**Questionnaire**

**Legal Protection and Empowerment of Vulnerable Adults**

**General instruction:**

Please write your national report in the form of answers to the questions of thequestionnaire.

The deadline for submission of the national reports is **1 September 2022**.

Please send your report by that date per e-mail as a MS-Word file to Rieneke Stelma-Roorda (h.n.roorda@vu.nl).

The length of your National Report will largely depend on the legal situation in your jurisdiction, but it is expected to be somewhere **between 30 to 50 pages** (including questions).

Please write your report in British English, in MS-Word, using letter type Times New Roman, letter size 11. Please use Intersentia authors guidelines (to be sent per separate mail).

Please assure that your report is written in correct English.

The FL-EUR members are free to write their National Reports alone or to involve co-authors. For technical support (such as language revision, etc.) a sum of €500 will be made available per report regardless the number of authors. This amount will be transferred to the authors upon submitting the final version of the report.

If there is something in your country's law that you think is worth reporting that has not yet been included, add it to your report.

Please refer to the relevant legal provisions, case-law and legal literature. When referring to legal provisions of your national law, please provide the text of those provisions (or the weblink to the specific provision), if possible both in the original language and an English translation. This does not apply to legal provisions that you cite in a by-the-way manner and that are not central to the questions.

Please use throughout this questionnaire the terminology used in your system, both in English translation and, in brackets, in the [Latin transcription of the] original language(s) of your jurisdiction. (Examples: the Netherlands: *full guardianship* – *[curatele]*; Russia: *full guardianship* *–[opeka]*).

During the FL-EUR conference in Lausanne on 11 October 2021 several theoretical questions related to the Reports were discussed. During the General FL-EUR meeting on 12 October 2021 in Lausanne questions from the national reporters were addressed, and the original questionnaire was slightly adapted pursuant to those questions.

You can also always contact Masha Antokolskaia with questions related to the substance, and Rieneke Stelma-Roorda for organisational questions.

**Definitions:**

**Adult:**an adult is a person who has reached the age of 18 years.[[1]](#footnote-1)

**Adult protection measures:** all measures and instruments, including*ex lege* representation (e.g. by partner or other family member); state-ordered representation (e.g. guardianship, public guardianship, institutional representation of persons in residential care); voluntary measures; and any other measures used for the purpose of adult protection, support or legal representation.

**Advance directive**: instructions given or wishes made by a capable adult concerning issues that may arise in the event of his or her incapacity.[[2]](#footnote-2)

**Attorney:** representative/support person appointed by means of a continuing power of attorney by the adult.

**Continuing power of attorney:** a mandate given by an adult with the purpose that it shall either be effective immediately, or enter into force in the future, and shall remain in force in the event of the granter’s incapacity.[[3]](#footnote-3)

***Ex lege* representation:** an adult protection measure providing legal authority to other persons to act *ex lege* (by operation of law) on behalf of the adult, requiring neither a decision by a competent authority *nor* a voluntary measure by the adult.

**Granter**: an adult giving the continuing power of attorney.[[4]](#footnote-4)

**Legal capacity**: the ability to hold rights and duties (passive legal capacity or legal standing) and to exercise those rights and duties (active capacity or legal agency).[[5]](#footnote-5)

**Mental capacity**: the *de facto* decision-making and decision-communication skills of a person.[[6]](#footnote-6)

**Representative:** a natural or legal person who acts on behalf of the adult.

**State-ordered measures**: adult protection measures, ordered by a competent state (judicial or administrative) authority, at the request of the adult or others.

**Support person:** a natural or legal person who assists the adult to legally act or who acts together with the adult.

**Voluntary measures**: any measure initiated by the adult without external compulsion *ex lege* or a decision by any competent state authority.

**Vulnerable adult:** adults who, by reason of an impairment or insufficiency of their personal faculties, are not in a position to protect their interests.[[7]](#footnote-7)

**Remarks:**

Wherever the phrase ‘partner/spouse’ is used, this also refers to ‘registered partners.’

The term ‘guardian’ has deliberately not been used in this questionnaire, even if this term may still be used in the official translations of certain jurisdictions. Often the term ‘guardian’ is linked to the combined measure of substitute decision making *and* deprivation or limitation of legal capacity (e.g. *curatele* in The Netherlands or *tutelle* in France), but in some jurisdictions, its meaning has been broadened to incorporate supported decision making without affecting legal capacity. If this term is used in your system, please explain clearly what it means and whether its meaning has changed over time.

The deprivation of liberty on the ground of “being of unsound mind” (art. 5, e) ECHR) and possible forced psychiatric treatment in such case, is outside the scope of this questionnaire, except insofar as it would be related to a measure as defined in this questionnaire.

**Abbreviations used in this questionnaire:**

**Adult**: vulnerable adult

**CRPD**: UN Convention on the Rights of Persons with Disabilities

**CSO’s:** Civil Society Organisations

**GC:** General Comment of the Committee on the Rights of Persons with Disabilities

**Hague Convention:** 2000 Hague Convention on the International Protection of Adults

**Measures**: adult protection measures

**Recommendation 2009:** Recommendation CM/Rec (2009)11 on Principles concerning continuing powers of attorney and advance directives for incapacity of the Council of Europe.

*This questionnaire consists of seven sections. In section I general questions will be posed in order to get an overview of the historical and policy background of your current system of protection and empowerment of vulnerable adults and to understand how this system operates as a whole. Section II concerns limitations of legal capacity. Support and/or representation by a state-appointed representative is the subject of section III. Voluntary measures are discussed in section IV. Ex lege representation is dealt with in section V. Any other relevant private law provisions are dealt with in section VI. In section VII the legal systems are assessed in terms of protection and empowerment.*

1. **General**

*This section concerns the general overview of your system of legal protection measures of vulnerable adults. Please write this section from an outside-in perspective, for a foreign readership. This will facilitate the comparative effort.*

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.
2. Provide a short list of the key terms that will be used throughout the country report in the original language (in brackets). If applicable, use the Latin transcription of the original language of your jurisdiction. [Examples: the Netherlands: *curatele*; Russia: *опека - opeka*]. As explained in the General Instructions above, please briefly explain these terms by making use of the definitions section above wherever possible or by referring to the official national translation in English.
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.
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.
5. Briefly address the historical milestones in the coming into existence of the current framework.
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.
7. Finally, please address pending and future reforms, and how they are received by political bodies, academia, CSOs and in practice.
8. **Limitation of legal capacity**

*This section concerns the limitation of legal capacity.*

1. If your system allows limitation of the legal capacity of an adult*, please answer questions 8 - 13; if not proceed to question 14. All reports should address questions 14 and 15.*
   1. on what grounds?
   2. how is the scope of the limitation of legal capacity set out in (a) statute or (b) case law?
   3. does limitation of the legal capacity automatically affect all or some aspects of legal capacity or is it a tailor-made decision?
   4. 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?
   5. does the application of an adult protection measure (e.g. supported decision making) automatically result in a deprivation or limitation of legal capacity?
   6. are there any other legal instruments,[[8]](#footnote-8) besides adult protection measures, that can lead to a deprivation or limitation of legal capacity?
2. Briefly describe the effects of a limitation of legal capacity on:
   1. property and financial matters;
   2. family matters and personal rights (e.g. marriage, divorce, contraception);
   3. medical matters;
   4. donations and wills;
   5. civil proceedings and administrative matters (e.g. applying for a passport).
3. Can limitation of legal capacity have retroactive effect? If so, explain?
4. Which authority is competent to decide on limitation or restoration of legal capacity?
5. Who is entitled to request limitation or restoration of legal capacity?
6. Give a brief description of the procedure(s) for limitation or restoration of legal capacity. Please address the procedural safeguards such as:
   1. a requirement of legal representation of the adult;
   2. participation of family members and/or of vulnerable adults’ organisations or other CSO’s;
   3. requirement of a specific medical expertise / statement;
   4. hearing of the adult by the competent authority;
   5. the possibility for the adult to appeal the decision limiting legal capacity.
7. Give a brief account of the general legal rules with regard to *mental capacity* in respect of:
   1. property and financial matters;
   2. family matters and personal rights (e.g. marriage, divorce, contraception);
   3. medical matters;
   4. donations and wills;
   5. civil proceedings and administrative matters (e.g. applying for a passport).
8. 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?

1. **State-ordered measures**

This section concerns the application of state-ordered measures and the appointment of a representative/support person by a state authority.

*Overview*

1. What state-ordered measures exist in your jurisdiction? Give a brief definition of each measure.[[9]](#footnote-9) Pay attention to:
   1. can different types of state-ordered measures be applied simultaneously to the same adult?
   2. is there a preferential order in the application of the various types of state-ordered measures? Consider the principle of subsidiarity;
   3. does your system provide for interim or ad-hoc state-ordered measures?

*Please answer the following questions [17 - 29] for each (if there are several) state-ordered measure:*

*Start of the measure*

*Legal grounds and procedure*

1. What are the legal grounds to order the measure? Think of: age, mental and physical impairments, prodigality, addiction, etc.
2. Which authority is competent to order the measure?
3. Who is entitled to apply for the measure?
4. Is the consent of the adult required/considered before a measure can be ordered? What are the consequences of the opposition of the adult?
5. Provide a general description of the procedure for the measure to be ordered. Pay attention to:
6. a requirement of legal representation of the adult;
7. availability of legal aid;
8. participation of family members and/or of vulnerable adults’ organisations or other CSO’s;
9. requirement of a specific medical expertise / statement;
10. hearing of the adult by the competent authority;
11. the possibility for the adult to appeal the order.
12. Is it necessary to register, give publicity or any other kind of notice of the measure?

*Appointment of representatives/support persons*

1. Who can be appointed as representative/support person (natural person, public institution, CSO’s, private organisation, etc.)? Please consider the following:
2. what kind of requirements does a representative/support person need to meet (capacity, relationship with the adult, etc.)?
3. to what extent are the preferences of the adult and/or the spouse/partner/family members taken into consideration in the decision?
4. 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?
5. what are the safeguards as to conflicts of interests at the time of appointment?
6. can several persons be appointed (simultaneously or as substitutes) as representative/support person within the framework of a single measure?
7. is a person obliged to accept appointment as representative/support person?

*During the measure*

*Legal effects of the measure*

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

*Powers and duties of the representatives/support person*

1. Describe the powers and duties of the representative/support person:
   1. 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;
   2. what are the criteria for decision-making (e.g. best interests of the adult or the will and preferences of the adult)?
   3. 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?
   4. are there other duties (e.g. visiting the adult, living together with the adult, providing care)?
   5. is there any right to receive remuneration (how and by whom is it provided)?
2. Provide a general description of how multiple representatives/support persons interact, if applicable. Please consider:
   1. 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?
   2. 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)?

*Safeguards and supervision*

1. Describe the organisation of supervision of state-ordered measures. Pay attention to:
   1. what competent authority is responsible for the supervision?
   2. what are the duties of the supervisory authority in this respect?
   3. what happens in the case of malfunctioning of the representative/support person? Think of: dismissal, sanctions, extra supervision;
   4. describe the financial liability of the representative/support person for damages caused to the adult;
   5. 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.
2. Describe any safeguards related to:
   1. types of decisions of the adult and/or the representative/support person which need approval of the state authority;
   2. unauthorised acts of the adult and of the representative/support person;
   3. ill-conceived acts of the adult and of the representative/support person;
   4. conflicts of interests

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

*End of the measure*

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

*Reflection*

1. Provide statistical data if available.
2. 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?
3. **Voluntary measures**

This section concerns the application of voluntary measures, allowing the adult him/herself to:

1. appoint self-chosen representatives/support persons (e.g. continuing powers of attorney) and/or,
2. give advance directives.

*If your legal system provides such possibilities, please answer questions 32 - 49; if not proceed with question 50.*

*Overview*

1. What voluntary measures exist in your jurisdiction? Give a brief definition of each measure.[[10]](#footnote-10)

*Please answer the following questions [33 - 47] for each (if there are several) voluntary measure.*

1. 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:
   1. the existence of specific provisions regulating voluntary measures;
   2. the possibility to use general provisions of civil law, such as rules governing ordinary powers of attorney.

1. 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.
2. 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)?

*Start of the measure*

*Legal grounds and procedure*

1. Who has the capacity to grant the voluntary measure?
2. 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.
3. Describe when and how the voluntary measure enters into force. Please consider:
   1. the circumstances under which voluntary measure enters into force;
   2. which formalities are required for the measure to enter into force (medical declaration of diminished capacity, court decision, administrative decision, etc.)?
   3. who is entitled to initiate the measure entering into force?
   4. is it necessary to register, give publicity or any other kind of notice of the entry into force of the measure?

*Appointment of representatives/support persons*

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

*During the measure*

*Legal effects of the measure*

1. To what extent is the voluntary measure, and the wishes expressed within it, legally binding?
2. How does the entry into force of the voluntary measure affect the legal capacity of the grantor?

*Powers and duties of the representative/support person*

1. Describe the powers and duties of the representative/support person:
2. 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?

1. what are the criteria for decision-making (e.g. best interests of the adult or the will and preferences of the adult)?
2. is there a duty of the representative/support person to inform and consult the adult?
3. is there a right to receive remuneration (how and by whom is it provided)?
4. Provide a general description of how multiple representatives/support persons interact, if applicable. Please consider:
   1. 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?
   2. 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)?
5. Describe the interaction with other measures. Please consider:
6. 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?
7. if other measures can be simultaneously applied to the same adult, how are third parties to be informed about the distribution of their authority?

*Safeguards and supervision*

1. Describe the safeguards against:
   1. unauthorised acts of the adult and of the representative/support person;
   2. ill-conceived acts of the adult and of the representative/support person;
   3. conflicts of interests

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

1. Describe the system of supervision, if any, of the voluntary measure. Specify the legal sources. Please specify:
2. is supervision conducted:

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

1. in each case, what is the nature of the supervision and how is it carried out?
2. the existence of measures that fall outside the scope of official supervision.

*End of the measure*

1. 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.

*Reflection*

1. Provide statistical data if available.
2. 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?
3. ***Ex lege* representation**

*This section concerns the ex lege provisions, allowing other persons to act ex lege (by operation of law) on behalf of the adult, requiring neither a decision by a competent authority nor a voluntary measure by the adult. First, some general questions are posed, followed by a specific scenario which deals with marital and matrimonial property representation.*

*Overview*

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

*If so, please answer questions 51 – 64. and, if not, proceed with question 65.*

*Please answer the following questions [51 - 59] for each (if there are several) ex lege provisions*

*Start of the ex-lege representation*

*Legal grounds and procedure*

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

*Representatives/support persons*

1. 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*

1. 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.
2. 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?

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

*Safeguards and supervision*

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

*End of the ex-lege representation*

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

*Reflection*

1. Provide statistical data if available.
2. 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*

1. 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?
2. Do the rules governing community of property permit one spouse to act on behalf of the other spouse regarding the administration etc. of that property? Please consider both cases: where a spouse has/has no mental impairment.

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

1. 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?
2. **Other private law provisions**
3. Do you have any other private law instruments allowing for representation besides *negotiorum gestio*?
4. 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?
5. **General assessment of your legal system in terms of protection and empowerment**
6. 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:
   1. the transition from substituted to supported decision-making;
   2. subsidiarity: autonomous decision-making of adults with impairments as long as possible, substituted decision-making/representation – as last resort;
   3. proportionality: supported decision-making when needed, substituted decision-making/representation – as last resort;
   4. effect of the measures on the legal capacity of vulnerable adults;
   5. the possibility to provide tailor-made solutions;
   6. transition from the best interest principle to the will and preferences principle.
7. 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:
   1. protection during a procedure resulting in deprivation of or limitation or restoration of legal capacity;
   2. protection during a procedure resulting in the application, alteration or termination of adult support measures;
   3. 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.

1. In most cases this will also be the age of majority. [↑](#footnote-ref-1)
2. Recommendation 2009. [↑](#footnote-ref-2)
3. We refer to the situations addressed in Recommendation 2009. [↑](#footnote-ref-3)
4. Recommendation 2009. [↑](#footnote-ref-4)
5. General Comment 1. [↑](#footnote-ref-5)
6. GC 1. [↑](#footnote-ref-6)
7. Art. 1 of the HCCH Convention on the International Protection of Adults. [↑](#footnote-ref-7)
8. 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 [↑](#footnote-ref-8)
9. Please do not forget to provide the terminology for the measures, both in English and in the original language(s) of your jurisdiction. (Examples: the Netherlands: full guardianship – [curatele]; Russia: full guardianship –[opeka]). [↑](#footnote-ref-9)
10. Please do not forget to provide the terminology for the measures, both in English and in the original language(s) of your jurisdiction. (Examples: the Netherlands: full guardianship – [curatele]; Russia: full guardianship –[opeka]). [↑](#footnote-ref-10)