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Neither the European Commission nor any person acting on its behalf is responsible for any use that might be made of the following information.

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Acknowledgements
Introduction
It is with great pleasure that I present the 2010 edition of the Dementia in Europe Yearbook. This publication combines our work on the ongoing Lawnet project which explores and provides an inventory of the legal provisions relating to the rights and protection of people with dementia within each member state of the European Union (as well as in Iceland, Norway, Switzerland and Turkey) with our Annual Report for 2009.

This year's topic is proxy decision making (e.g. guardianship measures and continuing powers of attorney) and various forms of legal capacity (e.g. relating to marriage, making a will, making a contract, voting, civil liability and criminal responsibility).

Once again, we have been able to count on the support of several legal experts who all shared their expertise freely. I would like to take this opportunity to extend my upmost gratitude to them as well as to Dianne Gove, the Information Officer of Alzheimer Europe who coordinated the collection of information. All of them contributed towards making this publication not only possible but also of a high quality and I encourage you to consult the acknowledgements section of the publication for details of the name of each legal expert for each country covered.

I hope that this body of information will serve to empower people with dementia and their carers by ensuring that they are aware of their rights and of certain legal measures designed to offer some form of protection. However, such information may also be of interest to service providers, researchers and policy makers.

By raising awareness of legal provisions in different member states, those states which are in the process of amending or drafting new legislation may benefit from the knowledge of legal provisions in other countries and consider whether their own laws are in line with current standards and if not, whether certain features could be adopted or adapted.

I am delighted that we were able to carry out this inventory and publish our findings as an integral part of our 2010 Work Plan which has received funding from the European Union, in the framework of the Health Programme.

Finally, I would like to thank Fondation Médéric Alzheimer for their continued support for our Lawnet project which made it possible to carry out this important work and to publish the results.

Jean Georges
Executive Director
Alzheimer Europe
Note to the readers of this Yearbook

The country descriptions in this Yearbook have been obtained through an extensive literature search, as well as from information provided by representatives of our national member organisations and other individual experts. The reports on the different European countries represent our interpretation of the information we were able to obtain and, to the best of our knowledge, are accurate descriptions of the legal systems in 30 European countries with regard to legal capacity and proxy decision making.

Nevertheless, we are aware that some of the information obtained may have been out-of-date or misinterpreted by us. Therefore, we invite readers to help us in improving the information contained in this publication. Please feel free to contact us with additional information for those countries for which our reports are incomplete, as well as with any corrections you feel are necessary.
Legal capacity and proxy decision making in dementia – National Reports
3.1 Austria

3.1.1 Issues surrounding the loss of legal capacity

The 136th Federal Law of 2 February 1983 on Trusteeship/Guardianship for Handicapped Persons (Law on Trusteeship/Guardianship Law) resulted in the repeal of several paragraphs relating to incapacitation in the Order on Incapacitation of 28 June 1916. Due to the change in Guardianship Law effective as from 1 July 2007 (Sachwalterrechtsänderungsgesetz BGBl 2006/92) guardianships are to be restricted to those cases in which the appointment of a guardian is unavoidable by legislation offering alternatives to guardianship, i.e. agents authority granted to next of kin or durable powers of attorney for legal representation.

This law refers to §268 of the General Civil Code which states that a person who is unable to manage his/her own affairs without risk of personal disadvantage can have a trustee appointed if there is no less restrictive method of protecting his/her interests.

3.1.2 Proxy decision making

3.1.2.1 Guardianship

3.1.2.1.1 The conditions for the appointment of a guardian

People with dementia who need a guardian are now covered by the Law on Trusteeship. According to §268 of the General Civil Code,

“If a person who suffers from a mental illness or who is mentally handicapped is unable to look after some or all of his own affairs without risk of disadvantage to himself, a trustee shall be appointed for this purpose on his own application or by order of the authorities.”

A trustee (the term which will be used hereafter for guardian) should not be appointed if the person concerned could be assisted in a way which would be less intrusive or extreme, e.g. by a family member or a private or public institution. One such possibility would be to use a durable power of attorney, provided that the person had sufficiently legal capacity to write a valid durable power of attorney. Nevertheless, the repeal of the Order on Incapacitation in 1984, which meant that people could no longer be declared “legally incompetent”, resulted in a huge increase in the number of trustees appointed (Blaha, 1999). Awareness of this problem has been increasing, and new research by appointment of the Ministry of Justice has been carried out.

3.1.2.1.2 How guardianship is arranged

The procedure for the appointment of a trustee is described in §§117-131 Außerstreitgesetz.

1. First, there must be a request for trusteeship. This can be made by the person him/herself or alternatively by anyone who is of the opinion that the person is in need of protection.

1 For more information please contact the Verein VertretungsNetz – Sachwalterschaft, Patientenanwaltschaft, Bewohnervertretung.
2 Please see the section after guardianship for more details.
3 Information provided in connection with the Lawnet conference on 11 May 1999.
2. Then, if the Court judges that there are reasonable grounds for concluding that such an appointment is necessary, it must contact the person concerned. This person must be informed of the reason and purpose of the procedure and s/he must have the opportunity to express his/her views on the matter. If the person ignores the summons to appear in Court, measures can be taken to bring him/her there although due consideration must be shown. If the person cannot appear in Court as it would be impractical or detrimental to his/her wellbeing, the judge must make a home visit.

3. If the Court decides to go ahead with the proceedings, a legal advisor is arranged for the person. A temporary trustee is appointed for the duration of the proceedings if the person has no legal representative of his/her own choice. The temporary trustee can be replaced at any time if the person appoints a legal representative of his/her own choice.

4. The Court then makes the necessary inquiries for a decision to be made on the basis of an oral hearing. The person can be excused from being present at the oral hearing if his/her presence would be impractical or detrimental to his/her wellbeing. At the oral hearing, people who are close to the person are called in and the circumstances surrounding the request and the person are taken into account. A trustee can only be appointed after at least one, or if appropriate several, experts have been heard and have submitted a report.

5. If the Court decides not to appoint a trustee, the proceedings must be terminated. If, on the other hand, a decision is made to appoint a trustee, the decision must be accompanied by a statement that a trustee is being appointed for the person in question in accordance with §268 of the General Civil Code. The trustee must be named and the affairs that s/he has to manage must be described on a case-by-case basis. If appropriate, the extent to which the person concerned is free to make decisions must be stipulated. A statement of costs must also be made. The decision concerning the appointment of a trustee is served in person on the person concerned, the representative and the trustee.

3.1.2.1.3 Who can be a guardian
The choice of trustee is based on the nature of the affairs which need managing and the needs of the person for whom the trustee is being appointed. Usually a person is appointed who is on close terms with the ward. Alternatively, a trustee can be appointed from a circle of people designated by a non-profit advocacy organisation. If it is felt that the person's affairs would be best handled by a person with legal knowledge, a lawyer, trainee lawyer or notary can be appointed.

Other appropriate persons (e.g. social workers) may be appointed if neither persons close to the ward nor an advocacy organisation nor an attorney or notary is available. These persons are not allowed to assume more than five guardianships. Attorneys-at-law or notaries may not take on more than 25 guardianships. The Court decides on a case-by-case basis if those persons are able to act in more than 5 or 25 guardianships.
According to the new law (§ 279 of the General Civil Code), the trustee in question must be able to act independently on behalf of the ward. This means, for example, that no employee of a nursing home where the person concerned lives, or care providers who are directly involved in the patient’s treatment, may function as a trustee.


3.1.2.1.4 The duties and responsibilities of guardians

As a “legal representative” the powers of the trustee are determined on an individual basis taking into account the extent of the disability, as well as the nature and scale of the affairs to be managed (§268 of the Law on Guardianship). The trustee can be entrusted with the management of the person’s individual affairs such as defence against a claim or entering into and handling a legal transaction, or with the management of all the affairs of this person. However, for “strictly personal decisions” such as the right to bodily integrity and the choice of one’s place of abode, the trustee can only decide on the person’s behalf if the latter is incapable of understanding or making a judgement. If the trustee is not only entrusted with single affairs, s/he must be in touch with him/her at least once a month (this is called “Personensorge” in §282).

The trustee may be entrusted with the management of a particular range of affairs, the administration of some or all assets or the management of all the affairs of the person. The Court may, however, grant the person under trusteeship the right to make decisions and undertakings which fall under the authority of the trustee, provided that this would not endanger his/her wellbeing. According to §282 of the Law on Trusteeship,

“the trustee of a handicapped person must also ensure that required personal care and in particular medical and social care is offered. …and must establish at least monthly contact, if s/he is not only entrust with single affairs.”

The person under guardianship only loses capacity for matters which have become the responsibility of the trustee. S/he retains legal capacity for all other matters, except legal representation of his/her children. This person also requires the guardian’s consent to marry.

Moreover, even if responsibility for a decision lies with the trustee, s/he must inform the person of any important decisions relating to his/her person or assets. The trustee must give the person sufficient time and opportunity to express his/her views and must take such views into consideration provided that any wish expressed is appropriate. The new law contains actual guidelines or stipulations on how assets should be managed: The guardian, is first and foremost, responsible for the person’s wellbeing. Primarily, assets should be used to improve the person’s living conditions (§ 281 (3) of the General Civil Code).

4 “höchstpersönliche Rechte”
5 Information provided by Margarete Blaha in connection with the Lawnet conference on 11 May 1999, §§ 283, 284a of the General Civil Code.
3.1.2.1.5 Measures to protect the ward from misuse of power

It is the duty of the Court to verify at appropriate intervals whether the wellbeing of the person for whom care has been ordered requires the removal of the trustee(s) or a change in the trusteeship (§278 of the General Civil Code). In addition, the trustee must regularly report to the Court and, if applicable, account for the management of the person’s income and assets. At least once a year, the trustee must submit a report on the contact s/he has had with the person and that person’s housing situation and living conditions. For financial matters, a financial report must be submitted at least once every three years.

With regard to associations acting as trustees, it is the responsibility of the Federal Minister of Justice to supervise their work. In §5 of the Law of Organized Guardians, Patients Advocates and Residential Advocacy it is stated, that the Federal Minister of Justice must ensure, in an appropriate manner, if necessary by direct examination, that the associations are carrying out their duties in the context of association trusteeship properly and in accordance with the law.

3.1.2.1.6 Compensation and liability of guardians

According to §276 of the General Civil Code, guardians can apply to the court for remuneration and to have their expenses reimbursed. Usually, they receive 5% of the ward’s net income excluding certain benefits and allowances that the latter may receive. An additional 2% of the ward’s assets exceeding EUR 10,000 may also be granted.\(^6\)

If the trustee does not act on behalf of the ward, s/he is liable for all resulting damage (§267 of the General Civil Code). Lawyers, public notaries or trustees from a non-governmental organisation must fulfil higher standards than trustees close to the ward.

3.1.2.1.7 Duration of the guardianship measure

The trustee can be relieved of his/her duties if at any time they are no longer needed. In addition, it is the duty of the Court to verify “at appropriate intervals” whether the wellbeing of the person for whom care has been arranged requires the removal or change of trustee (§283 of the General Civil Code).

3.1.2.1.8 The right to appeal

The ward has full legal capacity concerning the proceedings of guardianship. S/he can appeal to a Higher Court, file an application, apply or appear directly in Court.

3.1.2.2 Agent’s authority granted to next of kin (AAGNK)

3.1.2.2.1 The conditions for the appointment of an AAGNK

As stated in the previous section, it is now possible to grant agent’s authority to a next of kin\(^7\) (Vertretungsbefugnis nächster Angehöriger) if guardianship is not necessary but due to mental illness or disability, the person is unable to manage his/her legal affairs or personal matters. However, it is only possible to grant such authority to a next of kin if the person does not already have a trustee and has not already granted a durable power of attorney for legal representation (Vorsorgevollmacht).

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\(^6\) NÖ Landesverein für Sachwalter- und Bewohnervertretung, Brochures on Adult Guardianship and Agent’s Authority Granted to Next of Kin, 2007

\(^7\) § 284b – 284e of the General Civil Code (Sachwalterrechts-Änderungsgesetz BGBl I 2006/92)
3.1.2.2 How AAGNK is arranged
To obtain an agent’s authority, a person must submit a medical certificate in which it is stated that the person concerned lacks legal capacity, submit it to a public notary along with proof that s/he is the next of kin. This is then entered in the Central Austrian Register of Representation (ÖZVV). The notary gives the newly appointed agent a certificate for identification purposes.

3.1.2.3 Who can be an agent
Next of kin includes parents, children who are of age and spouses (or unmarried partners who have lived together for at least 3 years). These people are not placed in any order of priority.

3.1.2.4 The duties and responsibilities of agents
Once appointed, they are responsible for handling the person’s current income (there is a limit of € 901 per month, and there are different interpretations of this limit) and covering his/her needs for care. This might, for example, include making claims for pensions and social assistance and consenting to treatment provided that it would not have a lasting or serious impact on the person’s health and that the person lacks the insight and judgement to make the decision him/herself.

3.1.2.5 Measures to protect the ward from misuse of power
If the person concerned is considered to be in danger, this must be reported to the Court, which would then appoint a trustee who is entitled to take legal action.

3.1.2.6 Compensation and liability of agents
The agents are not entitled to remuneration but are liable for damages according to the rules laid down for guardians.

3.1.2.7 Duration of the AAGNK
There is no regulation specifically covering the duration of the AAGNK (i.e. its duration is not regulated by law). The AAGNK could be terminated at the objection of the person concerned, by appointment of a trustee or on recovery of the person concerned (e.g. the person concerned recovers after a stroke).

3.1.2.8 The right to appeal
An agent cannot be registered if the person concerned objects to his/her appointment or already has a guardian or durable power of attorney for legal representation. The person can even object after s/he has lost legal capacity, insight or judgement with the result that the agent’s authority would be terminated or not become effective.
3.1.2.3 Durable powers of attorney

3.1.2.3.1 The conditions for the appointment of a durable power of attorney for legal representation

The changes in the guardianship law, which came into force on 1 July 2007, also cover durable powers of attorney for legal representation\(^8\) (referred to hereafter as DPoA). The DPoA only becomes effective when the person granting it loses legal capacity, insight and judgement or the ability to express him/herself (as attested by a medical certificate).

3.1.2.3.2 How durable powers of attorney are arranged

There are two ways to make a DPoA:

1. It must be signed \textit{manu propria} (with one’s own hand) by the grantor who then confirms in front of three unbiased witnesses with full legal capacity that it fully conforms to his/her intentions.

2. It is not signed \textit{manu propria} by the grantor but is confirmed by a public notary.

If, however, it contains wishes relating to certain issues (namely consent to serious medical treatment with lasting effect, decisions relating to permanent relocation and/or financial matters which are not part of day-to-day business), it must be drawn up before a lawyer, public notary or court. If it was not drawn up before a lawyer, public notary or court, the court would have to appoint a guardian for decisions about such issues.

The grantor must be informed of the legal consequences of making such a document and of the option to revoke it at any time.

This is then entered in the Central Austrian Register of Representation (ÖZVV) by a lawyer or notary who must inform both the grantor and the holder of the DPoA of the registration of the document and make sure that each has a copy. Only a notary can register the entry into effect of the DPoA. When this is done, s/he must also provide the holder of the DPoA with a DPoA registration certificate.

3.1.2.4 Durable power of attorney for health care purposes

As mentioned above, a DPoA concerning consent to serious medical treatment with a long lasting effect or refusing treatment, which is vital, must be drawn up before a lawyer, a public notary or a court.

It is also possible to combine a DPoA with a living will:

A living will concerns the advance refusal of medical treatment at a time when the grantor no longer has insight or judgement or cannot express him/herself. It can be considered relevant or binding. For it to be binding, it must contain specific details of the treatment to be refused and must have been drawn up before a lawyer, notary or patient advocacy organisation. In addition, it must be renewed after five years.

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\(^8\) NÖ Landesverein für Sachwalterschaft und Bewohnervertretung, Durable power of attorney for legal representation, 2007
3.1.2.4.1 *Who can be appointed attorney*
According to § 284f – 284h of the General Civil Code, anyone can grant a DPoA to a person they trust.

3.1.2.4.2 *The duties and responsibilities of the attorney*
The wishes and obligations the grantor has stated in the DPoA must be fulfilled. If the grantor has not stated something specific, the general welfare of the person represented has to be promoted.

3.1.2.4.3 *Measure to protect the person from misuse of power*
The grantor can revoke the DPoA at any time. If the grantor is incapable to act for him/herself, anybody can inform the court. The court may appoint a guardian, who could, with special permission from the court, revoke the DPoA on behalf of the grantor.

3.1.2.4.4 *Compensation and liability of the attorney*
Compensation and/or reimbursement of expenses should be handled as stipulated in the DPoA.

There is liability of damage according to the rules laid down for trustees.

3.1.2.4.5 *Duration and right to appeal*
The person who made the DPoA can revoke it at any time, even after s/he has lost capacity, insight or judgement.

3.1.3 *Capacity in specific domains*

3.1.3.1 *Marriage and divorce*
Article II of the Law on Trusteeship which amends the marriage law, states that people with restricted legal competence shall be considered as minors over seven years old and persons for whom a trustee has been appointed under §268 of the General Civil Code. Under the Marriage Law, consent of the trustee (if one has been appointed) is necessary or if such consent is refused, the court of trusteeship can give it instead.

The person with restricted legal competence, however, must be able to understand what duties and responsibilities marriage implies (i.e. have the “capacity to marry”). If not, the marriage could be declared null and void.

If a person with dementia wants to divorce and his/her legal competence has not been restricted, s/he can file for divorce. If a trustee has been appointed, and the person concerned wanted to divorce before s/he became ill, the former is entrusted to file for divorce on behalf of the latter.

If his/her partner files for divorce, and the break-up is not in the ward’s interest, the marriage can be dissolved by the court 6 years after the end of marital cohabitation.
According to §51 of the Marriage Law, severe mental illness can be a reason for divorce if recovery is not expected.

Consensual divorce, in accordance with §55a of the Marriage Law, is based on a strictly personal decision. Surrogate decision making is therefore not permitted.

3.1.3.2 Voting capacity
A person for whom a trustee has been appointed does not lose the right to vote (or to be elected)⁹.

3.1.3.3 Testamentary capacity
Where there is a trustee, wills can be made in a particular way. The person who is making the will must make a statement of will before the court or before the notary, if the court has declared it to be a part of the decision related to the appointment of a trustee.

3.1.3.4 Contractual capacity
Once a person has had a trustee appointed in accordance with §268 of the General Civil Code, s/he can no longer make legal decisions or transactions for any actions for which the trustee has been entrusted without the express or tacit consent of the trustee. There are exceptions to this rule, which are determined by the Court. If the person does make a legal transaction which is not one of these exceptions but is of minor significance concerning daily life, it can still be considered legal provided that the person has fulfilled his/her duties in relation to it.

3.1.3.5 Criminal responsibility
According to § 11 of the Penal Code:

“A person who at the time of the action, on account of mental illness, of mental deficiency, of far-reaching disturbance of consciousness or of some other mental disturbance equivalent to one of these conditions, is incapable of understanding the wrongfulness of his action or of acting in accordance with this understanding, shall not be acting culpably.”

3.1.4 References

Alzheimer Austria, speech by Margarethe Blaha (11.5.99) on guardianship and other legal issues (in German and in English)

NÖ Landesverein für Sachwalterschaft und Bewohnervertretung (2007), Adult guardianship

⁹ Information provided by Margarete Blaha in connection with the Lawnet meeting on 11 May 1999
NÖ Landesverein für Sachwalterschaft und Bewohnervertretung (2007), Agent’s authority granted to next of kin

NÖ Landesverein für Sachwalterschaft und Bewohnervertretung (2007), Durable power of attorney for legal representation
3.2  

Belgium

3.2.1  

Issues surrounding the loss of legal capacity

Pursuant to Article 489 of the Belgian Civil Code, an adult suffering from a continuing state of insanity can be declared “legally incapable” by court order. From a legal point of view, this means that the person loses the legal rights of an adult person, and only has the rights of a minor. All legal acts carried out by the person after the date of the court order are null and void. A guardian (“tuteur”) and a substitute guardian (“subrogé de tuteur”) are appointed to manage the person’s affairs. If the causes that resulted in the loss of the legal capacity cease at any time, the court may order that the person regain his/her full legal capacity. The procedure for obtaining court order of loss of legal capacity pursuant to Article 489 is long and involved, and psychiatric reports must be obtained. The court application can only be made by a relation who is a potential heir, or by the spouse, or failing both of these, by the Attorney General. Given the radical consequences of a declaration of insanity and legal incapacity pursuant to Article 489 the Belgian legislator perceived the need for a more flexible regime – a regime that was adopted by the law of 18 July 1991 inserting a new Article 488 bis in the Belgian Civil Code.

If, upon hearing an application for a declaration of legal incapacity the court finds that the conditions for an order of legal incapacity are not satisfied, but that the person concerned has diminished mental facilities that prevent him/her from managing his/her assets, it may decide to appoint a counsellor (“conseil judiciaire”/“raadsman”) to assist the person concerned for certain acts (Article 1247 of the Belgian Judicial Code). As a result, the person concerned is legally incapable of accomplishing the following legal acts without the intervention of his/her counsellor: bringing or defending court proceedings, settling disputes, borrowing, receiving a capital sum (and signing for receipt thereof), disposal of assets by gift or contract, and taking out a mortgage on his/her assets. This alternative, which is provided by Article 1247 of the Belgian Judicial Code, has lost much of its utility now that it is possible to appoint a provisional administrator pursuant to Article 488 bis of the Civil Code.

Article 513 of the Belgian Civil Code provides a regime which is designed to protect one spouse against the prodigality or weakness of mind of the other spouse. If a married person demonstrates an inability to manage the joint property as well as his/her own property, or presents a danger for the family interest, the other spouse may apply to the court to have the powers of management withdrawn and conferred on the petitioning spouse or on a third party. A defect of this regime is that there is no legal supervision of the management by the petitioning spouse, as is the case when a provisional administrator is appointed pursuant to Article 488 bis.

In the light of these considerations, this chapter will concentrate on the regime for the appointment of a provisional administrator pursuant to Article 488 bis of the Belgian Civil Code, which in most cases will be more appropriate for persons with Alzheimer’s disease. That being said, it should be emphasised that Belgian law does not define Alzheimer’s
disease as constituting any particular form of disability per se. It will depend on the individual’s condition as evidenced by medical reports in each case, whether or not the conditions are satisfied for the appointment of a provisional administrator, etc.

3.2.2 Proxy decision making

3.2.2.1 Guardianship
Since the reform introduced by the law of 18 July 1991, by far the most common form of guardianship for persons having difficulty in managing their affairs is under the regime provided for by Article 488bis of the Belgian Civil Code. As observed by Nicole Delpéréée in her authoritative guide on the subject, this Article does not deal with personal rights (e.g. the right to marry, write a will and make a donation) and there is no protection of the person (e.g. decision on care, choice of the place of residence, etc.).

3.2.2.1.1 Conditions for the appointment of a provisional administrator
Pursuant to Article 488bis of the Belgian Civil Code, the conditions for appointing a provisional administrator (“administrateur provisoire” / “voorlopige bewindvoerder”) are as follows:

“A person of full age who, due to his or her state of health, is completely or partially incapable of managing his or her property, even temporarily, may for the purpose of protecting the said property, be assigned a provisional administrator, when he or she is not already assigned a legal representative.”

3.2.2.1.2 How is the appointment of a provisional administrator arranged
The person concerned (“the protected person”) or any other person interested may request that a provisional administrator be assigned by the Justice of the Peace. The Justice of the Peace may also take this measure as a matter of course when a petition has been made to place the person under observation.

The petition must be supported by a medical certificate. The Justice of the Peace then collects all the necessary information and designates an expert doctor to give an opinion on the state of health of the person concerned. The person and his/her spouse or parents are summoned to court and are heard, if required in the presence of their lawyer. The Justice of the Peace may also decide to visit the person in his/her home, if necessary.

The tasks of a provisional administrator will come to an end if a legal representative is named in the event of the protected person being disqualified from accomplishing certain legal acts – See Issues Surrounding the Loss of Legal Capacity above.

3.2.2.1.3 Who can be appointed provisional administrator?
The Justice of the Peace usually appoints the spouse or partner, a member of the immediate family or, if necessary, a person in whom the person to be protected has confidence. Within 15 days the clerk of the court publishes details of the provisional administrator in the Moniteur Belge/Belgisch Staatsblad. Any modification to or revocation of the powers of the provisional administrator must also be published. The provisional administrator

10 Delpéréée, N. (1999), Psychiatrie et vieillissement: du droit civil au droit social, Revue belge de securité sociale
11 The Belgian State Gazette
must be informed that s/he has been appointed within three days of the decision and must reply in writing within eight days stating whether s/he accepts the appointment.

3.2.2.1.4 The duties and responsibilities of provisional administrators

A provisional administrator has the duty of managing the property of the protected person. S/he must do this diligently with the same care as s/he would exercise over his/her own affairs. The Justice of the Peace defines the extent of the powers of the provisional administrator, taking into account the nature and the composition of the property to be managed and the state of health of the protected person.

In fulfilling his/her duties, the provisional administrator may obtain assistance from one or more persons acting under his/her responsibility.

The provisional administrator is responsible for controlling the living and treatment expenses of the protected person and must place at his/her disposal the necessary amount to ensure the improvement of his/her situation. In addition, s/he is required to ensure that social legislation in favour of the protected person is applied correctly.

3.2.2.1.5 Measures to prevent misuse of power by the provisional administrator

If the interests of the provisional administrator are in conflict with those of the protected person, s/he must obtain special authorisation from the Justice of the Peace. In addition, certain restrictions may be imposed on him/her. Specific authorisation must be obtained from the Justice of the Peace to do any of the following:

1. represent the protected person in court as petitioner in certain procedures and legal acts;
2. alienate his/her movable or immovable property;
3. borrow and consent to a mortgage;
4. consent to any request concerning real estate property rights;
5. reject an inheritance, or accept it on condition that the debts do not exceed the value of the assets;
6. accept a donation or receive a legacy;
7. grant an agricultural or commercial lease;
8. reach a compromise or settle any claim made by or against the protected person.

Apart from the cases where a provisional administrator is obliged to obtain specific authorisation from the Justice of the Peace, there are various reporting requirements designed to protect the patient against misuse of powers. For example:

- Within one month of being appointed, the provisional administrator must make a report concerning the nature and composition of the property to be managed and transmit it to the Justice of the Peace and to the protected person.

12 The civil law formulation is “en bon père de famille”, literally as the good head of a family.
• Every year, and also at the end of his/her mandate, the provisional administrator must submit his/her accounts to the Justice of the Peace and the protected person.

• The provisional administrator is obliged to inform the protected person of any legal acts carried out on his/her behalf.

3.2.2.1.1 Protection of the protected person’s dwelling and furniture
The dwelling of the protected person and his or her furniture must remain at his/her disposal as long as possible. However, if it becomes necessary - or if it is in the interests of the protected person - to dispose of them (e.g. in the event of hospitalisation or long-term institutionalisation) special authorisation from the Justice of the Peace is required. Nevertheless, souvenirs and other objects of a personal nature must be kept at the disposal of the protected person.

3.2.2.1.2 Provisions for the sale of real estate
If it is considered to be in the interests of the protected person, his/her real property may be disposed of by public sale. This must be carried out in the presence of the provisional administrator before the Justice of the Peace of the canton in which the property is located. The provisional administrator may request authorisation of sale by private contract if this is in the interests of the protected person. In this case, the Justice of the Peace must explain the justification for a private sale under his/her authorisation.

3.2.2.1.3 Remuneration and liability of provisional administrators
The Justice of the Peace may arrange for the provisional administrator to be paid for his/her services. In such cases, the amount of such payment cannot exceed three percent of the protected person’s total income. In addition, the Justice of the Peace may arrange for the provisional administrator to be paid for exceptional duties performed by him/her.

3.2.2.1.4 Duration of the measure
In principle a provisional administrator is appointed for an indefinite period, but s/he is obliged to submit an annual report on his/her management of the protected person’s affairs. The appointment of the provisional administrator may be revoked by the court and a new administrator appointed upon the petition of any person having an interest.

3.2.2.1.5 The right to appeal
A right of appeal exists from the decision of the Justice of the Peace to the Court of First Instance. The Court of First Instance (“Tribunal de première instance”/“Rechtbank van eerste aanleg”) has jurisdiction to reconsider the matter de novo, that is to say, to re-examine both the facts and the law. From the Court of First Instance there is an appeal to the Supreme Court (“Cour de Cassation”/“Hof van Cassatie”) but only on a point of law.

3.2.2.2 Powers of attorney
3.2.2.2.1 Conditions for making a power of attorney
A power of attorney or mandate is an authorisation to act on someone else’s behalf in a legal or business matter. The attorney-in-fact is a fiduciary for the principal, meaning that
s/he must be completely honest with, and loyal to, the principal in his/her dealings with the principal. It is possible to grant a "springing" or contingent power of attorney, i.e. a power of attorney that only enters into force after some other defined future act or circumstance, but care should be exercised in specifying exactly how and when the power springs into effect. This may be used to allow a spouse or family member to manage the grantor’s affairs once illness or injury renders the grantor physically incapable of acting. However, once an order of incapacity is made pursuant to Article 489 of the Belgian Civil Code, or a provisional administrator is appointed pursuant to Article 488 bis, all powers of attorney granted by the protected person cease to have effect.

3.2.2.2 How powers of attorney are arranged
If the attorney is being paid to act for the principal, the contract is usually separate from the power of attorney itself. If such contract is in writing, it is a separate document, kept private between them, whereas the power of attorney is intended to be shown to various other people. However, a power of attorney may be verbal as well. For some purposes, the law requires a power of attorney to be in writing, notably in the case for the transfer or acquisition of real estate.

A power of attorney may be special or limited to one specified act or type of act, or it may be general. It can also be limited in time. People with mental illness can prepare so-called psychiatric advance directives. These directives are powers of attorney that enable a patient to dictate his/her preferences for care before becoming wholly incapacitated through mental illness.

3.2.2.3 Duration and revocation of powers of attorney
Unless the power of attorney is expressed to be irrevocable, the grantor may revoke it at any time by simply telling the attorney-in-fact that it is revoked. It is also advisable to inform third parties. If the principal does not inform third parties and it is reasonable for the third parties to believe that the power of attorney is still in force, the principal may continue to be bound by the acts of the agent falling within the scope of the power of attorney. As observed above, once a declaration of loss of legal capacity is made pursuant to Article 489 of the Belgian Civil Code, or a provisional administrator is appointed pursuant to Article 488 bis, the power of attorney granted by the protected person ceases.

3.2.3 Capacity in specific domains

3.2.3.1 Marriage and divorce
In general, and as far as the person concerned has not lost his legal capacity as provided by Article 489 of the Belgian Civil Code, a person remains free to marry and/or divorce. However, once a provisional administrator has been appointed, the permission of the Justice of the Peace is required for the conclusion of a marriage settlement concerning assets in the patient’s estate.
3.2.3.2 Voting capacity
As long as a person has not lost his legal capacity, s/he retains the capacity to vote in governmental and local elections. Should it be practically impossible for the person concerned to go to the polling station, s/he can grant a power of attorney to someone else to vote on his/her behalf.

3.2.3.3 Contractual capacity
As long as the person concerned has not lost his legal capacity, s/he retains the capacity to contract. However, once a provisional administrator has been appointed, the assistance of the latter may be required in certain cases. The court order appointing the provisional administrator usually describes all the acts for which the assistance of the provisional administrator is required.

All legal acts performed by the protected person but over which a provisional administrator had authority are null and void. Nullity may only be requested by the protected person or his/her provisional administrator. The request must be made within five years of the relevant act.

3.2.3.4 Testamentary capacity
As long as a person has not lost his/her legal capacity, s/he retains the capacity to dispose of his/her goods by will and/or by gift. However, once a provisional administrator has been appointed, assistance of the latter will normally be needed. The court order appointing the provisional administrator will usually designate the acts for which the assistance of the provisional administrator is required.

3.2.3.5 Civil liability
In general, a person who commits a tort is liable and must therefore pay compensation for any damage incurred. However, pursuant to Article 1386bis of the Belgian Civil Code, the court can rule that a person in a state of madness\(^\text{13}\), serious mental imbalance or debility shall be held liable for all or part of the damage for which s/he could have been held liable if of full mind. In so doing, the Court must consider what is just having regard for the circumstances and situation of the parties. Thus, compensation can be claimed from a person who commits a tort, even if that person has Alzheimer's disease. It is therefore advisable for such person to take out civil liability insurance (if necessary, through his/her provisional administrator).

3.2.3.6 Criminal liability
In general, a person who commits a criminal act will be held criminally liable. However, pursuant to Article 71 of the Belgian Criminal Code, there is no crime when at the moment of the offence the offender was in a state of insanity. Depending on the qualification of the act by the judge, people with Alzheimer’s disease may escape criminal liability on the basis of Article 71 of the Belgian Criminal Code. However, this does not exempt them from civil liability (see above).

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\(^{13}\) The word in French is “démence” - and in Dutch “kankzinnigheid” - which can also be translated as “dementia”. This does not mean that someone with Alzheimer’s disease – which is the most common form of dementia and sometimes referred to in English as “dementia” – automatically fulfils the conditions of Article 1386 bis. It will be a question of fact in each individual case whether the conditions of this disposition are satisfied.
3.3 Bulgaria

3.3.1 Issues surrounding the loss of legal capacity

3.3.1.1 Incapacity
The Law for the Persons and Family of 1949 (with amendments to 2002) states that adults who are unable to take care of their own affairs due to a mental disorder shall be declared legally incompetent and placed under “full judicial disability”. Those whose condition is not as severe shall be placed under “restricted judicial disability” (article 5).

3.3.1.2 Establishing incapacity (also known as interdiction)
According to the Code of Civil Procedure (CCP), full and restricted interdiction (referred to in the CCP as incapacity) must be determined in court. The request for interdiction can be made by the spouse, close friends, prosecutor or anyone else with a legal interest in the matter. The prosecutor must, however, participate in the proceedings.

The person whose interdiction is sought must be questioned in person and, if need be, can be brought to court by force. The court must listen to the person concerned as well as his/her relatives, and gather additional evidence if necessary.

3.3.2 Proxy decision making

3.3.2.1 Guardianship

3.3.2.1.1 Conditions for the appointment of a guardian
Chapter 11 of the Family Code of 1 Oct 2009 deals with full legal guardianship and trusteeship. Article 153 states that full legal guardianship is instituted over people who are under full interdiction and that trusteeship is instituted over people who are under restricted interdiction. The following information on guardianship and trusteeship is taken from the Family Code.

3.3.2.1.2 How guardianship is arranged
Guardianship and trusteeship are organised by the organ of the full legal guardianship and trusteeship (hereafter referred to as the OGT) of the municipality where the person, for whom the measure is intended (i.e. the future ward), resides. The mayor or his/her official representative is the OGT.

The OGT appoints a full legal guardian, a deputy full legal guardian and two advisors from the family and close friends of the future ward in order to take care of the interests of the latter. These people make up the full legal guardianship council.

For trusteeship, the OGT appoints a trustee and a deputy trustee from among the relatives and close friends of the future ward. They make up the trusteeship council which is responsible for taking care of the interests of the future ward.
The OGT can make changes to the full guardianship and trusteeship councils at any time but must listen to the opinions of the wards, as well as their close relatives and friends.

The OGT or his/her representative makes a full inventory of the future ward’s property and takes any necessary measures to protect his/her interests until a full legal guardian or trustee has been appointed (art. 159). The interested parties are entitled to appeal to the regional court against the acts of the OGT. The decision of the regional court is not subject to appeal (art. 161).

### 3.3.2.1.3 Who can be a member of the guardianship/trusteeship council

The capable spouse of a person under full interdiction or restricted interdiction is usually appointed as the full legal guardian or trustee (respectively) unless this is not possible.

The following people cannot be members of full legal guardianship or trusteeship councils:

- those who are incapable;
- those who have been deprived of parental rights;
- those who have been sentenced for crimes committed with intent.

### 3.3.2.1.4 The duties and responsibilities of guardians/trustees

The full legal guardian is obliged to care for the ward, to administer his/her property and represent him/her before third parties. Within one month, the full legal guardian must inform the OGT about the acquisition of properties of considerable value which have to be entered into an inventory. The disposal of property belonging to the ward is governed by article 130, paragraphs 3 and 4, sentence 1.

Full legal guardians and trustees must obtain permission from the regional court to draw sums of money from the ward’s bank account. When applying for permission, the opinion of the full legal guardianship council/trusteeship council must be attached.

Income from the ward must be deposited in an account in his/her own name within 7 days of receiving it. For sums of money not deposited in time, legal interest must be paid by the guardian/trustee (art. 165, paragraph 3).

The ward must live with the full legal guardian or trustee unless there are important reasons to live elsewhere (art. 163). If the ward changes his/her place of residence without the consent of the guardian/trustee, the latter may request the regional court to issue an order for the return of the ward to the designated place of abode.

### 3.3.2.1.5 Duties and responsibilities of the deputy legal guardian/deputy trustee

The deputy legal guardian and the deputy trustee replace the full legal guardian and the trustee whenever the latter are prevented from carrying out their duties or in cases where there could be a conflict of interests (art. 169). The activities of guardians and
trustees are honorary, but the municipal council must assist them in carrying out their functions.

3.3.2.1.6 **Duties and responsibilities of the advisors in the full legal guardianship council**

The role of the advisors is to assist the full legal guardian and the deputy legal guardian in carrying out their obligations and to inform the OGT about any shortcomings regarding the protection of the rights and interests of the ward. They also hear the report of the full legal guardian and participate in its endorsement by the OGT. The advisors may suggest dismissal of the full legal guardian. There are some cases in which the guardian may only take action after having received the advisor’s approval.

3.3.2.1.7 **Measures to protect the ward from misuse of power**

According to article 171, the full legal guardian must submit a report by the end of February each year to the full legal guardianship council, which is then presented to the OGT. A report must also be submitted whenever a full legal guardian is relieved of his/her duties and whenever the OGT requests one. At the request of the OGT, the trustee must provide an explanation about his/her activities in the presence of the deputy trustee.

If the full legal guardian (or trustee), for no valid reason, fails to appear in court, s/he may be fined from leva 50 to leva 500. The OGT may in such cases ask the deputy full legal guardian or the deputy trustee to submit the report or provide an explanation.

The OGT states his/her opinion concerning the report or explanation and takes the necessary measures if irregularities are detected. The OGT may request a bill of execution from the regional court for sums of money that the full legal guardian has not accounted for.

3.3.2.1.8 **Duration of guardianship**

There is no restriction on the duration of the interdiction once it has been established.

3.3.2.1.9 **The right to appeal (against guardianship)**

Appeals to the regional court against acts relating to guardianship and trusteeship, and the refusal to establish guardianship or trusteeship or to take measures under art. 159, may be made by the parties concerned or by the prosecutor. The decision of the regional court is not subject to appeal. (Art. 161 of the Family code).

3.3.2.2 **Continuing powers of attorney**

In Bulgaria, powers of attorney are usually permanent, unless stated otherwise. However, after placing a person under full or limited interdiction, the validity of proxies established by that person ends.
3.3.3 Capacity in specific domains

3.3.3.1 Marriage and divorce
According to article 7 of the Family Code of 1 Oct 2009, a marriage may not be contracted by a person who is under full interdiction or who suffers from a mental disease to such an extent as to warrant being placed under full interdiction. Article 46 further stipulates that a marriage that has been contracted in violation of article 7 may be annulled. The action for annulment may be brought by either of the spouses or the public prosecutor.

3.3.3.2 Voting capacity
Every citizen above the age of 18, with the exception of those placed under judicial interdiction or serving a prison sentence, is free to elect state and local authorities and vote in referendums (art. 42 of the Bulgarian Constitution).

3.3.3.3 Contractual capacity
Placing a person under full or limited judicial interdiction is associated with loss of the right to exercise his/her legal rights and obligations by him/herself.

If s/he is considered completely incapacitated, s/he can only exercise his/her rights through another person who has capacity, i.e. a guardian. The guardian represents the person placed under full judicial interdiction. S/he substitutes the fully interdicted person before third parties.

As for a person who has been placed under restricted interdiction, s/he does not completely lose his/her ability to perform legal acts. For actions with legal consequences, carried out by a person placed under restricted interdiction, the approval of the trustee is necessary. However, people under restricted interdiction are free to carry out regular small transactions to meet their current needs and to have access to what they have acquired through their own work (Art. 4, Par. 2 of the Law for Individuals and Families).

Contracts entered into by interdicted people or their representatives, which do not comply with the legal requirements established for such matters, are voidable. (Art. 27 of the Obligation and Contract Law).

Certain transactions involving the assets of a person under legal interdiction are prohibited or may only be carried out with the permission of the court, namely:

Engaging in actions to dispose of real estate, movable property by a formal deal, with deposits and securities belonging to the interdicted person, is allowed with the permission of the district court, provided that this would not be contrary to the interests of the interdicted person.

Donations, disclaimers, and lending and providing foreign liabilities of the interdicted person shall be void. Exceptionally, secure foreign obligations by pledge or mortgage
may be made with the permission of the district court in cases of obvious need or benefit to the interdicted person (Art. 130 of the Family Code).

3.3.3.4 Testamentary capacity
Every person who is above the age of 18 and who has not been placed under full judicial interdiction due to imbecility and who is able to act reasonably, may dispose of his/her property after his/her death by means of a testament (Art. 13 of the Legacy Law).

3.3.3.5 Civil responsibility
Anyone who is incapable of understanding or directing/controlling his/her actions is not responsible for the damages caused whilst in that condition, unless s/he is responsible for having caused the incapability.

For damage caused by a person who is incapable, the person who is obliged to supervise him/her is responsible for him/her unless that person could not have prevented such damage. (Art. 47 of the Obligation and Contract Law).

3.3.3.6 Criminal responsibility
Chapter 3 of the Penal Codes deals with criminal responsibility. In order to be considered criminally responsible, a person must be at least 18 years of age and have been sane at the time the crime was committed (article 31). A person who had a continuous or short-term mental disorder at the time of the crime and was consequently unable to understand the quality or importance of the act or could not control his/her behaviour, shall not be considered criminally responsible (article 33).

If a person who commits a crime and then “lapses into a mental disorder” before the verdict has been made, and cannot therefore understand the quality or importance of his/her behaviour (or control his/her behaviour) shall not be punished. If the person recovers, the punishment may be applied (article 33).
3.4 Czech Republic

3.4.1 Issues surrounding the loss of legal capacity

Every person is considered as having legal capacity from the moment s/he is born until the moment s/he dies. The subject acquires legal competency with increasing age (for penal as well as labour legal competency from the age of 15). Complete legal competency is acquired when a person reaches 18 years of age and it covers each person's competency to acquire rights and to carry out legal acts for which they are legally responsible.

In accordance with §10 of the Civil Code, a person who is completely incapable of legal acts due to a permanent mental illness shall be deprived by court of his/her legal competency. The procedure usually involves a civil court trial. A person with a permanent mental illness who is nevertheless capable of certain legal acts shall have his/her legal capacity to act restricted by court. The court decision shall specify the extent of such restriction which can be amended or cancelled should the person's mental state change.

Anybody who is competent can request the restriction, deprivation or restoration of another person's legal capacity. The trial is free of charge (Baštecký, 1997). A medical record may be required and the person whose capacity is under review may be questioned by the court (but this is not essential). An expert is also interviewed. S/he may suggest a period of up to six weeks observation of the person in a medical institution. Information is also collected about the person's ability to carry out daily tasks and manage his/her finances. If the person has a spouse and/or adult children, their behaviour is also considered. The actual court case is usually completed within a couple of months. If the court decides to limit legal competence, it may also define the extent of the limitation. This is then valid from that point on. It cannot have a retroactive effect (Holmerová et al., 2008).

3.4.2 Proxy decision making

3.4.2.1 Guardianship

3.4.2.1.1 Conditions for the appointment of a guardian
Paragraph 26 of the Civil Code (CC) states that an individual who is not capable of legal acts shall be represented by a legal representative. Paragraph 27 subsection 2 further states that an individual who was deprived of his or her legal capacity to act by a court decision or whose legal capacity to act was restricted by a court decision shall be legally represented by a court appointed curator. The terms “legal representative” and “curator” seem to be used interchangeably. Hereafter, I will use the general term “guardian”.

The court may appoint a guardian for a person of no fixed abode if it is necessary for the protection of that person's rights or if it is in the interests of the public (§29 CC).
3.4.2.1.2 How guardianship is arranged

Guardianship is arranged in court in combination with the process of restricting legal capacity. According to §186 of the Act on the Code of Civil Procedure, a petition for the commencement of proceedings to deprive a person of the legal capacity to act may be filed by a healthcare institution or other interested parties. Unless the petition for commencement of proceedings was filed by a state authority or by a healthcare institution, the court may order that the petitioner submit, within an adequate period, a medical report on the mental condition of the person examined. If no medical report is submitted during this period, the court may stay the proceedings.

The court examines the person for whom the guardianship measure is intended unless this is likely to be detrimental to that person’s health. In all cases, the opinion of an expert on the condition of the future ward is heard (§187 of the Code of Civil Procedure). The person may be involuntarily detained for up to six weeks whilst the assessment is being carried out.

The person who has been deprived of the legal capacity to act can file a petition for the restoration of his/her capacity. If the court dismisses the petition or decides that the person’s capacity cannot be expected to improve, it may decide that this right cannot be exercised for a certain period of time which should not exceed 1 year (§186 of the Code of Civil Procedure).

The cost of the proceedings is borne by the State, but the court may rule that the person (whose capacity was being considered) reimburse the State. A person who files a petition for the deprivation or restriction of the legal capacity to act of another person may be required to compensate the latter, his/her representative and the State if it is found that the petition was obviously unreasonable (§191 of the Code of Civil Procedure).

3.4.2.1.3 Who can be a guardian

A relative of the individual is usually the first choice as curator. If this is not possible, another person meeting the necessary requirements may be appointed. It is also possible for an authority of the local administration or a representative of that authority to be appointed by the court as curator (§27 subsection 3 of the Civil Code).

3.4.2.1.4 The duties and responsibilities of guardians

The duties and responsibilities of the guardian are defined by the court. The guardian then carries out those duties and must obtain the approval of the court for other acts which are outside of his/her responsibility.

3.4.2.1.5 Measures to protect the ward from misuse of power

If there is a conflict of interests between the legal representative and the ward or between more than one person represented by the same legal representative, the court appoints a special representative/guardian ad item/ (§30 CC).

If the guardian has been granted the right to manage the property of the ward, the approval of the court is necessary to dispose of any property (§28 CC).

14 The term sanitary institution is used in the translation of the Code of Civil Procedure. However, as this presumably refers to a healthcare institution, this term will be used throughout this text.
The court supervises the administration of the ward’s assets by the guardian and takes any necessary and suitable measures to ascertain and conserve these assets. At the end of the guardianship period, the curator must give the court a final account of the administration of assets. The court may also order that the guardian submit regular reports on his/her activities during the period of guardianship (§193 CC).

3.4.2.1.6 Duration of guardianship
The law does not determine the duration of guardianship and does not request a regular appellate review of guardianship. The court will change or repeal the guardianship if the reason which led to it ceases to exist (§ 10 CC).

3.4.2.1.7 The right to appeal
An adult person who has been placed under guardianship has the right to request the termination of guardianship (and the restitution of legal competency) about once a year.

3.4.2.1.8 Continuing powers of attorney
The Civil Code contains a few paragraphs on powers of attorney. However, it is not clear from the text whether this measure also applies to people lacking the legal capacity to act.

3.4.3 Capacity in specific domains

3.4.3.1 Marriage and annulment
Paragraph 14 of the Family Act No. 94/1963 Sb. (FA) on Family contains the following conditions for marriage and annulment in the case of people with incapacity:

(1) A person deprived of the legal capacity to act cannot enter into marriage.

(2) A person whose capacity to carry out legal acts is restricted may enter into marriage only with an approval of court.

(3) A marriage cannot be entered into by a person suffering from a mental disorder that would lead to a restriction or deprivation of capacity to carry out legal acts. However, in the case of a person suffering from a mental disorder that would lead to restriction of capacity to legal acts, the court may approve of the marriage if the health condition of the person is compatible with the purpose of marriage.

(4) If a marriage is entered into by a person deprived of capacity to carry out legal acts or by a person suffering from a mental disorder that would lead to deprivation of capacity to legal acts, the court shall declare the marriage invalid even without a petition.

(5) If a marriage is entered into by a person whose capacity to carry out legal acts is restricted or by a person suffering from a mental disorder that would lead to deprivation of capacity to legal acts without the approval of a court, the court shall declare such marriage invalid upon a petition of any of the spouses. The court shall not declare the marriage invalid if the health condition of the person became compatible with the social purpose of marriage.
3.4.3.2 Voting
According to Act No. 247 on Elections to the Parliament of the Czech Republic, and on Amendments of Certain Other Acts of 1995, every person who has reached the age of 18 may vote (article 1, §2) unless s/he has been incapacitated for the performance of all legal acts (article 2).

There are also restrictions on voting locally which include people who are residing in local hospitals, residential homes or rest homes (article 6).

In the Ruling of 12 July 2010, in accordance with article 89 subsection 2 of the Constitution, the Constitutional Court of the Czech Republic obliged the civil courts to consider carefully every particular individual case in order to determine whether the loss of the right to vote is justified.

3.4.3.3 Contractual capacity
§38 of the Civil Code states that a legal act is invalid if it was carried out by a person with incapacity for legal acts. Similarly, a legal act by a person who has a mental disorder, which renders him/her incapable of such act, is also invalid.

3.4.3.4 Testamentary capacity
Chapter 3 (§§476-480) of the Civil Code (on wills) does not mention the need to have the capacity to make a valid will. The witnesses’ role is not described as certifying that the testator had capacity, but merely that s/he wrote and signed the testament.

3.4.3.5 Civil responsibility
§ 422 CC regulates the responsibility for damage incurred by people who cannot judge the consequences of their acts. A person with a mental disorder is responsible for damage s/he causes when capable of controlling his/her acts and of judging the consequences of his/her acts. His/her guardian is jointly and severally responsible.

3.4.3.6 Criminal responsibility
According to §12 of the Penal Code a person who, due to mental disorder, at the time the criminal act was committed, was not able to recognise the dangerousness of the act committed or to control his/her behaviour, is not criminally responsible.

3.4.4 References
Baštecký, J (1997), Psychiatrie, právo a společnost, Galén, Praha, pp. 99-102

3.5 Denmark

3.5.1 Issues surrounding loss of capacity

Chapter 6 of the Guardianship Act (No. 1015) of 20 August 2007 deals with the issue of legal competence. The term “den umyndige” (the legally disqualified) is used to refer to a person who has been declared incapable of managing his/her own affairs. Such disqualification is not an automatic process of the guardianship process. It is used to prevent a person from putting their own assets and financial interests at risk and/or to prevent them from being financially exploited. In 2003, less than 10% of guardianship judgments were supplemented by legal disqualification (Danielsen, 2007). Once a person has been classed as legally disqualified, s/he can dispose over what s/he has earned after having been deprived of the right to legally conduct business, can dispose of this as a gift or as a free inheritance through a will and can spend what has been left by the guardian. Moreover, guardianship does not entail the loss of legal capacity to act in personal matters. The person under guardianship is legally responsible unless he or she has been officially deprived of the legal right to conduct business.

3.5.2 Proxy decision making

3.5.2.1 Guardianship

3.5.2.1.1 Conditions for the appointment of a guardian

Chapter 2 of the Guardianship Act (2007) deals with the guardianship of adults who are unable to take care of their own affairs due to mental illness (including severe dementia), retarded psychological development or other forms of serious impaired health. As long as three criteria have been met (medical, legal and needs based), a guardian can be appointed.

The system of guardianship is extremely flexible. A guardian (or joint guardians) can be appointed to handle the person’s financial affairs and/or personal matters and in both cases, guardianship can be limited to specific assets or matters.

However, the appointment of a guardian is only necessary if the personal affairs of a person with limited or even non-existent capacity cannot be satisfactorily managed in an informal way.

3.5.2.1.2 How is guardianship arranged

The request can be made by the person him/herself, the person’s spouse, children, parents, siblings or close relatives; the Municipal Council; the Public administration or the Chief of Police. The same people can also request a change or cancellation of the guardianship, as can the guardian him/herself. The request is then sent to the Public administration (to the court if it involves a request for the loss of the right to conduct business). The person making the request must provide justification and state the nature and extent of the proposed guardianship.
The Public administration decides on guardianship unless it is considered inappropriate to handle the matter administratively or if the person objects, in which case, it is handed over to the court. All final administrative decisions can be brought before the court by the person concerned or his/her close relatives. However, in 2003 only 16% of guardianship cases were handled in court and there were only 3 appeals against administrative decisions between 1997 and 2006 (Danielsen, 2007).

The court is also responsible for making the decision if the person’s right to conduct business is to be suspended, i.e. only a judge can remove a person’s legal capacity.

In order to decide whether guardianship should be established, the Public administration (Statsforvaltningen) or the court obtains a declaration from a doctor on the state of health of the person and may contact people who know the person for additional information.

In all cases, the person in question has the right to be informed of the proceedings and can make a written or verbal statement on the matter if s/he so desires and is still able to do so.

3.5.2.1.3 Who can be a guardian

Most guardians (about two thirds) are relatives or close friends but if none are available or willing to be guardian or if there are disagreements or a conflict of interests, a professional guardian is appointed, e.g. a lawyer, a member of the clergy or a social worker.

3.5.2.1.4 The duties and responsibilities of guardians

The powers of the guardian depend on the particularities of the court decision. Generally speaking, however, the guardian is responsible for taking care of the interests of the person under guardianship. Whilst the decision is being made by the Court or Council, a temporary guardian may be appointed.

Guardianship only covers major legal issues which are stipulated in the guardianship order. It does not cover everyday decisions concerning the welfare and supervision of the person, e.g. shopping, taking care of laundry, cleaning, etc. The distinction between legal decisions and welfare/supervision decisions is not always clear-cut, although according to Buss, legal decisions include those relating to employment, accommodation and, if necessary, dealing with public authorities.

Joint representation is possible whereby the guardian and the adult have to act jointly. This kind of representation is used if a person only needs help to administer their capital and take care of their economic interests. Its use has gone down from 10% to 5% of all cases of guardianship between 1997 and 2003 (Danielsen, 2007)

16 Please see the subsection on “contractual capacity of the person under guardianship” for further details.
One of the personal decisions covered by §5 of the Guardianship Act is to authorise the participation of a person with impaired or non-existent capacity in biomedical trials. However, it is important to note that whilst the guardian can make certain decisions, s/he cannot make a decision to which the person under guardianship is opposed and has no legal right to enforce decisions. Consequently, if a person with dementia is moved to a nursing home on the decision of the guardian and s/he is opposed to this move and leaves, the guardian cannot have the person detained or force him/her to stay.

If guardianship includes management of the person's financial affairs, then s/he must ensure that assets are preserved and yield a reasonable return. The guardian must further ensure that money is used for the person's own benefit and can if s/he sees fit, entrust money so that the person under guardianship can see to his/her own needs. If the person has been declared legally disqualified, the guardian can prevent him/her from disposing of resources (with the Public administration's approval and if this is considered necessary for the welfare of the latter).

3.5.2.1.5 How the financial affairs of the person under guardianship are handled
Chapter 5 of the Guardianship Act (No. 1015) of 20 August 2007 provides clear instructions for the management of the person's financial affairs, i.e. cash, bonds, mortgage deeds, inheritance, investments etc. The person's assets and any inheritance to which s/he is entitled must be preserved in the form they had when guardianship was commenced. Any future consumption of assets (including investment) must be approved by the Public administration.

The guardian is responsible for real estate, personal property, claims to payment in kind and sums under an amount which is set by the Minister of Justice and is currently EUR 10,000. Cash, disposable means, bonds, mortgage deeds and other securities must be handled by the management department of specific financial institutions which have been approved by the Minister of Justice. They are called forvaltningsafdelinger. If the guardian wants to have cash invested, there are very few possibilities. For example, bonds have to be sold on the regular market and only half of the capital can be invested in shares (only 15% in any one company) (Danielsen, 2007).

At the beginning of the guardianship, it is the guardian's duty to draw up a list of assets and liabilities and to record, note and certify registration of legal disqualification.

3.5.2.1.6 Measures to protect the ward from misuse of power
Guardians must try to involve the person under guardianship when making important decisions, although this obligation is limited to the extent that the person is able to understand. If s/he is married (and not separated) a declaration must be obtained from the spouse. The guardian cannot oblige the person under guardianship to stand bail or provide security for a third party.
The guardian must keep a record of the administration of assets and use of income in line with the rules set by the Minister of Justice. The latter can also require the guardian to obtain approval from the Public administration for certain decisions which may include the disposal of income.

Permission from the regional office is needed to make decisions of an unusual character. Permission is also needed to buy or sell real estate, make debts, make gifts (unless they are of no great significance) and to refuse gifts. The regional offices can request information from guardians and instruct them to make certain decisions.

If the guardian neglects his/her obligations, s/he is responsible for compensation to the person under guardianship for damage caused either intentionally or as a result of negligence.

A guardian can be dismissed if it is found that s/he has misused his/her position, if s/he is found to be unsuitable for the assignment or if it is necessary out of concern for the person under guardianship. The appointment is annulled if the guardian him/herself becomes subject to guardianship.

### 3.5.2.1.7 Special guardians

In certain circumstances, an appointed guardian may be unable to carry out his/her duties. This could happen if the guardian entered into a legal transaction with the person under guardianship, if there was a clash of interests in a legal matter, if the guardian was for any reason prevented from carrying out his/her duties. In such cases a special guardian would be appointed by the Public administration. If the events preventing the guardian from carrying out his/her duties are merely of a temporary nature, another guardian can be appointed on a temporary basis.

### 3.5.2.1.8 Compensation and liability of guardians

Relatives and friends are not paid for their services but can get necessary expenses refunded. Professional guardians can deduct EUR 300 for the upkeep of their office. They usually receive EUR 700 per annum for dealing with financial issues and EUR 800 for dealing with personal matters. Larger amounts must be approved by the regional office and the request must be justified. The State pays the cost of guardianship unless the person's income is large enough (e.g. over EUR 20,000) in which case s/he pays the guardian him/herself (Danielsen, 2007).

### 3.5.2.1.9 Duration of guardianship

A guardianship measure only lasts for as long as the person needs a guardian. If the person becomes capable of managing his/her own affairs again, then the guardianship has to stop.
3.5.2.1.10 The right to appeal
Appeals against guardianship measures decided by the Public Administration can be made to the court. Appeals against guardianship measures decided by a court can be made to the High Court.

3.5.3 Capacity in specific domains

3.5.3.1 Marriage and divorce
The guardian has to give his/her consent both to marriage and divorce.

3.5.3.2 Voting capacity
According to Article 1 of the Parliamentary Election Act of Denmark of 2009, every person of Danish nationality, over the age of 18, and permanently resident in the realm, holds a franchise for the Folketing unless s/he has been deprived of his/her legal capacity under section 6 of the Guardianship Act.

It is the duty of the local council to correct the electoral list up to and including election day if it receives notification of factors affecting voting rights such as the initiation or abolition of guardianships involving the deprivation of legal capacity (Article 22, §2).

3.5.3.3 Testamentary capacity
If a public notary does not consider that a person has testamentary capacity, s/he must refuse that person’s will. This is not based on any medical assessment. A court may decide that a will made by a person with mental incapacity is invalid.

3.5.3.4 Contractual capacity
According to §§ 6 and 13 of the Guardianship Act (No. 1015) of 20 August 2007, a person can be deprived of the right to conduct business. This protective measure can be applied if, when determining the scope and extent of guardianship, the person with dementia is deemed to be incapable of carrying out business transactions without jeopardising his/her assets, income or other economic interests (e.g. through depreciation or interference with economic exploitation). Loss of legal capacity is total in that it cannot be limited to specific assets or affairs. Deprivation of the right to conduct business must be officially registered in accordance with §48 of the Law of Official Registration. However, according to §8, a person should not be deprived of his/her right to conduct business if his/her interests can be sufficiently taken care of by the guardian(s).

If a person who has been judged legally disqualified enters into an agreement independently and without being qualified to do so, the other party can withdraw from the agreement, unless it has been fulfilled or approved in a binding manner. However, as long as the legally disqualified person fulfils an agreement to do with personal work, the other party cannot withdraw from the agreement.
A guardian can permit a legally disqualified person to independently carry on a trade or other occupation.

3.5.3.5 Criminal responsibility
According to article 16 of the Danish Penal Code No. 1068 of 6 November 2008 (with later amendments), a person who commits a crime shall not be punished if s/he is not responsible for his/her actions at the time the offence was committed “owing to insanity or states which may be placed on an equal footing therewith, or a high degree of mental deficiency”. If this state was caused by the consumption of alcohol or other inebriates, a punishment may be imposed if the circumstances call for it. People who at the time of the offence were in a less severe state of mental deficiency shall not be punished unless special circumstances call for a punishment to be imposed.

3.5.4 Reference
Danielson (2007), Speech made at the International Guardianship Conference in Bergen (NL).
3.6 Estonia

3.6.1 Issues surrounding the loss of legal capacity

The General Part of the Civil Code Act of 27 March 2002 defines passive legal capacity and active legal capacity. Passive legal capacity begins with the birth of a person and ends with his/her death. Active legal capacity is the capacity to enter independently into valid transactions. A person has restricted active legal capacity if s/he is permanently unable to understand or direct his/her actions due to mental illness, mental disability or another mental disorder. A person who has had a guardian appointed by a court is presumed to have restricted active legal capacity.

3.6.2 Proxy decision making

3.6.2.1 Guardianship

The Code of Civil Procedure of 20 April 2005 (which entered into force on 1 January 2006) deals with the appointment of a guardian for people with restricted active legal capacity.

3.6.2.1.1 Conditions for the appointment of a guardian

If the court has information or suspects that a person has a mental illness or mental disability, the court shall order a forensic psychiatric examination in order to determine whether a guardian should be appointed.

3.6.2.1.2 How guardianship is arranged

A representative may be appointed if this is in the interests of the person for whom the guardianship measure is intended, particularly if the person is not already represented by someone with active civil procedural legal capacity and s/he is likely to need guardianship to manage most or all of his/her affairs. (§520).

The court may decide to establish provisional legal protection and appoint a temporary guardian (§521) if the following three conditions are fulfilled:

1. It may be clearly presumed that the conditions for appointment of a guardian are complied with and a delay would endanger the interests of the person in need of guardianship;
2. A representative has been appointed;
3. The person him/herself has been heard.

If, on the other hand, there are doubts as to whether the person has a mental illness or mental disability, the court must order a forensic psychiatric examination in order to determine whether a guardian should be appointed. Before the expert opinion can be given, the expert must personally examine the person for whom guardianship is being considered. If the latter does not attend the appointment with the expert, the court may, after hearing the opinion of a psychiatrist, compel him/her to attend. (§522).
The person may be placed in a medical institution for up to one month for the purposes of the examination. This can be extended to 3 months if necessary. Before a decision can be made, the person must be heard.

The examination is not considered necessary if the following 3 conditions are met:

1. The petition for appointment of a guardian was submitted by the person him/herself and documents pertaining to his/her state of health are included.
2. The person waives the right to undergo an examination.
3. Conduct of an examination would be unreasonably costly or labour intensive considering the volume of the guardian's duties. (§522)

The court may request information from the rural, municipal or city government of the residence of the person in need of guardianship. Such information may include, amongst other things, the choice of guardian, changing the sphere of the guardian's duties and changing the guardian. (§523)

The person may be asked to appear in court during the proceedings unless this is not considered necessary or advisable, e.g. if in an expert’s opinion this could be detrimental to the person's health or if the court is convinced that the person is unable to express his/her will. (§524)

As a general rule, the court also hears the opinion of the person's spouse and other people who are close to him/her, as well as the person that the court intends to appoint as guardian. (§525)

The court discusses the results of the hearing with the person for whom the measure is proposed. This discussion covers the contents of the expert opinion or documents relating to his/her health, the possible choices of guardian and the sphere of duty of the intended guardian. (§525)

The appointment of a guardian for a person with restricted active legal capacity is established by means of a ruling in which it is stated: for whom a guardian is appointed, the person or agency appointed as guardian, his/her duties, which transactions the person can perform with the consent of the guardian, the duration of the guardianship measure (which cannot be longer than 3 years) and the right of the guardian to represent the person. If the guardian is responsible for handling all the affairs of the person, the ward is additionally deemed to be without active legal capacity. (§526)

### 3.6.2.1.1 Who can be a guardian

When the judge discusses the results of the hearing with the future possible ward, this includes a discussion about the possible choices of guardian.
3.6.2.1.2 The duties and responsibilities of guardians
The duties and responsibilities of guardians are established in the court procedure and confirmed by court ruling at the end of the process.

3.6.2.1.3 Compensation and liability of guardians
The court may determine the extent of the remuneration to be provided by the ward or the state to the guardian, any expenses that should be refunded, the size of any advance payments and any payments that the ward should pay to the state. Before making a ruling on costs, the court must hear the ward. The ward has the right to apply for assistance in relation to these costs and may appeal against the ruling on costs if such costs exceed 3,000 kroons. (§527)

According to paragraph 171 of the Penal Code:

“A person who abuses his or her rights of guardianship or curatorship in order to increase his/her own assets out of the assets of the person under his or her guardianship or curatorship, or acts in any other manner against the proprietary or personal rights or interests of the person under guardianship or curatorship, shall be punished by a fine or up to 3 years’ imprisonment.”

3.6.2.1.4 Duration of guardianship
If the conditions which led to the appointment of a guardian cease to exist, either partly or completely, the court terminates the guardianship measure, restricts the sphere of duties of the guardians or extends the rights of the ward to perform transactions independently. A psychiatric evaluation must be carried out in order to ascertain whether the conditions have ceased to exist (§529).

3.6.3 Capacity in specific domains

3.6.3.1 Marriage and annulment
The Family Law Act of 18 November 2009, which entered into force on 1 July 2010, states that a person with limited legal capacity may only marry if s/he can adequately understand the legal consequences of marriage (§1.4). If a person has had a guardian appointed, it is presumed that s/he does not understand the legal consequences of marriage, except in cases where a legally appointed guardian indicates otherwise.

In §9 a few cases are described which would justify the annulment of the marriage by the court. Amongst these, the following are particularly relevant:

• Entering into a marriage or the marriage being in breach of the requirement of capacity.

• At least one of the spouses during the marriage had a temporary mental disorder, or for some other reason was unable to decide.

• Entering into marriage on the basis of fraud, threat or violence, including hiding the spouse's health status or other personal circumstances of relevance to the marriage.
3.6.3.2 Voting capacity

According to §526 of the Code of Civil Procedure, if the court establishes guardianship for all the affairs of the ward or if the guardian’s sphere of duties is extended in such a manner, the ward is deemed to be without active legal capacity. This means that s/he loses the right to vote. In such cases, the court notifies the agency maintaining the polling list (§531). Restrictions on voting are also contained in the Constitution of 28 June 1992 and the Riigikogu Election Law of 12 June 2002.

Article 57, section (2) of the Constitution states,

“An Estonian citizen who has been declared mentally incompetent by a court of law shall not have the right to vote.”

Article 4, section (2) of the Riigikogu Election Law states:

“A person who has been divested of his or her active legal capacity by a court does not have the right to vote.”

3.6.3.3 Contractual capacity

Provisions relating to contractual capacity can be found in Division 1 of the General Part of the Civil Code Act of 27 March 2002.

A multilateral transaction (i.e. a contract) is considered void if it was entered into by a person with restricted active legal capacity without the prior consent of his/her legal representative unless the latter subsequently ratifies the transaction. The other party to the transaction can withdraw unless the legal representative has already ratified it. The transaction is valid if the legal representative gave the person with restricted active legal capacity the authorisation to make such transactions beforehand. If the other party to the transactions asks the legal representative to ratify the transaction and the legal representative does not do so within two weeks, the transaction is deemed not to have been ratified. (§11)

The issue of transactions made by people without capacity to exercise will is addressed in §13 which states:

(1) A transaction which a person due to a temporary mental disorder or other circumstances enters into in a condition which precludes his or her ability to accurately assess the impact of the transaction on his or her interests (incapacity to exercise will) is void unless the person ratifies the transaction after cessation of the temporary mental disorder or other circumstances.

(2) The other party to a transaction may make a proposal for ratification of the transaction to the person who entered into the transaction while incapacitated to exercise will. If the person does not refuse ratification within two weeks after receipt of the proposal, the person is deemed to have ratified the transaction.
(3) If a transaction entered into by a person under the circumstances specified in subsection (1) of this section is clearly harmful to him or her, the person is deemed to have entered into the transaction while incapacitated to exercise will.

3.6.3.4 Testamentary capacity
According to the Law of Succession Act of 17 January 2008, which came into force on 1 January 2009, there are two main types of will: 1. notarial, 2. domestic.

A notarial will is either signed in the presence of a notary or given in a sealed envelope to a notary who then attests having received it from the testator and that it is the latter’s will (in which case, they both sign a deed to that effect). Such wills can be retrieved by the testator at any time. It is not actually stated in the law that the testator has to have legal capacity to make a notarial will but this is presumably the case (§22).

A domestic will must be signed in the presence of two witnesses (not close family members who stand to inherit). As soon as the testator has signed his/her will, the witnesses confirm by their signatures that in their opinion the testator had active legal capacity and the capacity “to exercise will” (§23). The testator is not obliged to let the witnesses see the content of the will (§23).

Another way to make a domestic will is to write it from beginning to end by hand, sign it and include the date and year it was made. If, once written, signed and dated, it is handed over to a notary, who prepares a notarial deed, it becomes valid as a notarial will (§24).

If six months after writing a domestic will, the testator is still alive, the will is no longer valid. It is also considered invalid if it is not clearly dated. Also, if the date and year the will was made are not stated and it is not possible to establish when the domestic will was made, the domestic will is considered void (§25).

3.6.3.5 Criminal responsibility
The following extracts from the Penal Code (consolidated text April 2008) are relevant to criminal responsibility in the case of people with incapacity:

§ 32. Principle of guilt

(1) A person shall be punished for an unlawful act only if the person is guilty of the commission of the act. A person is guilty of the commission of an act if the person is capable of guilt and there are no circumstances which would preclude guilt pursuant to the provisions of this Division.

(2) An offender shall be punished according to the guilt of the offender, regardless of the guilt of other offenders.
§ 33. Guilt capacity

A person is capable of guilt if at the time of commission of the act he or she is mentally capable and at least 14 years of age.

§ 34. Mental capacity

A person is not mentally capable if at the time of commission of an act he or she is incapable of understanding the unlawfulness of the act or incapable to act according to such understanding due to:

1) a mental illness;

2) a temporary severe mental disorder;

3) mental disability;

4) feeble-mindedness, or

5) any other severe mental disorder.

§ 35. Diminished mental capacity

If the capacity of a person to understand the unlawfulness of his or her act or to act according to such understanding is substantially diminished due to one of the reasons specified in § 34 of this Code, the court may apply the provisions of § 60 of this Act.
3.7 Finland

3.7.1 Issues surrounding the loss of legal capacity

Under §18 of the Guardianship Services Act (HE 146/98) of 2 October 1998, the Court can restrict a person’s competence if s/he is found to be incapable of managing his/her financial affairs, situation or income and for this reason his/her interests are threatened. The court has three options:

1. To allow the person to carry out particular legal acts or manage particular assets only with a guardian.
2. To restrict the person’s competence with the result that s/he does not have the competence to carry out particular legal acts or the right to manage particular assets.
3. To declare the person legally incompetent.

No-one can be declared legally incompetent if appointment of a guardian would be sufficient to protect his/her interests. If it is decided to restrict a person’s competence to act, the degree of restriction must not exceed that which is necessary to protect the person’s interests. If the court does restrict a person’s competence to act, it must at the same time appoint a guardian for the person in question.

Once declared legally incompetent, the person no longer has the right to manage his/her own assets, enter into contracts or other legal acts, or decide on personal issues for which s/he does not understand the meaning. S/he can carry out legal acts which are considered normal in view of the circumstances and insignificant in terms of importance.

The legally incompetent person can manage any money s/he has earned during the period of legal incompetence, as well as any money which the trustee has allowed him/her to handle. If, however, the guardian considers that the way the money is being handled is not in the interests of the person, s/he can take over responsibility for handling it. Taking over responsibility for handling the earnings of the person who has been declared legally incompetent requires the consent of the guardianship authority.

3.7.2 Proxy decision making

3.7.2.1 Guardianship

The Guardianship Services Act (HE146/98) of 2 October 1998, which came into force on 1 December 1999, replaced the existing law which dated back to 1898. The aim of the law is to protect the interests and rights of those people who due to legal incompetence, sickness, absence or some other reason, are themselves unable to take care of their financial affairs. The law also covers protection in the non-financial domain.
3.7.2.1.1 Conditions for the appointment of a guardian
Guardianship law applies to both minors and people over 18 years of age. Paragraph 8 specifies that the court can appoint a guardian to a person (hereafter referred to as “the client”) who is of age and who, due to illness, mental disturbance, deterioration in health or other equivalent reasons, is unable to protect his or her interests or manage matters concerning his or her financial affairs, and the affairs cannot be managed any other (less restrictive) way.

If a guardian is appointed under the paragraph 8, the client retains legal competence; a person with a guardian obtains support from the guardian, who manages the client’s affairs and looks after the client’s interests either together with him/her or on his/her behalf. However, if a client’s competency to undertake obligations endangers his/her financial interests, the competency of the client is restricted (according to paragraph 18; please see above under “loss of legal capacity”).

3.7.2.1.2 How guardianship is arranged
A petition for the appointment of a guardian or the restriction of someone’s legal competence may be filed by a guardianship authority (i.e. the local Registry Office), the person whose interests are to be looked after, as well as the guardian, parent, spouse, child or other person close to him/her. (§72)

The appointment of a guardian is usually made by the District Court. In addition, the local Registry Office may appoint a guardian if a person her/himself seeks a guardianship order when s/he is already starting to lose capacity. A person who seeks guardianship and whose interests are to be protected must be able to understand the meaning of the issue and request that a particular person be appointed as a guardian. The appointment of a guardian always requires a statement by a physician.

If a person lives with a spouse who manages the financial affairs of the family, a guardian is not necessarily needed as long as these affairs can be managed with simpler measures, such as through financial powers of attorney or joint bank accounts.

3.7.2.1.3 Who can be a guardian
Guardians must fulfil certain criteria. They must be legally competent, suitable for the post and have consented to appointment. In assessing suitability, the court or guardianship authority bases its opinion on the ability and experience of the prospective guardian, as well as the nature and scope of the task. If necessary, several trustees can be appointed and the duties divided between them.

The guardian of a person with dementia is usually someone who is close to him/her, e.g. his/her spouse or next of kin, or another relative. It is also possible for an official guardian to be appointed. This is common when there are conflicts within the family or if a person with dementia does not have anyone to take care of his/her affairs. In Finland, the state is obliged to organize guardianship services.
3.7.2.1.4 The duties and responsibilities of guardians
Chapter 5 of the Guardianship Services Act describes the guardian's position and duties in considerable detail. His/her duties and responsibilities can be divided into three categories: representation, management of assets and care (unofficial translations of the relevant extracts can be found below).

3.7.2.1.5 Representation
§ 29: The guardian has a duty to represent his/her client in legal acts concerning the client's assets and financial affairs unless the court in appointing the guardian has ruled otherwise or unless otherwise regulated. Similarly, unless the court has ruled otherwise, the guardian can represent the client in personal matters which the client may be incapable of understanding. S/he cannot agree to marriage or adoption, admit paternity, accept admission of paternity, make or cancel a will or represent the client in other such affairs of an equally personal nature.

§30: If the client has several guardians, they must jointly take care of the duties of the guardian unless the court has decided to divide these duties between them. If one of the guardians is unable, due to travel, illness or other reasons, to take part in making a decision and delaying the decision would be inconvenient, his or her consent to the decision is not required. Issues of considerable importance to the client, however, may only be decided by the guardians jointly, unless the interests of the client clearly indicate otherwise. If the trustees cannot come to a unanimous decision and delaying the decision would be disadvantageous to the client, they can request that the guardianship authority responsible for supervision decides which opinion should be followed.

§31: A claim which is part of the assets to be managed by the guardian may be paid only to the guardian or to the client's account as instructed by the guardian. A payment made to the client would, however, be considered valid, if the debtor did not know or, in view of the circumstances, could not have been expected to know, that the payment should have been made to the guardian.

If the client has an account with a credit institution, the guardian must inform the institution of the person or people able to withdraw funds from the account.

§32: A guardian may not give away the assets of his or her client. A guardian may not represent his or her client if the opposing party is the guardian him or herself, the guardian's spouse or another close friend or relative of the guardian or someone represented by the guardian. However, if siblings share a guardian, the guardian does have the power to represent the siblings in the distribution of an inheritance unless there is a conflict of interests linked to the distribution of the estate or other factors associated with the distribution.

§34: Unless otherwise provided by law, a guardian does not have the right to do any of the following on the client's behalf without the permission of the guardianship authority:
1. relinquish or for a consideration\textsuperscript{17} acquire fixed property or such land rental or other rights of use with buildings which may, without consulting the owner of the land, be transferred to a third party;

2. put up assets as collateral or otherwise mortgage them;

3. relinquish fixed or other property as set out in number 1 for the use of another party for a period exceeding five years or longer than a year from the commencement of the client’s majority;

4. take out a loan other than a state-guaranteed student loan or guarantee bills of exchange or guarantee the debts of a third party;

5. start a business on behalf of his or her client;

6. enter into a contract to found a partnership or a registered partnership or join such a business;

7. give up an inheritance or relinquish the client’s share of an inheritance;

8. enter into an agreement regarding the joint administration of an estate;

9. enter into an agreement on dividing assets or dividing an inheritance dealt with without an executor as set out in Chapter 23 of the Inheritance Code;

10. relinquish or for a consideration acquire stocks or shares which give him or her the right to manage apartments or right of residence as set out in the Act (650/1990) on Rights of Residence to Apartments;

11. relinquish property managed in accordance with the rights set out in number 10 for the use of a third party by a fixed period contract for a period longer than five years or for a longer time than one year from the commencement of majority;

12. sell forest or fell timber for sale or acquire for sale stone, gravel, sand, clay, peat or soil from the client’s land or relinquish the right to acquire it unless this is done in accordance with the asset management plan approved by the guardianship authority; or

13. for a consideration acquire investments or shares in bodies set out in the Act on Investment Companies (579/1996) second paragraph other than:

   a) bonds issued by the state, municipalities or local government regional authorities;

   b) securities publicly traded as set out in the Securities Marketing Act;

   c) shares in such investment funds in which at least three quarters of the capital is invested in bonds and securities set out in a) and b) above;

   d) parallel investments as set out in a) – c) as regulated by decree, plus

   e) such stocks and shares which produce a right whose main content is the right to acquire a service or consumable used in the home if this does not incur a personal responsibility for the body’s debt.

\textsuperscript{17} This means “in exchange for something of value”.
Permission must be obtained from the guardianship authority responsible for supervising the work of the guardian. The decision whether or not to grant permission will be based on the interests of the client.

### 3.7.2.1.6 Management of assets

§37: The guardian may manage the property of his or her client such that the assets and their proceeds can be used for the benefit of the client and to meet his or her personal needs. In this task the guardian must conscientiously protect the client’s rights and further his or her best interests.

The guardian must assume the administration of the property (e.g. take the property under his/her administration) to the extent necessary in order to protect the client’s interests. Where required in this respect the guardian is entitled to receive police assistance as set out in §40 of the Police Act (493/1995). If the issue concerns assets over which the client may freely determine, the guardian may not take care of the property against the wishes of the client.

§38: The client must have access to sufficient assets for his or her personal needs. The client must also have set aside a reasonable amount of available funds, taking into account his or her needs and other circumstances. The guardian may leave other assets in the client’s ownership, if this is in the interests of the client. The guardian must assist the client, should s/he wish to make a moderate gift, which is appropriate in view of the circumstances.

§39: The guardian must preserve assets which the client, during the duration of the guardianship or later, requires for living or for earning a living or which are otherwise of particular value to the client.

Other property which is not required to support the client or to meet other needs of the client must be invested in such a way that there is sufficient certainty that it will be preserved and that a reasonable profit can be attained. If the client so requests, the guardian must explain to him/her the financial situation and the steps which have been taken to manage any assets.

### 3.7.2.1.7 Care

According to §42, the guardian must take the necessary measures to ensure that the client receives the treatment, care and rehabilitation that is appropriate to his/her needs. The circumstances and the wishes of the client should be taken into account when making decisions.

Furthermore, before making a decision which is of importance to the client, the guardian must ask the client’s opinion on that matter, provided that this can be done without considerable inconvenience and that the client is incapable of understanding the meaning of the issue (§43).
The court can also authorise the guardian to represent his or her client on matters related to the client’s person, e.g. for treatment decisions, if the client lacks the capacity to understand such issues (§29.2).

**3.7.2.1.8 Measures to protect the ward from misuse of power**

The guardianship authority may decide that the guardian must draw up a plan for the management and use of the assets and present it to the guardianship authority for approval. Whether this is demanded, depends on the nature and size of the assets and other factors. When drawing up a management plan, the conditions for the managing of assets (as expressed in the Guardianship Services Act) must be taken into account. If the guardian in the course of his/her duties causes any injury or damage to the client (either intentionally or as a result of negligence), s/he is liable to pay compensation. Chapter 6 of the Guardianship Services Act specifically deals with the supervision of the work of the guardian.

It is the duty of the guardianship authority in the guardian’s home municipality to supervise the work of the guardian. If for some reason, there is no guardianship authority in the area to provide supervision, the obligation to supervise will rest with the Helsinki Administrative Court.

Within three months of taking up duties, guardians must submit to the guardianship authorities a list of the client’s funds and debts which are to be managed by the guardian. The list should include details of any assets which have been set aside for personal use by the client. If the client receives assets or becomes a co-heir to property after the list has been submitted, details must be provided within one month. The guardian may be required to include a statement that the information provided is to the best of his/her knowledge accurate and that nothing has been deliberately omitted. S/he may also be asked to swear an oath.

A guardian who is responsible for handling the client’s assets must keep a record of all assets, debts and transactions during the accounting period. A guardian who has responsibilities other than handling the client’s assets must also keep records in order to be able to substantiate the actions that s/he has carried out (§50).

Accounts must be submitted annually to the guardianship authorities, within three months from the end of the accounting period. This period can be extended if the guardian was unable to submit the accounts within that time due to illness, the extent of the task or another valid reason. The necessary receipts must be included with the accounts and are returned to the guardian at a later date. If the list reveals that the client has little if any assets, the guardianship authorities may release the guardian from the obligation to submit accounts or extend the accounting period beyond one year. This is not possible if the client has considerable debts which the guardian is in change of handling. Exemption from the obligation to provide accounts concerning assets or parts of the
assets handled may be granted if the guardian is the parent, spouse, child, close friend or relative of the client.

If the guardian does not fulfil his/her obligations or submit a requested management plan, the guardianship authorities can order the guardian to carry out the neglected action and enforce its decision by imposing the threat of a fine or by threatening that the neglected action be carried out at the expense of the negligent party. Alternatively, the courts may decide that it is in the interests of the client that another guardian be appointed to carry out the neglected action (§57-58).

3.7.2.1.9 Compensation and liability of guardians

Under Section 44, which deals with compensation, the guardian of an adult is entitled to compensation for his/her necessary expenses from the assets of the client, as well as a fee which is reasonable in view of the nature and extent of his/her task and the assets of the client. Detailed guidelines on the determination of guardians’ fees are available from the Ministry of Justice.

In section 45 of the Guardianship Services Act, it is stated that the guardian is liable in damages for any loss that s/he has deliberately or negligently caused to the client in the performance of his/her duties. The client cannot be held liable for any loss caused by the guardian acting on his/her behalf. Liability may be divided in the case of two or more liable people. Public guardians are also liable under the Damages Act.

3.7.2.1.10 Duration of guardianship

Guardians can be appointed for a fixed period of time or for an indefinite period. During this time, they must perform any tasks which have been assigned to them. They must complete such tasks but their duties can be amended if required.

There are a few reasons for releasing guardians from their duties, e.g.

- if the guardian asks to be released from his/her duties;
- if it is revealed that the guardian is incompetent or unsuitable for his/her duties (i.e. the guardian is unable/not capable of doing the job for whatever reason, including the fact that s/he has become incompetent.);
- if the person for whom the measure was arranged dies;
- if the tasks have been completed or the term of duty has come to an end.

3.7.2.1.11 The right to appeal

Everyone who has the right to bring the matter before a court under section 72 (a guardianship authority, the person whose interests are to be looked after, as well as the guardian, parent, spouse, child or other person close to him/her) shall have standing to appeal against a court order on the appointment of a guardian or the restriction of someone’s competency. (§80)
3.7.2.2  Continuing powers of attorney (CPA)
A power of attorney is a deed in which one person (known as the donor) grants authorisation to another person (known as the attorney) to manage his/her property and financial affairs. Powers of attorney can be general or limited to specific tasks specified in the document. They are usually considered as being durable powers of attorney which means that they continue to be valid even after the donor has become mentally incapable.

3.7.2.2.1 Conditions for setting up a Continuing Power of Attorney
In November 2007, the Act on Continuing Powers of Attorney (648/2007) came into force. This act provides a legal framework and system whereby donors can ensure that the attorney they appoint can continue or begin to manage their property and financial affairs once they have become mentally incapable.

3.7.2.2.2 How continuing powers of attorney are set up
A continuing power of attorney must be made in writing in the same way as a will. The donor appoints a person who is willing to be his/her attorney and defines the scope of the power of attorney. This can be limited to matters related to the donor’s property and other financial affairs but can also be for personal and healthcare matters.

Two witnesses must be present when the donor signs the continuing power of attorney or acknowledges his or her signature. They cannot be close relatives of the donor. The witnesses must certify the power of attorney by signing. The document is then given to the attorney or s/he is simply informed about it. It is advisable for the donor to seek advice before making such a document even though it can, of course, be revoked or amended.

The following information (at least) should be stated in the continuing power of attorney:
1. that it constitutes an authorisation;
2. the matters in which the attorney is entitled to represent the donor;
3. the donor and the attorney;
4. that the power of attorney will come into force in case illness, deteriorating health or similar circumstances renders the donor incapable of managing his or her own affairs.

3.7.2.2.3 When a continuing power of attorney comes into force
When the donor becomes incapable of managing his/her affairs e.g. due to illness, the Register Office has to officially confirm that the power of attorney has come into force. For this to be possible, the attorney must provide the Register Office with the original power of attorney and a medical certificate or equivalent stating that the donor has become incapable of managing the affairs covered by the power of attorney.
3.7.2.2.4  *Who can be an attorney*
Any person can be appointed attorney provided that s/he is willing. However, the Register Office cannot confirm the CPA if the attorney is incompetent (if s/he for example has a guardian) or if s/he is unsuitable for the task.

3.7.2.2.5  *Measures to protect the donor against misuse of power*
When the attorney commences his/her duties, s/he must draw up a list of the assets and debts of the donor which are covered by the power of attorney and submit this to the Register Office and at the request of the Register Office, submit a report on how the financial affairs have been managed. The donor can indicate in the power of attorney that certain requirements in the Guardianship Services Act be applied to the monitoring of the attorney, namely the obligation to submit a periodical statement of accounts to the Register Office.

3.7.2.2.6  *Compensation and liability of attorneys*
Unless otherwise stated in the CPA, the attorney is entitled to compensation for his/her necessary expenses from the assets of the donor, as well as a fee which is reasonable in view of the nature and extent of his/her tasks and the assets of the donor. The attorney is liable to pay damages for any loss that s/he has deliberately or negligently caused to the donor in the performance of his/her duties. The donor cannot be held liable for any loss caused by the attorney acting on his/her behalf.

3.7.2.2.7  *Duration of the continuing power of attorney*
A CPA becomes invalid if the guardian's duty is to manage the same assets/take care of the same matters as the appointed CPA. If the guardian and attorney have different duties, the CPA remains valid.

3.7.2.2.8  *The right to appeal*
A donor can annul a continuing power of attorney provided that s/he understands the meaning of the annulment. Annulment comes into force after the Registry Office has confirmed it. However, as the CPA comes into force only if the donor becomes incompetent to manage his/her affairs, this usually means that s/he cannot understand the meaning of the annulment. However, s/he can of course contact the Registry Office and demand that they investigate how the attorney is managing the person's affairs.

3.7.3  *Capacity in specific domains*

3.7.3.1  *Marriage and divorce*
A person retains the right to marry even if s/he has been diagnosed as having dementia and/or has been declared legally incapacitated. However, a person who wants to get married has to understand the meaning and consequences of the act. The priest/officiator is the person who decides whether a person has the capacity to get married.
According to the Marriage Act (§18):

“A marriage ceremony shall not be performed if the officiator is aware of a fact that forms an impediment to the marriage or if the officiator deems that an engaged person is evidently unable to understand the significance of marriage due to his or her disturbed state of mind.”

Once married, the marriage cannot be declared invalid. However, if it is clear that the relationship is over and that the spouse is merely using the marriage in order to financially abuse the incapacitated spouse, the guardian of the latter is entitled to file for a divorce on behalf of his/her client.

3.7.2.2 Voting capacity

It is stated in the Election Act (714/1998) that every Finnish citizen is entitled to vote in parliamentary elections, the Presidential election and European Parliamentary elections, provided that s/he has reached the age of 18 not later than on the day of the election.

A person retains the right to vote even if s/he has been diagnosed as having dementia and/or has been declared legally incapacitated.

3.7.3.3 Contractual capacity

3.7.3.3.1 Contractual capacity of people subject to guardianship (whose capacity has been restricted)

The Act on Guardianship (HE 146/98) of 2 October 1998 addresses the issue of the validity of contracts made by people who have been declared incompetent to act or whose capacity has otherwise been restricted and also guardians who have acted outside their domain of competence. (§23-28)

Responsibility on the part of the incompetent person and the contracting party:

If a person carries out a legal act, which s/he was not entitled to carry out due to a restriction of his/her competence to act, the act is not binding unless the guardian consented to it.

If a legally incompetent person carries out an act without the consent of the guardian, the person with whom the contract was made has the right to withdraw, provided that the contract has not already been approved or properly fulfilled. If the other contracting party was aware that the person was legally incompetent, s/he cannot withdraw from the contract until a sufficient period of time has passed during which consent can be obtained. On the other hand, the contracting party can withdraw if s/he genuinely believed that the person was legally incompetent but was still entitled to carry out the act. In the case of withdrawal from a contract, the legally incompetent person and his/her guardian must be notified.
If the legal act, which the legally incompetent person carried out, is not later authorised, each party must return what they received as a result of the agreement or, if this is impossible, pay compensation. A legally incompetent person cannot be obliged to pay compensation over and above that which has been used for his or her reasonable living expenses or which s/he might have benefited from.

If both parties contracting an agreement are legally incompetent and either party is unable to return that which was received as a result of the agreement, compensation must be paid which is considered reasonable from the point of view of both parties. In considering what would be reasonable, consideration must be paid to the position of both parties when making the legal act, subsequent circumstances and any other relevant factors.

Responsibility on the part of the guardian:

A legal act which the guardian was not competent to carry out, is not binding upon the client (the person for whom s/he is guardian). A legal act which the guardian has carried out without the required permission is not binding upon the client unless the guardianship authority (from which permission should have been requested) subsequently approves the legal act on the application of the guardian.

If a legal act carried out by the guardian is not binding, the guardian's obligation to compensate the contracting party for injury or damage caused is applicable as set out in §25 of the Act on Legal Acts under the Law of Property (228/1929).

3.7.3.3.2 Contractual capacity of people not under guardianship (whose capacity has not been restricted)

A person suffering from dementia, whose capacity has not been restricted under the Guardianship law, may make a contract which seems unwise or not in his/her best interests. The contract may be declared invalid if there is sufficient evidence that at the time the contract was made, the person lacked the necessary capacity to make a valid contract, e.g. the person could not understand the meaning and consequences of the act (actual legal incompetence). This regulation is not part of written law in Finland but it is acknowledged as a legal principle.

However, if there is evidence that a person was being financially abused due to the fact that s/he was suffering from dementia, sections 31 or 33 of the Contracts Act (228/1929) would be applicable:

Section 31: If anyone, taking advantage of another's distress, lack of understanding, imprudence or position of dependence on him/her, has acquired or exacted a benefit which is obviously disproportionate to what s/he was given or promised or for which there is to be no consideration, the transaction thus effected shall not bind the party so abused.
Section 33: A transaction that would otherwise be binding shall not be enforceable if it was entered into under circumstances that would make it incompatible with honour and good faith for anyone knowing of those circumstances (to invoke the transaction) and if the person to whom the transaction was directed could be presumed to have known of the circumstances.

3.7.3.4 Testamentary capacity
The rights of a legally incompetent person to make a will are regulated by the Finnish Code of Inheritance (40/1965).

If a person is under guardianship, this does not affect the person’s right to make a will. The capacity to make a will can be ascertained only after the death of the testator, if the testator’s heir wishes to contest it. Invalidity of the will is regulated in Chapter 13 of the Law of Wills 1965. Under Section 1, the whole will may be contested and declared invalid if the testator lacked testamentary capacity, that is, if a mental illness, debility or other mental aberration of the testator had influenced the making of the will.

The will may also be declared invalid, if the testator was forced into making the will or induced to do so through abuse of the testator’s lack of understanding, weakness of will, dependency, or if she or he was deceived and thereby misled into making the will.

It is often the case that testators’ relatives contest the will because they claim that the testator lacked testamentary capacity due to dementia and old age infirmity. On the other hand, relatives seldom win the case as it is very difficult to obtain evidence of lack of testamentary capacity (Mäki-Petäjä-Leinonen 2003).

3.7.3.5 Civil responsibility
If a legally incompetent adult causes damage or injury by committing an illegal act, this will be dealt with in accordance with the Damage Compensation Act (412/1972) regardless of the person’s responsibility.

3.7.3.6 Criminal responsibility
Criminal responsibility is addressed in Chapter 3 of the Penal Code of Finland (39/1889). Section 3 states that the act of an insane person, or a person who is mentally deficient due to senility or another similar reason, is not punishable. Similarly, an act committed by a person who was at the time temporarily not in possession of his/her mental faculties is also not punishable. Separate provisions govern decisions regarding conditional discharge and imprisonment and to sanctions which might be imposed in addition to conditional discharge (515/2003; entered into force on 1 January 2004).

However, under section 4 (of Chapter 3 of the Penal Code), a person who was not considered as having been in full possession of his/her mental faculties when the offence was committed, but cannot be regarded as totally irresponsible in accordance with section 3, may be punished. In such cases, the punishment would be the same as that given
to people of at least 15 years of age and not older than 18 who commit an offence, i.e. 2-12 years imprisonment instead of life imprisonment (if that is the sentence that would normally have been applicable) and in case of imprisonment or a fine, at most three quarters of the most severe penalty and at least the minimum penalty. A reduction of penalty does not apply in cases of voluntary intoxication or other “self-induced mental aberration” (Section 4, §2).
3.8 France

3.8.1 Proxy decision making

In 2007, France adopted a new law that constitutes a thorough reform of the systems for the legal protection of vulnerable adults. As it was, the French scheme was based on laws dating back to 1966 and 1968 that no longer corresponded to current demographic and sociological trends. There were multiple reasons, therefore, behind the reform: longer life expectancy and an ageing population, the rise in the number of decisions pronounced and overloaded courts, and the estimated cost of the system, which would have continued to increase without the reform.

We must also note that as time passed, legal protection applied more and more to problems of social and economic insecurity rather than physical or psychological vulnerability. The reform thus aimed to focus on the legal protection on people whose impaired physical and mental faculties made them unable to look after their own interests. Reasons of a more social nature (such as idleness, extravagance, intemperance) would be the object of administrative measures to establish social and budgetary supervision.

We should note furthermore that the Law of 5 March 2007, which entered into force on 1 January 2009, relates to the safeguarding both of people (health, personal life, etc) and of their property.

The French legal protection system, organised by the Law of 1968, established three types of protective measures: two permanent, curatorship (curatelle) and tutorship (tutelle) and one transitional measure, judicial protection (sauvegarde de justice). The reform, implemented by the Law of 5 March 2007, simplifies and harmonises that situation.

Judicial protection is a measure of protection which applies to a person who needs temporary protection or who needs to be represented for certain specified acts.

Curatorship is established when a person is not entirely incapable of handling his/her own affairs but needs to be assisted or supervised in carrying out civil acts.

Tutorship applies to a person who needs to be represented in a continuous manner in order to carry out civil acts.

The law reaffirms the principles of necessity, subsidiarity and proportionality for the safeguarding measures and strengthens certain rights of people under protection (e.g. the right to vote, obligatory hearing for an adult).

Finally, a new legal instrument was invented: the mandat de protection future (mandate for future protection). It enables anyone who is not under tutorship to appoint in
advance, without any legal procedure, one or several people who will represent them in all civil acts, in preparation for a time when they might be unable to look after their own affairs.

3.8.1.1 Guardianship
3.8.1.1.1 General provisions applicable to all three systems of protection
There are a few general provisions that apply to all three systems of protection. These provisions are listed in articles 425 to 427 of the French Code Civil.

3.8.1.1.1.1 Conditions for the appointment of a guardian
Any person who is incapable of looking after his or her own interests due to a medically ascertained impairment is eligible for legal protection. Unless otherwise specified, the measure covers the protection of both the person and their property.

3.8.1.1.1.2 How guardianship is arranged
The request can be made by any of the following:

- The person who needs protection.
- The spouse, the partner in a PACS (civil union contract) or the common law spouse if the relationship is ongoing.
- Any relative.
- Anyone who has a close and stable relationship to the person.
- The person who exercises the legal protection (mandataire spécial/de protection future, curateur, tuteur: special proxy or future protection proxy, guardian).
- The state prosecutor, in his/her own right or following a request from a third party (e.g. social services, health or medico-social centre etc.) or if the file/application from a person able to make the request is incomplete.
- In certain cases, the judge. S/he cannot do this when the measure is set up or increased but has the possibility when it is renewed, modified without increasing it or to substitute it for another measure, in which case s/he makes a ruling as a matter or course or on the request of the above-mentioned people. S/he can also make a ruling as a matter of course to revoke a mandate for future protection or to set up a measure of protection.

In addition, the judge can decide to put an adult under protection in two cases, which are described further on.

The following documents and details must be included in the request:

- A detailed medical certificate showing that the person's impaired faculties make them unable to look after themselves and the foreseeable development of their condition, filled out by a doctor chosen from the state prosecutor's list.
• The personal data of the person to be protected (the name of the person to be protected and details of the facts motivating the request for protection).

• List of people authorised to bring the case to court.

• The name of the person’s doctor, if known.

• All available details on the person’s family situation, finances and property.

The request must be delivered by hand or sent by normal mail to the registry of the tribunal d’instance (first instance court).

The guardianship judge in the person’s or guardian’s place of residence is territorially competent. S/he investigates the request and holds a hearing – in private – with the person concerned (unless this is contrary to doctor’s orders), the person making the request, the lawyer of the person concerned and, if the judge thinks it necessary, with relatives and friends.

3.8.1.1.1.3 Who can be a guardian

Any person appointed in advance (désignation anticipée, advance designation, by a notarised or a private document) can be a guardian.

Otherwise, the Law of 5 March 2007 establishes the family’s central role. In order of preference and depending on the evaluation of the judge, priority is given to the spouse, partner, common-law spouse if still living with the person, relative or anyone living with the person or maintaining a close and stable relationship with him or her. Please note that the judge must follow these rules unless the interests of the protected person demand otherwise.

When there is no friend or relative who can take charge, a legal trustee for the protection of adults (mandataire judiciaire à la protection des majeurs) is appointed, chosen from a list established by the Préfet (local head of government) of the department. This mandataire judiciaire à la protection des majeurs can be either a non-profit organisation (association tutellaire) or a professional guardian (gestionnaire privé). In France, there are also within certain institutions (i.e. those which are state-run with more than 80 beds) social services and agents who deal specifically with people under legal protection.

Expressly excluded are members of the medical or pharmaceutical professions and medical assistants who work with the protected person, as well as anyone who is the beneficiary of a trust set up by the protected person.

3.8.1.1.4 Measures to protect the ward from misuse of power

In all cases, the person’s home and furniture are kept as long as possible. Should it become necessary to dispose of the dwelling or sell the furnishings, authorisation must be obtained from the juge des tutelles (guardianship judge) (or the family council if there is one) who decides after hearing the opinion of a doctor who is on the official list main-
tained by the procureur de la République (state prosecutor). Keepsakes and other objects of a personal nature must not be sold and should be kept at the disposal of the protected person, for instance by the institution where the protected person is living.

The person responsible for protection cannot modify any bank or savings accounts opened in the name of the protected person, nor open new ones without the permission of the guardianship judge. When the person concerned has no bank accounts, the person in charge of protection will open one for him/her.

3.8.1.1.5 The right to appeal
An appeal against the decision must be filed within 15 days of the judgement. Appealing against the rejection of the case is possible only for the person making the request.

3.8.1.1.2 Judicial protection (sauvegarde de justice)
Judicial protection is covered by article 433 to 439 of the Civil Code.

3.8.1.1.2.1 Conditions for the appointment of a guardian
Judicial protection applies to a person who needs temporary protection or who needs to be represented for certain specified acts.

3.8.1.1.2.2 How judicial protection is arranged
Judicial protection is decided by the guardianship judge when a request that s/he receives to place someone under the tutelle or curatelle form of guardianship (tutorship or curatorship) demands an immediate safeguarding measure.

Medical protection might be requested from the state prosecutor by the doctor treating the person in need of protection, in which case a psychiatrist's evaluation is required. However, if the person to be protected is hospitalised in a psychiatric institution, the psychiatrist's evaluation is not required.

3.8.1.1.2.3 Who can be a guardian
If the person under protection has designated a mandataire (proxy) to manage his/her property, the mandate continues to be effective during the judicial protection, unless it is revoked or suspended by the guardianship judge (article 436 of the Civil Code).

If there is no mandate, the rules of gestion d'affaire (Negotiorum gestio) are applicable.

3.8.1.1.2.4 The duties and responsibilities covered by judicial protection
Those entitled to apply for tutorship on the person's behalf are obliged to perform the civil acts of conservation required for the management of the person's assets. This obligation also applies to the director of the institution where the person is receiving treatment or to the person housing the adult under protection.
For other civil acts, any interested person may give his/her opinion to the guardianship judge. The judge may decide to appoint a person for a specific civil act or for a series of civil acts of the same nature subject to certain conditions (article 437 of the Civil Code).

3.8.1.1.2.5 Consequences of judicial protection for the person concerned
A person who has been placed under judicial protection by the court retains his/her legal capacity and therefore does not lose the power to exercise his or her rights.

Nevertheless, any civil act or commitment they carry out may be nullified if it is prejudicial to the person or it may be reduced if considered excessive. These acts can be invalidated (i.e. considered null and void due to insanity) by virtue of article 414-1 of the Civil Code. This type of action may only be taken during the person’s lifetime by himself/herself and after the person’s death by his/her heirs. Such actions must be taken within five years.

To make its decision, the Court takes into consideration the assets of the protected person, the good or bad faith of the other people involved and whether or not the nature of the operation is valid.

3.8.1.1.2.6 Duration of judicial protection
Judicial protection is valid for one year, after which it is renewable once (with a medical certificate and after a hearing with the protected adult). It ends automatically after the first year if it has not been renewed.

3.8.1.1.3 Curatorship (curatelle)
Curatorship is covered by article 440 of the Civil Code.

3.8.1.1.3.1 Conditions for the appointment of a curator
Curatorship is established when a person is not entirely incapable of handling their own affairs but needs to be advised or supervised in carrying out civil acts. The Law of 5 March 2007 that came into force on 1 January 2009 does away with curatorship for extravagance, intemperance and idleness.

3.8.1.1.3.2 How curatorship is arranged
Please see the section on “general provisions applicable to all three systems of protection”.

3.8.1.1.3.3 Who can be a curator
Details of the people who can be appointed curator are also described in the general information on guardianship. In addition, the guardianship judge can appoint a surrogate curator to supervise the work of the curator.

The curator must be a legally capable adult or emancipated minor and not have been appointed as a trustee through a trust contract.
3.8.1.1.3.4 The duties and responsibilities of curators

The curator cannot take the place of the protected adult. His/her role is to assist him or her. This role can be reduced or reinforced by the judge but the decision must be backed up by a medical assessment or social inquiry. A decision to increase the responsibilities of the curator must be backed by a medical examination, but it is not necessary in order to reduce them because it is for the sake of the protected adult.

Exceptionally, the curator may ask the judge for authorisation to carry out a specific act on behalf of the adult, if s/he considers that otherwise the interests of the adult would be seriously endangered.

The judge may decide to reinforce the curatorship. In this case, the curator receives the income of the person under protection and arranges for payment of expenses involving third parties, depositing any remaining funds into an account opened with an approved depositing institution. In such cases, the curator must submit accounts every year to the chief clerk of the magistrate’s court.

3.8.1.1.3.5 Consequences of curatorship for the person concerned

A person who has been placed under curatorship may not, without the assistance of his or her curator, perform any civil act which, under the tutorship scheme, would have necessitated authorisation from the family council or the judge.

The person subject to curatorship may carry out certain civil acts alone or with the assistance of the curator. Such acts are specified when the protective measure is set up or in a subsequent judgement. If the person carries out acts which s/he does not have the necessary authorisation, they may be rendered null and void. Even those that s/he has the authority to carry out alone may be subject to rescission or deduction. Donations may only be made with the assistance of the curator.

3.8.1.1.3.6 Liability of curators (and of tutors)

The Law of 5 March 2007 states that curators/tutors are personally responsible. Part of this responsibility may be delegated to a third party. If the delegated part is not carried out in the best interests of the protected adult, the curator/tutor is held responsible. The judge supervises the implementation of the measure.

3.8.1.1.3.7 Compensation of tutors (and tutors)

The law does not foresee compensation of curators/tutors if the measure is executed by a member of the family. The legal effect of the marriage remains intact, which means that the spouse or common law spouse is obliged to take care of his/her husband/wife.

The judge may authorise the reimbursement of certain sizeable expenses if requested and if the relevant receipts are provided.
Professional curators /tutors are paid by the person under protection in accordance with his/her means. On top of fees, certain management costs of the curator/tutor may be reimbursed.

An additional remuneration may be allocated by the guardianship judge, notably when s/he assigns to the manager tasks which exceed his/her normal powers.

3.8.1.1.3.8 Duration of curatorship (and of tutorship)
The Law of 5 March 2007 limits the duration of curatorship and tutorship to five years but this is renewable.

It stipulates an obligatory re-examination every five years during which the judge hears the adult under protection in order to determine whether the legal protection is still necessary.

The judge can prolong the duration of the protection (beyond the five-year limit). Particular reasons must be cited and supported by the opinion of the doctor responsible for drawing up the medical certificate. The judge must always justify prolongation of the measure, based on a medical examination of the adult. The reason for the prolongation must be that there is no hope of improvement of the adult’s condition.

3.8.1.1.4 Tutorship (tutelle)
3.8.1.1.4.1 Conditions for the appointment of a curator
Tutorship can be instituted only when neither judicial protection (sauvegarde de justice) nor curatorship can ensure the protection needed. The option of tutorship is appropriate in cases where the person needs to be represented in a continuous manner in order to carry out civil acts. The 2007 law reinforces the protection of the person and his/her property including his/her home and bank accounts. The judge may decide to limit the measure if s/he sees fit.

3.8.1.1.4.2 How curatorship is arranged
Please see the section on “general provisions applicable to all three systems of protection”.

3.8.1.1.4.3 Who can be a tutor
Details of the people who can be appointed tutor are described in the general information on guardianship (please see above). In addition, the guardianship judge can appoint a surrogate tutor to supervise the work of the tutor.

The tutor must be a legally capable adult or emancipated minor and not have been appointed as a trustee through a trust contract.
3.8.1.4.4 The duties and responsibilities of curators
When instituting the tutelage or subsequently, the judge may enumerate certain civil acts that the person under tutelage will have the capacity to perform him/herself, or with the assistance of the tutor.

Unless the guardianship judge rules otherwise, “strictly personal” acts can be carried out by the person under tutelage (e.g. choice of residence).

3.8.1.4.5 How the financial affairs of the person are handled
The manager of the tutelage receives the revenues of the protected person and uses them for the maintenance and treatment of the person concerned. Any excess amounts are paid into an account which must be opened at an approved deposit institution. Every year s/he must submit accounts to the chief clerk of the magistrate's court.

3.8.1.4.6 Appeal
The people previously defined as being permitted to apply for tutelage (including the person him/herself) may appeal to a high court against the judgement, even if they did not intervene at the court proceedings. The appeal must be lodged within 15 days of the judgement’s pronouncement.

The judgment relating to the establishment of tutelage, its modification or cancellation may only be opposed by third parties within two months following its insertion in the margin of the birth certificate of the protected person.

3.8.1.5 Mandate for future protection (mandate de protection future)
The main innovation of the Law of 5 March 2007 is found in article 477 of the Civil Code which stipulates that any adult or emancipated minor who is not under tutelage may appoint by the same mandate one or several persons to represent him/her, should he or she become incapable of taking care of his/her own interests, for one of the reasons cited in article 425 of the Civil Code.

In other words, the mandate for future protection allows adults to organize in advance not only the future management of their property but also their personal protection, should a time come when they can no longer take care of their own interests.

3.8.1.5.1 Conditions for the appointment of a representative
Any adult or emancipated minor not under legal protection can appoint a representative by means of a mandate for future protection, as can any adult under curatorship with the help of the curator.

One or more proxies may be appointed.

Unless the judge decides otherwise, a mandate for future protection cannot coexist with the person’s placement under curatorship or tutelage. It can, however, coexist with a
judicial protection measure. The judge may decide to suspend the effects of the mandate during the measure, which would then resume when the judicial protection measure ends.

3.8.1.1.5.2 How mandates for future protection are arranged

Notarised mandates

For a notarised mandate, the proxy must accept his or her appointment in front of a notary.

The notarised mandate can concern acts of conservation (actes de conservation), “preservation acts” (actes d’administration) that allow reasonable management of the principal’s patrimony or “acts of disposal” (actes de disposition), when something should/can be sold.

One limit to this rule is that “acts of disposal” ("à titre gratuit") must be approved by the guardianship judge.

The proxy must present annual management accounts to the notary who has the task of supervising and verifying the management accounts. S/he must notify the judge of any unjustified activities or movement of funds. The notary conserves the documents presented and the inventory.

Mandates drawn up as a private deed.

A mandate that is drawn up without a notary must be dated and signed by the principal (the person drawing up the mandate) and accepted by the proxy. It must be countersigned by a lawyer or drawn up using a certified form.

There must be as many original copies as there are proxies.

The originals must be signed by the person responsible for supervising the execution of the mandate.

The mandate can only relate to acts of conservation and administration. For all other acts such as acts of disposition and those not covered by the mandate, the proxy must make a request to the guardianship judge for authorisation to carry them out.

The proxy must conserve the inventory, its updates and the last five years of annual management accounts along with documents.

Supervision of management is the task of the guardianship judge and the state prosecutor.

In both cases, the mandate for future protection takes effect when the mandate and the detailed medical certificate (less than one month old), presented by the principal, have been verified, stamped and dated by the court registry clerk.
3.8.1.1.5.3  Who can be a proxy/representative
Any person who is legally and morally capable can be appointed representative. The principal is entirely free to choose the representative s/he would like to have (e.g. a friend, lawyer, notary public), but the representative cannot be the guardianship judge or a court registry employee. Similarly, medical or pharmaceutical professionals or assistants are expressly excluded.

3.8.1.1.5.4  The duties and responsibilities of representatives
The principal is free to define the extent of the mandate and its responsibilities. S/he can set down provisions for the management of his/her assets.

3.8.1.1.5.5  Consequences of curatorship for the person concerned
The protected person does not lose his or her legal capacity and can therefore continue to carry out valid legal acts. The mandate functions as power of attorney given to the proxy.

Nonetheless, acts performed by the protected person during the execution of the mandate for future protection may be rescinded in the case of lesion, or reduced because of excess (lesion refers to excessive inequality in the obligations of each party in a contract).

3.8.1.1.5.6  Measures to protect the principal from misuse of power
As soon as the mandate takes effect (this applies when it is a private deed), the proxy must establish an inventory of the principal's assets and keep it up-to-date.

S/he must also establish an annual management account (according to the mandate's specifications).

The proxy must execute the mandate personally but a third party may be called upon to manage the assets.

One or more proxies may be designated who would then simultaneously share responsibility. This implies that they should keep each other informed.

If there is only one proxy, s/he must present accounts for the protection of both the person and the person's property.

When the mandate ends, the proxy must be able to produce annual accounts for the last five years, the property inventory and any other document needed to ensure continuity in the management of the person's property.

3.8.1.1.5.7  Compensation and liability of proxies
In principle, the proxy performs his/her tasks free or charge, but remuneration may be arranged.
The proxy must respect the regulations governing information and consent of the protected person and is not authorised to make “strictly personal” decisions.

If the judge considers that the mandate for future protection is not sufficient to protect the principal, s/he may decide to add another measure (tutorship or curatorship), or allow the proxy to perform one or several acts not covered by the mandate.

3.8.1.5.8 Duration of the mandate for future protection

The mandate ends when:

- the principal regains his or her faculties, as determined by an examination requested by the principal or by the proxy;
- the principal dies, or is placed under tutorship or curatorship, unless otherwise decided by the guardianship judge;
- the proxy dies or is placed under guardianship;
- the guardianship judge revokes the proxy’s appointment.

3.8.2 Capacity in specific domains

3.8.2.1 Marriage

The person under judicial protection does not require authorisation to marry, unless there is a specific clause in the document designating a proxy.

A person who is under curatorship must obtain the consent of the curator in order to marry or, in the absence thereof, that of the guardianship judge.

According to article 460 of the Civil Code, a person under tutorship can marry only with the authorisation of the judge or the family council if there is one, after a hearing of both future spouses, and if need be after obtaining the opinions of friends and relatives.

3.8.2.2 Voting capacity

Adult under judicial protection or under curatorship can exercise all their civic rights.

For the adult under tutorship, maintenance of the right to vote must be specified in the legal decision that establishes or renews the measure. If there is no mention of it, the right to vote is maintained. The Law of 5 March 2007 reinforced voting capacity by making it the default principle for adults under tutorship. They cannot, however, be called to serve on a jury in a criminal court.

3.8.2.3 Contractual capacity

The legality of business transactions in the case of people who are under any of the three forms of guardianship is determined by the nature of the particular form of protection. In
general, a person who is under guardianship is still able to carry out any act except for an act for which the judge designated a mandataire spécial (special proxy).

Mandate for future protection:
The protected person does not lose his or her legal capacity and can therefore continue to carry out valid legal acts. The mandate functions as power of attorney given to the proxy.

Nonetheless, acts performed by the protected person during the execution of the mandate for future protection may be rescinded in the case of lesion, or reduced because of excess (lesion refers to excessive inequality in the obligations of each party in a contract).

Judicial protection:
A person who has been placed under judicial protection by the court retains his/her legal capacity and therefore does not lose the power to exercise his or her rights.

Nevertheless, any civil act or commitment they carry out may be nullified if it is prejudicial to the person or it may be reduced if considered excessive. These acts can be invalidated (i.e. considered null and void due to insanity) by virtue of article 414-1 of the Civil Code. This type of action may only be taken during the person’s lifetime by himself/herself and after the person’s death by his/her heirs. Such actions must be taken within five years.

To make its decision, the Court takes into consideration the assets of the protected person, the good or bad faith of the other people involved and whether or not the nature of the operation is valid.

Curatorship:
A person who has been placed under curatorship must be assisted when carrying out important acts of civil life (article 440 of the Civil Code). S/he can carry out such acts but with the assistance or under the control of the curator.

Tutorship:
The person under tutorship is continuously represented by the tutor for any civil act.

3.8.2.4 Testamentary capacity
A person under curatorship may make a will unless this right is restricted under the provisions of article 901 of the Civil Code which states that in order to make a donation during one’s lifetime, or a will, a person must be “of sound mind”. A person under curatorship may write a will by him/herself (unless not of sound mind).

A person under tutorship may, with the permission of the judge or the family council if there is one, be helped or if necessary be represented by the tutor to make donations.
However, once tutorship has been established, the person can write a will only if author-
ised by the judge or the family council; otherwise it would be considered null and void.
The tutor cannot assist or represent the person in this case.

Nonetheless, the testator can revoke a will established before or after the tutorship pro-
cedure (irrespective of his/her degree of incapacity).

A will made prior to tutorship remains valid unless it can be proved that the reasons for
which the testator made the will have disappeared since tutorship was set up.

3.8.2.5 Civil responsibility
An adult who is under judicial protection, curatorship or tutorship is responsible for mis-
conduct committed voluntarily or involuntarily, as is any individual. S/he must make rep-
eration for any damage s/he causes (article 489-2 of the Civil code). S/he should therefore
be covered by personal liability insurance.

3.8.2.6 Criminal responsibility
In the case of people suffering from mental or neuro-psychiatric disorders, the Law of
5 March 2007 allows for situations in which their criminal responsibility is decreased or
even abolished.

Thus, if a person at the time of the crime is suffering from a mental or neuro-psychiatric
disorder that eliminates judgement or control over his/her actions, the person is not con-
considered criminally responsible. However, if the person’s judgement is only altered s/he
remains responsible for the acts in question, which are punishable. In this case, the court
takes these circumstances into consideration when it determines the sentence.

It should be noted that there is no link between partial or total irresponsibility and a
legal protection measure. The medical assessment established when the judge exam-
ines the case will allow the perpetrator’s responsibility to be ascertained at the time of
the crime.

The Law of 5 March 2007 contains several innovative aspects, namely that the tutor or
the curator of a person who has committed a criminal act is kept informed of the legal
process. S/he has the same right as the plaintiff to consult the documents in the file. S/he
also has the automatic right to visit the protected person who is in temporary custody.
3.9 Germany

3.9.1 Issues surrounding the loss of legal capacity

The process of declaring a person legally incompetent as part of the guardianship process has been abolished. However, it is still possible to make such a declaration if really necessary. In English there is only one word, whereas in German there are two and the significance of the terms used is important. In an information brochure on the law governing guardianship (the Bürgerliches Gesetzbuch/BGB) produced by the Ministry of Justice (Bundesministerium der Justiz, 1996), it is stated that a person can no longer be “entmündigt”. This word means incapacitated or “declared incapable of managing one’s own affairs”. This term has connotations of the loss of fundamental and basic rights, which are acquired with adulthood. The term “Geschäftsunfähig” which is used in §104 of the Civil Code simply means “incompetent to carry out business” and therefore has fewer derogatory connotations. Please see the section on contractual capacity for more details.

3.9.2 Proxy decision making

3.9.2.1 Guardianship

The Betreuungsgesetz (“Guardianship Law” in English) is part of the Bürgerliches Gesetzbuch (BGB) (i.e. the German Civil Code).

The Guardianship Law, which came into force in January 1992, was the result of the Act to Reform the Law Concerning Guardianship and Curatorship for Adult Persons of 12 September 1990. It is generally considered to be a vast improvement on the previous provisions for guardianship and care of the frail.

Prior to the implementation of the new system of guardianship, a person could be declared legally incompetent and this would lead to an automatic loss of the right to vote, marry, write a will, carry out a business and even legitimately purchase clothes or food.

The process of automatically declaring a person legally incompetent as part of the process of guardianship has been abolished in favour of a more flexible approach to guardianship based on the particular needs and abilities of the person under guardianship and is more geared towards self-determination.

3.9.2.1.1 Conditions for appointment of a guardian

According to §1896 of the Civil Code, a guardian can be appointed by the Guardianship Court if due to a psychiatric illness or mental impediment an adult is wholly or partly unable to look after his/her own affairs. A guardian is only appointed for tasks for which guardianship is necessary. If the person’s affairs could be managed equally satisfactorily in a way other than by appointment of a legal representative, this should be done. Similarly, if a person merely needs help with household tasks or to leave the house, this should be arranged, without this necessitating the appointment of a legal representative.

19 The terms “guardian” and “ward” will be used instead of the terms used in the translation of the Guardianship Law (i.e. “carer” and “the person cared for” respectively) in order to avoid confusion between an official guardian and someone who cares for someone.
3.9.2.1.2 How guardianship is arranged

The judge in charge of the guardianship case must obtain a medical report from a neurologist or psychiatrist and may also request a report on the person's social environment. S/he then visits the person in their familiar environment, which is usually at home, and listens to their views. The judge also interviews relatives and others who are closely linked to the person in order to find out their views about the possible guardianship measure. The procedure for appointing a guardian is usually fairly lengthy but it can be speeded up in case of emergency.

3.9.2.1.3 Who can be a guardian

If guardianship is considered necessary, the Guardianship Court appoints a person who is deemed capable of suitably looking after the person and his/her affairs. If the person to be placed under guardianship proposes a particular person, the Court must respect this decision unless it is judged to run counter to his/her personal wellbeing. A proposal not to appoint a certain person should also be taken into account by the Court. If anyone possesses a document in which the wishes of a person are expressed (with regard to the choice of guardian should the situation ever arise), s/he must hand it over to the Guardianship Court without delay on hearing that proceedings are underway or that a guardian has been appointed. A doctor can apply to the Guardianship Court only if the patient gives permission, unless the doctor is of the opinion that the patient could harm him/herself without a guardian.

If the person, for whom guardianship is being arranged, does not propose anybody, the Court will usually take into consideration his/her spouse or children, bearing in mind the possible conflict of interests that this may entail. A guardian must declare that s/he is willing to be a guardian before taking up the duty. Once the Court has decided on a person to be the guardian, this person is obliged to take on the guardianship duties provided that this can be expected with regard to his/her family, professional and other circumstances.

The Court can decide to appoint more than one guardian if this would mean that the person's affairs could be managed more efficiently this way. The duties and responsibilities of each guardian can be specified. Moreover, the Court can also appoint several guardians so that only one looks after the affairs of the person, but another can take over if the first is prevented from doing so or transfers the duty to him/her.

If guardianship cannot be ensured by the appointment of one or more individuals, the Court can appoint an association or, failing this, an authority. An association can then transfer guardianship duties to individuals, bearing in mind any proposals made by the person under guardianship.

3.9.2.1.4 The duties and responsibilities of guardians

The duties of the guardian are stipulated in §1901 (Civil Code):

"The carer will look after the affairs of the person cared for in the way his/her welfare requires. The welfare of the person cared for also includes the possibility of arranging..."
The guardian will comply with the wishes of the ward if this does not conflict with the latter’s welfare and if it can be expected of the guardian. This also applies to desires that the ward expressed before the guardian was appointed unless demonstrably does not wish to keep to this desire. The guardian will discuss important matters with the ward before discharging them, insofar as it does not conflict with his/her welfare.

Amongst his/her duties, the guardian will ensure that every opportunity is used to remove or improve the condition or impediment of the ward, to prevent its deterioration or to mitigate its consequences.

The guardian will notify the Guardianship Court of any circumstances of which she is aware that will facilitate suspension of guardianship. The same applies to circumstances that facilitate a restriction of the extent of his/her range of duties or require their extension, the appointment of an additional guardian or a limitation of previously granted authorisation. It is the duty of the guardian to represent the ward at law and otherwise.

3.9.2.1.5 How the financial affairs of the person under guardianship are handled
If the guardian has responsibility for handling the ward’s financial affairs, s/he must provide the Court with a complete list of the ward’s finances and assets. The Court decides when and how often this should be done. If the guardians are relatives, they only need to provide proof of the financial situation when the Court demands it, but at least every two years. The ward is entitled to demand to see this list whenever s/he wants to.

Money should be put into an account which can only be accessed with the authorisation of the Guardianship Court. Financial investments can only be made with the approval of the Court. If there is a current account, the guardian can withdraw money without authorisation from the Guardianship Court provided that there is not more than a specified amount in the account (EUR 3,000). If the guardian is the ward’s spouse or a relative, withdrawals can be made without authorisation for larger amounts.

Numerous authorisations are necessary for the purchase and sale of a piece of ground belonging to the ward or for taking out mortgages. If a contract is made between the guardian and the ward, the guardian cannot act on the ward’s behalf with regard to this contract. In such cases, the guardian must contact the Court so that an additional guardian can be appointed to deal with this matter.

3.9.2.1.6 Measures to protect the ward from misuse of power
The guardian must submit a statement on the financial state of affairs of the ward. This should be accompanied by a report on the personal situation of the ward, e.g. how frequent the guardian has contact with him/her, his/her place of residence, his/her state of
health, whether it is likely that guardianship will continue to be necessary and whether
the extent of the guardianship should be reduced or extended.

The guardian can only act within the area of competence agreed by the Guardianship
Court. If s/he feels that the ward needs assistance in other areas, s/he must inform the
Court and not take care of the task him/herself. If the guardian is unsure whether some-
thing lies within his/her area of competence, s/he must contact the Guardianship Court.

In rare cases, if the ward seems to be a danger to him/herself or assets, the Guardianship
Court can order a “reservation of consent”. This means that s/he can only make a decla-
ration of will with the consent of his/her guardian. This protective measure is similar to
measures designed to protect minors when carrying out business transactions.

There is a clause in the Civil Code (§1907), which states that the guardian must obtain
authorisation before terminating a rental agreement for the ward’s accommodation. This
measure is designed to protect the ward from the adverse effects of losing a trusted
environment and circle of acquaintances.

3.9.2.1.7 Compensation and liability of guardians
A normal guardianship case for a person living in a flat with no money would cost EUR
1,848. Guardians who are relatives or volunteers are entitled to a payment of EUR 323 per
year to cover various costs such as transportation and telephone calls. If the ward has
more than EUR 2,600, s/he must cover this cost. If the ward has more than EUR 2,600,
s/he must cover this cost; otherwise it is paid by the State (International Guardianship
Network, 2008).

Guardians are responsible for any loss or damage suffered by the ward due to their
actions but some communes provide volunteer guardians with an insurance against this
(Marburger Verein für Selbstbestimmung und Betreuung, 2008).

3.9.2.1.8 Duration of guardianship
The duration of the guardianship is set by the Court and cannot be longer than seven
years.

3.9.2.1.9 The right to appeal
If a ward, who has not lost his/her legal competence, disagrees with a decision made by a
guardian, s/he can contact the Courts in order to appeal against the decision.

3.9.2.2 Powers of attorney
A durable power of attorney (known as a Vorsorgevollmacht) is a power of attorney
which only becomes valid when the person who wrote it is no longer able to handle his/
her finances and other matters. The person who writes the durable power of attorney
can limit the powers of the future attorney to certain matters. People holding a power of
attorney are not routinely controlled.
3.9.3 Capacity in specific domains

3.9.3.1 Marriage
A person has the right to contract a marriage provided that s/he has not been declared legally incompetent in the sense of “Geschäftsunfähig” (Bundesministerium der Justiz, 1996).

3.9.3.2 Voting capacity
According to article 12 Bundeswahlgesetz (BwahlG), every person who has reached the age of 18 has the right to vote.

A person who is under guardianship retains the right to vote unless, as stated in the Federal Electoral Law of 1993, s/he is under complete guardianship in all matters (i.e. a guardian has been appointed to attend to all his/her affairs).

People who are currently detained in a psychiatric hospital under article 63 of the Penal Code also lose the right to vote according to the Federal Election Law of 1993.

3.9.3.3 Contractual capacity
The legal validity of business transactions is determined by the legal capacity of the people making it. According to paragraph 104 of the Civil Code, a person is deemed legally incompetent (Geschäftsunfähig) if s/he is incapable of free determination of his/her will due to a pathological disturbance of mental activity and if this condition, by its nature, is not temporary.

There is no system of relative incompetence. However, a person may be partially incompetent, which means that s/he may be able to carry out transactions or make decisions in a certain domain but not in others. A guardian can carry out a transaction on behalf of a ward, provided that s/he has the authority to act in this domain. If a person who has been declared legally incompetent makes a declaration of will, it can be declared invalid (§105 Abs.1 BGB/Civil Code). This also applies if the person who made it was in a state of unconsciousness or temporary disturbance of the mind.

3.9.3.4 Testamentary capacity
A person cannot make a will if due to a pathological disturbance of his/her mind, mental deficiency or a disturbance of consciousness, s/he is unable to understand the meaning of the will and act accordingly (§2229 Abs. 4 BGB).

Making a will is therefore linked to the concept of mental incapacity. As such, it is not affected by the mere naming of a guardian or by the “reservation of consent”. Anybody who wants to have a will declared invalid must prove that the person who made it was incapable at the time of writing.
If a person makes a will with the help of a lawyer or in an emergency situation with the help of other people, the lawyer or those people must assess the testator’s mental capacity. Without deciding whether s/he has testamentary capacity, they must simply record any indications they detect of a possible lack of such capacity (§28 Beurkungsgesetz) (Lipp, 2008).

3.9.3.5 Civil responsibility
As with a criminal offence, a person cannot be held responsible for damage to another person or his/her property if s/he (the perpetrator) is suffering from incapacity due to mental disturbance or diminished responsibility. This is covered by §827 of the Civil Code which states that a person is not responsible for any damage s/he causes if s/he was in a state of unconsciousness or suffering from a pathological condition of disturbance of mental activity that prevents the exercise of free will at the time the damage was caused.

Family members are not responsible either in that each person can only be held responsible for his/her own actions. Nevertheless, the injured party may attempt to obtain compensation from the head of the household for failure to prevent the person from causing damage. This is governed by §832 of the Civil Code which states that, if the damage was caused by a minor or a major who on account of his/her mental or physical condition was under supervision, the person responsible for his/her supervision is obliged to compensate the third party. However, the obligation to compensate for damage shall not arise if s/he has sufficiently carried out the task of supervision or if the damage would have occurred even if proper supervision had been carried out.

3.9.3.6 Criminal responsibility
According to the Penal Code, a person who commits a crime may be deemed to have acted without criminal responsibility due to incapacity or may be given a lighter sentence due to a state of diminished responsibility. The relevant paragraphs are as follows:

“§ 20 Incapacity due to mental disturbance
A person who, when s/he perpetrates an act, is unable, on account of mental disturbance, of far-reaching disturbance of consciousness, of mental deficiency or a serious mental abnormality of some other kind, to understand the wrongfulness of the act or to behave in accordance with this understanding, acts without criminal responsibility.

“§ 21 Diminished responsibility
If the capacity of the perpetrator to understand the wrongfulness of the act or to behave in accordance with this understanding is considerably diminished for one of the reasons described in § 20, the punishment can be mitigated in accordance with § 49 (1).”

Paragraph 63 of the Penal Code states that if a person who has committed an illegal act is suffering from mental incapacity or diminished responsibility, s/he may be committed to a psychiatric hospital or clinic. This could occur if following an overall assessment, the
Court establishes that s/he would be likely to commit a serious illegal act due to his/her condition, which would render him/her a danger to the public.

3.9.4 References

Bundesministerium der Justiz (1996), Das Bundesministerium der Justiz informiert: Das neue Betreuungsrecht, Klett Druck G.m.b.H.

International Guardianship Network (2008), Guardianship measures in various countries, unpublished document


Marburger Verein für Selbstbestimmung und Betreuung (2008) – Website: http://betreuungsverein-sub.marburg-biedenkopf.de/


3.10 Greece

3.10.1 Issues surrounding the loss of legal capacity

A person is declared legally incapacitated if s/he is incapable of taking care of him/her- self or property due to a permanent mental illness which eliminates the use of reason or due to physical disability (particularly if the person had been born deaf, blind or dumb). Incapacitation is declared by the judicial decision of a Court of Law and can be requested by means of a petition by any member of the family, the spouse, guardian, tutor or Public Prosecutor. This is dealt with in article 1688 of the Civil Code.

However, according to article 802 of the Civil Procedure Code, any person who has a law- ful interest can nominate a trustee and this person has the right to make a petition for incapacitation. This extends the number of people who are authorised to make such a request. The opinion of the family council must be included with the petition. The spouse of the person who is to be incapacitated as well as the person making the request attend the council in order to provide information on the person but they cannot take part in the decision-making process or give their opinion. Once a person has been declared incapacitated, s/he is incapable of any legal act.

According to article 1705 of the Civil Code, if the mental disorder is not sufficiently severe to warrant incapacitation in that the person concerned has not lost full use of the senses but there is a weakness of the mind, the person is liable to judicial receivership. This also applies in the case of physical disability which does not cause total disability or prevent the person from taking care of him/herself or managing his/her own affairs. The same procedure for judicial incapacitation (involving a petition) applies to judicial receivership, as does the procedure for termination, although in both cases termination is unlikely in the case of dementia.

3.10.2 Proxy decision making

3.10.2.1 Guardianship

3.10.2.1.1 Conditions for the appointment of a guardian

The system of guardianship is linked to the process of incapacitation in that once a deci- sion has been taken to declare a person incapacitated, s/he is placed under guardian- ship. However, as stated above, a judicial receiver (legal counsellor) may be appointed for people who still have some capacity.

3.10.2.1.2 How guardianship is arranged

The process for incapacitation is closely linked to that of setting up guardianship. According to article 1694 of the Civil Code, once the decision for incapacitation has been made, a guardian and deputy guardian are appointed according to the provisions for the appointment of guardians for minors.
Alternatively, if the future ward still has some capacity, a legal counsellor may be appointed (please see section on incapacitation).

### 3.10.2.1.3 Who can be a guardian

According to article 1696 of the Civil Code (CC) the guardianship of a married incapacitated person goes in the first instance to the spouse, unless there is an objection from the incapacitated person or anyone else who has a lawful interest in his/her welfare. In this case, the court has the right to choose an alternative solution which it considers to be in the best interests of the person concerned.

### 3.10.2.1.4 The duties and responsibilities of guardians

1. A person who has been declared incapacitated (and hence has had a guardian appointed) loses the right to carry out any legal act.

2. A person under judicial receivership must obtain the consent of the legal counsellor for the following acts:
   - Appear in court.
   - Make or receive a payment.
   - Borrow.
   - Sell immovable assets, government shares or company bonds.
   - Establish alliance or arbitration agreements.
   - Assume foreign obligations, in particular providing guarantees.
   - Accept or renounce an inheritance.
   - Renounce a bequest.
   - Accept a bequest or gift that involves burdens.

The judicial counsellor can consent before or after the act, but if s/he refuses to consent, the person under judicial receivership can appeal to the Court which is then responsible for the final decision (article 1708 CC).

### 3.10.2.1.5 How the financial affairs of the ward are handled

Article 1698 of the Civil Code states that the provisions for the guardianship of incapacitated adults are the same as those for minors. Precise details are missing.

### 3.10.2.1.6 Duration of guardianship

If the reasons which led to incapacitation are no longer valid, it can be terminated by judicial decision.
3.10.3 Capacity in specific domains

3.10.3.1 Marriage and divorce
People with dementia who have been declared incapacitated cannot marry or divorce. There have been numerous cases of divorce due to undiagnosed cases of Alzheimer’s disease but once the divorce has been granted, it cannot be annulled. On the other hand, the former spouse may claim and be granted guardianship as well as supervision of the spouse who is suffering from dementia, especially when there are children and none of the other family members have any objections (Lecca Marcati).

3.10.3.2 Contractual capacity
If a person carries out an act, which by law requires the consent of a judicial counsellor, and consent was not obtained, the act can be declared null and void (art. 1709 CC). Only the counsellor, the person under judicial receivership and his/her universal and special successors can recommend nullity.

The heirs of a deceased person can appeal against non-gratuitous legal acts that were carried out by or against him/her on the grounds of insanity (art. 1695 of CC) if:
- the person had been declared incapacitated during his/her lifetime;
- the legal act was attempted at a time when the person was receiving treatment in a lunatic asylum;
- the legal act which is under dispute is in itself proof of lunacy.

3.10.3.3 Testamentary capacity
The Greek Inheritance law is regulated by articles 1710 to 2035 of the Greek Civil Code. There are three types of will:
- A holographic will which is handwritten, dated and signed.
- A public will which is made before a notary in the presence of three witnesses.
- A secret will which is handed in a sealed envelope by the testator to a public notary in the presence of three witnesses. For public and secret wills, the three witnesses can be replaced by another notary and one witness.

Any person over the age of 18 and of sound mind may make a will. Consequently, a person who has been declared incapacitated cannot make a will.

If a person dies without having made a will, his/her assets are divided amongst his/her next of kin according to a predetermined order of eligibility because Greece has a system of forced heirship (Angolinfo, 2010).

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20 Information provided in connection with the Lawnet conference on 11 May 1999
21 The terms “lunatic” and “lunacy” are those used in the civil code.
3.10.3.1 Criminal responsibility
There are no provisions in the Penal Code or Civil Code concerning legal responsibility in the case of mental incapacity. Nevertheless, a person who has been diagnosed as having dementia who commits a crime is not prosecuted or punished as s/he is considered to be lacking mental capacity.

If the crime was committed before the diagnosis of dementia, but the court case takes place after diagnosis, a post-dated certificate may be obtained from the State Neurological Hospital. This may be accepted on the good will and discretion of the Judge as having valid retroactive legal validity (Lecca Marcati\textsuperscript{22}).

3.10.4 References

AngloInfo Ltd (2010), Wills and inheritance law in Greece, Article accessed online on 10 September 2010 at: http://greece.angloinfo.com/countries/greece/wills.asp

\textsuperscript{22} Information provided in connection with the Lawnet conference on 11 May 1999
3.11 Hungary

3.11.1 Issues surrounding the loss of legal capacity

Under the Hungarian Civil Code of 1959, a person may be considered incompetent due to age (under 14), illness or state of mind. Sections 14 and 15 define diminished capacity and legal incompetency as follows:

Section 14

Persons of legal age shall be of diminished capacity if a court has placed them in the custody of a guardian to that effect.

(4) Persons whose necessary discretionary ability for conducting their affairs is – owing to their mental state, unsound mind, or pathological addiction – permanently or recurrently diminished to a great extent in general or in relation to certain groups of matters shall be placed by a court in a guardianship that limits their competency.

(5) If the limitation of discretionary ability is only partial, the person under guardianship may make valid legal statements independently in all matters in relation to which the court did not limit his/her capacity in its decision.

(6) The court may limit the full capacity of a person placed under guardianship in particular in respect of the following groups of matters:

i. requests for social security, social and unemployment benefits and disposition over such benefits or over income deriving from employment … exceeding the amount defined in paragraph (2) c) of section 14/B;

ii. right of disposition concerning moveable and real property;

iii. making certain legal statements in family law matters, namely:
   a) legal statements concerning matrimonial property rights or property rights related to a registered partnership;
   b) making statements in relation to the establishment of parentage;
   c) defining the name of one’s child and its alteration;
   d) giving consent to the adoption of one’s child.

iv. taking pecuniary decisions in relation to maintenance obligations;

v. making legal statements in relation to residential leases (conclusion and termination of the contract);

vi. inheritance matters;

vii legal statements concerning placement in a social institution;
viii. disposing of rights related to health services;  
ix determination of place of residence.

Section 15

(1) Persons whom the court has placed in a guardianship precluding legal competency shall also be considered legally incompetent.

(4) Persons of legal age whose necessary discretionary ability for conducting their affairs is – owing to their mental state or unsound mind – completely and permanently absent shall be placed by a court in a guardianship that limits their competency.

Section 17 further stipulates that people who are completely lacking the mental ability to conduct their affairs shall be considered legally incompetent even if they have not been placed in the custody of a guardian.

3.11.2 Proxy decision making

3.11.2.1 Guardianship

3.11.2.1.1 Conditions for the appointment of a guardian

Sections 14 and 15 Hungarian Civil Code of 1959 describe the conditions for determining incapacity which are also those for the appointment of a guardian.

3.11.2.1.2 How guardianship is arranged

Once a court has determined diminished capacity and legal incompetency and decided that a guardian should be appointed, an administrative agency known as the guardianship authority appoints a guardian.

3.11.2.1.3 The choice of guardian

With regard to the appointment of guardians, preference shall be given to the person named by the person under guardianship, either when s/he was legally competent or following the court’s decision. If this is not possible or such a person does not exist, the spouse/registered partner living in the same household shall be appointed. If such a person does not exist, a different appropriate person shall be appointed. Preference is usually given to relatives. If it is not possible to appoint the guardian in any of these ways, a career guardian shall be appointed.

The guardian must be of legal age and legally competent. The person who has been appointed guardian must accept the office for the appointment to be valid.

A person cannot be appointed as a guardian if this would represent a conflict of interests with the person under guardianship. This applies to relatives and spouses as well. A person cannot be appointed as guardian if the person under guardianship has expressly objected to this.
3.11.2.1.4 The duties and responsibilities of the guardian
The guardian is the trustee and legal representative of the person under guardianship, either generally, or concerning certain affairs stated in the court’s decision, which might in certain cases extend to the provision of care (i.e. if the guardian takes on such responsibility).

3.11.2.1.5 How the financial affairs of the ward are handled
Guardians shall manage the affairs of the person under guardianship to the best of their ability. They should take into consideration requests of the person under guardianship and satisfy them if appropriate and depending on the funds available.

If the guardian is a close relative of the person under guardianship and his/her financial situation would not normally require accounting, the guardianship authority shall authorise simplified accounting.

With the exception of career guardians, an annual statement of accounts is not required if the person under guardianship has no assets, and if the monthly amount of his/her income from employment, pension or other benefits is below the limit specified in a separate legal regulation.

3.11.2.1.6 Measure to protect the person under guardianship from misuse of power
The guardianship authority oversees the activities of the guardian; the guardian is obliged to report on his/her activity and the condition of the person under guardianship at least yearly, or at any time on the request of the authority.

Article 16 of the Civil Code defines those cases in which the approval of the guardianship authority is needed for an effective/valid decision by the guardian.

Every year, the guardian shall submit a report to the guardianship authority on the financial affairs of the person under guardianship. The guardian may be excused from this obligation under special circumstances.

On the request of the person under guardianship, the authority may oblige the guardian to submit an ad hoc report in addition to the annual report.

3.11.2.1.7 Payment and liability of guardians
The guardianship authority shall remove the guardian from office, preceded by suspension in cases for which prompt action is required, if the guardian fails to fulfil his/her obligations or if s/he engages in conduct by which to cause serious injury to or endanger the interests of the person under guardianship.

The career guardians are employees of the local municipality and they receive their salary from it. The amount of the salary varies from one municipality to the next. Non-career
guardians do not receive any salary or similar payment. However, the social benefits of the person under guardianship are delivered into their hands.

3.11.2.1.8 Duration of guardianship
The court shall periodically review its decision. The original decision of the court shall stipulate the exact date of the statutory review which cannot be later than 5 years from the court’s decision coming into force.

The court shall review its decision on the request of people and authorities mentioned in Article 21 of the Civil Code, which also includes the person under guardianship.

As a result of the statutory review the decision on guardianship can be altered or the guardianship terminated.

Guardianship comes to an end upon the death of the person under guardianship which can sometimes be problematic (e.g. in cases where the person under guardianship is in residential care and has no relatives).

3.11.2.1.9 The right to appeal
The person under guardianship can appeal against the decision of the court and request a review of the decision.

3.11.2.1.10 Recent developments in legislation related to guardianship
The new Civil Code was adopted by the Parliament on 9 November 2009 after the political veto of László Sólyom, the President of Hungary. The new rules on legal competency would have come into force on 1 May, 2010. During the adoption process many concerns were raised by political and professional stakeholders but on the whole, such concerns were not about the rules of legal competency. This new regulation contained crucial amendments based on human rights, such as abolishing complete guardianship and introducing supported decision-making and advanced directives. These rules would have made it possible to find tailored solutions for everyone, whilst diminishing their legal competency to the least possible extent. The cornerstones of the new regulation were in line with the United Nations Convention on the Rights of Persons with Disabilities (CRPD), which Hungary ratified in July 2007.

However, despite the campaign by concerned NGOs, the new government of Hungary decided that the new Civil Code would not come into force. Moreover, new committees are working on a completely new Civil Code. The deadline for elaborating the new text of the codex is 30 September 2011. There is no news about the planned date of adoption or effectiveness of the Civil Code. Non-governmental organisations are concerned as neither the Government nor the members of the committees expressed their views on the guardianship. NGOs are concerned that the rights of people under guardianship will remain at risk in the coming years.
3.11.3 Capacity in specific domains

3.11.3.1 Marriage and divorce
Part 1 of the Hungarian Family Act of 1952 deals with marriage. A person who has been placed under guardianship on the grounds of legal incompetency is not considered as having the capacity to marry (§8). A marriage can be annulled by a court on the grounds that one of the spouses did not have sufficient capacity at the time of the marriage (§§7-12). Guardianship for people with diminished capacity affects the capacity to marry as the decision of the court limits legal capacity in that domain, making it necessary to obtain the approval of the guardian.

3.11.3.2 Voting capacity
According to article 70 of the Constitution, all adult Hungarian citizens residing in Hungary have the right to be elected and to vote in parliamentary elections, local government elections or minority self-government elections. This right does not extend to people who are under guardianship.

3. Article 2, paragraph 2 of Act No. XXXI of 1989 on the Election of Members of Parliament excludes people who are under guardianship with partial or complete incapacity from voting in elections for Members of Parliament.

4. The Mental Disability Advocacy Center (MDAC) recently won a case at the European Court of Human Rights in which the court stated that this absolute bar constitutes a violation of Article 3 of Protocol No. 1 to the European Human Rights Convention: http://mdac.info/en/european-court-human-rights-upholds-right-vote-per

3.11.3.3 Contractual capacity
People with diminished capacity have the right:

- to conclude contracts of minor importance aimed at satisfying their everyday needs;
- to dispose of 50% of their earnings acquired through work or social benefits;
- to assume obligations up to the extent of their earnings;
- to conclude contracts that only offer advantages;
- make legal statements of a personal nature for which they are authorised by legal regulation (Section 14 of the Civil Code).

According to section 18 of the Civil Code, legal statements made by legally incompetent people are considered null and void but legal representatives may act on behalf of incompetent people. Contracts of minor importance which do not require any special consideration can nevertheless be made by incompetent people and are not considered null and void.
Section 18 further stipulates that legal statements made by legally incompetent people who are not under guardianship are not considered null and void provided that, on the basis of the content and circumstances of the statement, it could be concluded that it would also have been justified had the person been legally competent.

### 3.11.3.4 Testamentary capacity

It is possible to allocate a certain amount from the assets of the person under guardianship (on request and with the approval of the guardianship authority) to a descendant for the subsistence costs of the descendant provided that this does not exceed the compulsory share of inheritance of the descendant (Article 16 paragraph 2 of the Civil Code).

People with diminished capacity shall only be entitled to make public wills. Neither the consent of their legal representatives, nor the approval of a guardian shall be required for the public wills of such people to be valid. A public will can be drafted before a notary public or a court. Public wills cannot be validly drafted before a person who is a relative, guardian or conservator of the testator or the testator’s spouse. Any bequest in favour of a person participating in the drafting of a public will or the relative, guardian, conservator or ward of such person shall be null and void.

People considered as legally incompetent do not have the capacity to make a will.

### 3.11.3.5 Civil responsibility

Section 16/A. of the Civil Code states that people who mislead others regarding their legal competence shall be held responsible for their acts. Section 347 addresses the issue of liability for damage caused by people with deficient or no mental capacity. It states:

1. A person with deficient or no mental capacity shall not be held liable for his/her actions. Liability for his/her actions shall be borne by his/her guardian, unless s/he is able to prove that, in the interest of performing his/her guardianship, s/he has acted in a manner that can generally be expected in the particular situation.

2. If a person causing damage has no guardian or the liability of the guardian cannot be established, under special circumstances the person causing the damage can be ordered to provide total or partial compensation if it is clearly warranted by the circumstances of the case and the financial conditions of the parties.

3. A person causing damage may not allege his/her mental incapacity or impairment if such condition was inflicted by the person him/herself.

### 3.11.3.6 Criminal responsibility

With regard to criminal responsibility, section 22 of Act IV on the Criminal Code cites an “insane mental state” as grounds for the preclusion of punishability for a criminal offence.

Section 24 of Act IV on the Criminal Code states:
(1) That person shall not be punishable, who perpetrates an act in such an insane state of mental functions – thus in particular lunacy, imbecility, dementia, cognitive or personality disorder, – which makes him/her unable to recognise the consequences of the act or to act in accordance with this recognition.

(2) The punishment may be mitigated without limitation if the insane state of mental function hinders the perpetrator in the recognition of the consequences of the act or in acting in accordance with this recognition.
3.12 Iceland

3.12.1 Issues surrounding the loss of legal capacity/competence

3.12.1.1 Definition of legal competence
According to the Act on Legal Competence, No. 71/1997 (hereafter referred to as ALC), a person becomes legally competent at the age of 18. A legally competent person is considered to be competent to manage his/her personal and financial affairs (section 1).

3.12.1.2 Conditions for the deprivation of legal competence
According to section 4 of the ALC, a person can, if necessary, be deprived of legal competence, personal competence alone, financial competence alone, or both by judicial decision:

a. If he or she is unable to manage his or her personal or financial affairs by reason of mental debility, old age infirmity or mental disease, or by reason of other serious health condition.

b. If he or she is, as a result of excessive use of alcohol or drugs of habituation or dependence, unable to manage his or her personal or financial affairs.

c. If he or she is not able to manage his or her personal or financial affairs in a satisfactory manner by reason of physical disability, health failure or other impairment, and therefore decides to request deprivation of legal competence.

d. If the provisions of health care legislation make it necessary to commit the person in question to a hospital without his or her approval.

3.12.1.3 Extent of deprivation of legal competence
A person can be deprived of legal competence for a limited or unlimited period of time. Financial competence can also be limited or unlimited in time, as well as limited to particular property. This includes real property, aircraft, ships and vehicles for which registration is required, negotiable instruments and money on deposit accounts with commercial banks and savings banks, and shares owned in securities funds (section 5).

After a request for deprivation of legal competence has been submitted to the relevant court, a person may be provisionally deprived of competence if the conditions outlined above are deemed fulfilled and deprivation of legal competence is urgently needed (section 6). A person can only be deprived of legal competence to the extent the judge considers necessary in each case (section 12).

3.12.1.4 Who can request deprivation of legal competence
According to section 7 of the ALC, the following people can make a request for the deprivation of legal competence:

• The person him/herself (known as the respondent in this law).
• The respondent’s spouse, his/her relatives by direct descent and siblings.
• The respondent’s guardian or administrator.
• The respondent’s nearest successor under the law of inheritance or an irrevocable testamentary disposition.
• The social security office or a corresponding municipal authority at the respondent’s place of stay at the time a request for deprivation of legal competence is considered advisable as a result of his or her own petition or that of his or her next of kin, physician or friends, or by reason of knowledge of his or her situation otherwise obtained.
• The Minister of Justice, if recommended by the public interest.

3.12.1.5 The procedure for the deprivation of legal competence
Section 8 of the ALC states that a request for deprivation of legal competence should be made in writing and that the following information must be provided:

a. The name, National Registry number and legal domicile of the plaintiff.

b. The name of the respondent, his or her National Registry number and legal domicile, and his or her place of stay, if other than the legal domicile.

c. Whether the request is made for deprivation of personal competence, financial competence, or both.

d. If temporary deprivation of legal competence is requested, the period of time for which this is requested.

e. If deprivation of financial competence in relation to particular property is requested, an exact specification of the property or properties.

f. The names and addresses of the respondent’s spouse or cohabiting partner, his or her legally competent children and parents, and information on whether those persons know of the request.

g. The name of the respondent’s family physician and of any medical consultants he or she may have consulted, if known, provided their written opinions are not attached to the request.

h. The reasons why deprivation of legal competence is requested.

i. The legal basis for the plaintiff’s status as a party to the case.

If possible, medical certificates and other documentary evidence in support of the request should be attached. In any case, the judge may collect on his/her own any evidence, including medical certificates, that were not submitted when the claim was made. The person making the request can withdraw it at any stage of the proceedings.

The judge may summon the respondent to appear in court, explain the request and give the respondent the opportunity to express his/her views on the matter. The judge may also summon the person making the request and any witnesses to appear in court if
necessary. If the respondent ignores the judge’s request to appear in court, he or she may be brought to the court by the police. If it is not possible for the respondent to appear in court, the judge must go to the respondent’s place of residence in order to personally ascertain his/her condition (unless it is clear from a medical certificate or other evidence that this is of no significance for the outcome of the case) (section 11).

The remuneration of the counsel appointed for the respondent and the representative appointed for the plaintiff (the person making the request), and any other legal costs, including the cost of obtaining medical certificates and other expert evidence, is paid by the State Treasury (section 17).

3.12.2 Proxy decision making

3.12.2.1 Appointment of an administrator

3.12.2.1.1 Conditions for the appointment of an administrator

A person possessing financial legal competence who is not able to manage his or her financial affairs in a satisfactory manner by reason of illness or disability can request the appointment of an administrator provided that he or she is aware of the significance of such a measure.

3.12.2.1.2 How this is arranged

To do this, the person must submit a petition for the appointment of an administrator to the supervisor of guardians using the official form for this purpose. This should be accompanied by a medical certificate which includes the doctor’s opinion as to whether the petitioner is aware of the significance of the requested measure. Details of the spouse or cohabiting partner should be given along with the details of the property/affairs to be managed and any request for the appointment of a particular person as administrator.

The supervisor then looks into the matter, collects additional information and consults the spouse or cohabiting partner. He or she then makes a decision and appoints an administrator if necessary. This procedure does not seem to involve any court procedure (article 33 to 37 of ALC).

3.12.2.1.3 Compensation and liability of administrators

The supervisor of guardians fixes the amount of remuneration to be paid by the client to the administrator. The client must also pay ISK 5,000 to the State Treasury for the appointment of an administrator and for any changes to his or her functions.

3.12.2.2 Guardianship

3.12.2.2.1 Conditions for the appointment of a guardian

As soon as the supervisor of guardians receives notification that a person has been deprived of personal competence, financial competence or both (including limited deprivation), he or she takes the necessary measures to appoint a guardian on that person’s behalf (section 50).
3.12.2.2 How guardianship is arranged
The decision to appoint a guardian is made in writing and states the following:

a. The name, National Registry number and legal domicile of the person not possessing legal competence, and his or her place of stay, if other than the legal domicile.

b. The name, National Registry number and legal domicile of the appointed guardian.

c. Where and when the person in question was deprived of legal competence, personal or financial, and whether the deprivation of legal competence was temporary. If so, the time of its cancellation shall be stated. In case of deprivation of financial competence that relates to particular property, only that property shall be stated exactly.

d. The remuneration of the guardian, and the manner of its payment.

The supervisor of guardians then issues a letter of appointment of guardian which is sent to the guardian who has been appointed.

3.12.2.3 Who can be a guardian
Guardians must be in possession of full legal competence, financially solvent, reliable and prudent, and otherwise well suited for the task. They must also have agreed to being appointed. The person who has been deprived of legal competence can request the appointment of a specific guardian. Provided that such appointment would not be in conflict with the interests of the person deprived of legal capacity, he or she will be appointed. The spouse or cohabiting partner of the person deprived of legal capacity is entitled to make observations concerning the selection of a guardian (section 55).

3.12.2.4 The duties and responsibilities of guardians
Guardians must consult the person not possessing legal competence for any affairs that they are handling, except for matters of a minor nature. They should also conduct the person's affairs in the best interests of that person at that particular time. Guardians must also respect any further instructions given by the supervisor of guardians and/or the Ministry of Justice (section 60).

Guardians of people not possessing financial competence must immediately after appointment compile a report of the person’s liabilities and assets, unless the guardianship is limited to a particular property. They must also submit a yearly report to the supervisor of guardians giving details of any significant decisions made in the last year (section 63).

According to section 58, the guardian of a person deprived of personal competence shall have the power to take any necessary decisions concerning the personal affairs of the person so deprived, which that person is unable to take on his or her own. Any lawful decision of the guardian shall be binding upon that person as if he or she had taken it in possession of full personal competence.
S/he also has powers related to involuntary internment.

Subject to any other provisions of law, the guardian of a person not possessing financial competence shall be in charge of that person's financial affairs. If a person has been deprived of financial competence in relation to particular property, the guardian shall only be in charge of that property. Any lawful disposition by the guardian shall be binding upon the person deprived of financial competence as if he or she had made it in possession of full financial competence.

3.12.2.2.5 How the financial affairs of the ward are handled

Chapter VI of the ALC of 1997 deals with the management of assets and liabilities of people not possessing financial competence.

Immediately on taking up his/her duties, guardians must make an inventory of all the ward's assets, make an annual report on the status of assets and liabilities and send a copy to the supervisor of guardians (section 63). If the amounts concerned are quite high, an auditors report may be necessary. Donations or winnings equaling or in excess of ISK 500,000 must be notified to the supervisor of guardians.

The person's assets must be well safeguarded and managed so as to provide a good return when needed. If the assets amount to more than ISK 500,000 in value, the guardian must consult the supervisor of guardians (section 67).

Income and dividends must be used for the benefit of the person lacking legal capacity. S/he may be allocated by the guardian a suitable amount of money for personal use (section 68).

Approval from the supervisor of guardians is needed for certain transactions such as the purchase, receipt or sale of property, aircraft, ships or vehicles; the lease of property for more than 3 years; or for transactions of a significant or extraordinary nature such as the appointment of a managing director for a business enterprise (section 69). There are also special provisions for mortgages and extending loans (section 72).

3.12.2.2.6 Measures to protect the ward from misuse of power

In certain cases (e.g. for amounts equaling or exceeding ISK 500,000), when someone makes a payment to the guardian of a person lacking financial competence, s/he must notify the supervisor of guardians (section 73).

The funds and negotiable instruments (assets?) of the person lacking incapacity must be kept separate from those belonging to the guardian. The supervisor of guardians may decide to take over the control of any assets of the person lacking capacity. In that case, the guardian would not have any control over those assets.

The Minister of Justice may issue further regulations concerning the managements by a guardian of the assets of a person lacking capacity (section 67).
The work of the guardians is monitored by the supervisor of guardians who must keep a record of his/her decisions relating to each guardianship case.

3.12.2.7 Compensation and liability of guardians
Guardians are refunded for any costs incurred as a result of carrying out their functions. This is generally paid from the property of the person deprived of legal competence. The supervisor of guardians may also decide that the guardian should receive payment for his/her work. If so, this is also be taken from the property of the person deprived of legal competence. However, if the latter has a very low income or for certain specific reasons, the supervisor of guardians may decide that such expenses are to be paid by the State Treasury. The Minister of Justice can also issue more detailed rules on the remuneration of guardians.

Guardians are obliged to compensate the people they are representing for any damage that they cause, either by intent or negligence, in the exercise of their functions.

3.12.2.8 Duration of the guardianship measure
Guardians may be released from their duties if they so request or if the supervisor of guardians considers that they have neglected their duties, have acted in violation of their duties or no longer fulfil the general requirements for being a guardian (section 64). The death of the ward also results in the termination of guardianship.

On termination of his/her duties, a guardian must send a report to the supervisor of guardians with details of the transactions s/he has managed on behalf of the person with dementia. Details are not given about conditions for the ending of the guardianship measure.

3.12.3 Capacity in specific domains

3.12.3.1 Marriage and divorce
According to the Law in Respect of Marriage, No. 31 of 14 April 1993, a person who has been deprived of legal competence cannot enter into marriage without the guardian’s approval. If the guardian refuses to give his or her approval, the person may ask for the matter to be referred to the Ministry of Justice which may authorise the marriage if it considers that the denial was unwarranted (article 8). If one of the people to be married lacks legal competence, the marriage settlement must be confirmed in writing by the guardian (article 81).

Either spouse may claim annulment of the marriage if one of the partners was not “in command of their reason” at the time the union was proclaimed (article 28).

3.12.3.2 Voting capacity
General conditions governing the right to vote are mentioned in article 33 of the Constitution of the Republic of Iceland of 17 June 1944 which states: “All persons who, on the date of an election, are 18 years of age or older and have Icelandic nationality have the
right to vote in elections to “Althingi”. Permanent domicile in Iceland, on the date of an
election, is also a requirement for voting, unless exceptions from this rule are stipulated
in the law on elections to “Althingi”. Further provisions regarding elections to Althingi
shall be laid down in the Law on Elections”.

In the Local Government Elections Act, No. 5/1988, article 33 states that people who are
eligible to vote in a municipality and who have not been deprived of legal competence
are eligible to stand for election to a municipal council.

It is not clear whether the right to vote is affected by the deprivation of legal capacity.

3.12.3.3 Contractual capacity
If a person lacking legal competence concludes an agreement without having the author-
ity to do so, the other party has the right to rescind23 the agreement, provided that the
agreement has not been confirmed by the guardian. If the other party was aware that
the person lacked legal competence and that the guardian’s approval had probably not
been granted, he or she cannot rescind the agreement until a suitable time for obtaining
the guardian’s approval has elapsed (section 77).

If a person lacking legal competence is found to have acted fraudulently or dishonestly in
concluding an agreement, he or she must compensate the other party. The courts may,
however, reduce the amount of compensation to be paid depending on the means of
the person lacking legal competence and other circumstances (section 77 of the ALC).

If a person knowingly concludes an employment agreement with a person not possess-
ing legal competence (without reasonably believing that the guardian’s approval has
been sought), he or she cannot rescind the agreement if the person not possessing legal
competence performs his/her duties (section 77).

The culpa rule (please see sub-section on civil responsibility) also applies to contractual
relations (Björnsson, 2009)

3.12.3.4 Testamentary capacity
Article 34 of the Act on Inheritance of 1962 states:

Any person who has attained the age of 18 years, or has entered into marriage, can
dispose of his or her property by will.

A will shall only be valid if the person making the preparing disposition was of such
sound mind as to be capable of making the disposition in a reasonable manner.

In article 39, it is further stated that a provision in a will to the effect that the testator’s
property should be destroyed is invalid, unless it is based on a sound and sensible reason.
A will must be executed in writing and signed (or have the signature witnessed) in the
presence of a public notary or two witnesses (article 40). The witnesses must certify that
the testator was of sufficiently sound mind as to be capable of making a will (article 42).
If it is later established that a testator or his/her witnesses lacked capacity, the provisions contained in the will can be contested (article 45).

The above provisions concerning wills also apply to gifts to be handed over after death or in anticipation of death (article 54).

A person who has had an administrator appointed on his/her behalf does not lose the right to make testamentary dispositions (section 41 of the ALC).

3.12.3.5 Civil responsibility
Björnsson (2009) provides details of the parts of the Tort Damages Act (TDA) of 1993 (Skadabótalög nr. 50/1993) applicable in the case of non-contractual legal liability. The *culpa* rule is applied, which means that a person is held liable for intentionally or negligently causing harm. However, the tortfeasor is not considered liable and would be acquitted if s/he had a mental disorder of sufficient seriousness as to render him/her incapable of understanding the nature of his/her behaviour or the consequences of such behaviour. Nevertheless, it is still possible, according to a special rule in the “Jónsbók” (dating back to 1281), for a person with such a serious mental disorder to bear strict liability (i.e. legal responsibility without fault).

3.12.4 Criminal responsibility
If it is established in a criminal case that a person lacking legal competence has acted criminally in concluding an agreement, he or she must compensate the other party (section 77 of the ALC).

Responsibility for a crime is also covered by article 15 Chapter 2 of the Penal Code which states:

*A person who was, at the time an act was committed, totally unable to control his/her actions on account of mental disease, retardation or deterioration, or on account of impaired consciousness or other similar condition, shall not be punished.*

3.12.5 References


24 The person who has committed a tort.
3.13 Ireland

3.13.1 Issues surrounding the loss of legal capacity

There is a general recognition that capacity is poorly defined in Irish law and that there has long been a need for a clearer definition and a more flexible approach (as opposed to the all-or-nothing nature of wardship as outlined below). Following the publication of a report by the Law Reform Commission and extensive public consultation, new draft legislation was due to be published in early 2009. However, publication has been delayed. The legislation, when it arrives, is likely to introduce a statutory definition of capacity and a functional approach which would recognise that a person may have capacity in relation to certain decisions and not others. The original draft legislation also contained proposals for the establishment of an Office of Public Guardian which would replace the Office of Wards of Court and exercise an oversight function in cases of incapacity. Due to the delay in publication of the Draft Bill, this paper focuses on the current situation while noting that significant change is likely in the near future.

3.13.2 Proxy decision making

3.13.2.1 Guardianship

Guardianship, or wardship as it is referred to in Ireland, is governed by laws which are contained in the Lunacy Regulation (Ireland) Act of 1871 and also the Rules of the Superior Courts (RSC). The term “lunatic” is frequently referred to in the 1871 legislation and is understood to mean “any person found by inquisition idiot, lunatic or of unsound mind and incapable of managing himself or his affairs”. However, this term is avoided as far as possible in general usage. The person subject to guardianship is referred to as the ward.

3.13.2.1.1 Conditions for the appointment of a guardian

A guardian may be appointed for a person who has been declared to be of unsound mind and incapable of managing his/her person or property.

3.13.2.1.2 How wardship is arranged

There are different possibilities for arranging wardship which depend on the situation of the person for whom the measure is intended. If, for example, the need for wardship is urgent or there is a need to minimise costs, the Judge (the President of the High Court) can arrange for a medical visitor to examine a person at the request of a solicitor who has expressed concern for the person’s welfare. The report made by the medical visitor is then considered as a petition and the Judge can order in open court that the person be taken into wardship.

If the proposed ward has an estate of not over £5,000 or his/her annual income does not exceed £300 p.a., the procedure is governed by S. 68 of the 1871 Act and Order 67 Rules 21-30 apply. For a proposed ward, who is weak of mind but only temporarily incapacitated, this would be governed by S.103 of the 1871 Act and the Order 67 Rules...
31-37 would apply. However, according to John Costello (1993), in the majority of cases the following procedure applies.

1. A social worker or member of the proposed ward’s family contacts a solicitor with a view to discussing wardship.

2. Two medical reports are then obtained from two different medical practitioners (usually on oath) which should specify the nature of the medical condition and the probable duration of the disorder. It should also be mentioned in the reports that the proposed ward is incapable of managing his/her affairs as these reports will be used to support a petition for an inquiry to be set up into the soundness or unsoundness of mind of the person in question.

3. A petition is then made, usually by the next of kin, but this is not obligatory. Anybody could be a petitioner, even a stranger. This is known as a section 15 petition, as the procedure in S.15 of the 1871 Act is followed in these applications by the Judge. The petition should include personal details about the proposed ward (e.g. name, address, marital status, religion and next of kin), information about the nature and amount of his/her property and debts, and information about the petitioner who must swear, in addition, that the contents of the petition are true.

4. When the petition has been lodged with the Wards of Court Office and the Registrar, the Judge may then make an inquiry order on the basis of the petition and doctors’ reports. The Registrar’s medical visitor examines the proposed ward and makes a confidential report.

5. The petition is then served by a solicitor to the proposed ward in which it is stated that an inquiry has been set up to determine whether s/he is of unsound mind and incapable of managing his/her person and property. The person is invited to make any objections or to request that the inquiry take place before a jury. If the person makes no objection to the inquiry, the Judge usually declares him/her to be a ward of Court.

6. Once the person has been made a ward of Court, the petitioner is required to draw up a statement of facts which contains information about:

   • the ward’s situation;
   • the nature of his/her mental illness;
   • the person who should be appointed committee (guardian) of his/her person and estate;
   • the value of the ward’s property;
   • the amount of his/her gross and net income;
   • present and future maintenance costs;
   • details of any debts belonging to the ward;
   • the location of the ward’s will (if one was made);
3.13.2.1.3 Who can be a guardian
The power to decide on the person's behalf may be vested in the court or in a person appointed by the court. (need further information such as if priority is given to spouses etc.).

3.13.2.1.4 The duties and responsibilities of the guardian
The guardian of a ward of court is responsible for his/her financial affairs and for this reason the system is not suitable for cases where the personal welfare of the person needs protection.

3.13.2.1.5 How the financial affairs of the ward of Court are handled
A committee of the person and estate of the ward is appointed by the Judge. The committee must lodge the proceeds of all bank accounts and building society accounts with the Accountants Office, which then controls the funds and invests them as directed by the Wards of Court. If the committee of the estate has been authorised to receive income or rent on behalf of the ward, s/he must submit an account of this to the Registrar. Income tax (returns and payments) can in certain cases be handled by an accountant.

The committee can obtain authorisation to sell property. This is often permitted in cases where the ward’s house is unoccupied, which can result in difficulties insuring it and increase the likelihood of it depreciating in value. If the ward owns agricultural land or property for which s/he is already receiving a rent, the committee is usually permitted to carry on letting it. If it is decided that it is necessary to sell the land or property of the Ward, the Registrar will have it valued, fix a minimum price and it can then be sold.

3.13.2.1.6 Measures to protect the ward against misuse of power
Information needed (e.g. the obligation to send yearly accounts or to have special permission to carry out certain transactions).

3.13.2.1.7 Duration of wardship
Information needed.

3.13.2.1.8 The right to appeal
When the inquiry is set up to determine whether the person is of unsound mind and incapable of managing his/her person and property, s/he is invited to make any objections or to request that the inquiry take place before a jury. If no objection to the inquiry is made, the Judge usually declares him/her to be a ward of Court.

3.13.2.2 Continuing powers of attorney
3.13.2.2.1 The conditions for setting up a continuing power of attorney
Under the Powers of Attorney Act of 1996, a power of attorney can be made which continues to be valid even when a person is no longer legally competent. Before this law came into force, a power of attorney was automatically revoked as soon as a person became mentally incapable.
3.13.2.2  How continuing powers of attorney are arranged

In order to make an enduring power of attorney, statements must be provided:

- that the donor (i.e. the person writing the power of attorney) has read the information concerning the creation of a power of attorney or has had the information read to him/her (to be provided by the donor);

- that the donor had mental capacity at the time of writing it and understands the consequences of giving power to an attorney (to be provided by a registered medical practitioner);

- that the attorney understands the duties and obligations involved in being an attorney, as well as the requirements of registration (to be provided by the attorney); and

- that the donor understood the effect of creating the power of attorney and that the document was not executed as a result of fraud or undue pressure (to be provided by a solicitor).

An enduring power of attorney (EPA) only comes into force once it has been registered. As soon as the attorney has reason to believe that the donor is or is becoming mentally incapable, s/he must make an application to the registration in the Wards of Court Office. This can be supported by a statement (signed by a registered medical practitioner) that the donor is or is becoming incapable by reason of a mental condition of managing and administering his or her own property and affairs. The donor must then be informed, as should a number of people, e.g. the spouse, children, parents, brothers and sisters, grandchildren etc. The attorney can request that certain people should not be informed on the grounds that it would be undesirable or impracticable or that it would serve no useful purpose (see also the right to appeal).

3.13.2.2.3  Who can be an attorney

The donor can appoint one or more attorneys and can specify that they act jointly. An attorney must be at least 18 years of age and not have been bankrupt or convicted of an offence involving fraud or dishonesty or an offence against the person or property of the donor. The attorney cannot be the owner of a nursing home where the donor resides or an employee or agent of the owner, unless this person is a spouse, parent, child or sibling of the donor.

If the donor and attorney are married, the enduring power of attorney will be invalidated or cease to be in force if:

1. subsequently the marriage is annulled or a divorce granted;
2. a separation is granted to either spouse;
3. there is a written agreement to separate; or
4. there is a protection order or safety order made against the attorney at the request of the donor.
The donor can give power to one or more specified persons to take over from the appointed attorney in case of the latter’s death.

3.13.2.2.4 The duties and responsibilities of the attorney
The Powers of Attorney Act of 1996 states that the attorney may act on behalf of the donor in relation to all or a specified part of his/her property or affairs, subject to the restrictions and conditions specified by the donor. Unless otherwise stipulated in the document, the attorney can act for his/her own benefit or that of other people to the extent that the donor might be expected to be responsible for providing for those needs. The attorney can also dispose of the property of the donor by making gifts of a seasonal nature or on the occasion of a birth, anniversary or marriage to relatives or other people connected to the donor. Gifts can be made to charities to which the donor previously contributed or might be expected to contribute to. In all cases, the gifts should be reasonable and in keeping with the circumstances and extent of the donor’s assets.

An enduring power of attorney also covers personal care decisions. The attorney can, for example, make decisions such as where and with whom the person should live and whether s/he should have contact with certain people. Personal care decisions must be made in the best interests of the donor. The following guidelines are provided as to how to decide on the donor’s best interests.

- The attorney should take into consideration, as far as is ascertainable, the past and present wishes and feelings of the donor, as well as factors which the donor would have considered (had he or she been able to do so).
- The attorney should allow, encourage and facilitate the participation of the donor in decisions as far as possible.
- The attorney should consult certain people in order to find out their views as to the donor’s wishes and feelings and what would, in their opinion, be in the donor’s best interests. These people would include anyone named by the donor as someone to be contacted on particular matters and anyone engaged in caring for the donor or interested in his/her welfare (e.g. the spouse, relatives, friends, etc.)
- The attorney should consider whether the proposed measures could be achieved in a less restrictive manner.

However, the attorney has no authority to make healthcare decisions, i.e. to authorise medical treatment or operations (Costello, 1998).

3.13.2.2.5 The right to appeal
The donor may object to the application for registration of the EPA. Under the Act, the donor has five weeks from receipt of notice in which to appeal to the Wards of Court Office. S/he could object that the enduring power of attorney was not valid or no longer valid, that s/he was not mentally incapable or becoming so, that the attorney was in
some way unsuitable for the post or that the enduring power of attorney was written under pressure. The Court may decide to cancel the registration of the EPA.

3.13.2.3 Care representatives
The Nursing Homes Support Scheme Act S2009 introduced elements of the proposed new approach to capacity within a specific limited context. It is the first piece of Irish legislation to enshrine the presumption of capacity and to adopt a functional approach to capacity (i.e. capacity is assessed only in relation to a person’s ability to make a particular decision).

The purpose of the Act is to establish a scheme of state support for nursing home care, including allowing the state to fund nursing home care through a loan secured by a charge on the applicant’s property, repayable on the death of the applicant OR the property of the person for whom the measure is intended (referred to hereafter as “the relevant person”), repayable on his/her death. Part 4 of the Act allows for the Circuit Court to appoint a care representative in the case of a person not having full capacity, for the purposes of making an application for ancillary State support and giving the necessary consent to the creation of the charge. (The appointment of a care representative is only necessary in situations where there is no Enduring Power of Attorney or the person concerned is not already a Ward of Court.)

3.13.2.3.1 Conditions for the appointment of a care representative
If the court is satisfied that the relevant person concerned is incapable for the time being of making a decision to which this section applies, and the court determines that it is in the best interests of the relevant person concerned, having regard to the expressed wishes, if known, of the relevant person concerned, and the circumstances of the relevant person concerned, the court may appoint a person to be a care representative. The court may also appoint more than one care representatives in which case they act jointly unless otherwise specified by the court.

3.13.2.3.2 Who can be a care representative
People who may apply to be care representatives, in order of descending priority, are as follows: where the person is a member of a couple, the other member of the couple; a parent of the relevant person; a child of the relevant person; a brother or sister (whole or half-blood of the relevant person); a niece or nephew of the relevant person; a grandchild of the relevant person; a grandparent of the relevant person; an aunt or uncle of the relevant person; a person who appears to the court to have a good and sufficient interest in the welfare of the relevant person and who is not either the proprietor of a nursing home in which the relevant person resides or is likely to reside, or one of the registered medical practitioners who prepared reports on the person’s lack of capacity.

A person may not be a care representative if they have been adjudicated bankrupt (unless the bankruptcy has been discharged or annulled), convicted of an offence involving fraud or dishonesty, or convicted of an offence against the person or property of the person concerned.
3.13.2.3.3 The duties and responsibilities of care representatives
The powers of the care representative are strictly limited to dealing with matters relating to the application for state support and the creation of the charge on property.

3.13.2.3.4 Measures to protect the relevant person against misuse of power
The court has the power to request accounts and can remove and replace a care representative.

3.13.3 Capacity in specific domains

3.13.3.1 Marriage and divorce
The issue of whether a person with a mental illness can enter into a marriage was the subject of several court cases in the 1870s and 1880s (British Medical Association/the Law Society, 1995). The distinction was made between understanding the marriage ceremony and understanding what is involved in the marriage. If one party to the marriage is unable to consent, the marriage can be declared either void or voidable. A void marriage is one that in the eyes of the law never took place, whereas a voidable marriage is one which can be annulled at the request of either party. A person who has been made a ward of court cannot marry.

If anyone considers that a person lacks the capacity to marry, they may lodge their objection in writing with any registrar (Inclusion Ireland, 2010). It is then the duty of the registrar to investigate the issue and decide whether the marriage should take place.

3.13.3.2 Voting capacity
A person lacking mental capacity does not automatically lose the right to vote. There is, however, a definition of legal incapacity to vote which was defined in a court case in 1874 (Stowe v Joliffe) (British Medical Association/the Law Society, 1995). According to the ruling from this case, there is “some quality inherent in a person, which either at common law, or by statute, deprives him of the status of Parliamentary elector”. Although doctors and lawyers rarely become involved in cases to prevent a person lacking mental capacity voting, this definition is still valid today. Common law also applies in relation to mental capacity. In the Oakhampton and Robin’s case (1791) it was declared that a “lunatic” could vote but only during a lucid interval. Although the term is offensive nowadays, the provisions of this case were confirmed in subsequent cases and are still applicable today for people suffering from a mental disorder. If the presiding officer at the polling station considers that a person lacks the capacity to vote, s/he may refuse that person access to vote (Inclusion Ireland, 2010).

3.13.3.3 Contractual capacity
As mental incapacity is assessed on the basis of the decision to be made, a person might be capable of making one kind of contractual agreement (e.g. to arrange for the daily delivery of a newspaper) but not another (e.g. a hire purchase agreement for a new car). In determining whether an agreement or contract should be rendered void, the courts
have to determine whether the person was capable or understanding the nature and effects of the specific contract. The courts must also protect the third party involved in the agreement. This person might or might not have been aware that the person with whom s/he made the agreement was lacking mental capacity. Consequently, if the third party was or should have been aware of the person’s mental incapacity, the contract would be voidable. Otherwise the person lacking mental capacity would be bound by the terms of the agreement. (Source: BMA/Law Society, 1995)

3.13.3.4 Testamentary capacity
One of the criteria for a will to be considered valid is that the person who made it was of sound mind. Consequently, a person who has been made a ward of court, having been declared of unsound mind and incapable of managing his/her person or property, would presumably not be able to make a valid will. A solicitor cannot aid a person to draw up a will, if s/he is not satisfied that the person fully understands what is involved. It is not possible to draw up a statutory document, i.e. a will drawn up by the Court on behalf of an incapacitated person as can be done in England (Costello, 1998).

3.13.3.5 Civil responsibility
Information needed.

3.13.3.6 Criminal responsibility
People in Ireland who are charged with a criminal offence and who are suffering from a mental disorder are dealt with under the Criminal Law (Insanity) Act 2006. This law came into effect on 1 June 2006.

The question of the mental state of someone in Ireland charged with a crime may arise at two different stages – at the start of the trial and at the decision on guilt. If a person is suffering from a mental disorder, they may be considered unfit to be tried at the start of the trial. In that case, no trial goes ahead. If a trial is held and the person is considered to have actually committed the offence but was insane at the time, it is possible for a verdict of not guilty by reason of insanity to be reached. In murder cases, the concept of diminished responsibility may be used to substitute a verdict of manslaughter.

A mental disorder in Irish law is defined as including mental illness, mental disability, dementia or any disease of the mind but does not include intoxication (drunkenness).

3.13.3.6.1 Fit or unfit to be tried
The decision on whether or not a person is fit to be tried is made by a judge. If the person cannot understand the charge or is unable to instruct a legal team, challenge jurors or follow the evidence, then they may be considered unfit to be tried.

This finding (that is that someone is considered unfit to be tried) is not a decision on the alleged criminal activity. If someone is found to be unfit to be tried, then the trial is postponed. The judge then decides what happens next. For example, the person may
be committed to a psychiatric hospital or unit if they are considered to be suffering from a mental disorder and are in need of in-patient treatment under the terms of the Mental Health Act, 2001. Alternatively, the person may be sent for out-patient psychiatric care. The person may be committed to a psychiatric hospital or unit for 14 days in order to establish whether or not they should be sent for treatment. The person may appeal against a committal order.

If the judge considers that there is a reasonable doubt that the person committed the alleged crime, the person may be acquitted. The Director of Public Prosecutions may appeal against a decision that a person is unfit to be tried.

3.13.3.6.2 Not guilty by reason of insanity
If someone is considered to have actually committed the offence but was insane at the time, the verdict may be not guilty by reason of insanity. According to common law and for the purposes of determining criminal responsibility, “insane” is understood to mean that the person:

1. did not know the nature and quality of the act;
2. did not know that what he or she was doing was legally wrong; or
3. was unable to refrain from committing the act.

This verdict is commonly known as “guilty but insane”. This decision is made by a jury. If this verdict is reached, the judge may order that the person be committed to a psychiatric hospital or unit in broadly the same way as applies in the case of being unfit to be tried.

3.13.3.6.3 Diminished responsibility in murder cases
If someone is charged with murder, the verdict of not guilty by reason of insanity is one possible verdict. The Criminal Law (Insanity) Act 2006 provides for the concept of diminished responsibility in murder cases. A conviction for murder in Ireland brings an automatic life sentence. In other crimes, the judge has discretion in relation to sentencing and so can take into account any diminished responsibility which may exist. If someone charged with murder successfully pleads diminished responsibility, then the verdict is manslaughter. The judge can then sentence the person to any length of time in prison.

3.13.3.6.4 Mental Health Review Board
The Mental Health (Criminal Law) Review Board’s main function is to review the detention of those found not guilty by reason of insanity or unfit to be tried, who have been detained in a designated centre by order of a court. The Review Board also has responsibility for people who have been convicted of offences and who become mentally ill while serving their sentences. The Review Board must have regard to the welfare and safety of the person whose detention it reviews and to the public interest. It may assign a legal representative to the person unless the person proposes to engage one. The Board is composed of a legal chairperson and a number of other people, at least one
of whom must be a consultant psychiatrist. It is obliged to review each detention at least once every six months.

3.13.4 References

British Medical Association/the Law Society (1995), Assessment of Mental Capacity; guidance for doctors and lawyers, British Medical Association

Costello, J. (1993), Wards of Court – a general guideline of the procedures involved, Gazette 1993

Costello, J. (1998), Legal Services and Older People (speech given at the national council on ageing and older people conference on 5 November 1998)


Department of Health (1995), White Paper; A New Mental Health Act, The Stationery Office, Dublin

3.14 **Italy**

3.14.1 **Issues surrounding the loss of legal capacity**

Law n. 6/2004 introduced into the Italian judicial civil system the rules known as “amministrazione di sostegno”. This is very similar to the German guardianship law (known as the Betreuungsgesetz) and means that the guardianship court appoints a person who is deemed capable of suitably looking after the person and his/her interests. The term describes the procedure which involves the provision of gradual protective intervention and responds to the specific needs and abilities of the beneficiary.

At present, the only law applicable to guardianship is this new one, even though it doesn’t repeal the previous rules of judicial disability (loss of fundamental basic rights which are acquired with adulthood) and judicial disqualification (incompetence to carry out business). This law involved a notable change of the whole section of the Italian civil code traditionally dealing with “infermità di mente” (insanity), “interdizione” (judicial disability) and “inabilitazione” (judicial disqualification). At this stage, the title of this section is “provisions for the protection of people who are partly or wholly unable to look after their own affairs”. This new law applies to people who are unable to look after their affairs due to major illness or permanent disability. The goal of the new rules is to balance the opposing needs for independence and protection, granting people as much freedom as possible and, at the same time, ensuring that they are provided with necessary protection that is proportionate to their needs and fair.

3.14.2 **Proxy decision making**

3.14.2.1 **Guardianship**

3.14.2.1.1 **Conditions for the appointment of a guardian**

“Amministrazione di sostegno” assists people suffering from insanity or any other physical or mental disease who, for these reasons, are unable to look after their own affairs. Consequently, it is not necessary to assess whether a person has full possession of his/her faculties. On the contrary, this new rule provides a wide range of possibilities. Indeed, it also includes the case of temporary or partial disablement linked to illness or disablement, as well situations in which it is impossible to look after one’s own affairs. As a result, the new law applies to all kinds of mental illness, to a wide variety of mental disorders, including mild dementia.

No fees or expenses are incurred by this procedure and no lawyer is needed.

The procedure can be undertaken even by the person who wishes to be the beneficiary of the guardianship measure (obviously provided that s/he is able to do this by him/herself), or by the spouse, or relatives up to 4th degree or relatives of the spouse to the 2nd degree, or the Public Prosecutor. At the same time, health and welfare services which are aware of a situation for which appointment of a guardian is necessary are under the
obligation to request the appointment of a guardian. The proceedings are started by the handing over of a petition to the competent guardianship judge to obtain the appointment of a guardian. The competent office depends on the place of residence or normal habitation of the beneficiary.

3.14.2.1.2 How guardianship is arranged
A decree issued by the guardianship court appoints the guardian following a hearing during which the person in need of assistance to take care of his/her own affairs must be heard. If s/he can’t attend the hearing, it is necessary to go to his/her place of residence.

The decree established by the judge must be the most flexible approach to guardianship, according to the particular needs of the beneficiary, both with regard to his/her welfare and personality.

A report must be submitted to the Judge – normally every year – in which the guardian describes the duties that s/he has carried out on behalf of the beneficiary supported by documents proving the beneficiary’s wellbeing, requirements (showing profit and expenditure) and state of health.

3.14.2.1.3 Who can be a guardian
The spouse, relatives or people who live with the beneficiary (even if not his/her relative) and other people who are deemed capable of looking after the person who needs assistance is/are appointed as guardian. However, the operator of public services or private care who are in charge of the beneficiary cannot be appointed guardian.

3.14.2.1.4 The duties and responsibilities of the guardian
The basic duties of the guardian are:

- to get acquainted with, evaluate and notify the Guardianship Court about the circumstances and needs in the life of the beneficiary;
- to represent and look after the beneficiary with the sole purpose of handling his/her affairs in accordance with the powers which were conferred on him expressly by the Guardianship Court.

The beneficiary of “amministrazione di sostegno” (the term used to refer to the person in need of assistance to look after his/her own affairs) remains legally competent and has the power to manage all acts for which the Guardianship Court did not grant power to the guardian. In any case, s/he can manage by himself/herself whatever is necessary for his/her everyday needs (e.g. the purchase of clothes and food).

All tasks covered by guardianship and those that can be jointly accomplished with the beneficiary or on his/her behalf must be stated in the appointing decree. These tasks are recorded in the register of civil status. Among other things, the decree must state the
amount of the money that the guardian is allowed to spend in the interest of the beneficiary. This sum can even have periodical limits.

### 3.14.2.1.5 Measures to protect the ward from misuse of power

The guardian must regularly report to the Judge of the Guardianship Court about the "personal and social life skills" of the beneficiary. At any stage of the procedure, for any kinds of decision which must be taken at any time by the Judge and the guardian, they must bear in mind the needs and wishes of the beneficiary, as much as possible and in accordance with the specific needs of each single case.

### 3.14.2.1.6 Compensation and liability of guardians

Guardians are not paid for the services they provide. However, the Guardianship Court may, considering the extent of the heritage to be protected and any difficulties linked to its administration, give a fair compensation to guardians.

Acts carried out by the guardian or the beneficiary in violation of laws or powers given by the appointing decree may be cancelled at the request of the guardian, the prosecutor, the beneficiary or his/her heirs.

The Guardianship Court declares the termination of the guardianship measure if it turns out to be inappropriate with regard to the full protection of the beneficiary.

### 3.14.2.1.7 Duration of guardianship

If the guardian is the spouse or a relative or a person living with the beneficiary, the duration of guardianship has no limit. In other cases, it cannot be longer than ten years or for the time decided by the judge based on the reason for the appointment. It can also be renewed or cease at any time due to the guardian’s resignation or revocation.

### 3.14.2.1.8 The right to appeal

Decrees of the Guardianship Court may be contested within ten days of notification. The Prosecutor may also lodge a complaint.

### 3.14.2.2 Power of attorney

As long as a person is still capable of understanding and intention, s/he can grant another person or people the right of legal representation. The legal representative would then have the authority to carry out certain acts on his/her behalf, e.g. issuing and receiving payments. A power of attorney can be either general or special (limited to specific matters). Acts of extraordinary administration are only possible if they are specifically detailed in the content of the power of attorney. Certain powers are non-delegable, such as the power to make a will on someone else’s behalf.

The power of attorney can be revoked at any time by the person who made it or renounced by the chosen representative(s). It remains valid even after the person becomes incapable of understanding and intention, but in this case, only for a short time as it would be
necessary to start the procedure to obtain the declaration of judicial disability or disqualification or “amministrazione di sostegno”.

3.14.3 Capacity in specific domains

3.14.3.1 Marriage and divorce
According to article 85 of the Civil Code, a person who has been made subject to judicial disability on the grounds of infirmity of the mind cannot get married. If the process of judicial disability has been started, the Public Prosecutor can demand that the marriage be postponed until a judgement has been made. This is further backed up by article 119 of the Civil Code, which states that any marriage by a person who has been made subject to judicial disability on the ground of infirmity of the mind may be contested by the guardian, the Public Prosecutor or any person with a legitimate interest. This can also occur if the judgement on judicial disability was made after the marriage but it was clear at the time of the marriage that the infirmity existed, unless the person has cohabited for one year.

If the person has not been made subject to judicial disability but it becomes clear at the time the marriage was contracted, s/he was incapable (even temporarily) of comprehension or intention, the marriage can be contested. This would not be possible if the person recovered his/her mental faculties and there had been cohabitation for one year.

3.14.3.2 Voting capacity
A person who is made subject to judicial disability has what is known as “absolute incapacity” and therefore cannot vote.

3.14.3.3 Contractual capacity
According to article 425 of the Civil Code, a disqualified person can run a commercial business provided that s/he has the authorisation of the court and at the discretion of the guardianship judge.

Article 427 states that deals or agreements made by a person subject to judicial disability or disqualification can be annulled at the request of the guardian, the person him/herself or his/her heirs and assignees. All acts performed by a person subject to judicial disability are invalid and there is no obligation to prove that the act entailed any prejudice or that the other party acted in bad faith. In fact, bad faith is actually presumed on the part of the other person contracting the agreement. This is due to the fact that the register in which judicial disability is recorded is freely accessible to the public and it is considered any person contracting a deal has acted in bad faith if they did not take the trouble to consult the register.

Deals or agreements made by a person who is not officially subject to judicial disability but who was suffering (even temporarily) from incapacity at the time of the action may be annulled at the request of the person concerned or his/her heirs or assignees. This is
covered by article 428 of the Civil Code. For acts not involving the disposal of assets, it is sufficient to demonstrate incapacity, whereas for acts involving the disposal of assets, annulment is only possible if the act entails serious prejudice to the incapable person. If not, the act remains entirely valid.

The situation in the case of contracts drawn up by people who lack the capacity for understanding and intention, but who are not subject to judicial disability or disqualification or “amministrazione di sostegno” is somewhat complicated in that it is necessary to prove that:

• The individual was incapable at the time of concluding the contract.
• S/he therefore suffered as prejudice. and
• The other contracting party acted in bad faith.

There is a legal presumption of the good faith of the contracting parties, which means that the person seeking the annulment of the contract must prove that the other party acted in bad faith. As this is not always easy to prove, there is a considerable risk of losing a case even for prejudicial acts carried out by the incapable individual.

3.14.3.4 Testamentary capacity
A person who has been made subject to judicial disability on grounds of infirmity of mind loses the right to make a will according to article 591 of the Civil Code. A person is also deemed to be incapable of making a will according to this article if s/he is proven to have been afflicted by incapacity for comprehension and intention at the time of making it. This is applicable even if the person is not officially subject to judicial disability.

If a will is made under either of the above circumstances, it can be contested by any interested party for up to five years from the date of execution of the testamentary dispositions.

3.14.3.5 Civil responsibility
Article 2047 of the Civil Code states that in the event of any damage caused by a person lacking the capacity for comprehension or intention, the person responsible for his/her supervision must pay compensation to the injured party. This person is legally responsible for the payment of any damages due as a result of the action.

However, it is possible to be exonerated from liability if the person can prove that it was impossible to prevent the damage, despite having performed the duty of supervision with all due care and attention.

If the injured party is unable to obtain damages from the person responsible for supervision, the judge may, on consideration of the financial situation of the parties involved, order the person who caused the damage (i.e. the incapable adult) to pay a fair sum as compensation.
3.14.3.6 Criminal responsibility

In order for a person to be held responsible for a crime or offence, s/he must have been imputable at the time it was committed. This means that the person must have had the capacity for comprehension and intention. The former is understood by judges and experts in criminal law to mean an individual's ability to recognise the significance of his/her own actions, whereas the latter is understood to mean the individual's capacity to make independent decisions.

According to article 85 of the Penal Code, a person is therefore deemed not to be imputable if, at the time of committing the deed, s/he was, by reason of infirmity, in a state excluding the capacity for comprehension and intention. In criminal proceedings it is the responsibility of the judge to determine whether this was the case at the time the crime was committed. It is not necessary for the person to have been previously declared subject to judicial disqualification or disqualification.

Should the person's capacity be greatly reduced but not actually exclude the capacity for comprehension and intention (as could also be the case at certain stages of dementia) s/he would be answerable for any offence committed but the penalties would be greatly reduced (covered by article 89 of the Penal Code).
3.15 Latvia

3.15.1 Issues surrounding the loss of legal capacity

According to article 357 of the Civil Law, “persons who are mentally deficient but, none-
theless, do not lack the intellectual capacity for management of ordinary matters, may
administer their own property and deal with it freely.”

Article 358 further states that trusteeship shall be established for people who are men-
tally ill and have been recognised as lacking the capacity to act and to legally represent
themselves. Mental illness or mental deficiency only has legal consequences when a
person has been found by a court to be lacking the capacity to act due to that illness or
deficiency (article 359).

3.15.2 Proxy decision making

Unfortunately, we were unable to obtain details about guardianship or continuing pow-
ers of attorney.

3.15.3 Capacity in specific domains

3.15.3.1 Marriage and divorce

Article 33 of the Civil Code states that people who have been found by a court to lack
capacity to act due to mental illness or mental deficiency are prohibited from marrying.
The marriage may be annulled if at the time of the marriage one of the spouses was
declared as lacking capacity to act due to mental illness or mental deficiency, or was
unable to understand the meaning of his or her actions or to control them (article 61).

3.15.3.2 Voting capacity

The Electoral Register Law of 22 January 2004 (which came into force on 5 February 2004)
covers the establishment of a voter registration system in the territory of the Republic of
Latvia and the registration of people who have the right to vote in the Saeima (the Par-
liament of the Republic of Latvia), the European Parliament, city council, county council
and parish council elections. To be eligible to vote, a person must have reached 18 years
of age, be registered in the Population Register and have the capacity to act. According
to section 15 of this law, it must be noted in the Population Register if a voter has been
recognised as not having the capacity to act.

3.15.3.3 Capacity to work

Section 71 of the Medical Treatment Act of 1997 addresses the issue of capacity to work.
It states that in cases of long-lasting or permanent limitation of physical or mental capa-
bilities, an expert assessment of health and work capability is carried out and disability
(invalidity) is determined by the state authorised Health and Work Capability Expertise
Commission (HWCEC) whose operation is governed by the legislative acts.
3.15.3.4 **Testamentary capacity**
According to articles 420 and 421 of the Civil Law, any person who has the capacity to act may make a will. A person with a mental illness is considered incapable of making a will.

3.15.3.5 **Civil responsibility**
Chapter 3 (Obligations and Claims arising from Wrongful Acts) of the Civil Law deals with “delicts”. According to article 1637, “persons with the capacity to act shall not be liable for delicts, if they committed the delict while unconscious or in a state of mental incompetence.”

3.15.3.6 **Criminal responsibility**
Chapter II of the Criminal Law addresses the issue of responsibility for criminal offences. The following sections are relevant to crimes committed by people with incapacity:

Section 8: Forms of Guilt

(1) Only a person who has committed a criminal offence deliberately (intentionally) or through negligence may be found guilty of it.

(2) In determining the form of guilt of a person who has committed a criminal offence, the mental state of the person in relation to the objective elements of the criminal offence must be established.

Section 13: Mental Incapacity

(1) A person who, during the time of the commission of the offence, was in a state of mental incapacity, that is, due to a mental disorder or mental disability was not able to understand his or her acts or control them, may not be held criminally liable.

(2) For a person who has been found to have a lack of mental capacity, the court shall order compulsory measures of a medical nature as set out in this Law.

Section 14: Diminished Mental Capacity

(1) If a person, at the time of the commission of a criminal offence, due to mental disorder or mental disability, was not able to understand his or her acts fully or control them, that is, was in a state of diminished mental capacity, the court may reduce the sentence to be adjudged or release such person from punishment, according to the actual circumstances of the offence.

(2) For a person who has been found to have diminished mental capacity, the court shall order compulsory measures of a medical nature as set out in this Law.

Sections 68 to 70 deal with the compulsory measures of a medical nature mentioned above. For people who are not considered dangerous to the public, a court may decide
to place them with their relatives or other people who will then care for them under the supervision of a medical institution linked to their place of residence (section 68).

Section 69, on the other hand, states that people with mental incapacity who have committed a crime and who are considered dangerous to the public due to their mental state may be obliged to have treatment in a psychiatric hospital, and that this should be determined by a court. Section 70 deals with people who have committed a crime whilst in a state of diminished responsibility. In such cases, the person may be obliged to undergo treatment at an institution in their place of residence or elsewhere depending on whether they are also sentenced to deprivation of liberty.

3.15.3.7 Disturbance of public order
“If a person due to a mental disorder or mental disease disturbs public order, his or her detention, conveyance to and supervision at the psychiatrist’s shall be performed by police officers in accordance with the Law on the Police. The police officers shall submit to the psychiatrist a notice in writing of the anti-social nature of the behaviour of the patient.” (Section 69 of the Medical Treatment Law of 1997)
3.16 Lithuania

3.16.1 Issues surrounding the loss of legal capacity

Article 2.10 of the Civil Code states that a person who as a result of mental illness or “imbecility” is unable to understand the meaning of his/her actions or control them may be declared incapable and placed under guardianship. Once under guardianship, the guardian may act on his/her behalf according to rights and duties of the guardian which have been specified by law.

The declaration of incapacity can be requested by the spouse, parents or adult children of the person with presumed incapacity or by a care institution or public prosecutor. This can be done by filing a request or applying to court.

3.16.2 Proxy decision making

3.16.2.1 Guardianship

The following information in this section is taken from part II, chapter X of the Civil Code which deals with guardianship and curatorship.

3.16.2.1.1 Conditions for the appointment of a guardian

According to articles 3.238 and 3.239, guardianship shall be established with the aim of exercising, protecting and defending the rights and interests of a legally incapable person, whereas curatorship shall be established with the aim of protecting and defending the rights and interests of a person of limited active capacity.

In article 3.277, which deals more specifically with adult guardianship, it is stated that an adult who has been declared legally incapable by the court shall be placed under guardianship by court judgement whereas an adult who has been declared to be of limited active capacity shall be placed under curatorship.

3.16.2.1.2 How guardianship is arranged

Having declared a person legally incapable or of limited active capacity, the court designates a guardian or curator without delay.

3.16.2.1.3 Who can be a guardian

A guardian or curator must have legal capacity and give written consent that they accept that responsibility. Their moral qualities, capacity to perform the function of guardian or curator, the preferences of the ward and other relevant circumstances must all be taken into account when deciding whom to appoint.

A legally incapable person is considered as having the same domicile as that of his/her guardian unless the guardian lives in a different state and the personal, social and economic interests of the person with incapacity are not in that state. In such cases, the
domicile of the person with incapacity would be considered as the one where his/her personal, social and economic interests lie (article 2.13 of the Civil Code).

3.16.2.1.4 How the financial affairs of the ward are handled
If the ward has property or land, the court may appoint an administrator. This could be the guardian, curator or any other person. The administrator of the property is subject to the same conditions as those which would apply to a guardian or curator. The powers of the administrator come to end when the guardianship measure ends or when the court relieves him/her of his/her duties.

Guardians or curators must use the assets and income of the ward exclusively in the interests of the ward.

3.16.2.1.5 Measures to protect the ward from misuse of power
Transactions of over Litas 5,000 require court approval.

Prior approval is also required if the guardian intends to sell, donate or otherwise dispose of immovable assets or property rights of the ward, or to lease them, transfer them for use without remuneration, or carry out other transactions which would reduce the ward’s assets or property rights.

A guardian, curator or their close relatives are not allowed to enter into a transaction with the ward except in cases where they are donating or transferring assets to the ward and provided that such a transaction would be in the interests of the ward.

3.16.2.1.6 Compensation and liability of guardians
If the guardian or curator is negligent, fails to ensure the protection of the rights and interests of the ward or uses his or her rights for personal gain, the court may relieve the guardian or the curator of his/her duties. If the person with incapacity has suffered loss or damage as a result of the guardian or curator, the latter must provide compensation. In addition, institutions of guardianship/curatorship have the right to apply to the court for the removal of the guardian or curator.

Municipal or regional institutions are responsible for the supervision and control of the actions of guardians and curators. Guardians and curators, who are a parent or close relative, are not paid for their work, whereas those who are not are entitled to recover necessary related expenses from the assets of the person with incapacity.

3.16.2.1.7 Duration of guardianship
No specific time limit is given for guardianship.
3.16.3 Capacity in specific domains

3.16.3.1 Marriage and annulment
According to article 3.15 of the Civil Code, a person who has been declared legally incapacitated by court judgement cannot marry. If it is later found that the person was legally incapacitated at the time of the marriage, the marriage can be declared null and void (article 3.37). Article 3.51 outlines three conditions for divorce by mutual consent, one of which is that both parties have full active legal capacity.

3.16.3.2 Voting capacity
Article 4 of the Law on Mental Health Care of 1995 states that mentally ill people may only be declared incompetent by a court decision.

According to article 2, paragraph 1 of the amended Law on Elections to the Seimas of 2005, citizens who have been declared incompetent by the court are not entitled to participate in elections (which is echoed in article 34 of the Constitution of the Republic of Lithuania of 1992). Paragraph 3 further states that people who have been declared legally incompetent and incapable by the court may not stand for election as members of the Seimas.

Voters who are in residential healthcare facilities and institutions of social guardianship and care due to their health condition or age are entitled to vote in such institutions. It is prohibited to exert influence on voters, their self-determination or to rush them to vote. This is covered by article 71 of the amended Law on Elections to the Seimas.

3.16.3.3 Contractual capacity
A transaction is voidable if it was made by a person who has been declared legally incapable due to a mental disorder (article 1.84 of the Civil Code). If the capable party involved in the transaction knew or should have known about the incapacity of that other party, s/he would be obliged to provide compensation for any expenses incurred by the incapable party, and also for any damage to or loss of the latter’s property.

A transaction can also be legally annulled if it was made by a person with capacity who was nevertheless at the time of the transaction unable to comprehend the meaning of his/her acts or to control them (article 1.89 of the Civil Code).

3.16.3.4 Testamentary capacity
Chapter IV of the Civil Code deals with testamentary capacity. The following provisions are relevant:

A will may be made only by a legally capable person who is able to comprehend the importance and consequences of his/her actions (article 5.15, §2).

A will shall be null and void if made by a legally incapable person (article 5.16, §1.1).
3.17 Luxembourg

3.17.1 Proxy decision making

Guardianship is covered by the Law of 11th August 1982 concerning Reform of the Law on Incapable Adults and also the Grand-ducal Decree of 27th October 1982 concerning Procedures relating to the Protection of Incapable Adults. The above provide protection for adults whose personal faculties are impaired in such a manner as to render them unable to look after their own interests without assistance, either for the purpose of a particular act or in a continuous manner (article 488).

3.17.1.1 Guardianship

3.17.1.1.1 Conditions for the appointment of a guardian

According to article 490:

“Where an individual’s mental faculties are impaired by illness, infirmity or enfeeblement due to old age, that person’s interests shall be provided for by means of one of the protective regimes stipulated in the succeeding chapters.

The same protective regimes shall apply to impairments of bodily faculties, where these preclude any expression of intention.

Impairment of mental or bodily faculties shall be medically established.”

The different kinds of protective regime (i.e. guardianship) referred to in the above article are:

- sauvegarde de justice (legal protection);
- curatelle (curatorship);
- tutelle (tutorship).

The system of guardianship adopted depends on the severity of the mental incapacity of the person for whom the measure is intended.

3.17.1.1.2 How guardianship is arranged

There are a few general provisions which apply to all three forms of protection.

First, the choice of medical treatment, in particular the choice between hospitalisation and home care, is not influenced by the kind of guardianship measure adopted. For example, the fact that a person has had a tutor appointed will not affect any decision concerning where s/he should be cared for.

Second, with regard to the protection of civil interests, the system applied is independent of any medical treatment administered. This means that the fact that a person is receiving a particular form of medical treatment has no relevance when it comes to deciding on the kind of measure necessary to protect his/her civil interests.
Third, in all cases, the person’s home and furniture are kept as long as possible. Should it become necessary to dispose of the dwelling or sell the furnishings, authorisation must be obtained from the tutelary judge who decides after hearing the opinion of the person’s usual doctor. Keepsakes and other objects of a personal nature must not be sold and should be kept at the disposal of the protected person, if necessary at an institution.

Finally, the State Prosecutor of the place of treatment and the tutelary judge may visit or arrange for any adult protected by law to be visited, irrespective of the protective regime applicable.

3.17.1.1.3 Legal protection (sauvegarde de justice)
3.17.1.1.3.1 Conditions for setting up legal protection
Legal protection may be imposed on any adult who, due to one of the causes cited in article 490, is in need of protection in the acts of civil life. It constitutes a minimum means of protection and can also be used as a temporary protective measure whilst a request for a tutor or curator is being processed. The person subject to legal protection continues to exercise his/her rights.

3.17.1.1.3.2 How legal protection is arranged
In order to arrange legal protection, a declaration must be made to the tutelary judge. A doctor can make this declaration if s/he notices that the person under care is in need of protection in line with the provisions of article 490. If the declaration is accompanied by the second opinion of a doctor specialised in neurology, neuro-psychiatry or psychiatry, the judge can decide to place the person under legal protection. The opinion of a specialist is not necessary if the doctor making the declaration is a specialist himself/herself.

3.17.1.1.3.3 How the affairs of the person under legal protection are handled
The person conserves his/her rights and can therefore continue to carry out financial transactions. However, these can be withdrawn or reduced if considered excessive, even to the point of being annulled if it can be proved that the person was suffering from a mental problem at the time of the act. The person under legal protection can establish a power of attorney (or mandate) either before or after the judgement. If it was stipulated that this would be for the duration of the protection, s/he cannot revoke it before it comes to an end. However, the judge can revoke it and can order that the accounts be submitted for inspection. If the person who requested the legal protection becomes aware of the necessity to carry out transactions to protect and conserve the patrimony of the person under guardianship, it is his/her duty to make sure that this is done. This same obligation extends to the director of an establishment where the person is residing or to whoever lodges the person.

26 Médecin traitant = a person’s usual (family) doctor
3.17.1.3.4 Duration of legal protection
According to article 491-6, there are three conditions which may lead to the termination of legal protection:

1. the order which led to it being set up lapses;
2. it is revoked by a tutelary judge;
3. guardianship or trusteeship has been established (i.e. a curator or tutor has been appointed).

3.17.1.3.5 The right to appeal
Any interested party may request revocation of legal protection and has the right to appeal against the decision of the tutelary judge.

3.17.1.4 Curatorship
3.17.1.4.1 Conditions for the appointment of a curator
The appointment of a curator is requested in cases where the person fulfils the conditions of article 490 and is in need of advice or assistance in carrying out daily acts (article 508). It is a very flexible system of guardianship in that the judge can tailor the protective measures to the needs of the individual. The person may carry out some actions alone, but needs the authorisation of the curator for others.

3.17.1.4.2 How curatorship is arranged
The same procedure and conditions as for tutorship apply (please see the relevant section).

3.17.1.4.3 Who can be a curator
The spouse becomes curator unless s/he is separated or the judge decides against this, in which case the judge may elect another person (article 509-1). There is no family council in the case of curatorship. The tutelary judge decides whether a person can be excused from the duty of curator, as well as on the exclusion, dismissal or challenging of a curator (article 509-2).

3.17.1.4.4 The duties and responsibilities of curators
A person under curatorship cannot, without the assistance of the curator, make any decision which under the system of tutorship would have necessitated the approval of the family council. Neither can s/he accept capital or use it without the assistance of the curator (article 510). If the curator refuses assistance, the person under curatorship can request authorisation from the tutelary judge. If authorisation is not required for particular acts, they can still be subject to rescission or annulled just like for someone who is subject to legal protection (article 510-3). Either at the time of setting up the curatorship or at a later date, the judge can, on the advice of the person’s usual doctor, stipulate the acts which the person is allowed to carry out freely or, on the contrary, add acts for which assistance is required (article 511).
The judge can order the curator to collect the revenue of the person under curatorship, take care personally of all expenses to third parties and invest any excess amount in an account approved by the government.

Donations can only be made with the assistance of the curator (article 513).

3.17.1.4.5 Measures to protect the ward from misuse of power.
Measures designed to protect the person under curatorship are not explicitly stated but are implied in the law in its provisions and procedures, e.g. the social inquiry into family relations and the judge's discretion in the choice of tutor or curator etc. There is little provision for supervision on a continuous basis or penalties for abuse of power.

However, a curator with responsibility for collecting and investing revenue must keep an account of all transactions and present the annual accounts to the tutelary judge.

3.17.1.4.6 Duration of curatorship
The same conditions apply to the duration of curatorship as to the duration of tutorship (please see next section) but in addition, curatorship would be terminated in the event of a tutor being appointed.

3.17.1.5 Tutorship
3.17.1.5.1 Conditions for the appointment of a tutor
A tutor is generally appointed in cases where the person (who fulfils the provisions of article 490) needs to be represented in all civil acts on a permanent basis (article 492). According to the Association Luxembourg Alzheimer\textsuperscript{27}, this form of guardianship is most suitable for people who are suffering from a severe deterioration of their cognitive abilities resulting in a need for permanent assistance.

3.17.1.5.2 How tutorship is arranged\textsuperscript{28}
Tutors are appointed by the tutelary judge at the request of the person for whom the measure is intended, the spouse (unless separated), ascendants, descendants, brothers and sisters or the Office of the Director of Public Prosecutions. Other relatives and friends cannot make an official request but can inform the judge of reasons which they feel would justify the appointment of a tutor. This also applies to the person's usual doctor and the director of an establishment.

The request must be addressed to the tutelary judge in the place of residence of the person with presumed incapacity (i.e. at the tribunal of Luxembourg or Diekirch). The request must contain details of the person's close relatives and be accompanied by a medical certificate from a doctor specialised in psychiatry, neuropsychiatry or neurology.

When the judge receives a request for tutorship, as stated previously, s/he may immediately take the necessary steps to arrange for legal protection. Then a social enquiry is set up by the central service of social assistance. A social worker, who is charged with

\textsuperscript{27} Guide des aidants, p.137
\textsuperscript{28} Guide des aidants, p.138
the inquiry, carries out an obligatory visit to the person who is presumed to be in need of protection in order to form an opinion of his/her mental state. A report is then drawn up on the general situation as well as on family relations, the financial situation and the personal fortune. The judge then sees the person to be protected in court or if this is not possible at the person’s home or in an institution. This allows him/her to form a personal opinion of the person and in combination with the social enquiry and medical report to make a decision.

This is a closed audience in the presence of the state prosecutor who must have received the relevant documentation one month before the date of the audience. The parties are heard but it is not obligatory for the person with presumed incapacity to be assisted by a lawyer. This procedure does not involve any costs.

3.17.1.1.5.3 Who can be a tutor
The spouse becomes the tutor unless s/he is separated or the judge decides against this, in which case the judge may select another person. No party other than the spouse, descendants or legal entities shall be obliged to retain the tutorship of an adult for more than five years. After this period, the tutor may ask to be replaced (article 496-1).

The person’s usual doctor cannot be tutor but the judge may ask him/her to take part in the family council on a consultancy basis (article 496-2).

3.17.1.1.5.4 The duties and responsibilities of tutors
The law allows for different ways to handle the finances of the person under tutorship depending on the state of the person’s illness and the extent of his/her personal fortune. For example, if there is a close relative who is willing to accept the responsibility, the judge can designate him/her as legal administrator under judicial control without appointing a surrogate tutor or family council (article 497). A family council is not usually necessary unless the fortune is particularly large or there are serious problems between family members.

Depending on the type of marriage contract that a married person previously drew up, it might not be necessary to appoint the spouse as tutor as s/he would already have the authority to take care of the person’s interests (article 498).

Another option is to appoint a manager (gérant de la tutelle) instead of a surrogate tutor or family council. This solution is often used if the person has no family or if the family is disinterested or unsuitable to manage his/her fortune. The manager could be someone from the administrative personnel of the establishment in which the person with incapacity is being treated or a special administrator appointed in accordance with conditions fixed by a Grand-Duchy ruling (article 499).

The manager (gérant de la tutelle) collects the revenue of the protected person and uses it for the person’s upkeep, treatment and maintenance. If there is any surplus, it is paid
into an account which must be opened at a deposit institution approved by the Government. If other acts become necessary, the manager must obtain authorisation from the tutelary judge (article 500).

However, the judge may at any time, in accordance with the advice of the person’s usual doctor, determine certain acts that the person with incapacity can do either on his/her own or with assistance (article 501).

If there is a family council, it can authorise donations in the name of the person with incapacity, but only in favour of the descendants of the latter as an advancement (of an inheritance) or in favour of the spouse (article 505).

3.17.1.1.5.5 Measures to protect the ward from misuse of power
Measures designed to protect the person under guardianship are not explicitly stated but are implied in the law in its provisions and procedures, e.g. the social inquiry into family relations, the judge’s discretion in the choice of tutor or curator, the limitation of tutorship to five years, etc. There is, however, little provision for supervision on a continuing basis or penalties for abuse of power.

Nevertheless, managers (gérants de tutelle) must submit annual accounts to the tutelary judge (article 500).

3.17.1.1.5.6 Duration of tutorship
Tutorship lasts until the conditions which necessitated it no longer apply (article 507).

3.17.1.1.5.7 The right to appeal
The person who requested tutorship as well as others, even if they were not involved in the proceedings, may appeal against the court decision concerning the establishment of tutorship (article 493).

However, judgements concerning the establishment, modification or lifting of the tutorship can only be opposed by third parties two months after the decision has been officially recorded in the person’s personal file in accordance with the provisions of the New Code of Civil Procedure (article 493-2).

3.17.2 Capacity in specific domains

As a person who is under legal protection continues to exercise his/her rights, s/he retains the right, in principle, to marry, vote and make a will.

3.17.2.1 Marriage and divorce
A person who is subject to curatorship cannot marry unless s/he has obtained the authorisation of the curator or, failing this, the authorisation of the tutelary judge (article 514). Article 1399 of the Civil Code also states that if marriage is authorised, the per-
son who is subject to curatorship must be assisted in the ceremony. If this condition is not respected, the ceremony can be annulled in the year following the marriage at the request of either the incapacitated person him/herself, those whose consent was required or the curator.

A person who is subject to tutorship must obtain the authorisation of the Family council in order to marry. The Family council must meet in order to discuss this and cannot come to a decision before it has met the proposed husband or wife. In addition, the opinion must be sought of the doctor who is responsible for the care of the person under tutorship (article 506). Article 1399 of the Civil Code also states that if the marriage is authorised, the person who is subject to tutorship must be assisted in the ceremony. If this condition is not respected, the ceremony can be annulled in the year following the marriage at the request of either the incapacitated person him/herself, those whose consent was required or the tutor.

### 3.17.2.2 Contractual capacity
According to article 1123 of the Civil Code, a person has contractual capacity unless s/he has been declared incapable by law. Under the provisions of article 488, for example, limitations to a person's contractual capacity may be defined.

A person with capacity cannot oppose a contract made by a person with incapacity (article 1125 of the Civil Code).

### 3.17.2.3 Voting capacity
The Law of 31 July 1924 concerning the modification of the Electoral Law (and subsequent amendments) lays down the conditions and restrictions on the right to vote. According to article 4, adults who are subject to tutorship are not entitled to vote.

### 3.17.2.4 Testamentary capacity
In order to make a donation during one's lifetime or by means of a testament, a person must be of sound mind ("sain d'esprit") (article 901 of the Civil Code). To challenge the validity of a testament, it must be proven that the person was not of sound mind at the precise time that s/he drew up the testament.

In principle, a person who is subject to curatorship may freely make a will.

A will which is made after tutorship has been established shall be legally null and void (article 504). A will made prior to tutorship remains valid unless it can be proved that the reasons for which the testator made the will have disappeared since tutorship was set up.

### 3.17.2.5 Civil responsibility
To carry out a valid act, according to the Law of 11th August 1982 concerning Reform of the Law on Incapable Adults, the person must be of sound mind. However, it is up to the
person concerned to prove that this was not the case at the time the act was committed. This defence must be instigated by the person who committed the act or, failing this, by the curator or tutor if there is one.

According to article 489-2 of the above-mentioned law,

“Any person causing injury to a third party while afflicted by mental disorder shall nevertheless be obliged to make reparation.”

3.17.2.6 Criminal responsibility

According to article 71 of the Penal Code:

“A person is not criminally responsible if at the time of the act s/he was suffering from a mental disorder which abolished his/her discernment or the control of his/her acts.”

However, if such a judgement is passed (i.e. that the person is not criminally responsible for the act) and if the person is still considered a danger to him/herself or others, it is accompanied by an order to place that person in an establishment or service recognised by law as providing the necessary care.

Article 71-1 stipulates that if the person’s discernment or the control of his/her acts was not abolished but simply altered as a result of a mental disorder, s/he could be punished for the acts but the court would take into consideration attenuating circumstances when deciding on the punishment.

3.17.3 Reference

Alzheimer Europe (2010), Guide des aidants, Alzheimer Europe
3.18 Malta

3.18.1 Issues surrounding the loss of legal capacity

Article 189 of the Civil Code states that:

“(1) A major who is in a state of imbecility or other mental infirmity or is prodigal, may be interdicted or incapacitated from doing certain acts, as provided in articles 520 to 527 inclusive, of the Code of Organisation and Civil Procedure”

According to article 524 of the Code of Organisation and Civil Procedure:

“(1) If no sufficient cause for the interdiction is made to appear, it shall be lawful for the court by a decree to order, if the circumstances of the case so require, that the person whose interdiction is demanded be incapacitated from suing or being sued, from effecting any compromise, borrowing any money, receiving any capital, giving a discharge, transferring or hypothecating his property, or performing any act other than an act of mere administration, without the aid of a curator to be appointed in the same decree.

(2) It shall also be lawful for the court, if it deems it necessary, to incapacitate any person from performing all or any of the acts of mere administration, entrusting the performance thereof to a curator in such manner as the court may deem fit to direct.”

This means that interdiction is a higher degree of deprivation of legal competence that comprehensively covers both personal and property issues. Incapacitation, on the other hand, is applicable for certain acts or categories of acts.

Consequently, interdiction and incapacitation could be described as two different degrees of deprivation of legal competence, the former being more comprehensive and far reaching than the latter.

3.18.2 Proxy decision making

3.18.2.1 Guardianship

During the process of interdiction or incapacitation, the court may decide to appoint a tutor or a curator. The provisions relating to the tutorship of minors apply to the curatorship of people who have been interdicted (insofar as they are applicable). The tutorship of minors is covered by articles in 159 to 192 of the Civil Code.

3.18.2.1.1 Conditions for appointment of a guardian

A tutor is appointed by the court on the demand of any person (159 (1) of the Civil Code).
3.18.2.1.2 Who can be a guardian

According to article 160 of the Civil Code, the tutor must be a competent person chosen firstly from amongst relatives, with priority given to the closest blood relative. The person’s best interests must always be borne in mind.

Article 161 of the Civil Code may also be applicable to adults with incapacity. It states:

“(1) It shall be lawful for the court to appoint more than one tutor.

(2) Where more than one tutor have been appointed the court may at any time, either of its own motion or upon the demand of any of the tutors, specify their respective duties; and, until such time as particular duties shall have been assigned to each of them, each of the tutors shall have all the powers and duties of a tutor, and they shall all be jointly and severally liable for the acts of each of them.

(3) Where any of the tutors dies or otherwise ceases to be tutor, the tutorship shall be exercised by the other tutor or tutors unless the court, of its own motion or upon the demand of any person shall have appointed another tutor in his stead.”

According to article 163 of the Civil Code, the following cannot be appointed tutors:

“(a) persons who have not attained majority;

(b) persons who are not vested with the free administration of their property or who are notoriously incompetent to administer property;

(c) persons who are or are about to be, or whose spouse or relatives by consanguinity or affinity up to the degree of uncle and nephew, are, or are about to be involved in a lawsuit with the minor, in which the status of such minor, or a considerable part of his property is at stake;

(d) undischarged bankrupts;

(e) persons who have been sentenced to the punishment of imprisonment for a term exceeding one year, or to any punishment for an offence affecting the good order of families, or for fraud;

(f) persons who are of a notoriously bad character, or manifestly untrustworthy or negligent;

(g) persons who are trustees of property for the benefit of the minor (person with incapacity).”

3.18.2.1.3 The duties and responsibilities of guardians

The tutor is responsible for the care of the person with incapacity and for representing him/her in all civil matters, and administering his/her property as a bonus paterfamilias (i.e. a good head of the family) (article 172).
3.18.2.1.4 How the financial affairs of the ward are handled
The court may decide that any precious articles, money or securities be deposited in a place specially designated for such articles or alternatively in another safe place, but may at any time decide on alternative arrangements for the money and securities (article 178).

Article 180 further stipulates that it shall not be lawful for the tutor, without the authority of the court, to:
- collect or transfer any capital belonging to the adult with incapacity;
- take money on loan except in case of urgency;
- accept or renounce any inheritance;
- accept any donation or legacy subject to any burden;
- refer any matter to arbitration or effect any compromise, or alienate, hypothecate, or make any emphyteutical grant of immovable property, or let out property for a time exceeding eight years, in the case of rural property, or four years, in the case of urban property, or the ordinary time according to usage, in the case of movables.

When a tutor requests authorisation to accept an inheritance on behalf of the ward, the court may decide to allow the tutor to make a description of the property contained in the inheritance instead of making an inventory (as required under article 848), provided that the tutor makes a sworn oath as to its authenticity (article 180.2).

Where a lease has been granted for a longer period of time than that stated in article 180.1, the term shall be reduced to the duration stipulated in article 180.1 with effect from the date of the contract (article 180.3).

At the time of appointment of the tutor (or later, in a subsequent decree), the court may grant the tutor a general authority in respect to all or any of the above-mentioned acts (article 180.4).

According to article 181(1), the tutor shall, after deducting necessary expenses for the ward, profitably invest any income or other money, amounting to more than EUR 116.47, which s/he collects.

3.18.2.1.5 Measures to protect the ward from misuse of power
Before appointing a person as tutor, the court orders the future tutor to make an inventory of the future ward’s property or, depending on the circumstances, a description of the property (sworn on oath to be authentic) and to mortgage his/her own property up to a certain amount. The future tutor is also ordered to manage the property of the person with incapacity properly and on termination of his/her office to render a true and faithful account of his/her administration (article 167.1). Alternatively, the court may decide that someone else carries out the afore-mentioned inventory or description (article 167.2).
Tutors must keep a book of receipts and administrative costs. Their accounts should include receipts for any expenses of a considerable amount. The accounts book, if sworn on oath by the tutor to be authentic, shall serve as sufficient proof of small expenses (article 182.1-3).

3.18.2.1.6 Suspension or removal of the tutor
The court may suspend or remove from office any tutor or curator for various reasons outlined in article 163.b-f, for failure to submit accounts, for false accounts or for any other valid reason (article 169.1).

3.18.2.1.7 Complaint to a competent court in case of neglect or abuse
If a tutor abuses his/her authority or neglects to fulfil his/her duties, anybody may lodge a complaint on behalf of the person with incapacity and the court shall give a warning to the tutor or take any other appropriate measures (article 175.2).

3.18.2.1.8 Compensation and liability of guardians
According to article 523 (3) of the Code of Organisation and Civil Procedure, the curator may at the time of appointment or later ask the court for remuneration. When making a decision, the court takes into account the nature of the services to be provided and the property of the person who is interdicted.

Tutors may only be credited with such expenses as are considered useful or, with respect to the position and the means of the person with incapacity, customary” (article 182.4).

A tutor who does not profitably invest the ward’s income shall be liable to pay interest unless s/he can prove that s/he took all due care but did not succeed in securing a profitable and safe investment (article 181.2). Similarly, a tutor is liable for any loss occasioned by his/her failure to take the necessary precautions that a good head of family (bonus paterfamilias) would be expected to take when making the investment (articles 181.2 and 181.3).

3.18.2.1.9 Duration of guardianship
According to article 183 (1), when the tutor ends his/her term of office, for any reason, s/he shall render his/her accounts to his/her successor in the office of tutor. If the person with incapacity dies during the tutorship, the accounts shall be rendered to his/her heirs (article 183.2).

If the tutorship terminates for any of the reasons mentioned in article 158, the accounts shall be rendered to the person who was under such tutorship (article 184).

Any balance which may be due by the tutor shall bear interest ipso jure (i.e. by the law itself) from the day of termination of the tutorship (article 185.1).
Article 183 (2) also states that the interest on any sum that the ward may owe the tutor shall only start to be calculated from the day on which a request for payment is made by the tutor after the termination of his/her office and by means of a judicial act.

3.18.2.2 Continuing powers of attorney
Continuing powers of attorney are not used in Malta and would not be considered as legally valid documents.

3.18.3 Capacity in specific domains

3.18.3.1 Marriage and divorce
According to the Marriage Act of 1975, a person who is subject to tutorship may not validly contract a marriage without the consent of the tutor (article 3). If either of the partners contracting the marriage is incapable of contracting "by reason of infirmity of mind", whether interdicted or not, the marriage will be considered void (article 4).

Either of the partners may take action to have the marriage annulled even if that person is not considered capable by law to sue or be sued. Such action, once initiated, may be continued by any of the heirs (article 19.2).

Divorce is not possible in Malta (Scerri, 2008). Annulment is different to divorce as it implies that the marriage was void from the beginning.

3.18.3.2 Voting capacity
Article 54 of the Malta Constitution stipulates that a person cannot be qualified to be elected as a member of the House of Representatives if s/he is “interdicted or incapacitated for any mental infirmity .../… or is otherwise determined in Malta to be of unsound mind.” Similarly, a person who is interdicted or incapacitated for any mental infirmity by a court in Malta or is otherwise determined in Malta to be of unsound mind, is not qualified to register as a voter for the election of members of the House of Representatives (article 58).

3.18.3.3 Capacity to work
If a person employs someone for a job or service who is not competent or if s/he does not have sufficient grounds to consider that person competent, s/he shall be liable for any damage that that person causes to others through incompetence in carrying out the job or service (article 1037 of the Civil Code).

3.18.3.4 Contractual capacity
A person who is interdicted or incapacitated is not capable of contracting, and any contract entered into by a person who does not have the use of reason is considered null (articles 967 and 968 of the Civil Code). However, a person who is capable of contracting cannot claim nullity of a contract on the grounds that the other contracting party did not have such capacity (article 973).
3.18.3.5 Testamentary capacity
Any person not subject to incapacity under the provisions of the Civil Code may dispose of or receive property by will (article 596 of the Civil Code). However, those who are interdicted on the grounds of insanity, and those who are not of sound mind at the time of the will, are considered incapable of making wills (article 597).

A will made by a person subject to incapacity is considered null, even if the incapacity ceased before that person's death (article 599).

3.18.3.6 Civil liability
A person who is officially responsible for someone of unsound mind may be considered liable for any damage caused by the latter, if s/he fails to exercise due care and attention in order to prevent the act (article 1034 of the Civil Code). It is explained in article 1035 that people of unsound mind are not obliged to make good any damage caused to third parties unless they acted mischievously. Nevertheless, if injured parties cannot recover damages from those responsible for the person who caused the damage, the court may order damages to be paid either partly or in full from the property of the person of unsound mind (article 1036).

3.18.3.7 Criminal responsibility
According to article 33 of the Criminal Law, a person is exempt from criminal responsibility if at the time of the act or omission of which s/he is accused, such person was in a state of insanity.

Insofar as interdiction is concerned (i.e. where a person has been deprived of any legal capacity), there is no doubt that s/he is exempt from criminal responsibility. However, in cases where a person has only been declared incapable, criminal responsibility is assessed on a case-by-case basis.
3.19 Netherlands

3.19.1 Issues surrounding the loss of legal capacity

From 1838 until 1982, the only measure for the protection and representation of incapacitated adults was the curatele (full guardianship). Curatele involved the appointment of a guardian and the loss of legal capacity. If guardianship had been established due to a mental illness or handicap, the loss of legal capacity concerned the person’s financial and personal matters. However, it became clear that the all or nothing approach to mental capacity was not necessary or suitable, and in certain respects was contrary to human and patients’ rights. In 1982, the protective trust (Beschermingsbewind) was introduced. This measure limited the loss of legal capacity to financial decisions. Later, in 1995, another measure was introduced which was known as mentorship (Mentorschap). Contrary to the protective trust, mentorship is limited to non-financial matters such as nursing, care, treatment and guidance. According to Blankman, it can be deduced from jurisprudence that the least far-reaching protective guardianship measure should be adopted. Recommendation No. R (99)4 of the Committee of Ministers to Member States on principles concerning the legal protection of incapable adults (which was adopted on 23 February 1999) states the need for proportionality in the provision of legal protection for incapable adults. According to principle 6:

“Where a measure of protection is necessary it should be proportional to the degree of capacity of the person concerned and tailored to the individual circumstances and needs of the person concerned.

The measure of protection should interfere with the legal capacity, rights and freedoms of the person concerned to the minimum extent which is consistent with achieving the purpose of the intervention.”

3.19.2 Proxy decision making

3.19.2.1 Guardianship

In the following sections, the three different guardianship measures will be examined in the following order: 1. full guardianship, 2. the protective trust, 3. mentorship.

3.19.2.1.1 Curatele (full guardianship)

3.19.2.1.1 The conditions for appointing a guardian

The legal provisions relating to the establishment of full guardianship can be found in title 16 (articles 378 to 391) of the Civil Code. There are several reasons which can justify the appointment of a guardian during minority. One such reason is that on account of mental disturbance an adult, albeit only at intervals, is not in such condition as to pay proper attention to his/her interests.

3.19.2.1.2 How guardianship is arranged
According to article 379, full guardianship may be requested by the adult concerned, by his/her spouse or partner, blood relatives of direct descent, others up to and including the fourth degree or by his/her guardian. It can also be requested by the public prosecutor.

The judge to whom the request is made or was last made, may appoint an interim receiver for the period leading up to the decision. The guardian takes up his/her duties on the day after the registrar gives notice of the appointment and the interim administration ends on that day. If the application for guardianship is rejected, the administration of the interim receiver ends the day after the judgement unless the judge determines otherwise.

3.19.2.1.3 The choice of guardian
The judge appoints a guardian at the same time as guardianship is ordered or as soon as possible thereafter. As far as possible, the judge respects the expressed preference of the person affected unless there are sound reasons for not doing so. If the person is married or has any other partner for life, this partner shall be appointed by preference unless the adult objects. Alternatively, one of his/her parents, children, brothers or sisters shall be appointed as guardian.

3.19.2.1.4 Duration of the guardianship measure
Guardianship ceases whenever a judgement is made that the original causes for it no longer exist. A request or application for ending the guardianship may be made by the same people who are entitled to request or apply for guardianship. Guardianship also ceases when a protective trust or mentorship is arranged.

The guardian may ask to be discharged from his/her duties at any time if there are valid reasons. The request may also be made by the Public Prosecutor or the Court. A guardian who is not the spouse or partner for life of the adult concerned or a blood relative may be discharged if s/he has carried out the duty of trustee for at least eight years, provided that the court is able to find a suitable successor.

3.19.2.1.5 The duties and responsibilities of guardians
The duties of the guardian are determined by the judge at the time of appointment. The section below provides details of how the property of the adult concerned and his/her financial affairs are handled. Once a guardian has been appointed, the adult is no longer competent to enter into legal transactions unless the guardian gives his/her authorisation (provided that the guardian has authorisation for such acts). Authorisation for such acts must be specific and given in writing. The guardian may place at the disposal of the adult sums of money which s/he may use for the purpose of maintenance, e.g. to buy food and clothes.
In article 381 it is stated that the provisions of articles 453 and 454 of the Civil Code (relating to mentorship) are also applicable. Article 453 states that the guardian is not competent to enter into legal transactions relating to care, treatment and attendance and so the guardian (in this case) may act in such matters on his/her behalf. If the adult objects to medical decisions taken by the guardian, they will only be adhered to if it is clearly necessary in order to avoid serious harm to him/her. According to article 454, the guardian must try to involve the adult as much as possible in the performance of his/her duties. This means encouraging him/her to enter into legal and other dealings, provided that s/he is in a fit state to make a reasonable assessment of his/her interests in the matter.

**3.19.2.1.1.6 How the financial affairs of the adult concerned are handled**

As mentioned above, the judge may appoint an interim receiver and determine the extent of his/her duties. This receiver may be granted authority to handle all or specified property belonging to the adult. The judge may also grant other powers to the receiver, but none which a curator does not possess. Unless the judge determines otherwise, the person whose full guardianship is sought may not carry out any act relating to ownership or disposal of property without support of the receiver. The judge may decide that debts of the adult cannot be recovered from his/her property which is under administration. This measure may continue if and when a permanent receiver is appointed.

As soon as a guardian is appointed the duties of the interim receiver end and s/he must provide the guardian with accounts and justification for his/her acts. If the interim receiver is appointed as guardian, this must be given to the cantonal judge.

**3.19.2.1.1.7 Remuneration of the guardian**

The guardian receives either five percent of the net return on the property managed or a set payment for a fixed or indeterminate period which is determined by the judge.

**3.19.2.1.2 2. The protective trust**

According to Blankman, one of the reasons for introducing protective trusts into Dutch law was to prevent the elderly from being financially exploited by their families. The provisions for setting up a protective trust are covered in title 19 of the Civil Code. According to article 431, a protective trust may be set up for an adult who, as a result of his/her physical or mental condition, is either temporarily or permanently incapable of managing his/her interests in property. This includes property which s/he owns partly through marriage, provided that it is not already under the exclusive control of his/her spouse.

**3.19.2.1.2.1 How a protective trust is arranged**

The establishment of a protective trust may be requested by the person him/herself, the spouse or partner, direct blood relatives of up to fourth degree, a guardian or mentor, and the Public Prosecutor. It is the responsibility of a judge to decide on the matter. A judge who is deciding on the appointment of a guardian may decide to set up a protective trust as an less intrusive alternative.
3.19.2.1.2.2 Who may be appointed administrator

Until a decision is made, a temporary administrator may be appointed. The choice of persons to administer the protective trust should follow the expressed preference of the person unless there are sound reasons not to.

Unless a preference has been stated, the administrator should be selected in the following order of preference: the spouse, partner or one of the person's parents, children, brothers or sisters. A person who lacks legal capacity or is bankrupt cannot be an administrator.

The judge may appoint one or more administrators if this would be in the person's best interests. In this case, each administrator has the authority to act alone. Should there be a difference of opinion between the administrators, the cantonal judge must decide on the matter. The judge may also appoint a legal person.

3.19.2.1.2.3 The duties and responsibilities of the administrator

The duties of the administrator of the protective trust are limited to financial affairs (e.g. property). S/he must ensure that the person's capital is invested appropriately in so far as it is subject to the administration and is not required to be spent on adequate care for the person. If the person is left an inheritance, the administrator may accept it on his/her behalf. The administrator is answerable for any acts carried out on behalf of the adult concerned which could be considered to fall short of what would be expected from a good administrator.

3.19.2.1.2.4 How the financial affairs of the adult are handled

The administrator must make an inventory of all property under administration and deliver a copy to the relevant cantonal court. If the administrator is to manage registered property, a company or partnership or a share in a shipping line, s/he should register this in the Public Register, the Register of Companies or the Register of Ships respectively. Unless the judge decides otherwise, the administrator should open an account with a credit institution registered in accordance with Article 52 of the Supervision of the Credit System Act of 1992.

For the following acts, the administrator must obtain consent from the adult concerned. If this person is not in a fit state to make a decision or if s/he opposes the administrator, then an order must be obtained from the cantonal judge:

• to dispose of and enter into agreements for the disposal of property subject to the administration;

• to accept a present or gift to which liabilities or conditions are attached;

• to lend money or bind the person as guarantor or principal debtor;

• to make an agreement that an estate to which the person is entitled should be left undivided for a defined period;
• to enter into an agreement (except in certain conditions) for the ending of a dispute, unless the amount in dispute does not exceed € 700,-; or

• for any other acts indicated when the protective trust was established.

3.19.2.1.2.5 Remuneration of the administrator
Family members that are appointed do not as a rule receive any remuneration. Professional administrators are entitled to an amount of EUR 1,400 per year when they meet certain quality criteria.

3.19.2.1.2.6 Measures to protect the person subject to a protective trust from misuse of power
The administrator must submit accounts and a justification annually to the person for whom s/he has acted and at the end of the period of administration to his/her successor. This must be done in the presence of the cantonal judge. If the person is not in a fit state to receive the accounts and justifications, they must be given to the cantonal judge. At any stage of the administration of the protective trust, the cantonal judge may call the administrator for a hearing and oblige him/her to provide any information that may be required.

3.19.2.1.3 Mentorship
Under the provisions of article 450 (title 20) of the Civil Code on Mentorship, the cantonal judge may institute a mentorship for a person who, due to his/her physical or mental condition, is temporarily or permanently unable to take proper care of him/herself or interests other than those involving property. This measure may also be ordered by the cantonal judge as a less intrusive alternative to full guardianship, if s/he considers that this would be preferable.

3.19.2.1.3.1 How mentorship is arranged
The same people can apply for a mentorship as can apply for a protective trust. In addition, any person in charge of an institution in which the adult concerned is permanently cared for can make a request, but must provide an explanation as to why the other people who were entitled to make the request did not do so. The decision is made by the cantonal judge and comes into effect when the registrar notifies the adult concerned by the measure.

3.19.2.1.3.2 Who may be appointed mentor
If a protective trust has been established and the administrator is a natural person, s/he should preferably be appointed as mentor. People who are not entitled to be the mentor include those who lack legal capacity, those for whom a mentorship has been instituted, “legal persons”, social workers directly involved or acting on behalf of the person and staff or managers of an institution in which the person is accommodated.
3.19.2.1.3.3 The duties and responsibilities of the mentor
The duties of the mentor include responsibility for legal dealings in matters related to the care, treatment and attendance of the person. S/he may grant this person permission to enter into such dealing him/herself. The mentor gives advice on non-financial matters and tries to involve the person in the performance of his/her duties.

3.19.2.1.3.4 Remuneration of the mentor
Expenses occurred by the mentor are payable from the accounts of the adult concerned. In certain cases, the judge may award remuneration to the mentor which is deducted from the accounts of the person.

3.19.2.1.3.5 Measures to protect the person subject to mentorship from misuse of power
The mentor must make a report of his/her activities and give it to the cantonal judge whenever asked to do so.

3.19.2.2 Continuing powers of attorney
There are no special legal provisions in Dutch law concerning continuing powers of attorney.

3.19.3 Capacity in specific domains

3.19.3.1 Marriage
People who are subject to mentorship or a protective trust may marry, whereas those for whom a guardian has been appointed must obtain the consent of the judge or the guardian.

3.19.3.2 Voting capacity
Adults under full guardianship or under a protective trust or adults for whom a mentor has been appointed do not lose the right to vote.

3.19.3.3 Contractual capacity
Under article 381 (title 16) of the Civil Code which deals with full guardianship, the adult concerned is no longer considered competent to enter into legal transactions unless otherwise specified by law. However, the adult can enter into a legal transaction if s/he has the written consent of the guardian, who is authorised to act on his/her behalf in the relevant domain.

In the case of an adult for whom a protective trust has been established, any deal including that involving the sale of property by the person who is not competent, can only be cancelled if it can be proved that the other contracting party knew or should have known about the protective trust.
3.19.3.4 **Testamentary capacity**
People who are subject to mentorship or a protective trust may make a will, whereas those for whom a trustee has been appointed cannot make a will on their own; the consent of the judge is required.

The notary is obliged to assess the mental capacity of his/her client for cases like changing a will, the sale or purchase of a house, making a power of attorney, etc. In case of mental incapacity, the notary is not allowed to draw up, authenticate or certify an official document on behalf of his/her client.

A protocol has been developed to assess mental capacity. If a notary does not assess the mental capacity of a client correctly, disciplinary measures can be taken.

3.19.3.5 **Criminal responsibility**
According to article 39 of the Dutch Penal Code, a person cannot be punished for a criminal act if s/he is not considered responsible for that particular act due to a pathological disturbance of his/her mental capacities. A forensic expert must determine whether there is a causal link between the criminal act and the mental disorder. The degree of criminal responsibility is usually determined on the basis of a five-point scale, namely:

- total absence of responsibility;
- severely diminished responsibility;
- diminished responsibility;
- slightly diminished responsibility;
- complete responsibility.
3.20 Norway

3.20.1 Proxy decision making

3.20.1.1 Guardianship

3.20.1.1.1 The conditions for appointing a guardian

Section 90 of the Act of 22 April 1927 relating to guardianship for persons who are legally incapable (the Guardianship Act) deals with the appointment of a provisional guardian. According to section 90a:

“A person of full age and legal capacity who because of unsoundness of mind or other mental disorders, senile dementia, retarded mental development, or physical disability cannot manage his or her own affairs may if necessary have a provisional guardian appointed.”

3.20.1.1.2 How guardianship is arranged

Before a provisional guardian can be appointed:

• an application must be made by a person or body authorised to do so;

• a satisfactory medical certificate must be produced to the effect that the person concerned “because of unsoundness of mind, other mental disorders, senile dementia, retarded mental development, or physical disability cannot manage his/her own affairs”;

• the consent of the person for whom a guardian is requested has been obtained unless it is impossible to obtain such consent or for special reasons it is inadvisable to do so.

3.20.1.1.3 The choice of guardian

The choice of guardian is usually the next of kin or another relative. The guardian’s office approves the choice when satisfied with the proposal. Every municipality runs a public guardian’s office. The office’s main task is to manage the ward’s resources, appoint a guardian and audit the guardians in that municipality. The role of the guardian’s office is not mentioned in the legislation or in any specific guidelines. It is managed according to rules and regulations of the municipality.

3.20.1.1.4 The duties and responsibilities of guardians

Provisional guardians may be granted authorisation to manage the person’s affairs in general or only in special cases. The sphere of authority is decided at the time of appointment and should not, in any case, be more comprehensive than is actually necessary. The Public Guardian’s Office may order the registration and valuation of the person’s estate as soon as possible. If the spouse is appointed provisional guardian, provisions relating to supervision, administration, registration and the duty to keep accounts are somewhat different.
3.20.1.5 How the financial affairs of the ward are handled
The financial affairs are handled by the guardian, and the guardian is obliged to send
details of the audited accounts every year to the Public Guardian's Office.

3.20.1.6 Measures to protect the ward from misuse of power
It is the responsibility of the public trustee appointed by the municipality to supervise
the work of trustee and custodians.

3.20.1.7 Payment of guardians
The guardian is not paid for his/her work.

3.20.1.8 Duration of guardianship
The guardianship measure lasts for as long as it is needed or until the death of the ward.

3.20.1.9 Recent developments
In March 2010, the Norwegian Parliament adopted a new Act of Guardianship. There is
reason to believe that this new law will be applied from 1 January 2012 onwards.

One of the most important changes compared to the current Act is that the public guard-
ian's office will be moved from the municipality to the county.

Another adjustment in the new Act is the legislation on advance directives which offers
an alternative to an appointed guardian. The advance directive can cover areas such as
general care, financial decisions and statements about personal preferences. The Act also
opens up the possibility for a person to designate his/her own legal guardian for when s/
he is no longer able to take care of his or her economic interests.

3.20.1.2 Powers of attorney
Powers of attorney are rarely used in Norway. They are not considered as legally binding
and are not mentioned in legislation.

3.20.2 Capacity in specific domains

3.20.2.1 Marriage
According to the Marriage Act of 1991, a person who has been declared to be without
legal capacity must obtain the consent of his/her guardian to contract a marriage. The
same applies to people for whom a provisional guardian has been appointed according
to section 90a et seq. of the Guardianship Act (if it is part of the duties of the provi-
sional guardian to give such consent). If consent is refused by the guardian or provi-
sional guardian, the person with incapacity can appeal to the County Governor, who may
authorise the marriage if there is no justifiable reason for such refusal (§2). Proof must
be provided that consent has been obtained from the guardian, provisional guardian or
County Governor (§7).
Marriages are contracted in the presence of a “solemniser” who is usually a clergyman, priest or public notary. If the solemniser has reason to believe that, owing to a severe mental illness or severe mental disability, either of the parties lacks legal capacity, he or she can demand a certificate from a public medical officer or from another medical practitioner designated by a public medical officer. In this context, “legal capacity” means the ability to have a normal understanding of what contracting a marriage entails and the ability to be normally motivated to contract a marriage (§9).

3.20.2.2 Annulment, separation and divorce
If a marriage has been solemnised despite the fact that one or both parties lacked legal capacity, proceedings to have the marriage declared null and void may be brought within six months after the solemnisation of the marriage. Guardians and provisional guardians can also instigate proceedings on behalf of a spouse who lack legal capacity, provided that this is part of their duties (§16).

Proceedings for separation or the dissolution of a marriage can be instigated by or against a spouse personally even if he or she lacks legal capacity. The guardian may then assist the person with incapacity. Guardians and provisional guardians (provided that the latter are responsible for such decisions) also have the right to instigate proceedings for the dissolution of a marriage or separation on behalf of a person with incapacity if they consider that this is in the best interests of the person lacking capacity. In such cases, the matter is dealt with by the courts which first decide whether there are grounds for legal action (§28).

3.20.2.3 Voting capacity
According to article 50 of the Constitution of the Kingdom of Norway, “rules may be laid down by law concerning the right to vote of persons, otherwise entitled to vote, who on Election Day are manifestly suffering from a seriously weakened mental state or a reduced level of consciousness”.

The Norwegian Election Act of 1985 contains a paragraph on the procedure to follow should the returning committee have reason to assume that a person is suffering from a serious mental disorder or is in a reduced state of consciousness. In such cases, the voter’s unopened ballot envelope is put to one side and his/her name, address and birth date written on it, along with the reason for excluding the vote and whether the decision to do so was unanimous. The envelope is then given to the election committee which decides whether or not the vote should be rejected (§41).

3.20.2.4 Contractual capacity
The Act of Disclosure of Contracts, Authorities and Invalid Declarations of 1918 states that a contract is invalid if it was signed by someone who was suffering from a mental disorder at the time.

31 A solemniser is a person who celebrates or performs the ceremony of marriage.
However, if the person with incapacity is under guardianship, it is the guardian’s duty to make sure that the contract is still binding. The guardian must also ensure that the contract is in the ward’s best interests.

3.20.2.5 Testamentary capacity
The following extracts from the Inheritance Act of 3 March 1972 refer to people who lack legal capacity:

§48 A person who has attained the age of 18 may by testament dispose of the property s/he leaves upon his/her death. A testament drawn up by a person under 18 years of age is invalid unless confirmed by the King. The same applies to any testament drawn up by a person who has been declared legally incapable. The request for confirmation should be presented as soon as possible after the testament has been drawn up.

§56: A testator may by inheritance contract commit himself/herself to abstain from making, altering or revoking a testament. (…/…) Any inheritance contract drawn up by a person who is legally incapable requires, in addition, the consent of the board of guardianship insofar as the inheritance contract pertains to assets which the legally incapable person cannot dispose of him/herself.

§62: A testamentary disposition is invalid if the testator was insane or mentally undeveloped or feeble-minded at the time he drew up the testament, unless there is no reason to believe that his mental state has had any effect on the contents of the provision.

3.20.2.6 Criminal responsibility
With regard to criminal liability, section 44 of the General Penal Code states:

“A person who was psychotic or unconscious at the time of committing the act shall not be liable to a penalty. The same applies to a person who at the time of committing the act was mentally retarded to a high degree.”
3.21  **Poland**

3.21.1  **Issues surrounding the loss of legal capacity**

There are no official procedures or guidelines for the assessment of legal competency. It is determined, if necessary, on the basis of an interview and psychiatric examination carried out by a doctor or specialist in psychiatry (Kiejna et al., 2008).

3.21.2  **Proxy decision making**

3.21.2.1  **Guardianship**

3.21.2.1.1  **Conditions for the appointment of a guardian**

A person, who due to mental illness, mental deficiency or any other mental disorder is not able to control their conduct, may be declared completely legally incapacitated (Article 13 of the Civil Code of 23 April 1964). Pursuant to Article 16 of the Civil Code a person whose condition does not justify the declaration of complete incapacitation, but who needs assistance to manage their affairs, may be declared partially legally incapacitated.

The consequences of the incapacitation are the following: the limitation or exclusion of the possibility to enter into civil-legal transactions independently (Article 14 of the Civil Code), to become a proxy (Article 109.2 of the Civil Code), to draft a will (Article 944 of the Civil Code) or enter into marriage (Article 11 §1 of the Family and Guardianship Code of 25 February 1964). In the scope of labour law, it is impossible for the legally incapacitated person to take up a job, and the autonomy of the partially incapacitated person is limited (Article 22 § 3 of The Labour Code of 26 June 1974). Such persons are denied performing some functions or professions, e.g. of a judge, a physician, a civil servant, a broker, an editor-in-chief of a newspaper or magazine.

The court appoints a guardian after a petition is filed by the person’s spouse, a close relative, or a prosecutor. According to Article 152 of the Family and Guardianship Code, everyone, who has been appointed a guardian of the incapacitated person, is obliged to carry out the obligation. For some important reasons the courts may release the appointed guardian from this obligation. Taking over the duty of the guardian starts as soon as the appointed person takes an oath (a sworn statement) before the court (Article 153). The guardian is obliged to perform his/her duties with due diligence, following the ward’s and community’s interest.

3.21.2.1.2  **How guardianship is arranged**

The same regulations of the Family and the Guardianship Code which refer to the guardianship procedure in the case of minors are applied to guardianship of an adult person who has become incapacitated. (Article 176) The guardian is appointed by the court on the basis of a family member’s (spouse, adult child, sibling, cousin) or a prosecutor’s application/petition in which the need and reasons for incapacitation are stated. A medi-
cal doctor’s certificate is enclosed to the petition. The Court may hear the opinion of a sworn expert (psychiatrist) on the mental condition of the person who is to be incapacitated.

3.21.2.1.3 Who can be a guardian
According to Article 176 of the Family and Guardianship Code, first of all, a spouse of the alleged incapacitated person should be considered as a guardian, or if it is not possible, the person’s father or mother, or another close relative, who has full capacity to legal transactions.

3.21.2.1.4 The duties and responsibilities of guardians
Under the Family and Guardianship Code (1964) Article 155 §1, the guardian/legal representative takes care of the incapacitated person and his/her property under the supervision of the Guardianship Court. According to Article 156 the guardian must obtain the Court permission for any important decisions which concern the ward. Before taking any decision which has vital consequences for the ward’s life, the guardian should listen to the ward if his/her health and mental condition allows that and take into account his/her rational wishes (Article 158).

The guardian’s main responsibilities include: care, administration (management) and representation. The guardian/legal representative looks after personal and property interests of the ward, ensuring financial means, securing health care and treatment, making sure that his/her life is safe and that the ward is not a threat to himself/herself. If the ward is to be placed at a care centre/institution, the guardian should inform the Court about such plans, seek the Court’s permission and follow the court’s advice and orders. The Court may punish the guardian with a fine for not following the Court orders. (Article 598 of the Code of Civil Procedure) The guardian is responsible for the administration of the ward’s property, which should be specified in an inventory and presented to the court in an annual written report on the state of the property and decisions made and present to the court the account resulting from administration of property, which will give evidence of financial transactions or expenditure (Article 595 of The Code of Civil Procedure). If the ward’s property is insignificant (inconsiderable) the court may exempt the guardian from the duty to provide such reports. It is the duty of the guardian to represent the ward in civil legal transactions, which need the Guardianship Court’s permission.

3.21.2.1.5 How the financial affairs of the ward are handled
The appointed guardian is responsible for the property of the ward and should consult the Court on major financial decisions. (Article 160 §1 of the Family and Guardianship Code) The Court may oblige the guardian to put the ward’s valuables, securities and other documents at the Court deposit. Withdrawing money from the ward’s bank account is possible only with the Court permission. (Article 161). The Court supervises all important financial decisions by checking the guardian’s annual reports. Under Article 162 of the Family and Guardianship Code and Article 597 of the Code of Civil Procedure
the Court may grant the guardian, on his/her request, appropriate gratification from the ward's income or from public funds.

3.21.2.1.6 Measures to protect the ward from misuse of power
Article 17 of the MHPA of 1994 states that if it is ascertained that the legal representative of a person with a mental disorder is not adequately fulfilling his/her duties towards that person, the head of the psychiatric facility shall notify the Guardianship Court of that person's place of residence. This presumably would also apply to people with mental disorders in nursing homes.

According to Article 595 of the Code of Civil Procedure the guardian is obliged to present reports to the Court on the ward's conditions and wellbeing as well on administration of the ward's property, at least once a year.

3.21.2.1.7 Compensation and liability of guardians
According to Article 151 of the Penal Code criminal liability applies only to a person who has committed a prohibited, punishable act.

Under Article 545 of the Code of Penal Procedure, whoever files a petition for incapacitation of a person, acting in bad faith or recklessly, is subject to pecuniary penalty (fine) of up to PLN 1,000.

Whoever persistently evades performing of an obligation, imposed on them by law (Family and Guardianship Act) or court order, of the duty to take care of the ward and thereby exposes the ward to the impossibility of satisfying basic needs, is subject to pecuniary penalty, restricted liberty or imprisonment of up to 2 years (Article 209, §2 of the Penal Code).

3.21.2.1.8 Duration of guardianship
The guardianship is established for an unspecified period of time. It is in force until the abatement of guardianship or change of the kind of incapacitation (partial or full). Pursuant to Article 559 of the Code of Civil Procedure of 17 November 1964 “the court shall revoke the declaration of legal incapacitation when reasons for such incapacitation cease to exist. Such revocation may also be issued ex officio (§ 1). In the event of an improvement of the mental condition of the legally incapacitated person, the court may change the scope of legal incapacitation from complete to partial, and in the event of deterioration of the person’s mental condition – change the legal incapacitation from partial to complete”(§ 2).”

3.21.2.1.9 The right to appeal
The Code of Civil Procedure (Article 367 §1) grants the right to appeal against the lower court’s decision to the higher court within 2 weeks from the decision being made. Article 559 §3 and Article 560 of the Code enable the person who has been declared incapacitated the right to appeal to the court to revoke or change the decision.
3.21.2.2 Continuing/enduring powers of attorney
In the Polish legal system there is no such legal instrument.

3.21.3 Capacity in specific domains

3.21.3.1 Marriage and annulment
Issues relating to marriage are covered by the Family and Protective Code (Kiejna et al., 2008). Article 11, §1, for example, states that a person who is completely incapacitated cannot marry. This also applies to anyone who has a mental disorder or mental deficiency (Art. 12, §1). An exception may be made if the health and state of mind of the person with the mental disorder or deficiency does not threaten the marriage or the health of future offspring and provided that the person is not entirely incapacitated.

Either spouse can ask for a marriage to be annulled on the grounds that one of them has a mental illness or mental deficiency but this cannot be done if the mental illness has since been overcome (§2).

3.21.3.2 Voting capacity
According to the Constitution of the Republic of Poland of 2 April 1997, people who have been subjected by a court of law to legal incapacitation or deprived of electoral rights do not have the right to participate in a referendum or to vote (article 62, section 2).

Similarly, the Electoral Law of 12 April 2001 on Elections to the ‘Seym’ of the Republic of Poland, people who have been deprived of legal capacity are not entitled to vote (article 7, section 3). The same law allows for polling wards to be established in hospitals and welfare homes with at least fifty resident voters (or with fewer voters following consultation with the head of the hospital or welfare home) (article 30, section 1).

3.21.3.3 Contractual capacity
Competency to act in legal matters may be full, limited or lacking. It is not affected by mental disorder alone but must be determined on the basis of an assessment of whether the person has control over his/her actions (Kiejna et al., 2008). Therefore, in addition to diagnosis of a particular condition, this must be ascertained by means of a detailed assessment of a person’s ability to control his/her actions.

3.21.3.4 Testimonial capacity
According to article 944 of the Civil Code, in order to write a valid will or revoke a will, a person must have full active capacity. If this was not the case, or the will was written under duress, it would be considered invalid (art. 945). (Kiejna et al. 2008).

3.21.3.5 Civil and criminal responsibility
A person, who at the time of committing an offence, was incapable of recognising its significance or controlling his/her conduct because of a mental disease, mental deficiency or other mental disturbance, shall not be considered to have committed an offence.
If the person's ability to recognise the significance of his/her act or to control his/her actions was significantly diminished, the court may apply a lighter sentence (article 31 of the Penal Code).

Neither of the above measures applies if the person brought on his/her state of mind through alcohol or drugs. The concept of diminished responsibility does not apply in civil law (Radziwillowicz and Gil, 2004).

3.21.4 References


Radziwillowicz and Gil, 2004 (quoted by Kiejna et al., 2008)
3.22 Portugal

3.22.1 Issues surrounding the loss of legal capacity

A person who lacks mental capacity may be declared either subject to interdiction or incapacitation depending on the degree of incompetence. Clause 138 of the Civil Code states that if a person is suffering from a mental disorder (or is deaf, dumb or blind), which makes it impossible for him/her to be held responsible for people or property, s/he can be prohibited from exercising his/her rights (i.e. subject to interdiction).

According to article 141, the interdiction can be requested by the spouse, by the guardian (a minor who has no parents can have a guardian) or the trustee (if someone was subjected to incapacitation, and the degree of the incompetence increases, the trustee can request the interdiction), by anyone in the family that can be an inheritor (“parente sucessível” – not necessarily a descendant; it can be a sibling, who, according to the Portuguese law, can inherit) and by the Public Prosecution Service.

If a person is suffering from a mental disorder which is not serious enough to warrant interdiction, but s/he is proved to be incapable of managing his/her assets, s/he may be declared incapacitated in accordance with clause 152 of the Civil Code. Before a request is made to restrict a person’s legal competence, a social, medical and psychological study should be carried out (Guimaraes, 2008) in order to:

- establish the mental and physical state of health of the person;
- identify his/her social situation, income and family support; and
- define the probable social and psychological impact of the proposed measure.

To be more exact, the person who is to be declared incompetent (interdiction or incapacitation) is presented to the judge who leads the audience and asks questions such as: “what is your name, what time is it, what can you buy with EUR 20, where are we?” An expert (normally a psychiatrist) will also ask questions and analyse clinical data in order to make a clinical report. This report is very important to the judge’s decision. Of course the lawyers and public attorney may also ask questions.

3.22.2 Proxy decision making

3.22.2.1 Guardianship

A trustee is appointed for people who have been declared incapacitated according to clause 152 and a guardian is appointed for people who are subject to interdiction according to clause 138. According to article 145º the guardian (“tutor”) is the person who represents (acts in the name and the interest of) the person declared interdicted. The person whose incapacity has been declared is, according to article 153º, assisted by
the trustee ("curador") which means that the person cannot sell or donate his/her properties without the approval of the trustee.

3.22.2.1.2 How guardianship is arranged
The legal process is extensive and slow and for this reason, a large number of people with dementia are taken care of by their families and carers who act in good faith, but whose decisions taken on behalf of the person with dementia are not legally valid. Families and professionals do not have enough information on the legal procedures and interdiction is looked upon as a social punishment to Alzheimer patients (Guimaraes, 2008).

Provisions for appointing a guardian are contained in several clauses of the civil code. Clause 142 of the Civil Code permits the Court at any time in the proceedings to appoint a temporary guardian to represent the party subject to interdiction in cases where delay could be detrimental to the wellbeing of the latter. One such case would be where there was an urgent need to provide for this person or take care of his/her property.

3.22.2.1.3 The choice of guardian
According to clause 143. a guardian can be appointed for an adult who is subject to interdiction and should be assigned in the following order of priority:

- The spouse unless separated or legally unable to hold the position for another reason;
- The person appointed by the parents in a will or in a written document officially recognized (it occurs with minors who are incapable);
- One of the parents;
- The eldest child and then the following children.

If, however, it is not possible for the above to take on the duties of guardian, it is the responsibility of the Court to appoint an alternative having listened to the views of the family.

It is not a simple matter of choice as to whether the spouse or children accept responsibility for guardianship in that they must be excused in order not to do it. The person’s descendants may be excused from further duty at their request on the completion of five years, provided that there are other descendants who are capable and willing to take on the duties. If the person has been declared incapacitated, a trustee may be appointed.

3.22.2.1.4 The duties and responsibilities of guardians
The guardian is responsible for taking special care of the health of the person subject to interdiction and may, to this end, sell or transfer property, having obtained the necessary legal authorisation (clause 145). The role of the trustee, on the other hand, is to assist the incapacitated person in transactions. This includes the distribution of assets amongst living people.
3.22.2.1.5 How the financial affairs of the ward are handled
According to clause 154, the responsibility for the administration of the assets of the incapacitated person may be given by the court either wholly or in part to the trustee. If this is the case, a family council is set up and a voting member designated. This person functions as a sub-trustee and exercises the function of guardian.

3.22.2.1.6 Measures to protect the ward from misuse of power
Article 153.2 states that if the trustee does not authorise a disposal act (e.g. the sale of property) the Court can decide instead of the trustee. Article 154.3 states that the trustee has to justify the administration of the assets of the person with incapacity.

3.22.2.1.7 Payment and liability of guardians
In Portugal there are no professional guardians. They are usually family members. So they don’t receive any payment and can only be reimbursed for their expenses. The payment of a guardian is only foreseen for minors.

The guardians are responsible for the administration they do on behalf of and according to the best interests of the person declared incapable. This means that they have to justify every expense and administrative act.

The Public Prosecution Service and the family council have the power to supervise the guardian’s activities and they can ask the judge to make him/her justify his/her actions. They may also demand the dismissal of the guardian if s/he is not acting according to his/her duties.

3.22.2.1.8 Duration of guardianship
There is no time limitation on the appointment of guardians and tutors.

3.22.3 Capacity in specific domains

3.22.3.1 Marriage
A person who has been declared interdicted or incapable has no capacity to marry. And if, in spite of the incapacity, the marriage is celebrated, it is null and this nullity can be declared at any time.

According to clause 1601 of the Civil Code, a marriage may be opposed if it is to a person who has been either diagnosed insane (even if s/he is in a period of lucidity) or declared subject to interdiction or incapacitation due to a mental disorder. The invalidation of a marriage contracted by someone who is suffering from dementia can be requested by any direct relative of the couple, heirs or the Public Attorney. The decision on this issue is made by the Family Court (Guimaraes, 2008).
3.22.3.2 Voting capacity
A person who has been declared interdicted has no voting capacity but a person who has been declared incapacitated can vote.

3.22.3.3 Contractual capacity
Any legal transaction carried out by a person who has been subjected to interdiction may be annulled (clause 148). Even legal transactions carried out during the proceedings for interdiction may be annulled, although this is only effective from the date that the sentence is passed and is dependent on proof that the transaction caused harm to the person subject to interdiction.

3.22.3.4 Testamentary capacity
A person who has been subjected to interdiction as a result of a mental disorder does not have the capacity to make a will (clause 2189 of the Civil Code). A person subject to either interdiction or incapacitation cannot be named as the executor of a will (clause 2321 of the Civil Code).

Nowadays, notaries are increasingly asking for the expertise of 2 psychiatrists to assess the capacity of people over 65 and/or who have a psychiatric disorder. This is not required by law but is done as a precautionary measure to avoid people contesting wills, e.g. relatives who were perhaps not or not sufficiently included in the will (Firmino et al. 2008).

3.22.3.5 Civil responsibility
According to article 139 of the Civil Code, a person who has been declared interdicted is considered a minor. As mentioned above (articles 148 and 149), the acts of people who have been declared interdicted can be annulled.

According to article 488, a person who is not capable of understanding at the moment of acting is not responsible for any damage s/he may cause (unless the person caused the incapacity, e.g. by getting drunk).

Incapacity is presumed in the case of people who have been declared interdicted. In other cases, incapacity has to be proved.

In some special cases, as foreseen in article 489º, in accordance with the equity principle, an incapable person may be condemned to pay damages they had caused (if there is no other way to compensate the victim but only if the incapable person has the financial means to pay without prejudice to his/her basic needs).

The tutor or other person responsible by law or contract to take care of the incapable person may be held responsible for the damages caused by him/her (article 490).
3.22.3.6 Criminal responsibility
According to article 20º of the Penal Code, the person who, due to a psychological disorder, is not able to understand that s/he is acting against the law, is not criminally responsible.

3.22.4 Reference

3.23 Romania

3.23.1 Loss of legal capacity

Mental capacity is described in article 5 of the Romanian Mental Health Law of 2002 as an individual’s capacity to make certain decisions and to perform certain acts and the ability to understand the nature and effects of one’s acts. On the basis of a medico-legal examination, a person may be declared incompetent or partially incompetent and subject to total or partial interdiction. Legal competence is defined in article 948 of the Romanian Civil Code (Tătaru, 2008).

3.23.2 Proxy decision making

3.23.2.1 Guardianship

3.23.2.1.1 Conditions for the appointment of a guardian

According to article 142 of the Romanian Family Code, a person who does not have discernment to take care of his/her interests, due to mental alienation or mental retardation, shall be placed under interdiction. A guardian may be appointed for a person who has been declared totally or partially incompetent.

Law no. 448 of 18 December 2006 on the promotion of the protection of disabled people also stipulates that people with disabilities shall receive protection from neglect and abuse wherever they are located and that disabled people, regardless of their age, who are wholly or partly incapable of managing their personal property, shall benefit from legal protection in the form of trusteeship or guardianship and legal assistance (article 23, §§1 and 2).

Dementia and Alzheimer’s disease are legally defined as a disability in Romania. This is covered by Order no. 90 of 9 August 2002 which was issued by the Ministry of Health, State Secretariat for Disabled People and published in the Official Gazette no. 701 of 25 September 2002. However, according to the Romanian Alzheimer’s Society, the methodological norms have not yet been established, which means that so far this definition is mainly theoretical and does not translate into practice.

3.23.2.1.2 How guardianship is arranged

The person must be examined by a legal medical commission in order to establish a possible diagnosis of mental illness and to evaluate competency. If total or partial interdiction is declared, the City Hall decides whether to set up total or partial guardianship. Total guardianship (tutela) is covered by article 142 of the Romanian Family Code and partial guardianship (curatela) is covered by article 146 of the Romanian Family Code. Partial guardianship can also be arranged prior to establishing the actual guardianship measure.
3.23.2.1.3  **Who can be a guardian**  

The choice of guardian is made by the guardianship authorities at the City Hall (which is the local administrative body). Section 6, §4 of Law no. 488 of 18 December 2006 states:

> If the disabled person has no relatives or people who accept guardianship, the court may appoint a guardian or the local government authority, as appropriate, and also the private legal entity that provides protection and care for the disabled person.

3.23.2.1.4  **The duties and responsibilities of guardians**  

The parent, legal representative, guardian or non-governmental organisation, of which the disabled person is a member, can assist him/her in court and the proceedings linked to obtaining the disability rights to which the person is entitled under Law no. 448 of 2006 shall be made expeditiously (Law no. 448, section 6, §6-7).

The duties and responsibilities of the person or authority appointed as guardian depend on whether it is partial or total guardianship and this is determined by the guardianship authorities.

3.23.2.1.5  **Measures to protect the ward from abuse**  

When a guardian is appointed, s/he is obliged to make an inventory of all the movable and immovable assets of the disabled person and to submit an annual report regarding the management of such assets to the guardianship authorities from the administrative territorial unit of the place where the disabled person resides (Law no. 448 of 2006, section 6, §3).

These guardianship authorities also monitor whether the guardian is fulfilling his/her obligations (§5).

3.23.2.1.6  **Duration of guardianship**  

Once the final decision for interdiction has been made, the guardianship measure continues for as long as the conditions which led to the interdiction remain.

Therefore in the case of dementia, the decision concerning the guardianship measure remains valid until the person with dementia, the guardian or any other person named in article 115 of the Romanian Family Code requests termination of the interdiction (which would rarely, if ever, happen).

However, the guardian of a person who is under interdiction is entitled to request replacement after three years of duty (article 148 of the Romanian Family Code).

Also, if guardianship authorities consider after the annual monitoring that the guardian did not fulfil his/her duties properly, they can terminate the guardianship and change the guardian (a partial guardian can be named until a new permanent guardian is appointed). Otherwise, the guardianship remains permanent.
3.23.3 Capacity in specific domains

3.23.3.1 Marriage and annulment
According to article 9 of the Family Code (Law 4/1953) (issued in the Official Bulletin no. 13 of 18 April 1956 and modified and completed by Law 288 of 2007), it is forbidden for a person with a mental disorder, mental retardation or temporary lack of mental faculties with loss of discernment to marry.

3.23.3.2 Voting capacity
Article 34 of the Romanian Constitution of 1991 states:

Every citizen having attained the age of eighteen by or on the election day shall have the right to vote.

Mentally deficient or alienated, placed under interdiction, as well as persons disenfranchised by a final decision of the court cannot vote.

3.23.3.3 Criminal responsibility

According to article 28:

An act provided in the criminal law shall not be an offence if the perpetrator, at the time of perpetration, could not realise his/her actions or his/her omissions and can not control them, either because of mental illness or other causes.

3.23.4 Reference

3.24 Slovenia

3.24.1 Proxy decision making

3.24.1.1 Guardianship
Guardianship is covered by article 178-223 of the Civil and Family Code (IGN, 2007).

3.24.1.1.1 How guardianship is arranged
The wishes and interests of the ward are the most important factors in the guardianship procedure.

3.24.1.1.2 Who can be appointed guardian
A guardian cannot be:
- A person who cannot have parental responsibility.
- A person who does not have contractual capability.
- A person whose interests are opposed to those of the ward.
- A person who cannot be expected to act in the best interests of the ward.

3.24.1.1.3 The duties and responsibilities of guardians
Guardians have to report to the Centre of Social Care on an annual basis.

3.24.1.1.4 Compensation and liability of guardians
Guardians are not paid by the State for the services they provide. However, they may be entitled to receive some expenses from the ward’s estate.

3.24.2 Capacity in specific domains

3.24.2.1 Voting capacity
Article 43 of the Constitution states that the right to vote is universal and equal and that every citizen who has attained 18 years of age is eligible to vote and to stand for election.

Article 7 of the National Assembly Elections Act of 1992 further states:

“Every citizen of the Republic of Slovenia who has reached the age of 18 by the Election Day and has not been declared legally incompetent shall have the right to vote and to be elected as a deputy.”

3.24.2.2 Criminal responsibility
According to article 16 of the Penal Code, a person shall not be held responsible for his/her actions if at the time the offence was committed, s/he was not capable of understanding the meaning of his/her act or of controlling his/her own actions due to any permanent or temporary mental disease, mental disorder or any other permanent and
severe type of mental disturbance such as insanity. A reduced sentence may be given if the perpetrator’s ability to understand the meaning of his/her actions or to control them was greatly diminished due to any of the above-mentioned states of mind. This would be classed as diminished responsibility.

The above provisions would not apply if the state of insanity was self induced, e.g. through alcohol or drugs.

3.24.3 Reference

3.25 Spain

3.25.1 Issues surrounding the loss of legal capacity

Provisions relating to legal capacity can be found in articles 199 to 214 of the civil code.

According to these provisions, nobody may be declared incapacitated except by court judgement by virtue of legally established causes. Causes for incapacitation include those illnesses or permanent deficiencies of a physical or psychiatric nature, which prevent the person from managing his/her own affairs. According to Marquez and Mateos (2008), anyone can commence an incompetence proceeding by informing the Department of Public Prosecutions. Alternatively, the person with presumed incompetency, first or second degree relatives, the authorities or public officers must inform the Department of Public Prosecutions if they are aware of any grounds for incompetence.

The Department of Public Prosecutions must request the declaration if the persons mentioned in the previous article do not exist or if they have not requested it. For this reason, should the authorities and civil servants in the exercise of their duties become aware of the existence of a possible cause for incapacitation, they must inform the Department of Public Prosecutions of this. In addition to those whose responsibility it is to report a possible case of incapacitation, any person can inform the Department of Public Prosecutions of facts which he/she believes could be a cause for incapacitation.

The Department of Public Prosecutions, which must always be involved in the court case, must request the appropriate information from the Judge within fifteen days of being informed. If the Department of Public Prosecutions had not requested the procedure, the Judge must appoint a defence counsel for the person presumed to be incapacitated, unless one has already been appointed. In all other cases, the Department of Public Prosecutions acts as the defence counsel. The person presumed to be incapacitated may appear in court with his/her own defence counsel and legal representatives.

During the court case, the Judge hears the closest relatives of the person presumed to be incapacitated, consults the latter and hears the verdict of a qualified doctor. The Judge may also ask for as many tests to be carried out as he/she sees fit. At any point in the proceedings the Judge may take any measures which he/she considers appropriate to safeguard the person or estate of the person who is presumed incapacitated.

When the sentence is declared, the Judge decides on the extent and limits of incapacitation as well as on the system of guardianship or control to which the incapacitated person must be subjected. The sentence can be overridden or modified if necessary at the request of those exercising the post of guardian, the Department of Public Prosecutions or the incapacitated person him/herself. Court decisions on incapacitation shall be recorded or inscribed in the Civil Register.
Other legislation which relevant to the issue of incompetence includes the Ley de Enjuiciamiento Civil (Spanish Rules of Civil Law Procedure) and the Código Penal (Spanish Penal Code) (Fernando Marquez and Raimundo Mateos, 2008).

3.25.2 Proxy decision making

3.25.2.1 Guardianship
With reference to Ley 41/2003 (de 18 de noviembre) sobre Protección de las personas con discapacidad (Law on Asset Protection of Handicapped Persons), two main points are mentioned by Marquez and Mateos (2008):

- The creation of a protected state that will be used exclusively for the care, protection and wellbeing of the disabled person whether it is managed by the person him/herself or a tutor, curator or non-profit specialised institution.
- The possibility to take precautionary measures against one’s own future incompetence (esp. in the case of neurodegenerative brain diseases).

Relatives (spouses, ascendants and descendants) are obliged to provide maintenance for each other according to the Civil Code (articles 142 to 153). This covers everything which is essential for sustenance, accommodation, clothing and medical care.

The guardianship, curatorship or custody of incapacitated people is covered by articles 215 to 306 of the Civil Code. The custody and protection of an incapacitated person can be ensured by means of:

- Guardianship (art. 222-285).
- Curatorship (art. 286-294).
- Court-appointed defence counsel (art. 295-302).
- De facto guardianship (art. 303-306).

3.25.2.1.1 Conditions for the appointment of a guardian
If it comes to the attention of the Department of Public Prosecutions or a competent Judge that there is a person within their territory who should be subject to guardianship, it is their responsibility to arrange for guardianship. Anyone can inform them of a fact which they feel could justify guardianship.

Once relatives have become aware of any fact which would necessitate the setting up of guardianship, they should instigate the setting up of guardianship. Failure to do so would result in their being responsible for compensation for any damages or losses caused.

Causes for incapacitation include those illnesses or permanent deficiencies of a physical or psychiatric nature, which prevent the person from looking after himself/herself. Consequently, these are the same conditions for the appointment of a guardian.
3.25.2.1.2 How guardianship is arranged
The Judge sets up guardianship after a hearing with the closest relatives of the person concerned or with people whom he/she may deem appropriate. If the person for whom the guardianship measure is intended is over 12 years of age, he/she must also be heard. When the decision is made by the Judge or at another point in time, he/she can stipulate the measures for supervision and control which are deemed appropriate for the person under guardianship. The Judge may also at any time ask the guardian to provide a report on the incapacitated person’s situation and the state of the guardianship.

3.25.2.1.3 Who can be a guardian
Guardians are appointed according to the following order of preference:

1. The spouse who cohabits with the person under guardianship.
2. The parents.
3. The person(s) designated by the person under guardianship in his/her last will and testament.
4. The descendants, ascendants or brother/sister appointed by the Judge.

The Judge can alter the order of preference or exempt all those included in it, if he/she feels that this would be in the best interests of the person under guardianship. In the absence of those mentioned in the above list, the Judge can appoint a person whom he/she considers to be the most ideal person due to his/her relationship with the person under guardianship. The court decision on the choice of guardian (as well as for curator) must be recorded in the Civil Register.

Guardianship is exercised by one person unless the Judge decides otherwise. This could be due to the fact that it would be more appropriate to divide the guardianship of personal matters from that of assets.

Non-profit making organisations whose aims include the protection of minors and/or incapable adults may also be guardians. Any person who is in full possession of his/her civil rights and has not been disqualified could be a potential guardian. Articles 243 to 247 give details of people who cannot be guardian. These include people who:

• have been removed from a previous guardianship;
• have been convicted and punished by a prison sentence, whilst incarcerated;
• have been sentenced for any crime that might lead to the assumption that they would not fulfil the role of guardianship properly;
• are incapable of the task;
• harbour manifest enmity towards the incapacitated person;
• have bad conduct;
• do not have known means of support;
• have substantial conflicts of interests with the incapacitated person;
• are involved in legal proceedings against the latter or proceedings regarding the civil status of the incapacitated person;
• owe considerable sums to the incapacitated person;
• are involved in bankruptcy proceedings unless guardianship only relates to the person.

3.25.2.1.4 The duties and responsibilities of the guardian
The guardian is the representative for the incapacitated person except for those acts which he/she may perform alone, whether by express provision of the Law or by the sentence of incapacitation.

Those subject to guardianship owe respect and obedience to the guardian. A guardian may, in the performance of his/her duty, seek the aid of the authorities.

The guardian is obliged to provide care and food, encourage the achievement or recovery of capacity and integration into society (if possible), to inform the Judge annually about the situation of the incapacitated person and provide the Judge with annual accounts for his/her administration.

If in the exercise of his/her duties, the guardian (or the curator) incurs damages or losses through no fault of his/her own, he/she may be entitled to compensation which can be deducted from the assets of the person under his/her custody.

3.25.2.1.5 How the financial affairs of the incapacitated person are handled
The Judge may demand that the guardian set up a guarantee deposit in order to ensure that the guardian respects his/her obligations. The type and amount of the guarantee deposit is determined by the Judge. This deposit can be annulled or modified at any time by the Judge provided that there is a valid reason.

The guardian is obliged to make an inventory of the assets of the ward of court within a time limit of sixty days to be counted as from the date on which he/she takes up the post. The court authorities may extend this time limit if there are reasons to do so. The inventory is registered by the court in the presence of the State Prosecutor.

Any money, jewellery, precious objects and stocks or documents that, in the opinion of the court authorities, should not remain in the possession of the guardian must be deposited at an establishment intended for that purpose. If this results in expenses, they can be charged to the estate of the person under guardianship. If the guardian does not include in the inventory loans held against the person under guardianship, it shall be understood that he/she has expressly waived them.
The guardian must have court authority:

1. To dispose of or encumber real estate, trading or industrial establishments, precious objects and movables belonging to the minors or incapacitated persons, or to execute contracts or perform acts that have the nature of an instrument or are liable to be registered. The sale of preferential share purchase rights is exempted.

2. To waive rights, as well as settle or submit to arbitration questions in which the person under guardianship is an interested party.

3. To accept any legacy without profit for the inventory, or to reject the latter or the gifts.

4. To make extraordinary expenditure on the assets.

5. To sue on behalf of those subject to guardianship, except in urgent matters or those for very small amounts.

6. To assign assets on lease for a period of over six years.

7. To grant and take money on loan.

8. To freely dispose of assets or rights belonging to the person under guardianship.

9. To assign to third parties the loans that the person under guardianship holds against him/her, or to purchase for cash the loans from third parties against person under guardianship.

The sharing out of a legacy or the division of a common asset performed by the guardian shall not require court authority, but once done court approval is required.

Before authorising or approving any of the acts mentioned above, the Judge holds a hearing with the Department of Public Prosecutions and with the person under guardianship. The Judge may also obtain appropriate reports if he/she deems it appropriate.

The guardian is entitled to payment, providing that the Judge considers that the estate of the person under guardianship allows it. It is the duty of the Judge to set the amount and to decide how it will be paid. In order to do this, he/she must bear in mind the work to be performed and the value and profitability of the assets, attempting as far as possible to ensure that the amount of the payment is not less than 4 percent and not more than 20 per cent of the cash yield from the assets.

In the event of the death of the person under guardianship, the guardian must submit general accounts with documentary evidence for his/her administration before the court authorities within a time limit of three months, which may be extended, where necessary, if there is a just cause. Before approving the accounts, the Judge holds a hearing with the trustee or the legally appointed guardian and the heirs of the person who has been subject to the guardianship.
3.25.2.1.6 Measures designed to protect the ward from misuse of power.
If guardians have been granted joint powers and a situation arises whereby there is some kind of incompatibility or conflict of interests with either guardian in respect of an act or contract, the other guardian can carry it out. Alternatively, if there are several guardians they can carry out the act jointly. If one guardian ceases to act as a guardian, the remaining guardians should continue to act on behalf of the person under guardianship unless otherwise stipulated when the appointment was made.

People can be removed from the office of guardian by the Judge if there is any legal cause for disqualification or if they have behaved badly in the performance of their duties, through non-compliance with the duties or manifest ineptitude. Removal can be requested by anyone and can be decreed by the Judge following a prior hearing with the guardian. During the proceedings, the Judge may suspend the guardian from his/her duties and appoint a court defender for the incapacitated person.

3.25.2.1.7 Curatorship, court appointed defender and de facto guardianship
A curator may be appointed for a person if this was decided as part of the sentence of incapacitation. The curator must assist the person in tasks which were stipulated in the court decision establishing curatorship. For tasks which were not mentioned at the time the court decision concerning incapacitation was made, it is understood that the curator needs authorisation for those tasks for which the guardian needs authorisation (mentioned earlier). The regulations regarding the appointment, disqualification discharge and removal of guardians are also applicable to curators and court-appointed defenders. A person has been made bankrupt or is involved in bankruptcy proceedings cannot be appointed as a trustee. If the person subject to curatorship previously had a guardian, the post of curator will be held by the same person unless the Judge decides otherwise.

A court-appointed defender may be appointed:

- to represent and protect the interests of an incapacitated person in situations where there is a conflict of interests between the latter and his/her legal representative or curator;
- to intervene if there is a reason which prevents the guardians or curator from performing his/her duties;
- to handle the assets of a person who is undergoing the procedure for appointment of a guardian or curator.

A de facto guardian is a person who acts in the interests of a person who may be incapacitated but for whom this has not been established by the courts. If the court authority becomes aware of the existence of a de facto guardian, it may require him/her to report on the situation of the person and the assets of the presumed incapacitated person and his/her relation thereto. The Judge may also decide to set up supervisory and control measures. The acts of the de facto guardian may not be contested if it is found to be in favour of the incapacitated person.
3.25.3 Capacity in specific domains

3.25.3.1 Contractual capacity
Article 293 of the Civil Code addresses the issue of a deal made by an incapacitated person who does not have the necessary authorisation. If a person for whom a curator has been appointed carries out a legal act for which the authorisation of the curator should have been obtained, the act may be annulled at the request of the curator or the person him/herself.

According to article 1888 of the Civil Code, a person who voluntarily takes charge of the administration of the business of another person, without any mandate from the latter, must continue to do so until completion. Alternatively, the person can request the interested party to replace him/her in the management of the transaction provided that he/she is able to do so.

3.25.3.2 Testamentary capacity
There is a presumption of capacity with regard to making a will (and/or entering into a contract). If somebody wants to challenge the validity of a will, it is not necessary to have proof of the testator’s incapacity prior to the writing of the will but a person must nevertheless prove that when the will was executed the testator lacked capacity (Marquez and Mateos, 2008).

3.25.3.3 Criminal responsibility
According to article 20 of the Penal Code, a person who at the time of committing a criminal offence was unable to understand the illegal nature of the act or of acting according to that understanding due to any psychic problem or alteration, is exempt from criminal responsibility.

The court may impose measures to restrict their liberty (e.g. linked to driving and carrying firearms) and may include admission into a medical or educational establishment or up to 5 years’ outpatient treatment at a medical or social/health care centre (Marquez and Mateos, 2008).

3.25.4 Reference
3.26  Sweden

3.26.1  Issues surrounding the loss of legal capacity

In 1989, the system of legal incompetence was replaced by the system of administrators. The main guiding principle of this reform was that it was considered that a declaration of incompetence was perceived as degrading.

3.26.2  Proxy decision making

3.26.2.1  Guardianship

Three different forms of guardianship exist in Sweden: guardian (for minors under 18), custodian (god man) and trustee (förvaltare).

3.26.2.1.1  Conditions for the appointment of a guardian

According to the Code on Parenthood and Guardianship (SFS 1949:381 chapter 11, paragraph 4):

“If, because of sickness, mental disorder, a weakened state of health or the like, a person needs assistance in safeguarding his rights, administering his property or providing for his needs, the Court shall, if needed, appoint a custodian (god man) for him.”

According to paragraph 7:

“If a person who is in such a situation described in paragraph 4 is unable to take care of himself/herself or his/her property, the court can appoint a trustee (förvaltare) for him or her.”

A custodian (god man) is usually appointed when a person is unable to manage his/her own financial affairs and has no other means of assistance. It is frequently used in cases of dementia. The system of trusteeship, on the other hand, is used when the conditions for appointment of a custodian exist, but it is felt that the need is not sufficient to warrant such an appointment (in which case a trustee may be appointed).

3.26.2.1.2  How guardianship is arranged

The request for a custodian (god man) can be made by the person concerned, the immediate family and the chief guardian or the Public Trustees’ Committee. An application must be made and sent to the Public Trustees’ Committee, along with a social welfare report outlining the reasons for the application. If possible, this should be approved by the person for whom the request is being made. If not, the application must be accompanied by a medical certificate stating that the person in question was unable to consent. A copy of the person’s birth certificate must also be included in the application. If a particular custodian is to be proposed, s/he must confirm his/her willingness to take on the responsibility. The Public Trustees’ Committee then carries out an examination and afterwards submits an application to the District Court. Once the District Court has made its decision, it issues a custodian’s authorisation which the custodian can then use as a means of identification and proof that s/he is the custodian.

The appointment of a trustee (förvaltare) involves more or less the same procedure. However, if at all possible, the District Court prefers to have a verbal examination of the person for whom the application is being made. A doctor's report must be provided and unless obviously unnecessary, statements must be obtained from the spouse, close relatives, the Public Trustees' Committee and the Social Welfare Committee.

### 3.26.2.1.3 Who can be a guardian
The conditions for someone to be appointed as custodian or trustee are that the person is honest, has relevant experience and is an eligible man or woman.

### 3.26.2.1.4 The duties and responsibilities of guardians
It is the duty of the custodian to ensure that the ward\(^\text{33}\) receives the care and supervision that s/he needs. As a rule, the custodian also has responsibility for the ward's financial affairs.

Trusteeship replaced the system of declaring people incompetent, which was discontinued in January 1989. The duties of the trustee differ from one case to the next according to the particular needs of the ward. The trustee may be limited to managing the ward's property or part of his/her capital. The ward then loses the right to make decisions relating to such matters, but retains his/her legal competence in all other matters.

### 3.26.2.1.5 How the financial affairs of the ward are handled
Within one month of being appointed, the custodian has to submit a list of the ward's assets and liabilities to the Public Trustees' Committee. This must include personal details of the ward, a list of assets, a list of bank assets (including the names of bank, account numbers and statements of accounts), details of securities (shares and bonds), details of real estate, details of owner-occupied dwellings and details of liabilities. Personal details of the custodian should also be included.

Certain bank accounts must be blocked to prevent unauthorised withdrawals. If it is necessary to access these funds, the approval of the public trustee must be obtained. Funds needed to cover daily expenses can be placed in an unblocked account. All accounts remain in the name of the ward.

The custodian should contact the ward's landlord/landlady, the telephone company and the insurance company etc. so that future bills can be sent to the correct address.

The duties of the trustee are determined on a case-by-case basis.

### 3.26.2.1.6 Measures to protect the ward from misuse of power
It is the duty of every municipality to appoint either a single public trustee or a committee of public trustees, whose task it is to supervise the guardians (for minors), trustees and custodians. The aim of this supervision is to ensure that the rights of the elderly, sick, handicapped and minors are respected.
It is the responsibility of the public trustee or Committee of public trustees appointed by the municipality to supervise the work of trustees and custodians. Every year, an account of the administrative work of the preceding year must be submitted by trustees and custodians to the public trustee. The annual account must contain details of assets and liabilities, income and expenditures, a statement of bank accounts (including deposited securities and certificates for other funds) and details of any blocked accounts. A final account must be submitted when the assignment comes to an end or the ward dies. The public trustee who examines the accounts can set a fee for this task.

**3.26.2.1.7 Compensation and liability of guardians**
Both custodians and trustees receive fees for their services and can also receive compensation for costs. Fees and compensation for costs are paid from the ward’s funds if his/her income totals more than twice the base amount\(^{34}\) or if his/her assets exceed three times the base amount. If this is not the case, the set fees are paid by the municipal authority. This is determined by the public trustees.

**3.26.2.1.8 Duration of guardianship**
The guardianship measure lasts until it is no longer needed. Decisions regarding the discontinuation of guardianship measures are made by court or the chief guardian.

**3.26.2.1.9 The right to appeal**
People who are affected by decisions made by a district court with regard to guardianship have the right to appeal.

**3.26.3 Capacity in specific domains**

**3.26.3.1 Marriage and divorce**
In order to marry, a person must be at least 18, not closely related to his/her future partner and not already married. Up until 1989, people who were under guardianship had to obtain special permission to get married. This is no longer the case and a person for whom a trustee or custodian has been appointed can still get married without needing to first obtain permission.

According to Sparring Björkstén (2008), there are no explicit requirements in Swedish law that the people contracting a marriage should actually understand the significance of it. A case in which a person with dementia married someone without dementia was taken to the Supreme Court (1994: 23). It was stated that the parties contracting a marriage must understand what they are doing and that it is the duty of the person officiating at the marriage to check that this is the case.

**3.26.3.2 Voting capacity**
A person who is a Swedish citizen and at least 18 years of age may vote, as the system of declaring a person incapacitated has been abolished. Moreover, anyone who has the right to vote can also run for office (Sparring Björkstén, 2008).
3.26.3 Contractual capacity
Since the practice of declaring a person incompetent has been abolished, even a person suffering from severe dementia retains his/her capacity to enter into legal relations. However, a contract can be rendered invalid.

The law of 1924 (SFS 1924:323) on the Effect of Contracts Concluded Under the Influence of a Mental Disturbance states that a contract is invalid if it was made by someone who was suffering from a mental disorder at the time. In such cases, the parties making the deal must return any goods which were exchanged and, if this is impossible, must provide appropriate compensation. In 1991, another paragraph was added (SFS 1991:1550) which states:

“Anyone with whom a contract is concluded in good faith has, to such an extent as is found reasonable, a right to receive compensation for the loss occasioned by the contract.”

3.26.3.4 Testamentary capacity
The following two articles in the Inheritance Code (SFS 1958: 637) cover the issue of validity of wills.

“A will that has been written under the influence of a mental disorder is not valid.” (Chapter 13, §2)

“If someone has forced the testator to write his/her will or abused his/her lack of judgement, weak will or dependence, the will is not valid.” (Chapter 13, §3)

If someone wants to challenge a will, they must go to court and it is their responsibility to find expert witnesses. People do not usually have a medical assessment before writing a will and most doctors are reluctant to be expert witnesses (Sparring Björkstén, 2008).

3.26.3.5 Civil responsibility
Chapter 2, paragraph 5 of the Damages Act (SFS 1972:207) deals with the responsibility for damage brought about by oneself when suffering from a mental disorder. The text reads as follows:

“Anyone who inflicts damage upon persons or things under the influence of a serious mental disorder or of any other mental disorder that is not self-inflicted and temporary shall make compensation for the damage to such extent as is reasonable, account being taken of his/her mental condition, the character of his/her actions, available liability insurance and other financial resources as well as other circumstances.”

3.26.3.6 Criminal responsibility
According to Chapter 30, section 6 of the Criminal Code:

“A person who commits a crime under the influence of a serious mental disturbance may not be sentenced to imprisonment. If, in such a case the court also considers that no other sanction should be imposed, the accused shall go free from sanction.” (Law 1991:1138)
3.26.4 Reference

3.27  Switzerland

3.27.1  Issues surrounding loss of legal capacity

The Swiss Civil Code of 10 December 1907 (RS 210) addresses the issue of incapacity. Article 13 states that adults who are capable of discernment can exercise their civil rights. Discernment is defined in article 16d as follows:

Any person who has not been deprived of the faculty to act with reason due to his/her young age, or has not been deprived of it as a result of a mental illness, weakness of the mind, drunkenness or other similar causes, is capable of discernment according to this law.

Adults who are incapable of discernment, minors and people who have been legally declared incompetent cannot exercise their civil rights according to article 17.

The Cantons designate the authorities which are responsible for declaring incompetence and the procedure to follow. Recourse to federal tribunals is possible (to preserve one's rights). Whenever a person is declared legally incompetent, this must be published in the official journal in the person's place of residence and place of origin. However, this is no longer the case in the new law on guardianship and incapacity (please see explanation later in this report).

A person may only be declared legally incompetent on the grounds of a mental illness or “weakness of the mind” if an expert opinion has been obtained to that effect. The report provided by the expert must indicate whether the person can be questioned (art. 374).

3.27.2  Proxy decision making

3.27.2.1  Guardianship

Switzerland is in a transitional period due to the fact that the parliament has adopted a new law on the protection of adults but this law has not yet come into force.

Below, you will find details about the legislation in force and the new law.

3.27.2.1.1  Conditions for the appointment of a guardian

There are three main guardianship possibilities: legal counsel (conseil légal), tutorship (tutelle) and curatorship (curatelle).

A tutor may be appointed for any adult who, due to mental illness or weakness of the mind, is incapable of managing his/her own affairs, cannot manage without permanent care and assistance or threatens the security of other people (art. 369 of the Civil Code).
Any adult who can show that s/he is incapable of managing his/her own affairs due to age-related weakness (“faiblesse sénile”), illness or lack of experience can ask for a tutor to be appointed (art. 372IV of the Civil Code).

A curator is appointed to assist a person with specific needs on a temporary basis. The person in need of assistance can request a curator him/herself. This measure is less restrictive than tutorship.

People for whom a curator is appointed retain their civil rights (article 417) but are nevertheless limited in exercising such rights. The duration of curatorship and payment for this service is fixed by the guardianship court (l’autorité de tutelle).

There are three types of curatorship:

1. Representative curatorship which is usually for adults (who are ill or absent) or in cases where there is a conflict of interests between a legal representative and the person concerned (article 392 of the Civil Code).
2. Management curatorship which is for people whose personal assets (e.g. financial, business or property) are not managed or are insufficiently managed (article 393 of the Civil Code).
3. A combination of the two.

Legal counsel is a measure which falls between tutorship and curatorship. It involves the limitation of a person’s civil rights but only those linked to the management of personal assets. There are three types of legal counsel:

1. Cooperative legal counsel which involves the management of certain personal assets and leaves the person concerned the right to manage all other affairs.
2. Management legal counsel which involves the management of all the person’s personal assets (but allows the person to manage the income from his/her wealth and the proceeds of his/her work).
3. A combination of the two.

In practice today, the legal counsel has practically disappeared and also tutorship is more and more being replaced by the combined curatorship, especially for elderly people who are incapable of managing their own affairs. This measure can actually be taken for a longer period.

3.27.2.1.2 How guardianship is arranged

The tutelary authority (autorité tutélaire) is the official body responsible for guardianship measures and is designated by each canton. It can be a judiciary authority, an administrative authority or a combination of the two.
When a tutor takes up his/her functions, s/he and a representative of the guardianship court make an inventory of the ward's possessions. If sufficiently capable, the ward can also take part in the inventory. The supervisory authorities can request a public inventory if they deem this necessary (art. 398).

The guardianship authorities may decide that it is in the interests of the ward to sell certain personal belongings (but not property, houses or land etc.), but items that are of sentimental value to the person's family are not usually sold (art. 400).

3.27.2.1.3 Who can be a guardian (i.e. a tutor or curator)
The tutelage authorities appoint an adult who is capable of fulfilling the necessary functions. Several tutors may be appointed who act together or according to their own specific abilities (art. 379).

Usually, provided there is no conflict of interests, a close relative such as the spouse is chosen, taking into account personal relationships and geographical proximity. The wishes of the person for whom the measure is intended are usually given preference. If designated, a spouse is obliged to be the tutor but may be excused in certain circumstances, e.g. if over the age of 60 (art. 380-383). This is something that will change if the new law is passed in that there would no longer be any obligation on spouses to become the tutor.

The curator is also appointed by the tutelage authorities of the place of residence of the person for whom the measure is intended. For curators who are responsible for the management of assets, they are selected by the tutelage authorities in the place where the largest part of the future ward's assets were located or managed (art. 396).

3.27.2.1.4 The duties and responsibilities of guardians
The role of the tutor is to provide assistance and to represent a person who is partially or totally incapable of managing his/her own interests and those of his/her family. The appointment of a tutor results in a considerable restriction of a person's contractual capacity. According to article 406 of the Civil Code, it is the tutor's duty to protect his/her ward and to assist him/her in all personal matters. The tutor also has the right to place the ward in an institution against his/her will but under the conditions of art. 397a-f of the Civil Code (fürsorgerische Freiheitsentziehung, privation de liberté à des fins d'assistance).

According to article 419 of the Civil Code, the role of the curator is to keep an eye on or manage a person's assets but s/he only carries out administrative and conservatory acts. S/he can only take other measures with the special consent of the person who is being represented or if the latter is incapable of consent, with the consent of the tutelary authorities.

The duties of the legal counsel are limited to the protection of a person's material interests. In practice, the provision of personal assistance tends to be accepted (Perrinjaquet, 2007).
3.27.2.1.5 Measures to protect the ward from misuse of power
The person subject to tutorship (i.e. the ward, provided that s/he is capable of discernment) and any other person concerned can complain to the tutelage authorities about the acts of a tutor and to the supervisory authorities about decisions made by the tutelage authorities (art. 420).

A tutor who is insolvent or guilty of grave negligence/abuse in the fulfilment of his/her functions may be dismissed by the tutelage authorities. A tutor who does not perform his/her duties in a satisfactory manner may also be dismissed even in the absence of an actual fault (art. 445).

The tutelage authorities request periodic reports from tutors which they examines. They may request the rectification of these reports and/or additional information. They also have the right to take any necessary measures in the interests of the ward (art. 423).

3.27.2.1.6 Duration of the guardianship measure
Tutorship and curatorship end when the conditions which led to their being set up no longer exist (art. 433 and art. 439). In such cases, the declaration of legal incapacity must be cancelled. The cancellation of the declaration of legal capacity can be requested by the person him/herself or by any other person with an interest in the matter (art. 433).

3.27.2.1.7 The right to appeal
An appeal against decisions made by the tutelary authority can be addressed to the surveillance authority (art. 450).

3.27.2.2 Reform of guardianship legislation
Present guardianship measures and procedures are not in line with modern circumstances and attitudes and do not respect the principle of proportionality to a sufficient degree. Consequently, the Federal Council decided to amend the Swiss Civil Code. Due to the Swiss legislative process it took several years before Parliament adopted the new legislation in December 2008. However, the new law will not come into force before 2013 as a lot of organisational adaptations are necessary in the Cantons.

The main principle of the reformed law is to support the subject’s right to choose (issue of advance directives, designation of a health care/welfare proxy) as well as to relieve the administrative and financial burden on the state. The new law will institute a standard instrument – “official assistance”, or Beistandschaft – in place of standardized measures. If a person is no longer able to handle their own affairs as a result of mental disability, psychiatric disorder or similar debility and the support provided by family members, private volunteers or public services is insufficient, the authorities will in future be called upon to tailor a support package for that person. They must determine the tasks and roles to be fulfilled by the official assistant in accordance with the needs of the person concerned. The authorities can appoint a family member (or several) as “official assistant” (Beistand).
In this case the family members will be granted certain privileges. For example, they will not have to produce inventories or submit periodic reports, as is the case with institutional assistants.

In addition, the revised legislation will also provide better protection to people without legal capacity who live in residential and/or nursing homes. A written care agreement must be concluded for these individuals in order to assure transparency about exactly what services are being provided and what costs are covered. It must also be stipulated under which conditions freedom of movement may be restricted. Finally, the cantons will be obliged by law to monitor such residential and nursing institutions.

The revised legislation also provides for the protection of dignity and extends the legal protection assured to people living in care homes.

For more information (in English, French, German and Italian), please refer to:


3.27.2.3 Continuing powers of attorney

In Swiss civil law, it is possible to designate a representative. Article 32 of The Code of Obligations RV220 of 30 March 1911 states that the rights and obligations resulting from a contract made in the name of another person by an authorised representative fall upon that person (i.e. the person who is being represented). If, however, when the contract was made, the representative did not make his/her role clear, then the person being represented would not be liable for any credits or debts unless the other contracting party should have normally been aware of the circumstances or did not care whether s/he was making a contract with either of the other two parties.

If the powers have been explained to a third party by the person being represented, the extent of the powers is based on the information which was provided to the third party.

In practice, it is also possible to appoint a representative for the future (e.g. who acts when the person has lost his/her capacity of discernment.) This is a measure comparable with the proxy in the new law.

3.27.3 Capacity in specific domains

3.27.3.1 Marriage, annulment and divorce

Every person who has reached the age of 18 and is not already married has the right to marry. A person who has been declared legally incompetent must obtain the authorisation of their guardian. If the guardian refuses consent, the person wishing to marry can appeal to the judge (article 94 of the Civil Code).
A marriage must be annulled if it is later found that one of the spouses lacked capacity at the time of the ceremony and has not since regained the necessary capacity (article 105 of the Civil Code).

A spouse can request divorce after having lived separately for two years or beforehand if there are serious reasons that are not of his/her doing, which render the continuation of the marriage intolerable (art. 114 to 115 of the Civil Code).

3.27.3.2 Voting capacity
Article 136 (political rights) of the Constitution states that all Swiss men and women who have reached the age of 18 and are not subject to tutorship due to mental illness or “weakness of the mind” have political rights at federal level. They have the right to vote even if they lack the capacity of discernment.

It is further stated in the Electoral Law (Federal Act on Political Rights of 17 December 1976) that people are disqualified from voting and holding office on the grounds of insanity, deprivation of civil rights and guardianship (www.electionaccess.org, 2007).

3.27.3.3 Contractual capacity
Article 12 of the Civil Code states that any person in possession of their civil rights is capable of acquiring and making binding agreements (*acquérir et s’obliger*). According to article 13, adults who are capable of discernment can exercise their civil rights.

Adults who have not been deprived of the capacity to act with reason as a result of mental illness or other causes are considered under article 16 of the Civil Code as being capable of discernment in the sense of the civil law.

Acts carried out by people who are incapable of discernment are not considered legally binding (article 182), although there are exceptions which are defined by law.

People who lack legal capacity but have the necessary capacity of discernment are only held responsible for acts for which their legal representative gave consent. They do not need to obtain such consent to acquire free gifts or to exercise rights of a strictly personal nature (article 193 of the Civil Code).

If a transaction is made with a person lacking capacity in the period between the judgement being made (i.e. that the person is legally incompetent) and its publication in the relevant official journals, it is considered valid. This protects the rights of the other contracting party who presumably made the transaction in good faith.

3.27.3.4 Testamentary capacity
Any person over the age of 18 can dispose of his/her possessions by means of a will (or testament) (art. 467 of the Civil Code). There are three possible ways to do this according
to article 498: 1. by means of a public act, 2. written, signed and dated by the testator (known as the “testament olographe”) or 3. orally.

Article 501 stipulates that once the will has been dated and signed, the testator must declare before two witnesses, in the presence of a public officer (officier public), that s/he has read the will and that it contains his/her last wishes. The two witnesses then sign a document in which they certify that the testator made the declaration and seemed capable of making a will. S/he does not have to let the witnesses know the content of the will. Article 502 allows for the testator simply to declare to the public officer and two witnesses that the document (read by the officer) contains his/her wishes even if s/he has neither read nor signed it.

The “testament olographe” is a will which has been completely written, dated and signed by the testator him/herself. The cantons foresee the handing over of the document (either open or sealed) to the appropriate authorities responsible for dealing with such documents (article 505).

Finally, a will can be made orally if there are exceptional circumstances which justify this such as imminent death, an epidemic or war (article 506). The testator must declare his/her last wishes to two witnesses who are then responsible for drawing up a deed.

A testament can be annulled if it was made by a person who did not have the necessary capacity at the time it was made (article 519).

3.27.3.5 Civil responsibility

Article 411 of the Code of Obligations stipulates that any person who causes damage to someone else, whether this be deliberate or due to negligence or carelessness, has to repair it.

Even a person who lacks the capacity of discernment may be obliged to pay total or partial compensation for the damage that s/he has caused (article 54).

Article 193 of the Civil Code states that people who lack legal capacity but have the necessary capacity of discernment are responsible for any damage caused by their illicit acts.

However, according to article 333 of the Civil Code, the head of the family is responsible for any damage caused by minors, people with mental illnesses and those with “weakness of the mind” unless s/he can justify having kept an eye on them as was appropriate in the particular circumstances. S/he must take the necessary measures to ensure that a person with a mental illness or weakness of the mind does not expose themselves or other people to danger or damage. S/he is expected to apply to the competent authorities in order to arrange for the necessary measures to be taken.
3.27.3.6 Criminal responsibility

Criminal responsibility in case of incapacity is dealt with in article 19 of the Swiss Penal Code RS 311.0.

It states that the author of a crime is not punishable if at the time it was committed s/he did not have the capacity to understand the illegal nature of his/her act or to behave in accordance with that understanding.

If the person who committed the crime only had reduced capacity, the judge may reduce the sentence. If there is any doubt concerning the responsibility of the author of the crime, the authorities or judge investigating the crime may, according to article 20, call for an expert assessment.
3.28 Turkey

3.28.1 Issues relating to the loss of legal capacity

The following summary selectively highlights legal capacity issues pertaining to adult persons with mental weakness or mental illness due to medical reasons. Simply put, these situations lead to various degrees of judicial restriction of legal capacity for those with such conditions. This situation also calls for the help of others, such as guardians (vasi), curators (kayyim) or legal advisors (yasal danisman), all appointed by the courts. However, guardians and the like are not only appointed for adults with mental problems (Turkish Civil Code = Türk Medeni Kanunu No. 4721, dated 22.11.2001 = TMK, Art. 405). Indeed, there are also other legislative reasons for an individual to lose his/her legal capacity either temporarily or permanently. This loss basically arises from judicial (court ordered) prevention of the person, from “exercising” his/her rights (fiil ehliyeti). The aim is to prevent the person from causing harm to him/herself, to his/her family and/or, if needed, to society. Although all these issues are covered by TMK, these other reasons, as stated, shall not be examined in this paper.

The provisions of TMK regarding the administration of guardianship (vesayet, TMK Arts. 438 494) primarily deal with issues of legal representation, particularly in financial matters.

According to Turkish law, depending upon the severity and urgency of the given situation, the court-appointed person may be for a wide range of daily issues a guardian (vasi), for urgent, specific, temporary issues a curator (kayyim), or in cases of mild mental difficulty, simply a legal advisor (yasal danisman). However, the brief explanations below shall refer mainly to guardians (vasi).

3.28.2 Definitions and use of terms

First of all, it may be helpful to consider the definition of certain terms and how they are used in the Turkish legal context. Although TMK refers to “mental illness” in various provisions, there is no definition of mental illness in TMK. Not every mental disorder which may be defined as a mental illness by medical science is to be understood as a mental illness in the meaning of TMK. What is legally relevant within the meaning of TMK is the issue of the existence or the non-existence of the power of judgement at a given time when a person enters into a legal transaction or is involved in a legal act. Not all mental illnesses result in the lack of the power of judgement of the person with the mental illness. It is also crucial to determine whether the lack of power of judgement was permanent or temporary, and if temporary, to also determine when it started.

Mental weakness (akil zayifligi) as referred to but not defined in TMK, is not a kind or degree of mental illness; but rather a different mental disorder which a person may be
born with or may develop later in life. It may contain elements of insufficiency, underdevelopment, standstill or reduction of mental functions. Dementia is an example of this. Even if medical science may label some of these cases as mental illness, from a legal perspective, they are treated as mental weaknesses. Most people with mental weaknesses retain their power of judgement. However, from a legal perspective, a person with a mental illness does not have power of judgement. As this power is not always lost forever and may come and go in some cases, it is important to examine its existence at the time of the person's action in question.

Alzheimer's disease is known to have a progressive development starting with mental weakness and leading to a possible mental illness. In the early stages of the illness, the person may continue to take good care of most of his/her affairs and may need less help from others. In the final stages of the illness, s/he may even be unable to cope with vital daily needs which obviously indicate a loss of the power of judgement requiring the restriction of his/her legal capacity. It is therefore important to determine the appropriate time for the appointment of a guardian. However, it may be useful to consider other less comprehensive legal measures even in the earlier stages (Zevkliler, Aydin, Kişiler Hukuku, p. 58 et seq., 1981, Ankara).

3.28.3 Proxy decision making

3.28.3.1 Guardianship

3.28.3.1.1 Conditions for the appointment of a guardian

The court’s appointment of one or more persons as guardian (vası) necessitates a complete medical examination by an official medical committee. Comprehensive neurological, psychiatric, neuropsychiatric examinations and tests must be carried out.

Based on the results of these official expertise reports, the competent courts determine the extent to which a person is unable to exercise his/her rights. The courts then appoint appropriate persons to safeguard the rights of those who are not competent to exercise their rights for various reasons. The judge may hear the person who is subject to the restriction before making a decision. (TMK Art. 409/2; Yargıtay 2nd Chamber for Civil Law, E. 2004/6402, K. 2004/7656, T. 10.6.2004).

A guardian (vası) may be appointed for any adult who is:

- not capable of taking care of his/her own affairs due to a mental illness (disorder) or mental weakness (including retardation); or
- who needs someone else's continuous help in order to care for him/herself; or
- who puts other people's safety at risk (TMK Art. 405/1).

Such a person is defined with the Turkish legal term kisitli meaning “a person whose capacity is restricted” (hereinaftesward, or in short “restricted person”).
A guardian is responsible more or less for all affairs of the restricted person whereas a curator (kayyim) is appointed only for urgent, specific, temporary affairs of importance (TMK Arts. 403, 426-428), either ex officio or upon an adult’s own justified request when s/he, for example, cannot personally take care of an urgent affair due to illness or is unable to personally appoint someone else to represent him/herself. The appointment of a curator (kayyim) for a person does not affect that person’s right to exercise his/her rights.

Another alternative could be a legal advisor (yasal danisman). S/he may be court-appointed instead of a guardian when there is no sufficient reason for restricting the capacity of a person, but it would be reasonable to limit him/her in the exercise of some specific rights such as buying and selling immovable property, giving credit or guarantee, making donations etc. (TMK Arts. 429-431). This alternative also includes the option of suspending the person’s right to administer his/her assets, but without depriving him/her from using the income from the assets as s/he pleases.

If it comes to the attention of the administrative authorities, public notaries or courts in the course of their duties that someone is in need of guardianship, they must immediately inform the competent guardianship authority (TMK Art. 405/2; Yargitay 2nd Chamber for Civil Law, E. 1996/4511, K. 1996/5252, T. 17.05.1996).

Moreover, any adult who proves that s/he is not capable of duly fulfilling his/her tasks due to old age, disability, lack of experience or serious disease is entitled to request a restriction of his/her legal capacity (TMK Art. 408).

3.28.3.1.2 How guardianship is arranged

Guardianship organs operate at three different levels, each with a different scope. These are the two specific courts, which together make up the guardianship administration, and one or more guardians.

At the top, the local Civil Court of General Jurisdiction (Asliye Hukuk Mahkemesi) as supervisory authority (denetim makami),

Below this, the local Civil Court of Peace (Sulh Hukuk Mahkemesi) as the common public guardianship (kamu vesayeti) authority (vesayet makami),

Exceptionally, under certain conditions, in private guardianship (özel vesayet), a family committee (aile meclisi) composed of at least three eligible members of the family may be authorised to serve as guardianship authority (instead of the local Civil Court of Peace), yet still under the supervision of the supervisory authority, i.e. the local Civil Court of General Jurisdiction,

Finally, for the daily, basic affairs of the restricted person, the court-appointed guardians, curators and legal consultants serving under all of the above.
Decisions relating to guardianship are taken by the guardianship administration in the place of residence of the person for whom the measure is intended (TMK Art. 411).

3.28.3.1.3 Who may be appointed guardian
The guardianship authorities are responsible for appointing an adult capable of such a task as guardian. More than one guardian can be appointed if needed (TMK Art. 413). The wife or the husband as well as close relatives are given priority, taking into account also the proximity of the relevant domiciles and personal relationships (TMK Art. 414). Unless there are justified reasons, the court appoints someone proposed by the person whose capacity shall be restricted or – regardless of maturity – someone proposed by his/her parents (TMK Art. 415).

A person who has attained the age of 60, is hardly able to fulfil the position due to physical disability or permanent disease, the parent of more than four children, already a guardian, the bearer of the title of President, member of the Turkish Grand National Assembly or the Cabinet, judge or prosecutor may refrain from accepting to undertake guardianship (TMK Art. 417).

On the other hand, a person who him/herself is restricted, has been banned from public service, leads a dishonourable life, has an obvious conflict of interests with the person for whom the guardian is needed, is in enmity with him/her, or is a judge of the guardianship administration is not permitted to be a guardian (TMK Art. 418).

3.28.3.1.4 The duties and responsibilities of guardians
Guardians are responsible for all the interests of a restricted person (kisitli), including handling his/her property and representing him/her, unless otherwise stated in all legal acts (TMK Art. 403).

The two specific courts making up the guardianship administration, namely the Civil Court of General Jurisdiction, and under it the Civil Court of Peace, as well as the court-appointed guardians, are bound by the standards of good administration (TMK Art. 466). Thus, guardianship involves three distinct spheres of duty. These duties cover various issues of property management, social care and legal representation.

The guardian is obliged to keep records of his/her administration and to regularly draft and submit duly prepared reports for the examination and approval of the guardianship authority, i.e. the local Civil Court of Peace about his/her exercised duties.

The guardians and/or guardianship administration are exceptionally required to also ask the restricted person for his/her unbinding opinion when s/he has power of judgement or is able to otherwise form an opinion and express this (TMK Arts. 450, 454).
3.28 Turkey

### 3.28.3.1.5 Measures to protect the ward from misuse of power

Complaints (sikayet) about the acts of a guardian can be filed with the guardianship authority, i.e. with the local Civil Court of Peace. Moreover, objections (itiraz) may be raised against the decisions of the guardianship authority, i.e. of the local Civil Court of Peace before the supervision authority, i.e. before the local Civil Court of General Jurisdiction (TMK Art. 461).

All actions and activities of the guardians are followed up and supervised by the guardianship authority (the local Civil Court of Peace) at regular intervals so as to protect those who are under guardianship from abuse by their guardians.

Moreover, certain transactions clearly listed in TMK, which would be considered for any person as pertaining to significant financial, personal or professional consequences such as buying or selling immovable property, giving credit, changing domicile, etc., require the additional permission of the guardianship authority, i.e. of the local Civil Court of Peace. As such, the guardian shall not have any power to take any decisions which exceed the scope of regular daily affairs of the ward at his/her own discretion (TMK Art. 462).

Finally, TMK specifically states some of the most important decisions to be made (again in any person’s life) for certain wards in a second separate list which includes, inter alia, the adoption of a child, certain inheritance issues as well as contracts between the restricted person and his/her guardian. For such decisions, the additional permission of the supervisory authority, i.e. the local Court of General Jurisdiction on top of the permission of the guardianship authority, i.e. local Court of Peace, is mandatory. This requirement provides a double-checking of the situation by the two local courts.

Any transaction wrongfully made by the guardian in the name of the ward, which should also have been permitted or approved by one or both of these competent courts, without obtaining such permission or approval, is not binding.

### 3.28.3.1.6 Compensation and liability of guardians

The guardian can be paid from the assets of the restricted person. When this is not possible, payment is made by the State Treasury. The amount of payment is assessed and determined regularly by the guardianship authority (the Civil Court of Peace) taking into account the guardian’s efforts and the income of the administered assets (TMK Art. 457).

Guardians are liable for damages caused by their faulty acts in the course of fulfilling their duties (TMK Art. 467; Yargıtay 2nd Chamber for Civil Law, E. 2003/16223, K. 2003/17337, T. 25.12.2003). The same applies to curators (kayyim) for specific tasks as well as court-appointed legal advisors (yasal danışman) (TMK Art. 467). A former guardian whose duty has been terminated by the competent court may under certain circumstances be sued for any damages s/he may have caused earlier.
Furthermore, the State is also liable for damages caused by the acts of the responsible persons who have duties at a guardianship administration, i.e. one of the two competent local courts. Finally, the State is liable for damages caused by an appointed guardian when no compensation can be obtained from the said guardian. The State’s recourse right against the guardian is reserved by law (TMK Arts. 468, 469).

3.28.3.1.7 Duration of guardianship

Guardians are appointed for a period of two years. The guardianship authority (i.e. the local Civil Court of Peace) can extend this period each time for two additional years. An appointed guardian may make use of his/her right to refrain from accepting the continuation of his/her duty after the completion of four years (TMK Art. 456). Failure of a guardian to regularly draft and submit duly prepared reports for the approval of the local Civil Court of Peace about his/her exercised duties shall result in the judicial termination of the guardianship duties.

3.28.3.1.8 Consequences of the loss of legal capacity

The capacity to have rights (hak ehliyeti) is granted to all human beings (TMK Art. 8). Even those whose capacity to exercise some or most of these rights is restricted continue to hold their rights.

On the other hand, the rights and obligations of a person whose capacity to exercise these rights (fiil ehliyeti) has been restricted depend on that person’s power of judgement (ayirt etme gücü).

If the person does not have power of judgement, s/he cannot enter into legal transactions even with the consent of his/her court-appointed guardian. Such a person can also not exercise any rights s/he may have acquired as a result of legal transactions entered into before losing his/her power of judgment. The protection of such previously acquired rights will be provided by his/her guardian (Akıntürk, Turgut; Türk Medeni Hukuku, Aile Hukuku, Kişinin Fiil Ehliyeti, p. 517 et seq., 2002, Istanbul).

A person whose legal capacity has been restricted (ward, kısıtlı) but who nevertheless continues to enjoy his/her own power of judgement may personally make use of the following rights independent of the consent his/her guardian.

- Strictly personal rights, such as the termination of an existing engagement, etc. (TMK Art. 16/1).

- Acceptance of gratuitous acquisitions, provided that these do not result in any obligation for the ward and that these do not have immoral aims (TMK Art. 16/1, Code of Obligations = Borçlar Kanunu No. 818, dated 22.04.1926 = BK, Art. 236/2).

- A ward who has been permitted to exercise a profession or an artistic activity may personally enter into all ordinary (daily) legal transactions which are required by such profession or art. However, the ward shall be liable for these transactions with all of his/her assets (TMK Art. 453).
• Administration of specific items of his/her assets which have been left to his/her personal discretion (TMK Art. 455).

• Administration of the assets gained as a result of the ward’s professional activity which had been permitted by his/her guardian (TMK Art. 455).

3.28.4 Capacity in specific domains

3.28.4.1 Marriage and annulment
Persons with certain medical conditions do not have the right to marry. A person who intends to marry must prove, *inter alia*, that s/he meets certain medical criteria. The official mandatory medical examination has to be conducted by a medical board (TMK Art. 136) and also includes the examination of the person’s power of judgement. Those who have been medically declared as having a chronic mental illness or those whose legal capacity has been restricted as a result of such severe illness can never marry. Each case is handled individually. Other people with a mental illness may marry, provided that the official medical board does not have any medical reservations (TMK Art. 133). Those whose legal capacity has been restricted on grounds other than mental illness may marry with the permission of their guardians or competent judges (TMK Art. 136, Marriage Regulation, No. 85/9747, dated 10.7.1985 = *Evlendirme Yönetmeliği*, Art. 14/2)

As dementia usually develops progressively, each person’s medical stage must be considered carefully. Thus, it is possible to medically determine to what extent the given medical stage would affect the person’s power of judgement. Finally, the level of the given power of judgement shall be taken into account in determining whether the person’s legal capacity needs to be restricted or not under these specific conditions.

A marriage which has somehow been concluded is definitely null and void if one of the married partners:

• had lacked his/her power of judgement permanently at the given time of the marriage; or

• had been suffering from a mental illness which had then reached a medical stage of such severity as to represent an obstruction to marriage (TMK Art. 145).

3.28.4.2 Voting capacity
Although all citizens of Turkey have the right to vote and be voted for, citizens who have been declared restricted (*kısıtlı*) cannot exercise these rights. (Act on Essential Principles of Elections and Registries of Electors = *Seçimlerin Temel Hükümleri ve Seçmen Kütükleri Hakkinda Kanun*, No. 298, dated 26.04.1961, Arts.6, 8).

3.28.4.3 Contractual capacity
Binding legal transactions in the name of a person who lacks power of judgement or who has been declared a restricted person (*kısıtlı*) can only be made by his/her guard-
ian acting as his/her representative. Such persons cannot enter into contracts without the consent of their legal representatives. However, consent is not required in gratuitous acquisitions or while exercising strictly personal rights (TMK Arts. 4, 5, 16). Certain legal transactions with significant consequences as listed in TMK cannot be made even by the guardian. These transactions require the specific permission of the guardianship authority, namely the local Civil Court of Peace (TMK Arts. 462, 463).

3.28.4.4 Testamentary capacity
In principle, people whose legal capacity has been restricted (wards, kisitli) as a result of their mental illnesses or mental weaknesses have no testamentary capacity. On the other hand, in the opposite situation, if it can be proven that a testament had been made by a person who had power judgement at the time s/he made the testament, this testament may be deemed valid. Any one who claims that the person who made a testament did not have power of judgement at the given time has the burden to prove his/her allegation in this respect. However, this legal assumption and burden of proof shifts sides when a testament was made by a ward who had been restricted as a result of his/her mental illness or mental weakness. In this case, it should be proven that the ward actually had his/her power of judgement at the time s/he made the testament in question (Imre, Zahit & Erman, Hasan, Miras Hukuku, Ölüme Bagli Tasarruf Ehliyeti, p. 59 et seq., 2003, Istanbul).

Testamentary contracts differ from testaments in the issue of testamentary capacity. All persons whose legal capacity has been restricted (wards, kisitli) are deprived of the right to enter into testamentary contracts, regardless of the reason for their restriction. As such, it makes no difference if the ward has power of judgement or not. Legal representation of a person is not possible for inheritance law transactions subject to the subsequent death of a person (ölüme bagli tasarruflar). The consent of a legal representative has no effect and significance in such cases. Various issues related to the law of inheritance are controlled either by the guardianship authority (local Civil Court of Peace) or by both the guardianship authority along with the supervisory authority (local Civil Court of General Jurisdiction) (TMK Arts. 462/9, 463/5).

3.28.4.5 Civil responsibility
The acts of a person who lacks power of judgement do not in principle result in any legal consequence (TMK Art. 15). A person who, inter alia, lacks power of judgement or, as explained above, has been judicially declared a restricted person (ward, kisitli) by a competent court does not possess the capacity to exercise his/her rights. As such, these people cannot undertake any obligations as a result of their own transactions so long as their legal representatives have consented to these.

On the other hand, people who have been declared a restricted person (ward, kisitli), but who nevertheless have power of judgement, have a civil law responsibility for their own torts (TMK Art. 16/II).
3.28.4.6 Criminal responsibility
According to the Turkish Penal Code (Türk Ceza Kanunu = TCK, Art. 32), a person who lacks the ability to understand the legal significance and consequences of a criminal act, or who has lost the capacity to control his/her actions due to insanity, may not be punished. Nevertheless, precautionary measures for the sake of security may be imposed on that person.

A person who lacked the ability to control his/her actions in relation to a criminal act committed by him/her, but to a lesser extent than that described above (due to partial mental illness) may be granted a lighter sentence or have the sentence replaced by preventive security measures.

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3.28.5 Acknowledgement

Mr Murat R. Özsunay was the author of the above text on the legal situation in Turkey.
3.29  United Kingdom - England

3.29.1  Issues surrounding the loss of legal capacity

Guidelines relating to mental incapacity aimed at lawyers and doctors were originally issued by the Law Society and the British Medical Association in 1995 and have been updated in their most recent 3rd edition in December 2009.

Guidance from the General Medical Council, called ‘Good Medical Practice’, came into effect on 13 November 2006 and includes the capacity considerations when relevant. Persistent failure to follow this guidance would put a medical practitioner’s registration at risk (General Medical Council, 2009).

There was a basic presumption against lack of capacity in that mental capacity was assumed to exist unless proved otherwise.

The Mental Capacity Act 2005 provides clear guidelines about determining capacity. According to Section 2 (1), a person is considered to be lacking capacity in relation to a particular matter if at the material time, s/he is unable to make a decision for him/herself in relation to that matter because of an impairment of, or a disturbance in the functioning of, the mind or brain. This is a “decision-specific” test and not based solely on having a particular medical condition or diagnosis. The act further states that lack of capacity cannot be established merely by reference to a person’s age or appearance. Neither can it be based on some condition or aspect of the person’s behaviour which might lead others to make unjustified assumptions about his/her capacity.

The following criteria are set out in the Mental Capacity Act for determining whether a person is unable to make a decision. Section 3 (1) states:

1) For the purposes of section 2, a person is unable to make a decision for himself if he is unable:

   (a) to understand the information relevant to the decision;

   (b) to retain that information;

   (c) to use or weigh that information as part of the process of making the decision; or

   (d) to communicate his decision (whether by talking, using sign language or any other means).

2) A person is not to be regarded as unable to understand the information relevant to a decision if he is able to understand an explanation of it given to him in a way that is appropriate to his circumstances (using simple language, visual aids or any other means).

3) The fact that a person is able to retain the information relevant to a decision for a short period only does not prevent him from being regarded as able to make the decision.
(4) The information relevant to a decision includes information about the reasonably foreseeable consequences of:

(a) deciding one way or another; or

(b) failing to make the decision. 3.17.2

3.29.2 Proxy decision making

3.29.2.1 Guardianship

3.29.2.1.1 Guardianship under the Mental Health Act 2007

Under section 7 of the Mental Health Act of 1983 an application to appoint a guardian can be made for a person on the grounds that:

“He is suffering from mental disorder, being mental illness, severe mental impairment, psychopathic disorder or mental impairment and his mental disorder is of a nature or degree which warrants reception into guardianship under this section and

It is necessary in the interests of the welfare of the patient or for the protection of other persons that the patient should be so received.”

3.29.2.1.2 The powers of the guardian

Once appointed, the guardian has the power to:

1. Take the patient for the first time to the place where she/he is required to live, if the patient does not (or cannot) go there without assistance (the residence power).

2. Take into legal custody and return the patient to the place where they are required to live, if they leave the address without the agreement of the guardian.

3. Decide where the person should live.

4. Require the patient to go to certain places at specific times for the purpose of medical treatment, occupation, education or training.

5. Require access to the patient to be given, at any place where the patient is residing, to any medical practitioner, approved social worker or other person so specified.

6. Restrict a patient’s liberty, but not to deprive them of their liberty.

‘Only the residence power may be directly enforced by taking the patient to the place in question if they will not go there voluntarily.... So in large part, the effectiveness of the guardianship relies on moral (rather than legal) authority and the quality of the relationship with the patient.’

The guardian has no power to compel the person to accept any kind of medical treatment. Although the guardian can require the person to reside at a particular place or attend a day centre, s/he does not have a great deal of power to enforce this. If the person under guardianship leaves the place of residence or day centre, the guardian can request the assistance of the local authority or constable to bring him/her back, but the person cannot be forced to stay.

The guardian has no power to take care of any property belonging to the patient. However, if the local authority is the responsible guardian, then under the National Assistance Act 1948 s. 48, social services are obliged to take steps to protect a person's property if s/he is admitted into hospital or residential accommodation.

3.29.2.1.3 The procedure for appointing a guardian
An application for guardianship may be made by the nearest relative of the person or by an Approved Mental Health Professional (AMPH) and addressed to the local social services authority of the town in which the person for whom the measure is intended resides. The person making the application must have seen the person in the last 14 days.

The guardianship application must be accompanied by two medical recommendations made by registered medical practitioners in the form prescribed by the law, stating the nature of the disorder justifying guardianship measures. The applications must be forwarded to the local social services authority within 14 days of the last medical recommendation. The person named as guardian in the application may be either a local social services authority or any other person, even the applicant him/herself.

Once appointed, if the guardian dies or gives written notice of his/her desire to resign, guardianship is taken over by the local social services authority which can then transfer the power to another person or remain the guardian. If it comes to the attention of the County Court that any person other than a local social services authority having the guardianship of a patient has performed his/her functions negligently or in a manner contrary to the interests or the welfare of the patient, the court may order the guardianship of the patient to be transferred to the local social services authority or to any other person approved for the purpose by that authority.

3.29.2.1.4 Duration of guardianship
Guardianship is granted for an initial period of 6 months. Subject to approval and unless the person has been previously discharged, the guardianship may be renewed for a further 6 months and from then on for periods of one year at a time.

3.29.2.1.5 Guardianship under the Court of Protection (deputyship) 36
Under Part VII of the Mental Health Act 1983, a person who is incapable due to a mental disorder of managing and administering his/her property and affairs may come within the jurisdiction of the Court of Protection. The management of the property and affairs of mentally disordered people is a system of protection which dates back to the Middle Ages when this was the responsibility of the Crown. The Mental Capacity Act 2005 introduced deputies for personal welfare who could be the same person as or separate to the deputy for property and affairs. The Court of Protection is not keen on appointing deputies for personal welfare matters, taking the view that social services/complaints procedures/Patient Advice and Liaison Service etc. ought to be able to resolve issues locally. Since October 2007 only a small number of applicants have successfully been appointed as deputies for personal welfare.

The Court of Protection, in conjunction with the Office of the Public Guardian is responsible for the overall running of the person’s financial affairs in conjunction with the deputy. The Court of Protection is responsible for the management of the property and affairs of a mentally disordered person and, since the implementation of the Mental Capacity Act, in some cases, their personal welfare, but may delegate this responsibility to a deputy.

### 3.29.2.1.6 Responsibilities of the Court of Protection

The judge may take the necessary steps to ensure:

- the maintenance or other benefit of the patient and members of his/her family;
- that provision is made for other persons or purposes which the patient would have taken care of were s/he not mentally disordered;
- the administration of the patient’s affairs.

His/her powers are fairly extensive and include the following:

- the control and management of any property of the patient;
- the acquisition, sale, exchange, charging or other disposition of or dealing with any property of the patient;
- the carrying on by a suitable person of any profession, trade or business of the patient;
- the dissolution of a partnership of which the patient is a member;
- the conduct of legal proceedings in the name of the patient or on his/her behalf;
- the execution of a will on behalf of the patient;
- the exercise of any power (including a power to consent) vested in the patient.

### 3.29.2.1.7 The appointment and duties of deputies and the Office of the Public Guardian

However, as stated above, the Court of Protection may appoint a deputy. An application for such an appointment is usually made by a close relative, but could be made by anyone, e.g. a friend, local authority or solicitor. Alternatively, the Public Trustee, who is the head of the Office of the Public Guardian, could make it. A person may apply for his/her own appointment as deputy or that of someone else.

Before appointing a deputy for property and finances, the Court of Protection must obtain medical evidence about the mental capacity of the person for whom a deputy is to be appointed, as well as details about his/her family and financial assets and liabilities. In most cases the applicant is asked to fill out a general application form, an assessment of capacity form, where an appropriate professional confirms the person lacks capacity to make the decisions that the applicant would make for them, and a number of different other forms depending on the person’s situation. The applicant may need to apply to ask the court for permission to apply to be a deputy in certain situations, for example where
they are asking to make decisions about a person’s health and welfare (Her Majesty’s Court Service, undated).

Deputies are usually asked to take out insurance for their decisions in the form of a security bond. Failure to do so may result in a person not being appointed and alternative arrangements being made.

**3.29.2.1.8 Appeals and control of the deputy**

Appeals against decisions made in accordance with the Court of Protection can be made to a nominated High Court Judge. The Office of the Public Guardian supervises deputies to differing degrees depending on the nature of decisions they are making, they will make an annual charge for this supervision (Crown, 2009a). The Office of the Public Guardian can also make enquiries into the way the deputy is carrying out his/her duties. Visits may be made by legal visitors who are senior qualified legal advisors appointed by the Lord Chancellor or general visitors, who regularly visit people in their own homes. Deputies must not obstruct these visitors. The Office of the Public Guardian can ask the Court of Protection to discharge a deputy (Crown, 2009a).

The deputy's powers come to an end when the Court is satisfied that the person concerned has recovered, when the person concerned dies or when an Order is made to appoint a new deputy. If a deputy fails to provide the required accounts, s/he may be discharged and replaced.

**3.29.2.2 Powers of Attorney**

**3.29.2.2.1 Enduring powers of attorney act 1985**

Under the Enduring Powers of Attorney Act 1985 (repealed by the Mental Capacity Act 2005), a person could create a power of attorney which was an enduring power. This meant that the power granted to an attorney continued to be valid if the donor (the person granting it) lost their mental capacity. An enduring power of attorney could grant the attorney the general authority to handle all or a specified part of their property or affairs. Alternatively, the donor could grant the attorney the authority to do specified things on their behalf and could attach conditions to this. [Any enduring power of attorney which had effect before the repeal of the Act came into force continues to have effect.]

If the donor would normally have benefited the attorney or another person in some way or provided for their needs, the attorney could do so on behalf of the donor without this necessitating the donor’s consent. Similarly, the attorney could without obtaining consent purchase presents (e.g. for births, marriages or anniversaries etc.) or make donations to charities provided that there were no restrictions on doing this in the power of attorney. The value of each gift or donation had to be reasonable in view of the size of the donor’s estate.

The enduring power of attorney could be used when the donor still has capacity and without being registered if that was how it was set up. However it has to be registered...
when the person loses the capacity to make the decision themselves. As soon as the attorney of an enduring power had reason to believe that the donor was or was becoming mentally incapable, they had to make an application to the court for the registration of the enduring power of attorney. The court would not authorise the registration of the enduring power of attorney if a receiver had been appointed under Part VII of the Mental Health Act of 2007. The court would also refuse registration if:

- the power of attorney was not valid;
- the power created by the instrument no longer subsisted;
- the application was premature because the donor was not yet becoming mentally incapable;
- the donor was persuaded to create the power as a result of the use of fraud or undue pressure;
- as a result of the attorney’s relationship to or connection with the donor, the attorney was unsuitable.

Once registered, the donor could neither revoke the power nor extend, restrict or change the scope or content of it. The courts would cancel the registration of a power of attorney if the donor died or went bankrupt, or if the attorney died, became mentally incapable or went bankrupt.

3.29.2.2 Mental Capacity Act 2005

According to section 9 of the Mental Capacity Act 2005, a person can make a lasting power of attorney (LPA) under which the donor confers on the attorney the authority to make decisions about all or any of the following:

- The donor’s personal welfare or specified matters concerning their personal welfare. and
- The donor’s property and affairs or specified matters concerning their property and affairs.

This includes the authority to make such decisions in circumstances where the donor no longer has capacity. The LPA can be revoked at any time when the donor has the capacity to do so.

For the LPA to be valid, the donor must be at least 18 years old and have the capacity to write the document. The appointed attorney (known as the donee in the Act) must also have reached 18. An attorney who is bankrupt cannot be appointed to manage the donor’s property and affairs. Two or more people may be appointed as attorneys in which case, it must be specified whether they can act jointly, jointly and severally or jointly in respect of some matters and jointly and severally in respect of others.
Attorneys do not have the power to appoint substitutes or successors but the donor can make provisions in the LPA for the replacement of attorneys in case of death, bankruptcy, rupture of a marriage or civil partnership or incapacity.

Section 11 of the Mental Capacity Act contains a section on restrictions covering the use of force, restraint and the deprivation of liberty.

Where an LPA authorises the attorney to make decisions about personal welfare, this authority extends to giving or refusing consent to the carrying out or continuation of a treatment by a person providing health care for the donor but is subject to any conditions or restrictions expressed in the LPA. Medical treatment is ultimately a clinical decision and the attorney cannot demand medical treatment which the practitioner thinks is dangerous or not worth while (Crown, 2009b). It does not, however, authorise the giving or refusing of consent to the carrying out or continuation of life-sustaining treatment unless the instrument contains express provision to that effect.

Conditions for purchasing gifts and making presents are the same as in the Enduring Powers of Attorney Act, the attorney must not benefit from the decisions that they are making.

### 3.29.3 Capacity in specific domains

#### 3.29.3.1 Marriage

A marriage is valid provided that both parties were mentally capable of understanding the nature of marriage and of consenting to it at the time it was contracted. As only limited mental capacity is required for the fulfilment of these criteria, the appointment of a guardian does not necessarily affect the right to marry. Similarly, the Court of Protection cannot prevent a person from getting married, as it is the Registrar of Marriages who must be satisfied that the person concerned understands the implications of the marriage contract. However, a receiver should report the marriage to the Court of Protection in case this affects the person's financial situation (Public Trust Office 1999).

According to the Matrimonial Causes Act of 1973 a marriage can be annulled at the request of either party if at the time the marriage was contracted either party, although capable of giving valid consent, was suffering from mental disorder of a sufficient degree to make that person unfitted to marriage. For the request to be successful, the person making the request must prove that the mental disorder of the other party rendered him/her incapable of living in a married state and fulfilling the obligations of the marriage contract. Proceedings must be started within 3 years of the marriage contract.

Nothing in the Mental Capacity Act 2005 permits a decision on any of the following to be made on behalf of a person with incapacity:

- Consenting to marriage or a civil partnership.
- Consenting to have sexual relations.

• Consenting to a decree of divorce being granted on the basis of two years' separation.
• Consenting to a dissolution order being made in relation to a civil partnership on the basis of two years' separation.

3.29.3.2 Voting capacity

A person lacking mental capacity does not automatically lose the right to vote.

The Representation of the People Act 1983 specifies who is entitled to vote. According to this act, a person with dementia would be able to vote provided that s/he had a place of residence for voting purposes and was not subject to any legal incapacity to vote. If an individual is resident in a care home or hospital for a sufficient (or indefinite) length of time, then this should be the address at which they are registered.

The Electoral Commission does not define a person with dementia as having a legal incapacity to vote and therefore has indicated that a person with dementia can vote no matter what their capacity. Their guidance states:

“A lack of mental capacity is not a legal incapacity to vote; persons who meet the other registration qualifications are eligible for registration regardless of their mental capacity or lack thereof. Electoral Registration Officers should therefore ensure that persons with learning difficulties or mental health conditions are included in the register of electors.”

“A mental health condition is not in itself a legal incapacity to vote and so is not, therefore, a bar to registration. The Electoral Registration Officer should assist, if requested, those who are making an application or who wish to find out more information about the electoral system.”

Nothing in the Mental Capacity Act 2005 permits a decision on voting at an election for any public office, or at referendum, to be made on behalf of a person with incapacity:

3.29.3.3 Contractual capacity

Contractual capacity is determined on a case-by-case basis. Courts have the responsibility to balance protection of the incapacitated person with protection of the other contracting party, particularly as the latter may not have been aware of the incapacity of the former. Consequently, a contract made by an incapacitated person is not automatically voidable, but they would have the option to void it had the other party been aware of the incapacity at the time of making the contract.

3.29.3.4 Transactions involving the sale of goods

Section 3 (2) of the Sale of Goods Act of 1979 provides a certain degree of protection against unscrupulous sellers, whilst also ensuring that an incapacitated person pays for goods or services which are classed as necessaries. It states that:

“Where necessaries are sold and delivered to a person who by reason of mental incapacity or drunkenness is incompetent to contract, he must pay a reasonable price for them.”

Necessaries are defined under 3 (3) as “goods suitable to the condition in life of the person concerned and to his actual requirements at the time of the sale and delivery.” Suitability to a person’s condition refers to his/her place in society and not his/her mental or physical condition. It has been established in case law that a person’s requirements are determined by what s/he already possesses. If the person already possesses a sufficient quantity of a particular item and then purchases a large quantity of the same item, it would be unlikely to be considered as a necessary. People covered by the Sale of Goods Act of 1979 must pay a reasonable price for goods and this is not necessarily the sale price.

Unfortunately, this law depends on the supplier making enquiries as to the person’s actual requirements. It doesn’t apply to contracts of hire purchase, barter or contracts for the supply of services to the incapacitated person.

3.29.3.5 Door-to-door sale of goods and services
The door-to-door sale of goods and services are governed by the Consumer Protection (Cancellation of Contracts concluded away from Business Premises) (Amendment) Regulation 1998, No. 3050). Under these regulations, the contract only becomes valid after a seven-day period has elapsed. This means that consumers can withdraw within seven days without being liable to buy. The salesperson can no longer claim the contract was valid even if the person consented to it. Also, if the salesperson does not inform the buyer of this cancellation period, s/he would be committing a criminal offence.

The above regulations apply to most sectors, e.g. contracts involving gas and electricity supplies, most building repairs, double glazing, burglar alarms and the purchase of goods. However, they do not apply to contracts for the supply of food and drink and other goods destined for household consumption which are supplied by regular deliverers, e.g. doorstep milk delivery.

3.29.3.6 Contracts made by people subject to a Court of Protection order
A person whose affairs are being handled by a judge of the Court of Protection (under the Mental Health Act 2007) cannot enter into any contract which falls under the authority of the Court. However, the court may delegate the power to enter into a contract on behalf of the person under court protection to a deputy. A contract is void even if the other party was unaware that the person’s affairs were being handled by the Court. A contract for necessaries would also be considered void.

If a person is incapable, s/he cannot personally sue or be sued. Legal proceedings can be conducted on his/her behalf by a “litigation friend” if the incapacitated person is bringing the proceedings. If, on the other hand, the proceedings are being brought against the incapacitated person, the legal proceedings are conducted by a guardian ad litem.

40 Press release by Dr. Kim Howells MP, Department of Trade and Industry (P/99/179 of 2 March 1999), DTI Crackdown on Rogue Doorstep Sellers (notes for editors)
41 Source of information: British Medical Association and The Law Society (1995),
3.29.3.7 Testamentary capacity
A person must have testamentary capacity in order to write and sign a will. The person making the will (a testator in the case of a man and a testatrix in the case of a woman) must be able to:

- understand the nature of the act and its effects;
- understand the extent of his/her property;
- comprehend and appreciate the claims to which s/he ought to give effect (although s/he may decide against benefiting certain relatives or potential beneficiaries).

S/he must not be suffering from any mental disorder which would lead him/her to dispose of property and assets differently than s/he would have done were it not for the mental disorder. Following the Banks v Goodfellow case (1870), partial unsoundness of mind is not considered to affect testamentary capacity unless it actually influences the way the testator/testatrix disposes of his/her property.

The will of an incapable person may still be considered as valid even if it contains an apparently unwise decision concerning the disposal of property or assets. In this respect, an incapacitated person is granted the same rights as a competent person to make decisions which may seem capricious, foolish, biased or prejudiced to other people. This is based on the Bird v Luckie case (1850) in which the judge stated with regard to testamentary capacity that people were not legally obliged to behave “in such a manner as to deserve approbation from the prudent, the wise or the good”.

Under Part VII of the Mental Health Act 2007, if a person is incapable of managing his/her own affairs and incapable of making a will, a request can be made to the Court of Protection to draw up a statutory will. (The mere fact that a person is unable to manage his/her property and affairs does not automatically mean that s/he should be prevented from making a will.) The Court will obtain medical evidence of the existence of both kinds of incapacity. The person authorised by the Court to execute the will signs on behalf of the person and with his/her own name in the presence of two or more witnesses. It is then sealed with the official seal of the Court of Protection. Such a will is then considered to have the same effect as if the person had been capable of making a valid will and as if it had been executed by him/her in the manner required by the Wills Act of 1837.

3.29.3.8 Criminal responsibility
In English law, a person is considered to be sane unless the contrary can be proved and it is up to the person accused of a crime to prove his/her insanity (Stewart and Burgess, 1996). Once a plea of insanity has been made as a defence, the McNaghten rules are applied. These rules derive from a case in 1843 whereby Daniel McNaghten attempted to murder the private secretary of the Prime Minister, Sir Robert Peel, but killed someone else by mistake. He was suffering from insane delusions at the time of the crime and the jury gave a verdict of not guilty by reason of insanity. There are two components of the McNaghten rules:

1. A person is presumed sane until the contrary is proved.

2. To establish a defence of insanity, it must be proved that at the time of committing the act the person was due to a disease of the mind or defect of reason unable to understand the nature and quality of the act or did not know that it was wrong.

### 3.29.4 References


Crown (2009a), *A guide to supervision of Deputies*, the Office of the Public Guardian advice booklet, OPG507


General Medical Practice (2009), *Good Medical Practice*, GMC

Her Majesty’s Court Service (undated), *Making an application to the Court of Protection, advice booklet COP42*.

Public Trust Office (1999), *Duties of a Receiver*, Public Trust Office


3.30 United Kingdom - Scotland

The first two articles of the Adult Support and Protection (Scotland) Act 2007 contain guiding principles for people intervening in an adult’s affairs. The first article states that a person may intervene or authorise intervention only if satisfied that the intervention will provide benefit to the adult which could not be reasonably provided without such intervention and that of the range of options available, it is the one which would least restrict the adult’s freedom.

The second article states that a public body or office-holder who is authorised to intervene in an adult’s affairs should have regard to the general principle on intervention in an adult’s affairs and to the adult’s ascertainable wishes and feelings (past and present). The views of the adult’s nearest relative, primary carer, guardian or attorney, or any other person with an interest in the adult’s wellbeing or property should be taken into consideration. The importance of involving the adult and respecting his/her individuality is highlighted. It should be ensured that s/he participates as fully as possible in the performance of the function and in addition that s/he is provided with the information and support necessary to enable such participation.

The adult must not, without justification, be treated less favourably than other adults who are not at risk might be treated in a comparable situation. His/her abilities, background and characteristics (including the age, sex, sexual orientation, religious persuasion, racial origin, ethnic group and cultural and linguistic heritage) should also be taken into consideration.

3.30.1 Proxy decision making

3.30.1.1 Guardianship

The Adults with Incapacity (Scotland) Act 2000 covers issues related to the property, financial affairs and personal welfare of adults with incapacity due to a mental disorder (or difficulties communicating). As such, it covers guardianship as well as continuing powers of attorney and welfare powers of attorney. It also covers intervention orders which are for one-off decisions or actions, i.e. in cases where a ‘once only’ decision is necessary. The Act was amended through Parts 2 and 3 of the Adult Support and Protection (Scotland) Act 2007.

In the past, people with learning disabilities were sometimes “boarded out” with unrelated guardians. This practice can be traced back to the mid-nineteenth century. It became legally binding in 1913 and was extended to cover all people with a mental disorder in 1960. However, in 1982 the Government rejected “boarding out” as a solution to protecting the welfare of people with mental disorders and the alternative solutions were found in the provisions of the Mental Health (Scotland) Act of 1984.
Under the Mental Health (Scotland) Act 1984, it was possible to appoint a mental health guardian as well as more archaic forms of guardianship such as the curator bonis, the tutor-at-law or the tutor-dative (details can be found in the Lawnet report of 1999). Situations arose whereby a person had three different kinds of guardian, e.g. a guardian (as appointed under the Mental Health (Scotland) Act 1984), a curator bonis for financial management and a tutor-dative for medical decisions. The Adults with Incapacity (Scotland) Act 2000 phased out these forms of guardianship and the holders of such offices were made guardians under the new Act.

3.30.1.1.1 Conditions for the appointment of a guardian
Any person (including the person him/herself) with an interest in the property, financial affairs or personal welfare of the adult with presumed incapacity can apply to the sheriff for a guardian to be appointed. Before starting the process for a guardianship order, the sheriff must be satisfied that the adult is incapable of making or acting on a specific decision or decisions, safeguarding or promoting his/her interests relating to his/her property, financial affairs or personal welfare; that s/he is likely to continue to be incapable of such acts and that no other means provided by or under the Adults with Incapacity (Scotland) Act 2000 would be sufficient (article 58).

Within this Act, an adult is understood to mean a person of 16 years and over. Incapacity is defined as being incapable of acting, making decisions, communicating decisions, understanding decisions or retaining the memory of decisions by reason of mental disorder or inability to communicate due to a physical disability.

3.30.1.1.2 How guardianship is arranged
Not more than 30 days before the application for a guardianship order is lodged in court, reports of an examination and assessment of the adult by at least two medical practitioners must be provided. If the incapacity is due to mental disorder, one of the medical practitioners must be “a relevant medical practitioner”. If the application only relates to property or financial affairs, the report must be based on an interview or assessment of the adult by a person who has sufficient knowledge to make such a report.

If the applicant only has an interest in the personal welfare of the adult and is not the local authority, s/he must notify the chief social work officer of his/her intention. The latter or alternatively, the mental health officer, must prepare the necessary report within 21 days. The guardian may be asked to provide caution or some form of security that the sheriff sees fit.

At any time during the application process, the sheriff may make an order for the appointment of an interim guardian for up to 3 or a maximum of 6 months.

The adult must be officially informed of the appointment of a guardian.
3.30.1.1.3 *Who can be a guardian*

The sheriff may appoint any person whom s/he considers suitable and who has consented to being appointed as a welfare and/or financial guardian. If the measure is only to cover personal welfare and there is no suitable family member or friend willing or able to apply, the chief social work officer of the local authority can apply to be appointed.

Where the local authority has assessed that a financial guardian is needed, and there is no suitable family member, the local authority cannot nominate itself. The local authority can nominate a professional, for example a solicitor or an accountant to be the financial guardian.

For any individual to be appointed guardian, the sheriff must be convinced that s/he is aware of the adult’s situation and circumstances and the functions of a guardian. In addition, the sheriff must ensure that the guardian would have access to the adult with incapacity, be capable of carrying out the functions of guardian and not be likely to have a conflict of interests with the adult with incapacity. Any possible reasons for the unsuitability of the individual must be considered by the sheriff. These conditions can be found in article 59.

If at any time, the guardian is unable to fulfil his/her functions, a substitute guardian can be appointed for the same period of time as the original guardian. This can even be arranged in advance, e.g. when the original guardian is appointed.

3.30.1.1.4 *The duties and responsibilities of guardians*

Article 64 covers the functions and duties of guardians which include the power to deal with property, financial affairs or personal welfare of the adult with incapacity as specified in the guardianship order. If authorised to deal with personal welfare, it may be specified in the order that the guardian has the right to defend or pursue an action to annul a marriage or to divorce or separate in the name of the adult with incapacity, or to manage certain parts of the property or financial affairs of the adult. A guardian does not have the power to place the adult with incapacity in hospital for treatment of mental disorder against his/her will or to make certain decision on his/her behalf in relation to the Anatomy Act 1984.

3.30.1.1.5 *Managing the finances of the person on guardianship*

The financial affairs of the adult may be managed by a guardian provided that the latter has been given the necessary powers. Schedule 2 of the Adults with Incapacity (Scotland) Act 2000 deals with the management of the estate of the adult. It stipulates that the guardian must draw up a management plan for the management, investment and realisation of the adult’s estate, taking into account the adult’s needs and insofar as s/he has been granted the necessary powers. The plan must be submitted to the Public Guardian for approval.
Also, as soon as possible after taking up his/her office (but within 3 months), the guardian must draw up an inventory of the adult’s property or financial affairs. The Public Guardian may free the guardian from this obligation or may ask the guardian to do something else instead.

All money received by the guardian must be deposited in a bank or building society in an account in the name of the adults and ensure that amounts exceeding £500 (or another specified amount) generate interest.

The guardian may be authorised to carry on a business on behalf of the adult with incapacity. The guardian may not, without the consent of the Public Guardian, purchase accommodation for, or dispose of any accommodation currently being used a dwelling house by, the adult.

3.30.1.1.6 Measures to protect the adult from misuse of power
Guardians have to keep records of the work they do on behalf of the person with incapacity (article 65). They can be withdrawn or have their powers amended if the Public Guardian decides that a particular measure is no longer needed, is not being correctly handled by the guardian or could be managed in another way without the necessity for guardianship.

If a guardian uses the funds of the adult even though s/he does not have the power to do so; or whilst aware of the termination or suspension of existing powers, s/he is liable to repay the funds with interest (article 81) unless s/he acted reasonably or in good faith (article 82).

3.30.1.1.7 Compensation and liability of guardians
Article 68 deals with the reimbursement and remuneration of the guardian. It states that the guardian is entitled to be reimbursed out of the estate of the adult with incapacity for any outlays reasonably incurred in the exercise of his/her functions. This is not applicable in the case of chief social work offers taking care of the personal welfare of the adult.

When fixing the remuneration of the guardian, the Public Guardian takes into account the value of the estate of the adult with incapacity. If a guardian is found to be in breach of any duty of care or of any other obligation linked to guardianship, part or all of his/her remuneration may be withheld (article 69).

3.30.1.1.8 Duration of guardianship
Guardians are appointed for 3 years or any other period of time, including indefinitely, as decided by the sheriff. A guardian can resign from his/her function but may be requested to wait until a replacement guardian has been found.
3.30.1.9 The right to appeal
Anyone found incapable for the purposes of the Adults with Incapacity Act may appeal to the sheriff against the finding. The adult him/herself or anyone with an interest in the subject matter of the decision may make an appeal (s14). A person can also appeal to the sheriff principal against a sheriff’s decision about incapacity. There is a further appeal, with permission of the court, to the Court of Sessions.

3.30.1.2 Powers of Attorney
3.30.1.2.1 Continuing powers of attorney
A power of attorney relating to property or financial affairs which continues to have effect in the event of the granter’s becoming incapable of managing that property or those affairs is known as a continuing power of attorney. This is covered by Part 2 of the Adults with Incapacity (Scotland) Act 2000.

For a continuing power of attorney to be valid, certain conditions must be fulfilled, such as:
• It must be made in writing by the granter.
• It must be clearly stated the granter wishes it to be a continuing power.
• The granter must indicate that s/he has considered how they want incapacity to be determined if the power is only to be valid once the granter is incapable of handling a specified matter.
• A certificate in the prescribed form must be obtained from a solicitor or other authorised person.

The solicitor (or other authorised person) must have interviewed the granter immediately prior to the granter signing the document. S/he must be satisfied, based on his/her own experience or as a result of information provided by named individuals, that the granter understood the ‘nature and effect’ of the document (s16(3)). S/he must also state that s/he has no reason to believe that the granter was acting under undue influence or that any other factor vitiates the granting of the power.

The continuing power of attorney ends if the granter or the attorney is declared bankrupt.

3.30.1.2.2 Welfare powers of attorney
A person may grant a power of attorney relating to his/her personal welfare in accordance with the provisions of Part 2 of the Adults with Incapacity (Scotland) Act 2000.

For a welfare power of attorney to be valid, certain conditions must be fulfilled, such as:
• It must be made in writing by the granter.
• It must be clearly stated the granter wishes it to be a welfare power.
• It must indicate that the granter has considered how incapacity relating to the decisions covered by the welfare power should be determined.

• A certificate in the prescribed form must be obtained from a solicitor or other authorised person.

The same requirements apply to the certificate from the solicitor (or other authorised person) as mentioned above in the section on continuing powers of attorney.

A welfare power of attorney can only be granted to an individual (not a person acting in an official capacity such as officer of a local authority) and does not come into force until the granter has lost the capacity for decisions related to matters contained in the welfare power of attorney. It does not end if the granter or the attorney goes bankrupt.

A welfare attorney cannot place the granter in hospital for the treatment of mental disorder against his/her will or make certain decisions which fall under the scope of the Anatomy Act of 1984.

If the granter intends the attorney to be able to make medical decisions on his/her behalf, this must be specifically stated in the document.

3.30.1.2.3 General issues linked to continuing and welfare powers of attorney
The granter can appoint one or more attorneys who can be granted welfare and/or financial powers.

The deed should indicate if the attorneys can act alone or must always act jointly. The granter may wish to appoint a substitute attorney in case the first attorney cannot act.

The attorney only has authority to act once the power of attorney has been registered. A continuing or welfare attorney should not be obliged to do anything which is unduly burdensome or expensive (in comparison to its value or utility) even if it is within the scope of his/her powers. Attorneys must keep records of their activities on behalf of the granter.

The granter of a continuing or welfare power of attorney may revoke it after it has been registered subject to certain conditions being fulfilled, i.e. the revocation must be in writing and incorporate a certificate in due form by a solicitor or other authorised person who certifies that s/he has interviewed the person and that the person understood the effect of the revocation and is making the decision freely.

The attorney may resign after the document conferring power has been registered. If the granter and the attorney are married, the power of attorney would come to an end if they separated or divorced or if the marriage was annulled. In the case of civil partnerships, the same would apply in the case of separation, dissolution or nullity of the partnership.
Other provisions for the management of funds under the Adults with Incapacity (Scotland) Act 2000

3.30.1.2.4 Access to Funds Scheme
There are provisions under Part 3 of the Adults with Incapacity (Scotland Act) 2000 for a private individual to manage the funds of someone with incapacity where his/her income and assets are not complex. It also allows organisations to apply for approval to manage the funds of an individual where there is no private person available to do so. It involves the setting up and operating a designated bank account in the name of the adult. An application to the scheme is made to the Office of the Public Guardian. It is an inexpensive way to manage funds in circumstances where the adult does not own property and financial guardianship is not necessary.

3.30.1.2.5 Management of residents’ funds in a care home or hospital
There are special provisions in the Part 4 of the Adults with Incapacity (Scotland) Act 2000 for financial management by a care home manager or hospital for a resident/long-term patient who lacks capacity to do so for themselves and there is no other interested person to do so. This might include claiming, receiving, holding and spending the person’s pension, benefit, social security allowance or money to which the adult with incapacity is entitled, as well as holding or disposing of the resident’s moveable property. This scheme is appropriate for managing funds where the adult does not have substantial savings. Where savings are above a prescribed limit the local authority must nominate a professional financial guardianship to manage the adult’s funds.

3.30.2 Capacity in specific domains

3.30.2.1 Marriage and divorce
A marriage is valid provided that both parties were mentally capable of understanding the nature of marriage and of consenting to it at the time it was contracted/celebrated. As only limited mental capacity is required for the fulfilment of these criteria\(^{43}\), the appointment of a curator bonis (no longer applicable) or a guardian does not necessarily affect the right to marry. Indeed, according to article 304 of the Adults with Incapacity (Scotland) Act 2000, the appointment of a guardian does not imply that the adult loses capacity in an area that the guardianship order does not cover. So a guardian cannot consent to or prevent a person from marrying. On the other hand, a guardian may be granted the power to pursue or defend the nullity of marriage, separation or divorce.

Under section 5 of the Marriage (Scotland) Act 1977, the guardian, like any other person, can object to a marriage by submitting an objection in writing to the district registrar who has been informed of the intention of the person in question to marry. If the objection is made on the grounds that the person does not understand the nature of the marriage ceremony or of consenting to marriage, it must be accompanied by a medical certificate. The registrar then notifies the Registrar General who decides whether the marriage may proceed. Anyone who disagrees with the decision of the Registrar General may apply to the court for a decision.

\(^{43}\) Long v Long 1950 SLT
If a person is married, his/her spouse is legally obliged to provide maintenance. This means that the local authority can ask the spouse to contribute towards the cost of care.

3.30.2.2 Voting capacity
Having a guardian does not prevent a person from voting.

3.30.2.3 Contractual capacity

3.30.2.3.1 Business transactions/agreements
A person is presumed to be competent and hence capable of entering into a legal transaction unless the contrary is proven. According to the Scottish Law Commission (1991), capacity (or lack of it) is determined after consideration of medical evidence and also on the basis of what was said and done at the time of a particular transaction. Moreover, for a transaction to be considered as invalid, the person’s incapacity must have affected the transaction in question. If incapacity is determined, a transaction is declared void and this applies irrespective of whether the other party was aware of this incapacity.

An adult with incapacity for whom a guardian has been appointed does not have the right to enter into any transaction covered by the powers of his/her guardian. The guardian would be personally liable for any transaction carried out on behalf of the adult with incapacity if the former had not disclosed that s/he was acting on behalf of the latter (article 67 of the Adults with Incapacity (Scotland) Act 2000).

If a third party enters into a transaction with an adult whom he knows is under guardianship, the transaction would not be regarded as void solely on the basis of the incapacity of the adult under guardianship (article 56 (5) of the above-mentioned act).

3.30.2.3.2 Transactions involving the sale of goods
Section 3 (2) of the Sale of Goods Act of 1979 provides a certain degree of protection against unscrupulous sellers, whilst also ensuring that an incapacitated person pays for goods or services which are classed as necessaries. It states that:

“Where necessaries are sold and delivered to a person who by reason of mental incapacity or drunkenness is incompetent to contract, he must pay a reasonable price for them.”

Necessaries are defined under 3 (3) as “goods suitable to the condition in life of the person concerned and to his actual requirements at the time of the sale and delivery.” Suitability to a person’s condition refers to his/her place in society and not his/her mental or physical condition. It has been established in case law that a person’s requirements are determined by what s/he already possesses. If the person already possesses a sufficient quantity of a particular item and then purchases a large quantity of the same item, it would be unlikely to be considered as a necessary. People covered by the Sale of Goods Act of 1979 must pay a reasonable price for goods and this is not necessarily the sale price.
Unfortunately, this law depends on the supplier making enquiries as to the person’s actual requirements. It doesn’t apply to contracts of hire purchase, barter or contracts for the supply of services to the incapacitated person.

3.30.2.4 Testamentary capacity
A person can only make a will if s/he has the mental capacity to do so. Mental disorder does not of itself render a will void. Forgetfulness or confusion is not of itself enough to mean that a person does not have capacity, if s/he understands the nature and effect of the will. If no will is left, a person’s possessions are divided according to fixed legal rules. Anyone wishing to challenge the validity of a will can do so through the Court of Sessions. The onus is on the person contesting the will to prove that the grantor was not capable at the time of subscription. A guardian cannot make a will on behalf of a person with incapacity.

3.30.2.5 Civil responsibility
The law (in both Scotland and the rest of the UK) has little to say about the liabilities of people with incapacities for civil wrongs. Some general rules can, however, be stated.

The elements required to establish the particular civil wrong may not exist if the person has a serious mental disorder. If, for example, a particular mental element is required, such as malice or wilful recklessness, the person’s mental disorder may mean s/he is incapable of having such an intention and could not be held liable.

All civil wrongs require some mental element, or at the very least, a voluntary action. Thus, if the person was sleep walking or acting under a paranoid delusion, it would not be right to hold him/her liable. The test might be whether the person was able to appreciate the nature or wrongfulness of the conduct, as in the criminal law.

Some civil wrongs incur strict liability, meaning a person can be held liable regardless of his/her intentions. However, even in these cases, a person should not be held liable if s/he lacked the mental capacity to commit a voluntary act.

Even where there is no liability for damages, Patrick and Killeen (2010) suggest that the court would retain the power to grant an order demanding that certain actions cease, for example, the publication of slander or loud music coming from the person’s house.

If the person is unable to take part in civil proceedings, the court will appoint someone to represent his/her interests.

3.30.2.6 Criminal responsibility
Under the Criminal Procedure (Scotland) Act 1995 s57 as amended by Mental Health (Care and Treatment) Scotland Act 2003 and Criminal Justice (Scotland) Act 2003, the court has a range of options when someone is acquitted because of ‘insanity’ or was not fit to plead and an examination of the facts decides the person committed the offence.
Options include a compulsion order authorising detention in hospital and welfare guardianship or welfare intervention order under the Adults with Incapacity (Scotland) Act 2000. This is only possible if the person has been found to be suffering from a mental disorder of a nature or degree which warrants his/her reception into guardianship, but is not possible in the case of a crime such as murder where the sentence is fixed by law. The court must be satisfied that this measure is the most suitable and is necessary for the welfare of the person. The court requires reports from two doctors (one of whom must be an approved medical practitioner under the Mental Health (Scotland) Act), confirming that the grounds for the order apply to the person. The court requires a mental health officer to interview the person and prepare the report. It may require a report from a criminal justice social worker as well as this report. Where the adult has a mental disorder and is incapable of protecting his or her own welfare and that no other means are available are grounds for making a welfare guardianship order under the Adults with Incapacity (Scotland) Act 2000 and appointing the Chief Social Work Officer of the local authority as welfare guardian.

3.30.4 Reference


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1.1 Preface

The speed at which action was taken to address Alzheimer’s disease at a European level during 2009 is nothing short of admirable, even inspirational. This action happily laid to rest my concern that the momentum built in 2008 at the French Presidency Conference on the fight against Alzheimer’s disease might be lost. Indeed, the exposure which Alzheimer’s disease received in the last 12 months has, to my mind, been completely unprecedented.

I believe many factors made this possible. One key element was the strong support from nearly 60% of MEPs for the European Parliament’s Written Declaration 80/2008 on the priorities against Alzheimer’s disease. The Declaration which was adopted in February by the European Parliament called on the European Commission to adopt a European Action Plan on Alzheimer’s disease. On behalf of all who work in this field, I would like to extend our deepest gratitude for the work of those MEPs who were the driving force behind this initiative and in particular, Françoise Grossetête, the Chairperson of the European Alzheimer’s Alliance.

The European Commission was swift to respond in July by adopting proposals to tackle Alzheimer’s disease, dementias and other neurodegenerative diseases and this received the support of the European Parliament in November. In December 2009 the Commission held discussions on how to proceed in their Alzheimer’s initiative and this impetus is ongoing. We look forward to continuing the good collaboration with the new Commissioner for Health, John Dalli who was appointed in November 2009.

Aside from launching the Written Declaration (above), the Alzheimer’s European Alliance hosted two lunch debates during 2009 in the European Parliament. These debates without a doubt have helped raise awareness of the issues surrounding dementia, especially when they can enjoy attendance levels of up to 60 people. Although some members of the Alliance did not return in the new Parliament, it was welcome news that some newly elected MEPs gave their commitment by becoming members of the Alliance.

As France illustrated in 2008, the Member State which holds the EU Presidency can also play a vital role in highlighting the need for action. Alzheimer’s disease was placed firmly on the European agenda during the Swedish Presidency Conference on Health and Dignified Ageing in September 2009. I would like to pay tribute to HM Queen Silvia of Sweden for sharing her experience of caring for her late mother who had dementia and highlighting the importance attitude plays if we wish to care for people with dementia and respect their dignity.

For many years Alzheimer Europe has advocated the importance of national dementia plans so it is wholly encouraging that in 2009 not only was the English Dementia Strategy launched, but also the Walloon Parliament adopted a resolution for the develop-
ment of an Alzheimer’s plan and the Welsh Assembly announced its commitment to the development of a dementia strategy.

Recognition of the contribution Alzheimer Europe can make to discussions on dementia was reflected in our being invited by the European Commission to sit on their Expert Group on Dementia and also to take part in the work of the steering committee for the Swedish Presidency Conference. I am thrilled that we, alongside our member organisations, are able to participate in these events and hope that this helps ensure that the needs of people with dementia and their carers are respected.

The highlight of Alzheimer Europe’s calendar is the annual conference and in 2009 this was no exception. Our 19th conference, Stars for Help, was held in Brussels, Belgium at the end of May and it underlined the advances that the European Union has made in its efforts to address Alzheimer’s disease.

The 2009 Dementia in Europe Yearbook presents the results of the Alzheimer Europe Lawnet project and provides detailed information on healthcare decision making for people with dementia by considering the legal systems in 31 European countries. Areas such as consent, advance directives, access to information, diagnosis and end-of-life issues were all reflected upon throughout this project.

Our long-term overhaul of our communication strategy, which commenced in 2008, was completed in 2009 with the launch of the completely revised and updated Alzheimer Europe website. Whilst integrating the information from our original site, we have included new sections on ethics and policy developments. The website will be continually updated and enhanced. Our newsletter was published a record seven times during 2009, which sees us well on our way to our ultimate aim of achieving monthly issues. We were also able to publish two editions of the Dementia in Europe magazine, one of which included interviews with no less than 13 MEPs who reflected on the work carried out in the field of dementia of the outgoing Parliament and hopes for the 2009-2014 Parliament.

I cannot emphasis enough how deeply impressed I am by the commitment, dedication and continually high level of work which the small team at Alzheimer Europe achieves. I am grateful to the whole team Annette Dumas, Julie Fraser, Dianne Gove, Gwladys Guil- lory, Grazia Tomasini and, last but not least, Jean Georges.

This financial year proved to be challenging and yet our workplan was extensive. I am only too aware that this would have been impossible for us to carry out without once again receiving the support of the Luxembourg organisation (Association Luxembourg Alzheimer), which provides rent-free offices and also seconds Jean Georges to us. I am deeply grateful for the much needed and appreciated support from our sponsors from the public sector (The German Ministry of Health), foundations (Fondation Médéric
Alzheimer) and the corporate sector (Elan, GlaxoSmithKline, Janssen-Cilag, Lilly, Lundbeck, Multimount, Novartis, Pfizer and Wyeth).

2009 marked my last full year as Chair of Alzheimer Europe and I would like to take this opportunity to sincerely thank all those who have made my task so enjoyable and satisfying and look forward to offering my wholehearted support to my successor in September 2010.

*Maurice O’Connell*
*Chairperson*
1.2 Executive summary

In 2009, Alzheimer Europe

- Continued its successful campaign to make dementia a European priority,
- Campaigned for the adoption of Written Declaration 80/2008 which was supported by close to 60% of all MEPs and which called on the European Commission to develop a European Action Plan on Alzheimer’s disease,
- Welcomed the launch by the European Commission of the Joint Programming Initiative to coordinate research activities to combat neurodegenerative diseases, in particular Alzheimer’s,
- Supported the European Commission Communication on a European initiative on Alzheimer’s disease and other dementias which highlighted four areas for greater European collaboration on public health aspects,
- Contributed to a workshop on Alzheimer’s disease and actively participated in the steering committee of the Swedish Presidency conference on health and dignified ageing in Stockholm,
- Associated its member organisations in all its projects, activities and meetings and provided visibility to their activities in the AE newsletter, magazine and Internet,
- Welcomed the Alzheimer associations of Croatia, Estonia and Slovenia as new associate members of the organisation,
- Launched a completely revised website integrating the information contained in Alzheimer Europe previous sites (Alzheimer Europe, Dementia in Europe and conference website) into one,
- Greatly extended and revised the information contained on the Alzheimer Europe website,
- Published two editions of the Dementia in Europe magazine with a number of interviews with key European policy makers,
- Sent out seven editions of its e-mail newsletter with policy and research updates,
- Organised two successful lunch debates in the European Parliament which were hosted by Françoise Grossetête, MEP (France) and Frieda Brepoels, MEP (Belgium) which were dedicated to a discussion on the development of a European Alzheimer’s plan,
- Carried out a detailed research on the national legislation from 31 European countries on healthcare and decision making which covered the issues of consent, advance directives, access to information and diagnosis and end-of-life issues,
- Published the results of its healthcare and decision making project in the 2009 edition of the Dementia in Europe Yearbook,
• Submitted the final reports of the work packages on prevalence and diagnosis and treatment of its European Commission financed project “European Collaboration on dementia – EuroCoDe”,

• Estimated the number of people with dementia in the European Union to 7.3 million based on the EuroCoDe findings,

• Saw the EuroCoDe findings on prevalence presented at the Alzheimer’s Association 2009 International Conference on Alzheimer’s disease (ICAD 2009) in Vienna and included as a reference on the European Commission website,

• Received support from the German Health Ministry for the launch phase of a European Dementia Ethics Network, set up a European Advisory Group and started a literature review of the ethical issues linked to assistive technologies,

• Supported the positions of the European Patients’ Forum on cross-border healthcare, the clinical trial directive and the discussions on the use of animals in research,

• Helped develop a Code of practice for the collaboration with pharmaceutical companies in the framework of its collaboration with the Working Party with Patient Organisations of the European Medicines Agency,

• Continued as a member of the Alliance for MRI which resulted in the European Parliament supporting a derogation to the Electromagnetic Field Directive,

• Received the support of 90 Members of the European Parliament who had either signed the Paris Declaration or become a member of the European Alzheimer’s Alliance before the June elections.

• Formally reconstituted the European Alzheimer’s Alliance which counted 41 Members by the end of 2009.
1.3 Our strategic objectives

1.3.1 Making dementia a European priority and representing the interests of people with dementia and their carers

2009 proved to be a particularly successful year with regard to our campaign of making dementia a European priority and the different European institutions all approved key initiatives in response to the campaign which Alzheimer Europe successfully coordinated with its member organisations.

1.3.1.1 European Parliament Written Declaration

On 5 February, the European Parliament adopted Written Declaration 80/2008 on the priorities in the fight against Alzheimer’s disease in which Members of the European Parliament called on the European Commission and the Member States to recognise Alzheimer’s disease as a European public health priority and to develop a European Action Plan. According to this important call, the European Union should promote pan-European research and collaborate in order to improve early diagnosis and the quality of people with dementia and their carers. Furthermore, the Declaration explicitly recognises the important role of Alzheimer associations and asked for their activities to be supported. The Declaration was launched by MEPs Françoise Grossetête (France), John Bowis (United Kingdom), Katalin Lévai (Hungary), Jan Tadeusz Masiel (Poland) and Antonios Trakatellis (Greece) and received the support of 465 Members (or 59.24%) of the European Parliament from all 27 countries of the European Union and all political groups.

1.3.1.2 European Commission Initiatives

In July, the Commission responded to the Parliament Declaration and the call issued during the French Presidency of the European Union in 2008 by issuing two Communications:

1. The Commission drafted a proposal for a council recommendation on measures to combat neurodegenerative diseases, in particular Alzheimer’s through joint programming of research activities which was to be based on a new concept of voluntary research collaboration. 11 Member States agreed to participate from the onset and collaborated throughout the year to develop the working methods and research agenda for such a Joint programming initiative.

2. At the same time, the Commission issued a Communication on a European initiative on Alzheimer’s disease and other dementias. In this document, the Commission highlighted four areas where it felt Community action could be beneficial (1) Raising awareness of the importance of prevention and early intervention measures against dementia throughout the EU, (2) Improving how we understand dementia, (3) Sharing good practices with regard to diagnosis, treatment and financing of therapies and (4) Increasing the attention given to the rights of people with a cognitive deficit.
Both the European Parliament (12 November 2009), as well as the Economic and Social Committee (December 2009) welcomed the Commission initiatives and gave their support for greater European collaboration on dementia.

1.3.1.3 Swedish Presidency Conference on health and dignified ageing
Further evidence of dementia becoming a European priority was apparent when Sweden took on the European Presidency. Alzheimer’s disease continued to be on the European agenda with a Conference on Health and Dignified Ageing being held from 15-16 September. Alzheimer Europe took part in the steering committee for the Conference preparations. A number of parallel workshops were organised during the conference with one focusing specifically on Alzheimer’s disease. This workshop was chaired by Florence Lustman, coordinator of the French Alzheimer’s Plan, with the participation of Nick Fahy, Head of Unit for Health Information at the European Commission, Sylvie Legrain, Professor of geriatrics at Hôpital Bretonneau and Jean Georges, Executive Director of Alzheimer Europe.

1.3.2 Involving and supporting national Alzheimer associations
Alzheimer Europe member organisations played a vital role in helping to secure support for Written Declaration 80/2008, contacting MEPs directly for their support. At the same time, national events of member organisations were given greater visibility by the attendance of some MEPs. Representatives from our member organisations participated in the lunch debates in the European Parliament.

The work of our members was reported on in our regular newsletter and also in the magazine. Aside from the magazine’s regular features in which members’ work is highlighted, a new feature on Living with dementia gave members the opportunity to give a voice to their members. In addition, a report on the feedback from members regarding the adoption of Written Declaration 80/2008 was included in the magazine.

Greater visibility of our members’ work was also achieved by dedicating new sections of our website to the members and by including contributions from them on various parts of the website.

As in previous years, Alzheimer Europe continued to collaborate with national and local Alzheimer’s associations in countries which were not yet represented by a full member organisation. In 2009, these contacts led to a closer collaboration with the Slovenian Alzheimer Association “Forget-me-not”, the Estonian Association of Alzheimer’s disease and the Alzheimer’s Disease Societies Croatia which were all granted provisional membership at the Annual General Meeting of Alzheimer Europe in May 2009.
1.3.3 Improving the information exchange between AE, its members and European structures

1.3.3.1 A new Alzheimer Europe website

Following on from the communication strategy overhaul which commenced in 2008, Alzheimer Europe launched its fully revised and updated website in October 2009. With a stronger corporate identity, this comprehensive website combines all Alzheimer Europe’s previous sites (Alzheimer Europe, Dementia in Europe and our conference website) into one. The highly user-friendly site includes new navigational aids (including a more comprehensive search function) to assist users to find appropriate information quickly. Information can be found on:

- Alzheimer Europe – who, what and where we are
- Dementia – the different types of dementia as well as easy to use A to Z list
- Living with dementia – tips for living with dementia from a carer’s or person with dementia’s perspective
- Policy in practice – the work of the European Alzheimer’s Alliance, developments on European action on dementia, Alzheimer Europe’s opinions on different issues as well as country comparisons
- Ethics – discussions on some of the ethical issues which are at the core of caring for, and treating people with dementia. In addition, there is information on the newly-formed Ethics Network
- Our Research – the results from our latest European Collaboration on Dementia project are available as are details of the Dementia Research Observatory which Alzheimer Europe is developing
- Conferences – details of past, future and the forthcoming 20th Alzheimer Europe conference which will be held in Luxembourg
- News – the most up-to-date information on Alzheimer’s disease and dementia as reported in the news

1.3.3.2 The Dementia in Europe Magazine and newsletter

Two issues of the Dementia in Europe magazine, which focuses on policy work in the field of dementia, were published during 2009 and due to demand, circulation was increased. The June issue had a special section dedicated to a reflection of the work on dementia carried out by the European Parliament over the last five years and also a look at hopes for the new Parliament. The aim of a monthly newsletter came closer to be realised with seven issues of the Alzheimer Europe newsletter being distributed throughout the year.
1.3.3.3 The 19th Alzheimer Europe Conference in Brussels
The 19th Alzheimer Europe conference held in Brussels, Belgium, and entitled “Stars for Help” took place from 28 to 30 May 2009 and was jointly organised by Alzheimer Europe and its Belgian member organisation “Ligue Nationale Alzheimer Liga”. Some 300 delegates (including people with dementia, carers, local, national and European policy makers and healthcare professionals) from over 20 countries participated in the meeting. It was also supported by the attendance of H.R.H. Princess Mathilde of Belgium, as well as Laurette Onkelinx, the Belgian Deputy Prime Minister and Minister for Social Affairs and Public Health.

1.3.3.4 European Alzheimer’s Alliance lunch debates
The European Alzheimer’s Alliance was also active in hosting two lunch debates which provided the perfect opportunity for an exchange of information between Alzheimer Europe, its national member organisations and European policy makers.

On 3 March, Françoise Grossetête, MEP (France) and Chairperson of the European Alzheimer’s Alliance hosted a lunch debate entitled “Towards a European Action Plan on Alzheimer’s disease” to which Florence Lustman, the Coordinator of the French Alzheimer’s Plan and Antoni Montserrat, Policy Officer for neurological disorders at the European Commission contributed.

On 29 September, Frieda Brepoels, MEP (Belgium) hosted Alzheimer Europe’s 6th lunch debate which was entitled “European Action on Alzheimer’s disease” at which Antoni Montserrat and Maria-José Vidal-Ragout from the European Commission were able to present the Commission’s plans with regard to the joint programming of research activities and the European Alzheimer’s Initiative.

1.3.4 Promoting best practice through the development of comparative surveys

1.3.4.1 Healthcare and decision making in dementia
The publication of Yearbooks was an integral part of our EuroCoDe project and the aim of these yearbooks was to compare the situation of people with dementia and their carers in the different Member States of the European Union, as well as in Iceland, Norway, Switzerland and Turkey. The Yearbooks published as part of the EuroCoDe project thus provided detailed information on the availability and reimbursement of anti-dementia drugs, the prevalence of dementia, the provision of home care and a description of social support systems.

Due to the great interest generated by these yearbooks and the positive echo provided by policy makers, researchers and Alzheimer associations, Alzheimer Europe decided to continue this type of publication despite the end of the EuroCoDe project.
In 2009, Alzheimer Europe decided to revisit the findings of the Alzheimer Europe “Lawnet” project which was carried out in 1998 and 1999 and which resulted in the production of national reports on the legal rights of people with dementia, as well as recommendations on how to improve the legal rights and protection of adults with incapacity due to dementia.

The focus of the 2009 project was on healthcare and decision making and the 31 national reports provide information on the legal systems in the studied countries with regard to consent, advance directives, access to information and diagnosis and end-of-life issues for people with dementia.

The reports were published in the 2009 Dementia in Europe Yearbook.

1.3.4.2 European Collaboration on Dementia

The three-year European Commission financed European Collaboration on Dementia (EuroCoDe) project came to an end in 2008. The project, coordinated by Alzheimer Europe, brought together over 40 researchers from 20 different European countries. The results were published in the 2008 Dementia in Europe Yearbook, including:

- Recommendations and examples of good practice in the provision of social support to people with dementia and their carers,
- A report on the socio-economic impact of dementia,
- European guidelines on psychosocial interventions and
- A report on risk factors and prevention.

In 2009, the final report and documents were submitted to the European Commission in 2009 and two additional EuroCoDe reports were finalised and included on the Alzheimer Europe website:

- A guideline on the diagnosis and treatment of dementia, and
- A review of the prevalence of dementia in Europe.

Also, the report on the socio-economic impact of dementia was updated to take into account the new prevalence findings.

The findings of the EuroCoDe prevalence group headed by Dr Emma Reynish were presented on 13 July at the Alzheimer’s Association 2009 International Conference on Alzheimer’s disease (ICAD 2009) in Vienna and chosen as a media story by the conference organisers resulting in great media coverage of the new EuroCoDe prevalence figures which showed that age-specific prevalence rates were higher than previously documented in the female “oldest old” age groups rising to close to 50% in those over 95 years. On the basis of these new findings, Alzheimer Europe estimates the numbers of people with dementia.
dementia in the European Union to 7.3 million. These figures were welcomed by the European Commission as a reference and included on the Commission website.

1.3.4.3 European Dementia Ethics Network
In 2008, Alzheimer Europe started discussions with representatives of the German Health Ministry on the feasibility of a European Dementia Ethics Network. These discussions continued in 2009 and on 23 September 2009, Ulla Schmidt, Federal Minister for Health, announced the support of her ministry to the initiative and the allocation of a grant of EUR 60,000.

Thanks to the support of the German Ministry, Alzheimer Europe was able to start the implementation phase of such a network and was able to set up a European Advisory Group for the project, to establish a web presence for the project and carry out a literature review of the ethical issues linked to assistive technologies.

The original steering committee of the project was constituted by: Prof François Blanchard (University of Reims and Coordinator of the French Ethics Network), Christian Berringer (German Ministry of Health), Jean Georges (Alzheimer Europe), Dianne Gove (Project Manager, Alzheimer Europe), Sabine Jansen (German Alzheimer Association), Cornelia Reitberger (German Ministry of Health), Matthias von Schwanenflügel (German Ministry of Health) and Sigurd Sparr (Norwegian Alzheimer Association).

1.3.5 Developing policy statements

While the focus of the organisation was primarily on its campaign towards the establishment of a European Alzheimer’s Initiative, Alzheimer Europe also contributed to a number of other policy initiatives through its membership of the European Patient’s Forum, in particular the directive on the application of patients’ rights in cross-border healthcare, the Commission consultation on tackling health inequalities, the clinical trial directive and the discussions on the use of animals in clinical research.

On the pharmaceutical package and the issue of information on prescription medicines, Alzheimer Europe continued supporting the development of a comprehensive information strategy to diversify the sources of information for patients on available medicines, as well as a continued ban on direct to consumer advertising by pharmaceutical companies.

Alzheimer Europe also continued its collaboration with the Alliance for MRI which called for a derogation for MRI from the scope of the Electromagnetic Field Directive. The campaign of the Alliance was endorsed by a number of key Members of the European Parliament and resulted in the European Parliament supporting such a derogation.

In the framework of the Working Party with patient organisations of the European Medicines Agency, Alzheimer Europe collaborated with other patient organisations and
helped develop a Code of practice for the collaboration with pharmaceutical companies which was approved by the Alzheimer Europe Board in May 2009.

1.3.6 Developing strategic partnerships

1.3.6.1 European Alzheimer’s Alliance
The European Alzheimer’s Alliance, set up and supported by Alzheimer Europe and comprised of Members of the European Parliament with an interest in dementia continued to be a key ally of the organisation in its campaign to make dementia a European priority. Chaired by Françoise Grossetête, MEP (France), the Alliance had been able to gather the support of 90 Members of the European Parliament by the end of the Parliamentary mandate with all seven political groups represented, as well as 22 out of 27 Member States of the European Union. 50 of these supporters were duly reelected as Members of the European Parliament during the June elections and Alzheimer Europe continued its collaboration with these MEPs.

The European Alzheimer’s Alliance was formally reconstituted after the European Parliament elections with Françoise Grossetête, MEP (France) continuing as Chairperson. She was joined by her colleagues Frieda Brepoels, MEP (Belgium) Brian Crowley, MEP (Ireland) and Dagmar Roth-Behrendt, MEP (Germany). By the end of the year, 41 Members of the European Parliament had either joined or confirmed their commitment to the European Alzheimer’s Alliance.

1.3.6.2 European Patients’ Forum
As in previous years, Alzheimer Europe collaborated with the European Patients’ Forum and supported the majority of the organisation’s policy and project statements. Representatives of Alzheimer Europe also participated in the Annual General Meeting of the organisation.
## 1.4 Annex 1: Meetings attended by AE representatives

<table>
<thead>
<tr>
<th>Date</th>
<th>Meeting</th>
<th>Location</th>
</tr>
</thead>
<tbody>
<tr>
<td>14 January</td>
<td>Visual Online</td>
<td>Luxembourg, Luxembourg</td>
</tr>
<tr>
<td>14 January</td>
<td>European Patients Forum</td>
<td>Brussels, Belgium</td>
</tr>
<tr>
<td>16 January</td>
<td>Binsfeld Live</td>
<td>Luxembourg, Luxembourg</td>
</tr>
<tr>
<td>20 January</td>
<td>EFPIA</td>
<td>Brussels, Belgium</td>
</tr>
<tr>
<td>21 January</td>
<td>European Parliamentary assistants</td>
<td>Brussels, Belgium</td>
</tr>
<tr>
<td>26 January</td>
<td>Visual Online</td>
<td>Luxembourg, Luxembourg</td>
</tr>
<tr>
<td>29 January</td>
<td>European Commission Meeting on the Pact for Mental Health</td>
<td>Brussels, Belgium</td>
</tr>
<tr>
<td>30 January</td>
<td>Pfizer and Easai</td>
<td>London, United Kingdom</td>
</tr>
<tr>
<td>6 February</td>
<td>Health Editorial Board of the European Commission</td>
<td>Luxembourg, Luxembourg</td>
</tr>
<tr>
<td>9 February</td>
<td>EFPIA Think Tank</td>
<td>Brussels, Belgium</td>
</tr>
<tr>
<td>9-11 February</td>
<td>Meeting with Polish Organisation</td>
<td>Brussels, Belgium</td>
</tr>
<tr>
<td>12 February</td>
<td>19th AE Conference Organising Committee</td>
<td>Brussels, Belgium</td>
</tr>
<tr>
<td>17 February</td>
<td>European Voice Health Check Debate</td>
<td>Brussels, Belgium</td>
</tr>
<tr>
<td>17-18 February</td>
<td>Consent in Dementia Conference</td>
<td>Belfast, United Kingdom</td>
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<tr>
<td>19-23 February</td>
<td>Greek Alzheimer Conference</td>
<td>Thessaloniki, Greece</td>
</tr>
<tr>
<td>2-3 March</td>
<td>Alzheimer Europe Board meeting</td>
<td>Brussels, Belgium</td>
</tr>
<tr>
<td>3 March</td>
<td>Alzheimer Europe lunch debate in the European Parliament</td>
<td>Brussels, Belgium</td>
</tr>
<tr>
<td>4 March</td>
<td>Organising Committee of the 19th Alzheimer Europe Conference</td>
<td>Brussels, Belgium</td>
</tr>
<tr>
<td>5 March</td>
<td>Binsfeld</td>
<td>Luxembourg, Luxembourg</td>
</tr>
<tr>
<td>7 March</td>
<td>King Baudouin Foundation</td>
<td>Brussels, Belgium</td>
</tr>
<tr>
<td>9 March</td>
<td>Visual Online</td>
<td>Luxembourg, Luxembourg</td>
</tr>
<tr>
<td>Date</td>
<td>Meeting</td>
<td>Location</td>
</tr>
<tr>
<td>-----------</td>
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<td>-------------------------------</td>
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<tr>
<td>12 March</td>
<td>EuropaBio Patient Advocacy Group Meeting</td>
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<td>13 March</td>
<td>Assistant of MEP Jan Tadeusz Masiel</td>
<td>Brussels, Belgium</td>
</tr>
<tr>
<td>17 March</td>
<td>European Expert Panel on Dementia with the European Commission</td>
<td>Luxembourg, Luxembourg</td>
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<tr>
<td>18 March</td>
<td>Novartis workshop</td>
<td>Brussels, Belgium</td>
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<tr>
<td>19 March</td>
<td>Organising Committee of the 19th Alzheimer Europe Conference</td>
<td>Brussels, Belgium</td>
</tr>
<tr>
<td>20 March</td>
<td>Binsfeld</td>
<td>Luxembourg, Luxembourg</td>
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<tr>
<td>25 March</td>
<td>European Commission Conference on the outcomes of the Pharmaceutical Forum</td>
<td>Brussels, Belgium</td>
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<td>26 March</td>
<td>European Patient’s Forum general assembly meeting</td>
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<tr>
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<td>Health Advisory Board of GlaxoSmithKline</td>
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<td>1 April</td>
<td>Binsfeld</td>
<td>Luxembourg, Luxembourg</td>
</tr>
<tr>
<td>3 April</td>
<td>Dementia Ethics Network</td>
<td>Luxembourg, Luxembourg</td>
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<tr>
<td>16 April</td>
<td>Petra Wilcon from Cisco</td>
<td>Luxembourg, Luxembourg</td>
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<tr>
<td>20-21 April</td>
<td>Recognition programme</td>
<td>Barcelona, Spain</td>
</tr>
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<td>24 April</td>
<td>Lukas Pfister of MSD</td>
<td>Brussels, Belgium</td>
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<tr>
<td>28 April</td>
<td>Preparatory Meeting of Swedish Presidency Conference on Healthy and Dignified Ageing</td>
<td>Stockholm, Sweden</td>
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<tr>
<td>30 April</td>
<td>Organising Committee of 19th Alzheimer Europe Conference</td>
<td>Brussels, Belgium</td>
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<tr>
<td>5-6 May</td>
<td>Peer Review organised by the European Commission</td>
<td>Paris, France</td>
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<td>7 May</td>
<td>Binsfeld</td>
<td>Luxembourg, Luxembourg</td>
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<tr>
<td>17 May</td>
<td>Visual Online</td>
<td>Luxembourg, Luxembourg</td>
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<tr>
<td>18 May</td>
<td>A. Montserrat from the European Commission</td>
<td>Brussels, Belgium</td>
</tr>
<tr>
<td>Date</td>
<td>Meeting</td>
<td>Location</td>
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<tr>
<td>------------</td>
<td>-------------------------------------------------------------------------</td>
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<tr>
<td>19 May</td>
<td>A Chidgey and V Combe of the Alzheimer's Society (UK)</td>
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</tr>
<tr>
<td>25 May</td>
<td>Eurodis</td>
<td>Brussels, Belgium</td>
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<tr>
<td>28 May</td>
<td>Alzheimer Europe Board meeting</td>
<td>Brussels, Belgium</td>
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<tr>
<td>29-30 May</td>
<td>Alzheimer Europe's 19th Annual Conference</td>
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<tr>
<td>2 June</td>
<td>Baxter</td>
<td>Vienna, Austria</td>
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<tr>
<td>24-26 June</td>
<td>Lilly, caregiver interventions meeting</td>
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<td>2-3 July</td>
<td>European summer school on health law and bioethics, University of Toulouse</td>
<td>Toulouse, France</td>
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<tr>
<td>5-7 July</td>
<td>Conference of the International Association of Gerontology</td>
<td>Paris, France</td>
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<tr>
<td>8 July</td>
<td>INTERDEM</td>
<td>Paris, France</td>
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<tr>
<td>18 August</td>
<td>Andrew Ketteringham from the Alzheimer's Society (UK)</td>
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<tr>
<td>20 August</td>
<td>Ruth Bosworth, Pfizer</td>
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<td>1 September</td>
<td>Meeting of the GSK Health Advisory Board</td>
<td>London, United Kingdom</td>
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<tr>
<td>1 September</td>
<td>Parliament Magazine Swedish Presidency Reception</td>
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<td>2 September</td>
<td>Environment Committee Meeting, European Parliament</td>
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<tr>
<td>2 September</td>
<td>Employment and Social Affairs Committee, European Parliament</td>
<td>Brussels, Belgium</td>
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<td>3 September</td>
<td>Industry and Research Committee, European Parliament</td>
<td>Brussels, Belgium</td>
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<tr>
<td>14-16 September</td>
<td>Facing the future, Dementia Services Development Centre</td>
<td>York, United Kingdom</td>
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<tr>
<td>15-16 September</td>
<td>EU Presidency Conference on Healthy and Dignified Ageing</td>
<td>Stockholm, Sweden</td>
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<tr>
<td>22 September</td>
<td>EFPIA Think Tank</td>
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<tr>
<td>23 September</td>
<td>European Dementia Ethics Network</td>
<td>Berlin, Germany</td>
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<td>28 September</td>
<td>AE Board Meeting</td>
<td>Brussels, Belgium</td>
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<tr>
<td>28 September</td>
<td>Meeting with AE sponsors</td>
<td>Brussels, Belgium</td>
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<tr>
<td>29 September</td>
<td>European Parliament lunch debate “European Action on Dementia”</td>
<td>Brussels, Belgium</td>
</tr>
<tr>
<td>Date</td>
<td>Meeting</td>
<td>Location</td>
</tr>
<tr>
<td>--------------</td>
<td>------------------------------------------------------------------------</td>
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</tr>
<tr>
<td>30 September</td>
<td>Liisa Jaakonsaari, MEP (Finland)</td>
<td>Brussels, Belgium</td>
</tr>
<tr>
<td>30 September</td>
<td>Philippe Lamberts, MEP (Belgium)</td>
<td>Brussels, Belgium</td>
</tr>
<tr>
<td>2 October</td>
<td>Luxembourg Ministry of Family</td>
<td>Luxembourg, Luxembourg</td>
</tr>
<tr>
<td>6 October</td>
<td>Towards a new ageing vision: the role of ICT in business and industry</td>
<td>Brussels, Belgium</td>
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<tr>
<td>7 October</td>
<td>Launch of AGE publication to promote ageing well in the European Union</td>
<td>Brussels, Belgium</td>
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<tr>
<td>13 October</td>
<td>Alliance for MRI</td>
<td>Brussels, Belgium</td>
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<td>14 October</td>
<td>European Economic and Social Committee on the European Commission</td>
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<tr>
<td></td>
<td>Alzheimer’s Initiative</td>
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<td>15 October</td>
<td>Eli Lilly</td>
<td>Brussels, Belgium</td>
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<tr>
<td>29-30 October</td>
<td>Alzheimer Portugal’s meeting on a Portuguese Alzheimer Plan</td>
<td>Lisbon, Portugal</td>
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<td>3 November</td>
<td>EFPIA/parliament magazine – Towards a healthier Europe</td>
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</tr>
<tr>
<td>3 November</td>
<td>Parliament Magazine Hearing “Towards a healthier Europe”</td>
<td>Brussels, Belgium</td>
</tr>
<tr>
<td>10 November</td>
<td>Alzheimer’s in Europe – The opportunities of Joint Programming, European initiatives and Danish research</td>
<td>Brussels, Belgium</td>
</tr>
<tr>
<td>17 November</td>
<td>Binsfeld</td>
<td>Luxembourg, Luxembourg</td>
</tr>
<tr>
<td>18 November</td>
<td>GSK</td>
<td>London, United Kingdom</td>
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<td>19 November</td>
<td>Recognition Programme Meeting</td>
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<td>EFPIA Think Tank</td>
<td>Brussels, Belgium</td>
</tr>
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<td>Binsfeld</td>
<td>Luxembourg, Luxembourg</td>
</tr>
<tr>
<td>27 November</td>
<td>Europabio</td>
<td>Brussels, Belgium</td>
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<tr>
<td>30 November</td>
<td>Novartis</td>
<td>Luxembourg, Luxembourg</td>
</tr>
<tr>
<td>2 December</td>
<td>20th Anniversary Meeting of the German Alzheimer’s Association</td>
<td>Berlin, Germany</td>
</tr>
<tr>
<td>2 December</td>
<td>Meeting with representative of Bayer Healthcare</td>
<td>Berlin, Germany</td>
</tr>
<tr>
<td>Date</td>
<td>Meeting</td>
<td>Location</td>
</tr>
<tr>
<td>--------------</td>
<td>-------------------------------------------------------------------------</td>
<td>---------------------------------</td>
</tr>
<tr>
<td>4 December</td>
<td>Meeting with Binsfeld</td>
<td>Luxembourg, Luxembourg</td>
</tr>
<tr>
<td>7 December</td>
<td>Alzheimer Europe Board Meeting</td>
<td>Brussels, Belgium</td>
</tr>
<tr>
<td>9 December</td>
<td>Preparatory Meeting for Belgian Presidency Conference on AD</td>
<td>Brussels, Belgium</td>
</tr>
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<td>10 December</td>
<td>Symposium on “Living by proxy”</td>
<td>Reims, France</td>
</tr>
<tr>
<td>14 December</td>
<td>European Commission Preparatory Meeting – Joint Action on dementia</td>
<td>Luxembourg, Luxembourg</td>
</tr>
<tr>
<td>16 December</td>
<td>France Alzheimer Meeting</td>
<td>Toulouse, France</td>
</tr>
</tbody>
</table>
Financial Report
2.1 **Report of the independent auditor**

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**To the Board of Directors**

**ALZHEIMER EUROPE**

Association sans but lucratif

R.C.S. Luxembourg F2773

145, Route de Thionville

L - 2611 Luxembourg

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**REPORT OF THE REVISEUR D’ENTREPRISES AGREE**

We have audited the accompanying annual accounts of **ALZHEIMER EUROPE**, which comprise the balance sheet as at December 31, 2009 and the profit and loss account for the year then ended.

**Board of directors’ responsibility for the annual accounts**

The board of directors is responsible for the preparation and fair presentation of these annual accounts in accordance with Luxembourg legal and regulatory requirements relating to the preparation of the annual accounts. This responsibility includes: designing, implementing and maintaining internal control relevant to the preparation and fair presentation of annual accounts that are free from material misstatement, whether due to fraud or error; selecting and applying appropriate accounting policies; and making accounting estimates that are reasonable in the circumstances.

**Responsibility of the réviseur d’entreprises agréé**

Our responsibility is to express an opinion on these annual accounts based on our audit. We conducted our audit in accordance with International Standards on Auditing as adopted for Luxembourg by the Commission de Surveillance du Secteur Financier. Those standards require that we comply with ethical requirements and plan and perform the audit to obtain reasonable assurance whether the annual accounts are free from material misstatement.

An audit involves performing procedures to obtain audit evidence about the amounts and disclosures in the annual accounts. The procedures selected depend on the judgement of the réviseur d’entreprises agréé, including the assessment of the risks of material misstatement of the annual accounts, whether due to fraud or error. In making those risk assessments, the réviseur d’entreprises agréé considers internal control relevant to the entity’s preparation and fair presentation of the annual accounts in order to design audit procedures that are appropriate in the circumstances, but not for the purpose of expressing an opinion on the effectiveness of the entity’s internal control.
An audit also includes evaluating the appropriateness of accounting policies used and the reasonableness of accounting estimates made by the board of directors, as well as evaluating the overall presentation of the annual accounts.

We believe that the audit evidence we have obtained is sufficient and appropriate to provide a basis for our audit opinion.

Opinion

In our opinion, the annual accounts give a true and fair view of the financial position of ALZHEIMER EUROPE as of December 31, 2009, and of the results of its operations for the year then ended in accordance with Luxembourg legal and regulatory requirements relating to the preparation of the annual accounts.

Luxembourg, June 21, 2010

For MAZARS, Cabinet de révision agréé

[Signature]

Joseph HOBSCHEID
Partner

Appendix:
- balance sheet as of December 31, 2009
- profit and loss account for the year ended December 31, 2009
### Balance sheet as of December 31, 2009

**ALZHEIMER EUROPE**  
Association sans but lucratif  
R.C.S. Luxembourg F2773

Balance sheet as of December 31, 2009

<table>
<thead>
<tr>
<th></th>
<th>2009</th>
<th>2008</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>EUR</td>
<td>EUR</td>
</tr>
<tr>
<td><strong>ASSETS</strong></td>
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<td></td>
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<tr>
<td><strong>Current assets</strong></td>
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<tr>
<td>Debtor EU Commission - Eurocode</td>
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<td>174,745</td>
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<tr>
<td>Other debtors</td>
<td>67,963</td>
<td>19,680</td>
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<td>Advance payments - Eurocode partners</td>
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<tr>
<td>Cash at bank and on deposit</td>
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<td>202,962</td>
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<tr>
<td><strong>Accruals</strong></td>
<td>7,687</td>
<td>9,590</td>
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<tr>
<td><strong>Total Assets</strong></td>
<td>386,865</td>
<td>417,242</td>
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<tr>
<td><strong>LIABILITIES</strong></td>
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<td></td>
</tr>
<tr>
<td><strong>Capital and reserves</strong></td>
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<td></td>
</tr>
<tr>
<td>Results brought forward</td>
<td>145,088</td>
<td>106,758</td>
</tr>
<tr>
<td>Result of the year</td>
<td>17,587</td>
<td>38,330</td>
</tr>
<tr>
<td><strong>Total Liabilities</strong></td>
<td>162,675</td>
<td>145,088</td>
</tr>
<tr>
<td></td>
<td>386,865</td>
<td>417,242</td>
</tr>
</tbody>
</table>

241
### Profit and loss account – Year ended December 31, 2009

**ALZHEIMER EUROPE**  
Association sans but lucratif  
R.C.S. Luxembourg F2773

**Profit and loss account**  
year ended December 31, 2009

<table>
<thead>
<tr>
<th></th>
<th>2009</th>
<th>2008</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>EUR</td>
<td>EUR</td>
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<tr>
<td><strong>Other operating income</strong></td>
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<tr>
<td>Sponsorship</td>
<td>356,483</td>
<td>323,664</td>
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<td>Sponsorship received on account</td>
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<td>-83,798</td>
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<td>EU Subsidy</td>
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<td>79,503</td>
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<td>93,832</td>
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<td>48,000</td>
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<td>Donations</td>
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<td>485</td>
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<td>Publication sales and royalties</td>
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<td>9,873</td>
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<td>Internet services</td>
<td>-</td>
<td>2,220</td>
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<tr>
<td>Project participation and other subsidies</td>
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<td>21,310</td>
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<td>Other operating income</td>
<td>15,004</td>
<td>6,479</td>
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<td>AE Conference registration fees</td>
<td>91,875</td>
<td>22,989</td>
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<td>Unpayable debts</td>
<td>-</td>
<td>399</td>
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<tr>
<td>Eurocode Partner Income</td>
<td>-</td>
<td>333,146</td>
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<td><strong>External charges</strong></td>
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<td>External experts</td>
<td>-218,041</td>
<td>-160,041</td>
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<td>Publication and information material</td>
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<td>Communication costs</td>
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<td>Accommodation expenses</td>
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<td>Irrecoverable debt</td>
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<td>Eurocode Partner expenses</td>
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<td><strong>Staff costs</strong></td>
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<td></td>
</tr>
<tr>
<td>Wages and salaries</td>
<td>-136,739</td>
<td>-112,614</td>
</tr>
<tr>
<td>Social security costs</td>
<td>-37,873</td>
<td>-31,204</td>
</tr>
<tr>
<td><strong>Interest receivable and similar income</strong></td>
<td>1,144</td>
<td>7,108</td>
</tr>
<tr>
<td><strong>Interest payable and similar charges</strong></td>
<td>-2,151</td>
<td>-504</td>
</tr>
<tr>
<td></td>
<td>17,587</td>
<td>38,330</td>
</tr>
</tbody>
</table>
2.4  **Annex 1: Acknowledgements**

2.4.1  **Introduction**

In 2009, Alzheimer Europe had an audited income of EUR 692,894.74 of which EUR 350,510.24 (50.59%) was for the organisation’s core activities (including the organisation’s Dementia Ethics Network and Annual Conference) and EUR 342,384.50 (49.41%) was for the organisation’s public affairs activities.

2.4.2  **Funding of core activities (EUR 350,510.24)**

In 2009, the core funding of Alzheimer Europe was composed as follows:

- EUR 150,371.28 (42.90%) from member organisations,
- EUR 89,905.33 (25.65%) from individuals,
- EUR 51,222.21 (14.61%) from public funding,
- EUR 36,750 (10.48%) from corporate sources,
- EUR 15,000 (4.28%) from foundations and other non-profit organisations,
- EUR 6,117.15 (1.75%) from other sources and
- EUR 1,144.27 (0.33%) from bank interest and similar.

2.4.2.1  **Funding from member organisations**

In 2009, the EUR 150,371.28 funding from member organisations can be broken down as follows:

- EUR 91,107.31 in co-financing from the Luxembourg member organisation through the secondment of the AE Executive Director,
- EUR 46,500 in membership fees,
- EUR 12,000 in co-financing from the Luxembourg member organisation by providing the offices of Alzheimer Europe free of rent,
- EUR 763.97 in co-financing from member organisations covering the travel expenses of AE Board members to attend Board meetings.

2.4.2.2  **Individuals**

In 2009, AE received EUR 89,905.33 from individuals which can be broken down as follows:

- EUR 86,875 in conference registrations,
- EUR 2,572.33 in publication sales and
- EUR 458 in donations.
2.4.2.3 **Public funding**
In 2009, Alzheimer Europe received EUR 51,222.21 from the German Ministry of Health to cover the expenditure for the setting up of the European Dementia Ethics Network.

In 2009, Alzheimer Europe did not receive funding from the European Commission or other European agencies.

2.4.2.4 **Corporate support**
In 2009, Alzheimer Europe received EUR 36,750 from corporate sources as core-funding which can be broken down as follows:

- EUR 10,000 from Janssen-Cilag and Pfizer as support to the Alzheimer Europe Conference in Brussels,
- EUR 5,000 from Lundbeck and Multimount as support to the Alzheimer Europe Conference in Brussels,
- EUR 3,750 from Wyeth as support to the Alzheimer Europe Conference in Brussels,
- EUR 3,000 as co-financing from Mazars which carried out the audit of the organisation's accounts free of charge.

2.4.2.5 **Foundations and organisations**
The EUR 15,000 which Alzheimer Europe received in 2009 from foundations and other non-profit organisations can be broken down as follows:

- EUR 5,000 from Fondation Médéric Alzheimer, Fondation Roi Baudouin and EUR Mutualités libres to support the Alzheimer Europe Conference in Brussels,

2.4.2.6 **Bank interest and similar**
In 2009, Alzheimer Europe had an income of EUR 1,144.27 from bank interest and similar income.

2.4.2.7 **Other income**
In 2009, EUR 6,117.15 came from other sources not mentioned above.

2.4.3 **Funding of public affairs activities (EUR 342,384.50)**
In 2009, Alzheimer Europe received EUR 342,384.50 for its public affairs activities, of which

- EUR 239,107.68 (69.83%) came from corporate sponsors,
- EUR 83,798.13 (23%) from reserves brought forward from the financial year 2008,
- EUR 9,000 from foundations and organisations,
- EUR 1,591.98 from member organisations and
- EUR 8,886.71 from other sources.
2.4.3.1 Corporate support
The corporate support received by Alzheimer Europe for its public affairs activities can be broken down as follows:

- Pfizer contributed EUR 40,000 as a gold sponsor and EUR 826.20 in travel support,
- Novartis contributed EUR 40,000 as a gold sponsor and EUR 294.95 in travel support,
- Janssen-Cilag contributed EUR 40,000 as a gold sponsor,
- GlaxoSmithKline contributed EUR 35,287.80 as a gold sponsor and EUR 1,027.76 in travel support and honoraria,
- Lundbeck contributed EUR 20,000 as a silver sponsor and EUR 2,152.40 in travel support and honoraria,
- Lilly contributed EUR 20,000 as a silver sponsor and EUR 2,000 in travel support and honoraria,
- Wyeth contributed EUR 20,000 as a silver sponsor,
- Elan contributed EUR 9,263.44 as a bronze sponsor,
- Sudler & Hennessy contributed EUR 6,761.35 in travel support and honoraria,
- Huntsworth Health contributed EUR 1,143.46 in travel support and honoraria,
- Bayer contributed EUR 178 in travel support,
- Alzheimer Europe received a donation of EUR 172.32 from Mark Krueger and Associates.

2.4.3.2 Reserves
In 2009, Alzheimer Europe was able to contribute EUR 83,798.13 of its own reserves to its public affairs activities which came from income received on account in 2008.

2.4.3.3 Foundations and organisations
In 2009, Alzheimer Europe received EUR 9,000 from Fondation Médéric Alzheimer for the work carried out on the inventory of national legislation on healthcare decision making and the publication of its 2009 Dementia in Europe Yearbook.

2.4.3.4 Member organisations
Members contributed EUR 1,591.98 in 2009 in co-financing for travel expenditure incurred by member organisations for public affairs meetings organised by AE.

2.4.3.5 Other income
In 2009, EUR 8,886.71 came from sources not included above.
### 2.4.4 Overall funding

The following table lists all sources of income received in 2009. In line with the policy of the European Medicines Agency on transparency requirements for accredited patients' organisations, this is presented in total amounts as well as in terms of percentages of the overall income of the organisation.

<table>
<thead>
<tr>
<th>Funding source</th>
<th>Funding received (2009)</th>
<th>as % of AE Income (2009)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Pfizer</td>
<td>50,826.20</td>
<td>7.34%</td>
</tr>
<tr>
<td>Janssen-Cilag</td>
<td>50,000.00</td>
<td>7.22%</td>
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<tr>
<td>Novartis</td>
<td>2,294.95</td>
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<tr>
<td>GlaxoSmithKline</td>
<td>36,315.56</td>
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<tr>
<td>Lundbeck</td>
<td>27,152.40</td>
<td>3.92%</td>
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<tr>
<td>Wyeth</td>
<td>23,750.00</td>
<td>3.43%</td>
</tr>
<tr>
<td>Lilly</td>
<td>22,000.00</td>
<td>3.18%</td>
</tr>
<tr>
<td>Elan</td>
<td>9,263.44</td>
<td>1.34%</td>
</tr>
<tr>
<td>Bayer</td>
<td>178.00</td>
<td>0.03%</td>
</tr>
<tr>
<td><strong>Sub-total: Pharmaceutical funding</strong></td>
<td>259,780.55</td>
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<tr>
<td>Sudler &amp; Hennessy</td>
<td>6,761.35</td>
<td>0.98%</td>
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<tr>
<td>Multimount</td>
<td>5,000.00</td>
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<tr>
<td>Mazars</td>
<td>3,000.00</td>
<td>0.43%</td>
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<tr>
<td>Huntsworth Health</td>
<td>1,143.46</td>
<td>0.17%</td>
</tr>
<tr>
<td>Mark Krueger and Associates</td>
<td>172.32</td>
<td>0.02%</td>
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<tr>
<td><strong>Sub-total: Other corporate funders</strong></td>
<td>16,077.13</td>
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<tr>
<td><strong>TOTAL: Corporate Sources</strong></td>
<td>275,857.68</td>
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<tr>
<td>Association Luxembourg Alzheimer</td>
<td>103,107.31</td>
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<tr>
<td>Membership dues</td>
<td>2,500.00</td>
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<tr>
<td>Travel borne by member organisations</td>
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<tr>
<td><strong>TOTAL: Members</strong></td>
<td>151,963.26</td>
<td>21.93%</td>
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<tr>
<td>Individuals</td>
<td>89,905.33</td>
<td>12.98%</td>
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<tr>
<td><strong>TOTAL: Individuals</strong></td>
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<td>12.98%</td>
</tr>
<tr>
<td>Reservers brough forward</td>
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<tr>
<td><strong>TOTAL: Reserves</strong></td>
<td>83,798.13</td>
<td>12.09%</td>
</tr>
<tr>
<td>German Ministry of Health</td>
<td>51,222.21</td>
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</tr>
<tr>
<td>European Commission and other European funding</td>
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<td>0.00%</td>
</tr>
<tr>
<td><strong>TOTAL: Public Funding</strong></td>
<td>51,222.21</td>
<td>7.39%</td>
</tr>
<tr>
<td>Funding source</td>
<td>Funding received (2009)</td>
<td>as % of AE Income (2009)</td>
</tr>
<tr>
<td>------------------------------------</td>
<td>------------------------</td>
<td>--------------------------</td>
</tr>
<tr>
<td>Fondation Médéric Alzheimer</td>
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<td>Fondation Roi Baudouin</td>
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<tr>
<td>Mutualités libres</td>
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<td>0.73%</td>
</tr>
<tr>
<td><strong>TOTAL: Foundations and organisations</strong></td>
<td><strong>24,000.00</strong></td>
<td><strong>3.46%</strong></td>
</tr>
<tr>
<td>Bank interest and similar</td>
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<td>0.17%</td>
</tr>
<tr>
<td><strong>TOTAL: Bank interest and similar</strong></td>
<td><strong>1,144.27</strong></td>
<td><strong>0.17%</strong></td>
</tr>
<tr>
<td>Other sources</td>
<td>15,003.86</td>
<td>2.17%</td>
</tr>
<tr>
<td><strong>TOTAL: Other sources</strong></td>
<td><strong>15,003.86</strong></td>
<td><strong>2.17%</strong></td>
</tr>
</tbody>
</table>