

**Recommendation CM/Rec(2009)11 of the Committee of Ministers to member states
on principles concerning continuing powers of attorney and
advance directives for incapacity**

REVIEW OF FOLLOW UP BY COUNCIL OF EUROPE MEMBER STATES

**QUESTIONNAIRE
(Short Version)**

Terminology and abbreviations

“the Recommendation” – Council of Europe Ministerial Recommendation CM/Rec(2009)11 on principles concerning continuing powers of attorney and advance directives for incapacity

“Principle” (with initial capital), unless otherwise indicated – a Principle of the Recommendation

“law district” – this term refers to individual legal areas of a state where a state is divided into two or more separate individual areas with different legal systems (or different legal systems for the purposes of the subject-matter of this questionnaire)

“CPA” – a continuing power of attorney as defined in the Recommendation - “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”

“granter” (as in the Recommendation) - “the person giving the continuing power of attorney”

“attorney” (as in the Recommendation) - “the person mandated to act on behalf of the granter”

“advance directives” (as in the Recommendation) – “are instructions given or wishes made by a capable adult concerning issues that may arise in the event of his or her incapacity”

“autonomous measures” – any measures put in place by a person to be operated in the event of, or in respect of, any impairment of that person’s capacity; including but not limited to continuing powers of attorney and advance directives; including measures put in place (with appropriate support if necessary) by persons with some impairment of capacity who are nevertheless capable of validly putting such measures in place; and including measures for, or including elements of, supported decision-making and/or co-decision-making

“incapacity” – factual incapability of acting and deciding, in any particular matter, capably and with legal effect; explicitly excluding any form of incapacitation imposed by law which does not match factual incapability; and “capacity” has the narrow meaning of the converse of such factual incapability, and does not extend to the wider meaning of “capacity” to encompass personality, rights and status in law

“*ex lege* representation” – any automatic or statutory right of representation (such as exists in a number of member states)

Short questionnaire

“UN CRPD” – Convention on the Rights of Persons with Disabilities (New York, 13 December 2006, 2515 UNTS 3)

“Hague 35” – Convention on the International Protection of Adults (the Hague, 13 January 2000, 2600 UNTS 3)

Action

1. Where a member state includes more than one law district (as defined above), a copy of this questionnaire should be completed in respect of each law district.
2. Any queries regarding completion of the questionnaire should be referred to the consultant Adrian D Ward at adw@tcyoung.co.uk.
3. Questions may be referred to by number simply in the form Q1, Q2, etc.
4. All completed questionnaires should be submitted to DGI-CDCJ@coe.int with copy direct to the consultant (see 2 above) by **30 September 2016**.

QUESTIONNAIRE

1. Preliminary

- 1.1. Name of state/law district for which this questionnaire has been completed.
- 1.2. Name and contact details of CDCJ member responsible for this completed questionnaire.
- 1.3. Name and contact details of any other person(s) to whom queries should be addressed.

Principle 1 – promotion of self-determination

2. Promotion of self-determination

- 2.1. Has the Recommendation been translated into any national language(s)? If so, please give details.¹
- 2.2. Is it possible, under the law of your state/law district, for granters to grant a CPA to cover economic and financial matters? YES/NO
- 2.3. Is it possible, under the law of your state/law district, for granters to grant a CPA to cover health, welfare and other personal matters (or any of the foregoing)? YES/NO
- 2.4. Does the law of your state/law district permit the issuing of advance directives? YES/NO
- 2.5. If the answer to any of 2.2, 2.3 or 2.4 is NO, are there proposals (or is there pending legislation) to introduce CPAs and advance directives, and by when? YES/NO/WHEN?
- 2.6. If the answer to any of 2.2, 2.3 or 2.4 is YES, are such autonomous measures given priority, in accordance with the principles of self-determination and subsidiarity, over all other measures?

Part II – continuing powers of attorney

Principle 3 – content

3. Content of continuing powers of attorney

- 3.1. If your answer to 2.2 or 2.3 was YES, are any matters specifically excluded from those which may be dealt with in a CPA? YES/NO. If YES, please specify.

Principle 4 – appointment of attorney

4. Appointees under continuing powers of attorney

- 4.1. Please specify any limitation on the range of persons or entities who may be appointed as attorneys.

¹ As far as possible this questionnaire follows the wording of the Recommendation, so a translation of the Recommendation may assist when answering this questionnaire

Short questionnaire

- 4.2. May the granter appoint more than one attorney, to act jointly, concurrently, separately, or as substitutes? YES/NO. If only some of these appointments are possible, please specify.
- 4.3. Are any restrictions deemed necessary for the protection of the granter? YES/NO. If YES, please specify.

Principle 5 – form

5. Form of document and ensuring validity

- 5.1. Does a CPA document require to be in writing?
- 5.2. Are all powers of attorney automatically CPAs? YES/NO
- 5.3. If your answer to 5.2 is NO, must the document explicitly state that it shall enter into force or remain in force in the event of the granter's incapacity?
- 5.4. Is the form and content of a CPA fixed by law? YES/NO/PARTLY. If PARTLY, please clarify. Please also explain reasons for method adopted, and any perceived strengths or weaknesses of it.
- 5.5. Is the validity of the CPA checked at time of granting as to (a) Capacity of the granter? YES/NO, (b) No undue influence? YES/NO, (c) Any other factors? YES/NO. (d) How are these matters assessed? (e) Please provide details and comments.
- 5.6. Specify any other provisions and mechanisms which are required to ensure the validity of the document.

Principle 6 – revocation

6. Revocation – form and safeguards

- 6.1. May a granter who is still capable revoke the CPA at any time? YES/NO
- 6.2. Do the same requirements as at 5.1 and 5.3 – 5.6 apply to revocation? YES/NO. If NO, please explain what requirements do apply.
- 6.3. (a) How are the matters listed in 5.5 assessed in relation to revocations? (b) Please provide details and comments.
- 6.4. May a CPA be revoked by a court, or by any other person or entity? YES/NO. If YES, please give details.

Principle 7 – entry into force

7. Entry into force

- 7.1. What provisions cover the manner of entry into force of the CPA in the event of the granter's incapacity?
- 7.2. What are the provisions as to how incapacity should be determined and what evidence is required?

- 7.3. Must the granter be consulted about/involved in the decision that the CPA should enter into force? YES/NO. If YES, please provide details, including as to how compliance with these requirements is evidenced and recorded.

Principle 8 – certification, registration, notification and ensuring effectiveness

8. Certification

- 8.1. Please specify what systems of certification, registration and notification apply when a CPA is granted, revoked, enters into force or terminates.
- 8.2. Is access to the registered information restricted? YES/NO. If YES, what are the restrictions?
- 8.3. How is the acceptance of the CPA by third parties, and the effectiveness of the CPA in dealings by the attorney with third parties, ensured?

Principle 9 – preservation of capacity

9. Effect upon capacity

- 9.1. Is it explicitly provided that the entry into force of a CPA shall not as such affect the legal capacity of the granter? YES/NO
- 9.2. After entry into force, may the granter still act where the granter has capacity? YES/NO
- 9.3. After entry into force, may the attorney act where the granter still has capacity? YES/NO
- 9.4. How are any contradictory acts of the granter and of the attorney resolved?

Principle 10 – role of the attorney

10. Role of the attorney

- 10.1. Is the attorney required to act in accordance with the CPA and in the interests of the granter? YES/NO. If YES, please state the principles or standards with which the attorney must comply.
- 10.2. What (if any) requirements are there upon the attorney to inform and consult the granter on an on-going basis?
- 10.3. To what extent (if any) is the attorney required to ascertain and take account of the past and present wishes and feelings of the granter?
- 10.4. Is the attorney explicitly required to give due respect to the rights, will and preferences of the granter (in terms of Article 12 of UN CRPD)? YES/NO.
- 10.5. Is an attorney acting in respect of the granter's economic and financial matters required, as far as possible, to keep those matters separate from the attorney's own?

- 10.6. Is the attorney required to keep sufficient records in order to demonstrate the proper exercise of the attorney's mandate?
- 10.7. May the attorney be reimbursed for out-of-pocket costs incurred in the performance of the attorney's duties? YES/NO.
- 10.8. May the attorney be paid for acting as attorney? YES/NO. If YES, in what circumstances and subject to what conditions may the attorney be paid?

Principle 11 – conflict of interest

11. Conflict of interest

- 11.1. Please specify what (if any) provisions exist to regulate conflicts between the granter's and the attorney's interests.

Principle 12 – supervision

12. Supervision

- 12.1. May the granter appoint a third party to supervise the attorney? YES/NO.
- 12.2. Is there a system of supervision under which a competent authority is empowered to investigate? YES/NO. If YES, specify the competent authority (or authorities).
- 12.3. When an attorney is not acting in accordance with the CPA or in the interests of the granter, does that competent authority have the power to intervene? YES/NO.
- 12.4. Does such intervention include terminating the CPA in part or in whole? YES/NO.
- 12.5. May the competent authority act on request? YES/NO.
- 12.6. May the competent authority act on its own motion? YES/NO.
- 12.7. (a) What is the threshold to permit the competent authority to interfere with an act or decision of the attorney? For example, must it be clear that the attorney has acted improperly, or may the competent authority intervene merely because it disagrees? (b) If the competent authority intervenes, must it comply with the same principles or standards as are applicable at Q10.1?

Principle 13 – termination

13. Termination

- 13.1. What are the circumstances under which, by law, a CPA ceases to have effect?
- 13.2. Is a competent authority required to consider which measures of protection might be taken, where a CPA ceases to have effect in part or in whole?

Principles 3–13: general

14. Powers of attorney – general

- 14.1. Are adequate legal and other services available to advise and assist granters? YES/NO. Are they available on a legally aided basis where necessary? YES/NO.
- 14.2. Are legal and other services available to advise and assist attorneys? YES/NO. Are they available on a legally aided basis where necessary? YES/NO.
- 14.3. What is the practical experience of the operation of Principles 3–13 inclusive, and in particular what (if any) particular issues have been identified?

Part III – advance directives

Principle 14 – content

15. Content of advance directives

- 15.1. If your answer to question 2.4 was YES, may advance directives apply:
 - 15.1.1. to health, welfare and other personal matters (if only some of these, specify which)?
 - 15.1.2. to economic and financial matters?
 - 15.1.3. to the choice of a guardian or equivalent, should one be appointed?

Principle 15 – effect

16. Effect of advance directives

- 16.1. To what extent (if any) do advance directives have binding effect?
- 16.2. Where advance directives do not have binding effect, must they be treated as statements of wishes and be given due respect as such?
- 16.3. What provisions apply to situations that arise in the event of a substantial change in circumstances following issue of an advance directive?

Principle 16 – form

17. Form of advance directives

- 17.1. Do advance directives, or certain types of advance directives, require to be made or recorded in writing if intended to have binding effect? YES/NO. If YES, but this applies only to certain types, please specify which types.
- 17.2. Are there different forms of advance directives (or equivalent) for different purposes, e.g. for mental health purposes and for other purposes?

- 17.3. What other provisions and mechanisms are required to ensure the validity and effectiveness of advance directives intended to have binding effect?

Principle 17 – revocation

18. Revocation of advance directives

- 18.1. Is an advance directive revocable at any time and without any formalities?

Principles 14-17 – general

19. Advance directives – general

- 19.1. Except insofar as answered above, what safeguards exist in relation to advance directives to ensure compliance with Article 12.4 of UN CRPD?
- 19.2. What is the general experience of operation of advance directives, and what (if any) particular issues have arisen?

The Recommendation – general

Note: The following questions are optional. They apply to all autonomous measures to which the Recommendation relates, that is to say to CPAs and to advance directives. They also apply to equivalents by any name. Where answers are different for different categories of autonomous measures, please specify. Answers may be included in respect of any other types of autonomous measure, beyond those to which the Recommendation relates.

20. Statistics

- 20.1. What statistics are available for uptake and use of autonomous measures over the last decade? If statistics are available, please provide them (if possible) on a year-by-year basis, specifying the date(s) of relevant year-end(s) for this purpose.
- 20.2. To permit accurate comparisons, please specify the event(s) to which the statistics relate. For example, if figures are provided for registrations of continuing powers of attorney, do these relate to registration upon grant, or registration upon entry into force, or both?

21. Cross-border issues

- 21.1. Has your state/law district experienced significant cross-border issues:
 - 21.1.1. between Contracting States under Hague 35;
 - 21.1.2. between a Contracting State on the one hand and a Non-Contracting State on the other;
 - 21.1.3. between Non-Contracting States?
- 21.2. Has your state/law district ratified Hague 35? If not, when is it expected that your state/law district will ratify Hague 35?
- 21.3. Would it be helpful to the citizens of your state/law district for Articles 22 and 23 of Hague 35 (or provisions equivalent to those of Article 22 and Article 23 of Hague 35) to apply to continuing powers of attorney, and (if so) to do so on a Europe-wide basis regardless of ratification of Hague 35?²
- 21.4. Would it be helpful to the citizens of your state/law district for standard Europe-wide certificates equivalent to those provided for in Article 38 of Hague 35 to have effect explicitly in relation to continuing powers of attorney on a Europe-wide basis?

22. Inter-relationship with other measures

- 22.1. What is the experience within your state/law district of the inter-relationship between (a) autonomous measures governed by the Recommendation and (b) the range of other measures for the protection of incapable adults?

² Article 22 of Hague 35 provides that measures to which it applies (which hitherto have been understood not to include powers of attorney) should be recognised by operation of law in other states, subject to certain specified grounds on which recognition may be refused. Article 23 provides that any interested party may request a decision from a state's competent authorities on the recognition or non-recognition of a measure taken in another Contracting State.

Short questionnaire

22.2. In particular:

- 22.2.1. Are there measures which to a degree serve an equivalent purpose to continuing powers of attorney, such as appointing a “person of trust” or (in accordance with Principle 14 or otherwise) deciding the choice of guardian (or equivalent) should a guardian ever be necessary?
- 22.2.2. Are there any automatic powers of *ex lege* representation applicable when capacity is impaired, and if so how do such provisions inter-relate with continuing powers of attorney, with advance directives, or with any other autonomous measures?

23. Learning from experience

- 23.1. Are there ways in which your state/law district believes that its own provisions regarding continuing powers of attorney and/or advance directives could be improved? If so, please specify.
- 23.2. Does your state/law district have (a) legal provisions, procedures and guidance, or practical experience, which would be likely to be helpful to other states/law districts; and does it have (b) knowledge or experience of problems or dangers which could helpfully be drawn to the attention of other states/law districts? In either case, please specify.
- 23.3. Was the Recommendation helpful in developing provision of continuing powers of attorney and advance directives, and in encouraging appropriate use of them?
- 23.4. Has the task of completing this questionnaire helped focus any needs within your state/law district for further action (including but not limited to legislative or regulatory action) to encourage citizens to grant continuing powers of attorney and (where appropriate) advance directives?