THE EMPOWERMENT AND PROTECTION OF VULNERABLE ADULTS

BELGIUM

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SECTION I – 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.

Belgian law provides for both state-ordered, voluntary, and *ex lege* measures with a view of protecting and empowering adults who are vulnerable on reaching majority at eighteen (article 488 old[2] Civil Code).

The statutory framework on state-ordered and voluntary measures was profoundly reformed in 2013.[3] Those measures are included in the Civil Code, Book I. Persons, Title XI. Majority and protected persons (articles 488/1-502 old Civil Code). These provisions will be inserted in Book 2 Persons, Family and Relationship Property Law of the New Civil Code at a yet undetermined time. *Ex lege* measures are not included in the general legal framework on vulnerable adults, but are provided for in various regulations, both in and outside the Civil Code. In a 2018 reform,[4] the proceedings and files relating to state-ordered measures were,

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[1] Both authors took up equal contributor roles. See Contributor Roles Taxonomy, available at <https://credit.niso.org> accessed 22.09.2022.

[2] In the context of a long-term legislative project, the books of the 1804 Civil Code are being replaced with new books. Rather than labelling the new set of books as New Civil Code, the legislature has opted to rename the remainder of the 1804 Civil Code, awaiting the introduction of the remaining new books, as "old Civil Code". This includes the family law provisions. Article 2 of the Act of 13 April 2019 (…), *Belgisch Staatsblad* 14.05.2019.

The text of all Belgian legislation is available in Dutch and in French via <https://justice.belgium.be/fr/service_public_federal_justice/organisation/moniteur_belge>.

[3] Act of 17 March 2013 reforming the regimes on legal incapacity and establishing a new status of protection consistent with human dignity, *Belgisch Staatsblad* 14.06.2013. Also see the Act of 21 January 2013 amending the Electoral Code and the Act of 17 May 2006 on the external legal status of persons sentenced to a custody and on the rights granted to victims in the context of the enforcement of sentences, following the establishment of a new status of protection in accordance with human dignity, *Belgisch Staatsblad* 14.06.2013.

[4] Articles 2-98 of the Act of 21 December 2018 containing various provisions relating to justice, *Belgisch Staatsblad* 31.12. 2018.

amongst other, fully digitised. In 2019,[5] the Hague Convention was implemented in Belgian law.

The principles of necessity, subsidiarity and proportionality determine the interaction between the three types of adult protection measures.[6]

In application of the principle of *necessity*, state-ordered measures can only be applied if, and insofar, the protection of the best interest of the vulnerable adult require so (article 488/1 old Civil Code). State-ordered measures were, for example, deemed an unnecessary limitation of the autonomy of a vulnerable adult who was still capable of providing for voluntary measures themselves[7] or who participates in adequate budget and debt counselling by the municipal Public Social Welfare Office.[8]

As per the principle of *subsidiarity*, *ex lege* representation and voluntary measures take precedence over judicial protection if, and insofar, possible (article 492 old Civil Code).[9] The precedence of (*ex lege*) measures provided for in marriage law[10] or marital property law[11] is, however, subject to critique because supervision is much more limited compared to state-ordered measures (see below question 62).

The principle of *proportionality* requires a tailor-made response to vulnerability.[12] Measures should not only be ordered *if* (principle of necessity), but also only *insofar* necessary (articles 488/1, 488/2 and 492/1 old Civil Code – also see below, section 2).

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[5] Act of 10 March 2019 implementing the Convention of the Hague of 13 January 2000 on the international protection of adults, *Belgisch Staatsblad* 22.03.2019.

[6] F. Swennen, *Het personen- en familierecht. Een benadering in context*, Intersentia, Antwerp 2021, pp. 202-03.

[7] Family Court Hainaut (division Bergen) 27 March 2017, [2018] *Revue trimestrielle de droit familial* 526. Als to the term themselves: <https://www.justice.gc.ca/eng/rp-pr/csj-sjc/legis-redact/legistics/p1p30.html> accessed 25.10.2022.

[8] Justice of the peace Antwerp (III) 7 June 2018, [2019] *Tijdschrift van de Vrederechters* 275, case note B. Mevesen.

[9] Article 492 (1) old Civil Code; *Parliamentary documents* Chamber of Representatives 2010-11, n° 53-1009/1, p. 6.

[10] Hereto V. Vanderhulst, 'Gerechtelijke indeplaatsstelling of bewind: welk statuut geniet voorrang bij gehuwden?' [2013] *Notarieel en Fiscaal Maandblad* 156-169.

[11] Justice of the peace Bruges (IV) 5 June 2019, [2020] *Tijdschrift van de Vrederechters* 320, case note N. Gallus.

[12] Also see *Case of N. v Romania (No. 2)*, 16 November 2021, § 63, ECLI:CE:ECHR:2021:1116JUD003804818.

In confirmation of Belgium's commitment to respecting its international engagements, particularly those included in the CRPD,[13] article 22*ter* of the Belgian Constitution, inserted in 2021, provides for the right of every person with a disability to full inclusion in society, including the right to reasonable adaptations. All acts, decrees, and regulations should safeguard the protection of that right.[14] The introduction of this provision in the Constitution has as an important consequence that the Constitutional Court can review any statutory provision against all provisions of the CRPD.[15]

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

Where applicable, the concordance between the key terms and definitions in the questionnaire, and the terminology in Belgian statutory provisions and doctrine used in this report is as follows. Absent specification, the definitions in the terminology section of the questionnaire apply and/or no specific term for it exists in Belgian law. The Belgian statutory terminology is inserted below in square brackets in the official Dutch / French versions.

Adult [volwasssene / majeur] - an adult is a person who has reached the age of 18 years and has reached, according to Belgium law, the age of majority.

Adult protection measure [beschermingsmaatregel voor volwassenen / mesure de protection pour les adults] - all measures and instruments, including ex lege representation (e.g. by partner or other family member); state-ordered representation (e.g. guardianship, public guardianship, institutional representation of persons in residential care); voluntary measures; and any other measures used for the purpose of adult protection, support or legal representation.

Advance directives - instructions or preferences expressed by a capable adult to be respected in the event of their incapacity.

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[13] Report of the Commission on Justice, *Parliamentary Documents* Chamber of Representatives 2020-21, n° 55-1445/2, pp. 4-10.

[14] Revision of the Constitution of 17 March 2021 in order to insert into Title II an Article 22ter safeguarding the right of persons with a disability to full inclusion in society, *Belgisch Staatsblad* 30.03.2021.

[15] Opinion of S. Sottiaux, 'Report of the hearings and written opinions', *Parliamentary Documents* Senate 2019-20, n° 7-169/3, pp. 114-115.

Attorney [lasthebber / mandataire] - representative/support person appointed in a continuing power of attorney.

Confidant [vertrouwenspersoon / personne de confiance] - a person who acts as a mediator between the guardian(s) and the protected adult, expresses the opinion of the protected adult in the cases provided for by law, or supports them and supervise the proper functioning of the guardianship (see the definition in article 494, d) old Civil Code).

Continuing power of attorney [lastgeving met het oog op buitengerechtelijke bescherming / mandat en vue de protection extrajudiciaire] - a registered power of attorney granted with the explicit purpose to remain in force, or enter into force, in the event of the granter's mental incapacity (see the definition in article 490, section 1 old Civil Code).

***Ex lege* representation** [wettelijke vertegenwoordiging / représentation légale] - an adult protection measure providing legal authority to other persons to act ex lege (by operation of law) on behalf of the adult, requiring neither a decision by a competent authority nor a voluntary measure by the adult.

Extrajudicial protection [buitengerechtelijke bescherming / protection extrajudiciaire] - voluntary and *ex lege* protection measures, particularly a continuing power of attorney.

Granter [lastgever / mandant] - an adult capable to express their will, or an emancipated minor, who have not been judicially incapacitated, who grants a continuing power of attorney (see the definition in article 490, section 1 old Civil Code).

Guardian [bewindvoerder / administrateur] - the general term used for a representative and/or support person appointed to a protected person by the justice of peace (see the definition in article 494, b) and c) old Civil Code). The Belgium legislature explicitly chose to abandon the term 'guardian' [voogd / tuteur] in 2013, because of its negative connotation, e.g., the equation of the vulnerable adult with a minor ward that would run counter the former's empowerment.[16] It is with much hesitation that we use the term guardian throughout this report.

[16] Explanatory memorandum, *Parliamentary documents* Chamber of Representatives 2010-2011, n° 53-1009/1, p. 13. Also see: G. Willems, V. Ghesquière, M. Horlin, T. Van Halteren and C. Vandermeulen, 'Les balises internationals et leur reception en droit belge et à l'étranger' in J. Sosson (ed.), *La protection extrajudiciaire et judiciaire des majeurs vulnérables*, Larcier, Brussels 2021, pp. 37-38.

Judicial protection [rechterlijke bescherming / protection judiciaire] - state-ordered measure under which a protected person is declared incapacitated and (a) guardian(s) is/are appointed to support and/or represent them.

Legal capacity [bekwaamheid / capacité] - the power to exercise rights and duties autonomously oneself (article 491/1, a) old Civil Code) (legal agency).

Mental capacity [wilsbekwaamheid / capacité d'exprimer sa volonté; also reversely: in de onmogelijkheid zijn wil te kennen te geven of wilsonbekwaam / impossibilité ou incapacité d'exprimer sa volonté] - *de facto* decision-making and decision-communication skills of a person.

Prodigality [staat van verkwisting / état de prodigalité] - habitual useless or fool expenditures caused by the immorality of a person and not by their illness.

Protected person [beschermde persoon / personne protégée] - vulnerable adult who has been judicially incapacitated (see the definition in article 491, a) old Civil Code).

Representation [vertegenwoordiging / représentation] - power of the guardian to act on behalf of the protected person who is judicially declared incapable to perform a specific legal act autonomously themselves (see the definition in article 491, g) old Civil Code).

Representative [vertegenwoordiger / représentant] - a natural or legal person who acts on behalf of the adult.

State-ordered measures - see *judicial protection*.

Support [bijstand / assistance] - power of the guardian to complete the legal validity of a specific legal act which the protected person was judicially declared incapable to perform autonomously (see the definition in article 491, f) old Civil Code).

Support person [bijstandsverlener / assistant] - a natural or legal person who assists the adult to legally act or who acts together with the adult.

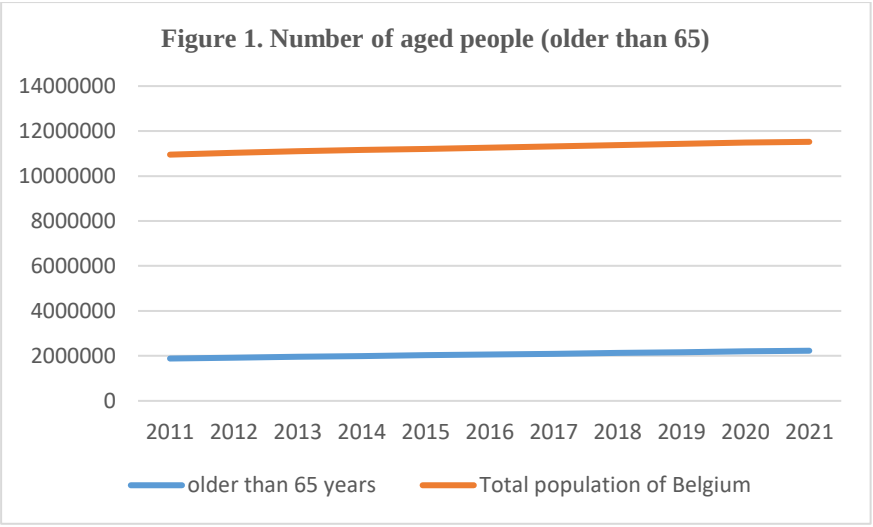
Voluntary measures [vrijwillige maatregelen / mesures volontaires] - any measure initiated by the adult without external compulsion ex lege or a decision by any competent state authority.

Vulnerable adult [kwetsbare volwassene / adulte vulnerable] - adults who, by reason of an impairment or insufficiency of their personal faculties, are not in a position to protect their interests.

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

Figure 1 presents the number of aged people (older than 65) compared to the Belgian population.

Figure 1. Number of aged people (older than 65)



Source: Statistics Belgium.[17]

No reliable statistical information is available on the numbers of persons with a disability (in the sense of the CRPD). As was mentioned in a Parallel report to the Committee on the Rights of Persons with Disabilities on the second and third periodic reports submitted by Belgium, 'The data available is limited (this includes: no disaggregated data on the type of disability) and difficult to compare (different definitions of disability). It is distributed among the different policy areas. It is therefore difficult to identify developments and establish links.'[18] The

[17] <https://bestat.statbel.fgov.be/bestat/crosstable.xhtml?view=5fee32f5-29b0-40df-9fb9-af43d1ac9032> accessed 28.01.2022.

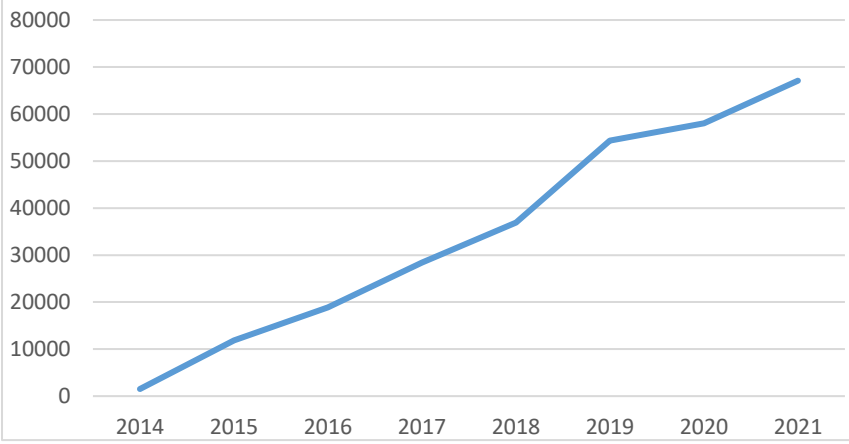
[18] UNIA, 'NHRI Parallel Report and CRPD 33.2.', p. 22 <https://www.unia.be/en/publications-statistics/publications/parallel-report-to-the-committee-on-the-rights-of-persons-with-disabilities-crpd-2021> accessed 28.01.2022.

division of competences in Belgium, between the federal level and the communities, also complicates the collection and analysis of data.[19] Improvement is needed.[20]

Continuing powers of attorney and advance directives on the preferred guardian and confidant are registered in Central Registers (CRL and CRV), held by the Royal Federation of the Belgian Notary Public.

Figure 2 represents the total number of newly registered continuing powers of attorney per year; this number is rising quickly. This is particularly so in the Dutch-speaking part of Belgium.[21]

Figure 2. Newly registered continuing powers of attorney



Source: Royal Federation of the Belgian Notary Public.[22]

Figure 3 contains the total number of newly registered advanced directives on preferred guardians and confidants.

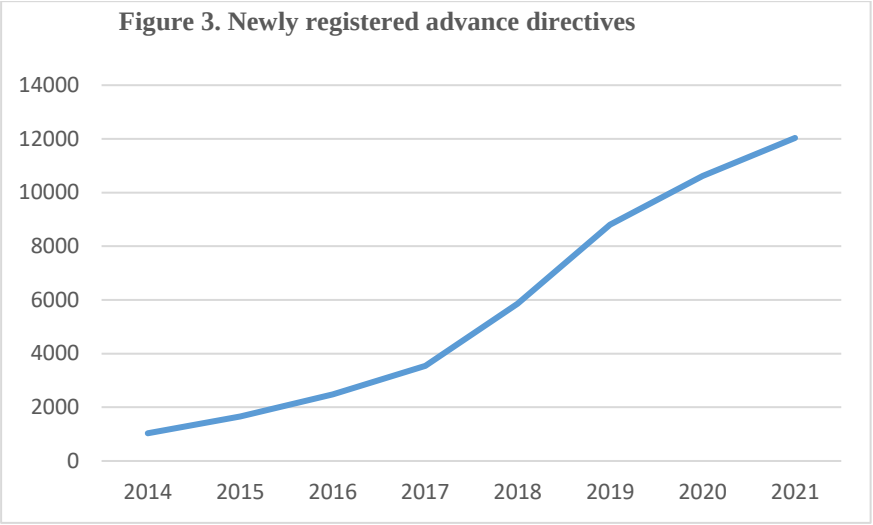
[19] See <https://handicap.belgium.be/nl/contact/publicaties/index.htm> accessed 28.01.2022; <https://www.statistiekvlaanderen.be/nl/levensomstandigheden/zorg> accessed 28.01.2022.

[20] Also see: F. Swennen, 'Registerdata' [2019] *Tijdschrift voor Familierecht* 146-147.

[21] T. Wuyts, 'Zorgvolgmachten: een zegen of een vloek?' in W. Pintens and C. Declerck (eds.), *Patrimonium 2020*, die Keure, Bruges 2020, pp. 235-323.

[22] Observation date: 13 January 2022.

Figure 3. Newly registered advance directives



Source: Royal Federation of the Belgian Notary Public[23]

No reliable statistical information is available on the number of protected persons under judicial protection. There will be in the future, as the digitisation mentioned above is implemented (articles 1253/2 to 1253/7 Judicial Code). Hereafter we present the available statistical information.

Following the National Register[24], 90,566 persons have been subject to a state-ordered protection measure after the 2013 reform. 44,863 persons are still registered as being subject to an expired state-ordered protection measure. It is unclear whether those persons are included in the 90,566 or must be added due to the automatic conversion to a new state-ordered measure since September 2019. At the same time, the National Register shows that 32,397 different people were appointed as guardians. This number includes both professional and family guardians. 34,212 guardians were registered as guardians under an old state-ordered measure, limited to the property. 53,996 guardians were registered as guardians of the property. 4,409 guardians were registered as guardians of the person. 40,075 guardians were registered as both guardians of the property and the person. Again, it is unclear whether the guardians registered under an old state-ordered measure must be added or are included in the other numbers.

[23] Observation date: 13 January 2022.
[24] Observation date: 8 January 2022.

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.

Belgium has been a party to the CRPD since 1 August 2009[25] and to the Hague Convention since 1 January 2021.[26] One of the main reasons for the above-mentioned 2013 reform was to comply with its obligations under CRPD (see above, question 1 and below, section 7). Belgium is also a member state of the Council of Europe, which Recommendations (99)4 and (2009)11 of the Committee of Ministers also inspired the 2013 reform.[27]

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

The Acts of 17 March 2013[28] and 21 January 2013 fundamentally reformed the legal framework concerning state-ordered and voluntary measures.[29] Before this reform, several state-ordered measures existed, like the prolonged minority[30] [verlengde minderjarigheid], judicial incapacity[31] [gerechtelijke onbekwaamheid], assistance by a legal counsel[32] [bijstand door een gerechtelijk raadsman], and more recently, the temporary administration[33] [voorlopige bewindvoering].

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[25] Act of 13 May 2009 consenting to the Convention on the Rights of Persons with Disabilities and to the Optional Protocol, *Belgisch Staatsblad* 22.05.2009. See on the impact on Belgian Law: Opinion of S. Sottiaux, 'Report of the hearings and written opinions', *Parliamentary Documents* Senate 2019-20, n° 7-169/3, pp 111-113.

[26] Act of 13 March 2019 consenting to the Convention on the International Protection of Adults, *Belgisch Staatsblad* 22.12.2020.

[27] Explanatory memorandum, *Parliamentary documents* Chamber of Representatives 2010-2011, n° 53-1009/1, pp. 5 and 21.

[28] Act of 17 March 2013 reforming disability schemes and establishing a new protection status consistent with human dignity [Wet van 17 maart 2013 tot hervorming van de regelingen inzake onbekwaamheid en tot instelling van een nieuwe beschermingsstatus die strookt met de menselijke waardigheid], *BS* 14 juni 2013.

[29] Act of 21 January 2013 amending the Election Code and the Act of 17 May 2006 on the external legal position of those convicted of a custodial sentence and the rights conferred on to the victim in the context of the sentence execution modalities, following the establishment of a new protection status that consistent wiht human dignity [Wet van 21 januari 2013 tot wijziging van het Kieswetboek en van de wet van 17 mei 2006 betreffende de externe rechtspositie van de veroordeelden tot een vrijheidsstraf en de aan het slachtoffer toegekende rechten in het raam van de strafuitvoeringsmodaliteiten, ingevolge de instelling van een nieuwe beschermingsstatus die strookt met de menselijke waardigheid], *BS* 14 juni 2013.

[30] Introduced by the Act of 29 June 1973, *BS* 3 July 1973.

[31] Old articles 489-512 old Civil Code.

[32] Old articles 513-515 old Civil Code.

[33] Old articles 488bis, A-K old Civil Code.

This reform had mainly two objectives.[34] First, to replace all the existing state-ordered measures with one unified state-ordered measure that allows a judge to organise a tailor-made protection of an adult. State-ordered measures existing at that time were either out-dated or limited to the protection of a person's property. Second, adapt Belgium's legislation to resolution R(99)4 of the Council of Europe and the CRPD.

It was a long-term job. A first draft was introduced and supported by a large majority of the political groups in the Chamber of representatives.[35] The civil society strongly criticised this draft because, while the explanatory memorandum indicated the paradigm shift accordingly the CRPD and could be supported, it was not reflected in the text.

After a broad civil society consultation, a new draft was prepared and discussed in a working group constituted by staff members of all the democratic political parties in the federal parliament. The commission on justice organised four hearings over this new bill.[36] The legislator asked the Council of State for advice.[37] The advice resulted in many amendments to the original bill to improve the text and make it entirely according the philosophy mentioned in the explanatory memorandum. The Senate evocated the bill. The Senate also adapted some amendments.[38] The Chamber finally approved the bill unanimously.[39]

The reform entered into force on 1 September of 2014.[40] It was in line with the new 'family court' entry into force. After all, both reforms resulted in a shift in powers and coordination was necessary.[41] The legislator had hoped that transferring family cases from the justices of the peace to the family courts would reduce the workload and ensure that the justices of the peace also had time to apply the new state-ordered measure according to its philosophy.

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[34] Explanatory memorandum, *Parliamentary documents* Chamber of Representatives 2010-11, n° 53-1009/1, pp. 3-6.

[35] Bill amending the legislation on disability statutes with regard to the introduction of a global statute [Wetsvoorstel tot wijziging van de wetgeving inzake de onbekwaamheidsstatuten wat de invoering van een globaal statuut betreft (Goutry c.s.)], *Parliamentary documents* Chamber of Representatives 2007-08, n° 52-1356/1.

[36] Addendum to the first report of the Commission on Justice of the Commission on Justice, *Parliamentary documents* Chamber of Representatives 2011-12, n° 53-1009/10, pp. 235-389.

[37] The advice of the Council of State n° 50.186/2 and 50.187/2 of 12 October 2011, *Parliamentary documents* Chamber of Representatives 2011-12, n° 53-1009/3.

[38] Text adapted by the Senate, *Parliamentary documents* Senate 2012-13, n° 5-1774/8.

[39] *Proceedings* Chamber of Representatives 2012-13, 28 February 2013, CRIV 53 PLEN 133, 57.

[40] Article 233 Act of 17 March 2013.

[41] *Parliamentary documents* Chamber of Representatives 2013-14, n° 53-3356/1, p. 49.

All the old state-ordered measures ended at the latest on 1 September 2019 either because they were converted by a court order or *ex lege*.[42]

The reform was repaired several times after and even before entry into force.[43] Furthermore, the new legal framework was adapted several times.[44] There were two major reforms in the introduction of the new legal framework. The first one was by the Act of 21 December 2018.[45] The second one is the Act of 10 March 2019[46] implementing the Hague Convention in Belgium law.

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.

Legal doctrine welcomed the 2013 reform with mixed feelings. While subscribing to the spirit of the new framework on state-ordered measures, it criticized its complexity and inconsistency.[47] The legal regulation of voluntary measures was applauded,[48] yet criticized for the lack of supervision of the attorney if not provided for in the continuing power of attorney by the granter.[49]

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[42] See articles 227-229 Act of 17 March 2013.

[43] See, for instance, Act of 30 July 2013; articles 181-221 Act of 25 April 2014; articles 11-22 Act of 12 May 2014.

[44] Act of 10 August 2015; articles 5-9 and 63 Act of 31 July 2017; article 27 Act of 25 December 2017; article 29 Act of 7 January 2018.

[45] Articles 2-98 Act of 21 December 2018 containing various provisions on Justice, *BS* 31 December 2018. Most articles entered into force on 1 March 2019.

[46] Act of 10 March 2019 implementing the Convention of the Hague of 13 January 2000 on the international protection of adults, *BS* 22 March 2019.

[47] F. Deguel, 'La loi du 17 mars 2013 réformant les regimes d'incapacité et instaurant un nouveau statut de protection conforme à la dignité humaine: vers une simplification?' [2013] *Tijdschrift voor Belgisch Burgerlijk Recht* 316, n° 91; K. Rotthier, 'De nieuwe wet tot hervorming van het statuut van onbekwamen: een overzicht vanuit vogelperspectief' [2013] *Notarieel en Fiscaal Maandblad* 203, nr. 128; F. Swennen, 'De meerderjarige beschermde personen' [2014] *Rechtskundig Weekblad* 623, n° 149.

[48] J. Bael, 'De buitengerechtelijke bescherming: een overzicht met aandacht voor een aantal discussiepunten in de rechtsleer en met een voorstel van een aantal modellen' in J. Bael (ed.), *Rechtskroniek voor het notariaat. Deel 28*, die Keure, Bruges 2016; J. Verstraete, 'Krijtlijnen voor de zorgvolmacht' in *Liber Amicorum Aloïs Van den Bossche*, die Keure, Bruges 2019, pp. 163-194; N. Dandoy, F. Derème and V. Bertouille, 'La conclusion et la mise en oeuvre du mandat extrajudiciaire' in J. Sosson (ed.), *La protection extrajudiciaire et judiciaire des majeurs vulnérables*, Larcier, Brussels 2021, pp. 82-196. See also the comparative legal study by A. Van den Broeck, *Vermogensbescherming van kwetsbare meerderjarigen via lastgeving. Een rechtsvergelijkend onderzoek*, Intersentia, Antwerp 2014.

[49] Interview with justice of the peace L. Carens by R. Boone, 'Verzoeningsbevoegdheid van vrederechters mag fors uitgebreid worden', (2019) 394 *Juristenkrant* pp. 10-11.

In 2016, civil society organisations claimed that it was not applied according to its objectives and spirit.[50] They complained that justices of the peace do not offer a tailor-made approach to the declaration of incapacity, that they systematically appoint professional guardians instead of next of kind as guardian – resulting in an impersonal approach –, and, more generally, that there is no dialogue between the civil society organisations on the one hand and the justices of the peace and guardians on the other.[51] For example, a practice guide that was to be developed with participation of civil society organisations, is still even not in preparation.[52] It is, however, worth mentioning that local initiatives have been taken by civil society organisations, justices of the peace and the Bar, e.g., in setting up a resource centre guardianship [Steunpunt Bewindvoering].[53] Everyone with questions or a need for support concerning guardianship can contact the resource centre.

In a 2019 audit at the justice of the peace courts, the High Council of Justice came to the same conclusions as the civil society organisations in 2016, and pointed at insufficient supervision on fraud and abuse by guardians.[54] Also, the High Council appealed to better estimate the real workload of the justice of the peace courts and to provide the necessary resources to address that workload. A follow-up report for 2022 shows significant improvements on some points.[55] For instance, the full implementation of the central register has led to the automation of the control of administration files, and several justices of the peace courts took measures to optimise their monitoring. However, more structural improvements remain desirable. The follow-up report mentions, among other things, the introduction of quality criteria for professional guardians, an incompatibility between the function of guardian and deputy justice of the peace in the same canton and uniform rules on the remuneration of guardians.

In conclusion, many indications suggest that the legal framework for state-ordered measures is still not applied according to the 2013 legislatures' objectives

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[50] See <https://www.vlaamswelzijnsverbond.be/nieuws/open-brief-aan-de-korpschefs-van-de-vlaamse-vrederechters> accessed 06.12.2021.

[51] Report of the first reading of the Bill containing various provisions relating to justice, *Chamber of representatives* 2018-19, n° 54-3303/8, pp. 5-6.

[52] Ghent University College took an initiative, which resulted in a practical guide for non-professional guardians. N. Vandenbussche, 'Bewindvoering. Praktische gids anno 2021', <https://www.hogent.be/projecten/bewindvoering/> accessed 28 January 2022.

[53] <http://www.steunpuntbewindvoering.be> accessed 28.01.2022.

[54] High Council of Justice, 'Audit. The supervision of guardianships by the justice of the peace courts', <https://hrj.be/nl/publicaties/2019/audit-het-toezicht-op-de-bewindvoeringen-door-de-vredegerechten> accessed 28.01.2022.

[55] High Council of Justice, 'Monitoring of the Audit "The supervision of guardianships by the justices of the peace courts', <https://hrj.be/nl/publicaties/2022/opvolgingsverslag-van-de-audit-het-toezicht-op-de-bewindvoeringen-door-de-vredegerechten> accessed 22 August 2022.

and spirit.[56] The newly inserted continuing power of attorney has become very popular, but exploratory empirical legal research indicates special attention should be had to its careful application (see question 49).[57]

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

No major reforms were pending or had been announced at the time this report was submitted.

A bill has been introduced to allow the judicial incapacitation for the exercise of political rights, with a view of creating legal certainty and combatting actual abuses.[58] This had already been proposed in the context of the 2013 reform but was rejected at that time at the request of civil society organisations because of a potential violation of the CRPD.[59]

The Minister of Justice also aims at taking further two limited initiatives of his predecessor.[60] On the one hand, he aims at rendering more transparent and uniform the regulations on the guardian's expenses and remuneration (see article 497/5 old Civil Code). The draft decree was, however, severely criticised.[61] On the other hand, a bill had been prepared with a view of determining the requirements for

[56] Also in that sense: T. Wuyts, 'Een jaar toepassing van het eengemaakte beschermingsstatuut. Een tussentijdse evaluatie en aanbevelingen tot bijsturing waar nodig' in M. Dambre en P. Lecocq (eds.), *Rechtskroniek voor de vrede- en politierechters 2015*, die Keure, Bruges 2015, pp. 3-31; N. Gallus and T. Van Halteren, 'La personnalisation des mesures d'incapacité' in La protection des personnes majeurs. Dix-huit mois de pratique, coll. CUP, vol. 165, Larcier, Brussels 2016, pp. 9 ss; G. Willems, V. Ghesquière, M. Horlin, T. Van Halteren and C. Vandermeulen, 'Les balises internationals et leur reception en droit belge et à l'étranger' in J. Sosson (ed.), *La protection extrajudiciaire et judiciaire des majeurs vulnérables*, Larcier, Brussels 2021, pp. 42-47.

[57] T. Wuyts, 'Zorgvolmachten: een zegen of een vloek?' in W. Pintens en C. Declerck (eds.), *Patrimonium 2020*, die Keure, Bruges 2020, pp. 235-323.

[58] Bill to amend the Civil Code as regards the capacity of the protected person, *Parliamentary documents* Chamber of Representatives Special Session 2019, n° 55-272/1.

[59] The first report of the Commission on Justice, *Parliamentary documents* Chamber of Representatives 2011-12, n° 53-1009/10, p. 259.

[60] *Questions and Answers*, Parliamentary documents Chamber of Representatives 2020-2021, 21 April 2021 (Question n° 55016595C GEENS), CRIV 55 COM 445, 41.

[61] D. Scheers, 'De vergoeding van de bewindvoerder: in de beperking toont zich de meester' [2022] *Rechtskundig Weekblad* 871.

exercising as a professional guardian and the maximum number of files per guardian (see article 497/1 old Civil Code).[62] The High Council of Justice has issued an advice on the draft bill,[63] which has not yet been introduced.

A general evaluation of the 2013 reform is provided for nine years after its entry into force, *i.e.*, in 2023 and should be presented to Parliament by 30 June 2024 (article 224 of the 2013 Act).

SECTION II – LIMITATIONS OF LEGAL CAPACITY

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

a. on what grounds?

Limitation of legal capacity in the context of judicial protection is primarily aimed at adults, i.e. persons who have reached majority (18 years) and who, because of their health condition, are unfit – fully or partly, even temporarily – to properly attend to their financial and personal interests without assistance or other protective measure (article 488/1 para. 1 old Civil Code).

Applications are admissible on behalf of a minor, from the age of seventeen, if it is established that, by the time of reaching majority, they will meet the above conditions for judicial protection. The legislature thus wanted to avoid a gap in the protection as a minor resp. as a protected person. It is, therefore, stipulated in article 488/1 para. 2 old Civil Code that judicial protection will only come into effect upon reaching majority. Even better would have been a possibility to make effective judicial protection available from the twelfth or fifteenth birthday of a minor, depending on whether it concerns his personal or his financial interest, for minors acquire specific active legal capacity from that age onwards.[64]

The legislature deliberately has not further defined the health condition that may give rise to limitation of legal capacity, to allow its interpretation follow developments in the medical science. No distinction is made between the physical

[62] In execution of article 497/1 old Civil Code.

[63] High Council of Justice, 'Advice of 27 November 2019 on a draft bill amending the Civil Code and the Judicial Code with a view to establishing a Federal Guardianship Commission and to determine the conditions for the professional exercise of the functions of guardian of a vulnerable adult', <https://hrj.be/admin/storage/hrj/20191127-advies-profiel-bewindvoerder.pdf > accessed 12.01.2022.

[64] F. SWENNEN, *Het personen- en familierecht. Een benadering in context*, Intersentia, Antwerp 2021, p. 205.

and mental health condition, to avoid over- or under-inclusiveness. The only relevant question is whether the vulnerable adult is unfit to make decisions knowingly and wilfully and to communicate them, regardless of the physical or mental cause.

Regarding one's mental health condition, it is irrelevant whether the vulnerable adult suffers from a mental or an intellectual impairment. Both hypotheses may be medically different but give rise to a similar legal need for protection.

Social vulnerability leading to social insecurity, e.g., in case of debt burden, does not qualify as a ground for judicial protection.[65] Other types of protection are applicable in such case, e.g., personal insolvency measures.

The vulnerable adult must be unfit to properly manage their interests themselves due to their health condition. The word 'properly' should not only be interpreted normatively, with reference to the reasonable or prudent person. The subjective values of the vulnerable adult should also be considered. In the absence of knowledge of such values, the objective benchmark applies.[66]

The unfitness may be temporary, e.g., in case of an evolving health condition. It may be full or partial, depending on (the complexity of) the personal or financial interests to which it relates, or depending on whether the vulnerable adult can still act themselves with a support person or not.

Limitation of legal capacity regarding property and financial matters is also possible on the ground of prodigality of adults who have reached majority at the time of the application (article 488/2 old Civil Code).

An adult may be judicially declared a prodigal in case their dissolute expenditures are caused by wasteful conduct that is considered contrary to public morals rather than their health condition. Public opinion may, of course, evolve on whether, e.g., a gambling addiction is considered immoral or rather a disease.

According to the traditional view, a vulnerable adult may only be judicially declared a prodigal in case expenditure exceeds income, and capital is being withdrawn. Yet often, vulnerable adults have no capital. We agree that judicial protection should also be possible in case the prodigal squanders their income only.[67]

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[65] Justice of the Peace Boussu 5 January 2016, [2018] *Tijdschrift van de Vrederechters* 7.

[66] Justice of the Peace Vorst 3 December 2015, [2018] *Tijdschrift van de Vrederechters* 10.

[67] K. ROTTHIER, 'De nieuwe wet tot hervorming van het statuut van onbekwamen. Een overzicht vanuit vogelperspectief', [2013] *Notarieel en Fiscaal Maandblad* 183.

Not living up to the benchmark of the reasonable or prudent person regarding the administration of income or capital does not, as such, justify the judicial declaration of prodigality. For example, the fear of putative heirs that nothing will be left at the death of a spendthrift is not worthy of protection.

A justification for judicial protection can be found in the financial interests of the state or family members[68] as potential maintenance debtors resp. creditors of the vulnerable adult. Spendthrift should indeed not result in the state having to come to the aid of the prodigal or of their maintenance creditors.

Contrary to other jurisdictions, no empirical information is available on the concurrence of judicial declaration of prodigality and other measures related to personal insolvency, such as debt mediation and collective debt settlement – which concurrence may be presumed in Belgium, too, but is not explicitly regulated.[69] Certainly in case the vulnerable adult is also married or in a registered partnership, a complex situation arises.

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

It is set out in the Civil Code.

The justice of the peace may legally incapacitate the vulnerable adult to exercise one or more (categories of) rights or duties, taking into account their personal circumstances and health condition. The court order should contain an enumerative list of the rights and duties, or categories, concerned (articles 491 a) and e) and 492/1 para. 1 old Civil Code). In other words, legal capacity is the rule, incapacity the exception (articles 488 and 1124 old Civil Code).[70]

The scope of the vulnerable adult's incapacity is determined as follows.

The court order should separately address personal resp. financial rights and duties of the vulnerable adult (article 492/1 para 3 old Civil Code).

For both matters, the Civil Code contains a checklist of rights and duties that are considered important for the vulnerable adult's autonomy and for each of which the justice of the peace should tick whether the adult is incapacitated. In the

[68] Hereto Justice of the Peace Westerlo 1 February 2016, [2017] *Rechtskundig Weekblad* 1233.
[69] F. SWENNEN, 'Meerderjarigenbescherming in de Lage Landen', [2013] *Tijdschrift voor Familie- en Jeugdrecht* 336-45.
[70] Also see Court of Cassation 18 October 2018, [2019] *Revue Trimestrielle de Droit Familial* 57.

absence of an explicit declaration of incapacity for such right or duty, the vulnerable adult retains their legal capacity (article 492/1 para. 1 section 2 and para. 2 section 2 old Civil Code).

Furthermore, the justice of the peace may declare the protected adult expressly incapacitated for rights and duties that do not appear in the above-mentioned checklists. In personal matters, the justice of the peace should list those rights and duties individually (article 492/1 para. 1 section 1 old Civil Code). In financial matters, the justice of the peace may also list categories of rights and duties. They shall take into account the nature and composition of the assets to be administered when determining the incapacity (article 492/1 para. 2 section 1 old Civil Code).

The incapacitated vulnerable adult in principle continues to act themselves, assisted by or together with a support person. Only if and insofar necessary, representation by a guardian may be ordered explicitly, in which case the vulnerable adult no longer exercises their rights and duties. In case of judicial declaration of prodigality, only the assistance of a support person may be ordered (article 492/2 old Civil Code).

The incapacity commences as from the notification in the official gazette that judicial protection has been ordered (article 1250 Judicial Code), for legal acts in personal matters and for those legal acts concerning financial matters for which the guardian would need prior authorisation by the justice of the peace to execute them (articles 499/7 paras. 1 and 2, 748/1, 905, 1397/1 and 1478 section 4 old Civil Code). For these rights and duties, protection of legal certainty is considered important.

The incapacitation terminates or changes on the day of a new court order with that effect, upon the death of the vulnerable adult, upon expiration if ordered for a fixed period, and upon the termination of the internment (article 492/4, first and third sections old Civil Code).

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

Full deprivation of legal capacity is not possible in Belgium; it can only be limited. A tailor-made response to vulnerability should always be offered,[71] in which the autonomy of the vulnerable adult is safeguarded as much as possible.[72]

[71] Also see *Case of N. v Romania (No. 2)*, 16 November 2021, § 63, ECLI:CE:ECHR:2021:1116JUD003804818.

[72] Constitutional Court 30 September 2009, No. 147/2009 <www.const-court.be> accessed 10.01.2022.

Admittedly, this may lead to quite complex situations in which legal certainty for third parties is not necessarily safeguarded.[73]

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?

The incapacitation is open-ended in time in principle, except in case the justice of the peace orders otherwise explicitly. The 2013 reform had initially provided for a one-off mandatory evaluation of the incapacitation within two years of the court order. This was considered unnecessary in some cases and insufficient in others,[74] and replaced with a system of permanent evaluation in 2018.

The vulnerable adult, their trusted person, the guardian, any interested party, and the public prosecutor may always request the evaluation of the incapacitation with a view of fully or partly restoring it or further limiting it. The justice of the peace may also evaluate the incapacitation of their own motion. The guardian should keep them informed of any relevant change of circumstances to that end (article 492/4 old Civil Code).

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

No. Voluntary measures (including extrajudicial protection) and *ex-lege* representation never result in a limitation of legal capacity. Judicial protection, as a state-ordered measure, consists in a court-ordered tailor-made, and never automatic, limitation of legal capacity on the one hand, and assistance or representation of the vulnerable adult on the other hand.

f. are there any other legal instruments,[75] besides adult protection measures, that can lead to a deprivation or limitation of legal capacity?

[73] F. SWENNEN, *Het personen- en familierecht. Een benadering in context*, Intersentia, Antwerp 2021, p. 220.

[74] S. MOSSELMANS and A. VAN THIENEN, 'Meerderjarige beschermde personen: update en modernisering met titel 2 van de wet van 21 december 2018' [2020] *Tijdschrift voor Familierecht* 38, 49.

[75] 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

Not in the same legal-technical sense. There is, however, a broad array of measures limiting adult's powers over certain assets, with a view of protecting the spouse, creditors etc.[76]

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

a. property and financial matters

The Civil Code contains a checklist of rights and duties that are considered important for the vulnerable adult's autonomy and for each of which the justice of the peace should tick whether the adult is incapacitated. In the absence of an explicit declaration of incapacity for such right or duty, the vulnerable adult retains their legal capacity (article 492/1 para. 2 section 2 old Civil Code).

Furthermore, the justice of the peace may declare the protected adult expressly incapacitated for (categories) of rights and duties that do not appear in the above-mentioned checklist. They shall take into account the nature and composition of the assets to be administered when determining the incapacity (article 492/1 para. 2 section 1 old Civil Code).

The incapacitated vulnerable adult in principle continues to act themselves, assisted by or together with a support person. This can only be excluded if and insofar necessary and never in case of judicial declaration of prodigality (article 492/2 old Civil Code).

See Question 28for the voidability of the adult's transactions contrary to the determination of incapacity.

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

The Civil Code contains a checklist of family matters and personal rights that are considered important for the vulnerable adult's autonomy and for each of which the justice of the peace should tick whether the adult is incapacitated. Examples are marriage, divorce, exercising parental responsibilities or exercising rights under the GDPR. In the absence of an explicit declaration of incapacity for such right or duty, the vulnerable adult retains their legal capacity (article 492/1 para. 1 section 2 old Civil Code).

[76] Hereto R. JANSEN, *Beschikkingsonbevoegdheid*, Intersentia, Antwerp, 2009, 931 p.

Furthermore, the justice of the peace may declare the protected adult expressly incapacitated for individual rights and duties that do not appear in the above-mentioned checklist (article 492/1 para. 1 section 1 old Civil Code).

The incapacitated vulnerable adult in principle continues to act themselves, assisted by or together with a support person. This can only be excluded if and insofar necessary.

In a number of cases in which this is explicitly provided for, the justice of the peace may authorise vulnerable adults to perform a legal act for which they are incapacitated in principle in the court order, e.g. to enter into marriage[77] (articles 145/1, 186, 231, 328, para. 1, and 1397/1 old Civil Code and 4.139 Civil Code). The only relevant criterion for the court to grant authorisation is the vulnerable adult's mental capacity. It is in principle not within the discretion of the court to assess the expediency of the legal act for the vulnerable adult.[78]

The impact of judicial protection on the vulnerable adult's parental responsibilities is not quite regulated consistently and is a matter of concern regarding its compatibility with article 23 CPRD.[79]

c. medical matters

Legal incapacitation for the exercise of patients' rights is not possible: only the patient's mental capacity is relevant (article 14 para. 1 section 1 Patients' Rights Act).

Legal incapacitation is, however, possible regarding the participation to medical experiments, consenting to or opposing (post mortem) organ transplantation, and consenting to or opposing (post mortem) removal of body tissue (article 492/1 para. 1 old Civil Code).

d. donations and wills

Donations and wills are included in the checklist of legal acts for which the justice of peace must explicitly address incapacitation; incapacitation is possible (article 492/1 para. 2 section 3, 13° and 15° old Civil Code).

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[77] The ECtHR found a comparable French regulation compatible with the ECHR: *Case of Delecolle v. France*, 25 October 2018, § 60, ECLI:CE:ECHR:2018:1025JUD003764613.

[78] F. SWENNEN, *Het personen- en familierecht. Een benadering in context*, Intersentia, Antwerp 2021, pp. 224-25.

[79] See, e.g., District Court Mechelen 27 November 2019, [2020] *Tijdschrift voor Familierecht* 81, and the case note by T. Wuyts, 83-86.

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

Regarding family and personal proceedings, the justice of the peace should individually determine (with the checklist) the proceedings for which the adult is legally incapacitated. Regarding property and financial matters, acting as a defendant or claimant in (administrative or judicial) proceedings in general, and entering into a settlement or arbitration agreement, are listed in the checklist on which the justice of the peace has to explicitly decide (article 492/1 para. 2 section 3, 7° and 10° old Civil Code).

Regarding personal administrative matters, the court should decide on incapacitation per matter – the modification of names, legal sex reassignment, the application for Belgian nationality (not its renunciation) and the use of the electronic ID card to electronically sign documents or authenticate oneself are included in the checklist (article 492/1 para1 section 3, 11°, 14°, 21° and 22° old Civil Code).

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

Yes. The incapacity commences retroactively as from day of the application for all other legal acts (article 492/3 old Civil Code). Moreover, it has a *quasi*-retroactive effect on the basis of article 493/2 old Civil Code, which permits to challenge legal acts preceding the application on the ground of legal incapacity upon proof that the reason for the judicial incapacitation already manifestly existed in that period.

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

The justice of the peace of the vulnerable adult's habitual residence; courts of the peace are organized on a sub-district level, closest to the law-user (articles 594, 16° and 628, 3° Judicial Code).

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

The request for a limitation of legal capacity may be made by the vulnerable adult – as a kind of voluntary measure –, by any interested party – such as the municipal Public Social Welfare Office –,[80] and by the public prosecutor (article

[80] District Court Antwerp 5 February 2015, [2016] *Tijdschrift voor Vrederechters* 335.

1238 para. 1 Judicial Code). The justice of the peace may also order judicial protection of their own motion, in case the person to be protected is confined under the Mental Health Act,[81] is interned in case of criminal insanity,[82] or in case the justice of the peace is seized in the context of extrajudicial protection (see below, section 0; article 1238 para. 2 Judicial Code).

The vulnerable adult, their trusted person, the guardian, any interested party, and the public prosecutor may always request the evaluation of the incapacitation with a view of fully or partly restoring it or further limiting it. The justice of the peace may also evaluate the incapacitation of their own motion. The guardian should keep them informed of any relevant change of circumstances to that end (article 492/4 old 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

Whenever the vulnerable adult appears before the court without the assistance of a lawyer, the judge will ask whether they wishes to designate a lawyer, either themselves or through the President of the Bar or the Legal Aid Office. The court may also order such designation of its own motion, if considered necessary (article 1244/1 Judiciary Code).

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

The application to the court must include, if applicable and known to the petitioner, the details of the close family members and partner of the vulnerable adult (article 1240 para. 1, 4° and para. 2, 3° Judiciary Code) and should describe the adult's family situation (article 1240 para. 2, 5° Judiciary Code). The justice of the peace may convoke those family members to be heard; they can also appear voluntarily (article 1244 para 2 Judiciary Code).

The vulnerable adult may be accompanied by a confidant (from a CSO), should they want so (article 1245 para. 1 Judicial Code).

c. requirement of a specific medical expertise / statement

[81] Act of 26 June 1990 concerning the protection of the person of the mentally ill, *Moniteur belge* 27.07.1990.
[82] Act of 5 May 2014 concerning the internment, *Moniteur belge* 09.07.2014.

If the application aims at limiting the vulnerable adult's legal capacity because of their health condition, a detailed medical certificate should in principle be attached. An official template should be used; the certificate may be drawn up by any medical practitioner – such as the general practitioner of vulnerable adult,[83] but not by a relative of the vulnerable adult or of the applicant or by a medical practitioner who is, in any way, affiliated with the institution where the vulnerable adult is staying (articles 1241 and 1246 para. 2 Judicial Code, which provide for exceptions and for the delivery of expert opinions).

d. hearing of the adult by the competent authority

The justice of the peace should in principle summon the vulnerable adult to be heard (separately, if they request so) in case a limitation of capacity is considered.

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

The vulnerable adult can object to the judgment limiting their legal capacity (article 1249/1 para. 2 Judiciary Code).

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

a. property and financial matters

Article 5.27 Civil Code requires every party's free and conscious consent for a legal act to be valid. Absence of such consent leads to the voidability of the act (art. 5.31 Civil Code).

A party should give their consent willingly – e.g., not under the influence of an addiction or a compulsion – and knowingly – i.e., based on an intelligent appreciation of the legal consequences of the contract. Such consent is presumed and the vulnerable adult or their guardian or heirs should prove the absence of the free and conscious consent at the moment of the conclusion of the legal act.[84]

In some statutory provisions the legislature makes the distinction between the "incapacity" and the "impossibility" to express one's will, respectively. The first would refer to the mental inability to form and express a free and conscious will. The second would also refer to the mere physical impossibility of expressing one's

[83] District Court Antwerp 05.02 2015, [2016] *Tijdschrift voor Vrederechters* 335.
[84] F. Swennen, *Het personen- en familierecht. Een benadering in context*, Intersentia, Antwerp 2021, p. 209.

will, which is validly formed. It is not clear what the relationship is to yet other notions in the law, e.g. "unable to express one's will".

One by no means needs multiple notions to cover all hypotheses. The term mental incapacity can encompass all situations of actual inability to form or express a free and conscious will, regardless of its physical or mental cause.[85]

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

See a. insofar legal acts are concerned.

c. medical matters

Article 14 para. 3 Patients' Rights Acts refers to the 'mental incapacity' [wilsbekwaamheid; incapacité d'exprimer sa volonté], whichever its cause, of the adult to exercise their patient's rights themselves, in which case representation is possible. For the interpretation of this concept, see a.

d. donations and wills

Article 4:136 Civil Code requires a person to be of sound mind [gezond van geest; sain d'esprit] to make a gift. The traditional view in jurisprudence and doctrine is that the specific requirement in article 4:136 Civil Code boils down to one of an 'enhanced consent': the threshold to void a donation or will on the ground of incapacity would be lower than for legal acts with consideration by both parties. In practice, and taking into account the law of evidence, the threshold seems to be identical, however.[86]

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

The Court of Cassation has held that the general rules on mental capacity apply to civil proceedings.[87] The same should, in our opinion, apply to administrative legal acts.

[85] *Ibid.*

[86] Recently C. Blomme, 'Gezondheid van geest van de schenker', [2022] *Nieuw juridisch Weekblad* 465, p. 548.

[87] Court of Cassation 05.02.1998, [1998] *Arresten van het Hof van Cassatie* 170.

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?

A general evaluation of the 2013 major reform (see Question 1) is due by the Minister of Justice in 2024. Awaiting that reform, the non-implementation of the tailor-made approach provided for in the Civil Code is criticized: see question 67

SECTION III – STATE-ORDERED MEASURES

Overview

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

On the occasion of the above-mentioned 2013 reform, the then four different existing regimes for the protection of vulnerable adults in the Civil Code were merged into one state-ordered measure of judicial protection [rechterlijke bescherming, protection judiciaire] (articles 488/1, 488/2 and 491-512 old Civil Code). Judicial protection is twofold: a customized judicial declaration of legal incapacity of the protected person to exercise (some of) their rights and duties on the one hand (see above, section 0), and the organisation of the administration of those rights and duties by a guardian who acts as a representative or support person on the other, if and insofar as necessary (this section).

In case the vulnerable adult is married or in a registered partnership, the family court can also delegate the exercise of some of their rights and duties to the spouse or registered partner. The vulnerable adult themselves is not legally incapacitated by such measure. As the exercise of rights and duties by the spouse or registered partner remains by and large in the sphere of family privacy, we consider it to be a kind of *ex lege* representation rather than a state-ordered measure, even if a court order is needed. We will discuss it in section **Fout! Verwijzingsbron niet gevonden.**.

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

n/a

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

As per the principle of *subsidiarity*, *ex lege* representation and voluntary measures take precedence over judicial protection if, and insofar, possible (article 492 old Civil Code).[88] The precedence of (*ex lege*) measures provided for in marriage law (see below, question 62) [89] or marital property law (see below, questions 62and 63)[90] is, however, subject to critique because supervision is much more limited compared to state-ordered measures (see below, question 62).

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

The president of the district court is also competent to appoint a judicial guardian in summary proceedings in case of emergency (article 584, section 4, 3° of the Judicial Code).

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.

See above, question 8

18. Which authority is competent to order the measure?

See above, question 11

19. Who is entitled to apply for the measure?

See above, question 12

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?

[88] Article 492 (1) old Civil Code; *Parliamentary documents* Chamber of Representatives 2010-11, n° 53-1009/1, p. 6.

[89] Hereto V. Vanderhulst, 'Gerechtelijke indeplaatsstelling of bewind: welk statuut geniet voorrang bij gehuwden?' [2013] *Notarieel en Fiscaal Maandblad* 156-169.

[90] Justice of the peace Bruges (IV) 5 June 2019, [2020] *Tijdschrift van de Vrederechters* 320, case note N. Gallus.

As mentioned under question 12, the adult themselves is entitled to petition a state-ordered measure (article 1238 para. 1 Judicial Code). That is not to say that their consent is required to order such measure. They will, however, be convoked and heard (separately) by the court in case the state-ordered measure would impact on their legal capacity (articles 1244 para. 2 and 1245 Judicial 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

See above, question 13

b. availability of legal aid

On the one hand, legal aid is available to the parties under the conditions of general judiciary law, which discussion falls outside the scope of this report (articles 508/1 et seq. Judiciary Code).

On the other hand, the Judiciary Code provides for specific legal aid for the vulnerable adult as well, through the appointment of attorney by the Legal Aid Office (see question 13).

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

See above, question 13

d. requirement of a specific medical expertise / statement

See above, question 13

e. hearing of the adult by the competent authority

See above, question 13

f. the possibility for the adult to appeal the order

See above, question 13

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

Yes.

Pursuant to article 1249/2 Judiciary Code, every court decision is noticed to the parties and their lawyers, to the vulnerable adult and, if applicable, to the guardian(s) and confidant(s). An extract of the operative part of the decision can be communicated to any other person who can justify a specific interest pertaining to the protection of the vulnerable adult.

Pursuant to articles 1250 and 1251 Judiciary Code, an extract of every decision ordering, terminating or modifying a protection measure (or recognising or declaring enforceable such a foreign decision) shall be published in the Official Gazette within fifteen days. The extract is also noticed to mayor of the vulnerable adult's residence, for registration in the population register. The civil registrar may deliver an extract from the population register, mentioning the name and address of an adult, and whether or not their legal capacity has been limited, as well as the identity of the guardian if applicable, to the adult and to any third party demonstrating an interest.

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.)?

It is always the justice of the peace who formally appoints the guardian(s), taking into account the opinion of the vulnerable adult, their personal circumstances, living conditions and family situation (and, regarding the guardian(s) of the property: the nature and composition of the assets (article 496/2, section 1 old Civil Code and article 1247/1 Judicial Code).

The guardian(s) may be natural person, a private foundation specifically created for the vulnerable adult, or a public benefit foundation which purpose it is to organise guardianship of vulnerable adults and has a statutory committee responsible for that (article 496/3 old Civil Code).

Some persons are not eligible as a guardian. This is the case for vulnerable adults for whom judicial protection has been ordered or to whom extrajudicial protection applies, for all other legal persons than the foundations mentioned

above, for board or staff members of the institution where the vulnerable adult is living, for persons to whom personal insolvency measures apply, and for parents whose parental responsibilities have been terminated (article 496/6 old Civil Code).

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

If applicable, the justice of the peace should approve the appointment of the guardian(s) for whom the vulnerable adult has expressed their preference in registered declaration made when they were still mentally capable (article 496 old Civil Code) or should appoint as a successor the guardian for whom the sitting legally preferred guardian (see below) has expressed their preference in a formal declaration (article 496/1 para. 1 old Civil Code). Those declarations of preference, and any modifying declaration, are recorded in a central register at the Royal Federation of Belgian Notaries or in the guardianship file of the vulnerable adult. The declarations can also include a backup guardian or successor. The justice of the peace may refuse the approval of a declaration of preference for serious reasons relating to the interest of the vulnerable adult, to which he should accurately refer in the order. The justice of the peace may also refuse such approval by referring to an extract from the criminal record of the preferred guardian (article 496/2 old Civil Code).

The preferences of the spouse/partner/family members who are not the sitting guardian are taken into consideration in two ways. On the one hand, they can suggest a guardian in their application to the court (article 1240 para. 2, 6° Judicial Code). On the other hand, they may express their preference to the justice of the peace, also if they did not petition. As discussed under question 13, they will be invited to be heard.

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?

The Civil Code contains a non-hierarchical list of next of kin – close relatives or other members of the vulnerable adult's social network – who should preferably be appointed as guardian(s): the parents or one of them, the spouse, the registered partner, the *de facto* cohabitant person with whom the vulnerable person cohabits *de facto*, a close family member, a person responsible for the daily care of the vulnerable adult or who assists the vulnerable adult and those around them in the daily care, a foundation (see below), or, as guardian of the property, the attorney

to whom a continuing power of attorney had been granted that cannot be upheld (article 496/3 old Civil Code).[91] Justices of the peace, however, often give precedence to professional guardian, such as an attorney-at-law, over a next of kin. This is certainly desirable in case of a family conflict,[92] but a generalized precedence should be avoided.[93] The legal preference for the appointment of next of kind should nonetheless go hand in hand with better support for them when executing their mission,[94] e.g., by a resource centre guardianship.[95]

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

See under a.

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

The Civil Code distinguishes between a guardian of the person (*viz*. in personal matters) and the guardian of the property (*viz*. in financial matters; article 494, a) and b) old Civil Code), but in principle one guardian (or both parents) will combine both capacities.

However, the justice of the peace may not appoint the guardian of the person as guardian of the property if this is contrary to the interests of the vulnerable adult, or if no confidant has been appointed. In application of the four-eyes principle, guardians should supervise each other in case no confidant is available to supervise the single guardian.

If applicable, the justice of the peace may appoint one (or both parents as) guardian of the person and one or more guardians of the property. Unfortunately, the justice of the peace cannot jointly appoint the adult children of the vulnerable

[91] The justice of the peace may also appoint the attorney as a confidant: Justice of the peace Brussels (III) 30 September 2020, [2021] *Tijdschrift van de Vrederechters* 242.

[92] See however Justice of the Peace Lennik 21 June 2017, [2020] *Tijdschrift voor Familierecht* 86, with case note by T. Wuyts.

[93] High Council of Justice, 'Advice of 27 November 2019 on a draft bill amending the Civil Code and the Judicial Code with a view to establishing a Federal Guardianship Commission and to determine the conditions for the professional exercise of the functions of guardian of a vulnerable adult', <https://hrj.be/admin/storage/hrj/20191127-advies-profiel-bewindvoerder.pdf > accessed 12.01.2022.

[94] SAM – Resource Centre People and Society, *Guardianship. Need for interaction between justice and social assistance*, 2019, < https://www.samvzw.be/sites/default/files/Publicaties/2019_Project_bewindvoering_rapport.pdf> accessed 12.01.2022.

[95] <https://steunpuntbewindvoering.be/> accessed 12.01.2022.

adult as guardians of the person, which might be desirable e.g., in the context of end-of-life decisions.[96]

The justice of the peace should consider appointing more than one financial expert as guardian of the property in case the nature and composition of the assets require so: the Belgian state was held liable in a case where the justice of the peace had not done so, and the vulnerable adult's assets had suffered severe losses due to mismanagement.[97]

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

No. The justice of the peace should ascertain that they will accept their appointment (article 496/2, section 1 old Civil Code and article 1247/1 Judicial Code).

During the measure

Legal effects of the measure

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

See above, question 9 The powers of the guardian [bewindvoerder, administrateur], which we discuss hereinafter, are by and large – but not fully – the flipside of the legal incapacitation of the vulnerable adult.

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:
    - property and financial matters;
    - personal and family matters;
    - care and medical matters;

By default, the competences of the guardian will be that of a support person, as the vulnerable adult is in principle only incapacitated partially: they act themselves, but not independently (article 494, e) old Civil Code).

[96] F. Swennen, *Het personen- en familierecht. Een benadering in context*, Intersentia, Antwerp 2021, p. 232.
[97] District Court Brussels 20 April 2006, [2006] *Journal des Tribunaux* 530.

The Civil Code defines support as the intervention of the guardian to complete the legal validity of the vulnerable adult's legal act with their assent, at the request of the vulnerable adult.

The justice of the peace may order that the guardian's assent can relate towards one specific legal act, a category of legal acts, or a series of legal acts aimed at a specific purpose – such as the sale of a house. In the latter case, the justice of the peace shall specify which legal acts can be performed under the order. The assent must be given in writing if it concerns legal acts aimed at a specific purpose (article 498/1, section 1 old Civil Code).

In the absence of further stipulation by the justice of the peace, the guardian is to assent in writing, usually by countersigning the relevant document(s) the vulnerable adult has signed themselves (article 498/1, section 2 old Civil Code).

The guardian may only refuse to be a support person if the intended legal act in personal matters of the vulnerable adult is manifestly detrimental to their interests. The guardian may refuse to be a support person if the intended transaction in financial matters is prejudicial to the interests of the vulnerable adult.

If and insofar the vulnerable adult has been incapacitated to act themselves, the guardian will have the competences of a representative (article 494, f) old Civil Code).

The guardian of the property should act as a reasonable or prudent person. They should spend the income of the vulnerable adult on their maintenance, care and wellbeing and should apply for social benefits in their interest. Furthermore, they should provide the vulnerable adult with pocket money (article 499/2 old Civil Code).

Of particular interest in Belgian law is the competence of the guardian of the property to donate on behalf of the vulnerable adult, upon proof that the adult would have made such donation if still mentally capable and subject to prior judicial authorisation, which is dependent on the proportionality of the donation vis-à-vis the assets and on the vulnerable adult or his maintenance creditors not becoming financially dependent because of the donation (article 499/7 para. 4 Civil Code). Representation is not possible for a last will or testament.

The Civil Code lists several legal acts it considers so personal that the guardian may not act as a support person or representative for them (art. 497/2 old Civil Code). One example is to enter into marriage or a registered partnership. These

legal acts would require a personal choice, only to be made by the adult themselves if mentally capable.

The list is subject to critique. For example, it does not correspond with the checklists mentioned above, nor with the list of legal acts of which the justice of the peace can authorise the incapacitated adult to perform them themselves on the condition of being mentally capable. Furthermore, one may wonder whether some legal acts indeed require such a personal choice, for example, to apply for divorce. Also, we question why the guardian should not be competent to decide on the (non-)therapeutic sterilisation of the vulnerable adult in exceptional circumstances, which would be more proportional than to organise their living circumstances so that sexual activity is prevented.

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

The purpose of guardianship is to promote the best interests of the vulnerable adult (article 497, section 2 old Civil Code). The guardian should pursue this purpose.

The Civil Code explicitly mentions as one of the interests of the vulnerable adult that the guardian(s) would try to promote the vulnerable adult's autonomy as much as possible (article 497 section 2 old Civil Code).

In case the guardian represents the vulnerable adult, they should take into consideration the principles, formulated in writing by the vulnerable adult (article 496, section 2 old Civil Code). The justice of the peace may exempt the guardian from this on the grounds that such principle(s) may no longer be relevant in view of changed circumstances (article 499/1 para. 3, section 1 old Civil Code).

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

The guardian(s) should involve the vulnerable adult as much as possible, in accordance with their ability to understand this. The guardian(s) should consult with the vulnerable adult or their confidant at least once a year (article 498/2, section 3 and 499/1, para. 3, section 2 old Civil Code).

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

According to article 499/1 para. 3 old Civil Code, the guardian should consult with the vulnerable adult at regular intervals and at least once a year.

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

Article 497/5 old Civil Code is devoted to this matter.

Firstly, the justice of the peace may grant the guardian(s) a remuneration of maximum three per cent of the income of the vulnerable adult, taking into account the nature, composition and worth of the vulnerable adult's assets, as well as the nature, complexity and extent of the services provided by the guardian. The income that serves as the basis for the remuneration may be determined by Royal Decree, but this has not yet been done after eight years.

Except in exceptional circumstances, the justice of the peace may not grant a remuneration to the parent or parents who was/were appointed as a guardian.

In addition to the remuneration, the guardian's expenses shall be reimbursed after due verification by the justice of the peace. Expenses may be determined on a lump-sum basis by Royal Decree, but this, too, has not yet been done after eight years.

The justice of the peace may also grant the guardian a compensation commensurate with extraordinary services performed. There are defined as the material and intellectual services which are not part of the daily administration of the vulnerable adult's assets. Again, a list of extraordinary services, and their remuneration, may be determined by Royal Decree, but this has not yet be done after eight years. these determine the way in which the remuneration for extraordinary official services is budgeted [2 and may determine which official services can be considered extraordinary]2.

As mentioned under Question 7, the Minister of Justice aims at rendering more transparent and uniform the regulations on the guardian's remuneration and expenses, but the draft decree was severely criticised and not yet taken further.[98]

The guardian is prohibited from receiving any remuneration or benefit of any kind or from anyone in respect of their services apart from the remuneration and reimbursement mentioned above. This is to avoid, for example, banks awarding benefits to guardians who pool the accounts of their administered assets with them.

[98] D. Scheers, 'De vergoeding van de bewindvoerder: in de beperking toont zich de meester' [2022] *Rechtskundig Weekblad* 871.

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?

n/a

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)?

When appointing several guardians, the justice of the peace must clarify their respective powers and their exercise, if need be in addition to the relevant statutory provisions in this regard. In relation to third parties of good faith, each guardian is deemed to act with the consent of the other guardian(s) when they alone performs an act, subject to the exceptions provided by law. The justice of the peace resolves conflicts between the guardians in the best interest of the vulnerable adult (articles 496/4 para. 2, 497/3 paras. 2 and 3 and 500/3 paras. 1 and 2 old Civil Code).

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?

The justice of the peace is the competent authority for supervision. They may appoint an additional guardian tasked with monitoring the main guardian. They may also appoint a technical adviser or a guardian *ad hoc* to audit the guardian's accounting reports (art. 499/14 para. 2, section 6 and 499/15 old Civil Code).

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

Their main duty is the supervise the guardian's reports and accounts.

Guardians, indeed, have quite comprehensive reporting obligations. Guardians with the powers of a representative should in principle draw an initial report within six weeks of the notification of judicial protection (article 499/6 old Civil Code).

Every guardian is to submit an annual report (articles 498/3 and 499/14 old Civil Code), if applicable with attachment of a copy of the transactions and balance of each bank and securities account (article 499/14 para. 2 section 2 old Civil Code). Finally, each guardian draws a final report within a month of the end of their task. Templates of reports have been determined by Royal Decree. All reports are added to the (electronic) guardianship file in a Central Register.

The justice of the peace approves the annual reports after examining whether they comply with the applicable legal requirements (article 498/3, section 3 and 499/14, section 5 old Civil Code). The justice of the peace may make comments or observations that the guardian should take into account in the future. Approval of the annual report does not imply discharge of the guardian, but guardian of the property with power of representation may request to be granted interim discharge (article 499/15 old Civil Code). Finally, the justice of the peace approves or rejects the final report (articles 498/4 and 499/17 old Civil Code).

The justice of the peace can grant derogations from the annual reporting obligations with regard to the guardianship of the person on the one hand (article 498/3 para. 1, section 1 and 499/14 para. 1, section 1 old Civil Code) and to the benefit of parents who have been appointed as guardians on the other (article 500/2 old Civil Code).

If applicable, the appointed confidant may act as a whistle-blower towards the justice of the peace (art. 501/2, paragraph 4, former Civil Code).

And finally, the justice of the peace may always, on their own motion, gather information about the situation of the vulnerable adult and about their living conditions (article 497/6 old Civil Code).

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

The justice of the peace may dismiss the guardian, stipulate a tighter framework for his mandate to allow closer monitoring (article 496/7, section 1 old Civil Code) or reduce or abolish their remuneration in case of shortcomings (article 497/5, section 2 old Civil Code).

Unfortunately, there is no system yet of (informally) blacklisting guardians for the future, apart from the eligibility rules.[99] More elaborate and consistent supervision mechanism have been called for by the High Council of Justice.[100]

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

The guardian with the powers of a support person is only liable for their fraud and serious misconduct. These are assessed less strictly for unremunerated guardians (article 498/2, section 4 old Civil Code).

The guardian with the powers of a representative is subject to general liability law (also articles 499/13, last section and 499/20 old Civil Code). The liability claim is subject to a time limit of five years from the termination of the guardian's mandate (article 499/21old Civil Code).

The justice of the peace may request a financial security from the guardian of the property (article 496/7, section 2 old Civil Code), to meet their financial liability in case necessary.

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.

No other provision than those on the voidability of the vulnerable adult's legal acts have been determined (see below, Question 28).

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

The Civil Code lists several legal acts in personal matters resp. financial matters for which the guardian(s) need a prior authorisation to represent the vulnerable adult from the justice of the peace (article 499/7 paras. 1, 2 and 4 old Civil Code).

[99] Hereto F. Swennen, 'Meerderjarigenbescherming in de Lage Landen', [2013] *Tijdschrift voor Familie- en Jeugdrecht* 336-45.

[100] High Council of Justice, 'Advice of 27 November 2019 on a draft bill amending the Civil Code and the Judicial Code with a view to establishing a Federal Guardianship Commission and to determine the conditions for the professional exercise of the functions of guardian of a vulnerable adult' <https://hrj.be/admin/storage/hrj/20191127-advies-profiel-bewindvoerder.pdf > accessed 12.01.2022.

Examples are the change of residence of the vulnerable adult, or the sale of immovable property. Unfortunately, this list does not fully correspond with the checklists mentioned above. Also, the justice of the peace should determine explicitly whether the guardian can exercise the vulnerable adult's patient's rights in case the adult is mentally incapable (art. 492/1 para. 1, section 4 old Civil Code).

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

The guardian is not allowed in principle to acquire or rent assets or receive gifts or bequests from the vulnerable adult; some statutory and judicial exemptions apply (articles 499/10 old Civil Code and 4:141 Civil Code).

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

The legal acts the vulnerable adult performs in violation of their incapacitation are voidable by the court upon application by themselves or their guardian, within a time limit of five years in principle (articles 493 paras. 3 and 4 and 493/1 old Civil Code).

The court will in any case annul legal acts in personal matters and for those legal acts concerning financial matters for which the guardian would need prior authorisation by the justice of the peace to execute them (article 493 para. 1 and para. 2, sections 1 and 3 old Civil Code).

Other legal acts will only be annulled by the court in case of lesion of the vulnerable adult and taking into consideration the rights of third parties of good faith.[101] Alternatively, the court may also reduce the excessive obligations of the vulnerable adult (article 493 para. 2, section 2, old Civil Code).

Voidable legal acts may be regularized by the guardian, when applicable – dependent on the legal act concerned – after prior authorisation by the justice of the peace.

The vulnerable adult or a guardian *ad hoc* may apply for the annulation of legal acts the guardian performed in violation of the applicable formalities, within a period of five years. Regularisation of a voidable legal act is, however, possible (article 499/13 old Civil Code).

[101] See, for example, Justice of the peace Genk 25 February 2020, [2020] *Rechtskundig Weekblad* 437.

d. conflicts of interests

In the event of a conflict of interests between the vulnerable adult and their guardian, the justice of the peace, or the judge hearing the case, shall appoint a guardian *ad hoc* (article 497/4 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.

See Question 12

Reflection

30. Provide statistical data if available.

See Question 3

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?

See Question 68

SECTION IV VOLUNTARY MEASURES

Overview

32. What voluntary measures exist in your jurisdiction? Give a brief definition of each measure.[102]

On the occasion of the 2013 reform, an explicit legal framework was introduced for continuing powers of attorney, which were already commonly used before but on which validity legal uncertainty existed.

A continuing power of attorney is a registered power of attorney granted with the explicit purpose to remain in force, or enter into force, in the event of the

[102] 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]).

granter's mental incapacity (see the definition in article 490, section 1 old Civil Code).

By formally introducing the continuing power of attorney, the legislature aimed at stimulating self-determination and autonomy, in line with recommendation n° R(99)4 of the Committee of Ministers of the Council of Europe.[103] A limited 2018 reform aimed at incentivising the use of continuing powers of attorney even more.[104]

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 continuing power of attorney is a specific form of the general private law power of attorney (articles 490, section 1 and 490/2 para. 1, section 1 old Civil Code), but to which additional requirements apply in the Civil Code and in some specific regulations, e.g., on patient's rights (article 14 para. 1, section 3 Patients' Rights Act 2002), or donations. [105]

The continuing power of attorney functions as a general private law power of attorney. A specific regime called 'extrajudicial protection', however, becomes applicable *ex lege* (articles 490 – 490/2 old Civil Code) in the event, and for so long, the granter is mentally incapable or in a state of prodigality. This change in legal nature is justified because the granter can no longer supervise the attorney.[106]

It is possible to use an ordinary power of attorney for as long the granter is mentally capable of controlling the attorney. Once the granter becomes mentally incapable, the execution of the ordinary power of attorney will be suspended (art. 2003 old Civil Code).

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[103] Explanatory memorandum, *Parliamentary documents* Chamber of Representatives 2010-11, n° 53-1009/1, p. 21.

[104] First report of the Commission on Justice, *Parliamentary documents* Chamber of Representatives 2018-19, n° 54-3303/8, pp. 6-7.

[105] N. Geelhand de Merxem, 'De beschermde persoon en de successieplanning: wat biedt de nieuwe wet?' [2014] *Tijdschrift voor Estate Planning* 27, n° 27; R. Barbaix, 'Actuele ontwikkelingen familiaal vermogensrecht 2013' in R. Barbaix and N. Carette (eds.), *Tendensen vermogensrecht 2014*, Intersentia, Antwerp 2014, p. 37, n° 45.

[106] Amendment n° 61, *Parliamentary documents* Chamber of Representatives 2013-14, n° 53-3149/4, 54.

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 continuing power of attorney can include advance directives that the attorney must respect when executing their powers, insofar possible (article 490/2 para. 1, section 2 old Civil Code).

Advanced directives can also exist besides a continuing power of attorney. For example, the Patient Rights Act allows patients to make an advance directive concerning medical treatment in cases where they can no longer exercise their rights (article 8, para. 4). A physician must respect these directives.

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)?

Initially, the scope of the continuing power of attorney was limited to property matters; in the 2018 reform, it was expanded to personal matters, such as the admission to a residential care centre.[107] Today, it can cover all aspects.

The continuing power of attorney, however, cannot be used for personal legal acts that require a strictly personal choice. It is disputed whether the list of personal acts for which the guardian is never competent (see above, question 25) applies here, too.[108]

It was also explicitly confirmed[109] in 2018 that a continuing power of attorney is not strictly limited to legal acts, but also grants powers relating to the administration of the vulnerable adult's matters (articles 489 and 494, g) old Civil Code), such as the payment of bills.[110]

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[107] First report of the Commission on Justice, *Parliamentary documents* Chamber of Representatives 2018-19, n° 54-3303/8, p. 7; See also: J. Nolf, "Versie vier van wet op bescherming onbekwamen: eerbaar compromis", (2019) 390 *Juristenkrant* 11.

[108] T. Wuyts, 'Wat verandert er na de wet van 21 december 2018 houdende diverse bepalingen betreffende justitie op het vlak van zorgvolmachten, giften en wilsverklaringen in de materie van de wilsonbekwamen?' in W. Pintens en C. Declerck (eds.), *Patrimonium 2019*, die Keure, Bruges 2019, pp. 129-131, n° 5.

[109] As was already accepted in legal doctrine: F. Swennen, 'De meerderjarige beschermde persoon (Deel 1)', [2014] *Rechtskundig Weekblad* 568, n° 15.

[110] First report of the Commission on Justice, *Parliamentary documents* Chamber of Representatives 2018-19, n° 54-3303/8, p. 7. With regard to the general private law power of attorney: Court of Cassation 24 January 2008, [2010] *Rechtskundig Weekblad* 229.

Start of the measure

Legal grounds and procedure

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

Any adult capable to express their will, or an emancipated minor, who have not been judicially incapacitated, can grant a general or specific continuing power of attorney (article 490, section 1 old Civil Code).[111]

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.

All continuing powers of attorney must meet the following two requirements (490/1, § 1 old Civil Code). *First*, it should be concluded with the purpose, best to be stipulated explicitly,[112] to either remain in force, or enter into force, in the event of the granter's mental incapacity (article 490, section 1 old Civil Code). *Second*, the power of attorney should have been registered in the Central Register (see above, question 3), either by the notary public or by the justice of the peace court's registrar (article 490, section 2 old Civil Code), ultimately when the granter becomes mentally incapable or a prodigal.

The continuing power of attorney can be concluded without the involvement of any public authority. It must, however, be done by notarial deed in case the attorney is granted the power for legal acts that must be done by deed, such as a donation. The intervention of a notary public is also considered a safeguard for the assessment of the granter's mental capacity[113] and of potential undue influence by the attorney, and for the qualitative drafting of the power of attorney.[114]

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

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[111] Advice of the Council of State n° 50.186/2 and 50.187/2 of 12 October 2011, *Parliamentary documents* Chamber of Representatives 2011-12, n° 53-1009/3, p. 24.

[112] C. De Wulf, 'De nieuwe wettelijke regeling inzake beschermde personen', [2013] *Tijdschrift voor Notarissen* 262, nr. 10; A. Wylleman, 'Buitengerechtelijke bescherming' in P. Senaeve, F. Swennen en G. Verschelden (eds.), *Meerderjarige beschermde persone*n, die Keure, Bruges 2014, p. 30, nr. 48; G. Verschelden, *Handboek Belgisch Personen- en familierecht*, die Keure, Bruges 2016, p. 450, n° 1021.

[113] See, for example, Justice of the peace Tubize 7 February 2019, [2019] *Tijdschrift van de Vrederechters* 254.

[114] J. Bael, 'De buitengerechtelijke bescherming: een overzicht met aandacht voor een aantal discussiepunten in de rechtsleer en met een voorstel van een aantal modellen' in J. Bael (ed.), *Rechtskroniek voor het notariaat. Deel 28*, die Keure, Bruges 2016, pp. 192-195.

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?

In the case it is concluded to remain in force, the continuing power of attorney enters into force immediately.[115] It remains in force in the event of the granter's mental incapacity or prodigality, whereas a general private law power of attorney would in principle[116] be suspended[117] in such event (articles 490/1 para. 1 and 2003, section 2 old Civil Code). In the case it is concluded to enter into force in the event of the granter's mental incapacity (article 490, section 1 old Civil Code), the continuing power of attorney only enters into force in the event of the granter's mental incapacity or prodigality.

It is the responsibility of the attorney to determine from and until when the continuing power of attorney is in force. This can be determined in the continuing power of attorney itself, e.g., by referring to an attestation by one or two physicians[118] or to a declaration of enforceability from the justice of the peace at the request of the attorney.[119] In other words, such judicial declaration is not always already applicable. The entry into force of the continuing power of attorney is also not made public – as is the case for legal protection – as this was considered to be a disproportional measure for the granter's privacy in the context of a voluntary measure.[120] The exercise of their competences by the attorney is, however, always

[115] Court of Cassation 18 October 2018, [2019] *Revue Trimestrielle de Droit Familial* 2019, p. 57.
[116] Exceptions apply to a specific mandate, for instance, a mortgage mandate: article 2003, section 3 old Civil Code.
[117] F. Swennen, 'De meerderjarige beschermde personen (Deel I)' [2014] *Rechtskundig Weekblad* 570, n° 22; C. De Wulf, 'Het oude en het nieuwe recht in verband met de bruikbaarheid van volmachten wanneer de lastgever feitelijk wilsonbekwaam is geworden' (2015) *Tijdschrift voor Notarissen* 101-102; J. Bael, 'De buitengerechtelijke bescherming: een overzicht met aandacht voor een aantal discussiepunten in de rechtsleer en met een voorstel van een aantal modellen' in J. Bael (ed.), *Rechtskroniek voor het notariaat. Deel 28*, die Keure, Bruges 2016, p. 198, n° 22.
[118] First report of the Commission on Justice, *Parliamentary documents* Chamber of Representatives 2011-12, n° 53-1009/10, 35-36; *Compare* J. Verstraete, 'Krijtlijnen voor de zorgvolmacht' in *Liber Amicorum Aloïs Van den Bossche*, Brugge, die Keure, 2019, p. 184.
[119] Second report of the Commission on Justice, *Parliamentary documents* Chamber of Representatives 2018-19, n° 54-3303/11, p. 6.
[120] First report of the Commission on Justice, *Parliamentary documents* Chamber of Representatives 2011-12, n° 53-1009/10, p. 38.

binding towards third parties of good faith (article 490/1 para. 3 old Civil Code),[121] notwithstanding a liability claim against the attorney (article 2005, section 2 old Civil Code).

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 appointed attorney should be eligible as a guardian (see above, question 23) at the time the extrajudicial protection enters into force and as long it remains in force. Their powers will be suspended[122] if, and so long, that is not the case (article 2003, section 5 old Civil Code).

In case of a (potential) [123] conflict of interest, the attorney should be replaced by attorney *ad hoc* appointed either in the continuing power of attorney, or by the justice of the peace (article 490/2 para. 1, section 4 old Civil Code). An exception to this rule is not allowed.[124]

A granter can appoint multiple attorneys to act exclusively, concurrently or jointly. In that case, conflicts between them are resolved by the justice of the peace in the best interest of the granter (article 490/2 para. 1, section 6 old Civil Code).

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[121] Also see C. De Wulf, 'Het oude en het nieuwe recht in verband met de bruikbaarheid van volmachten wanneer de lastgever feitelijk wilsonbekwaam is geworden', [2015] *Tijschrift voor Notarissen* 107; J. Bael, 'De buitengerechtelijke bescherming: een overzicht met aandacht voor een aantal discussiepunten in de rechtsleer en met een voorstel van een aantal modellen' in J. Bael (ed.), *Rechtskroniek voor het notariaat. Deel 28*, die Keure, Bruges 2016, p. 202, n° 34; J. Verstraete, 'Krijtlijnen voor de zorgvolmacht' in *Liber Amicorum Aloïs Van den Bossche*, die Keure, Bruges 2019, p. 166.

[122] F. Swennen, 'De meerderjarige beschermde personen (Deel I)' [2014] *Rechtskundig Weekblad* 570, n° 22; C. De Wulf, 'Het oude en het nieuwe recht in verband met de bruikbaarheid van volmachten wanneer de lastgever feitelijk wilsonbekwaam is geworden' [2015] *Tijdschrift voor Notarissen* 101-102; J. Bael, 'De buitengerechtelijke bescherming: een overzicht met aandacht voor een aantal discussiepunten in de rechtsleer en met een voorstel van een aantal modellen' in J. Bael (ed.), *Rechtskroniek voor het notariaat. Deel 28*, die Keure, Bruges 2016, p. 198, n° 22.

[123] See, for example, Justice of the peace Antwerp (II) 29 January 2019, [2019] *Tijdschrift van de Vrederechters* 266.

[124] See, for example, Justice of the peace Antwerp (II) 29 January 2019, [2019] *Tijdschrift van de Vrederechters* 266.

A granter can also appoint successive attorneys in case one of them can no longer execute his mission.

During the measure

Legal effects of the measure

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

The common law is applicable. The continuing power of attorney is legally binding as a contract for the attorney. The attorney can legally bind the granter in accordance with the powers granted (article 1998, section 1 old Civil Code).

An attorney must respect the wishes expressed within it as far as possible (article 490, § 1, second section old Civil Code). In case of a change of circumstances leaving severe doubts about whether these expressed wishes within it are still compatible with the actual will, the attorney can ask the justice of the peace to release him from the duty to respect them. An attorney who does not respect the wishes expressed within it could be held liable.

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

The entry into force of the continuing power of attorney does not affect the legal capacity of the granter. This renders a continuing power of attorney for the event of prodigality by and large useless in practice, for the granter's expenditures should be put to an end.[125]

Powers and duties of the representative/support person

42. Describe the powers and duties of the representative/support person:
   1. can the representative/support person act in the place of the adult, act together with the adult or provide assistance in:
      - **property and financial matters;**
      - **personal and family matters;**
      - **care and medical matters?**
   2. what are the criteria for decision-making (e.g. best interests of the adult or the will and preferences of the adult)?

[125] J. Verstraete, 'Krijtlijnen voor de zorgvolmacht' in *Liber Amicorum Aloïs Van den Bossche*, Brugge, die Keure, 2019, p. 167.

3. **is there a duty of the representative/support person to inform and consult the adult?**
4. **is there a right to receive remuneration (how and by whom is it provided)?**

The agreement and articles 1984-2010 (mandate) of the old Civil Code determine the attorney's powers and duties. The attorney can act instead of the adult for the powers vested in him by the mandate (article 1984, first section old Civil Code). His actions legally bind the granter (article 1998, first section old Civil Code).

The continuing power of attorney can cover all or just some (non-high personal) matters. It can be general or specific (article 1987 old Civil Code). It includes acts of disposition if not excluded (article 1988 old Civil Code).

The continuing power of attorney can also include advance directives that the attorney must respect when executing their powers, insofar possible (article 490/2 para. 1, section 2 old Civil Code).

The attorney should involve the granter as much as possible, in accordance with their ability to understand. They should consult with the granter or their confidant regularly, and at least once a year (article 490/2 para. 1, section 3 old Civil Code).

There exists no right to receive remuneration. In principle, the execution of a power of attorney is not paid (article 1986 old Civil Code). However, payment can be determined by the agreement. In practice, if no amount is fixed in the agreement, reference is made to the remuneration of the (professional) guardian.[126] Additionally, the granter must compensate the attorney for the advances and costs that he has made in the performance of his assignment (article 1999, first section old Civil Code). It is enough that the costs incurred were useful.[127]

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?

[126] J. Verstraete, 'Krijtlijnen voor de zorgvolmacht' in *Liber Amicorum Aloïs Van den Bossche*, die Keure, Bruges 2019, p. 170.
[127] B. Tilleman, Lastgeving in *APR*, Kluwer, Deurne 1997, p. 123.

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)?

Multiple measures can be simultaneously applied to the same adult.

A granter can conclude more than one power of attorney. The terms of each contract will determine how to execute them. The same counts for the coordination of their activities. Third parties will not be explicitly informed. Common law applies.

Besides, a granter can also appoint several attorneys in the continuing power of attorney framework. The continuing power of attorney determines how the representatives have to exercise their powers and duties. The selected attorneys execute their powers jointly, concurrently or exclusively, depending on the agreement's terms. Again, third parties will not be explicitly informed. Common law applies. Disagreements between the attorneys will be solved either according to the terms included in the agreement or by the justice of the peace.

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?

Other measures can be simultaneously applied to the same adult.

First, a power of attorney and a state-ordered measure can co-exist to the extent they are compatible. If they are consistent, the justice of the peace who ordered a state-order measure will determine the conditions for further execution of a power of attorney (article 492, section 2 old Civil Code). Third parties will be informed of the state-ordered measure as it is in principle published in the Official Gazette (article 1250 Judicial Code). However, third parties will not be explicitly informed of the co-existence of both measures, as the publication only serves to inform third parties about the existence of a state-ordered measure and not about the content of

the measure.[128] In practice, the attorney or the guardian will notify third parties and prove the distribution of their authority by the judgment. Furthermore, a justice of the peace can install a hybrid form of judicial and extrajudicial protection. See further the answer to question 46.

Second, *ex lege* representation can complement a power of attorney when it does not cover all fields of the law. For example, the Patients' Rights Act must be applied when no representative in that sense was appointed in the continuing power of attorney. Anyone could inform the health practitioner of the existence of a representative. This information is available in the patient's file if registered on his demand (art. 9, § 1, second section Patients' Rights Act). The appointed representative can prove his power based on a specific power of attorney dated in writing by the patient (art. 14, § 1, third section Patients' Right Act).

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.

See the answers to questions 39 and 46.

There exist no unauthorised acts of the adult since the measure does not affect the legal capacity. Ill-conceived acts of the adult can lead to a state-ordered measure (article 490/1, par. 2 old Civil Code). In addition, the ill-conceived act can also be annulled under certain conditions (see the answer to question 10).

An unauthorised act of the attorney does not legally bind the granter (art. 1998, second section old Civil Code). An unauthorised or ill-conceived act of the attorney could lead to a state-ordered measure (see the answer to question 46) and to liability (article 1991 and 1992 old Civil Code). In those cases, the justice of the peace will probably appoint a professional guardian who will demand accountability and bring liability claims against the attorney. The liability claim will be

[128] Royal Decree of 25 June 2020 establishing the model for the publication in the Belgians State Journal as mentioned in article 1250 of the Judicial Code [Koninklijk besluit vaststelling van het model van de bekendmaking in het Belgisch Staatsblad, zoals bedoeld in artikel 1250 van het Gerechtelijk Wetboek], *Belgisch Staatsblad* 20 juli 2020,

judged less strictly when a power of attorney was executed for free (article 1992, section 2 old Civil Code).

The attorney is accountable towards the granter (article 1993 old Civil Code), their heirs or the appointed guardian, and they should anticipate this by documenting the exercise of their powers.[129] Accountability, indeed, is at the heart of any power of attorney.[130]

It is a law principle that an attorney may not act in case of conflicts of interest. Those acts can be annulated by their nature.[131]

Third parties could bring a liability claim against an attorney acting without power unless they know or should have known the scope of a power of attorney (article 1997 old Civil Code). The granter is liable for the bad execution of a power of attorney against third parties. The granter can subsequently sue the attorney on the basis of contractual liability (art. 1992 old Civil Code).

46. Describe the system of supervision, if any, of the voluntary measure. Specify the legal sources. Please specify:

a. is supervision conducted:

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

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

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

The interests of the vulnerable are protected by several preventive mechanisms, comparable to those in case of guardianship (see above, question 23), on the one hand.

First, as mentioned above, the appointed attorney should be eligible as a guardian. Their powers will be suspended[132] if, and so long, that is not the case (article 2003, section 5 old Civil Code).

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[129] See, for instance, Justice of the peace Aalst (I) 11 October 2017, [2018] *Tijdschrift van de Vrederechters* 480.

[130] Constitutional Court 17 May 2018, n° 58/2018, <www.const-court.be> accessed 31.01.2022.

[131] Court of Cassation 18 March 2004, [2004-05] *Rechtskundig Weekblad* 303, case note A. Smets.

[132] F. Swennen, 'De meerderjarige beschermde personen (Deel I)' [2014] *Rechtskundig Weekblad* 570, n° 22; C. De Wulf, 'Het oude en het nieuwe recht in verband met de bruikbaarheid van volmachten wanneer de lastgever feitelijk wilsonbekwaam is geworden' [2015] *Tijdschrift voor Notarissen* 101-102; J. Bael, 'De buitengerechtelijke bescherming: een overzicht met aandacht voor een

Second, in case of a (potential) [133] conflict of interest, the attorney should be replaced by attorney *ad hoc* appointed either in the continuing power of attorney, or by the justice of the peace (article 490/2 para. 1, section 4 old Civil Code). In case a granter has appointed multiple attorneys, conflicts between them are resolved by the justice of the peace in the best interest of the granter (article 490/2 para. 1, section 6 old Civil Code).

Third, article 490/2 para. 1, section 5 old Civil Code imposes on the attorney to keep fully separated their assets and those of the granter, whose bank and securities accounts should be registered in their own name.

The continuing power of attorney itself can provide for other or more supervision mechanisms, but this is, regretfully,[134] not mandatory, and seldom the case as it is built on trust after all.[135]

On the other hand, a whistleblowing procedure is provided for. Any interested party may petition the justice of the peace court with concerns on the scope or execution of the continuing power of attorney; the justice of the peace may also act on their own motion (articles 490/2 para. 1, section 6 old Civil Code and 1247 Judicial Code).

The justice of the peace will check whether the requirements for a continuing power of attorney were met, whether it is adequate to meet the best interests of the granter, and whether it is executed accordingly. They will consider the opinion of the granter on these matters.[136]

The justice of the peace can decide to uphold the continuing power of attorney as is, or to fully replace it by judicial protection. The latter option will, of course,

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aantal discussiepunten in de rechtsleer en met een voorstel van een aantal modellen' in J. Bael (ed.), *Rechtskroniek voor het notariaat. Deel 28*, die Keure, Bruges 2016, p. 198, n° 22.

[133] See, for example, Justice of the peace Antwerp (II) 29 January 2019, [2019] *Tijdschrift van de Vrederechters* 266.

[134] Interview with the justice of the peace L. Carens in R. Boone, 'Verzoeningsbevoegdheid van vrederechters mag fors uitgebreid worden', (2019) 394 *Juristenkrant* 10-11.

[135] T. Wuyts, 'Zorgvolmachten: een zegen of een vloek?' in W. Pintens en C. Declerck (eds.), *Patrimonium 2020*, die Keure, Bruges 2020, pp. 308-310, n° 68.

[136] See, for instance: Justice of the peace Lennik 21 June 2017, [2020] *Tijdschrift voor Familierecht* 88, note T. Wuyts; Justice of the peace Ghent (IV) 27 November 2019, [2020] *Tijdschrift van de Vrederechters* 290; Justice of the peace Oudenaarde 28 November 2019, [2020] *Tijdschrift van de Vrederechters* 315.

be taken in cases of abuse[137] or negligence by the attorney,[138] in case tensions between the attorney and the (rest of the) family negatively affect the granter,[139] or in case the granting of a continuing power of attorney seems suspicious as such.[140] It is claimed that this assessment is sometimes not carefully made, and that continuing powers of attorney are too easily replaced by judicial protection.[141] Replacement by judicial protection is necessary, too, in case the vulnerable adults should be judicially declared incapable due do the legal acts they perform themselves.[142]

The justice of the peace may also modulate the continuing power of attorney as follows. One the one hand, they may partly replace or supplement the continuing power of attorney by judicial protection (see above, section 3). For example, they may appoint a guardian for those matters that are not covered by a specific continuing power of attorney,[143] or appoint a guardian for all legal acts that need prior authorisation by the justice of the peace in case of legal protection,[144] or incapacitate the vulnerable adult and upholding the continuing power of attorney rather than appoint a guardian for purposes of support or representation.[145] In such case, both judicial and extrajudicial protection will co-exist. They may, on the other hand, also install a hybrid form of judicial and extrajudicial protection by

[137] Justice of the peace Etterbeek 20 December 2018, [2019] *Tijdschrift van de Vrederechters* 243; Justice of the peace Aalst (I) 22 October 2019, *unedited*, case n° 19B1929/1.

[138] See, for instance, if the attorney does not pay the bills or want to receive the letters: Justice of the peace Ghent (IV) 20 December 2019, [2020] *Tijdschrift van de Vrederechters* 289.

[139] See, for instance, in case of a severe threat of conflict of interests: Justice of the peace Nivelles 24 January 2020, [2020] *Tijdschrift van de Vrederechters* 286.

[140] See, for instance, a voluntary measure organised by an adult: Justice of the peace Westerlo 19 October 2015, [2018] *Rechtskundig Weekblad* 1234; Justice of the peace Vorst 8 October 2020, [2021] *Tijdschrift van de Vrederechters* 245. See for instance, a voluntary protection measure organised during court proceedings for a state-ordered measure: Justice of the peace Antwerpen (II) 31 May 2018, [2019] *Tijdschrift van de Vrederechters* 258.

[141] G. Willems, V. Ghesquière, M. Horlin, T. Van Halteren and C. Vandermeulen, 'Les balises internationals et leur reception en droit belge et à l'étranger' in J. Sosson (ed.), *La protection extrajudiciaire et judiciaire des majeurs vulnérables*, Larcier, Brussels 2021, pp. 46-47.

[142] See, for instance: Justice of the peace Brussels (III) 30 September 2020, [2021] *Tijdschrift van de Vrederechters* 242.

[143] Justice of the peace Antwerp (V) 13 December 2016, [2018] *Tijdschrift van de Vrederechters* 59.

[144] First report of the Commission on Justice, *Parliamentary documents* Chamber of Representatives 2011-12, n° 53-1009/10, pp. 34-35.

[145] S. Mosselmans and A. Van Thienen, 'Bescherming en bewind voor meerderjarigen. Commentaar bij de wet van 17 maart 2013', [2014] *Tijdschrift voor Familierecht* 66, n° 17; A. Van Den Broeck, *Vermogensbescherming van kwetsbare meerderjarigen via lastgeving. Een rechtsvergelijkend onderzoek*, Intersentia, Antwerp 2014, pp. 214-215; J. Bael, 'De buitengerechtelijke bescherming: een overzicht met aandacht voor een aantal discussiepunten in de rechtsleer en met een voorstel van een aantal modellen' in J. Bael (ed.), *Rechtskroniek voor het notariaat. Deel 28*, die Keure, Bruges 2016, p. 189, nr. 11.

extending supervision mechanisms of guardianship to the continuing power of attorney, such as reporting[146] and accounting[147] obligations, or requiring the attorney to seek a prior authorisation from the justice of the peace for certain legal acts (article 490/2 para 2 old Civil Code).[148]

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 extrajudicial protection ends in the event the granter is no longer mentally incapable or in a state of prodigality, by a registered revocation of the continuing power of attorney by the granter or its termination by the attorney (in the latter case only if no successor had initially been appointed by the granter), by the decease or legal incapacitation of the granter or the attorney (in the latter case only if no successor had initially been appointed appointed by the granter), and in case the justice of the peace replaces it with judicial protection (articles 490, section 5 and 490/2 para 3 old Civil Code). The attorney must notice the justice of the peace in case of termination, with a view of allowing them to organise judicial protection[149] and to provide the justice of the peace with the necessary information.[150] See for the ground of termination by the justice of the peace in extension, the answer to question 46.

Reflection

48. Provide statistical data if available.

[146] It is unclear whether a justice of the peace can impose on the attorney to report to next of kin rather than to themselves: Justice of the peace Etterbeek 20 June 2016, [2018] *Tijdschrift van de Vrederechters* 8.

[147] See, for example, Justice of the peace Antwerp (II) 1 February 2018, [2019] *Tijdschrift van de Vrederechters* 261; Justice of the peace Etterbeek 9 May 2018, [2018] *Tijdschrift van de Vrederechters* 470; Justice of the peace Tubize 7 February 2019, [2019] *Tijdschrift van de Vrederechters* 254.

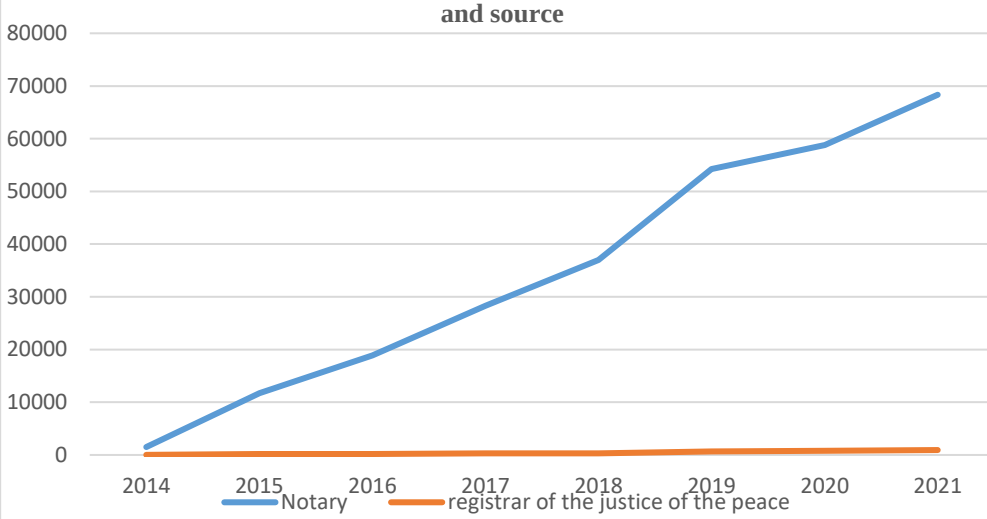
[148] See, for instance: Justice of the peace Ghent (IV) 27 November 2019, [2020] *Tijdschrift van de Vrederechters* 290.

[149] Explanatory memorandum, *Parliamentary documents* Chamber of Representatives 2017-18, n° 54-3303/1, 22.

[150] D. Scheers and C. Scheers, 'Bescherming van meerderjarige onbekwamen: op maat van de praktijk (Deel I)', [2019] *Rechtskundig Weekblad* 1523.

See also the answer to Question 3 Please find in addition some detailed statistical data hereafter. Figure 4 shows the number of registrations of powers of attorney is increasing significantly. Just in a few cases, registration is done by the Justice of the Peace Court Registrar (< 1%).

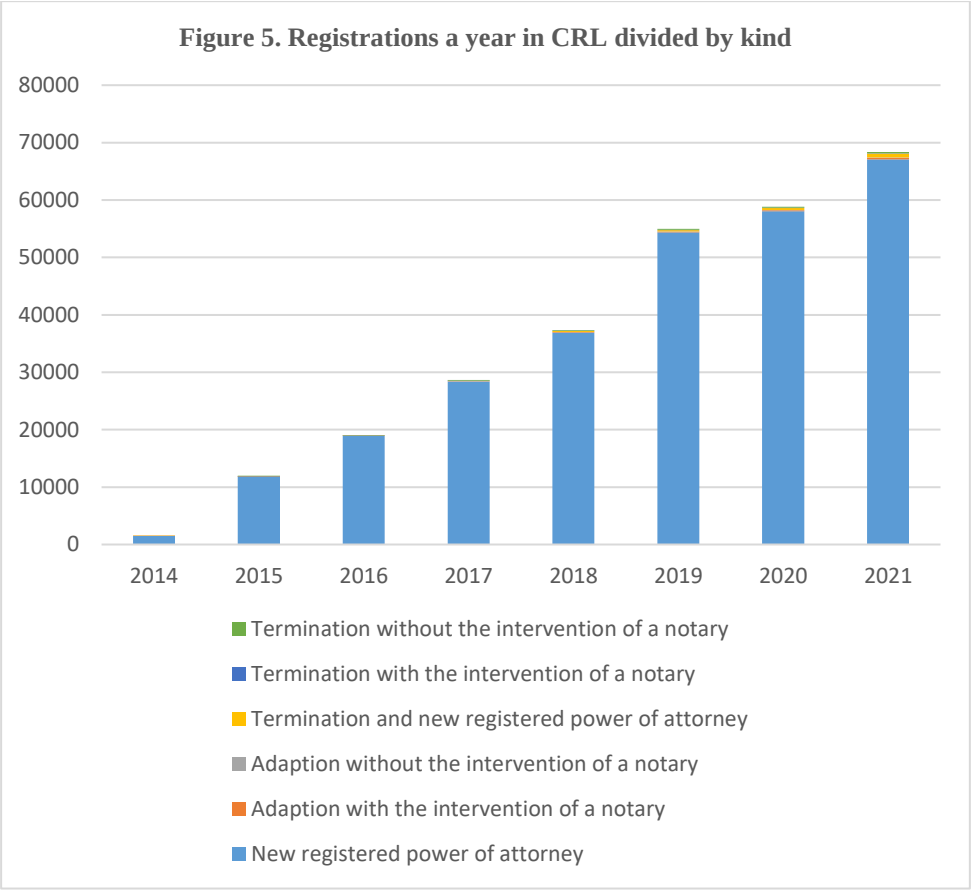
Figure 4. Newly registered continuing powers of attorney by year and source



Source: Royal Federation of the Belgian Notary Public[151]

Figure 5 shows that mainly new powers of attorney are registered. It is exceptional that a power of attorney is ended, adapted or replaced by a granter or ended by an attorney. However, those situations are increasing.

[151] Observation date: 13 January 2022.



Source: Royal Federation of the Belgian Notary Public[152]

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?

As mentioned in the answer to Question 7, a general evaluation of the 2013 reform is provided in 2023. This evaluation will contain, in particular, a study of the practice of powers of attorney (article 224, first section Act of 17 March 2013).

Meanwhile, the students of the university of Hasselt have conducted exploratory empirical legal research in Limburg. [153] Twenty-seven in-depth interviews

[152] Observation date: 13 January 2022.

[153] T. Wuyts, 'Zorgvolmachten: een zegen of een vloek?' in W. Pintens en C. Declerck (eds.), *Patrimonium 2020*, die Keure, Bruges 2020, pp. 235-323.

were conducted, among which justices of the peace, lawyers, members of financial institutions, members of civil society, members of social services and notaries. These results were complemented by statistics delivered by the Royal Federation of the Belgian Notary Public and doctrinal research of published case law. The outcome shows that the power of attorney has become very popular. People appreciate that they can anticipate to unexpected event. They like to make arrangements according to their wishes and preferences (autonomy), knowing they will not lose legal capacity. Besides, they want to avoid the appointment of a guardian who could be an outsider. In descending order are referred to as attorney: the other spouse or cohabitant and, mainly in the same power of attorney, one or more of the children, one or more children if there is no spouse or cohabitant available (anymore), a family member, a good friend or neighbour and, finally, a professional such as a lawyer. Justices of the peace respect the primacy of the voluntary measure in general.

However, the success of the measure depends on many factors. First, the research shows that the measure is not well known in some professional circuits, for instance, social services. They look at it with some suspicion. Second, Belgian people do not have the habit of talking about bad days without any incentive. The measure is mainly encouraged while visiting a notary or a financial institution. Third, the question arises of whether the measure reaches the entire population. For instance, are the financial burdens not too heavy? How do we deal with migrants who only speak a foreign language? Is it possible to organise a power of attorney if the granter has an intellectual disability? Fourth, the appointment of an attorney is based on trust. A power of attorney instead exceptionally includes a mechanism to prevent abuses. People experience any measure of control as a lack of confidence, and granters fear it will scare potential attorneys. Nevertheless, the research shows that a small measure, like appointing a confidant or providing an annual report to another family member, could avoid many problems. Justices of the peace confronted with the question of organising a state-ordered measure will probably command the continuation of the voluntary measure under the condition of delivering an annual report just like a guardian. Fifth, a power of attorney should be feasible in practice. The appointment of several attorneys acting together or beside one another could deliver problems in practice, for instance, if an attorney disagrees with the others or act in opposite ways. Sixth, although it is possible to make advanced directives for the attorney, it is exceptionally included in powers of attorney in a tailor-made way. The reason is that a tailor-made approach is a too heavy workload for a professional like a notary. Seventh, when instructions are included in a power of attorney, it is important to anticipate a change of circumstances to ensure the granters' current will and preferences are respected. Eight, it should be kept in mind that a continuing power of attorney does not solve family issues and could even create new ones. Appointing one of the children without

talking this through with the other children creates suspicion and contemporary issues. The same counts to parents having difficulties that their children taking over or children who also have children with needs (for example, young adults with children) and will be jammed between both (so-called 'sandwich generation').

In conclusion, a power of attorney stimulates autonomy, creates certainty and can avoid the organisation of a state-ordered measure. However, organising it carefully by anticipating issues and paying attention to the decision-making process is essential. The legal framework could provide the obligation to make arrangements to protect the granter better. The pendulum swings for the moment too much towards autonomy in terms of striking a fair balance between autonomy and protection.

SECTION V – EX LEGE REPRESENTRATION

Overview

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

Beside the specific cases discussed under questions 60 et seq., article 14 para. 3 Patients' Rights Act 2002 contains a relevant provision regarding the representation of the adult for the representation of their patient's rights.

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?

The cumulative legal grounds are (1) the 'mental incapacity' [wilsbekwaamheid; capacité d'exprimer sa volonté], whichever its cause, of the adult to exercise their patient's rights themselves, and (2) absence of a conventional representative (voluntary measure) or a competent guardian of the person (state-ordered measure).

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

No medical expertise/statement is required, but it is up to the health professional to assess whether their patient is mentally capable to exercise their patient's rights and, if not, to revert to a representative.

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

No.

Representatives/support persons

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

Article 14 para. 3 of the Patients' Rights Act contains a hierarchical list of next of kin who may act as a representative to the extent and for as long as the adult is mentally incapable to exercise their patient's rights.

In the first rank are the adult's cohabiting spouse, registered partner or *de facto* cohabiting partner – the Act does not provide for a solution in case the vulnerable adult has both a spouse and a *de facto* cohabiting partner.

In case they choose not to act or are absent, the adult's rights shall be exercised, in consecutive order, by an adult child, a parent, or an adult brother or sister.

In case they, too, choose not to act, are absent, and in case there is conflict between the representatives – e.g., between the three adult children –, the health professional themselves, if necessary in multidisciplinary consultation, shall represent the patient's interests.

In derogation from the above, the patient's right of complaint may be exercised simultaneously by the various persons referred to above, with the exception of the patient's adult brother or sister, without the order listed in this paragraph having to be observed.[154]

During the ex-lege representation

Powers and duties of the representatives/support person

[154] Article 14 para. 4 Patients' Rights Act and Royal Decree of 15.02.2007 laying down different rules concerning the representation of the patient in the exercise of the right of complaint as provided for in Article 11 of the Act of 22.08.2002 on Patients' Rights, *Moniteur belge* 20.03.2007.

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.

The provision discussed here only applies to patient rights.

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?

The representative acts for and on behalf of the adult.

The adult cannot directly exclude or opt out of such *ex-lege* representation. They can however appoint a representative (voluntary measure), which takes priority over *ex-lege* representation. They can also issue a positive or negative advance directive on certain acts (see question 41). We have found no sources on the acceptability of a negative advance directive excluding a specific member of the next of kin as *ex-lege* representative.

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

Article 14 para. 3 Patients' Rights Act explicitly determines that *ex-lege* representation is subsidiary to voluntary resp. state-ordered representation.

Safeguards and supervision

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

First and foremost, the representative must involve the adult as much as possible, and in proportion to his capacity, in the exercise of his rights (article 14 para. 4 Patients' Rights Act).

The exercise of the representative's powers is also supervised by the health professional, who can derogate from the representative's decision in two cases, on the condition of a written justification (article 15 Patients' Rights Act).

On the one hand, the health professional may (partly) refuse the representative to exercise the right of inspection and to a copy of the medical file of the adult, in order to protect the latter's privacy. In such case, the representative may appoint a health professional to exercise those rights as an intermediary.

On the other hand, the health professional may, where appropriate in multidisciplinary consultation, derogate from the medical decision taken by the *ex-lege* representative in the interest of the patient and in order to avert a threat to their life or a serious prejudice to their health.

End of the ex-lege representation

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

Powers of representation only exist to the extent and for as long as the adult is mentally incapable to exercise their patient's rights (article 14 para 1 Patients' Rights Act).

Reflection

60. Provide statistical data if available.

n/a

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)?

Extensive scholarly attention has been devoted to article 14 Patients' Rights Act, and improvements have been proposed as to the standard to determine the adult's mental incapacity, the selection of and hierarchy amongst the next of kin, the standard for substitute decision-making, and the role of the health professional.[155] No legislative reform is currently planned, however.

Specific cases of ex lege representation

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

[155] For a recent overview: C. Lemmens, *Handboek Gezondheidsrecht. Volume 2,* Antwerp 2022, Intersentia, pp. 1005-1091.

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?

In case the court finds that a spouse is (physically) unable to express their will or is mentally incapable [onmogelijkheid verkeert zijn wil te kennen te geven of wilsonbekwaam is; dans l'impossibilité ou incapable d'exprimer sa volonté], it may delegate some of their powers to the other spouse:

- pursuant to article 214 old Civil Code, the other spouse may then determine where the matrimonial home is to be established;
- by virtue of article 220 paras. 1 and 3 old Civil Code, the court may authorise the other spouse to sell or dispose of the matrimonial home or household effects, and to receive (part of) the adult's income directly from their debtors in order to meet the household expenses;
- in absence of a conventional representative or a guardian, the court may also delegate all or part of the powers of the adult to the other spouse pursuant to article 220 para. 2 old Civil Code.

In matrimonial property law, too, the court may delegate powers of the vulnerable adult [die in de onmogelijkheid verkeert zijn wil te kennen te geven; qui est dans l'impossibilité de manifester sa volonté] over matrimonial property and even over their separate property to the other spouse.[156] The court may also deprive the vulnerable adult [die blijk geeft van ongeschiktheid in het bestuur van het gemeenschappelijk vermogen zowel als van zijn eigen vermogen of de belangen van het gezin in gevaar brengt; qui fait preuve d'inaptitude dans la gestion tant du patrimoine commun que de son patrimoine propre ou met en péril les intérêts de la famille] of their powers over the matrimonial or separate property – which is a different measure from legal incapacitation (articles 2.3.34 resp. 2.3.40 Civil Code).

The potential delegation of powers to the registered partner is limited to the sale or disposal of the home and of household effects (article 1477 para 2 old Civil Code).

The (revocation of the) delegation of powers in the cases mentioned above is subject to prior review by a court, but the procedural safeguards in the context of judicial protection do not apply. Also, only the deprivation of powers is published in the Official Gazette – as is the case for judicial protection –, while no publicity is given to the other measures. Furthermore, the exercise of the delegated powers

[156] Example: Justice of the peace Bruges (IV) 5 June 2019, [2020] *Tijdschrift van de Vrederechters* 320, case note N. Gallus.

is subject to far fewer safeguards compared to guardianship. The court should therefore strike a balance between right to respect for family life on the one hand and the *parens patriae* responsibility towards the vulnerable adult.[157] The current statutory provisions, we think, do not sufficiently safeguard the personal and financial interests of the vulnerable adult in case the other spouse abuses their delegated powers.

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.

Pursuant to article 2.3.30 Civil Code, the common marital property is separately managed by either of the spouses, who can exercise the powers of administration alone, each of them being obliged to respect the management acts of the other.

With the exceptions of acts relating to the exercise of a profession, important legal acts – going beyond mere administration – must be exercised jointly (articles 3.3.31-33 Civil Code). Only in case an adult is unable to express their will can the court authorise the other spouse to act alone and/or deprive the adult concerned of their powers over the common property (articles 2.3.34 and 2.3.40 Civil Code – see above, question 60).

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

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

Negotiorum *gestio* is regulated in articles 5.128 et seq. Civil Code. It seems to have little relevance in the context of arrangements for vulnerable adults. It should be reminded, however, that protection of vulnerable adults is subsidiary to "assistance or other protective measures" (article 488/1 para. 1 old Civil Code). The psycho-social dimension of such assistance or measures should be taken into account, to determine whether technical or social support can make a protection

[157] See already V. Vanderhulst, 'Gerechtelijke indeplaatsstelling of voorlopig bewind: welk statuut geniet voorrang bij gehuwden?', [2013] *Notarieel en Fiscaal Maandblad* 158.

measure unnecessary.[158] *Negotiorum gestio*, e.g., by a child, can be considered such social support.

SECTION VI – OTHER PRIVATE LAW PROVISIONS

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

Besides *negotiorum gestio*, porte-fort also offers a basis for *ex-lege* 'representation'. Porte-fort is a particular guarantee between parties that a legal act will be performed on behalf of the vulnerable adult who is a third party (article 5.106 Civil Code).

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?

The law does not directly and explicitly provide for any party – parent or not – to make advance arrangements on behalf of an adult.

Indirectly, however, such arrangements are taken into consideration. As discussed under question 28, a private foundation or a public interest foundation can be appointed as a guardian if certain conditions are met. Such foundations are often founded by the adult's parents, and their constitution and by-laws are usually designed as advance arrangements.

Implicitly, too, advance planning by third parties, such as parents, is accommodated. For example, conditions and charges of a gift – e.g., by the parents to the adult's siblings – can comprise elements of an advance planning on behalf of the adult.

A discussion of those general law mechanisms falls outside the scope of this report. They have been extensively analysed in a 2022 PhD.[159]

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

[158] F. Swennen, 'De meerderjarige beschermde personen', [2013-14] *Rechtskundig Weekblad* 563, n° 11.

[159] V. Vanderhulst, *Zorgplanning voor meerderjarige zorgenkinderen. Persoonsrechtelijke, familiaal(vermogens)rechtelijke en sociaalrechtelijke aspecten*, Vrije Universiteit Brussel, 2022, 760 p.

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

a. the transition from substituted to supported decision-making;

b. subsidiarity: autonomous decision-making of adults with impairments as long as possible, substituted decision-making/representation – as last resort;

c. proportionality: supported decision-making when needed, substituted decision-making/representation – as last resort;

d. effect of the measures on the legal capacity of vulnerable adults;

e. the possibility to provide tailor-made solutions;

f. transition from the best interest principle to the will and preferences principle.

The 2013 reform had two main objectives:[160] to provide for a single system of judicial protection in which the justices of the peace cater for a tailor-made approach, and to comply with Belgium's CRPD- and CoE-engagements by defining a new balance between autonomy and protection of vulnerable adults. The then new legal framework was meant to stimulate social integration and participation of persons with a disability and to support their autonomy and self-development.[161]

A *first* critical reflection is that the necessary statistical data to assess whether those objectives have been met, is simply not available (also see above, question 3). The Committee on the Rights of Persons with Disabilities regretted the lack of disaggregated data on persons with disabilities already in its first report of 2014. It recommended to systematize the collection, analysis and dissemination of data, disaggregated by gender, age and disability; to enhance capacity-building in that regard; and to develop gender-sensitive indicators to support legislative development, policymaking and institutional strengthening for monitoring, and to report on progress made concerning implementation on the various provisions of the Convention.[162] Unfortunately, this has not been followed up on by the Belgian authorities. Admittedly, the division of competences in the Belgian political framework does not render this easy an exercise. The digitisation of judicial protection (see above, questions 1 and 6) will, hopefully, be a first step in the right direction.

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[160] Explanatory memorandum, *Parliamentary documents* Chamber of Representatives 2010-11, n° 53-1009/1, pp. 3-6.

[161] Explanatory memorandum, *Parliamentary documents* Chamber of Representatives 2010-11, n° 53-1009/1, p. 6.

[162] Concluding observations on the initial report of Belgium, 28 October 2014, *UN Documents* CRPD/c/bel/co/1, § 43.

Second, the designed tailor-made response to vulnerability might be an empty shell after all. The explanatory memorandum to the 2013 reform had already referred to much-needed additional means for the justices of the peace.[163] However, these are still not provided for, and a reform of the judiciary has not sufficiently reduced the workload of the justices of the peace.[164] Both the Committee on the Rights of Persons with Disabilities,[165] the High Council of Justice,[166] and Unia[167] – Belgium's independent body for the enhancement, protection and follow-up of the application of the CRPD – have questioned whether a tailor-made approach can at all be achieved in those circumstances. It seems, indeed, that justices of the peace incapacitate vulnerable adults as full as possible and prefer to appoint professional guardians rather than a next of kin, with a view of achieving uniformity (also see above, question 6).

Third, the initial bill leading to the 2013 reform was severely criticised by civil society organisations for it would not allow to make the necessary paradigmatic shift required under the CRPD.[168] The Committee on the Rights of Persons with Disabilities[169] conveyed the same message to Belgium in its first report, even if the reform was welcomed for it was likely to already improve the situation and lives of persons with disabilities. However, the Belgian legislature by and large retained a *substituted* rather than *supported* decision-making model in the 2013 reform, e.g., by retaining the possibility to judicially incapacitate a vulnerable adult. Belgium, in other words, did not adhere to the social approach of disability and did not sufficiently elaborate support measures.[170] Unia repeated this critique in its final report for the second evaluation, while regretting that the legislature did

[163] *Parliamentary documents* Chamber of Representatives 2010-11, n° 53-1009/1, p. 7.
[164] *Parliamentary documents* Chamber of Representatives 2013-14, n° 53-3356/1, p. 49.
[165] Committee on the Rights of Persons with Disabilities, Concluding observations on the initial report of Belgium, 28 October 2014, *UN Documents* C/BEL/CO/1.
[166] High Council of Justice, 'Audit. The supervision of guardianships by the justice of the peace courts', <https://hrj.be/nl/publicaties/2019/audit-het-toezicht-op-de-bewindvoeringen-door-de-vredegerechten> accessed 28.01.2022.
[167] UNIA, 'NHRI Parallel Report and CRPD 33.2.', p. 22 <https://www.unia.be/en/publications-statistics/publications/parallel-report-to-the-committee-on-the-rights-of-persons-with-disabilities-crpd-2021> accessed 28.01.2022. Also see G. Willems, V. Ghesquière, M. Horlin, T. Van Halteren and C. Vandermeulen, "Les balises internationals et leur reception en droit belge et à l'étranger" in J. Sosson (ed.), *La protection extrajudiciaire et judiciaire des majeurs vulnérables*, Larcier, Brussels 2021, pp. 76-77.
[168] Addendum to the first report of the Commission on Justice of the Commission on Justice, *Parliamentary documents* Chamber of Representatives 2011-12, n° 53-1009/10, pp. 235-389.
[169] Committee on the Rights of Persons with Disabilities, Concluding observations on the initial report of Belgium, 28 October 2014, *UN Documents* C/BEL/CO/1.
[170] G. Willems, V. Ghesquière, M. Horlin, T. Van Halteren and C. Vandermeulen, "Les balises internationals et leur reception en droit belge et à l'étranger" in J. Sosson (ed.), *La protection extrajudiciaire et judiciaire des majeurs vulnérables*, Larcier, Brussels 2021, p. 56.

not follow up on the first report.[171] Some legal scholars, however, believe that article 12 CRPD does not necessarily exclude substituted decision-making in specific cases, if the own will and preferences of the vulnerable adult are respected.[172]

Fourth, a last point of critique following legal doctrine is that the pendulum between autonomy and protection may have swung too far in the direction of autonomy insofar continuing powers of attorney are concerned. The state's *parens patriae*-obligations might call for closer preventive and repressive supervision of continuing powers of attorney.[173]

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

a. protection during a procedure resulting in deprivation of or limitation or restoration of legal capacity;

The legal framework provides multiple measures to ensure that the vulnerable adult is involved in the decision-making process and supported during this process. For instance:

- the vulnerable adult who appears without the assistance of a lawyer, will be invited to appoint one, either themselves or through the President of the Bar of the Legal Aid Office. The court may also order such designation of its own motion;
- the vulnerable adult may be accompanied by a confidant;
- a detailed medical certificate should in principle be attached when the application aims at limiting the vulnerable adult's legal capacity because of their health condition;
- the justice of the peace should in principle summon the vulnerable adult to be heard (even separately, if they request so), in case limitation of capacity is considered;
- the justice of the peace has investigative measures at their disposal. For instance, they can obtain all useful information, appoint a licensed GP or psychiatrist, can visit the vulnerable adult, etc.;

[171] Information for List of Issues Prior to Reporting – BELGIUM, Submission by Unia (33.2) to the Committee on the Rights of Persons with Disabilities, March 2019, <https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=INT%2fCRPD%2fICS%2fBEL%2f33842&Lang=en> accessed 31.01.2022.

[172] T. Opgenhaffen, *Vrijheidsbeperkingen in de zorg*, Intersentia, Antwerp 2020, pp. 111-112.

[173] Interview with justice of the peace L. Carens by R. Boone, 'Verzoeningsbevoegdheid van vrederechters mag fors uitgebreid worden', (2019) 394 *Juristenkrant* pp. 10-11; T. Wuyts, 'Zorgvolmachten: een zegen of een vloek?' in W. Pintens en C. Declerck (eds.), *Patrimonium 2020*, die Keure, Bruges 2020, pp. 235-323.

- the vulnerable adult, any interested party, the confidant and the public prosecutor can ask the justice of the peace at any time to end the limitation of legal capacity;
- the vulnerable adult can appeal (technically: oppose) the judgement limiting their legal capacity.

An empirical legal study of 2021 indicates that the decision to limit the legal capacity is mainly based on the medical certificate, the conversation with the vulnerable adult and the people surrounding them and an additional expert investigation. Though vulnerable adult mostly appears before the justice of the peace in person, it is exceptional that they are accompanied by an attorney or ask to be accompanied by one. They are accompanied by a family member or a social assistant mostly.[174]

In addition, civil society organisations point out how difficult it is to restore legal capacity. In most cases, a vulnerable adult's legal capacity is limited until the end of their days. This is confirmed by an empirical legal study of 2021.[175]

b. protection during a procedure resulting in the application, alteration or termination of adult support measures;

See a. A difference is made depending on the impact of the application on the vulnerable adult's legal capacity. When the application has a potential impact on the legal capacity, the justice of the peace must respect all the protection measures mentioned in a. If the application does not impact the legal capacity, the justice of the peace can assess the usefulness of the measures themselves.

c. protection during the operation of adult support measures:

- **protection of the vulnerable adult against his/her own acts;**
- **protection of the vulnerable adult against conflict of interests, abuse or neglect by the representative/supporting person;**
- **protection of the vulnerable adult against conflict of interests, abuse or neglect in case of institutional representation of persons in residential-care institutions by those institutions;**

[174] G. Willems, V. Ghesquière, M. Horlin, T. Van Halteren and C. Vandermeulen, 'Les balises internationals et leur reception en droit belge et à l'étranger' in J. Sosson (ed.), *La protection extra-judiciaire et judiciaire des majeurs vulnérables*, Larcier, Brussels 2021, pp 43-44.

[175] G. Willems, V. Ghesquière, M. Horlin, T. Van Halteren and C. Vandermeulen, 'Les balises internationals et leur reception en droit belge et à l'étranger' in J. Sosson (ed.), *La protection extra-judiciaire et judiciaire des majeurs vulnérables*, Larcier, Brussels 2021, p 46.

- **protection of the privacy of the vulnerable adult.**

In case of a state-ordered measure, vulnerable adults are protected by the limitation of their legal capacity. See question 28c. Voluntary measures and *ex lege* measures do not affect the legal capacity. If more protection is required, the justice of the peace can supplement or replace it with a state-ordered measure. It should also be reminded that state-ordered measures have a limited retroactive effect (see question 10). A point of critique is the lack of supervision of voluntary measures (see question 67).

Several mechanisms to protect the vulnerable adult against conflict of interests, abuse or neglect by the representative/support person are included in the Belgian legal framework, for example:

- rules on (in)eligibility as a guardian or attorney;
- for guardians, a strict budgetary framework is organised by the justice of the peace;
- guardians are subject to an annual reporting obligation;
- guardians and attorneys need to keep fully separated their assets and those of the vulnerable adult, whose bank and securities accounts should be registered in their own name;
- in case of conflict of interests, a guardian *ad hoc* or attorney *ad hoc* should be appointed by the justice of the peace;
- the guardian is prohibited from receiving any remuneration or benefit of any kind or from anyone in respect of their services apart from the remuneration and reimbursement approved by the justice of the peace;
- a whistleblowing procedure is provided in case of malfunctioning of the continuing power of attorney;
- the justice of the peace can end the mission of the guardian or attorney at any time or can make the exercise of their mission subject to additional conditions.

All in all, the supervision on both voluntary measures and ex-lege representation is considered sub-optimal by civil society organisations and legal scholarship.

Several mechanisms to prevent conflicts of interest, abuse or neglect in case of institutional representation of persons in residential-care institutions by those institutions are included in the Belgian legal framework, for example:

- neither an institution, nor board members or employees of an institution, where the vulnerable adult stays are eligible as guardians;
- no board member or employee of an institution can accept a gift made by the vulnerable adult during their stay in the institution;

– health care regulations are applicable, providing for a screening mechanism of care institutions.[176]

The legal framework does not provide for any form of publicity in the case of voluntary measures and *ex-lege* measures. A state-ordered measure is notified to the parties and their attorneys, to the vulnerable adult and, if applicable, the guardian(s) and confidant(s). An excerpt of the operative part of the decision can be communicated to any other person who can justify a specific interest. An excerpt of every decision ordering, terminating or modifying a protection measure is to be published in the Official Gazette. This is the result of a balancing exercise between, on the one hand, legal certainty and, on the other hand, the protection of the privacy of the vulnerable adult. A Royal Decree[177] determines the elements published in the Official Gazette. No information about the extent of the limitation of legal capacity is made available, except whether it applies to personal and/or property matters. Third parties may contact the guardian to know the exact scope of the measure.[178] In legal doctrine, discussion exists on the scope of the right of information of third parties.[179]

[176] For instance, the Flemish decree of 17 October 2003 concerning the quality of the health care and welfare institutions, *Belgisch Staatsblad* 10.11.2003.

[177] Royal Decree of 25 June 2020 containing the model of publication in the Official Gazette as mentioned in article 1250 of the Judicial Code, *Belgisch Staatsblad* 20.07.2020.

[178] See in extension: T. Wuyts, "Een jaar toepassing van het eengemaakte beschermingsstatuut. Een tussentijdse evaluatie en aanbevelingen tot bijsturing waar nodig" in M. Dambre and P. Lecocq (eds.), *Rechtskroniek voor de vrede- en politierechters*, die Keure, Bruges 2015, p. 10.

[179] D. Scheers and C. Scheers, "Bescherming van meerderjarige onbekwamen: op maat van de praktijk (Deel II)", [2018-19] *Rechtskundig Weekblad* 1575.