to their vulnerability.

Notably, voluntary civil law measures can be initiated mainly to persons whose capacity has not been limited or deprived. This provides the limited possibility of receiving support for those with limited or deprived capacity.

The current judicial practice primarily reflects on the issues arising from the agreement on lifelong care.<sup>111</sup> Most cases are those where the applicant has been a grantor. The case practice typically emphasises that the agreement on lifelong care presupposes not only material maintenance of a person but also care of other types, depending on the grantor's needs. The judicial practice also addresses that lifelong care agreements cannot be terminated unilaterally but only in court.

## **SECTION V – EX LEGE REPRESENTATION**

### ***Overview***

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

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<sup>111</sup> See also Верховний Суд України, Практика розгляду судами цивільних справ про визнання правочинів недійсними [Supreme Court of Ukraine, Practice in Civil Cases on Recognition of Transactions as Void]: [https://www.viaduk.net/clients/vsu/vsu.nsf/\(print\)/42F78B0BAAD38DCAC2257B7C0044DC05](https://www.viaduk.net/clients/vsu/vsu.nsf/(print)/42F78B0BAAD38DCAC2257B7C0044DC05)



The legal system does not provide possibilities for *ex lege* representation.

### *Start of the ex-lege representation*

#### *Legal grounds and procedure*

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

#### *Representatives/support persons*

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

### *During the ex-lege representation*

#### *Powers and duties of the representatives/support person*

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

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

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

*Safeguards and supervision*

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

*End of the ex-lege representation*

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

*Reflection*

**60. Provide statistical data if available.**

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

*Specific cases of ex lege representation ex lege representation resulting from marital law and/or matrimonial property law*

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

The Family Code includes provisions that all essential family matters shall be decided by spouses jointly according to the principles of equality.<sup>112</sup> The spouses are

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<sup>112</sup> Family Code, Article 54.

supposed to manage common matrimonial property based on each other's consent.<sup>113</sup> If a contract concerning the matrimonial property is signed, it is assumed that the spouse's consent exists.<sup>114</sup> An agreement concluded by one of the spouses creates obligations for the other if made in the family's interests.

A spouse may submit a complaint to a court to recognise the transactions not based on the consent as void. For contracts that are supposed to be registered as notary deeds, the deeds requiring state registration, or such that concern especially valuable property, the spouse's consent shall be written and often certified by a notary.

Only a legally capable spouse can conclude agreements. If a person's legal capacity is limited, he or she can only enter ordinary domestic transactions. For other transactions, consent of the partial guardian is required. If the partial guardian does not consent, there is a possibility of complaining about such actions to courts or Guardianship Authorities.<sup>115</sup> In Section II of the questionnaire, the legal consequences of deprivation and limitation of legal capacity to act have been discussed in detail.

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

The possibilities for the administration of the property of spouses are not foreseen in Ukrainian Family Code as a general rule. However, if one of the spouses is deprived of legal capacity, and the other spouse acts as a guardian, the guardian can manage the property.

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

The Civil Code contains provisions on *negotiorum gestio*.<sup>116</sup> These concern situations where a person – gestor – does not have the authority to act and voluntarily

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<sup>113</sup> Family Code, Article 65.

<sup>114</sup> Family Code, Article 65.

<sup>115</sup> Civil Code, Article 79.

<sup>116</sup> Civil Code, Articles 1158-1160.

chooses to act to protect the principal's interests. Usually, *negotiorum gestio* becomes relevant when a danger to property occurs suddenly, and a gestor cannot ask for the principal's consent to such actions but can take actions to protect property. However, *negotiorum gestio* refers not only to property but any kind of material interests of the principal.

The legislator obliges a gestor to inform the principal about the actions taken as soon as possible. If the actions are approved, they can be considered an agreement between the parties. Gestors should receive compensation for the factual losses only if the principals were informed about the gestor's actions.<sup>117</sup>

A person with a disability or a person deprived or limited in the exercise of legal capacity can be a gestor; no limitations in this regard are imposed by national law. However, Ukrainian legislation does not allow viewing guardians as gestors because they have obligations related to protecting property. *Negotiorum gestio* can have a bearing on other situations where the principal is a person deprived or limited in the exercise of legal capacity or is a vulnerable adult and where the gestor is not a guardian.

## **SECTION VI – OTHER PRIVATE LAW PROVISIONS**

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

Article 1029 of the Civil Code defines the management of property agreements. These are agreements where a person – the installer – provides another person – a manager – with the property that the installer owns. The manager is obliged to manage this property for a fee. However, if the owner of the property is deprived of or limited in legal capacity, a full or partial guardian will be considered an installer.<sup>118</sup>

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

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<sup>117</sup> Civil Code, Article 1160.

<sup>118</sup> Civil Code, Article 1032.

There are no advanced planning mechanisms embedded in the national laws.

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

- 67. Provide an assessment of your system in terms of empowerment of vulnerable adults (use governmental and non-governmental reports, academic literature, political discussion, etc.). Assess your system in terms of:**
- a. the transition from substituted to supported decision-making;**
  - b. subsidiarity: autonomous decision-making of adults with impairments as long as possible, substituted decision-making/representation – as last resort;**
  - c. proportionality: supported decision-making when needed, substituted decision-making/representation – as last resort;**
  - d. effect of the measures on the legal capacity of vulnerable adults;**
  - e. the possibility to provide tailor-made solutions;**
  - f. transition from the best interest principle to the will and preferences principle.**

The Ukrainian legal system has not yet transitioned from substituted to supported decision-making. The existence of full deprivation of legal capacity signals that substituted decision-making is the primary mechanism of protection of vulnerable adults. The legislation on deprivation of legal capacity does not put the transition process in the spotlight so far. There is no obligation for guardians to trace and follow the wishes and preferences of the adult whose capacity has been deprived.

The role of wishes and preferences of the vulnerable adults is not particularly spotlighted, even in situations where legal capacity is limited. On the one hand, a partial guardian cannot act without the vulnerable adult's consent. On the other, if a partial guardian refuses to act, the role of the wishes and preferences of the person is not determining. The wishes of the person are thus not decisive.

The Constitutional Court of Ukraine has led a more straightforward discussion regarding the disproportionality of the limitation of rights for those deprived of legal capacity. For instance, it was considered that a person deprived of the legal capacity to act should preserve the possibility to apply to authorities and courts and have their cases heard (see question 1). The Court highlighted the issues related to the necessity of legal safeguards in cases the will of the guardian substitutes for the wishes of the person not to receive psychiatric care (see questions 1

and 31). This practice of the Constitutional Court allows for reconsidering the effect of the full deprivation of legal capacity on adults. However, whether similar reasoning will apply in other areas of legal relations by both authorities and courts remains to be seen.

Among the relatively recent legislative changes, the legal possibilities to receive some forms of support in decision-making shall be highlighted. In 2019, the Social Service Act was adopted. The act lays down options to obtain various social services, including those that are supposed to aid in the support of vulnerable adults. Among such services, social support should be especially spotlighted. The standard for this social service provision presupposes support in the determination of ways to solve problems, monitoring of assigned tasks, help in understanding the meaning of actions and/or development of the ability to manage them, and training and development of skills aimed at overcoming or minimising difficult life situations.<sup>119</sup> Some of these abilities that are supposed to be trained during such social services are the mental abilities assessed for deprivation or limitation of legal capacity to act. A wide array of other social protection services, such as supported living and social adaptation, can be essential in supporting decision-making. However, the mechanism for obtaining social services is rather complicated. Decision-making about social services is often dependent on the resources of local authorities. Therefore, estimating how and how often the support mechanisms are applicable in practice is difficult.

It is also important to highlight that legislation on social services establishes both the principle of voluntariness of services and the best interest of the users of social services. Although these principles are often reconcilable, they may also conflict. It remains to be seen how the conflicts between these principles will be resolved.

In 2021, the Government adopted the Plan to Implement the Convention on the Rights of Persons with Disabilities Until 2025.<sup>120</sup> The Plan specifically addressed the issue of transition from substituted to supported decision-making. It suggests that the various ministries provide a comparative overview of the supported decision-making models implemented in various countries until October 2023. The plan also suggests that governmental ministries study the possibilities of altering the national legislation to transition from substituted to supported decision-making (until February 2024). Considering the war, it remains to be seen whether and how these plans will be implemented within the suggested deadlines.

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<sup>119</sup> Social Support Standard for Persons or Families in Difficult Situations, Section I para 3. Similar social service, but with a different standard of care, also exist in Social Support Standard for Children that Lack Parental Care.

<sup>120</sup> National Plan for Implementation of the Convention on the Rights of Persons with Disabilities Until 2025.

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

For the past decade, the legal system has undergone some transformation regarding the protection that shall be provided. This is especially visible in procedural relations concerning persons whose capacity is impugned. Examples of such transformation that improves protection are the increased obligation of the courts to hear a person whose capacity is impugned, as well as the possibility to appeal the decisions for persons deprived of legal capacity. It is also important to remark that the period for deprivation of legal capacity is currently limited and shall not exceed two years. It can be questioned why similar safeguards on time limitation have not yet been implemented for persons with limited capacity.

However, there is always much room for improvement. As mentioned in the previous parts of the report, the obligations of voluntary and state-appointed representatives are often formulated vaguely. These vague formulations may often signify difficulty in proving that the representatives have duly fulfilled their obligations. Safeguards against undue influence, abuse, etc. can be sharpened. In particular, clarifying the standards for supporters' decision-making appears relevant: whether it is in the best interest or wishes and preferences, as well as the steps that shall be made for the assessments within these standards.

The mechanisms for supervision of the actual actions of supporters are mostly limited to judicial supervision. There are also other extraordinary means of supervision, such as the possibility of complaining to the Ombudsman. However, these mechanisms do not ensure regular control. Judicial supervision as the main form of supervision may be challenging for many vulnerable adults whose factual access to court can be restricted due to their vulnerability. In case of full and partial

guardians, the Guardianship Authorities are also charged with the tasks of supervision, particularly through inspections. However, due to the absence of specific protection standards, such supervision may often be only formal.

As to institutional care, the mechanism of appeal and complaints are essential to prevent cases of inhumane and degrading treatment.<sup>121</sup> As previously highlighted, the Constitutional Court has previously ruled that persons deprived of legal capacity shall preserve the right to complain and appeal to authorities. Still, the possibility to complain is in practice not well accessible for many vulnerable adults, and access to justice can be hindered despite formal legal accessibility. The mechanisms and the standards for regular monitoring and prevention against abuse remain to be further developed.

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<sup>121</sup> See further М. Гнатівський, В. Климчук, І. Сенюта. *Механізм реабілітації жертв катувань в Україні: аналітичний звіт*, Council of Europe (2021).