

# THE EMPOWERMENT AND PROTECTION OF VULNERABLE ADULTS

## ROMANIA

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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 adult legal protection system was substantially overhauled through the entry into force on 18 August 2022 of Act no. 140 of 17 May 2022, published in the Official Gazette of Romania no 500 of 20 May 2022. This Act has amended all the provisions of the Civil Code and The Civil Procedure Code concerning adult protection measures; it has granted competence to public notaries to notarize voluntary deeds, by amending Act no 36/1995 on Public Notaries<sup>1</sup>. It has also introduced new legal concepts such as assisted decision-making.

Most of the legal provisions concerning the legal protection and empowerment of vulnerable adults are to be found in the Civil Code.<sup>2</sup> Book I (On Persons), Title II (The Person), Section II (the capacity to act), Articles 42 to 48 relate to the deprivation of legal capacity. Title III (The Protection of the Person), Articles 104 to 109, and 164 to 186, as the title suggests, includes extensive provisions on adult protection measures. As will be indicated below, some rules concerning minors are applicable *mutatis mutandis* to adults in need of protection. Further, as will be discussed in the dedicated sections below, the Civil Code contains special provisions for vulnerable adults in various areas, such as inheritance, conclusion of contracts, marriage and divorce, etc.

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<sup>1</sup> Republished in the Official Gazette no 237 of 19 March 2018.

<sup>2</sup> The Romanian Civil Code was adopted through Act no 287/ 2009 published in the Official Gazette, no 511 of 24 July 2009 and republished pursuant to Act no 71/2011, published in the Official Gazette no 427 of 17 June 2011.

Further, the Civil Procedure Code,<sup>3</sup> as amended, regulates the participation of vulnerable adults in court proceedings (Articles 92, 226, 315, 320), summoning (Article 155), procedural incidents (Article 412), extraordinary appeals, and procedural deadlines (Articles 509 and 511), forced execution (Articles 688, 762, 816, etc). It also regulates the procedure for instituting the state-ordered measures and the approval of the continuing power of attorney (Book VI, Title II, Articles 936 - 943<sup>7</sup>).

Following the recent amendments to Act no. 36/1995 on Public Notaries, public notaries have been given a role in authorizing contracts for supported decision-making. The National Union of Public Notaries is in charge of keeping the registry of supported decision-making and of protection measures taken by notaries and guardianship courts (*Registrul național de evidență a măsurilor de sprijin și ocrotire luate de notarul public și instanța de tutela*).

In addition, Act no 17 of 6 March 2000 (republished in the Official Gazette no 157 of 6 March 2007) on social assistance for older persons covers some forms of supported decision-making. The support is to be granted to older persons by administrative units within the city hall. This type of support applies whenever the older persons have full legal capacity.

- 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 - опека*]. 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.**

**Continuing power of attorney** (*mandatul de ocrotire*) – a mandate given by an adult with full legal capacity with the purpose that it shall enter into force in the event of the granter’s incapacity.

**Curatorship** (*curatela*) -court-ordered temporary protection measure ensuring the legal representation of an adult who is temporary incapacitated and who retains mental capacity.

**Granter** - the adult giving the continuing power of attorney.

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<sup>3</sup> The Civil Procedure Code was adopted through Act 134 of 2010, Published in the Official Gazette of Romania no 247 of 10 April 2015

**Grantee** - the adult receiving the continuing power of attorney.

**Guardian** (*tutore*) – the person appointed to represent the adult in cases of judicial counseling or special guardianship. It is to be understood as being closely linked to substituted decision-making types of decisions.

**Guardianship court** – the family court deciding on applying/removing adult protection measures and regulating conflicts resulting from these measures.

**Judicial counseling** (*consilierea judiciara*) – state-ordered adult protection measure resulting in the limitation of the legal capacity of an adult whose mental capacity is partially impaired. Courts shall decide on a case-by-case basis the acts for which the adult under judicial counseling needs the approval of a guardian.

**Special guardianship** (*tutela speciala*)- state-ordered adult protection measure resulting in the deprivation of legal capacity whenever it has been found that a person's mental capacity is impaired and that person needs to be continuously represented for the exercise of rights and liberties. Courts shall decide on a case-by-case basis the acts for which the adult under special guardianship shall be represented by a guardian.

**Supported decision-making** (*asistenta judiciara*) – the agreement entered into by a vulnerable adult with a support person whereby the latter shall act as an intermediary for the former before third parties.

- 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.**

According to the Romanian National Institute of Statistics, on 1 January 2022, Romania's population was of almost 22 million people.<sup>4</sup> Of these, people over 65

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<sup>4</sup> The exact figure is 21,980,500 people, the Press issue of the Romanian National Institute of Statistics, no. 102 of 28 April 2022, available here (<[https://insse.ro/cms/sites/default/files/com\\_presa/com\\_pdf/popdom1ian2022r.pdf](https://insse.ro/cms/sites/default/files/com_presa/com_pdf/popdom1ian2022r.pdf)>) last accessed on 1 September 2022.

years old amount to 3,836,000 or 17,5% of the total population, and their number is on the rise compared to previous years.

Further, as per an official report published on 31 December 2021, at that date there were 865,573 adults and children with disabilities.<sup>5</sup> These persons represented about 4% of Romania's total population. The same report identified 101,990 adults with multiple disabilities and 126,486 adults with intellectual disabilities. Almost 73% of adult persons with disabilities were older than 50 years. About 47% (a total of 372,078 adults) were over 65 years old.

There are no official statistics on the number of adults who were subject to protection measures before the entry into force of Act 140/2022. According to data published by a non-governmental organization active in the field, on 31 December 2020, 47,000 persons with disabilities were deprived of their legal capacity.<sup>6</sup>

**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.**

To date, Romania has ratified most international human rights treaties. Under Article 20 of the Constitution, the rights and freedoms of citizens shall be interpreted and applied in accordance with the Universal Declaration of Human Rights, the Covenants and other treaties to which Romania is a party. Further, as per Article 20 (2) of the Constitution, in case of conflict, international human rights treaties have priority over national laws.

Of particular relevance to the present report, the CRPD was ratified on 31 January 2011. Romania has not however accepted the individual complaints procedure or the inquiry procedures under the CRPD. Further, as per Article 35 of the CRPD, states are to submit reports to the CRPD Committee within 2 years of the entry into force of the Convention, and every 4 years thereafter. Despite the ratification

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<sup>5</sup> Report of the National Authority for the Rights of Persons with Disabilities, children and Adoption (*Autoritatea Națională pentru Drepturile Persoanelor cu Dizabilități, Copii și Adopții*), available here (<http://anpd.gov.ro/web/transparența/statistici/trimestriale/>), last accessed on 1 September 2022. It should be noted that this Authority has been reorganized pursuant to the Emergency Government Ordinance no. 121/2021 of 25 November 2021 and it is now named The National Authority for the Protection of the Rights of Persons with Disabilities (*Autoritatea Națională pentru Protecția Drepturilor Persoanelor cu Dizabilități*). See also <http://mmuncii.ro/j33/index.php/ro/comunicare/comunicate-de-presa/6496-cp-hg-organizare-functionare-anpdpd-16022022>, last accessed on 1 September 2021.

<sup>6</sup> Information available at <https://www.crj.ro/pledoarie-pentru-demnitate/liber-sa-decid/harti-info-grafice/>, last accessed on 13 February 2023.

of the Convention in 2011, Romania has submitted its first report on the implementation only on 3 March 2022; thus to date, there are no available recommendations from the CRPD Committee.<sup>7</sup>

Romania has also ratified the ECHR in May 1994 and arguably this Convention and the case law of the ECtHR have had a more profound impact on the domestic case law and practice. As will be discussed below (question no 5), the CRPD and in particular the case law of the ECtHR were the main drivers of the recent legal capacity reforms. To date, the ECtHR has found a violation in two cases concerning the legal capacity of adults brought by the same applicant, *N. v Romania (No.1)*, no 59152/08, judgment of 28 November 2017 and *N. v Romania (No.2)*, no 38048/18, judgment of 16 November 2021. These cases paved the way for the 2022 legal reform and transition from substitute to supported decision-making.

Romania has neither signed nor ratified the Hague Convention on the Protection of Adults.

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

At the time of writing Romania has just undergone a major reform of its legal capacity laws. This section shall briefly describe the process of legal reform until May 2022 when the new act has been passed in Parliament.

Until 2022, the domestic rules concerning legal capacity of persons originated in Decree no 31 of 1954 concerning natural persons and legal entities.<sup>8</sup> The provisions of this Decree became part of the Family Code and subsequently of the Civil Code of Romania.<sup>9</sup>

The Civil Code outlined a binary view of legal capacity (*capacitatea de exercitiu*). Under Article 164 of the Civil Code adults could either have legal capacity to exercise rights or undertake obligations (*capacitate de exercitiu deplina*) or they had this capacity removed (*punerea sub interdictie judecatoreasca*) on the ground of mental alienation (*alienatie sau debilitate mintala*). The rules of the Civil Code assimilated adults who were declared incapable to minors under the age of 14,

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<sup>7</sup> Initial report submitted by Romania under Article 35 of the Convention, State Party Report, CRPD/C/ROU/1, 3 March 2022, available at [https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/TBSearch.aspx?Lang=En&CountryID=143&ctl00\\_PlaceHolderMain\\_radResultsGridChangePage=6\\_20](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/TBSearch.aspx?Lang=En&CountryID=143&ctl00_PlaceHolderMain_radResultsGridChangePage=6_20), last accessed on 13 February 2023.

<sup>8</sup> published in the Official Gazette no 8 of 30 January 1954.

<sup>9</sup> The Romanian Civil Code was adopted through Act no 287/ 2009 published in the Official Gazette, no 511 of 24 July 2009 and republished pursuant to Act no 71/2011, published in the Official Gazette no 427 of 17 June 2011.

meaning that the rights and obligations of incapacitated adults were similar to those of minors under 14 years old.<sup>10</sup>

On 6 February 2017, in the context of litigation for declaring the incapacity of an adult, that adult challenged the constitutionality of Article 164 of the Civil Code, as in force at that time<sup>11</sup>. It was argued that the adult protection measures as envisaged at that time instituted a binary regime for adults on the ground of their mental capacity (*discernamant*) without allowing for any possibility of individualized measures. Also, the legal provisions were criticized for not envisaging any supported decision-making possibilities for vulnerable adults.

Article 20 (2) of the Romanian Constitution gives priority to international human rights treaties over national laws. The unconstitutionality of Article 164 of the Civil Code was supported by the provisions of the Convention on the Rights of Persons with Disabilities (in particular Article 12) and those of European Convention on Human Rights and Fundamental Freedoms (the “ECHR”) as interpreted in the case law of the European Court of Human Rights (the “ECtHR”), both of which had been ratified by Romania at that time.

By Decision no 601 of 16 July 2020 the Constitutional Court accepted that the provisions of Article 164 of the Civil Code were unconstitutional.

In its reasoning, the Constitutional Court found that the Civil Code created a substituted decision-making regime instead of one facilitating supported decision-making. Such a regime was not compatible with the Constitution on several grounds. First, it was disproportionate in that it did not envisage measures that would reflect the capacity of the person, and which could be adjusted to the adult’s actual circumstances. Second, the adults subject to protection measures did not benefit from sufficient guarantees to ensure respect for their dignity. Third, the Constitutional Court found that as a result of the Civil Code, adults subject to protection measures were placed in an inferior position compared to other adults and that this in itself was contrary to the CRPD and the case law of the ECtHR.

As per Article 147 of the Constitution, a legal provision which is declared ceases to apply within 45 days as of the publication of the decision in the Official Gazette. The Constitutional Court Decision was published in the Official Gazette on 27

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10 See also, G. BOROI, *Drept Civil, Partea Generala, Persoanele*, Editia a II-a, Editura All Beck, 2001-2002, pp368-385

11 According to Article 146 (d) of the Romanian Constitution, the Constitutional Court is competent to adjudicate on motions for unconstitutionality of legal provisions raised before domestic courts. For more details on the procedure, <<https://www.ccr.ro/solutionarea-exceptiei-de-neconstitutionalitate/>>, last accessed on 30 May 2023.

January 2021, and consequently the Civil Code provisions related to legal capacity ceased to apply after 45 days. Also all pending litigation concerning adult protection measures was suspended or dismissed until the adoption of a new act by the Parliament.<sup>12</sup>

The ensuing parliamentary debates resulted in a comprehensive reform of the Civil Code, the Civil Procedure Code and other norms related to the legal capacity of adults. The new act which modified the existing legislation is Act no. 140 of 17 May 2022, published in the Official Gazette of Romania no 500 of 20 May 2022. This act entered into force on 18 August 2022 and it was largely inspired by the Civil Code of Quebec.<sup>13</sup>

Act no. 140 of 2022 introduced a distinction between supported and substituted decision-making as well as between state-ordered protection measures and voluntary protection measures. As these new provisions only entered into force on 18 August 2022, at the time of writing this report there had been no legal evaluation of their impact or how they are applied by courts or administrative authorities.

**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.**

There have not been any evaluations of the implication of the new Act. It is expected that the CRPD Committee will provide some guidance during the upcoming review of Romania's initial report.

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

See the responses to Questions no 5 and 6 above.

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<sup>12</sup> In practice, domestic courts adopted divergent case law in the area, ranging from applying the Civil Code, to suspending the pending litigation or dismissing the cases: see also, Ioana-Anamaria FILOTE-IOVU, '*Divergente jurisprudentiale în cauzele având ca obiect punerea sub interdicție judecatorească*', 20 September 2021, published on 'juridice.ro', last accessed on 4 February 2023.

<sup>13</sup> According to an interview with Ms. Iulia Scantei, the president of the Juridical Commission within one of the Parliamentary Chambers (available here-<https://www.youtube.com/watch?v=EosyuTL9S84>)

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

### **8. If your system allows a limitation of the legal capacity of an adult**

#### **a. on what grounds?**

The Romanian legal systems allows for a limitation of the legal capacity of an adults on the basis of the person’s ‘mental aptitudes’.

According to Article 164 of the Civil Code, “The adult who is not capable of determining his/her own interests due to a deterioration in mental aptitudes, either temporarily or permanently, partially or totally, established following a medical and psychosocial assessment, and who needs support in forming or expressing the will may benefit of judicial counseling or special guardianship if taking this measure is necessary for the exercise of one’s civil capacity on an equal basis with others”.

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

The Civil Code determines the general legal conditions when a protection measure may be adopted by the courts. Article 168 of the Civil Code establishes the maximum duration of the measures which ranges from 3 years for judicial counseling (Article 168 (2)) to 5 years for special guardianship ((Article 168 (3)).

Under Article 168 (4) of the Civil Code, the courts may determine the actual extent of the limitation of legal capacity on a case-by-case basis, depending on the adult’s level of autonomy. Courts can adopt a tailor-made approach to both judicial counseling and special guardianship.

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

Pursuant to Article 168 (4) of the Civil Code, the court can determine the extent of the limitation of legal capacity, on a case-by-case basis, depending on individual circumstances.

Article 168 (4) of the Civil Code reads as follows: “Through the judgment instituting the measure of the judicial counseling or special guardianship, the guardianship court sets out, depending on the degree of autonomy of the protected person and the specific needs, the types of acts for which approval is necessary, or, as the case may be, a representation. The court can also rule that a protection measure relates only to one category of deeds. Also, the court may rule that the protection measure relates only to the person subject to protection or only to the person’s assets.”



- 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?**

Yes, the limited legal capacity can be restored or the limitation of legal capacity reversed either upon the expiry of its duration or if it is lifted - provided that the causes which led to its imposition have ceased (Article 177 of the Civil Code).

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

The two main state-ordered adult protection measures envisaged by the Civil Code, i.e. judicial counseling or special guardianship always result in a limitation or as the case may be a deprivation of legal capacity.

However, the legislation envisages other types of protection measures, such as the curatorship (*curatela*) or the continuing power of attorney (*mandatul de ocrotire*) and the contract for supported decision-making (*contractul de asistenta pentru incheierea actelor juridice*) which do not automatically result in the loss or limitation of legal capacity. It should be noted however that courts are usually authorised to institute protection measures and deprive a person of legal capacity whenever they deem necessary. For example, the newly introduced Article 2029<sup>1</sup>(5) of the Civil Code provides that: “The guardianship court may, whenever it is vested with approving a continuing power of attorney, in order to avoid a grave prejudice of the grantor (*mandantul*), take any necessary measure for protecting the grantor, his/her representation for exercising civil rights and liberties or administering his/her assets.” Such provision appears to give a wide discretion to courts in assessing whether to replace the continuing power of attorney with a substituted decision-making measure.

- f. are there any other legal instruments,<sup>14</sup> besides adult protection measures, that can lead to a deprivation or limitation of legal capacity?**

The measures which can lead to a deprivation or limitation of legal capacity are state-ordered: the judicial counseling, special guardianship, curatorship or voluntary: supported decision-making and the continuing power of attorney. It should be noted that in the case of curatorship and

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<sup>14</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

the supported decision making the adult retains full legal capacity; in the case of curatorship however, the curator shall represent the adult when entering into legal transactions (Article 183 (1) of the Civil Code), and for this reason in practice it may operate as a limitation of legal capacity. In addition, the Civil Code (Article 2254 et following) and Act no. 17 of 6 March 2000, concerning social assistance for older persons regulate the maintenance contract. Here one party undertakes to provide maintenance to the other party (the older person), in exchange for the sale of property of the the other person. This contract is equally not limiting the legal capacity of the (older) person, however in practice such contracts are concluded as powers of attorney from the grantor to the grantee, entitling the latter to represent the grantor in transactions, or before authorities, such as when collecting the pension benefits.<sup>15</sup>

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

**a. property and financial matters;**

Under Article 41 (3) taken together with Article 171 of the Civil Code, a person under judicial counseling can only enter into agreements concerning the preservation and administration of one's own assets and may only dispose of inexpensive assets. The law does not clarify what 'inexpensive' means; in academic commentaries, some examples of transactions are given, such as purchasing sweets, tickets for public transportation, and generally goods that are needed for daily living.<sup>16</sup> Persons subject to judicial counseling may also accept inheritances or gifts provided there are no obligations attached to such acceptance. All other acts require the approval of the guardian and sometimes the approval in court. As per Article 144 (2) of the Civil Code, the disposition of assets, division of assets, mortgages or other securities, waivers of rights over assets, or any other act which falls outside the regular administration of assets need to be approved in court.

Under Article 43 (2) to (4) of the Civil Code, a person subject to special guardianship can only conclude preservation acts and dispose of inexpensive assets, necessary for day-to-day living. For all other deeds, the guardian shall enter into legal agreements on their behalf. Failure to comply with these rules results in the act being voidable (Article 44 of the Civil Code). Courts are competent to declare the act void, upon the application of the adult of the guardian (Article 46). The other party to a voidable transaction lacks legal standing to request that such a deed is declared void (Article 46 (3) of the Civil Code); however, if the adult regains legal capacity or if the guardian agrees to the deed and if all the other validity conditions are met, it is possible to confirm a voidable act

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<sup>15</sup> For example, Decision no 287 of the Cluj County Court, dated 15 May 2015

<sup>16</sup> G. BOROI, *Drept Civil. Partea generala. Persoanele*, All Beck, Bucharest, 2002, p. 369.

with the effect that this act becomes valid and enforceable (Article 48 taken together with Articles 1263 and 1264 of the Civil Code).

The law assimilates persons under judicial counseling to minors between 14 and 18 and those under special guardianship to minors under 14 years old (Article 171 of the Civil Code).

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

Under Articles 276 and 286 of the Civil Code, persons under judicial counseling or special guardianship must inform their guardians of their intention to marry. If the guardian objects, the courts need to authorize or as the case may be refuse to authorize the marriage.

Persons under judicial counseling or special guardianship may divorce only in contentious proceedings; divorce by agreement is barred for these adults (Article 375 (3) of the Civil Code).

Article 503 of the Civil Code sets out that parental responsibility is shared and equally divided between parents. By way of exception, Article 503, (1<sup>^</sup>1) of the Civil Code establishes that whenever one parent is under judicial counseling, a court may decide to vest parental authority to the other parent. Similarly, if the adult subject to judicial counseling was solely vested with parental authority, the court may decide to institute guardianship over the adult's child (Article Article 503, (1<sup>^</sup>1) of the Civil Code). Adults subject to special guardianship cannot exercise parental responsibility in relation to their children but have the right to follow the development and education of their children (Article 507, of the Civil Code).

**c. medical matters;**

Act no 46 of 21 January 2003 (published in the Official Gazette no. 51 of 29 January 2003) covers patients' rights. Article 16 of this Act provides that even if the consent of the guardian is necessary, the patient should be involved as much as possible in the decision-making process. Concerning consent, Article 661 of Act no. 95 of 14 April 2006 (republished in the Official Gazette no 652 of 28 August 2015) on the reform of the health system, mentions that the age of consent is 18 years old and only in emergency situations or situations regarding sexual and reproductive matters (of children over 16) can children consent without their legal representatives. These laws do not include express provisions for adults with restricted capacity. However, as per Article 171 of the Civil Code, adults under protection measures are to be assimilated to minors between 14-18 years old or under 14 years old depending on the protection measure.

Consequently, if the provisions of the Civil Code are to be applied *mutatis mutandis*, the guardians of persons with limited capacity need to consent to medical procedures. Act no. 95 of 2006 introduces some exceptions for after death situations, such as organ donation or other limited situations (including but not limited to stem cell preservation) where even younger children may consent, or other rules may apply.

Further, Act no. 487 of 11 July 2002 (published in the Official Gazette no 652 of 13 September 2012), envisages situations of forced medical treatment and commitment in cases of patients suffering from serious psychiatric conditions.

**d. donations and wills;**

The paragraphs below apply to the extent the courts have not exempted donations or wills from the scope of the special guardianship or judicial counseling, as per Article 168 (4) and (5) of the Civil Code.

Any donation and wills of persons under special guardianship must be concluded by the guardian on behalf of the person subject to this measure. In addition, it is necessary to receive the prior authorization of the family council and of the guardianship court. (Article 144 (1) and Article 175 of the Civil Code). In principle, in addition to the role of the guardian, such acts should be authorized by the family council and the court.

Persons under special guardianship may conclude donations or wills with the special approval of the guardian and the court's authorization (as per Article 41 (2) and (3) of the Civil Code which provides that only administration acts or acts of disposition of a small value may be concluded without the approval of the guardian and the court).

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

Act no. 140/2002 did not bring any amendments to how adults subject to protection measures may request a passport. Article 15 (4) of Act no. 248 / 2005 on the free circulation of Romanians abroad (published in the Official Gazette no 682 of 29 July 2005) provides that requests for passports for persons subject to protection measures shall be filed by their guardians.

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

The rule is that the limitation of legal capacity does not have a retroactive effect. However, under Article 172 (2) of the Civil Code legal deeds of persons under judicial counseling or special guardianship are voidable even before the judgment limiting/depriving them of legal capacity if their lack of discernment was well known to the other party.

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

The limitation or restoration of legal capacity can only be decided in court. The competent courts are the family courts located within the area of the adults' domicile (Article 936 of the Code of Civil Procedure)

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

Under Article 165 taken together with Article 111 of the Civil Code, any person or authority has the possibility to request the limitation of legal capacity. As per Article 177 of the Civil Code, the same rule applies to requests regarding the restoration of legal capacity. The person who needs protection may also file such requests. It should be noted that Article 111 identifies certain persons who may request the limitation or restoration of legal capacity, such as those in the close circle of friends, administrative authorities or the prosecutor, or any other person. Consequently, ultimately any person has the legal power to make such requests (as per Article 111 (d) of the Civil Code).

**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.**

The procedure of limitation or restoration of legal capacity is laid down in Articles 936 to 943 of the Civil Procedure Code. The same rules apply to the limitation as

to the restoration of legal capacity. In all cases, the prosecutor shall be summoned and will participate in court.

The adult shall receive all the documents regarding the request (including the evidence adduced in support thereof) and shall be entitled to a lawyer *ex officio*, if

the adult has not designated a legal representative. The person for whom the limitation/restoration of legal capacity is envisaged shall always be heard in private by the competent court. A trusted person may also be present during this hearing. Article 940 (7) of the Civil Code provides that the adult shall be informed, in a suitable manner of the proceedings as well as of any measures taken regarding him/her or his/her assets. The law does not directly address the participation of family members to the proceedings, other than a referral to a social report to be carried out by the administrative authorities. Further, the law does not enable CSOs to participate to the proceedings.

The prosecutor shall order the medical and psychological evaluations, as well as an additional report whenever the limitation or legal capacity is linked to the committal to a medical unit. The adult is entitled to consent to the medical and psychological evaluations; however in case the adult refuses to be evaluated or is absent, the court may order that he/she is brought in for the purposes of the evaluations. In addition, as mentioned above, the prosecutor shall order a social report to be carried out by the administrative authorities.

The new act amending the Civil Procedure Code does not include any express provisions regarding the possibility to appeal the aforementioned judgments. In absence of such express provisions, it can be inferred that the judgments may be appealed according to the general rules laid out under Article 466 and following of the Civil Procedure Code.

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

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

Persons with full legal capacity are presumed to have mental capacity to enter into contractual relations.<sup>17</sup> Under Article 1205 of the Civil Code, the contract concluded by a person whose mental capacity was impaired at the moment of entering into the agreement is voidable. A contract is also voidable if a person has been

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<sup>17</sup> G. BOROI, *Drept Civil. Partea generala. Persoanele*, All Beck, Bucharest, 2002, p. 158.

subsequently declared incapable, if at the moment of concluding the contract the reasons for incapacity existed and they were known to the other party. The courts will decide on a case-by-case basis whether the conditions for annulment, i.e. the lack of mental capacity was known by the other party or could have been known. Any interested party may request the annulment of the act (Article 177 of the Civil Procedure Code).

For tort actions, the person under special counseling shall remain liable for damages if it is proven that he/she had mental capacity at the date of the tortious act (Article 1366 of the Civil Code). Conversely, the lack of mental capacity at the moment of commission of the tortious act exonerates the person from liability (Article 1367 Civil Code). Further, even if it is proven that the adult lacked mental capacity, such adult remains liable for compensation to the victim if it is not possible to hold liable the person who should have supervised the adult (Article 1368 Civil Code). The exoneration of the person responsible with the supervision of an adult in a state of mental incapacity shall take place whenever that person proves that he/she could not have prevented the tortious act.

Article 299 of the Civil Code provides that a marriage entered into by a person under a state of temporary mental incapacity is voidable. An interested party may request the voidance within six months from knowing of the lack of mental capacity. Lack of mental capacity can also be a ground for withdrawing of parental responsibility.<sup>18</sup> The decision shall be taken in court, on a case-by-case basis.

Medical proceedings are subject to the patient's informed consent (Article 660 of Law 95/1996). As an exceptions, medical interventions can be carried out in emergency situations, when the legal representative or a close relative of the patient cannot be contacted (Article 660 (1) of Law 95/1996). In principle, other than in emergency situations, the legal representative of a person without mental capacity shall consent in writing on behalf of that person. The lack of mental capacity is acknowledged in writing, and attached to the file of the patient (Article 8 (4) and Article 9 of Order no. 1.411 of 12 December 2016, published in the Official Gazette no 1027 of 21 December 2016.)

Mental capacity is also a general condition of validity for donations and wills. Consequently, donations or wills concluded without mental capacity are voidable. As the mental capacity is presumed, the lack of capacity needs to be proven in court.<sup>19</sup> Article 1038 of the Civil Code provides expressly for the voidance of wills given without mental capacity; no direct provisions exist in the case of donations, however the general rules for contracts (mentioned above) apply *mutatis mutandis*.

Mental capacity is equally relevant for administrative acts. For example, in the case of obtaining a passport, Article 15 (4) of Law 248/2005 on free circulation of

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<sup>18</sup> Satu Mare District Court, Judgment no. 1758/2020 of 7 July 2020.

<sup>19</sup> In relation to wills, see for example Bucharest Court of Appeal Decision no. 344 of 19 February 2009; in relation to donations see Valcea County Court Decision no. 1080/! Of 31 October 2017.

Romanians abroad, provides that either medical personnel or the legal representatives of persons temporarily incapacitated shall apply for a passport on their behalf. The adult must also be present in front of the competent authorities.

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

The rules on state-ordered measures entered into force on 18 August 2022, thus there have been no significant debates or court practice to date. As mentioned in Section 1 above, the new rules are meant to implement a transition from substitute decision-making to supported decision-making and reflect a vision of vulnerable adults more in line with the CRPD and the case law of the ECtHR. While not abolishing substituted decision-making, the new rules envisage a gradual transition from substituted to supported decision-making leaving the courts significant leeway in deciding on the appropriateness of the measure.

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

#### *Overview*

- 16. What state-ordered measures exist in your jurisdiction? Give a brief definition of each measure.<sup>20</sup> 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?**

Article 164 of the Civil Code and Civil Procedure Code as amended by Act no. 140/2022 envisage two types of state-ordered measures (1) judicial counseling (*consilierea judiciara*) or (2) special guardianship (*tutela speciala*). The same Article sets out the order in which these measures should be taken by courts. Thus, judicial counseling can be adopted only if the supported decision-making regime (which is described below under Voluntary measures) cannot adequately protect the interests of the adult. In turn, special guardianship may be adopted only if supported decision-making or judicial counseling cannot adequately protect the inter-

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<sup>20</sup> 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]).



ests of the adult. Article 178 and the following of the Civil Code cover the curatorship (*curatela*) which applies to temporary situations of incapacity and whenever the mental capacity is not affected.

### *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.**

According to Article 164 of the Civil Code, “The adult who is not capable to determine his/her own interests due to a deterioration in mental aptitudes, either temporarily or permanently, partially or totally, established following a medical and psychosocial assessment, and who needs support in forming or expressing the will may benefit of judicial counseling or special guardianship if taking this measure is necessary for the exercise of one’s civil capacity on an equal basis with others”.

Further, Article 178 envisages the institution of the curatorship (*curatela*) as applicable by courts whenever due to specific circumstances such as age, physical impairment, etc an adult cannot protect their interests and are not able to appoint a representative.

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

The family court within the territorial area of the person’s domicile is competent to order the measure (Article 936 of the Civil Procedure Code).

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

Any person may apply for the measure (including the prosecutor’s office or local authorities). Article 165 Civil Code identifies particular persons, such as family members, the spouse, or the persons living with the adult; however, ultimately any person may apply for the measure. (see also the answer to Question 12 above).

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

The consent of the adult is not required but his/her opinion shall be sought in court (Article 940 of the Civil Procedure Code). The court has also the possibility to compel the adult to undergo a medical and/or psychological evaluation (Article 938 (5) of the Civil Procedure Code).

- 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;**
- the possibility for the adult to appeal the order.**

The procedure for limitation or restoration of legal capacity is laid down in Articles 936 to 943 of the Civil Procedure Code. The same rules apply to the limitation as to the restoration of legal capacity. In all cases, the prosecutor shall be summoned and will participate in court.

The adult shall receive all the documents regarding the request (including the evidence adduced in support thereof) and shall be entitled to a lawyer *ex officio*, if the adult has not designated a legal representative. The adult subject to the envisaged measure shall always be heard in private by the competent court. A trusted person may also be present during this hearing. Article 940 (7) of the Civil Code provides that the adult shall be informed, in a suitable manner of the proceedings as well as of any measures taken regarding him/her or his/her assets. The law does not directly address the participation of family members in the proceedings; the local authorities (social services within the City Hall) need however to present a social report in court therefore family members or other persons close to the adult could presumably be interviewed on the occasion of the preparation of the social report. Further, the law does not enable CSOs to participate in the proceedings.

The prosecutor shall order the medical and psychological evaluations, as well as an additional report whenever the limitation or legal capacity is linked to the committal to a medical unit. The adult's consent to the medical and psychological evaluations is necessary; however in case the adult refuses to be evaluated or is absent, the court may order that he/she is brought in for the purposes of the evaluations. In addition, as mentioned above, the prosecutor shall order a social report to be carried out by the administrative authorities.

The new act amending the Civil Procedure Code does not include any express provisions regarding the possibility to appeal the aforementioned judgments. In the absence of such express provisions, it can be inferred that the judgments may be appealed according to the general rules laid out under Article 466 and following of the Civil Procedure Code, which provide that these judgments are subject to appeal within 30 days from delivery and with appeal on points of law.

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

Under Article 941 of the Civil Procedure Code the measures shall be registered in several registers (such as the population register, the health register, the land book, the commercial register as well as a register for persons for whom such measures have been taken administered by the Union of Public Notaries of Romania). For publicity, the protection measure shall be noted in the birth certificate of the adult, and it shall be communicated to the competent medical office.

*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?**

Article 113 of the Civil Code lists certain categories of persons who cannot become guardians. These persons are minors and persons who are in their turn subject to special guardianship or judicial counseling; those who have been removed from their role as guardians, those with whom there is a conflict of interests, etc. The courts shall rule in accordance with the preferences of the adults, recorded in authenticated deeds, except if the persons designated by such adult fall under the excluded categories mentioned under Article 113 of the Civil Code. In the absence of a designated person, the court shall appoint a guardian. Article 118 of the Civil Code lists as persons who shall have priority the spouse, the parents, family members, persons living with the adult or friends of the adult.

If the guardian was appointed as a result of a contract with the adult, the former is not allowed to renounce the guardianship unless one of the reasons listed under

Article 120 of the Civil Code is raised. These reasons are: (a) the guardian has turned 60 years old; (b) the guardian is pregnant or is the mother of a child younger than 8 years old; (c) the guardian is bringing up 2 or more children; (d) the guardian is suffering from a disability; an illness, is living far away or is raising other serious reasons. If the guardian is appointed in court, the appointment can only become effective with the guardian's consent (Article 119 of the Civil Code). In discharging of his/her duties the guardian must take into account with priority the "will, preferences and the needs of the person under guardianship and to give that person the necessary support in forming and expressing the will and to encourage to exercise of rights and undertaking of obligation on his/her own." (Article 174 (2) (a) of the Civil Code).

Article 174 (7) mentions that disagreements shall be resolved in court, where the adult subject to the measure shall be heard.

The Act does not directly envisage the possibility of more guardians or substitute guardians. By way of exception, Article 114 (6) of the Civil Code allows for a parent with full legal capacity to enter into a continuing power of attorney for his/her child who is subject to special guardianship, in the event of the parent's death or whenever the parent can no longer exercise the guardianship. The same possibility extends to relatives to the second degree who are guardians of a minor or of an adult under special guardianship.

### *During the measure*

### *Legal effects of the measure*

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

The two state-ordered measures affect the legal capacity of the adult as follows:

(a) **judicial counseling:** in principle persons under judicial counseling can only enter into legal deeds subject to the approval of those deeds by their guardian (Article 146 of the Civil Code). These persons are assimilated to minors between 14 to 18 years old. For transactions outside of day-to-day business (such as property sales, mortgages, securities, etc) the authorization of the court is necessary.

(b) **special guardianship:** persons under special guardianship can only conclude minor transactions, such as purchases of day to day goods, transportation tickets, etc. All other acts are concluded in their name by their guardian (Article 43 (b) of the Civil Code). Persons under special guardianship are assimilated to minors under 14 years of age (Article 171 of the Civil Code).

*Powers and duties of the representatives/support person*

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

- a. can the representative/support person act in the place of the adult; act together with the adult or provide assistance in:**
  - b. property and financial matters;**
  - c. personal and family matters;**
  - d. care and medical matters;**
- (i) Judicial counseling: the guardian (*tutorele*) needs to approve all property and financial matters, except for those entered into for daily business. The guardian has the right to oppose to the marriage. (see also the answers to Question 9 above)
- (ii) Special guardianship: the guardian (*tutorele*) enters into agreements on behalf of the adult. The guardian has the right to oppose to the marriage. (see also the answers to Question 9 above)

Personal and family matters as well as care and medical matters have been elaborated upon in Question no 9.

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

Article 174 of the Civil Code provides that the guardian should prioritize the wishes, preferences, and needs of the adult. As wishes and needs are included together it is debatable whether the will and preferences take precedence over the best interests of the adult. Moreover, there are no supervisory mechanisms or safeguards to ensure that the wishes have actually been taken into account.

- f. what are the duties of the representative/support person in terms of informing, consulting, accounting and reporting to the adult, his family and to the supervisory authority?**

The guardian does not have to live together with the adult, however Article 174 of the Civil Code encourages the guardian to maintain a personal relationship with the adult. The guardian should prioritize the wishes, preferences, and the needs of the person under guardianship and give the adult the necessary support in forming and expressing his/her will. The guardian is prohibited from interfering with the correspondence of the adult. The guardian should also cooperate with the persons and legal entities involved in caring for the adult. The guardian should take all necessary steps to ensure that the medical and psychological reports are being carried out. The sale of assets of the adult (including furniture), the lease of the adult's home are subject to court approval. In addition, a guardian needs to carry out an inventory of the assets of the adult at the commencement of the state-ordered measure and submit thereafter a yearly report to the guardianship court. The report is not limited to the assets, but should also include a description of how the guardianship duties have been exercised.

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

The duties generally refer to the protection of the rights of the adult, rather than to aspects related to the adult's care or personal life. Article 174 (2) (e) provides that the guardian must maintain to the extent possible a personal relationship with the adult.

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

Article 123 of the Civil Code provides that guardianship is not remunerated. Exceptionally, Article 123 (2) provides:

“...The guardian may be entitled, throughout the duration of the guardianship to a remuneration in an amount decided in court, with the approval of the family council, proportionate to the work undertaken in administering the assets, as well as to the material state of the minor or of the guardian, but not more than 10% from the income generated by the minor's assets. The court, with the approval of the family council, may modify or waive this amount, as the case may be.”

These provisions refer to minors, however the Article 171 of the Civil Code clarifies that they are applicable to adults as well.

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

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

The Civil Code does not envisage that more state-ordered measures are applicable simultaneously (Article 177 (1)). As per Article 114 (6), the only exception is the situation of a parent who is the guardian of a minor or of an adult under special guardianship who can give a continuing power of attorney (voluntary measure) in relation to the child, in the event of the parent's death or impossibility to exercise his/her role. Also, under Article 114 (1) a parent with full legal capacity can designate (either through a notarial deed or through a will) a guardian for his/ her children.

Any conflicts in relation to the guardianship are within the competence of the guardianship court of the adult's domicile. Article 94 (1) (a) of the Civil Procedure Code clarifies that the guardianship courts are the district courts (*judecatoriile*). The prosecutor is also competent to bring before the guardianship courts any action in relation to the state-ordered measures.

## *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?**

Under Article 171 of the Civil Code, the rules from the guardianship of minors shall apply *mutatis mutandis* to adults subject to judicial counseling or special guardianship. Article 151 of the Civil Code sets out that the guardianship court (*instanta de tutela*) has the responsibility for overseeing the manner in which the guardians fulfil their duties. These are the civil and family courts within the territorial area of the adult's residence. Further, under Article 92 (1) of the Civil Procedure Code, the prosecutor is entitled to initiate any civil action for the protection of the interests of adults subject to protection measures.

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

In the performance of their duties, courts may request the collaboration of any other relevant authorities, such as local public administration or protection bodies (*institutiilor de ocrotire*) (Article 151 of the Civil Code). The guardians are to draft yearly reports concerning their activities and submit these reports to the courts for review (Article 152 of the Civil Code). Courts need to approve all the financial statements presented by the guardians.

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

Under Article 155 of the Civil Code the adult, as well as a wide range of other individuals and/or authorities, listed under Article 111, may file complaints against acts of the guardian which have prejudiced the adult. Article 158 of the Civil Code provides that the guardian may be removed on several grounds, including if such guardian does not discharge of one's duties in an appropriate manner. Article 163 of the Civil Code also envisages that the guardian may be subject to a civil fine which should not exceed 3 average salaries if he or she does not discharge appropriately of their duties.

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

Under Article 162 of the Civil Code, the guardians shall present the court for approval the financial documents related to the guardianship. Article 162 (2) of

the Civil Code also provides that the guardians remain liable for damages caused because of their own fault.

- e. describe the financial liability of the representative/support person for damages caused by the adult to contractual parties of the adult and/or third parties to any such contract.**

Under Article 1372 of the Civil Code, the person who by law or by contract is charged with supervising an adult (via judicial counseling or special guardianship) shall be liable for the prejudice (contractual or otherwise), caused by the adult to third parties. The guardian shall be exonerated from liability if he/she proves that they could not have prevented the prejudicial action.

**28. Describe any safeguards related to:**

- a. types of decisions of the adult and/or the representative/support person which need approval of the state authority;**
- b. unauthorised acts of the adult and of the representative/support person;**
- c. ill-conceived acts of the adult and of the representative/support person;**
- d. conflicts of interests**
- e. Please consider the position of the adult, contractual parties and third parties.**

Article 172 of the Civil Code provides that civil deeds concluded without the necessary legal formalities shall be voidable and that it is not necessary to demonstrate a prejudice for such voidance to be requested. The court may refrain from declaring a contract void, if the adult has committed fraud in concluding the contract and if it is considered that this is an appropriate civil sanction (Article 45 of the Civil Code). The adult may confirm the acts concluded without the necessary legal formalities after the restoration of his/her legal capacity (Article 46).

The adult cannot donate or leave wills without the approval of the guardian and the authorization of the court (Article 175 of the Civil Code).

*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.**

Under Article 156 of the Civil Code, the measure shall cease when the conditions which led to it being instituted cease to exist. Also, the measure shall cease upon the death of the adult or of the guardian or from removing the guardian from this function.



Except for the event of the adult's death, guardianship courts decide on the the dissolution of any state-order measure. The procedure for removing the guardian is the same as that for the setting up of the measure (please refer to Question 21 above).

### *Reflection*

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

The concepts of judicial counseling and special guardianship have been introduced following Act no. 140 of 2022 which is in force as of 18 August 2022. There is thus no data available on these types of measures. There is some data available concerning persons under guardianship as of 2020 when the Constitutional Court decision was handed out. According to the Centre for Legal Resources, a non-governmental organisation who was involved in data collection following the aforementioned Constitutional Court decision, between 2010 and 2020, over 47,000 individuals had been placed under guardianship.<sup>21</sup> The same organisation highlights that this information was obtained following official requests submitted to authorities who would otherwise not release any public information regarding persons under guardianship.

#### **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?**

Considering the recent entry into force of the state-ordered measures, there have been no court cases or evaluations of the new measures. The commentary below thus reflects the opinion of the author, largely informed by the CRPD and the ECHR, as the two most relevant international treaties for the Romanian legal system in relation to the protection of vulnerable adults.

The Romanian Civil Code distinguishes between two types of state-ordered measures: judicial counseling and special guardianship. The introduction of these state-ordered measures was meant primarily to give effect to the criticism of the Constitutional Court regarding the disproportional impact of the guardianship system, as it then was, on the rights of vulnerable adults. At the time it was impossible for courts to order tailor-made measures, which could have suited the concrete situation of the adult.

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<sup>21</sup> The information is available here: <https://www.crj.ro/pledoarie-pentru-demnitare/liber-sa-de-cid/harti-infografice/>, last accessed on 1 September 2022.

The new Act no. 140/2022 divides the protection measures into two types – judicial counseling and special guardianship-, compared to one possibility - plenary guardianship -which existed in the past. It should be recalled that the previous measure of plenary guardianship deprived adults of the possibility to exercise most of their civil rights and assume any obligation. They were assimilated to minors under 14 years old. The new law adds the state-ordered measure of judicial counseling and redefines the old measure of plenary guardianship as special guardianship (*tutela speciale*). Also, Article 164 which formed the basis for the constitutional challenge has been amended and a hierarchy of protection measures has been established. In this new hierarchy, courts should give priority to voluntary measures and supported decision-making and if this is not possible they should first opt for judicial counseling. Special guardianship should be ordered as a last resort if the other measures would not offer an adequate protection to the adult.

Further, the imposition of either judicial counseling or special guardianship should be preceded by several reports, of both medical and psychosocial nature. Contrary to the previous legal regime, under the new law courts have been given the possibility to select the type of acts to the protection measure applies. Article 168 (4) of the Civil Code allows courts to apply a protection measure easure to a single category of acts.

Procedurally, vulnerable adults have the right to legal representation and must be heard in court whenever a decision regarding protection measures is being taken. Article 940 (7) of the Code of Civil Procedure now provides that throughout the trial the adult shall be informed through appropriate means of the procedure and of any measure taken in respect of the person or his/her assets.

Despite these positive developments, which certainly aim to prioritise the autonomy of the person, some aspects remain of concern. For example, the Civil Code clearly assimilates vulnerable adults to minors between 14 and 18 or to minors under 14, depending on the type of the protection measure. Despite some procedural guarantees, the special guardianship which is the most intrusive protection measure is very similar to the old institution of guardianship. Adults subject to this measure have virtually no decision-making power. This is clearly a substitutive regime, which has been considered by the CRPD Committee to go contrary to the CRPD.

Second, it is yet to be decided who will perform the forensic evaluations and how the courts will weigh them in practice. While the Code of Civil Procedure does indeed mention that persons subject to protection measures should be informed in a manner suitable to them, no other law or methodological norms clarify how this should be carried out, nor is there any information as to specific training which judges or attorneys who deal with these cases may have to follow. Without adequate training of the professionals involved in the decision-making, it is unclear whether the new norms will empower vulnerable adults or whether these professionals will use their discretion to impose the most restrictive protection measures available.

Another aspect to be highlighted is that virtually all incidents which may arise from the protection measures are to be resolved by the guardianship courts, via the regular process. Courts now supervise the proper execution by the guardians of their duties, conflicts of interests, property matters, family matters, etc. This implies potentially big case dockets for courts without any measures to ensure that adequate time can be dedicated to such sensitive matters. It may also lead to long waiting periods for resolution of the cases.

#### **SECTION IV – VOLUNTARY MEASURES**

##### **32. What voluntary measures exist in your jurisdiction? Give a brief definition of each measure.<sup>22</sup>**

Act no. 140/2022 provides for two types of voluntary measures: (a) supported decision-making (*asistentă pentru încheierea actelor juridice*) and (b) the continuing power of attorney (*mandatul de ocrotire*).

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

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

The supported decision-making (*asistentă pentru încheierea actelor juridice*) has entered into force on 18 August 2022 following the adoption of Act no. 140/2022. The assistant (*asistentul*) is a person appointed by an adult with full legal capacity who needs support in decision making, either for exercising his/her rights and obligations or for the administration of his/her assets. The appointment lasts for a maximum period of 2 years. The assistant is acting as an intermediary between the adult and third parties. There is a presumption that the assistant is acting with the consent of the adult. The legal capacity of the adult who appoints an assistant remains intact.

The continuing power of attorney (*mandatul de ocrotire*) has been introduced by Act no. 144/2022 as an amendment to the Civil Code (Articles 2029<sup>1</sup> to 2029<sup>10</sup>). Article 2029<sup>4</sup> of the Civil Code provides that whenever the breadth of the continuing power of attorney is not clear, the rules of special guardianship (*tutela specială*) shall apply. The continuing power of attorney can be complemented with another protection measure if the courts deem this necessary. When it comes to the duties of the adult giving the power of attorney, some rules from the ordinary powers of attorney (*mandat*) apply (Article 2029<sup>8</sup>).

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<sup>22</sup> 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]).

Both types of voluntary measures are contracts between the adult and the grantees.

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

The self-chosen representative (*asistentul*) is envisaged for persons who need support in decision-making. The contract for support enters into force upon the signing of the agreement by both parties and the fulfilment of the necessary legal requirements. In addition to the contract for supported decision-making (*contractul de asistentă pentru încheierea actelor juridice*), the continuing power of attorneys (*mandatul de ocrotire*) -which are new legal institutions introduced by law 140/2022-, the Civil Code (Articles 2254-2256) regulates the contract of support (*contractul de întreținere*). Under this contract, a party undertakes to provide support to another party for a certain period of time, or for the entire duration of a person's life. 'Support' is understood to encompass, food, household assistance, clothing or the necessary expenses in case of sickness. The support is offered against compensation (usually sale of real estate) and also covers the situations when the beneficiary is not able due to a psychosocial disability to ensure his/her socio-economical needs. In addition to the Civil Code, this type of support contract is mentioned in Act no. 17 of 6 March 2000 regarding the social assistance of older persons (published in the Official Gazette of Romania no. 157 of 6 March 2007).

Further, the same Act envisages in Article 30 free legal counseling services for older persons. These services are to be provided by administrative units within the City Halls (*autoritatea tutelara*). This service is provided upon request of the adult (older person) in cases the adult intends to dispose of real estate, through sales or donations or uses real estate as security. However, it should be noted that this possibility is not discussed in the academic literature, thus arguably the practical application of the legal counseling services is limited.

The continuing power of attorney (*mandatul de ocrotire*) is an authentic deed that cover specific acts (as mentioned in the deed) that the representative will conclude in the future, conditioned on the adult not being able to take care of his/her person or the assets. The continuing power of attorneys are thus contracts that will be executed in the future and are conditioned on certain events whereas the self-chosen representative shall take over immediately, after the grantor has completed the legal formalities. Also, the continuing power of attorney can be complemented with other state-ordered measures, whereas such a possibility does not exist for the supported decision-making. Given the recent entry into force of the provisions allowing for supported decision-making and continuing power of attorney, there is no legal practice concerning the appointment of a self-chosen representative and advanced directive. Romanian law does not recognize advance directives, as understood in the Questionnaire. Considering the phrasing of the relevant legal provisions, it could be argued that advanced directives may only be enforced to the extent the adult has included the instructions in the continuing power of attorney.

In this situation, it will be the grantee who could enforce the advance directives. In any event, it is not possible to issue advance directives for medical institutions, or legal entities in general.

**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)?**

Act no. 140/2022 specifies that the supported decision-making contract (*asistentă pentru încheierea actelor juridice*) can cover acts of administration of one's patrimony or support in exercising one's civil rights and duties. Consequently, unless expressly prohibited by law, any matter may be covered by this type of contract.

Article 2029<sup>2</sup> of the Civil Code provides that the continuing power of attorney can cover all the wishes regarding a person's care and living conditions. The continuing power of attorney can also include the administration of a person's assets. There has been no court judgment yet to interpret the Civil Code in this regard, and therefore it is not clear whether for example the representative can dispose of important assets of the adult through the continuing power of attorney. For example, in the case of special guardianship, the disposition of important assets must always be authorized in court. There is no equivalent provision for the continuing power of attorney; however under Article 2029<sup>4</sup> of the Civil Code, in case of doubt regarding the extent of the power of attorney the rules of special guardianship shall apply. Also, courts have the possibility to revoke the continuing power of attorney and replace it with a state-ordered protection measures. It remains to be seen how courts will deal with these matters in practice.

***Start of the measure***

***Legal grounds and procedure***

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

An adult who due to an intellectual or psychosocial disability needs support in taking care of himself or herself, his/her assets or more in general in exercising his or her rights and assuming obligations may request the public notary to appoint an assistant/supporter (Article 1 of Act no. 140/2022). The Supported decision-making (*asistentă pentru încheierea actelor juridice*) shall be approved by a public notary upon a joint request of the adult and of the supporter (Article 138<sup>1</sup> of Act no. 36/1995).

The continuing power of attorney (*mandatul de ocrotire*) can be granted by any adult whose capacity was not restricted or by an adult subject to judicial counseling if it was approved by the guardian (Article 2029<sup>1</sup> (1)). The continuing power

of attorney must be approved in court following a request of the grantor (Articles 943<sup>1</sup> of the Civil Procedure Code).

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

The supported decision-making (*asistenta pentru incheierea actelor juridice*) must be concluded before a public notary. If approved, the public notary shall register the deed in the National register for support and protection measures of notaries and courts (*Registrul național de evidență a măsurilor de sprijin și ocrotire luate de notarul public și instanța de tutelă*) which shall be held by the Notaries' Association) (Article 138<sup>4</sup> of Act no. 36/1995)

The continuing power of attorney (*mandatul de ocrotire*) needs to be authenticated by a notary and approved in court. Once approved, the continuing power of attorney shall be registered in 5 registers as follows: (1) the people's register; (2) the sanitary authorities' register; (3) the land register; (4) the commercial register and (5) the notaries' register.

**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?**

The supported decision-making (*asistenta pentru incheierea actelor juridice*) enters into force upon approval by a notary or in case of appeal, whenever the appeal becomes final. The public notary's decision shall be registered for enforceability towards third parties in a Register to be set up to this effect. The provisions mentioned below regarding the enforceability of the continuing power of attorney are applicable *mutatis mutandis* to the contract for supported decision-making.

Article 943<sup>4</sup>(6) of the Civil Procedure Code provides that the continuing power of attorney (*mandatul de ocrotire*) needs to be approved in court. The court approval is subject to appeal, and if an appeal has been filed the continuing power of attorney is considered approved upon the dismissal of the appeal or if the term for the appeal has expired. Article 160 of the Civil Code further provides that the protection measures shall have legal effects from the moment the judgments are final.

However, the measures are only enforceable towards third parties after the publicity formalities have been completed, save if the third party became aware of the measure through other means.

### *Appointment of representatives/support persons*

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

The same rules as those mentioned above (see the answers to Question no 23) regarding the appointment of guardians apply (Article 166 of the Civil Code). However, it is unclear whether more persons can be appointed as assistants or grantees as there is no explicit provision authorizing it. This matter remains to be clarified once practice in this area shall develop.

### *During the measure*

#### *Legal effects of the measure*

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

In the case of the supported decision-making (*asistenta pentru incheierea actelor juridice*), the adult has full legal capacity, therefore it is the adult who will enter into any agreement.

In the case of the continuing power of attorney (*mandatul de ocrotire*), the provisions are legally binding provided that the Court (upon the request of several designated persons) does not revoke the contract. The new Civil Code does not expressly deal with the issue of the enforceability of the continuing power of attorney. However, there are several possibilities for courts to revoke the continuing power of attorney in well-reasoned cases. The Courts -upon the request of any person- can revoke the advanced directives and replace such measures with state-ordered measures if they deem necessary (Article 2030 Civil Code).

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

The supported decision-making (*asistenta pentru incheierea actelor juridice*) does not affect the legal capacity of the grantor.

The continuing power of attorney (*mandatul de ocrotire*) does not affect the legal capacity of the grantor but the court may decide that this is necessary during its execution.

***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)?**

In the case of the supported decision-making (*asistenta pentru incheierea actelor juridice*), the assistant does not replace the adult as a contracting party; the assistant is present to support the adult. The assistant must observe the wishes and preferences of the adult (Article 2 (2) of Act no. 140/2022).

The assistant is normally providing the assistance free of charge. The adult must reimburse the assistant for reasonable expenses exercised by the latter in the completion of his/her duties (Article 4 (3) of Act no. 140/2022)

With regard to the continuing power of attorney (*mandatul de ocrotire*), Article 2029<sup>3</sup> of the Civil Code provides that any decision regarding the execution of the continuing power of attorney is taken in the interest of the adult and it ensures respect for the adult's dignity, rights, and liberties, will, needs and preferences as well as safeguarding the adult's autonomy. The same Article refers to the rules concerning the duties of the guardian which shall apply *mutatis mutandis*. The law does not clarify whether the person appointed as representative in the context of a continuing power of attorney may be remunerated.

**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)?**

Article 2029<sup>1</sup>(6) of the Civil Code provides that support contracts for the administration of assets shall remain in force, -unless revoked by courts for good cause-, along with the continuing power of attorney. It is thus possible to have simultaneous voluntary measures. The law does not clarify how such representatives/support persons interact. However, in the case of the contract for supported decision-making, the supporter/assistant must submit a yearly report to the guardianship authority (*autoritatea tutelara*). The guardianship authority is a public body, usually a department within the city hall of the adult's domicile.

In the case of the continuing power of attorney, the grantor must indicate a person to whom the grantee shall present at least once every 3 years a report on the execution of the duties within the continuing. Should the grantor fail to nominate a responsible person, such nomination falls upon the guardianship court on the occasion of the approval of the contract (Article 2029<sup>2</sup> Civil Code). Also, if the continuing power of attorney covers the management of the adult's assets, the grantee must submit an inventory to the court and to another person designated as responsible by the grantor within 10 days as of the approval of the contract (Article 2029<sup>6</sup> Civil Code).

The above paragraphs, show that the legislator differentiates between the responsible person for supervision of the support persons in the case of the contract for supported decision-making and the grantor in the case of the continuing power of attorney. The law does not lay down any rule of coordination. Article 2029<sup>1</sup>(6) of the Civil Code implies that the scope of such agreements is not overlapping. Further, in practice, notaries need to authenticate both deeds, and have the right to refuse the authentication them for due cause. An overlapping scope may be a reason for the refusal to authenticate such contracts. In the absence of such a rule, any conflict shall be resolved by the guardianship court within the adult's domicile.

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

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

Under Article 2029<sup>5</sup>(1), if the continuing power of attorney does not entirely cover the care of the grantor or the management of his/her assets the court may order a protection measure to this effect. The grantee of the continuing power of attorney shall have priority to be appointed guardian, if the court opts for such a complementary protection measure. In case the grantee is not appointed guardian, the grantee must submit a yearly report to the guardian regarding the execution of the continuing power of attorney 2029<sup>5</sup>(2).

Consequently, in case of an overlap between a voluntary measure and a state-ordered measure, the grantee (of the voluntary measure) is responsible before the guardian (of the state-ordered measure). Should there be conflicts, any party can file a petition in court. The law does not provide expressly for the coordination of activities or distribution of authority in case of concurrent voluntary measures. Assuming that conflicts arise, the Code of Civil Procedure gives the guardianship courts (the district courts within the adult's domicile) competence for conflict resolution.

State-ordered measures are registered in the National Register of Support and Protection Measures taken by public notaries and the guardianship courts. This register is administered by the National Union of Public Notaries (Article 941 (e) of the Civil Code). The contract of supported decision-making shall also be registered in the same register (Article 6(2) of Law 140/2022). The same rule applies to the continuing power of attorney (Article 943<sup>3</sup>(3) and Article 943<sup>6</sup>(3) of the Civil Code).

### *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.**

In the case of the supported decision-making (*asistentă pentru încheierea actelor juridice*), Article 5 of Act no. 140/2022 provides that the assistant is to present a yearly report to the guardianship authority. Further, under Article 5 (3) of the same Act any person may complain to the competent court within the residence of the grantor if the power of attorney prejudices the adult.

With reference to the continuing power of attorney (*mandatul de ocrotire*), Article 2030 of the Civil Code provides that any person as listed in Article 111 (see also the comments under Question no 23) who notices that the contract is not carried out in an appropriate manner may request the court to withdraw it, to request that liability of the support person is triggered or request the application of a protection measure regarding the adult. Also, as per Article 2029<sup>2</sup> of the Civil Code, the

adult shall appoint a person to supervise the execution of the power of attorney, or in absence of such a nomination, the court will appoint a person to this effect. The supervision should be carried out not later than every three years. Further, if the continuing power of attorney concerns the administration of assets, the provisions of the Civil Code envisage that the person executing the continuing power of attorney shall conduct an inventory of such assets which shall be communicated to the court and to the person supervising the execution of the continuing power of attorney (Article 2029<sup>6</sup>). Under Article 2029<sup>7</sup> (2) of the Civil Code, the deeds entered into by the grantee following the conclusion of the continuing power of attorney which are contrary to it can be declared void only if damage is shown. There are no express provisions regarding possible conflicts of interests, but in light of Article 2030, any interested person may bring this to the attention of the guardianship court.

- 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.**

In the case of supported decision-making (*asistentă pentru încheierea actelor juridice*), Article 5 of Act no. 140/2022 provides that the assistant is to present a yearly report to the guardianship authority. Further, under Article 5 (3) of the same law any person may complain to the competent court within the residence of the grantor if the contract prejudices the adult. Thus, supervision should be exercised in the context of the yearly report as well as in case specific complaints are filed in court.

A similar system of supervision has been conceived for the continuing power of attorney (*mandatul de ocrotire*), in that individuals may complain in court and the person executing the directive is to file regular reports. In addition, for the continuing power of attorney, Article 2029<sup>2</sup> obliges the adult to appoint a person to supervise the execution of the power of attorney, or in absence of such a nomination, the court will appoint a person to this effect.

### *End of the measure*

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

The contract for supported decision-making (*asistentă pentru încheierea actelor juridice*) ends in the following cases: (a) upon the expiry of its term; (b) on the request of the adult; (c) whenever a protection measure has been taken regarding the adult; (d) upon a complaint concerning the execution of the mandate; (e) on the death of either party. The measure may be terminated by the public notary, or in case of conflicts, in court. The termination of the measure shall be registered in the Notaries' special register (see also the answer to Question no. 37). (Article 6 of Act no. 140/2022).

The continuing power of attorney (*mandatul de ocrotire*) ends upon ceasing of the event which led to the start of the power of attorney; if the adult revokes it (providing that the adult becomes capable of doing this); upon the request of the grantee if the grantee indicates another person to execute it and if such possibility has been envisaged in the continuing power of attorney or upon the courts applying one of the protection measures for the adult. The continuing power of attorney shall also end upon the death of either party or upon revocation by a court.

## ***Reflection***

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

Voluntary protection measures have been in force as of 18 August 2022 and such measures did not exist prior to this date; for this reason there is no statistical data at the moment and given the novelty of these measures for the Romanian legal system, it is likely that no voluntary protection measures have yet been concluded.

### **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 voluntary protection measures are a novelty for the Romanian legal system. They have entered into force as a direct consequence of the Constitutional Court decision no 601/2020 requiring more tailor-made approaches to the protection of adults and a transition from substitutive measures towards supported decision-making of vulnerable adults. There is no assessment to date of these new legal provisions.

An overview of Act no. 140/2022 indicates that public notaries and judges in particular, have been given considerable leeway in authorizing or revoking/modifying such measures. The law clarified that any departure from -for example- a continuing power of attorney shall only be authorized if serious grounds exist. The courts will have to develop through case law concepts such as 'serious grounds'.

Further, the Constitutional Court decision of 601 was inspired by the CRPD and in particular Article 12. A source of inspiration for practitioners could then be the CRPD Committee's very first General Comment (General Comment no 1 of 19 May 2014: Article 12: Equal recognition before the law). For example, under paragraph 17 of this General Comment, the CRPD Committee encourages various forms of supported decision-making while at the same time condemning any type of substitutive regime. The CRPD Committee also mentions that support includes providing information in accessible formats, or the recognition of diverse non-conventional methods of communication, especially for non-verbal persons to be able to express their will and preferences.

The new Romanian legal provisions depart from the CRPD Committee's standard in that they still allow for substitute decision-making and several Articles mention the best interests or the needs of vulnerable adults alongside concepts such as wishes and preferences. On several occasions there is no clear hierarchy of criteria to be taken into account by court when taking decisions as all concepts: 'best interests', 'needs', 'wishes and preferences' are listed together. Further, contrary to the aforementioned General Comment, no legal provision covers the issue of accessible formats or the acceptance of different methods of communication in the case of entering into voluntary measures. For the interpretation of the new law to be as faithful to international law (in particular CRPD) as possible, it would be necessary that in depth training are conducted with a wide range of legal professionals so as to ensure that voluntary measures will not be devoid of purpose whenever courts or notaries will be faced with unconventional means of expressing the will and preferences.

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

### ***Overview***

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

Other than the institution of *negotiorum gestio* provided for under Articles 1330–1440 which is similar to the institution of a power of attorney but it does not require the consent of the grantor, there is no specific provision for *ex lege* representation of a vulnerable adult.

#### ***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?**

Article 312 of the Civil Code provides that the spouses may choose one of the following matrimonial regimes: legal community of property; separation of assets or a property regime by agreement. It is understood that under the legal community of assets the acts of one spouse regarding joint property shall bind the other spouse as well. However, Article 322 of the Civil Codes provides that in certain cases - mainly related to the family home and the assets therein- the consent of both spouses is necessary. As per Article 345 the joint community relates mainly to the administration and use of joint assets.

**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.**

Article 315 of the Civil Code provides that one spouse may request the court authorization to represent the other spouse if the latter is in an impossibility to express his or her will. Article 316 also envisages that one spouse may request the court that any legal deeds may only be concluded with his express agreement in situations where the other spouse is concluding deeds which gravely prejudice the family.

**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?**

Yes, Articles 1330 to 1340 set out the concept of *negotiorum gestio*. Under Article 1330, *negotiorum gestio* exists when a person who is not subject to a legal obligation towards a beneficiary administers the assets of the beneficiary. The beneficiary is either not aware of the *negotiorum gestio*, or if he/she is aware, he/she is not able to designate a representative to this effect.

*Negotiorum gestio* could have practical significance for vulnerable adults; there is however no evidence of it being used in this area in a systematic manner.

**SECTION VI – OTHER PRIVATE LAW PROVISIONS**

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

**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?**

Article 114 (6) of the Civil Code allows for a parent with full legal capacity to enter into a continuing power of attorney for his/her child who is subject to special guardianship, in the event of the parent's death or whenever the parent can no longer exercise the guardianship. The same possibility extends to relatives to the second degree who are guardians of a minor or of an adult under special guardianship.

**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;



The system for the protection of vulnerable adults has seen a substantial transformation through Act no 140/2022 which has entered into force in August 2022. The changes were triggered by the Constitutional Court's decision no 601 of 2022 requiring a change from substituted to supported decision making. Prior to this Constitutional Court decision, the Civil Code did not allow for any tailor made approach to vulnerable adults, judges could only decide between full legal incapacity and full capacity, regardless of the personal situation of the adult concerned. The ECtHR has also found this lack of flexibility contrary to Article 8 of the ECHR, highlighting in particular that at the time of the decision (2021) no legal possibility existed for taking into account the wishes and / or needs of vulnerable individuals in the decision-making process.<sup>23</sup>

Thus, the ensuing modifications laid out under Act no. 140/2022 were meant to respond to the criticism of the Constitutional Court and the ECtHR, as well as to attune the legal system to the provisions of the CRPD. It is debatable whether Act no. 140/2022 has struck the right balance between empowerment and protection; given the recent entry into force there have not been any evaluations or research studies dedicated to the topic. The analysis below is hence informed solely by the domestic provisions, seen in light of international law, in particular the CRPD and authoritative interpretations of the CRPD Committee or of the UN Special Rapporteur on Disability and, to a lesser extent of the ECtHR.

Internationally, most notably Article 12 of the CRPD provides for the right of persons with disabilities to enjoy legal capacity on an equal basis with others. The right to legal capacity has been considered a key element of the human rights model of disability, implying a shift from substituted decision-making to supported decision-making.<sup>24</sup> Importantly, the CRPD Committee distinguishes between legal capacity and mental capacity; legal capacity refers to the ability to hold and exercise rights and obligations, whereas mental capacity refers to the decision-making skills of a person which vary from individual to individual.<sup>25</sup> With this distinction in mind, the CRPD Committee has interpreted Article 12 (3) of the CRPD as obliging states to provide support to persons with disabilities to enable them to make decisions that have legal effect.<sup>26</sup> Also, the CRPD Committee has interpreted Article 12 of the CRPD as entirely rejecting any form of substituted decision making.<sup>27</sup> Persons with disabilities should be the ones choosing the forms of support, there being many possible forms ranging from peer support, advocacy, assistance with communication, accessible formats, recognition of diverse and non-conventional communication means, etc.<sup>28</sup> The importance of choice and control, coupled with a rejection of the 'best interests approach' has equally been highlighted in Reports of the Special Rapporteur on the Rights of persons with

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<sup>23</sup> ECtHR N (2) v Romania, para 65.

<sup>24</sup> CRPD Committee, General comment No. 1 (2014) Article 12: Equal recognition before the law, 19 May 2014, para 3.

<sup>25</sup> GC 1, para 13.

<sup>26</sup> GC 1, para 16.

<sup>27</sup> GC 1, para 17.

<sup>28</sup> GC 1, para 17.

Disabilities.<sup>29</sup> In line with the views of the CRPD Committee, the Special Rapporteur emphasized that the denial or restriction of legal capacity amounts to a human rights violation.<sup>30</sup> In addition, it should be mentioned that the topic of legal capacity has received widespread attention in the academia, with many scholars addressing important topics, ranging from support in decision making, the medicalization of decision making, or addressing the human rights approach to legal capacity.<sup>31</sup>

The position of the ECtHR on the topic of legal capacity falls short from that of the CRPD, in that so far, the case law of the ECtHR has not required states to entirely replace substituted with supported decision-making regimes. Rather, under the ECtHR case law, states are required to provide flexible legal capacity frameworks so as to account for the individual needs of vulnerable adults.

Further, it is important to note that while there is clearly an overlap between vulnerable adults and persons with disabilities in that all persons with disabilities are vulnerable adults, there are situations where vulnerable adults are not persons with disabilities. Such distinction may play a role in identifying the international legal regime applicable and in the relevance of Article 12 of the CRPD Committee.

Last but not least, it should be noted that debates continue to exist on whether a supported decision-making regime alone is suitable or feasible or whether supported decision-making should co-exist with substituted decision-making with the understanding that substituted decision making, if at all, should only be imposed as a measure of last resort and as narrowly tailored as possible.

These reflections are thus to be broadly understood against the background sketched above of ongoing debates regarding supported decision-making, with the understanding that there is a considerable shift towards supported decision-making and limiting or eliminating substitution.

Turning back to the domestic recent reforms, it is important to note that the new legal framework lays down several entirely new concepts. For example, voluntary measures such as those envisaged through the contract for supported decision-making or the continuing power of attorney did not exist prior to August 2022. These are welcomed changes and they reflect an intention to move in the direction of supported decision-making, also endorsed under the CRPD and the CRPD Committee. Also, on state-ordered measures judges have now the possibility of restricting legal capacity to varying degrees on a case-by-case basis. The Civil

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<sup>29</sup> Report of the Special Rapporteur on the Rights of Persons with Disabilities, 20 December 2016, A/HRC/34/58, para 55.

<sup>30</sup> Ibidem.

<sup>31</sup> See, among many other authorities, Flynn, E., & Arstein-Kerslake, A. (2014). Legislating personhood: Realising the right to support in exercising legal capacity. *International Journal of Law in Context*, 10(1), 81-104; De Bhailis, C., & Flynn, E. (2017). Recognising legal capacity: Commentary and analysis of Article 12 CRPD. *International Journal of Law in Context*, 13(1), 6-21; Gooding, P. (2015). Navigating the 'Flashing Amber Lights' of the Right to Legal Capacity in the United Nations Convention on the Rights of Persons with Disabilities: Responding to Major Concerns. *Human Rights Law Review*, 15(1), 45-71, Series, L. (2015). Relationships, autonomy and legal capacity: Mental capacity and support paradigms. *International Journal of Law and Psychiatry*, 40, 80-91.

Code clarifies that supported decision-making is to be prioritized to substituted decision-making, the latter becoming applicable only if the former is deemed insufficient for protecting the vulnerable adult.

While indeed, these measures do allow for more flexibility and introduce supported decision-making, they clearly fall short of the CRPD standards outlined above. Moreover, the language predominantly used in the new legal text suggests that the objective of ‘protection’ largely prevails over that of empowering vulnerable adults. This is inferred from the many references to the needs of the persons, and to the overarching possibility to overrule the person’s wishes whenever their needs so require, without a corresponding obligation on the part of the decision-makers to thoroughly substantiate such an approach. The laws do however give judges in particular the margin to make the ideological shift from protection to empowerment, yet it is debatable how this will be achieved in a culture where deprivation of legal capacity has been the norm for over 70 years.

Moreover, and equally contrary to the CRPD is the assimilation of vulnerable adults subject to judicial counseling to children under the age of 14 and that of adults subject to special guardianship to children under the age of 14. This may result in practice in negative stereotypes and moreover, it outlines how limited the autonomous decision-making of adults is seen in practice. On the basis of these restrictions, marriage remains impossible without the approval of a guardian, financial transactions are very limited, consent to medical treatment is subject to approval of a guardian as well as the issuance of a passport. Also, vulnerable adults under state ordered measures will not be able to exercise parental responsibility over their children- a provision which is arguably contrary to the ECtHR case law.<sup>32</sup> On a positive note, judges will be able to remove some of these restrictions; yet given the overall paternalistic language of the law it is questionable whether this will actually happen in practice.

Moreover, on the topic of support, the CRPD Committee and the Special Rapporteur have recommended in the past that states adopt wide support systems to be able to respond to the wishes of persons with disabilities, as well as to their various communication needs. While indeed the new legal provisions allow for supported decision-making contracts as well as for continuing power of attorney, it does not appear that any budgetary allowance has been made at governmental or local level enabling the development of a support system. Thus, this will most likely result in a practice where only vulnerable adults who have family members or a social network will be able to enter into support agreements. Adults who cannot secure the support through their own resources may thus remain left out of the system; their capacity being determined through the state ordered measures. Also, no other form of support, such as peer support, or network support is legal recognized. Moreover, there are no legal provisions referring to the various communication needs of vulnerable adults and how these needs could fit into the justice system. For example,

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<sup>32</sup> ECtHR, *Kocherov and Sergeeva v. Russia*, [16899/13](#), Judgment 29.3.2016

even though vulnerable adults have the right to appeal certain decisions, they must exercise this right in writing, in accordance with the rigors of strict formal proceedings and deadlines.

One other aspect to highlight is that the new law has not introduced any new mechanism to secure easy(er) access to court in cases of abuse by the guardians or any (procedural) guarantees (other than very formal ones) to settle potential disagreements between vulnerable adults and guardians.

To conclude, it is undeniable that Act no. 140/2022 represents a crossroad in the national landscape for the protection of vulnerable adults. It introduces the possibility of support in the exercise of legal capacity as well as various degrees of substituted decision-making. However, a closer reading of this law indicates that many of the new provisions require further clarifications and that the law overall does not seem to have shifted the balance from protection to empowerment. Thus, considering a deeply rooted historical and cultural background seeing incapacitation as a protection measure, there is a high risk that these new legal provisions will not achieve the meaningful change necessary for empowering vulnerable adults.