

**Draft Recommendation on
Principles concerning continuing powers of attorney and advance
directives for incapacity**

The Committee of Ministers, under the terms of Article 15 b of the Statute of the Council of Europe;

Considering that the aim of the Council of Europe is to achieve a greater unity between the member states, in particular by promoting adoption of common rules in legal matters;

Noting that demographic changes have resulted in an increasing number of elderly people who become incapable of protecting their interests by reason of an impairment or insufficiency of their personal faculties;

Noting that there continue to be other circumstances in which people become incapacitated;

Having regard to relevant international instruments, including the United Nations Convention of 13 December 2006 on the Rights of Persons with Disabilities, the Hague Convention of 13 January 2000 on the International Protection of Adults and Recommendation Rec(2006)5 of the Committee of Ministers to member states on the Council of Europe Action Plan to promote the rights and full participation of people with disabilities in society: improving the quality of life of people with disabilities in Europe 2006-2015;

Bearing in mind the relevant case-law of the European Court of Human Rights;

Agreeing that Recommendation No. R (99) 4 of the Committee of Ministers on principles concerning the legal protection of incapable adults is a valuable and up-to-date international instrument containing detailed guidance and general advice on legal rules dealing with measures of protection of such persons;

Noting the strong tendency in the above recommendation and in the legislation of the member states concerning persons with incapacity towards promoting self-determination and autonomy;

Considering that self-determination is essential in respecting the human rights and dignity of each person as a human being;

Noting that in some member states continuing powers of attorney are a preferred alternative to court decisions on representation;

Noting that legislation on continuing powers of attorney and advance directives has recently been passed or proposed in some member states;

Noting that in jurisdictions where continuing powers of attorney and advance directives are available, adults of all ages increasingly make use of them;

Recognising that there are considerable disparities between the legislations of member states;

Building upon the principles of subsidiarity and necessity contained in Recommendation No. R (99) 4 and supplementing it with principles on self-determination; Recommends the governments of member states to take all measures considered necessary with a view to implementing the following principles:

Principles

Part I - Scope of application

Principle 1 - Promotion of self-determination

1. States should promote self-determination for adults about their lives for periods when they are not capable of making decisions. Two principal methods are continuing powers of attorney and advance directives.
2. In accordance with the principles of self-determination and subsidiarity, states should consider giving such methods priority over public measures of protection.

Principle 2 - Definitions

1. A continuing power of attorney is a mandate given by a capable adult with the purpose that it shall remain in force, or enter into force, in the event of the granter's incapacity.
2. The granter is the person giving the power of attorney. The attorney is the person who is appointed to act on behalf of the granter.
3. An advance directive is issued by a capable adult with the purpose of giving binding instructions, or expressing wishes, concerning situations that may arise in the event of that adult's incapacity.

Part II - Continuing powers of attorney

Principle 3 - Applicability

1. States should consider whether there should be differentiation between continuing powers of attorney which remain in force in the event of incapacity and continuing powers of attorney which only enter into force upon incapacity.
2. States should regulate the differences between powers relating to economic and financial matters, and powers relating to personal, health and welfare matters.

Principle 4 - Content

1. States should consider whether it should be possible for a continuing power of attorney to cover property, financial, personal, health and welfare matters, or whether there should be particular exclusions.

Principle 5 - Appointment of an attorney and acceptance

1. The granter shall appoint an attorney.
2. States should consider whether the granter can appoint more than one attorney and whether they can act jointly, concurrently or separately, or as substitutes.

Principle 6 – Form

1. A continuing power of attorney shall be in writing. The document shall explicitly state that it shall remain in force, or enter into force, in the event of the granter’s incapacity.
2. States should consider what provisions and mechanisms may be required to ensure the validity and effectiveness of the document.

Principle 7 - Revocation

1. A capable granter shall have the possibility to revoke the continuing power of attorney at any time. Principle 6, paragraph 2, is applicable.

Principle 8 - Entry into force

1. States should consider how to regulate the entry into force of the continuing power of attorney in the event of the granter’s incapacity.
2. States should consider whether a medical certificate concerning the capacity of the granter is required.
3. States should consider introducing a provision on notification of the granter and other specified persons of the entry into force of the continuing power of attorney.

Principle 9 – Role of the attorney

1. The attorney shall act in accordance with the power of attorney and in the interests of the granter.
2. The attorney shall, as far as possible, inform and consult the granter on an ongoing basis. The attorney shall, as far as possible, ascertain and take account of the past and present wishes and feelings of the granter and give them due respect.

3. The grantor's economic and financial affairs shall be kept separate from the attorney's own.

4. The attorney shall keep sufficient records in order to demonstrate the proper exercise of his or her mandate. He or she shall be accountable to specified persons or competent authorities.

Principle 10 – Conflict of interest

1. States should consider regulating conflict of interest.

Principle 11 - Control

1. States should consider permitting the grantor to appoint a third person to monitor the attorney.

2. States should consider introducing a system of control under which a competent authority might have power to investigate, and if necessary to intervene, on request or on its own motion.

Principle 12 – Termination of continuing powers of attorney

1. The continuing power of attorney shall terminate in the event of the death of the grantor or the attorney, or the resignation or incapacity of the attorney.

2. When an attorney is not acting in accordance with the power of attorney or in the interests of the grantor, the competent authority should have the possibility to repeal the continuing power of attorney in whole or in part.

3. When a continuing power of attorney has terminated or has been repealed in whole or in part, the competent authority should consider whether appropriate measures of protection are required.

Part III - Advance directives

Principle 13 – Content

1. States should consider introducing advance directives. They may apply to health, welfare and personal matters; to property and financial matters; and to the choice of a guardian, should one be appointed.

Principle 14 – Effect

1. States should decide to what extent advance directives should have binding effect if certain requirements are met, and to what extent they should be statements of wishes to be given due respect.

2. States should address the issue of situations that arise in the event of a material change in circumstances.

Principle 15 – Form

1. An advance directive shall be in writing if intended to have binding effect.

2. States should decide whether provisions and mechanisms should be in place to ensure the validity and effectiveness of that document.

Principle 16 – Revocation

1. An advance directive should be revocable at any time and without any formalities.