



**Омбудсман України  
Ombudsman of Ukraine**

**SPECIAL REPORT**  
**of the Ukrainian Parliament Commissioner  
for Human Rights**

on the state of observance of social and economic rights  
of adults in need of guardianship under the legal regime  
of martial law





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The views expressed in this document are the responsibility of its authors and do not necessarily reflect the official policy of the Council of Europe.

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# Introduction



## FOREWORD BY THE UKRAINIAN PARLIAMENT COMMISSIONER FOR HUMAN RIGHTS

The full-scale invasion of Ukraine by the Russian Federation has rendered the protection of human rights and fundamental freedoms extremely important.

The heroic fight of the Ukrainian people for their freedom should be recorded in the history of mankind, but it is important to recognise and be aware of the need to protect human rights and freedoms in all circumstances.

The current situation resulting from military events primarily affect the lives of the most vulnerable groups. These also include legally incapacitated people or people with limited civil capacity.

These people are often ignored by both the state and their family members. The public is unaware of their concerns and plight.

According to the Central Election Commission, as of 24 February 2022, 35,372 people were documented as being legally incapacitated in Ukraine, and as of 1 October 2023, 34,342 legally incapacitated people were registered in communities.

In my capacity of the Ukrainian Parliament Commissioner for Human Rights, I have exercised parliamentary control over how the rights of legally incapacitated persons and persons with limited civil capacity are observed in the context of war, to draw attention to the protection of the rights of people in vulnerable situations.

Based on the findings of this control, I am presenting for the first time a special report “On the state of observance of social and economic rights of adults in need of guardianship under the legal regime of martial law”.

The report outlines its information through the lens of the protection of rights of this category of citizens that are guaranteed by the Constitution of Ukraine and national and international law.

The report has been prepared based on on-site and off-site monitoring of 17 territorial communities in the country, information received from public authorities, individual appeals to the Ombudsman and proceedings initiated thereunder, and expert research.

This special report focuses on the following three key areas of concern:

- How state authorities and local self-government bodies observe the rights of adults with incapacity and persons with limited civil capacity.
- How courts protect the rights of adults with incapacity and persons with limited civil capacity.
- How adults with incapacity and persons with limited civil capacity exercise their rights, in particular, the rights to social protection, healthcare and employment and how their property rights are protected.

The report also analyses for the first time whether the national legislation complies with international law in the field of protection of the rights of adults with incapacity and persons with limited civil capacity.

The report presents recommendations for the Parliament, the Government and the local authorities of Ukraine on how to improve legislation and state policy and develop practical tools to ensure the rights and freedoms of adults in need of guardianship under the legal regime of martial law.



**Омбудсман України**  
**Ombudsman of Ukraine**

## List of abbreviations

<b>SJA</b>	State Judicial Administration of Ukraine
<b>Labour Code</b>	the Labour Code of Ukraine
<b>KCMA</b>	Kyiv City Military Administration
<b>MoSP</b>	Ministry of Social Policy of Ukraine
<b>MoJ</b>	Ministry of Justice of Ukraine
<b>MoH</b>	Ministry of Health of Ukraine
<b>NSS</b>	National Social Service of Ukraine
<b>RMA</b>	Regional Military Administration
<b>PFU</b>	Pension Fund of Ukraine
<b>Voter Register</b>	State Voter Register
<b>FMHA</b>	Forensic Mental Health Assessment
<b>TC</b>	Territorial Community
<b>Ombudsman</b>	the Ukrainian Parliament Commissioner for Human Rights
<b>CDDDB</b>	Centralised Disability Data Bank
<b>CEC</b>	Central Election Commission
<b>CCU</b>	Civil Code of Ukraine
<b>CPCU</b>	Civil Procedure Code of Ukraine

# Ensuring the Rights of Adults with Incapacity and Persons with Limited Civil Capacity by State Authorities and Local Self-Government Bodies

The Civil Code of Ukraine (CCU) establishes the legal status of adults with incapacity and persons with limited civil capacity and the Civil Procedure Code of Ukraine (CPCU) regulates the procedure for recognising the legal incapacity, limiting and restoring the civil capacity of individuals.

Only a court may limit the civil capacity of an individual or declare them legally incapacitated (Articles 36 and 39 of the Civil Code).

## Limiting the civil capacity of an individual

The court may limit the civil capacity of an individual, should they:

- suffer from a mental disorder that significantly affects their ability to understand the meaning of their actions and/or to control them;
- abuse alcohol, drugs, toxic substances, or show problem gambling behaviour, etc. and thereby put themselves or their family and other persons whom they must support by law in a difficult financial situation.

Limiting the civil capacity of an individual has the following legal implications:

- a guardianship is established over them;
- they can only make petty daily transactions on their own, while any transactions involving the disposal of property and other transactions that go beyond petty daily ones must be made with the consent of the guardian;
- they may appeal against the guardian's refusal to give consent to transactions;
- they are solely responsible for breach of the agreement concluded with the consent of the guardian and for damage inflicted by them on another person;
- their guardian or they themselves, under the guardian's written permit, receive and use earnings, pensions, scholarships or other income.

## Declaring an individual legally incapacitated

A court may declare an individual legally incapacitated if, as a result of a chronic and persistent mental disorder, they are unable to understand the meaning of their actions and/or control them.

Declaring an individual legally incapacitated has the following legal implications:

- a guardianship is established over them;
- they are entitled to no transactions whatsoever;
- their guardian makes transactions on their behalf and in their interests;
- the guardian is liable for the damage caused by them.

The parliamentary control over the observance by state authorities and local self-government bodies of the social and economic rights of adults with incapacity and persons with limited civil capacity under martial law has been exercised based on information from on-site and off-site TC monitoring, from public authorities, individual appeals to the Ombudsman and proceedings initiated thereunder, and from expert research.

### ■ Activities to monitor local self-government bodies, enterprises, institutions and organisations of territorial communities.

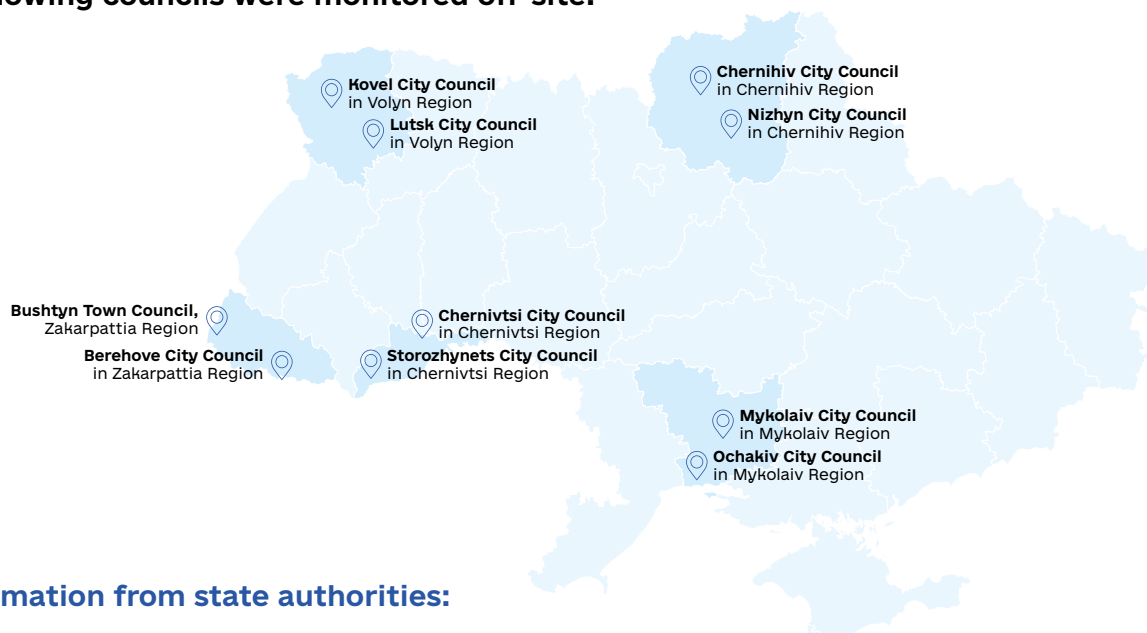
**Monitoring types:**  
on-site and off-site.

**A total of  
17 monitoring  
activities were  
carried out:**  
7 on-site visits and  
10 off-site activities.



**Facilities monitored on-site (21 in total) included:** city councils, subdivisions for social protection of the population<sup>1</sup>, centres for the provision of social and administrative services and healthcare facilities.

**The following councils were monitored off-site:**



### ■ Information from state authorities:

**Central executive authorities:** Ministry of Social Policy, Ministry of Health, Ministry of Justice, National Health Service of Ukraine, National Social Service;  
**other state bodies:** CEC, SCA;

<sup>1</sup> Hereinafter, the phrase “subdivisions for social protection of the population” means subdivisions for social protection of the population of district administrations (military administrations), district administrations (military administrations) in the cities of Kyiv and Sevastopol and executive bodies of city and city district (where established) councils.



**judicial authorities:** Supreme Court;

**local executive authorities:** 24 RMAs and KCMA; the Department for Social Protection of Zhytomyr RMA; Dniprovskyi District State Administration in Kyiv;

**research institutions:** Institute of Forensic Psychiatry of the Ministry of Health of Ukraine.

■ **Information taken from individual appeals to the Ombudsman and proceedings conducted based on them.**

■ **Analysis of Mental Health Legislation and Policy in Ukraine research made within the Mental Health for Ukraine (MH4U) project<sup>2</sup>.**

## 1.1. Activities of guardianship bodies in territorial communities

### 1.1.1. Functioning of guardianship bodies in territorial communities

Guardianship (Article 55 of the Civil Code) is established to protect the rights and interests of adults who, for health reasons, cannot exercise their rights and perform their duties independently (individuals declared legally incapacitated or with limited civil capacity) as a means to protect personal non-proprietary and proprietary rights and interests of these individuals.

The district state administrations, district state administrations in the cities of Kyiv and Sevastopol and the executive bodies of city, city district, town and village councils operate as guardianship bodies (Article 56 of the Civil Code).

The laws and other regulations establish the rights and obligations of bodies entrusted with guardianship that are related to the protection of rights and interests of individuals in need of guardianship.

The laws<sup>3</sup> specify the powers of district state administrations, district state administrations in the cities of Kyiv and Sevastopol and the executive bodies of city, city district, town and village councils to perform guardianship and protect the rights and interests of individuals in need of guardianship.

In the context of decentralisation, a clear definition in the Law of Ukraine “On Local Self-Government in Ukraine” of powers of guardianship bodies in territorial communities became a pressing need.

Guardianship bodies are regulated by the Guardianship Rules approved by the Order of the State Committee of Ukraine for Family and Youth, the Ministry of Education of Ukraine, the Ministry of Health of Ukraine and the Ministry of Labour and Social Policy of Ukraine No. 34/166/131/88 dated 26 May 1999 (hereinafter, the “Rules”), which were developed to implement the Measures for Improving the Situation of Orphans and Children Left Without Parental Care approved by the Decree of the President of Ukraine No. 1153/97 dated 17 October 1997, and in accordance with the provisions of the Civil Code of the Ukrainian Soviet Socialist Republic of 1963, which ceased to be effective upon entry into force of the Civil Code of Ukraine on 1 January 2004.

<sup>2</sup> Analysis of mental health legislation and policy in Ukraine.

<sup>3</sup> Law of Ukraine “On Local State Administrations” No. 586-XIV dated 9 April 1999, Law of Ukraine “On Local Self-Government in Ukraine” No. 280/97-VR dated 21 May 1997.

No amendments were made to the Rules after the new Civil Code was adopted.

The Rules establish that guardianship bodies have several powers to protect the rights of adults in need of guardianship, including the following:



**custody establishment and termination;**



**keeping records of individuals in need of guardianship;**



**supervision of guardians;**



**review of complaints against guardians;**



**measures to protect the personal and proprietary rights of individuals under guardianship;**



**participation in court litigations concerning the protection of rights of individuals under guardianship;**



**custody over property whenever prescribed by law;**



**execution of documents related to the ward<sup>4</sup> and property in custody;**



**protection and maintenance of housing and property of wards and persons reported as missing;**



**other activities to protect the rights and interests of adults in need of guardianship.**

In the course of 17 on-site and off-site activities to monitor local self-government bodies we assessed how guardianship bodies exercised their specific powers set out in the Rules to protect adults in need of guardianship.

The guardianship bodies were found to violate the Rules, which gave rise to violating the rights of adults with incapacity and individuals with limited civil capacity.

The operation of TC guardianship bodies was assessed in the course of monitoring based on data from 1,348 TCs (information from the RMAs and KCMA).

It was found that 109 out of 1,348 TCs lacked guardianship bodies or failed to provide any information on them.

## Reasons

Either there are no legally incapacitated persons and persons with limited civil capacity in the territorial communities or communities located in combat zones or in the temporarily occupied territories lacked such information.

<sup>4</sup> Hereinafter, the word “ward” means a person under guardianship.

### 1.1.2. Establishment of guardianship over adults

Chapter 6 “Guardianship and Care” of the Civil Code regulates guardianship establishment over adults.

In the course of monitoring visits to territorial communities it was investigated whether guardianship bodies comply with the guardianship establishment procedure. For this purpose, the personal files of individuals registered with the guardianship bodies were randomly checked.



Monitoring visit to Irpin City TC

**The guardianship bodies were found to comply with the following Civil Code provisions:**

- Guardianship is established and a guardian is appointed by a court decision upon an application from the guardianship body (Parts 1 and 2, Article 60 of the Civil Code);
- full guardianship is established over citizens declared legally incapacitated by a court; limited guardianship is established over persons whose civil capacity is limited (Part 1 of Article 58 and Part 1 of Article 59 of the Civil Code);
- guardianship is established at the place of residence of the individual in need of guardianship, or at the place of residence of the guardian (Article 62 of the Civil Code);
- a guardian or trustee is appointed primarily from among individuals who are members of the ward’s family or their relatives (Part 4 of Article 63 of the Civil Code).

A court usually declares a person incapacitated or with limited civil capacity and appoints a guardian for them in a single decision.

An individual may be appointed one or more guardians (Article 63 of the Civil Code).

In practice, one guardian is appointed as a rule. However, there are cases when the court appoints several guardians. In this event, in order to perform the guardianship functions more efficiently, these functions should be distributed among the guardians and the scope of various responsibilities of each of them towards the ward (everyday life, representation with authorities, etc.) should be defined. In particular, a court may order such distribution in its decision to appoint guardians.

#### **Guardianship over an individual to whom no guardian has been appointed**

Article 65 of the Civil Code stipulates that the guardianship body should care for such individuals.

It was found in the course of monitoring that guardianship bodies fail to provide care for such individuals when guardians are being searched for.

**Example.** *The Mykolaiv City Council informed that it registered three individuals that had been declared legally incapacitated by the court and had not been appointed a guardian. The guardianship body searched for guardians for these individuals, made efforts to deliver social services to them and place them in a residential institution. No other actions were taken in the interests of these individuals to help them exercise their rights, in particular to receive pensions, state social benefits and other social guarantees.*

### Reason

No regulations establish how guardianship bodies should act should no guardian be appointed for an individual.

### The establishment of guardianship over individuals who were dependents of other individuals who went missing in extraordinary circumstances

As early as July 2018, the Law of Ukraine “On the Legal Status of Persons Missing in Extraordinary Circumstances” No. 2505-VIII dated 12 July 2018 prescribed that guardianship be established over adults who had been dependent on missing persons and, for health reasons, could not independently exercise their rights and perform their duties. Amendments<sup>5</sup> introduced to this Law prescribed that, from 27 April 2022, such guardianship should be appointed for individuals who were dependent on individuals missing in extraordinary circumstances.

No cases of guardianship over adults who had been dependent on individuals who went missing in extraordinary circumstances and, for health reasons, could not independently exercise their rights and perform their duties were found in the course of monitoring.

Guardianship authorities fail to both make efforts to find such individuals and conduct awareness-raising campaigns.

### Reason

No regulatory instrument defines how guardianship should be established under these circumstances.

### Observance by guardianship bodies of time limits for deciding on guardianship establishment

The Rules prescribe that a decision to establish guardianship must be made no later than one month after the relevant guardianship body becomes aware of the need to establish guardianship.

Non-observance of time limits for decisions on guardianship have been found in four out of 17 (24%) territorial communities.

<sup>5</sup> The Law of Ukraine “On Amendments to the Law of Ukraine ‘On the Legal Status of Missing Persons’ and Other Legislative Acts of Ukraine on Improving the Legal Regulation of Public Relations Related to the Acquisition of the Status of Persons That Went Missing in Extraordinary Circumstances” No. 2191-IX dated 14 April 2022.

### Compliance with the procedure for maintaining personal files of registered persons

As a rule, subdivisions responsible for social care in territorial communities have been found to be entrusted with the day-to-day management of guardianship cases.

When guardianship is established, a personal file is created for each ward that includes the required documents, based on which guardianship was established. Later on, documents related to the implementation of guardianship (guardian reports, reports on visits to see individuals under guardianship, property inventory reports and copies of documents confirming that the property is available, etc.) are attached to it.

№	Наименование документа	Классификация	Примечания
45	Акт обследования 26.08.09		
46	Акт обследования 26.08.09		
47	Акт обследования 26.08.09		
48	Акт обследования 26.08.09		
49	Акт обследования 26.08.09		
50	Акт обследования 26.08.09		
51	Акт обследования 26.08.09		
52	Акт обследования 26.08.09		
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67	Акт обследования 26.08.09		
68	Акт обследования 26.08.09		
69	Акт обследования 26.08.09		
70	Акт обследования 26.08.09		

Description of personal file documents

Cases of non-compliance with the Rules were identified as follows:

- **in 2 out of 17 (12%) TCs**, personal files of wards, registers, alphabetical books or case file databases was not properly maintained (Clause 3.5 of the Rules);
- **in 4 out of 17 (24%) TCs**, personal files lack registration cards for each individual in need of guardianship (Clause 2.7 of the Rules);
- **in 11 out of 17 (65%) TCs**, personal files lack property inventory reports for the property of persons in need of guardianship (Clauses 2.7 and 3.3 of the Rules).

In some cases, documents proving that such property (in particular, apartments, houses, land plots) existed, including copies of extracts from state registers, were available.

#### 1.1.3. Supervision (control) over guardians

Monitoring activities have revealed that guardianship bodies failed to take appropriate control actions to protect the rights of legally incapacitated persons and persons with limited civil capacity.

The monitoring data showed the following dynamics of control actions:

- **in 10 out of 17 (59%) TCs**, there were no scheduled visits to persons under guardianship (Clause 4.14 of the Rules);
- **12 out of 17 (71%) TCs** lacked schedules for visiting persons under guardianship (Clause 4.14 of the Rules);
- **12 out of 17 (71%) TCs** failed to provide the proper frequency of visits (at least once a year, except for the first inspection to be carried out three months after the guardianship is established, Clause 4.14 of the Rules);
- **in 13 out of 17 (77%) TCs**, the public was not involved in the visits (Clause 4.14 of the Rules);
- **in 5 out of 17 (29%) TCs**, no reports were drawn up following visits to persons under guardianship (Clause 4.15 of the Rules).

Visit reports lack the following information:

- **in 6 out of 17 (35%) TCs**, on whether the guardian has created and provided appropriate living conditions for the ward;
- **in 8 out of 17 (47%) TCs**, on whether social assistance is required for individuals in need of guardianship;



- **in 13 out of 17 (77%) TCs**, on whether the rights of these individuals to health care have been implemented (only 4 TCs indicated that reports included information on a contract with a family doctor, medical examination results, and the provision of rehabilitation equipment to wards).
- **in 9 out of 17 (53%) TCs**, the reports lacked information on whether utility services were provided in the housing where the ward resides, including the supply and distribution of natural gas, supply and distribution of electricity, heat, hot water and piped water supply, central water discharge, and household waste management.

Visit reports are drawn up following no particular form. Some guardianship bodies use the form of the Act of Inspection of Living Conditions of a Family, approved by Order of the Ministry of Social Policy No. 95 of 28 April 2004 (expired on 29.07.2022), which was intended to help grant state social benefits and subsidies. The form of this act does not fully reflect what guardians do and leave no opportunity to properly assess the ability of the guardian to perform their duties.

### Reason

No form for a report following visits to persons under guardianship has not been approved as a regulation.

Guardianship bodies should also supervise guardians by requesting annual reports from them describing what they did in the previous year (Clause 4.11 of the Rules).

**13 out of 17 (77%)** of the TCs, lacked any annual guardian reports.

**In 14 out of 17 (82%)** TCs, guardians violated deadlines for submitting reports on how they had protected the rights and interests of wards (to be submitted no later than 1 February, Clause 4.11 of the Rules).

The Rules provide for no exceptional circumstances under which guardians may submit reports in violation of the established deadline.

Personal files of persons under guardianship include isolated explanations from guardians (custodians) about the reasons for their delay in submitting reports. The reasons included temporary incapacity for work, quarantine restrictions, and the full-scale invasion of Ukraine by the Russian Federation.

**ЗВІТ ОПІКУНА**

- Прізвище, ім'я, по батькові підопічного
- Дата народження
- Де навчається підопічний
- Прізвище, ім'я, по батькові опікуна
- Місце роботи опікуна
- Адреса опікунської родини
- Адреса прописки підопічного
- Яка заборгованість за комунальні послуги, за квартиру
- Які кошти одержує на підопічного
- Як оздоровлювався підопічний у 2022 році
- Яку допомогу, хто надав у 2022 році
- Чи має підопічний єдиний квиток, пенсійну книжку, рішення суду про призначення аліментів
- Якої допомоги потребує опікунська родина
- Витрати коштів підопічного

ПРИМІТКИ:

Example of submitted guardian report

The Rules do not provide for any standardised form of the Guardian's Report. None of the local self-government bodies have approved their own report forms.

The analysis of the content of guardians' reports showed that they were formal and did not reflect what actions guardians actually performed. They shared information at their own discretion, in particular, on the use of wards' funds from pensions and state social benefits for their maintenance, purchase of food, clothing, medicines, and hygiene products. The information was often general, lacking any specifics.

The reports provided no information on what guardians did to satisfy the needs of the wards and exercise their rights in various areas.

In general, the information available in guardians' reports makes it impossible to fully assess to what extent they performed their duties to their wards.

During the monitoring, some guardianship bodies pointed out that they had no opportunity to encourage guardians to submit reports, as their work was voluntary, and excessive pressure on them would result in their refusal to take care of legally incapacitated persons and persons with limited civil capacity.

One of the reasons for refusing from guardianship is that guardians receive no remuneration for performing their duties to their wards. Clause 4.12 of the Rules prescribes that guardians perform their duties free of charge. At the same time, pursuant to Article 73 of the Civil Code of Ukraine, the Cabinet of Ministers of Ukraine must define the grounds entitling guardians to receive payment for their services and the amount of and the procedure for such payment. The Government has so far approved no such procedure.

The judicial practice also confirms that guardianship bodies fail to properly perform their functions, which directly affects the protection of the rights and legitimate interests of individuals in need of guardianship.

**Example.** *The Prydniprovskiy District Court of Cherkasy delivered ruling in case No. 708/1300/17 of 15 March 2018, where it informs the head of the Tinkivska village council of Chyhyryn district of Cherkasy Region and the head of the Cherkasy City Council that they need to urgently decide to establish guardianship and appoint a guardian over a legally incapacitated individual within the scope of their powers and competence of the Guardianship Council.*

The court stated in its ruling that the above authorities had failed to properly exercise control over the guardian and the quality and sufficiency of the powers exercised by them in relation to the ward in order to prevent violations of their rights and interests, that no measures had been taken to maintain real estate and other property owned by the incapacitated individual, that no application for the appointment of another guardian had been submitted to the court and there had been no interaction between the guardianship bodies related to the change of residence by the incapacitated person.

### **Supervision by guardianship bodies of how residential institutions perform their tasks related to guardianship**

In accordance with the Model Regulations on a Psycho-Neurological Residential Facility approved by Resolution of the Cabinet of Ministers of Ukraine No. 957 dated 14 December 2016, the Model Regulations on a Children's Residential Facility approved by Resolution of the Cabinet of Ministers of Ukraine No. 978 of 14 December 2016, the Model Regulations on a Residential Facility for Older Persons and Persons with Disabilities approved by Resolution of the Cabinet of Ministers of Ukraine No. 772 of 2 September 2020, guardianship bodies that register legally incapacitated persons and persons with limited civil capacity must oversee how such residential care facilities perform their duties related to caring for wards from among such persons.

The monitoring revealed that the guardianship bodies received reports from these institutions on the use of funds belonging to the wards from pensions (monthly lifetime allowance) and/or state social benefits accrued in accordance with the law. The guardianship bodies do not require that any other information (similar to that provided by guardians) be submitted.

### Other activities to protect the rights and interests of adults in need of guardianship

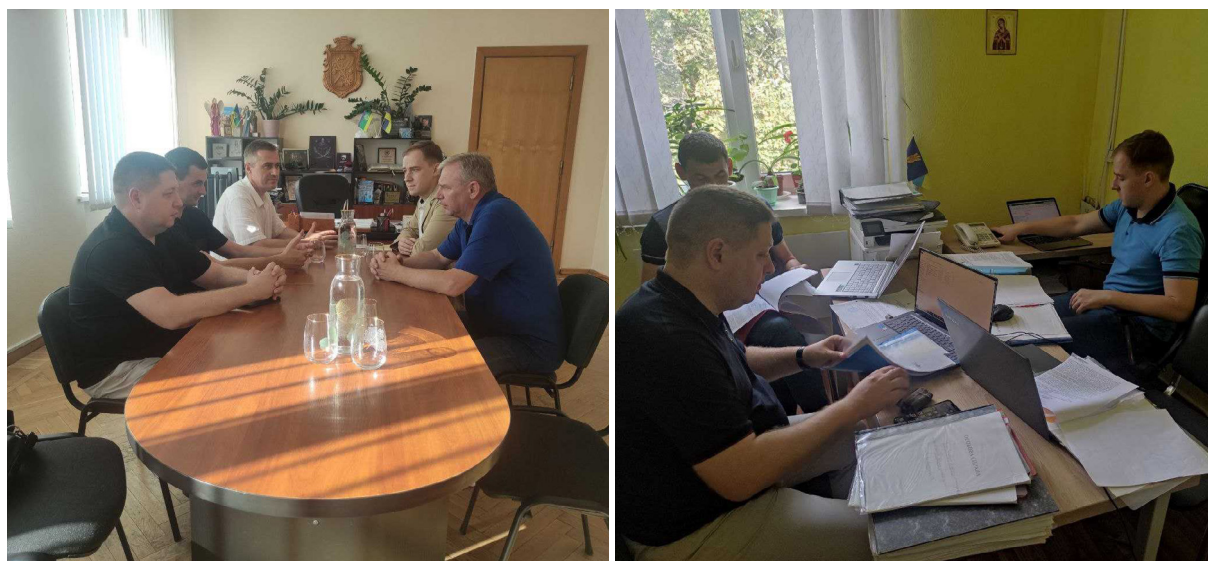
The full-scale invasion of Ukraine by the Russian Federation has caused massive displacement of people, including people with disabilities, from all regions of Ukraine, primarily from combat zones or adjacent territories. It was assessed as part of the monitoring, how guardianship bodies oversee the location, stay, and movement of wards and their guardians under these challenging conditions.

Some guardianship bodies made efforts to find out information on individuals under guardianship, in particular by visiting them at their place of residence and interviewing their neighbours. In some instances, guardians and their wards have left Ukraine, namely to Germany, France, Italy, Poland, Lithuania and Switzerland.

The monitoring has shown that **6 out of 17 (35%)** of territorial communities failed to take actions to exercise such oversight.

The monitoring revealed instances where the rights of legally incapacitated persons were violated as their guardians failed to fulfil their duties when the martial law was in effect.

**Example.** The monitoring visits to Berdychiv and Korostyshiv city territorial communities in Zhytomyr Region revealed that some the guardians had gone abroad, leaving their wards behind. Despite this fact, they continued to receive the relevant state social benefits for their wards.



Monitoring visits to Berdychiv (left) and Korostyshiv (right) City TC in Zhytomyr Region

The guardianship bodies of Berdychiv and Korostyshiv City Councils in Zhytomyr Region have taken no action to protect the rights of legally incapacitated persons who have been left without guardians and without means of subsistence.

The heads of Berdychiv and Korostyshiv City Councils in Zhytomyr Region followed the Ombudsman's recommendations to eliminate the identified shortcomings.



## Reasons

No regulations define either how guardianship bodies should act under the state of emergency or martial law, in particular in the event of detection of cases of a ward's residence without an appointed guardian and loss of contact with the latter, or how local authorities and relevant agencies should interact to establish the whereabouts of guardians and their wards, including those who have left Ukraine and whose whereabouts are unknown.

Neither the Ministry of Social Policy, nor National Social Service issued methodological recommendations on how guardianship bodies should act under martial law.

As a result, guardianship bodies make decisions that guardianship should be established or terminated at their own discretion outside the legal framework.

**Example.** During the monitoring visit to Smila City Council in Cherkasy Region, it was found that the executive committee of the council had decided to approve the opinion of the Guardianship Council that the powers of guardians whose wards had been evacuated from combat areas should be “suspended” as contacts with them had been lost. Instead, the Smila Neuro-Psychiatric Institution, where such persons were held, had been temporarily vested with duties of guardianship over the incapacitated individuals, including the management of their pensions and state social benefits.



Monitoring visit  
to Smila TC of Cherkasy region

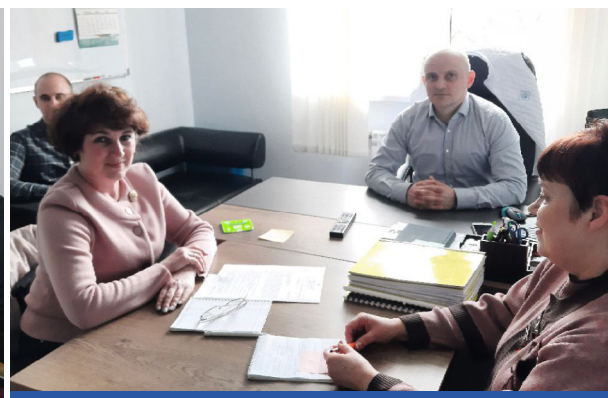
### 1.1.4. Interaction of guardianship bodies with related bodies, institutions, and establishments

Under Clause 1.7 of the Rules, guardianship bodies should focus their efforts on protecting the rights and interests of minor children and adults in need of guardianship in all areas.

The monitoring assessed the interaction of guardianship bodies with related bodies, institutions, and establishments to protect the rights of adults in need of guardianship.



Visit to ASC of Cherkasy



Visit to communal non-profit enterprise "Irpin City Center  
of Primary Health Care" of the Irpin City Council

Appropriate cooperation is lacking between guardianship bodies and the following institutions:

- housing and maintenance offices, housing administrations, internal affairs agencies, civil registration agencies, notary offices and judicial authorities, in searching for adults in need of guardianship;
- social security agencies, local branches of the Pension Fund of Ukraine, territorial centres for social services (for provision of social services), in protecting the social security rights of individuals under guardianship. Nevertheless, it is important for these persons to receive pension, state social benefits, other state support under individual rehabilitation programmes, and social services, as such individuals or their families are unable to overcome challenging circumstances;
- healthcare institutions, in overseeing the observance of the rights to healthcare of individuals under guardianship;
- administrative service centres that deliver residence deregistration services and register real rights to immovable property, in exercising the property rights of individuals under guardianship. Guardianship bodies lack any access to the register of territorial communities and the State Register of Immovable Property Rights, therefore, cooperation with administrative service centres will give them an opportunity to monitor instances when wards' residence is unlawfully deregistered or property is sold/leased without the authorisation of the guardianship body;
- providers of utility services, in protecting the rights to relevant services of individuals under guardianship.

## Reasons

No regulations govern interaction of guardianship bodies with interested agencies, enterprises, institutions and organisations to protect the rights of persons under guardianship in various areas.

The Ministry of Social Policy/National Social Service could partially address the issues found in the course of the monitoring, including those that are insufficiently regulated, by providing the authorised guardianship bodies with the necessary methodological recommendations on guardianship. No such methodological recommendations were received over the period of monitoring. Only generic explanations have been so far provided.

## 1.2. Keeping records of adults with incapacity and persons with limited civil capacity

The monitoring has revealed the following:

- adults in need of guardianship are being registered in territorial communities.
- guardianship bodies enter information on the legal capacity of individuals into CDDB;
- territorial communities submit reports on guardianship over adults to the Ministry of Social Policy and the National Social Service;
- the Voter Register contains information on the dates when individuals were declared legally incapacitated and when their legal capacity was restored.

### Record-keeping in territorial communities

All territorial communities keep records of adults in need of guardianship and care.

Cases of improper accounting and submission of inaccurate reporting were found.

**Example.** The visit to Tysmenytsia City Territorial Community revealed that:

- no record was kept of personal files transferred by the liquidated guardianship body of the Tysmenytsia District State Administration under the administrative and territorial reform (July 2020);
- the report to the National Social Service for the first half of 2023 included no information on an individual who had been declared legally incapacitated by a court and stayed in the Pohonia Psycho-Neurological Institution under the care of its head.



Monitoring visit  
to Tysmenytsia City TC

Nothing is done to search for internally displaced persons in need of guardianship.

Out of the 17 communities visited, only one Smila City TC registered 18 internally displaced persons from Luhansk, Donetsk and Kherson regions.

### Reasons

Local authorities do not interact in identifying and registering such individual and no regulatory acts govern such interaction.

### Information displayed in the Centralised Disability Data Bank

The monitoring found that some guardianship bodies (Cherkasy City TC) do enter information about the legal capacity of individuals into the CDDB.

The Ministry of Social Policy has been informed that the CDDB receives information from the guardianship bodies of executive bodies of city councils and city district councils (if established) (except for Kyiv) on the scope of legal capacity of individuals, indicating the dates when such status was granted and lost. The executive bodies of village and town councils acting as guardianship bodies have no access to the CDDB.

### Reasons

No required amendments have been made to the Regulation on the Centralized Disability Data Bank<sup>6</sup>.

The fact that the executive bodies of village and city councils cannot submit data to the CDDB on this category of persons impedes proper registration of data on adults and children with disabilities and other individuals and the use of the Bank's data to analyse the needs of these individuals and meet them, as provided for in the Regulation.

<sup>6</sup> Regulation on the Centralised Disability Data Bank, approved by the Cabinet of Ministers of Ukraine, No. 121 dated 16 February 2011 (as amended).

### **Information of the Ministry of Social Policy and the National Social Service on reports of territorial communities concerning guardianship of adults**

The Ministry of Social Policy introduced, on its own initiative, a six-month report form on guardianship of adults in 2017<sup>7</sup>.

Reporting data by TGs is filled in using Google tools.

Since February 2021, the National Social Service, in exercising its powers to care for adults with incapacity and persons with limited civil capacity, has been collecting reports from territorial communities based on a revised form.

### **Information from the CEC on data collection on legally incapacitated persons**

Based on legislative acts, the CEC administers, maintains and operates the Voter Register, which contains information on voters who have been declared legally incapacitated by courts, including validity terms of such decisions, persons in respect of whom decisions to declare them incapacitated were cancelled, and persons in respect of whom it was decided to extend the validity term of decisions to declare them legally incapacitated, indicating the term.

Each month, the SJA sends such information to the CEC as electronic copies of court decisions.

Additionally, the CEC clarifies information about a person declared legally incapacitated by a court and entered in the Voter Register by asking the relevant court whether the validity of the decision to declare the person concerned legally incapacitated has been extended.

The Ombudsman's monitoring has revealed that the data in the Voter Register was last updated 24 February 2022. The Central Election Commission does not update the Voter Register data based on data received from the SJA because it has adopted a resolution to this end<sup>8</sup>.

### **Analysis of information on the number of legally incapacitated persons and persons with limited civil capacity**

Information on the number of legally incapacitated persons was received from the Central Election Commission (35,372 persons, last updated on 24 February 2022), the Ministry of Social Policy (26,880 persons, last updated on 1 January 2023), the National Social Service (31,075 persons, last updated on 1 July 2023), and the RMAs and KCMA (34,342 persons, last updated 1 October 2023). Its analysis shows that these data differ significantly.

By the same token, the data provided by the Ministry of Social Policy, the National Social Service, the RMAs and KCMA on the number of persons with limited civil capacity and persons and entities acting as guardians is also inconsistent.

## **Conclusion**

The lack of unified registration of legally incapacitated persons and persons with limited civil capacity makes it impossible to monitor the observance of the rights and freedoms of these persons.

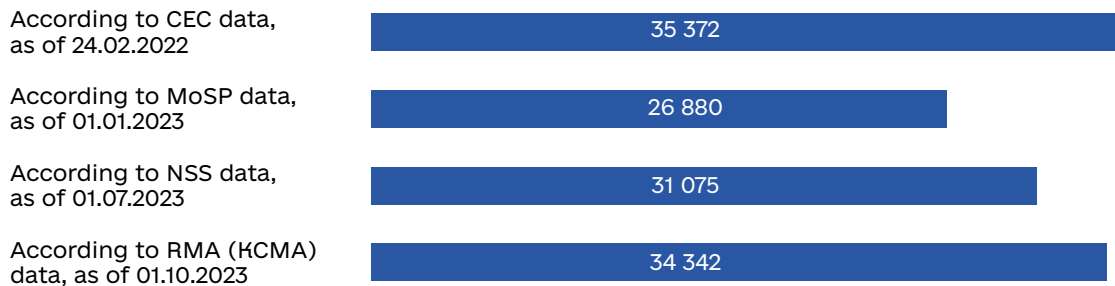
<sup>7</sup> Letter of the Ministry of Social Policy No. 576/O/131-17/175 of 21 June 2017.

<sup>8</sup> Resolution of the Central Election Commission "On the Temporary Suspension of the Functioning of the Automated Information and Communication System "State Register of Voters" for the Period of Martial Law" No. 61 of 24 February 2022.

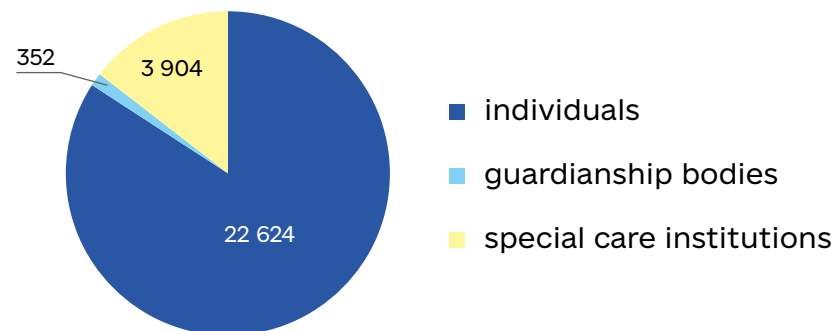
The infographics below show the statistical data on these categories provided by the Ministry of Social Policy, the National Social Service, RMAs, KCMA and the CEC.

### INFOGRAPHICS on the number of individuals declared legally incapacitated

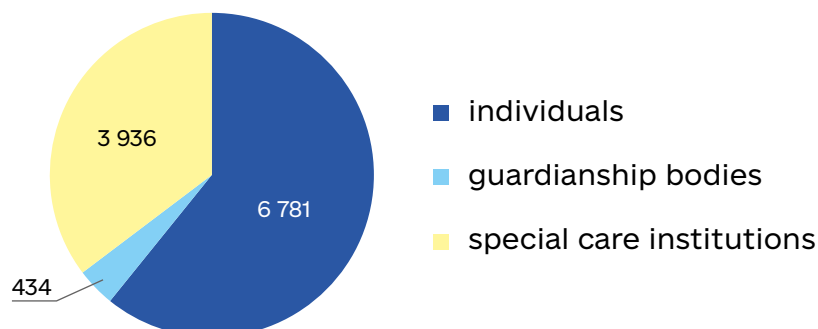
#### The overall number of individuals declared legally incapacitated



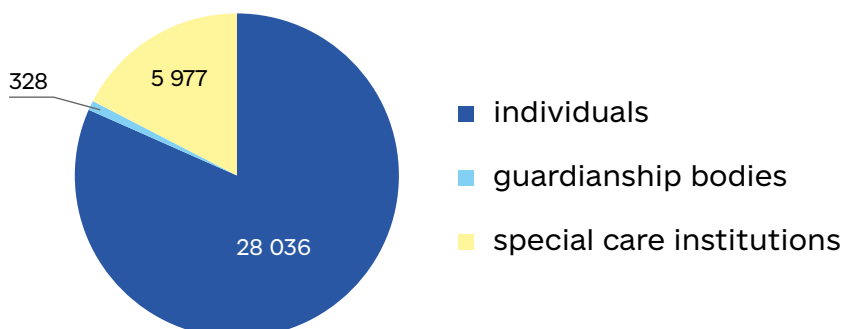
**According to MoSP data, as of 01.01.2023,** individuals declared legally incapacitated had the following persons/entities as their guardians:



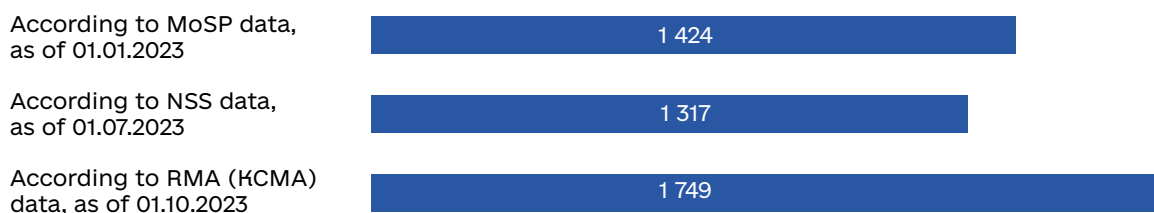
**According to NSS data as of 01.07.2023,** individuals declared legally incapacitated had the following persons/entities as their guardians:



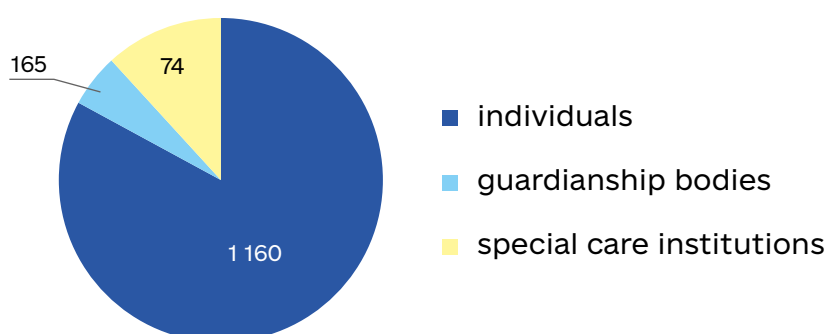
**According to RMA and KCMA data as of 01.01.2023,** individuals declared legally incapacitated had the following persons/entities as their guardians:



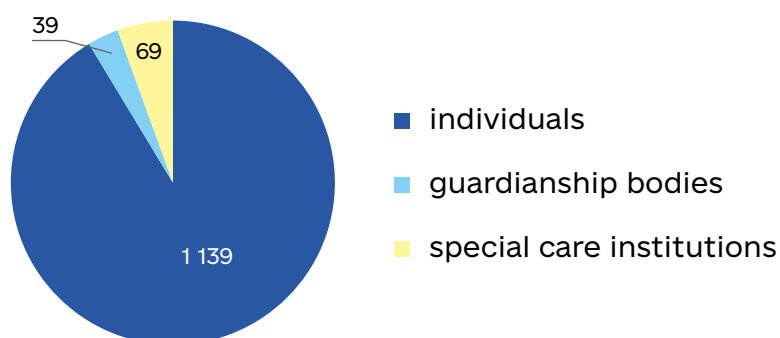


**INFOGRAPHICS on the number of individuals with limited civil capacity****The overall number of individuals with limited civil capacity**

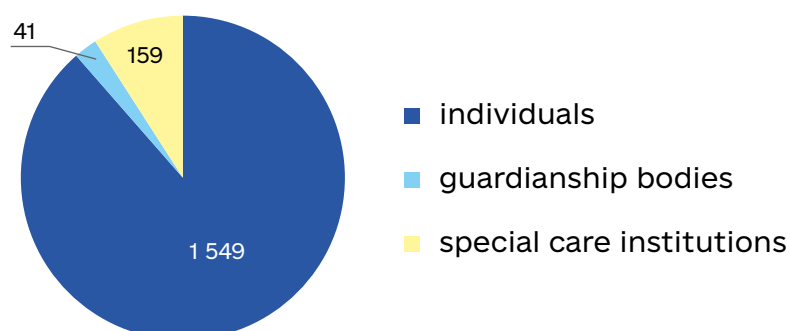
**According to MoSP data, as of 01.01.2023**, individuals with limited civil capacity had the following persons/entities as their guardians:



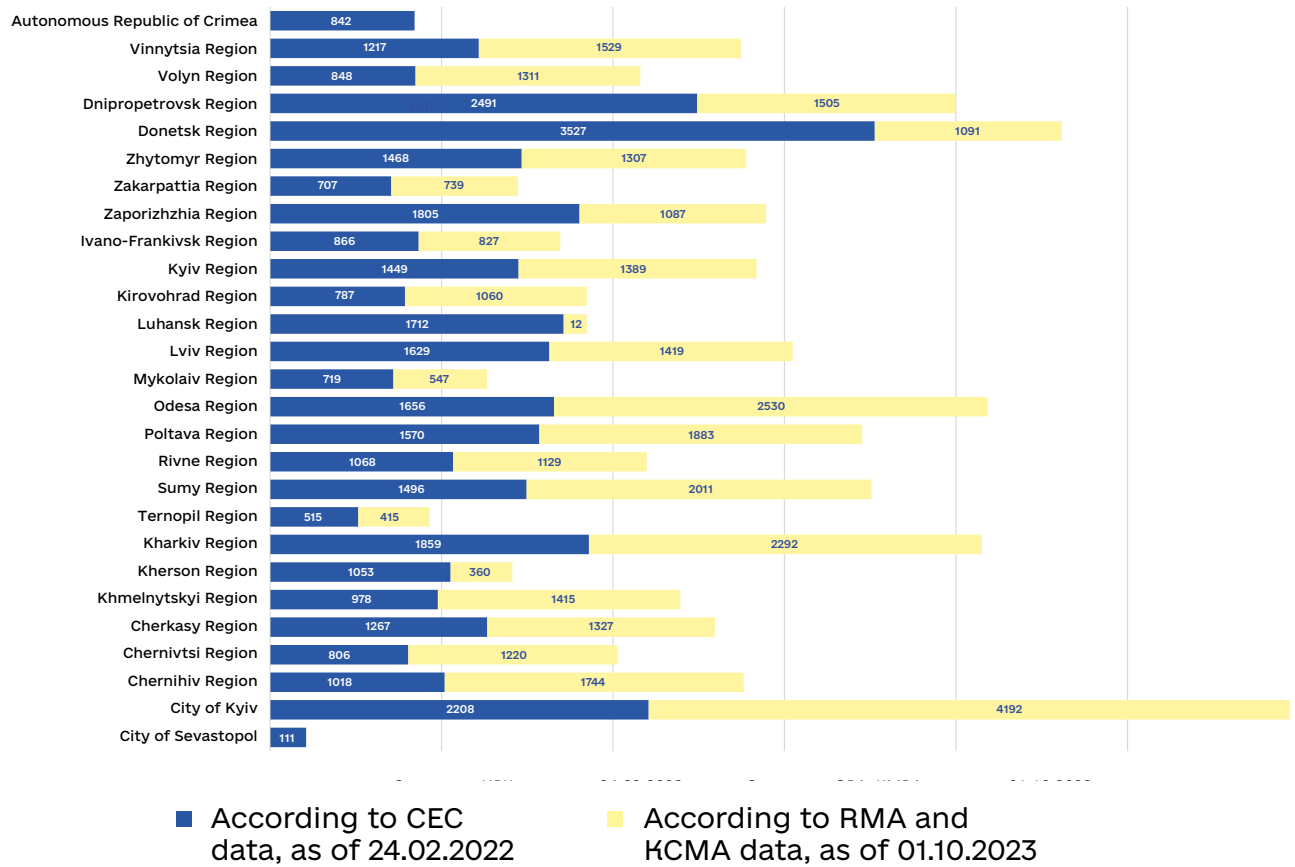
**According to NSS data as of 01.01.2023**, individuals with limited civil capacity had the following persons/entities as their guardians:



**According to RMA and KCMA data as of 01.01.2023**, individuals with limited civil capacity had the following persons/entities as their guardians:



## INFOGRAPHICS on the number of individuals declared legally incapacitated by Ukrainian regions



# Ensuring the Rights of Adults with Incapacity and Persons with Limited Civil Capacity in Court

## 2.1. Declaring individuals legally incapacitated and restoring their civil capacity: achievements and challenges

Over the past 10 years, there have been certain positive developments as to the protection of the rights of individuals declared legally incapacitated in court. In particular, the Civil Procedure Code of Ukraine was amended<sup>9</sup> (amendments effective as of 15 December 2017) by changing the procedure for declaring an individual legally incapacitated (provisions were later amended) to involve such individuals in making certain decisions about themselves, including, inter alia, the following:

- courts consider cases on declaring individuals legally incapacitated with the presence of the person involved (Part 1 of Article 299 of the Civil Procedure Code of Ukraine); the presence of such a person is guaranteed where decision is made to declare them legally incapacitated even if the person is in a psychiatric or other medical institution (via video conference);
- a court decision declaring an individual legally incapacitated is cancelled and their civil capacity is restored, upon recovery or significant improvement of their mental state, by a court ruling based on the forensic mental health assessment report and at the request of such an individual or their lawyer (Part 4 of Article 300 of the CPCU); a right to personally apply for the restoration of civil capacity is granted;
- the validity period is established for court rulings on declaring an individual legally incapacitated, which may not exceed two years. A guardian or a representative of a guardianship authority may file a request to extend the validity of a court ruling declaring an individual legally incapacitated no later than 15 days before the expiry of the court ruling (Parts 6 and 7 of Article 300 of the CPCU).

### Regarding the civil capacity restoration requests of individuals who were declared legally incapacitated in court

It was found that the provisions of Part 4 of Article 300 of the CPCU are inconsistent with Part 1 of Article 42 of the CCU regarding the restoration of civil capacity of such individuals upon their request.

Pursuant to Article 42 of the CCU, at the request of a guardian or guardianship authority, the court shall restore the civil capacity of an individual who has been declared legally incapacitated and terminate the guardianship, should there be established that, upon recovery or significant improvement in their mental state, they have regained the ability to understand the meaning of their actions and to manage them. However, Part 4 of Article 300 of the CPCU provides that a court shall cancel its decision to declare an individual legally incapacitated and restore their civil capacity in the event of recovery or significant improvement in their mental state, inter alia, at the request of the person declared legally incapacitated or their lawyer.

<sup>9</sup> The Law of Ukraine "On Amendments to the Commercial Procedure Code of Ukraine, the Civil Procedure Code of Ukraine, the Code of Administrative Procedure of Ukraine and Other Legislative Acts" No. 2147-VIII of 3.10.2017.



**On Legislative Establishment of the Validity Period for Court Decisions to Declare an Individual Legally Incapacitated**

The legal provision of Parts 6 and 7 of Article 300 of the CPCU regarding the establishment of the validity period for court decisions to declare an individual legally incapacitated, which may not exceed two years, complies in general with the standards for protecting the rights of legally incapacitated individuals established by international law. However, as practice shows, it does not fully comply with the principle of legal flexibility, which provides that the remedies and other legal means available for the protection of personal and economic interests of adults with incapacity should be sufficient in scope and flexible enough to apply legal means to persons with varying degrees of incapacity at the appropriate level, as enshrined in the Principles concerning the Legal Protection of Incapable Adults, approved on 23 February 1999 by the Committee of Ministers of the Council of Europe (Recommendation No. R(99)4).

The two-year period established by law is a positive factor for the observance of the rights of adults with incapacity, but at the same time, it is not justified in relation to all such individuals. In accordance with paragraph 6 of Resolution 46/119 “The Protection of Persons with Mental Illness and the Improvement of Mental Health Care”, adopted by the UN General Assembly on 18 February 1992, any decisions regarding legal capacity and the need for a personal representative shall be reviewed at reasonable intervals established by domestic law; the person whose legal capacity is at issue, their personal representative, if any, and any other interested person shall have the right to appeal against any such decisions to a higher court.

Article 39 of the CCU provides for two criteria of mental disorder that serve as grounds for declaring a person incapacitated: chronicity and persistence of mental disorder, the presence and severity of which are established by the FMHA opinion.

The requirement for all legally incapacitated individuals (even for those who have a medical condition that causes mental health disorders for an indefinite period of time, including some persons with disabilities from childhood of group I of subgroup A) to undergo a regular confirmation of this status in court every two years is burdensome and inappropriate.

It is recommended that FMHA opinions indicate whether the mental disorders of such individuals are finite or indefinite. In view of this, it is deemed to be necessary to introduce in the applicable legislation of Ukraine a differentiated approach to setting time limits for declaring an individual legally incapacitated (based on medical conditions evidencing the development of mental disorder).

In Ukraine, it is necessary to introduce individual assessments of each person with mental disorders and make the most individualised decisions regarding the ability of each individual to make informed decisions in a particular area of life. Each specific restriction imposed on such a person should be based on a study of their situation and, as a result, periods of incapacity should be established for each person individually.

The legislator has provided for periodic judicial control over the continued existence of the grounds for depriving a person of legal capacity in order to guarantee the protection and exercise of the rights and freedoms of persons declared incapacitated. However, it is effective only if the parties to the legal relationship in question strictly comply with the legal requirements in accordance with the established time limits and procedures.

It was assumed that this provision would be aimed at restoring the rights and obtaining a positive effect for those incapacitated persons who did not receive proper protection, including due to their abuse by guardians.

### Monitoring results regarding the implementation of provisions of Parts 6 and 7 of Article 300 of the Civil Procedure Code of Ukraine

The on-site and off-site monitoring (in 10 territorial communities) revealed 34 cases where the two-year validity term for court decisions declaring an individual legally incapacitated, as stipulated by Part 6 of Article 300 of the CPCU, was expired

- 3 cases in Bezlyudivka TC;
- 2 cases in Berehove City TC;
- 4 cases in Irpin City TC;
- 1 case in Ochakiv City TC;
- 8 cases in Mykolaiv City TC;
- 1 case in Smila City TC of Cherkasy Region;
- 2 cases in Tysmenytsia City TC;
- 10 cases in Cherkasy City TC;
- 1 case in Chernihiv City TC;
- 2 cases in Chernivtsi City TC.

In the vast majority of cases, the guardians took no action to extend the validity of decisions that declared individuals legally incapacitated.

An analysis of the documents in the personal files of individuals registered with the guardianship authorities reveals that guardians apply to the court with an application to extend the validity of decisions declaring individuals legally incapacitated, mostly 15 days before the expiry of the court decision concerned (under Part 7 of Article 300 of the Civil Code, such is the deadline for filing a relevant application). In most cases, courts deliver new decisions within 6 to 12 months after the expiry of the previous court decision.

During this period, individuals have an uncertain status (as formally they possess legal capacity and de facto they do not) and may not realise the meaning of their actions, and others may abuse this their status to their detriment. The Ministry of Justice calls this situation a “grey area” in the law.

#### Reasons:

- guardians' failure to file with the court an application to extend the validity of the decision declaring an individual legally incapacitated;
- lengthy application reviews in court (caused by the overload of courts and the requirement that FMHA opinions be produced, etc);
- failure of guardianship bodies to monitor the validity of court rulings declaring individuals legally incapacitated and to educate guardians about the requirement to apply to court;
- the fact that the provisions of Part 7 of Article 300 of the CPCU make no distinction between instances where guardianship bodies should file an application for the extension of the term of a decision declaring an individual legally incapacitated and where guardians should do the same. Guardianship bodies believe that filing an application for the extension of the term of a decision declaring an individual legally incapacitated is the sole responsibility of the guardian.

### Conclusions

The results of the Commissioner's monitoring indicate that the rights of individuals in need of guardianship are violated because of non-compliance with the requirements of Parts 6 and 7 of Article 300 of the CPCU, and that they should be reviewed.

## 2.2. Forensic mental health assessment required to declare an individual legally incapacitated, restore their civil capacity or extend the validity of a decision to declare an individual legally incapacitated

### Expenses related to forensic mental health assessments

Pursuant to Article 299 of the Civil Procedure Code of Ukraine, legal costs related to proceedings on declaring an individual incapacitated or restricting the civil capacity of an individual shall be borne by the state. Should the court establish that the applicant acted in bad faith without sufficient grounds, it must recover all legal costs from the applicant.

Article 15 of the Law of Ukraine “On Forensic Expertise” No. 4038-XII dated 25 February 1994 provides that state specialised institutions shall carry out FMHAs in criminal proceedings following the instruction of investigators, inquirers, prosecutors, and courts and also in cases of administrative offences by using funds that have been purposefully allocated to these expert institutions from the State Budget of Ukraine.

Forensic psychiatric institutions conduct forensic examinations, surveys and studies using funds that are directly and purposefully allocated to these expert institutions from the state budget or local budgets. The cases stipulated in Part 4 of this Article of the Law are an exception as far as such expenses are covered by the ordering party if the latter makes an order.

The FMHA costs of forensic psychiatric institutions operating under the Ministry of Health of Ukraine that are conducted in civil and commercial cases are reimbursed in accordance with the procedure provided for by the current legislation<sup>10</sup>.

It is ascertained that the law does not provide for the targeted allocation of funds for FMHAs in civil proceedings. At the same time, under Article 8 of the Law of Ukraine “Fundamentals of the Legislation of Ukraine on Healthcare” No. 2801-XII dated 19 November 1992 (hereinafter, the Law “Fundamentals of the Healthcare Legislation”), the state guarantees that FMHAs are conducted free of charge in the manner prescribed by law.

**Example.** *A citizen T. from Kyiv applied to the Ombudsman for assistance in the regulation of free MFHAs for people with disabilities. The applicant reported that she had a son born in 2002, a person with a disability from childhood of group 1 (subgroup A), who had been suffering from a persistent chronic disorder since early childhood and required constant outside care. Her son, upon reaching the age of majority, was declared in court a legally incapacitated person for two years, and his parents were also appointed as guardians for this period. Two years later, T. filed a relevant application with the court. The court ruled that the application did not meet the requirements of Article 300 of the CPCU, as it was not supplemented by a MFHA opinion.*

Pursuant to the court decision, the applicant entered into an agreement with the Institute of Forensic Psychiatry on the provision of paid MFHA services, paid for the assessment and submitted its findings to the court.

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<sup>10</sup> Resolution of the Cabinet of Ministers of Ukraine “On the Limits of Compensation for Expenses Related to Civil, Administrative and Commercial Case Reviews and the Procedure for Their Compensation at the Expense of the State”, No. 590 dated 27 April 2006.

As part of the proceedings, the Ombudsman established that if a court ordered a MFHA to decide on declaring an individual legally incapacitated or to extend such decision, it should be carried out free of charge. If a court decides that an individual intending to become a guardian should provide an MFHA opinion, such an assessment should be carried out at the expense of the ordering party.

According to the Institute of Forensic Psychiatry, in 2022, forensic experts of this institution conducted 1643 forensic examinations in cases where a court should have decided whether to declare an individual legally incapacitated. In 36 cases, the court charged the person intending to become a guardian with the examination costs, and in the remaining 1607 cases, it was paid from the state budget. In instances where courts were to decide on whether to extend rulings to declare an individual legally incapacitated, the forensic experts of the Institute of Forensic Psychiatry conducted 123 examinations. In 32 instances, courts charged individuals intending to become a guardian with examination costs, and in the remaining cases, the state budget paid for it.

The monitoring shows the lack of a uniform approach to the compensation of legal costs associated with MFHAs.

The Ministry of Justice of Ukraine has agreed that certain inconsistencies between the provisions of civil procedural legislation results in ambiguous case law regarding the right of citizens to a free MFHA.

It has also been established that the National Plan<sup>11</sup> provides that actions should be taken to explore the possibility that individuals whose civil capacity restoration or incapacity declaration extension is the matter of the case under consideration are exempt from payment for MFHA (subparagraph 3 of paragraph 1 of Section VI of the National Plan), and that a procedure for addressing issues of guardianship over adults should be developed for guardianship bodies (subparagraph 4 of paragraph 1 of Section VI of the National Plan), where MoSP is appointed as responsible party.

Despite the fact that the deadline for this action was December 2022, the Ministry of Social Policy failed to develop a draft of the regulatory act concerned. At the same time, the Ministry of Social Policy supports the requirement that there should be a regulation allowing for exemption from MFHA payments for individuals whose incapacity declaration, civil capacity restoration or incapacity declaration extension is the matter of the case under consideration, and continues to work towards development of relevant changes in cooperation with other central authorities.

### **Certain issues pertaining to the reform of forensic mental health assessment system**

In 2022, the FMHA system was improved in Ukraine. In connection with the reform of the Institute of Forensic Psychiatry, its structure was changed and a capable network of state institutions is currently being developed to provide FMHA.

In order to improve the quality of FMHA, the laws governing the procedure for its conduct should be updated. In particular, amendments should be made to the Procedure for Forensic Mental Health Assessments, approved by Order of the Ministry of Health No. 865 dated 5 August 2018, which would take into account modern medical techniques and digitalisation.

Ukraine is reforming its current system of measuring disability by introducing the International Classification of Functioning, Disability and Health, which was endorsed on 22 May 2001 at the 54th World Health Assembly.

<sup>11</sup> Order of the Cabinet of Ministers of Ukraine "On Approval of the National Action Plan for the Implementation of the Convention on the Rights of Persons with Disabilities for the Period until 2025" No. 285-p of 7.04.2021

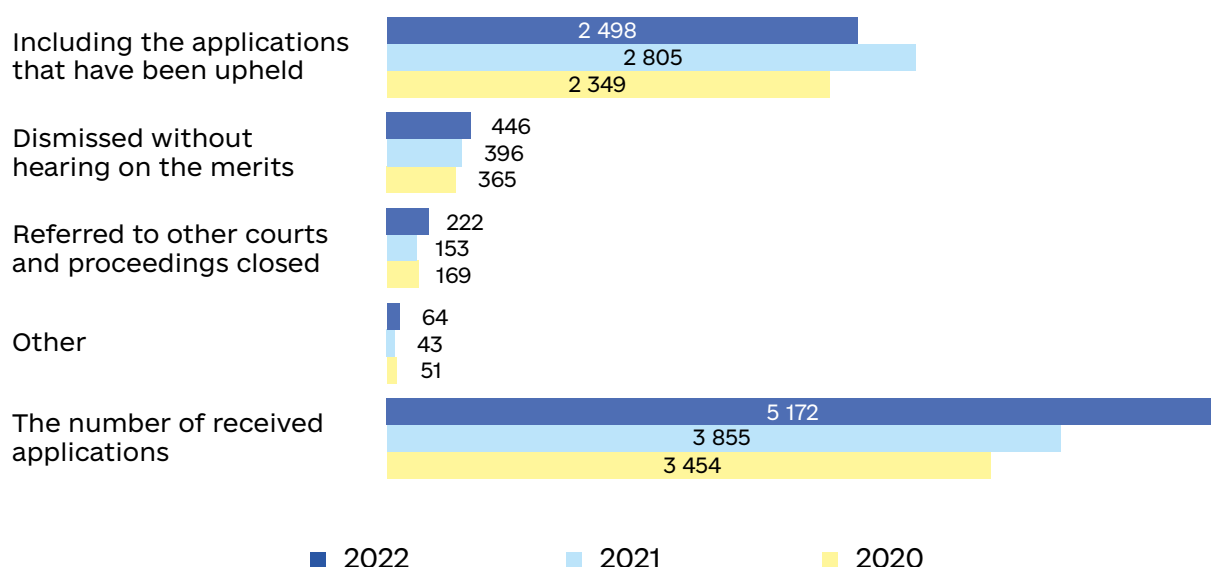
In line with European trends, the innovations will abandon the concepts of “disability”, “physical and other impairments”, etc. and apply the concepts of “functioning”, “activity limitations”, “activity and participation”. This will help to modify the established approaches to the opportunities for the self-fulfilment of persons with health disorders in all spheres of life and serve to modernise approaches to access and participation of persons declared legally incapacitated in court. In particular, it is worth mentioning the classification of chronic and persistent mental disorders in the context of opportunities for engaging persons with relevant disorders in various activities with due regard for medical indicators. Given the specific health conditions of this category of individuals, such an approach would be consistent with the humanistic principles of protection of their rights.

## Conclusions

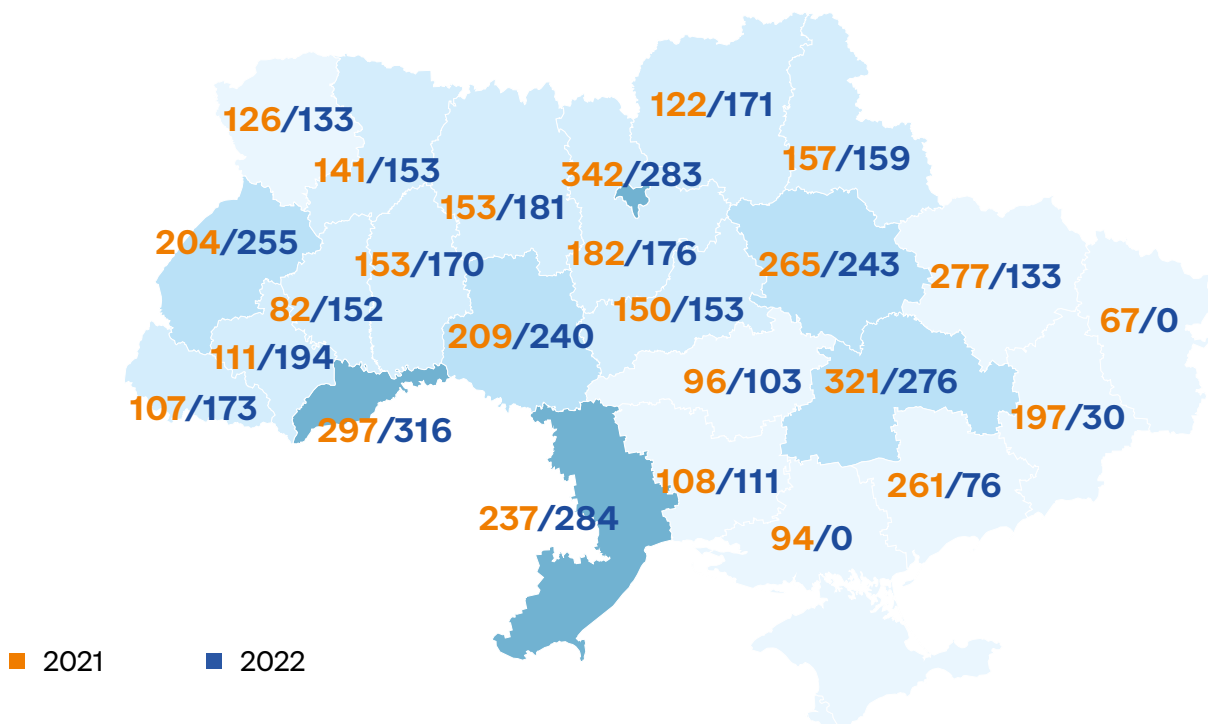
The monitoring carried out by the Ombudsman showed that a regulatory act should be developed to govern the exemption from MFHA payments for individuals whose incapacity declaration, civil capacity restoration or incapacity declaration extension is the matter of the case under consideration.

### 2.3. Judicial consideration of cases on the establishment of legal incapacity and limited legal capacity of individuals

**According to SJA, applications for declaring individuals incapacitated showed the following dynamics in 2020-2022:**

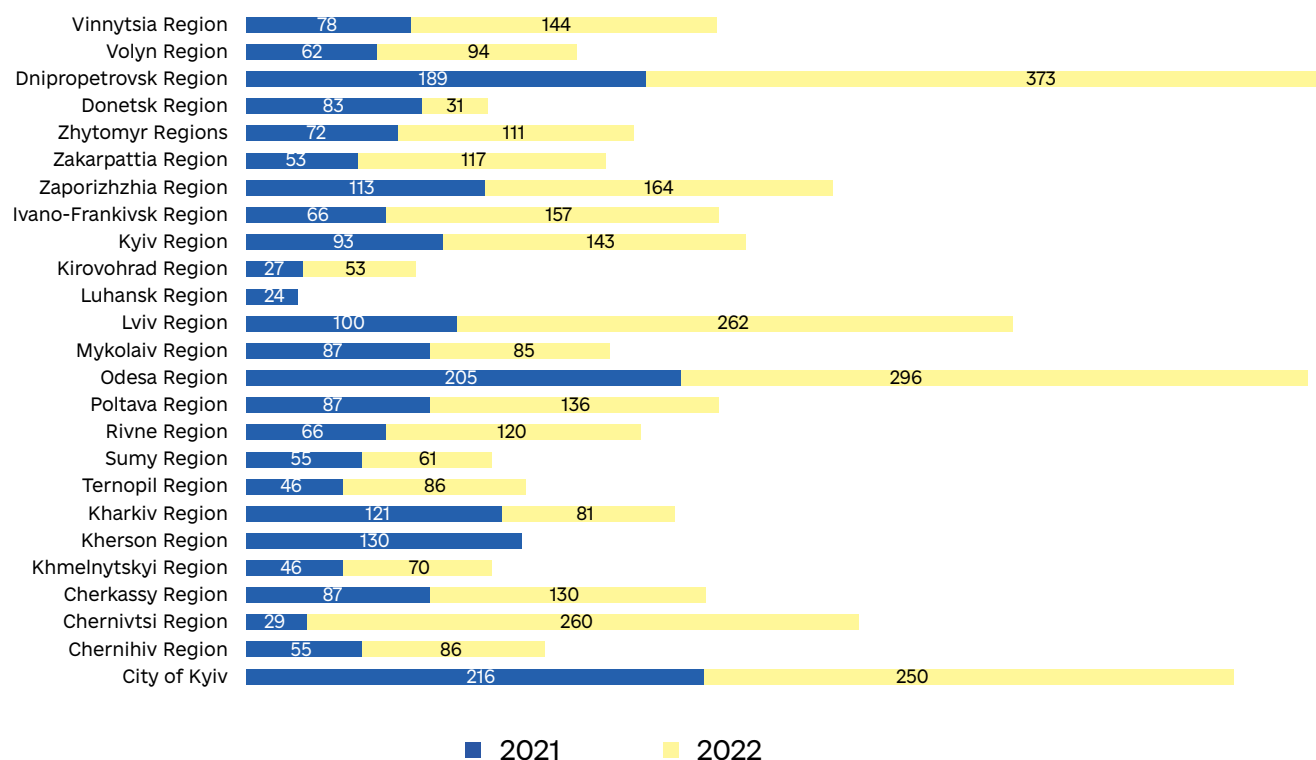


The number of cases reviewed by courts in 2021 and 2022, by regions



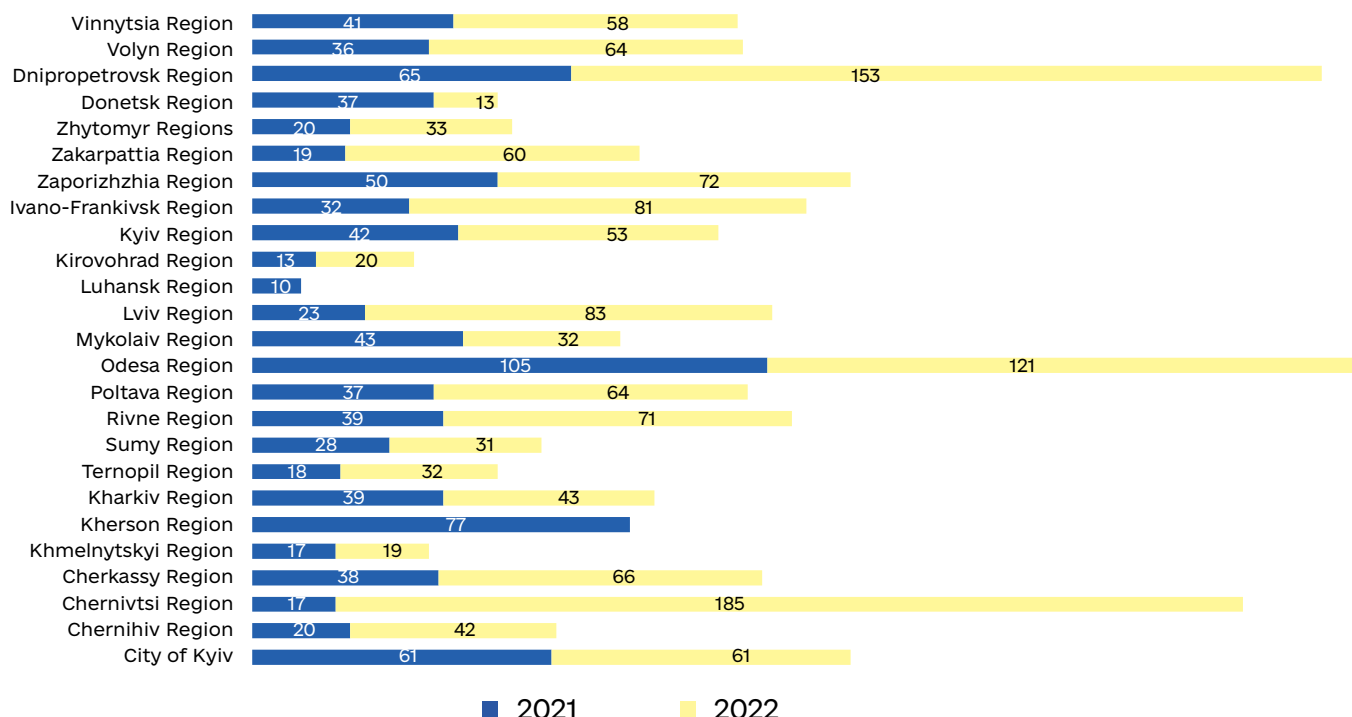
The analysis of the cases on civil capacity restriction, declaring individuals legally incapacitated and restoring civil capacity by regions indicates a decrease in the number of cases considered in the territories with active hostilities or in the adjacent territories.

The number of pending cases in 2021 and 2022





## The number of pending cases where proceedings were suspended in 2021 and 2022



**Example.** During on-site and off-site monitoring, the personal files of legally incapacitated persons were checked for compliance by the courts with the provisions of Part 6 of Article 300 of the Civil Procedure Code of Ukraine regarding the validity period of decisions to declare an individual legally incapacitated, which may not exceed two years.

It was found that 1,118 personal files included court rulings delivered after 15 December 2017. In 55 files, court rulings to declare an individual legally incapacitated did not specify their validity period of two years; this was the case, in particular in the following courts: Irpin City Court of Kyiv Region, Nizhyn City District Court, Novozavodskyi District Court of Chernihiv, Prydniprovskyi District Court of Cherkasy, Sosnivskyi District Court of Cherkasy, Storozhynets District Court of Chernivtsi Region, Berdychiv City District Court of Zhytomyr Region, and Central and Zavodskyi District Courts of Mykolaiv.

The Ombudsman issued relevant recommendations to the Irpin City Court of Kyiv Oblast and the Berdychiv City District Court of Zhytomyr Oblast, which were taken into account by court presidents.

## Conclusions

The number of pending cases in the courts increased during the full-scale invasion of Ukraine by the Russian Federation.

After the amendment of the CPCU, courts did not always follow the rules on incapacity time limits.

# Exercise of Rights by Adults with Incapacity and Persons with Limited Civil Capacity

## 3.1. General overview

The Constitution of Ukraine (Articles 21 and 24) declares that all people are free and equal in their dignity and rights. Human rights and freedoms are inalienable and inviolable. Citizens have equal constitutional rights and freedoms and are equal before the law. There should be no privileges or restrictions based on race, skin colour, political, religious or other beliefs, gender, ethnic or social origin, property status, place of residence, language or other characteristics.

At the same time, Article 70 of the Constitution of Ukraine establishes a direct restriction that deprives Ukrainian citizens who have been declared incapacitated by a court to vote in elections and referendums.

The Convention on the Rights of Persons with Disabilities (which, in accordance with Article 9 of the Constitution of Ukraine, is part of the national legislation of Ukraine) guarantees that persons with disabilities, including persons with persistent physical, mental, intellectual or sensory impairments, possess legal capacity for rights (the ability to have rights and obligations) on an equal basis with others.

As the national legislation links a person's legal capacity to act with their legal capacity for rights, individuals declared legally incapacitated become actually excluded from making decisions on how they should exercise of their rights. Such individuals are made totally dependent on their guardian and restricted in their fundamental human rights, and so they almost completely lose their personal integrity.

Persons declared legally incapacitated do not have in Ukraine the following rights:

- the right to choose the place of residence as the place of residence of a legally incapacitated person must be the place of residence of their guardian or the location of the relevant organisation that performs the functions of their guardian (Article 29 of the Civil Code);
- the right to vote in elections and referendums (Article 70 of the Constitution of Ukraine, Article 7 of the Electoral Code of Ukraine);
- the right to independently request free legal aid on all issues (currently, it is permitted only on issues related to declaring an individual legally incapacitated and restoring their civil capacity) (Part 3 of Article 10 and Part 5 of Article 18 of the Law of Ukraine "On Free Legal Aid");
- the right to request the court to deprive the guardian of their powers;
- the right to make decisions on medical interventions (including the application of prevention, diagnostics, treatment and rehabilitation methods and medication intake) (Articles 43 and 44 of the Law "Fundamentals of Healthcare Legislation").

## Conclusion

The Ukrainian laws on establishing full legal incapacity of individuals fails to comply with the Convention on the Rights of Persons with Disabilities and therefore it should be revised to protect the rights of these persons to equality before the law.



### 3.2. The right to social protection

Legally incapacitated persons and persons with limited civil capacity may exercise their rights in the field of social protection through a guardian. In particular, in accordance with Part 1 of Article 44 of the Law of Ukraine “On Compulsory State Pension Insurance”<sup>12</sup>, in order for the pension to be awarded (recalculated), a legally incapacitated person or a person with limited civil capacity should, through their legal representative, submit an application and other documents required for the award (recalculation) of a pension to a local branch of the Pension Fund or to a body authorised by the Fund. Paragraph 1.4 of the Procedure for Submission and Execution of Documents for the Award (Recalculation) of Pensions in Accordance with the Law of Ukraine “On Compulsory State Pension Insurance”<sup>13</sup> specifies that guardians and representatives of institutions (guardianship bodies) performing the functions of guardians for such persons who file relevant applications are considered as their legal representatives.

In accordance with paragraph 28 of the Procedure for Organising the Provision of Social Services<sup>14</sup>, an application from the individual or their legal representative or a notification from an authorised person of the guardianship body (for legally incapacitated persons who have not been appointed a guardian or who have lost contact with them under the state of emergency or martial law in Ukraine or in its separate localities) is required for the delivery of social services. The amendments to the said Procedure, implying that an authorised person of the guardianship body may act in the interests of a legally incapacitated person if the latter has a de jure guardian but de facto lacks them, are caused by the challenges of the martial law introduced in Ukraine, as there are numerous cases when, as a result of the military invasion of Ukraine by the Russian Federation, guardians left their place of residence, leaving their wards behind.

Similar changes<sup>15</sup> have been also made to the Procedure for registration and issuance of a certificate of registration of an internally displaced person<sup>16</sup>. They stipulate that an application for registration of a person declared legally incapacitated by a court may be submitted by their legal representative (should such incapacitated person be appointed a guardian), the head of a social protection institution (for incapacitated persons who have not been appointed a guardian, should they be placed in a social protection institution) or an authorised person of the guardianship body (for incapacitated persons who have neither been appointed a guardian nor been placed in a social protection institution, or for incapacitated persons who have lost contact with their guardians in the time of the state of emergency or martial law in Ukraine or its separate localities), the jurisdiction of which covers the declared (registered) place of residence (stay) of such individual, and an individual with limited legal capacity may independently apply for registration.

The new legal approaches to the manner in which individuals declared legally incapacitated or individuals with limited civil capacity exercise their rights that have been introduced by these regulations are somewhat inconsistent with the principles of guardianship laid down in the Civil Code. However, this measure is justified, as it is aimed at protecting the rights of this category of individuals.

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12 Law of Ukraine “On Compulsory State Pension Insurance” No. 1058-IV of 9.07.2003.

13 Resolution of the Pension Fund of Ukraine “On Approval of the Procedure for Submission and Execution of Documents for the Award (Recalculation) of Pensions in accordance with the Law of Ukraine “On Compulsory State Pension Insurance”” No. 22-1 of 25.11.2005, registered with the Ministry of Justice of Ukraine on 27.12.2005 under No. 1566/11846.

14 Resolution of the Cabinet of Ministers of Ukraine “On Organising the Provision of Social Services” No. 587 of 1.06.2020, as amended by Resolution of the Cabinet of Ministers of Ukraine No. 560 of 7.05.2022.

15 Resolution of the Cabinet of Ministers of Ukraine “Some Issues of Protection of the Rights of Deported and Internally Displaced Persons” No. 740 of 28.06.2022.

16 Resolution of the Cabinet of Ministers of Ukraine “On Registration of Internally Displaced Persons” No. 509 of 1 October 2014.

### Use of funds belonging to wards in the form of pension and benefits

Pursuant to paragraphs 4.9 and 4.10 of the Rules, the funds that wards possess as pensions, benefits or alimony, other current income or profits from their property shall be transferred to the guardian, who should spend them and spent on the ward's well-being. The guardian may receive these funds and spend them on the well-being of individuals under guardianship, if the interests of these individuals so require.

The guardianship bodies supervise the expenditure of funds belonging to wards for their well-being when they receive reports on their activities.

During the monitoring, cases were identified where a court decision declaring a person incapacitated had expired, and therefore the person was de facto legally capable, but the guardian continued to receive the amount of state social benefits due to such person.

**Example.** During the monitoring visit to Irpin City Council, four cases were identified where guardians continued to receive state benefits for persons with expired court rulings on declaring them legally incapacitated and appointing them guardians.

### Reasons

Regulatory legal uncertainty as to the manner, in which payments should be received by individuals with expired court rulings on declaring them legally incapacitated, including in cases where the court is considering a motion to extend the validity of a court ruling declaring an adult legally incapacitated, during the period until a new court ruling enters into force.

### Pensions for legally incapacitated persons or persons with limited civil capacity who are fully dependent on the state aid

In accordance with Part 1 of Article 48 of the Law of Ukraine "On Compulsory State Pension Insurance", a pensioner is paid 25% of their pension when they are fully supported by the state while living in a relevant institution (facility). If the amount of their pension exceeds the cost of maintenance, the difference between the pension and the cost of maintenance, but not less than 25% of the pension, should be paid to them.

The monitoring has identified violations of the procedure for paying pensions to individuals fully supported by the state.

**Example.** During the monitoring visit to Irpin City Council, the personal file of the ward V. was studied and it was found that the individual resided in a residential institution fully supported by the state.

The guardian reported that they spent the whole ward's pension and not only 25% of it, as it should be for an individual fully supported by the state. It was established that the Pension Fund was not aware that the incapacitated person V. lived in a residential institution fully supported by the state. The guardianship body failed to notify the local branch of the Pension Fund of the circumstances that affect the manner, in which pension should be paid to a legally incapacitated person.

### 3.3. The right to health care

The state ensures everyone the right to health care, medical assistance and medical insurance (Article 49 of the Constitution of Ukraine). Article 4 of the Law of Ukraine “On Psychiatric Care” No. 1489-III of 22 February 2000 defines the following principles of psychiatric care: legality, humanity, respect for human and citizen’s rights, the voluntary nature and accessibility of treatment in accordance with the current level of scientific knowledge and with minimal social and legal restrictions.

The amendments to the legislation reduced the interference of guardians in other areas of the life of incapacitated individuals, namely, the provision on sterilisation of incapacitated individuals with the consent of the guardian was removed (Article 281 of the Civil Code and Article 49 of the Law “Fundamentals of Healthcare Legislation”).

At the same time, the risk of a guardian making decisions that may not necessarily be supported by an incapacitated person remains because of the provisions of Article 43 of the Law “Fundamentals of Healthcare Legislation”, according to which any medical intervention in respect of an incapacitated person should be carried out at the request of the guardian.

At the same time, it is the guardian who is responsible for observing the rights of the ward in the field of healthcare, in particular, meeting their needs for treatment, provision of medicines and other means in accordance with the individual rehabilitation programme.

The results of the monitoring show that guardianship bodies that receive annual reports from guardians require no information on regular health check-ups of persons under guardianship in healthcare facilities and delivery of medical services to them, although under paragraph 4.3 of the Rules, the guardian must conduct a full medical examination of wards once a year.

The following issues remain unaddressed by guardianship bodies:

- ensuring that the guardians select a doctor who will provide primary healthcare to the ward and sign a corresponding declaration;
- the status of vaccination of persons under guardianship against COVID-19;
- the state of provision of persons under guardianship with medicines and medical devices (on a free/concessional basis).

In general, the information available in these reports does not allow for a full assessment of the extent, to which guardians fulfil their obligations to their wards as regards their right to healthcare.

### 3.4. Property rights

#### 3.4.1. Protection and preservation of property of legally incapacitated persons and persons with limited civil capacity

The law defines the ways of protecting the property of a legally incapacitated person and a person with limited legal capacity.

A way to protect property from unlawful actions is to impose an encumbrance, which results in a ban on its alienation.

The grounds for state registration of encumbrances are as follows: a court decision on real rights to real estate or objects of unfinished or future real estate; a decision of a public/private executor to encumber such property; legal grounds for a ban on the use and disposal of property; a document on which a notary has made an inscription on imposing a ban; a decision of a local self-government body to classify real estate objects as obsolete housing stock; other acts of public authorities and officials executed in accordance with the law.

According to this list, the guardianship bodies are not empowered to apply for encumbering real estate to protect the personal and property rights and interests of adults who have been declared incapacitated.

Encumbrances of movable property are regulated by the Procedure for Maintaining the State Register of Encumbrances on Movable Property<sup>17</sup>, and in accordance with the provisions of its paragraphs 6 and 10, information on encumbrances on movable property should be entered into the State Register of Encumbrances on Movable Property on the basis of an application by the encumbrancer or a person authorised by them. An entry on the encumbrance of movable property should be made on the day the application is accepted for its consideration by the registrar.

In these relations, the encumbrancer acts as a person with the right to dispose of the property.

Guardianship bodies have more powers to protect the property rights of children than those of adults. For example, a guardianship body may request a notary to prohibit the alienation of the child's home.

Thus, the legislation provides for the possibility of taking measures by guardianship bodies to preserve property, but not for all age categories of wards.

The gaps in the legislation can be addressed through appropriate amendments, in particular, by providing for the right of guardianship bodies to request state registrars to impose bans on immovable property and encumbrances on movable property when deciding on the establishment of guardianship and if there is information indicating a threat to the property of the ward.

One of the possible options for depriving a legally incapacitated person or a person with limited civil capacity of their property is entering into agreements for its sale. To conclude contracts for the sale and purchase of real estate and to enter information into the State Register of Immovable Property Rights, citizens apply to notaries.

Pursuant to Article 44 of the Law of Ukraine "On Notaries", the scope of civil capacity of individuals involved in transactions is determined when notarising them.

The scope of civil capacity of an individual is determined on the basis of a passport of a citizen of Ukraine or other documents that make it impossible to have any doubts about the scope of civil capacity of an individual who has applied for a notarial act. If necessary, the notary should be provided with a certificate stating that the person does not suffer from a mental disorder that may affect their ability to understand and (or) control their actions.

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17 Resolution of the Cabinet of Ministers of Ukraine "On Approval of the Procedure for Maintaining the State Register of Encumbrances on Movable Property" No. 830 of 5.07.2004.

If there is any doubt about the extent of civil capacity of an individual who has requested a notarial act, the notary is obliged to contact the guardianship body at the place of residence of the individual concerned to establish the fact of absence of guardianship over such individual.

Similar provisions are also contained in the Procedure for Performing Notarial Acts by Notaries of Ukraine<sup>18</sup>.

It is worth noting that mental disorders of an incapacitated person may be in remission and, despite a court decision to declare the person legally incapacitated, for some time the person can be aware of their actions and behave normally, which in turn may not raise doubts in the notary's mind.

Unfortunately, such persons are easily manipulated and can be misled by unscrupulous citizens.

In this case, there is a risk of notarial acts being performed without the authorisation of the guardianship body, as required by the Rules. Currently, information on declarations of individuals as legally incapacitated is contained in the Voter Register, but notaries do not have access to its data, since, according to the Ministry of Justice, Article 26 of the Law of Ukraine "On the State Voter Register" provides that personal data of the Voter Register may be used, in particular, by state bodies that are granted, by law, access to automated information systems and registers.

## Conclusion

It will be possible to exchange information between the Unified State Electronic Notary System and the Voter Register will be possible if such exchange is regulated by law.

### 3.4.2. Rights in the field of housing and utility services

Under the current legislation, a legally incapacitated individual is not entitled to enter into housing and utility service delivery contracts. Under the Civil Code, such contracts should be entered in by a guardian in the interests of the incapacitated person.

However, the guardian does not always take measures to ensure proper living conditions for the legally incapacitated person.

**Example.** *A citizen from Uzhhorod who had been declared legally incapacitated in court, complained to the Ombudsman that heat, electricity and water supply had been absent in his apartment since 2019.*

The Ombudsman initiated proceedings on this appeal and found that the reason for the absence of utilities was a large debt for their consumption. Also, the guardian, who was the applicant's sister and lived separately, had failed to conclude contracts with utility providers. The guardian failed to take actions to create proper living conditions for the applicant.

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<sup>18</sup> Order of the Ministry of Justice of Ukraine "On Approval of the Procedure for Performing Notarial Acts by Notaries of Ukraine" No. 296/5 of 22.02.2012.

Under the proceedings, the Commissioner recommended that the Uzhhorod City Council and the Uzhhorod City Police Department take response action against the guardian and ensure proper living conditions for the ward.

The guardianship body made efforts to protect the rights of the incapacitated individual, but the guardian continues to fail to take action in the interests of the ward. The police found no offences in the actions of the guardian.

### 3.5. The right to work

For individuals suffering from mental disorders, the legislation establishes state guarantees for mandatory job quotas to employ such individuals<sup>19</sup>. Upon employment, the employer must enter into an employment contract with the employee. Labour law prescribes for no direct prohibitions on entering into an employment contract with legally incapacitated individuals. At the same time, Chapter IX of the Labour Code provide for guarantees when employees are held liable for damages. In particular, pursuant to Article 130 of the Labour Code, employees are liable for damage caused to an enterprise, institution or organisation as a result of a breach of their employment duties. Article 147 of the Labour Code provides for the types of penalties for breach of labour discipline.

According to civil law, guardianship deprives persons under it of the right to enter into contracts independently. The CCU defines the concepts of an individual, personal non-proprietary rights, and civil capacity. Therefore, civil law is decisive in matters of an individual's legal capacity, which is important for other branches of law, including labour law.

In some cases, legal incapacity is a ground for termination of certain labour relations with an employee. For example, the registration of an unemployed individual with the territorial body of the central executive authority implementing the state policy in the fields of employment and labour migration should be terminated if they are declared legally incapacitated or their legal capacity is restricted by a court decision<sup>20</sup>; a person who has been declared incapacitated or whose civil capacity was limited cannot enter the civil service<sup>21</sup>; persons declared incapacitated in court cannot be employed by local self-government bodies<sup>22</sup>; and the powers of a village, town or city mayor are considered to be terminated early if they are declared incapacitated by a court<sup>23</sup>.

The absence of mandatory norms in labour legislation leads to the use of analogy and makes it impossible to employ legally incapacitated persons and persons with limited civil capacity. The monitoring has found that the guardianship bodies lack complete information about the need for labour rehabilitation of legally incapacitated individuals and take no action for labour rehabilitation due to the absence of such an obligation in regulatory documents, the obligation to hold a medical and social expert commission, and the lack of relevant national and local programmes for the rehabilitation of legally incapacitated persons.

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19 Law of Ukraine "On Psychiatric Care" No. 1489-III of 22.02.2000.

20 Law of Ukraine "On Employment of the Population" No. 5067-VI of 5.07.2012.

21 Law of Ukraine "On Civil Service" No. 889-VIII of 10.12.2015.

22 Law of Ukraine "On Service in Local Self-Government Bodies" No. 2493-III of 7.06.2001.

23 Law of Ukraine "On Local Self-Governance in Ukraine" No. 280/97-VR of 21.05.1997.



**Example.** The inspection of 42 personal files of legally incapacitated persons and persons with limited civil capacity registered in Irpin TC revealed that only one such personal file contained an individual rehabilitation programme with a recommendation for labour rehabilitation. The file contained no information on whether this individual rehabilitation programme had been implemented.

- індивідуальна форма навчання					
- дистанційна форма навчання, екстернат					
3. Фізична реабілітація	+				
консультування	+				
світлотерапія					
кінезотерапія					
лікувальний масаж					
лікувальна фізкультура					
4. Професійна реабілітація	-				
експертиза потенційних професійних здібностей					
професійна орієнтація					
професійний відбір					
професійна підготовка, перепідготовка та підвищення кваліфікації					
професійна освіта					
5. Трудова реабілітація	+				
пристосування та створення робочого місця з урахуванням безпеки та особливих потреб інвалідів					
раціональне працевлаштування (поновлення трудової діяльності інваліда за колишньою або новою професією)					
види професій і спеціальності, доступні за станом здоров'я					
6. Фізкультурно-спортивна реабілітація					
навчання навичкам занять фізичної культури					

*всіх наробу-  
ванн в б.і.  
дні псих. реабілітації*

An example of a completed individual rehabilitation program

## Reasons

Guardianship bodies are not empowered to monitor the implementation of individual labour rehabilitation measures; there is no methodology for labour rehabilitation of legally incapacitated individuals.

# International Legislation and European Practices

## 4.1. International legislation

International human rights standards recognize that persons with incapacity and limited civil capacity have the same rights as other citizens. The international legal standards for the protection of the rights of adults, including those with incapacity or limited capacity, are based on the provisions of general international human rights treaties, most of which have been ratified by Ukraine.

The Universal Declaration of Human Rights (adopted and proclaimed by the United Nations General Assembly on 10.12.1948 and ratified by Ukraine on 10.12.1948) proclaims the inalienable and indispensable observance of civil, political, economic, social and cultural human rights. Among the most important rights proclaimed are the following: the right to recognition as a person before the law; equality of all before the law; inviolability of the person; inadmissibility of unlawful interference with personal and family life; inviolability of the home; the right to work and protection from unemployment, rights to property, recreation, education, social security, etc.

The provisions of the Declaration became the legal basis for the development of standards subsequently adopted by the Council of Europe and for the improvement of national legal systems that guarantee strict and consistent observance of human rights.

The European Convention on Human Rights (Convention for the Protection of Human Rights and Fundamental Freedoms) (04.11.1950, Rome; ratified by Ukraine on 17.07.1997) protects the following rights and fundamental freedoms at the national level and guarantees a system of their protection at the national (international) level: the right to life; prohibition of slavery and forced labour; prohibition of discrimination against a person; right to liberty and security; right to a fair trial; right to respect for private and family life; right to marriage and equality of each spouse; right to freedom of thought, conscience and religion; right to an effective remedy; right to protection of property; right to education; right to freedom of movement.

The International Covenant on Civil and Political Rights (16.12.1966; ratified by Ukraine on 19.10.1973) extends the civil and political rights and freedoms listed in the Universal Declaration of Human Rights. The European Social Charter (Revised) (3.05.1996; entered into force on 01.07.1999; ratified by Ukraine on 14.09.2006) was adopted to further implement human rights and sets out the obligation to adopt six of the nine articles of Part II of the Charter: Articles 1, 5, 6, 7, 12, 13, 16, 19 and 20, stipulating that persons with disabilities have the right to independence, social integration and participation in society. The Convention on the Rights of Persons with Disabilities (13.12.2006; ratified by Ukraine on 16.12.2009) promotes the encouragement, protection and full and equal enjoyment by all persons with disabilities of all human rights and fundamental freedoms.

The Convention on the International Protection of Adults (13.01.2000, not ratified by Ukraine) introduces protection at the international level for adults who, due to illness or lack of personal capacity, cannot protect their interests. The Convention regulates issues related to legal incapacity declaration and the introduction of a protective regime; placement of an adult under the protection of a judicial or administrative authority; guardianship, trusteeship and similar institutions;



appointment and functions of any person or body responsible for, representing or assisting an adult or their property; placement of an adult in an institution or other place where their protection can be ensured; disposal, storage or placement of an adult's property; authorisation of special intervention to protect an adult or their property. The Convention provides for the protection of adults with incapacity who, *inter alia*, have been forced to leave their country and become refugees due to hostilities or other circumstances. In particular, according to Article 6 of the Convention, adult refugees and those displaced outside their country as a result of disturbances in their country shall be subject to the jurisdiction of the authorities of the Contracting Party in whose territory such adults are located as a result of their displacement.

The Commissioner clarified the issue of Ukraine's accession to the Convention. The Ministry of Justice has informed that the draft law on accession to the Convention is being reviewed by the relevant departments of the Ministry of Justice to examine the compliance of the Convention with the Ukrainian legislation. The Ministry of Social Policy is also clarifying whether the National Social Service should be designated as the central authority in Ukraine for the purposes of the Convention.

The Ombudsman's monitoring has identified cases of guardians travelling abroad with their wards since February 2022. Only on 25 October 2023, the Ministry of Justice requested information from the Ministry of Foreign Affairs on the number of cases where the competent authorities of foreign host countries took measures to protect adults with limited civil capacity and incapacitated persons on the territory of the States Parties to the Convention, including the number of decisions taken and the issues that arose in this regard.

The Recommendation No. R(99)4 of the Committee of Ministers of the Council of Europe on Principles concerning the Legal Protection of Incapable Adults of 23 February 1999 was recognised by the European Court of Human Rights as the standards in the field of protection of the rights of adults with legal incapacity. The principles enshrined in the Recommendation apply to the protection of adults who, due to impaired or deficient personal capacity, are unable to make autonomous decisions in any or all of their personal or economic affairs, or to understand, express or act upon such decisions, and who are unable to protect their interests; the inability of such individuals to work may be caused by mental disability, illness or similar cause.

The Recommendation sets out four groups of principles for the protection of the rights of adults with incapacity and the development of national legislation on these issues: first, the basic principles of respect for human rights, including in the process of declaring a person legally incapacitated (with limited legal capacity); second, procedural principles and guarantees for ensuring and protecting the rights of adults with incapacity; third, principles on the role, powers and responsibilities of a representative; fourth, principles for the exercise of the right of adults declared incapacitated to healthcare.

## 4.2. European practices: France and Germany

Given that the Ukrainian legal system is part of the Romano-Germanic legal family, which includes, in particular, the Roman (or "French") and Germanic groups, an analysis was performed of the legislation of France and Germany on guardianship of adults and it was found out that in these countries, as well as in Ukraine, guardianship of adults was regulated by Civil Codes.

In general, the laws of France and Germany do not contain the concept of "legal incapacity", but use the concepts of "under the protection of justice", "under guardianship", "care", "family protection".

In particular, in France, an adult who is unable to independently safeguard their interests can be protected by law both during a specific act and permanently. Similarly, if such a person exposes themselves to want or jeopardises the performance of their family responsibilities through their wastefulness, intemperance or idleness, they may be protected.

In Germany, if an adult is unable to manage their own affairs in full or in part due to mental illness or physical, mental or emotional disability, the guardianship court appoints a guardian upon their request or on its own initiative.

Another common feature of these countries is that they have specialised guardianship courts.

However, the types of guardianship differ somewhat: in France, they are guardianship, care (simple or enhanced), judicial protection, family protection permit, future protection permit, permission or order for future protection of another person, and in Germany, these are guardianship, emergency representation, care, and absentee care.

In the context of the mechanism of exercising rights by adults under the protection of justice, guardianship, custody, family protection, French law establishes that in order for a person's actions to be recognised as valid, they must be of sound mind. It is up to those who consider the transaction invalid to prove the existence of a mental disorder at the time of the action. An adult under the protection of justice retains the exercise of their rights. An adult under guardianship may not, without the assistance of their guardian, perform any actions that require the permission of the family council under the guardianship regime; receive or use capital.

In Germany, a carer represents a person under care within the scope of their duties. The law defines the cases in which a person has the right to express their will to enter into marriage or civil partnership; to challenge an inheritance contract; to terminate an inheritance contract; to express their will, and other cases. A person under guardianship does not need the consent of their guardian if the declaration of intent only brings a legal advantage to the person under guardianship. If an adult is unable to take care of their affairs due to physical disabilities, a guardian may be appointed only at the request of the adult. In this case, a guardian cannot be appointed against the will of the adult.

As for the specifics of the appointment of a person or body responsible for an adult or their property, it is provided in France that if the appointed person refuses to perform their obligations or is unable to perform them, or if the interests of the protected person require the removal of the appointed person, the court should issue a separate decision thereon.

Guardianship may not be transferred to a medical institution or to any person employed there, unless they are among those who had the right to apply for guardianship. The guardian receives the ward's income and then uses the funds for the ward's well-being, treatment, and any alimony. Any excess funds are placed in a deposit account.

The German law stipulates that if an adult is unable to manage their own affairs due to mental illness or physical, mental or emotional disability, a guardian is appointed by the guardianship court upon their request or on the court's own initiative. The family court may appoint a married couple as joint guardians.

A guardian cannot be appointed against the will of an adult. A guardian (supervisor) may be appointed only for areas of responsibility that require supervision, and authorised representatives may be appointed to defend the rights of the person under care.

An employee of a guardians' association who works there exclusively or partially as a supervisor (association supervisor) may be appointed only with the consent of the association, as well as an employee of a care authority who works there exclusively or partially as a supervisor.

Any person who is a dependent or has other close relationship with an institution, dwelling or other facility where an adult is kept or resides cannot be appointed as a guardian.

In France, there are public and private residential institutions for adults with disabilities who have serious mental, intellectual, physical and somatic health problems.

There are also assisted living facilities for persons with disabilities, which are part of the Social Housing Stock and where individual health characteristics are taken into account. In these institutions, persons with disabilities may, but are not obliged to, work in specially created workshops; this work is paid and provides them with a certain degree of financial independence.

State residential services are funded by the state, while private residential institutions are funded mainly by church organisations.

Assisted living facilities are funded through deductions from benefits provided for accommodation, as well as by charitable organisations.

In Germany, placements that involve the deprivation of liberty of the cared-for person are permitted by a decision of the guardianship court for as long as it is necessary for the welfare of the cared-for person. Without prior court approval, such placements are only permitted if the delay is due to a danger to the cared-for person, but the court's approval must be obtained immediately.

Placement involving deprivation of liberty is defined as staying in a hospital, home or other institution for a long period of time or on a regular basis, with the use of coercive restraint measures by means of mechanical devices, medication or other means.

In France, in order to ensure the protection of the rights and interests of adults is unable to protect them on their own, no one, with the exception of spouses, descendants and legal entities, is obliged to retain custody of an adult for more than five years. After this period, the guardian may request and must obtain a replacement.

The guardianship is terminated together with the reasons for it; however, the discharge will be announced only after the formalities for its opening have been complied with.

The person in care will only be able to resume the exercise of their rights after a decision to release them has been made. The views of the person receiving mental health care on care arrangements should be sought and taken into account as much as possible.

In any event, such a person may:

- communicate with the state representative in the department or their representative, the president of the special court or their representative, the prosecutor in whose jurisdiction the institution is located, and the mayor of the municipality or their representative;
- refer the case to the commission for psychiatric care, and, in case of hospitalisation, to the commission, users;
- to bring to the attention of the Inspector General of Places of Deprivation of Liberty facts or situations that may fall under their jurisdiction;
- seek advice from a doctor or lawyer of their choice;
- send or receive letters;
- familiarise themselves with the internal regulations of the institution and receive explanations regarding them;
- exercise their right to vote;
- engage in religious or philosophical activities of their choice.

In Germany, there is no time limit for interference with the rights or property of an adult. The time limits depend on the reasons that gave rise to guardianship. Once these reasons cease to exist, the guardianship is terminated.

## RECOMMENDATIONS

### It is recommended: that the Verkhovna Rada of Ukraine

**ratify** the Convention on the International Protection of Adults;

### that the Cabinet of Ministers of Ukraine:

**develop and submit** to the Verkhovna Rada of Ukraine draft laws on:

- guardianship and care of adults with incapacity and persons with limited civil capacity;
- the establishment of powers of guardianship bodies within territorial communities;
- amendments to the Civil Procedure Code of Ukraine regarding the restoration of civil capacity of a person at their request; establishing validity terms for decisions to declare an individual legally incapacitated depending on the physical (mental) state of the individual; the procedure for filing motions for extending validity terms of such decisions; sharing responsibilities for a ward between guardians if two or more guardians are appointed;
- prohibition by notaries to alienate property of legally incapacitated persons or person with limited civil capacity upon the request of guardianship bodies;
- ensuring that notaries have access to the State Register of Voters to assess the extent of civil capacity of an individual who has applied for a notarial act;

**develop and approve** regulations on:

- the grounds for the right to be reimbursed for guardian's services, the reimbursement amount and the procedure for its payment;
- exemption from fees for the forensic mental health assessment of individuals whose incapacity declaration, civil capacity restoration or incapacity declaration extension is the matter of the case under consideration
- establishing guardianship over persons who were dependents of persons who went missing under extraordinary circumstances;
- continuing payment of pension and state social benefits while the court considers a motion to extend the validity of a previous court decision declaring an adult legally incapacitated;
- Amendments to the Regulation on the Centralised Disability Data Bank to ensure that executive bodies of village and town councils have access to CDDB;
- the concepts of legal and institutional protection of persons in need of guardianship with due respect of the provisions of the Convention on the Rights of Persons with Disabilities;

**order** the authorised central executive authorities:

- to establish the Unified register of legally incapacitated persons and persons with limited civil capacity;

## that the Ministry of Social Policy of Ukraine

**approve** the forms for reports of visits to persons under guardianship and guardians' report on the performance of their duties to the wards;

## that the Ministry of Social Policy of Ukraine and the Ministry of Economy of Ukraine

**develop and approve** a methodology for the labour rehabilitation of persons with intellectual and mental disabilities, including legally incapacitated individuals;

## that the Ministry of Social Policy of Ukraine and the National Social Service of Ukraine

**provide** methodological recommendations to the authorised bodies of the guardianship system on the specifics of guardianship and ensuring the exercise of the rights of adults with incapacity and persons with limited civil capacity, interaction of guardianship bodies with related bodies, institutions, and establishments under the legal regime of martial law;

## that the National Social Service of Ukraine, the Pension Fund of Ukraine and local self-government bodies

**identify** instances where the two-year term of court rulings declaring individuals legally incapacitated, as specified in Part 6 of Article 300 of the Civil Procedure Code of Ukraine, has expired and monitor compliance with the procedure for paying pensions and state social benefits to such individuals;

## that local self-government bodies

ensure that the current Rules of Guardianship are complied with and the rights and freedoms of adults with incapacity and persons with limited civil capacity are observed.







**Омбудсман України**  
**Ombudsman of Ukraine**