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CONSEIL DE L'EUROPE

ENABLING CITIZENS TO PLAN FOR INCAPACITY

A review of follow-up action taken by member states of the Council of Europe to Recommendation CM/Rec(2009)11 on principles concerning continuing powers of attorney and advance directives for incapacity

Report prepared by Mr Adrian D. Ward
Consultant (Scotland, UK)

on behalf of the European Committee on Legal Co-operation (CDCJ)

French version :

*Permettre aux citoyens de s'organiser en cas d'incapacité -
Examen des suites données par les Etats membres du Conseil de l'Europe
à la Recommandation CM/Rec(2009)11 sur les principes concernant les
procurations permanentes et les directives anticipées ayant trait à l'incapacité*

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The views expressed in this report are solely those of the author and do not necessarily reflect the views of the Council of Europe or its member states.

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THE AUTHOR

Adrian D Ward MBE LL.B was appointed consultant to conduct the review of implementation of Recommendation CM/Rec(2009)11. He is an international expert in adult incapacity law. During a lengthy career as a practising Scottish solicitor he acted in many leading cases in the field. He has been continuously involved in law reform processes. His books include the current standard Scottish texts on the subject. His international publications include *A New View*, published in six European languages. He was one of the editors and principal authors of *The International Protection of Adults* (Oxford University Press, 2015). Several of his articles have been published internationally. He has advised and given seminars in 18 countries, some of them regional events including further neighbouring countries. He has acted as an expert to Scottish Law Commission, World Health Organisation, and on projects funded by European Union. He has been founder chairman of both governmental and non-governmental organisations providing relevant services, and has been convener of the Mental Health and Disability Sub-Committee of the Law Society of Scotland since 1989. He has also assisted the establishment of service delivery projects outside the United Kingdom. He has received various awards for his work.

He was a member of the core research group of the Three Jurisdictions Project, which assessed compliance of the UK jurisdictions with the UN Convention on the Rights of Persons with Disabilities. He is a research affiliate with the Essex Autonomy Project, University of Essex, UK, and an expert adviser to the Centre for Mental Health and Capacity Law, Edinburgh Napier University, Scotland. During the preparation of this report he was consultant to TC Young LLP, Solicitors in Glasgow and Edinburgh, Scotland.

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EXECUTIVE SUMMARY

Across Europe, implementation of Recommendation CM/Rec(2009)11 is work-in-progress. Achievements to date by member states are commendable. Much has been done, and continues to be done, by member states towards promoting self-determination for their citizens, by providing and refining voluntary measures, and encouraging their use.

The picture across Europe is however that outcomes envisaged by the Recommendation are only at an early stage of development, leaving most member states still with much to be done. It is also a picture of diversity, ranging from unavailability of continuing powers of attorney (“CPAs”) and/or advance directives, through to relatively wide-ranging provision for CPAs, and at least some provision for advance directives. There is also diversity in that some member states have legislation in force and in full operation, some have passed legislation which is not yet in operation, some have proposals before their legislatures, and some have proposals which are not yet before their legislatures. These categories are reflected in Table A in Appendix IV. Where CPAs and advance directives are available to citizens, there is diversity among member states as to the length of time for which they have been available, and remarkable diversity in the extent to which – so far as statistics have been provided – they are used. Relevant statistics appear in Table C in Appendix IV.

As at 1 September 2017, nine member states currently had in force all of the areas of relevant provision of (1) CPAs to cover economic and financial matters, (2) CPAs to cover health, welfare and other personal matters, and (3) advance directives as defined in Principle 2.3 of the Recommendation. One more state will have all of those areas of provision when legislation already passed comes into force. Only one member state, when legislation already passed comes fully into force, will have implemented all of the Principles identified as fundamental in this report.

Completed questionnaires, in the form in either Appendix I or Appendix II to this report, were received from 26 member states. They contributed a wealth of information, which has been correlated and analysed in this report. These responses to questionnaires (“Responses”) reflect great care and enthusiasm with which member states have analysed and addressed relevant issues in recent years. In addition to Responses, one abbreviated form, and further information from two further member states, were received, contributing further information contained in Table A.

The Principles in the Recommendation remain highly relevant. In a time of dynamic development across our continent, guided by the common Principles in the Recommendation, this report seeks to provide a starting-point for further collaborative progress. Member states are encouraged to continue to share information, initiatives and experience. Member states are encouraged to contact the Secretariat to the Directorate General of Human Rights and Rule of Law (“DGI Secretariat”) with proposals for joint projects, conferences and the like.

As well as the general need to continue collaboratively the work of full implementation of the Recommendation, particularly significant conclusions emerging from this review include:

- Provision for advance directives, compared with CPAs, is under-developed. Nowhere is there clear legislative provision maximising the scope of self-determination by advance directives, so as, in conjunction with CPAs, to maximise the total range of provision for self-determination.
- There are insufficiently strong requirements to ensure that, in accordance with the UN Convention on the Rights of Persons with Disabilities, during operation of CPAs granters are informed and consulted, and their wishes and preferences identified and respected.
- Europe-wide, there is insufficient clarity as to how to balance expressions of self-determination when voluntary measures are created, with inconsistent expressions when they are subsequently in operation.
- Promotion of self-determination requires not only availability in legislation of voluntary measures, but availability of fully inclusive forms of document and procedures to establish them; proactive promotion of use of voluntary measures; and removal of barriers to their effective operation, both within member states and in cross-border situations. All of these aspects require to be developed

further in many member states.

This report contains six proposals designed to address the foregoing issues, and 30 suggestions (see paragraphs 217 – 247), four of them directed to both Council of Europe and member states, and the remainder to member states. Some of those suggestions are at least partly supplementary to the proposals. The majority are free-standing.

The proposals set out below, and the suggestions appearing later in this report, have been drawn by the consultant from the information provided in this report, and from matters within his own knowledge. These proposals and suggestions are solely those of the author and do not necessarily reflect the views of CDCJ, the Council of Europe or its member states.

The proposals are:

PROPOSAL 1:

(A) – That all member states should, on an ongoing basis, continue to review and develop provisions and practices to promote self-determination for capable adults in the event of future incapacity by means of CPAs and advance directives.

(B) – That in doing so, member states should have regard to such assistance as may be provided by the solutions to issues, and experience in practice, of other states as described in this report; should continue to share information, initiatives and experience; and should where appropriate, and in conjunction with Council of Europe, promote joint projects, conferences and the like.

PROPOSAL 2:

(A) – That member states consider, in particular, developing provision for advance directives, as a component in the overall promotion of self-determination in conjunction with CPAs, having regard to the full potential scope of application of advance directives to all health, welfare and other personal matters, to economic and financial matters, and to the choice of a guardian should one be appointed; and with appropriate distinction between the categories of instructions given and wishes made.

(B) – That Council of Europe should consider promoting research and consideration at a European level, and issue of guidance or recommendations, with a view to assisting member states in implementing Proposal 2 (A).

PROPOSAL 3:

That member states review laws relating to CPAs to ensure –

(A) That in relation to all acts and decisions in their role as attorneys, attorneys are required to take all practicable steps to ascertain the will and preferences of the granter, or failing that the best interpretation of the will and preferences of the granter.

(B) That in their acts and decisions on behalf of the granter attorneys are required to give effect to the will and preferences of the granter (or best interpretation thereof) except only where stringent criteria for doing otherwise, set forth in law, are satisfied.

(C) That the requirement to inform and consult the granter on an ongoing basis includes a requirement (i) to present to the granter, in the form that the granter is most likely to understand, the information necessary to enable the granter to formulate and communicate his or her will and preferences, (ii) to provide the granter with all reasonable support towards enabling the granter to formulate and communicate the granter's will and preferences, and (iii) to keep the granter informed of acts and decisions taken and implemented.

PROPOSAL 4:

That Council of Europe give consideration to promoting discussion and research with a view to clarifying matters relevant to situations of conflict between the terms of a continuing power of attorney or advance directive, on the one hand, and on the other the apparent will and preferences of the granter at time of exercise of powers conferred by a CPA, or of implementation of instructions in an advance directive, or when wishes expressed in an advance directive are to be followed.

PROPOSAL 5:

(A) – That member states facilitate and encourage the use of continuing powers of attorney and advance directives in forms helpful to people with disabilities, including in easy-read form, and the maximisation of support to enable people with disabilities to exercise their legal capacity by granting CPAs and issuing advance directives.

(B) – That member states facilitate and encourage the incorporation of supported decision-making and co-decision-making provisions in continuing powers of attorney.

(C) – That Council of Europe develops and issues guidance or recommendations to assist member states in implementing Proposals 5 (A) and (B).

PROPOSAL 6:

That member states should:

(A) – Educate citizens about CPAs and advance directives, and proactively promote the granting of CPAs and the issue of advance directives.

(B) – Assess whether financial savings achieved by higher levels of uptake of CPAs and advance directives would make it economically prudent to fund such public education and promotion, and/or to subsidise the costs of granting CPAs and issuing advance directives.

(C) – Review whether all available involuntary measures comply with international human rights requirements, and whether they avoid inhibiting uptake of voluntary measures.

(D) – Review and address any barriers, internally or in cross-border situations, to the full recognition and effectiveness in practice of CPAs and advance directives.

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DEFINITIONS AND ABBREVIATIONS

Definitions in quotation marks are taken from the Recommendation.

“the Recommendation”:	Recommendation CM/Rec(2009)11 of the Committee of Ministers of the Council of Europe to member states on principles concerning continuing powers of attorney and advance directives for incapacity
“the Explanatory Memorandum”:	The Explanatory Memorandum to the Recommendation
“Advance directives”:	“Instructions given or wishes made by a capable adult concerning issues that may arise in the event of his or her incapacity”
“Appendix”:	Unless otherwise indicated, an Appendix to this report
“Attorney”:	Person mandated to act on behalf of the granter
“CDCJ”:	European Committee on Legal Co-operation
“Chapter”:	Unless otherwise indicated, a chapter of this report
“CJ-FA”:	Committee of Experts on Family Law
“Continuing power of attorney” (“CPA”):	“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”
“Contracting states”:	States which have ratified Hague 35
“DGI”:	Directorate General of Human Rights and Rule of Law of Council of Europe
“ECHR”:	Convention for the Protection of Human Rights and Fundamental Freedoms (also known as “European Convention on Human Rights”)
“ <i>ex lege</i> representation”:	Arrangements under which powers, similar to some of those which might otherwise be derived from a CPA or guardianship order, are conferred by operation of law, usually upon a specified relative, without any procedure beyond establishment of relevant incapacity
“General powers of attorney”:	Powers of attorney/contracts of mandate not expressly designed to have continuing effect in the event of the granter’s relevant incapacity, which may or may not have such continuing effect
“Granter”:	“Person giving the continuing power of attorney”
“Hague 35”:	Convention on the International Protection of Adults (the Hague, 13 January 2000, 2600 UNTS 3)
“Member states”:	Except where otherwise indicated, member states of the Council of Europe
“NGO”:	Non-governmental organisation
“Non-contracting states”:	States which have not ratified Hague 35

“Paragraph”:	Unless otherwise indicated, a paragraph of this report
“Principle” (with initial capital):	Unless otherwise indicated, a Principle of the Recommendation
“Promote/promotion of relevant provision”:	In chapter V, means methods to encourage citizens to make full use of relevant provision
“Relevant provision”:	Provision in law designed to promote self-determination for capable adults by means of CPAs and advance directives
“Response”:	A reply to the questionnaires reproduced in Appendices I and II
“UK”:	United Kingdom of Great Britain and Northern Ireland
“UN Committee”:	United Nations Committee on the Rights of Persons with Disabilities
“UN CRPD”:	United Nations Convention on the Rights of Persons with Disabilities (New York, 13 December 2006, 2515 UNTS 3)
“Voluntary measures”:	Powers of attorney, advance directives, representation agreements, supported decision-making arrangements, co-decision-making arrangements, advocacy arrangements where the advocate is chosen by the person represented, and all other measures established by people to be supported by such measures themselves, as contrasted with involuntary measures imposed by a court, tribunal, authority or other mechanism, including by operation of law, rather than by the people subject to such measures themselves (see also “Voluntary measures” in paragraph 13, and the explanation of the adoption of that term in Appendix V)
“WPOA” (Scotland):	Welfare power of attorney, Scotland (in paragraphs 159 – 161)
“1996 Act” (Ireland):	Powers of Attorney Act 1996, Ireland
“2015 Act” (Ireland):	Assisted Decision-Making (Capacity) Act 2015, Ireland

CHAPTER I: INTRODUCTION

The background to the Recommendation

1. Council of Europe Recommendation No. R (99) 4 of the Committee of Ministers to member states on principles concerning the legal protection of incapable adults¹ was and remains the “parent” Recommendation by the Committee of Ministers in relation to its subject-matter. Principle 2.7 of that Recommendation reads: “*Consideration should be given to the need to provide for, and regulate, legal arrangements which a person who is still capable can take to provide for any subsequent incapacity.*” Principle 9.1 of that Recommendation reads: “*In establishing or implementing a measure of protection for an incapable adult the past and present wishes and feelings of the adult should be ascertained so far as possible, and should be taken into account and given due respect.*”

2. At its 36th meeting in November 2006, the Council’s Committee of Experts on Family Law (CJ-FA) decided to set up a Working Party on Incapable Adults (CJ-FA-GT2) to examine the usefulness of drafting a convention based on Recommendation No. R (99) 4. However, at its first meeting in September 2007, that Working Party concluded that little value would be added by preparing new binding rules, as they would have almost the same content as Recommendation No. R (99) 4, the continuing strength, relevance and usefulness of which the Working Party commended. In light of the Working Party’s conclusions, and following endorsement of those views by the CJ-FA at its 37th meeting held from 28 to 30 November 2007, and by the Bureau of the European Committee on Legal Co-operation (CDCJ) at its 80th meeting from 13 to 14 December 2007, the Committee of Ministers of the Council of Europe adopted new terms of reference for the CJ-FA for the period January 2008 – June 2009, which included, *inter alia*, the task of drawing up a new Recommendation dealing with planning for future incapacity, by means of continuing powers of attorney and advance directives.

3. The composition of the Working Party was adjusted and, under the chairmanship of Mr Kees Blankman (Netherlands) and with Mr Svend Danielsen (Denmark) as consultant, during 2008 it drafted the text of what became Council of Europe Recommendation CM/Rec(2009)11 of the Committee of Ministers to member states on principles concerning powers of attorney and advance directives for incapacity² (“the Recommendation” in this report).

4. The background to Recommendations No. R (99) 4 and CM/Rec(2009)11 is described more fully in the Explanatory Memorandum to Recommendation CM/Rec(2009)11.

The Recommendation and Explanatory Memorandum

5. The Recommendation and the Explanatory Memorandum were duly published by Council of Europe and remain available on the Council’s website³. They should be referred to and read by all who are interested in the subject-matter of this report. The Recitals with which the Recommendation commences are not reproduced in this report, but they are significant and relevant. All of the Principles of Recommendation CM/Rec(2009)11 are reproduced in this report, but not as continuous text. The definitions in Principle 2 are reproduced, each in its alphabetical position, in the “Definitions and abbreviations” section (pages 11-12). All other Principles appear, cumulatively, within the text of Chapters II and III.

Reasons for the review and the wider context

6. The significance of Recommendation CM/Rec(2009)11 is demonstrated by the Recitals to the Recommendation and the accompanying Explanatory Memorandum. CPAs strongly support the principles of autonomy and self-determination. They do so by permitting people to establish for themselves who should act and make decisions for them, with what powers and subject to what controls, in the event that their own ability to act and decide in any particular matters becomes

¹ Adopted by the Committee of Ministers on 23 February 1999 at the 660th meeting of the Ministers’ Deputies.

² Adopted by the Committee of Ministers on 9 December 2009 at the 1073rd meeting of the Ministers’ Deputies.

³ <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168070965f>

impaired. They also allow people with limited abilities likewise to determine who should act and decide for them in matters beyond their capabilities, if it is nevertheless within their capabilities to make such determination⁴. Advance directives permit people to make, for future application when they are no longer capable, decisions which would be competent if they were still capable. Both forms of instrument accordingly help to reduce the discriminatory disadvantages otherwise likely to result from impairment of capabilities.

7. Recommendation CM/Rec(2009)11 was pioneering in that, when it was issued, development and use of such voluntary measures across Europe had been uneven and variable. CPAs were unknown in some jurisdictions. In many others, legislative provision was new and practical experience scant. There were, as is narrated in the Recommendation, considerable disparities among member states. It was however common experience that where such measures were available, they were used by ever-larger numbers of people attracted by the opportunity to put in place their own preferred arrangements in such matters. Where there was substantial and increasing use of such voluntary measures, there was also growing awareness of dangers and other issues.

8. In 2014 the author, in his capacity as a former member of the Working Party which drafted Recommendation CM/Rec(2009)11, was invited to submit to CDCJ proposals for a review of implementation of Recommendation CM/Rec(2009)11. The proposals which he submitted in August 2014 included the points in the two preceding paragraphs. The proposals suggested that, against that background, a review of implementation of Recommendation CM/Rec(2009)11 within the following year or two would be both relevant and useful, to establish the extent to which the aspirations of the Recommendation have been realised, including aspirations to enhance the effective application of principles of autonomy, self-determination and non-discrimination for the practical benefit of the citizens of member states. It was also suggested that Recommendation CM/Rec(2009)11 appeared to have had some success in stimulating interest in and development of voluntary measures, and in stimulating consideration of related issues. A significant advantage of a review would be (a) objectively to verify, analyse and quantify that impression, (b) to help to coordinate and further stimulate such trends, and (c) to share the benefit of experience since 2009, of lessons learned in individual member states, and of lessons which might be learned collectively.

9. Also in 2014, the Committee of Ministers of the Council of Europe issued to member states Recommendation CM/Rec(2014)2 on the promotion of human rights of older persons. Recommendation CM/Rec(2014)2 covers issues of non-discrimination, protection from violence and abuse, social protection and employment, a range of principles relating to health and care, and the administration of justice. In particular it stresses the importance of personal dignity, self-determination, autonomy, the right to receive appropriate support, and the right to make provision for future incapability. Principle 9 of Recommendation CM/Rec(2014)2 declares that: *“Older persons have the right to respect for their inherent dignity. They are entitled to lead their lives independently, in a self-determined and autonomous manner. This encompasses, inter alia, the taking of independent decisions with regard to all issues which concern them, including those regarding their property, income, finances, place of residence, health, medical treatment or care, as well as funeral arrangements. Any limitations should be proportionate to the specific situation, and provided with appropriate and effective safeguards to prevent abuse and discrimination.”* Principle 13 declares that: *“Older persons have the right to receive appropriate support in taking their decisions and exercising their legal capacity when they feel the need for it, including by appointing a trusted third party of their own choice to help with their decisions. This appointed party should support the older person on his or her request and in conformity with his or her will and preferences.”* Principle 14 declares that: *“Member States should provide for legislation which allows older persons to regulate their affairs in the event that they are unable to express their instructions at a later stage.”*

10. In addition, in 2014 the United Nations Committee on the Rights of Persons with Disabilities issued its General Comment No 1 (2014) entitled “Article 12: Equal Recognition before the Law”. The General Comment strongly advocated a complete shift in emphasis from involuntary measures towards voluntary measures. Indeed, in paragraph 7 of the General Comment, the UN Committee wrote that: *“Historically, persons with disabilities have been denied their right to legal capacity in many areas in a discriminatory manner under substitute decision-making regimes such as*

⁴ See paragraph 15 of the Explanatory Memorandum.

guardianship, conservatorship and mental health laws that permit forced treatment. These practices must be abolished in order to ensure that full legal capacity is restored to persons with disabilities on an equal basis with others.” Article 12 of UN CRPD is reproduced in Appendix III to this report. Issues and debate have arisen as to the status and substance of views expressed by the UN Committee⁵. Such issues and debate are of limited relevance to this report, as they contain little focus upon CPAs and advance directives. See however paragraphs 198 – 206 below.

11. In the wider context, the proposals submitted by the author to CDCJ recommended discussion with the Permanent Bureau of the Hague Conference on Private International Law about the possibility of a parallel review of Hague 35. Experience had demonstrated particular – and unfortunate – difficulties in the cross-border use of CPAs, which Council of Europe would have an obvious interest in trying to resolve. It was noted that all of the states which had so far ratified Hague 35 were European states.

12. At its 96th meeting in September 2014, the Bureau of CDCJ considered the proposal that it had received from the author and agreed to recommend to the ensuing plenary meeting of CDCJ that a review of implementation of Recommendation CM/Rec(2009)11 should proceed. That recommendation was accepted at the 89th plenary meeting of CDCJ in October 2014. The Committee of Ministers subsequently agreed to inclusion of the review of implementation of Recommendation CM/Rec(2009)11 as part of the activities of CDCJ in 2016-17.

“Voluntary measures”

13. The UN Committee on the Rights of Persons with Disabilities, drawing upon the UN Convention on the Rights of Persons with Disabilities, is increasingly stimulating the use of what in this report are termed “voluntary measures”. As explained in the definitions and abbreviations section of this report, that term covers CPAs and advance directives. It covers the creation by people with intellectual disabilities of CPAs to take effect immediately, and of advance directives, where necessary with support. It also covers other emerging methods, such as those described in the definition of “voluntary measures” on page 12. The alternative to such voluntary measures is the imposition by a court or other authority, or by operation of law, of measures which are likely at least to some extent to be involuntary⁶. The use of involuntary measures is strongly discouraged by the UN Committee. The underlying theme of this report is the Europe-wide promotion of self-determination for all citizens of our continent, by encouraging continuous progress in the provision and use of voluntary measures. For further explanation of the evolution of terminology, using the terms “anticipatory measures”, then “autonomous measures”, and now “voluntary measures”, see Appendix V to this report.

Methodology

14. In January 2016, the author was commissioned by CDCJ to review the follow-up given by Council of Europe member states to Recommendation CM/Rec(2009)11. It was provided that the review should describe the action taken by member states and assess the extent to which it represents an effective application of the Principles in Recommendation CM/Rec(2009)11, particularly in respect of autonomy, self-determination and non-discrimination, as well as its practical benefit for individuals. It was provided that the review should also include proposals for relevant follow-up action by the Council or its member states; and that the author should, as appropriate, reference the work carried out in the area of the review by the European Union and international organisations, including the Hague Conference on Private International Law. The contract entered with the author in

⁵ See for example the decision of the German Federal Constitutional Court of 26 July 2016 (*1 BvL 8/15*). A statement dated 24 August 2017 by the Council of Europe’s Commissioner for Human Rights is more closely aligned to the views of the UN Committee, but does not mention the Recommendation nor comments on its subject-matter. The Recommendation represents, and remains, the position of the Committee of Ministers in relation to the subject-matter of the Recommendation.

⁶ Characterisation of measures as “involuntary” requires however to be modified increasingly by aspects of voluntariness, such as the provision in Germany that a “*Betreuer*” (guardian) may not be imposed contrary to the “free will” of the adult; provisions for choice of persons to be guardian (see Principle 14 defining the scope of advance directives); and provisions in various jurisdictions (e.g. Germany and UK – Scotland) under which people may initiate proceedings for appointment of guardians to themselves.

January 2016 was in respect of the calendar year 2016. A subsequent similar contract was entered with the author for the calendar year 2017.

15. As well as working in collaboration with the DGI Secretariat, the author worked closely with the Bureau of CDCJ and received much helpful guidance from both the DGI Secretariat and the Bureau, as well as much practical assistance from the DGI Secretariat. It was agreed that the author should assemble the information required from member states in order to prepare his report by preparing questionnaires to be issued to member states. The terms of the questionnaires were agreed in consultation with the DGI Secretariat and the Bureau of CDCJ. A “full questionnaire” was prepared in the terms reproduced in Appendix II to this report. It was recognised that completion of the full questionnaire would place significant demands upon the resources available for that purpose within member states. The shorter version of the questionnaire, which is reproduced in Appendix I to this report, was also prepared. Both questionnaires were issued to each member state. A deadline of 30 September 2016 was agreed for receipt by the DGI Secretariat of Responses to the questionnaires. In fact, Responses⁷ continued to be received after that date, the last Response being received (by the author and by the DGI Secretariat) on 16 January 2017. Upon examination of the Responses, the author had some queries for some member states, which were put to those member states by the DGI Secretariat, their Responses being passed to the author. The author collated Responses received to both questionnaires in working documents, and then proceeded to write relevant parts of an initial draft of this report from those working documents.

16. The author also referenced the work of the European Union and international organisations, in accordance with his remit, and the results are included where appropriate in this report. He records in particular his gratitude to the Permanent Bureau of the Hague Conference for generous co-operation and assistance in addressing matters of mutual concern, and providing valuable information and comment, reflected in paragraphs 122 – 124 of this report.

17. An incomplete preliminary draft report was considered by the Bureau of CDCJ at its 101st meeting on 9 – 10 March 2017. A first draft of the report, in both French and English, was sent to all member states on 2 June 2017, with a request that they submit their comments to the DGI Secretariat by 30 June 2017. Also on 2 June 2017, an “abbreviated form” was sent to those member states in respect of which Responses had not been received. The abbreviated form was designed to elicit the basic information required for completion of Table A in Appendix IV. At a late stage of finalisation of this report information was received from Italy regarding legislation passed on 14 December 2017. That information has been incorporated. Member states were requested to respond with their comments on the first draft report, and (where applicable) to return abbreviated forms duly completed, by 30 June 2017. The author had some further queries for some member states arising from those Responses, again put to those member states by the DGI Secretariat, and duly answered. All comments and information thus provided were taken into account in preparing the final draft of the report, which was sent to all member states on 27 October 2017 and was considered at the 92nd plenary meeting of CDCJ on 22-24 November 2017. Some member states made comments on the final draft before, during and after that meeting. That meeting agreed to allow a period until 1 December 2017 for such further comment. This report in fact incorporates information received by the DGI Secretariat up to 18 December 2017. That meeting also agreed some adjustments to the final draft; allowed the author until 31 December 2017 to incorporate those adjustments and the further information received, and to carry out further editing⁸; and, subject to the author completing his remit in those ways, accepted and adopted this report, and authorised publication. Regarding the proposals and suggestions in Chapter V, adoption was subject to the clarification which appears **in bold** in the first paragraph of that Chapter V (paragraph 191).

Responses to questionnaires

18. Tables A and B in Appendix IV record the Responses received; whether these were in the form of Responses to the full questionnaire, to the short questionnaire, or to the abbreviated form; the language of the Response; the languages in which the Recommendation is available; and a primary

⁷ See definitions on page 12.

⁸ Material which entered the public domain in Ireland on 8 December 2017 has been added by footnote No 111 (paragraph 166). Account has been taken of legislation passed in Italy on 18 December 2017.

categorisation of compliance with Principle 1.1: “*States should promote self-determination for capable adults in the event of their future incapacity, by means of continuing powers of attorney and advance directives*”. In the case of CPAs, the categorisations in Principle 3 are also applied in Table A, except as regards excluded matters, which are dealt with in paragraphs 68 and 69⁹. **It is important to note that all statements of numbers and identities of member states¹⁰ to whom anything in this report applies relate only to the states which have responded regarding that particular matter.**

Structure of the report

19. For the purposes of this report, some of the Principles of the Recommendation have been classed as fundamental. These are Principles written in directive language. Thus, Principle 5.1 recommends that CPAs shall be in writing. If the law of a member state requires CPAs to be in writing, then in that respect that member state has implemented the Recommendation. In the absence of such a requirement, a member state has not in that respect implemented the Recommendation. Information from member states directly relevant to the implementation of fundamental Principles is presented in Chapter II. It is presented in relation to individual Principles, parts of Principles, or groups of Principles, which are classed as fundamental, and which appear in boxes.

20. An example of a Principle which is not fundamental is Principle 5.3, which recommends that member states should consider what other provisions and mechanisms may be required to ensure the validity of a CPA document. One could of course say that Principle 5.3 (and similarly worded Principles) have been implemented if a member state has given the matter consideration, even though – having done that – it takes no action. In practice, what is of interest is whether (in the case of Principle 5.3) such other provisions and mechanisms have been introduced, and – if so – what they are. Chapter III contains, in similar manner to that adopted in Chapter II, information from member states relevant to action taken in relation to all Principles other than the fundamental Principles, and various issues related to each of those non-fundamental Principles.

21. The primary purpose of the Recommendation, as stated in Principle 1.1, is to “*promote self-determination for capable adults in the event of their future incapacity*”. In order to consider the extent to which, across Europe, that primary purpose has been realised, it was necessary to review and assess further matters, beyond the review and assessment by reference to each of the individual Principles of the Recommendation in Chapters II and III. Some of such further matters were addressed in both the short and full questionnaires, others in the full questionnaire only. Matters addressed in both questionnaires are covered in Part A of Chapter IV. Matters addressed only in the full questionnaire are covered in Parts B and C. Part B deals solely with the important topic of proactive promotion. Part C deals with all other matters addressed in the full questionnaire only.

22. Chapter V sets out the author’s proposals and suggestions. Appendix I reproduces the short questionnaire. Appendix II reproduces the full questionnaire. Appendix III reproduces selective provisions of relevant international instruments, which were also reproduced within the questionnaires. Appendix IV contains tables and statistics. Table A summarises, state by state, the relevant measures which are available in each, or which are at some stage of the process towards becoming available. Table B lists the languages in which the Recommendation is available. Table C reproduces statistics provided by each member state, and Table D sets out the dates when relevant statutory provisions entered into force.

⁹ Principle 3 provides that: “States should consider whether it should be possible for a continuing power of attorney to cover economic and financial matters, as well as health, welfare and other personal matters, and whether some particular matters should be excluded”.

¹⁰ The United Kingdom was the only member state from which Responses were received from two distinct jurisdictional areas. In matters relevant to this report, the common law based system in England & Wales, and the civil law based system in Scotland, are substantially different and merit separate treatment. They are separately identified as “UK – England & Wales” and “UK – Scotland”, but the United Kingdom is one member state and general references, such as here, to member states treat it accordingly. All unqualified references to member states include, in the case of the United Kingdom, both of those jurisdictional areas.

Further relevant activities during consultancy

23. In addition to his principal activities in discharge of his remit summarised in paragraphs 14-17, the author had various further opportunities during the period of his consultancy to augment the information and experience from which this report has been drawn, to interact with relevant officials in member states and others, and to publicise and promote relevant aspects of the work of Council of Europe, including in particular in relation to the Recommendation and this review of implementation of the Recommendation.

24. The author had opportunities for this at various meetings, conferences and other events. Those of an international nature included addressing the British Institute of International and Comparative Law in London on 11 February 2016¹¹; attending a meeting of the Legal Affairs Committee of the European Parliament in Brussels on 14 February 2016; addressing a meeting of the UN Committee on the Rights of Persons with Disabilities in Geneva on 31 March 2016 (followed by various further individual discussions with members of that Committee); attending the final event of the Three Jurisdictions Project at the Institute of Government in London on 12 May 2016; participating in review of the Yokohama Declaration in Gottingen, 11-12 August 2016; keynote addresses at the European Conference on the Elderly (Amsterdam, 12 September 2016), the World Adult Guardianship Congress (Erkner, near Berlin, 14 September 2016¹²) and, on behalf of the Council of Europe, Alzheimer Europe Conference in Copenhagen (31 October – 2 November 2016); as guest lecturer, Kiel University “Kiel Week”, 21 June 2017; and as keynote speaker at the Conference of the International Society for Family Law (Amsterdam, 26-28 July 2017)¹³.

Disclaimer and effective dates

25. The information in this report is limited to its purpose of presenting a comparative review of implementation of the Recommendation, and presenting the information from which the proposals and suggestions in Chapter V are drawn. The sources of information collated by the author are the Responses and the other sources identified. Where member states have been grouped together as having provided similar Responses on any particular point, those Responses have been judged to be sufficiently similar to warrant such grouping for the purposes of this report, but it should be assumed that, even within such groupings, the provisions of law and requirements of practice are varied. This report is not intended to provide, and does not provide, legal advice which may be relied on as to requirements of law and practice in any member state. Moreover, except for occasional direct quotations from Responses, this report does not reproduce verbatim the information provided by member states. Rather, it draws upon that information as modulated by the author for the purposes of providing a comparative narrative. Regarding the status of the proposals and suggestions in Chapter V, see paragraph 191.

26. Unlike a legal textbook, this report does not specify a date at which relevant law is stated. In the case of Responses, the position may be assumed (but is not guaranteed) to state the position as at the date when each Response was prepared, prior to submission across the range of dates indicated in paragraph 15, subject to any relevant further information and updating during the periods narrated in paragraph 17. Such updating related to particular matters, and in no case was intended to be comprehensive. Some items of further information received by the DGI Secretariat up to 18 December 2017 have been incorporated. It is indicative of the extent to which the subject-matter of this report continues to develop that in the short period from 1 June to 1 September 2017 three statutory regimes of CPAs¹⁴ entered into force in Europe. It is also worthy of note that although Italy did not submit a questionnaire or abbreviated form, Italy reports that registration making provision for CPAs in health matters has been approved by the Lower Chamber of its legislature. Not incorporated are all ongoing processes of review in various member states which may in due course lead to alterations to existing relevant provision.

¹¹ Also attended by the First Secretary of the Permanent Bureau of the Hague Conference, with whom further discussion continued as recorded in paragraphs 16 and 122 - 124.

¹² Also conducting a session for judges and other decision-makers at the Congress on 15 September 2016.

¹³ Also moderating a session at that conference at which various international researchers made presentations on matters relevant to CPAs.

¹⁴ In Denmark, Republic of Moldova and Sweden.

CHAPTER II: REVIEW AND COMMENTARY – FUNDAMENTAL PRINCIPLES

Introduction

27. This chapter reports, and comments upon, the Responses from member states to questions in the questionnaires which were relevant to an assessment of implementation of Principles, and specific paragraphs of Principles, classed as “fundamental” for the purposes of this review. For explanation of the term “fundamental Principles”, see paragraph 19.

Promotion of self-determination

Principle 1 – Promotion of self-determination

1. States should promote self-determination for capable adults in the event of their future incapacity, by means of continuing powers of attorney and advance directives.

2. In accordance with the principles of self-determination and subsidiarity, states should consider giving those methods priority over other measures of protection.

Principle 3 – Content (Powers of Attorney)

States should consider whether it should be possible for a continuing power of attorney to cover economic and financial matters, as well as health, welfare and other personal matters, and whether some particular matters should be excluded.

Principle 14 – Content (Advance Directives)

Advance directives may apply to health, welfare and other personal matters, to economic and financial matters, and to the choice of a guardian, should one be appointed.

28. These Principles are taken together. At first sight, and on a narrow reading, only Principle 1.1 might be viewed as “fundamental”. Even more narrowly, it might be thought that implementation would be achieved by a member state even if very limited forms of CPAs, and of advance directives, were statutorily available. However, the two-part structure of Principle 1.1 is significant. The recommendation to member states is that they should promote self-determination for capable adults in the event of their future incapacity. The means by which they should do so is by CPAs and advance directives. The operative verb in this opening Principle is “promote”. That means more than making available by legislative provision. This review of implementation of the Recommendation must consider not only the availability of CPAs and advance directives in member states, but the extent of the effective self-determination which they provide, and the extent to which their use has been successfully promoted. To that end, this section draws together Principles 1, 3 and 14; and it reviews the information drawn from the primary classification of Responses shown in Table A in Appendix IV, the statistics in Table C of Appendix IV, and certain information from Responses not collated elsewhere. Proactive promotion to the general public is addressed in Part B of Chapter IV.

29. The broad picture provided by the above sources is one of diversity. There is diversity ranging from unavailability of CPAs and/or advance directives, through to relatively wide-ranging provision for CPAs and (subject to the reservation noted in paragraph 35 below) reasonably extensive provision for advance directives. There is diversity in the sense that some member states have legislation in force and in full operation, some have passed legislation which is not yet in operation, some have proposals before their legislatures, and some have proposals which are not yet before their legislatures. These categories are reflected in Table A in Appendix IV. In two member states¹⁵ there is no legislation providing expressly for CPAs, but CPAs have nevertheless been made available within the framework of existing law.

¹⁵ The Netherlands and Turkey.

30. A small number of member states¹⁶ are in course of introducing statutory regimes for provision of CPAs, but may have existing, largely unregulated, situations where general powers of attorney continue in force after impairment of the granter's relevant capabilities. Where a Response has ignored the existence of such powers of attorney which are unregulated but which might nevertheless be classified as CPAs, and has described a prospective statutory scheme only, this report does likewise.

31. There is of course diversity in the nature of the provisions which may or may not qualify for entry in the boxes provided in Table A. Even adopting a teleological approach, in some cases categorisation has to be a matter of judgement, and it is acknowledged that judgements in such matters can themselves vary. Thus a judgement has been made, which could be disagreed, that instructions given to the attorney in a CPA should not be classed as an advance directive. Accordingly, states such as the Netherlands, where only such instructions may be given, and advance directives as a separate instrument are not available, have not been classed as having advance directives.

32. The categorisation of the provision available in Romania has in particular been a matter of judgement, greatly assisted by the full and careful explanation in the Response from Romania. On the face of it, all that is available in Romania is the possibility to nominate guardians and administrators, both of whom may be appointed only by a court. As a general rule, Romanian legislation does not recognise contractual representation by means of a CPA. A general power of attorney ceases in the event of the granter becoming incapacitated, with the limited exception that when the purpose of the document is the conclusion of successive acts in the context of an ongoing activity, that activity may continue to completion. However, the nomination of a guardian or administrator (though not always binding upon the court) may be made either by unilateral document or by bilateral agreement with the nominee(s). Moreover, in the case of administrators, the bilateral document may state the powers to be conferred. For the purposes of this report, accordingly, such a nomination in Romania is treated as marginally within the definition of CPA in Principle 2, the role of the court being within the scope of Principles 4.3 and 7. Romania should however be taken as exemplifying the minimum end of the range of self-determination achievable, in terms of Principle 1.1, by a measure categorisable as a CPA¹⁷. The principle of self-determination is to some extent limited in any situation where entry into force of a CPA may be denied by a court or other authority.

33. Where CPAs and advance directives are available to citizens, there is diversity among member states as to the length of time for which they have been available, and remarkable diversity in the extent to which – so far as statistics have been provided – they are used. Relevant statistics appear in Table C in Appendix IV¹⁸.

34. CPAs in both economic and financial matters, and in health, welfare and other personal matters, are currently available in 16 member states¹⁹. Both forms are available in Switzerland, except that in relation to personal matters there is a limitation to healthcare decisions, though a supporter may be appointed for other welfare matters. Conversely, in two member states (Ireland and Sweden) healthcare matters are excluded and only welfare and other personal matters may be covered, but in Ireland provision has been enacted, though is not yet in force, to cover healthcare matters as well. Legislation which would provide for CPAs to cover economic and financial matters, and also health, welfare and other personal matters, is proposed but not yet before the legislature in two member states²⁰. CPAs in economic and financial matters only are available in two member states²¹. CPAs in healthcare matters only are available in one member state²² and have been

¹⁶ E.g. Denmark prior to its new provisions coming into force on 1 September 2017.

¹⁷ This is ultimately a rather arbitrary limit which could be said to be of little more than terminological significance: see for example the position under advance directives in Lithuania described in paragraph 190.

¹⁸ Dates when some regimes came into force are given in Table D.

¹⁹ Armenia, Austria, Cyprus, Czech Republic, Denmark, Finland, France, Germany, Latvia, Republic of Moldova, Netherlands, Norway, Sweden, Turkey and UK – both England & Wales and Scotland.

²⁰ Andorra and Croatia.

²¹ Belgium and Romania (though in Romania powers may to a very limited extent be available in health, welfare and other personal matters where such matters require to be assessed in conjunction with economic matters).

legislated for in one member state²³. CPAs are neither available nor proposed in five member states²⁴.

35. Turning to advance directives, it is necessary to make a preliminary point. A reasonable interpretation of Principle 1.1 is that member states should maximise the overall provision for self-determination by a combination of two methods, namely by bilateral arrangements under which an attorney is appointed, and by unilateral arrangements under which an advance directive is issued. The instructions and wishes in a CPA are directed to the attorney, who is responsible for implementing them. The instructions and wishes in an advance directive apply directly as “the voice of the granter”, without being directed through another party such as an attorney. In the case of advance directives, the extent of true self-determination is limited in the Recommendation in that the definition of “advance directives” in Principle 2.3 encompasses both instructions given and wishes made. To express wishes is clearly a significantly less effective form of self-determination than giving instructions. However, even setting aside that distinction, Responses do not reveal a picture of availability in any member states of clear legislative provision maximising the scope of self-determination by advance directives, so as, in conjunction with CPAs, to maximise the total range of provision for self-determination. Subject to that qualification, advance directives within the definition in Principle 2.3 are available in 14 member states²⁵. They are available for the limited purpose of choosing a guardian in advance in two member states²⁶, and for making a prior statement regarding arrangements if conservatorship should be established in one member state²⁷. Legislation providing for advance directives has been passed but is not yet in force in one member state²⁸, and has been proposed but is not yet before the legislature in one member state²⁹. Advance directives are not available in 10 member states³⁰.

36. As to whether CPAs and advance directives are given priority over other methods of protection (Principle 1.2), they are not given priority in four member states³¹. Priority for CPAs and advance directives is given by implication rather than expressly, or is “usually given”, in five member states: in the Czech Republic, under the principle requiring the least restrictive measure; in Norway, in consequence of the principle of self-determination, and the requirement that guardianship should only be established where it is deemed necessary to protect the granter (and where CPAs are given express priority over *ex lege* representation); in Romania, by application of the principle of self-determination; and UK – Scotland, where again this is a consequence of general principles in the legislation and an exclusion of guardianship where other measures suffice (though in the case of advance directives in mental health legislation, these are truly advance statements, being subject to the professional giving care or treatment at the time considering that the terms of the document would not at that time be in the individual’s best interests). In the Netherlands, where there is no express statutory scheme, CPAs are in practice “usually given” priority. In 14 member states³², CPAs and advance directives are given priority.

37. As well as recommending that member states should consider the scope of CPAs, Principle 3 also recommends that they consider whether some particular matters should be excluded. That

²² Slovenia.

²³ Italy (legislation passed on 14 December 2017).

²⁴ Bulgaria, Hungary, Lithuania, Montenegro and Ukraine.

²⁵ Austria, Belgium, Czech Republic, Denmark, Finland, France, Germany, Lithuania, Republic of Moldova, Slovenia, Spain, Switzerland, Turkey and UK – both England & Wales and Scotland.

²⁶ Croatia and Romania.

²⁷ Hungary.

²⁸ Ireland.

²⁹ Andorra.

³⁰ Armenia, Bulgaria, Cyprus, Hungary, Latvia, Montenegro, Netherlands, Norway, Sweden and Ukraine. The Response from the Netherlands suggested that advance directives are available there, but in fact this referred to instructions to an attorney within a CPA document, not to any unilateral arrangement within the definition of advance directives.

³¹ Bulgaria, Cyprus (where CPAs do not apply where there is specific provision in another form), Sweden (where a guardian or administrator, if appointed, will supersede an attorney) and Turkey (where guardians or trustees are normally appointed upon loss of capacity, and may cancel a CPA).

³² Armenia, Austria, Belgium, Croatia, Denmark, Finland, France, Germany, Ireland (prospectively as regards advance directives), Latvia, Lithuania (which has advance directives only, not CPAs), Slovenia, Switzerland and UK – England & Wales.

aspect of Principle 3 is not fundamental, as defined in paragraph 19, and is accordingly dealt with in Chapter III.

38. Statistical information provided in Responses appears in Table C in Appendix IV. The information in Table C regarding advance directives covers only two member states³³. This, coupled with the previous observation about the diverse and often limited coverage of advance directives, means that further comment would be speculative only.

39. The statistics regarding CPAs are subject to the obvious qualification that they do not compare like with like. Procedural requirements and systems vary, therefore the information captured to produce the statistics also varies. The length of time for which CPAs have been available is a further variant. Nevertheless, two conclusions may reasonably be drawn from these statistics. The first is that where CPAs are available, their uptake, year-on-year, will generally increase, sometimes dramatically. The second is that there are major variations among member states in the amount of uptake. At extremes, one would contrast the substantial total uptake in Germany, coupled with significantly high uptake (in relation to population) in Austria and UK – both England & Wales and Scotland, with relatively very much smaller figures in Czech Republic, Finland, France and Latvia. In France, the figures quoted are likely to have been affected by the availability of the *fiducie* (or trust), not included in the statistics, but there would nevertheless appear to be *prima facie* cause for investigation into the reasons for these variations. Advertising campaigns to promote the granting of CPAs, such as the project (in UK - Scotland) described in paragraphs 157 – 161, can be demonstrated to increase uptake, but that particular project only began after Scotland had established a history of substantial year-on-year uptake and, in comparative terms, a high level of uptake.

Continuing powers of attorney

Principle 4 – Appointment of attorney

1. **The granter may appoint as attorney any person whom he or she considers to be appropriate.**
2. **The granter may appoint more than one attorney and may appoint them to act jointly, concurrently, separately, or as substitutes.**

40. In relation to Principle 4.1, there are relatively limited exceptions to the picture from member states who have responded and, where CPAs are available, of a general position that granters may appoint as attorneys any persons whom they consider to be appropriate. In Austria, an attorney must not be closely connected to a hospital or institution where the granter lives and is cared for. In Belgium, excluded from appointment are (a) persons subject to a judicial or extrajudicial protection order, (b) legal persons other than private foundations either responsible only for protected persons or serving the public interest and having a statutory committee responsible for administering the affairs of persons to be protected, (c) the managers or staff members of the institution where the protected person resides, (d) persons not permitted by law freely to dispose of their own property, and (e) persons who, under certain provisions of child and youth protection legislation, have had their parental rights entirely removed. In Denmark, an attorney must be aged not less than 18, not under guardianship or being under a CPA which is in force. In Finland and Sweden, only physical persons may be appointed. In France, excluded from appointment are (a) persons who themselves benefit from legal protection measures, (b) persons subject to certain relevant prohibitions by decision of a criminal court, (c) in the case of granters who are their own patients, members of the medical and pharmaceutical professions, and medical auxiliaries, and (d) in relation to granters who have created a trust, a trustee under that trust. In Ireland, excluded are (a) persons convicted of an offence in relation to the person or property of the granter, or subject to a safety or barring order in relation to the granter, (b) various categories of persons, and their relatives, connected to centres or facilities where the granter resides, and (c) persons convicted of various specified offences. In Ireland, also excluded

³³ Croatia and Lithuania.

in relation to economic and financial matters only are (d) undischarged bankrupts and similar, and (e) persons subject to various specified declarations and disqualifications. In Norway, an attorney must be aged not less than 18 and must not be under guardianship. In Romania, any fully capacitated natural person may be nominated, though the final decision as to appointment is by the court. In Slovenia, medical representatives must be aged not less than 18 and themselves able to make decisions. In Switzerland, the appointment is reviewed upon incapacitation. In UK – both England & Wales and Scotland, only individuals may be appointed to act in health, welfare and other personal matters; and bankrupts may not act in property and financial matters. Eight states³⁴ responded affirmatively without restrictions. No member states have reported a general prohibition upon attorneys being appointed to act on a remunerated basis. In Germany, only an attorney who is a lawyer may be remunerated: all other attorneys may only act gratuitously.

41. In relation to Principle 4.2, joint, concurrent, dual and substitute appointments are generally available except for some limitations in some member states. Finland permits substitutes but not joint appointments. In France, there are no limitations where the CPA document is notarised, but the alternative standard form of document does not provide for substitutes, though a joint appointment is available and could achieve substantially the same outcome. In Romania, where more than one person is nominated, a dual appointment of spouses is possible, but otherwise the court will only appoint one person³⁵. Apart from these, unqualified affirmative Responses were received from 15 member states³⁶.

Principle 5 – Form

- 1. A continuing power of attorney shall be in writing.**
- 2. Except in states where such is the general rule, the document shall explicitly state that it shall enter into force or remain in force in the event of the granter's incapacity.**

42. Regarding Principle 5.1, in two member states – Germany and Turkey – the CPA does not strictly speaking require to be granted in writing. However, in Germany a written document is recommended “for the sake of clarity and evidence”, and in Turkey for practical purposes a written document is advisable. All other member states³⁷ require the CPA document to be in writing, but there are various further requirements. For example, in France there are the alternatives of a notarised document or private agreement; in Latvia the document must be notarised; and in Switzerland it must be holograph or publicly authenticated. Requirements for certification are dealt with under Principle 8.

43. Regarding Principle 5.2, explicit statements are not required in Denmark, Germany, Latvia, Netherlands and Turkey. In Germany, the position can be regulated by a separate mandate: see comment in the next paragraph. Although such an explicit statement is not required in Latvia, the notary must explain the effect of the document to the granter. In Turkey, there are complexities because CPAs are possible by application of the principles of general law, but there is no explicit legislative provision for them. Likewise in Netherlands, any such explicit statement is a matter for the granter. This question was not answered in respect of two member states³⁸. Explicit statements are required in the remaining member states which answered this question³⁹. A precise form of words is

³⁴ Armenia, Czech Republic, Germany, Latvia, Republic of Moldova (in draft law), Netherlands and Norway. And also Belarus.

³⁵ See explanation regarding Romania in paragraph 32.

³⁶ Armenia, Austria, Belgium, Czech Republic, Denmark, Germany, Ireland, Latvia, Republic of Moldova, Netherlands, Norway, Slovenia, Sweden, Switzerland and UK – both England & Wales and Scotland.

³⁷ Armenia, Austria, Belgium, Czech Republic, Denmark, Finland, France, Ireland, Latvia, Netherlands, Norway, Romania, Slovenia, Sweden, Switzerland and UK – both England & Wales and Scotland.

³⁸ Bulgaria and France.

³⁹ Armenia, Austria, Belgium, Czech Republic, Finland, Ireland, Norway, Slovenia, Sweden, Switzerland and UK – both England & Wales and Scotland.

not specified for all member states⁴⁰. The limited scope of the document in Romania renders such a statement unnecessary⁴¹.

44. Germany reported a solution, worthy of note, to an issue which arises more widely. If a CPA document specifies that the attorney may only act during periods of relevant incapacity, there is a risk that the attorney will be repeatedly challenged by third parties to demonstrate relevant incapacity. To an extent, that can be met by registration procedures in states where a CPA may only be registered and operated upon loss of relevant capacity⁴² or where a granter may opt for the CPA to be registrable and operable only upon production of evidence of loss of relevant capacity to the authority responsible for registration⁴³. Even those procedures do not necessarily provide protection against the possibility of recovery of relevant capacity. The solution recommended in Germany is that the CPA document should be silent as to whether it is only operable during relevant incapacity, so that third parties may safely accept the attorney's authority without enquiry as to whether the granter currently has or does not have relevant capacity, but that the question of when the attorney may and may not act be a matter governed solely as a question between granter and attorney in a separate contract of mandate. Thus, if the separate contract of mandate provides that the attorney may only act during relevant incapacity, breach of that provision will not invalidate the attorney's actions in relation to third parties, though it may provide grounds for redress against the attorney.

Principle 6 – Revocation

A capable granter shall have the possibility to revoke the continuing power of attorney at any time, Principle 5, paragraph 3, is applicable.

45. According to the draft law for the Republic of Moldova, it is proposed that even while the granter is capable, the CPA may be revoked only by court decision. In Slovenia, even a capable granter cannot revoke if that would result in serious damage to the granter's health. In two member states where the CPA only comes into force upon deemed incapacity, or upon registration triggered by deemed incapacity, the question of capability to revoke is fixed by the coming into force, following which the granter cannot revoke⁴⁴. Similarly in Romania, revocation by the granter is possible only up to the point where the court makes an appointment in pursuance of the granter's nomination⁴⁵. In all other member states which responded on this topic, capable granters have an unqualified right to revoke⁴⁶. In Armenia, there is a supplementary provision that purported renunciation of the right to revoke is null and void.

Principle 7 – Entry into force

1. States should regulate the manner of entry into force of the continuing power of attorney in the event of the granter's incapacity.

46. In Belgium, there are no specific provisions regarding entry into force; and in Turkey, entry into force is not regulated. Where CPAs can enter into force prior to loss of capacity, the entry into force is generally regulated by the CPA document rather than by specific legislation. Thus, in Germany a CPA enters into force once it has been granted, unless the granter stipulates otherwise. In Romania, entry into force is not dependent upon incapacity but in all cases does require a court decision⁴⁷. In

⁴⁰ Examples of member states where the wording must be clear, but not in a specific form, are Norway and UK – both England & Wales and Scotland.

⁴¹ See paragraph 32.

⁴² E.g. UK – England & Wales.

⁴³ E.g. UK – Scotland.

⁴⁴ France and Ireland.

⁴⁵ See paragraph 32.

⁴⁶ Those member states are Armenia, Austria, Belgium, Cyprus, Czech Republic, Denmark, Finland, Germany, Latvia, Netherlands, Norway, Sweden, Switzerland, Turkey and UK – both England & Wales and Scotland.

⁴⁷ See paragraph 32.

UK – Scotland, there is no formal procedure for entry into force unless this is required in terms of the CPA document. Scottish property and financial CPAs may enter into force at any time, whereas CPAs in respect of health, welfare and other personal matters are only operable during relevant incapacity. On determination of incapacity, see paragraph 186.

47. In the other countries which responded⁴⁸, entry into force is regulated by various prescribed methods. In UK – England & Wales, there is a dual system under which CPAs in relation to property and financial matters enter into force upon registration, regardless of loss of relevant capacity. CPAs in relation to health, welfare and other personal matters require both registration and loss of relevant capacity to enter into force.

Principle 9 – Preservation of capacity

The entry into force of a continuing power of attorney shall not as such affect the legal capacity of the granter.

48. In relatively few member states⁴⁹ does relevant legislation explicitly state that entry into force of a CPA shall not as such affect the granter's legal capacity. In many member states⁵⁰, the preservation of capacity is not explicit but is the consequence of general law, or applicable principles. In Austria, an explicit provision about retention of capacity is proposed for envisaged revision of the legislation. In Latvia, the matter is dealt with conversely, by explicit provision that a person's legal capacity may be restricted only by a court decision.

49. There is however a difficulty in interpreting Principle 9, which has largely developed since the Recommendation was issued⁵¹. The term "capacity" (in both official languages, French and English) has a range of meanings, and to an extent the range of meanings in current use has been expanded in recent years. The most recent example of a wide range of meaning in an international document is to be found in General Comment No 1 (2014) by the United Nations Committee on the Rights of Persons with Disabilities entitled "Article 12: Equal Recognition before the Law". This wider definition includes the whole of a person's rights, status and personality in law. In member states where it is well understood that all persons, however disabled, retain their rights, status and personality in law, and where the purpose of legislation specifically relating to persons with intellectual disabilities is to ensure the protection and due exercise of their rights, "capacity" may be understood as relating only to the ability to act for themselves, without special support, in safeguarding and exercising their rights⁵². The broad range of meanings of "capacity" now current in the official languages of the Council of Europe is further complicated when applied in the contexts of various legal systems which use those languages, and the potential complications multiply further when this key term is translated into the many other official languages of member states, and applied in that greater variety of legal contexts. In consequence, of all of the Principles in the Recommendation, implementation has become more difficult to evaluate, and in particular to evaluate comparatively, in relation to Principle 9 than in relation to any other Principle.

⁴⁸ Armenia, Austria, Cyprus, Czech Republic, Denmark, Finland, France, Ireland, Latvia, Norway, Slovenia, Sweden and Switzerland.

⁴⁹ Austria (with effect from entry into force on 1 July 2018), Cyprus, Republic of Moldova, Romania and Slovenia.

⁵⁰ Czech Republic, Denmark, Germany, Norway and Sweden.

⁵¹ Though this matter was addressed in paragraphs 39 and 40 of the Explanatory Memorandum to the Recommendation.

⁵² Thus, for example in UK – Scotland's relevant legislation, the converse term "incapacity" is expressly defined as the noun deriving from "incapable", and thus carries no implication of meaning "incapacitated".

Principle 10 – Role of the attorney

- 1. The attorney acts in accordance with the continuing power of attorney and in the interests of the granter.**
- 2. The attorney, as far as possible, informs and consults the granter on an ongoing basis. The attorney, as far as possible, ascertains and takes account of the past and present wishes and feelings of the granter and gives them due respect.**
- 3. The granter’s economic and financial matters are, as far as possible, kept separate from the attorney’s own.**
- 4. The attorney keeps sufficient records in order to demonstrate the proper exercise of his or her mandate.**

Principle 10.1 (requirement to act in accordance with the CPA and in the interests of the granter)

50. In Germany, the attorney must comply with the standards set out in the CPA document; failing which the attorney must take account of the past and present wishes and perceptions of the granter; and failing that, the appointment must be interpreted on the basis that the attorney must not act contrary to the objective interests of the granter. If necessary, the standards required of a *Betreuer* (guardian) are likely to influence the standards expected of an attorney, because CPAs are designed to render unnecessary the appointment of a *Betreuer*.

51. In Switzerland, the attorney can obtain authority to act beyond the scope of the CPA by applying to the Adult Protection Authority. If it is found to be necessary for the Adult Protection Authority to supplement the provisions of an incomplete CPA, the Authority must give priority to the will of the person concerned.

52. In the circumstances explained in paragraph 32, this provision does not apply to Romania, and questions in relation to Principle 10.2 have not been answered in respect of Romania.

53. Having regard to the particular status of CPAs in the Netherlands and Turkey (see paragraph 29), the Response in respect of the Netherlands is that the requirements of Principle 10.1 are “usually guaranteed”, and the Response in respect of Turkey is that in practical effect those requirements are fulfilled.

54. All other member states⁵³ responded with an unqualified affirmative in respect of Principle 10.1.

Principle 10.2 (a) (requirements to inform and consult the granter on an ongoing basis)

55. There is a diversity of positions, to a significant extent arising from the diversity of legislative contexts in which this requirement falls to be considered. There is a broad division in emphasis between member states where matters such as the obligations of the attorney are prescribed in fixed provision by law, and the extent to which such matters are determined by the granter in the CPA document. There are no legal obligations to inform or consult the granter in Austria, Cyprus, Latvia and the draft law for the Republic of Moldova. In the Netherlands, the matter is governed entirely by the CPA document. In Austria, the attorney must inform the granter about proposed decisions and allow the granter an opportunity to comment. The views and wishes of the granter must be taken into account. There are duties to inform but not to consult in France, and duties to consult but not explicitly to inform in Finland, Norway, Turkey and UK – Scotland, though in each of these cases meaningful consultation will require the provision of some information. However, in those cases this is likely to precede a particular act or decision, there being no explicit statutory obligation to inform about acts and decisions once they have been taken and implemented. Similarly, generalised

⁵³ Armenia, Austria, Belgium, Cyprus, Czech Republic, Denmark, Finland, France, Ireland, Latvia, Norway, Slovenia, Sweden and UK – both England & Wales and Scotland.

obligations to involve the granter imply at least significant elements of consultation and information: this applies in member states such as Armenia, Denmark and Ireland. In Germany, duties to inform and consult are established primarily by separate agreement between granter and attorney (see the explanation in paragraph 44): if that agreement is interpreted as amounting to a mandate, statutory provisions concerning mandates apply under which the attorney must provide to the granter required reports; information as to the status of a transaction; and thereafter to account for it; and in all cases an attorney must consult the granter if the attorney proposes to act in a manner contrary to the explicit wishes of the granter. In Sweden, the attorney is required to consult and inform the granter only in “important issues”. In Switzerland, the attorney must provide details of management activities at all times, which implies an obligation to inform rather than to consult. In Slovenia, there are obligations to inform and consult only if (and to the extent that) this is provided for in the CPA document. In Belgium, there are clear obligations both to consult and to inform. The same appears to apply to UK – England & Wales, where it is stated that informing and consulting the granter is merely “to be expected”.

Principle 10.2 (b) (requirement to ascertain and take account of the granter’s past and present wishes and feelings)

56. This requirement is fulfilled explicitly, or by requirements which can reasonably be equated to fulfilment, in Czech Republic, Ireland, Norway, Switzerland and UK – both England & Wales and Scotland, and in Sweden in relation to “important issues”. In Germany, the attorney must ascertain and take account of the past and present wishes and perceptions of the granter, and comply with the granter’s wishes, but only to the extent that this is not inconsistent with the granter’s best interests, and only to the extent that the attorney can be expected to do so. The latter qualification is reflected elsewhere, for example in the provision in UK – Scotland, in relation to attorneys but not guardians or other appointees, that attorneys are not obliged to do anything “if doing it would, in relation to its value or utility, be unduly burdensome or expensive”. In Austria, wishes expressed by the granter when incapable must be taken into account, if they are not contrary to the welfare of the granter, but past competent instructions override current expressions of wishes and feelings.

57. There are no specific such obligations in Denmark or France, but in Denmark there is a requirement that the attorney’s decisions should accord with what the granter would have decided if the granter had been capable; and in France the effect of an attorney’s general obligations is that the attorney would require to take the past and present wishes of the granter into account as far as possible. The matter is not covered in the proposals for the Republic of Moldova. Except for requirements described in the immediately preceding section, there are no requirements to this effect in Armenia, Belgium, Cyprus, Finland, Netherlands and Turkey.

Principle 10.3 (requirement to keep granter’s economic and financial matters separate from the attorney’s own)

58. This requirement is not relevant to member states such as Slovenia, where CPAs may be granted in relation to health, welfare and other personal matters (or some of them) but not economic and financial matters; nor to the Netherlands, where such matters are governed solely by the CPA document. In some member states⁵⁴, there is no explicit requirement, but it is suggested that this may be necessary to comply with general duties⁵⁵. In the remaining member states which have responded⁵⁶, there is an explicit requirement for such separation.

Principle 10.4 (requirement to keep sufficient records)

59. There is no such requirement under the proposed law for the Republic of Moldova, and in Turkey there is no such requirement unless it is contained in the CPA document. Such a requirement may be inferred from regulatory or other requirements in respect of some member states⁵⁷. In the

⁵⁴ Austria, Germany and Latvia.

⁵⁵ In Austria, the requirement is to allow the correctness and proper exercise of the attorney’s duties to be ascertained.

⁵⁶ Armenia, Belgium, Cyprus, Czech Republic, Denmark, Finland, France, Ireland, Republic of Moldova (in draft law), Norway, Sweden, Switzerland, Turkey and UK – Scotland.

⁵⁷ Armenia, Austria, Germany and Latvia.

Czech Republic, attorneys must prepare an inventory and prepare annual accounts, but are not subject to a requirement to keep records in relation to welfare matters. In Denmark, there is only a requirement to keep records if that should be imposed in the individual case by the State Administration, though the Minister of Justice is empowered to make regulations about record keeping. There is a requirement in accordance with Principle 10.4 in the remaining member states⁵⁸ which have responded.

60. In some Responses there are indications of a lack of understanding that the requirement to keep records applies to exercise of powers in relation to health, welfare and other personal matters, as well as in relation to economic and financial matters.

Principle 12 – Supervision

1. The granter may appoint a third party to supervise the attorney.

61. Principle 12.1 is not implemented in respect of nine member states⁵⁹. Denmark reported that the granter may opt to appoint any natural person as supervisor. In France, in the case of a notarised deed, the attorney must report to the notary in question, but under a private agreement any person or entity other than the relevant judge or court official may be appointed to supervise. The appointment is only effective if the supervisor accepts appointment. A supervisory appointment is not required, but not prohibited, in the Czech Republic and in UK – England & Wales, where a third party supervisor may be appointed only to the limited extent that the granter may require financial accounts to be submitted to a named third party. Similarly, in Latvia there are no relevant provisions, but there is no reason why a supervisor should not be appointed (though in any event the Public Prosecutor does have a supervisory role). Austria, Ireland and UK – Scotland all replied “no” to this question. In remaining member states which responded in relation to Principle 12.1⁶⁰, a third party supervisor may be appointed.

Advance directives

Principle 15 – Effect

- 1. States should decide to what extent advance directives should have binding effect. Advance directives which do not have binding effect should be treated as statements of wishes to be given due respect.**
- 2. States should address the issue of situations that arise in the event of a substantial change in circumstances.**

62. This section should be read in conjunction with the comments regarding advance directives in paragraph 35. There is much diversity of provision, ranging from none⁶¹ through those which should (in the words of Principle 15.1) be treated as statements of wishes only⁶², to many where there is binding quality subject to provision for exceptions, all with varying areas of operation and frequently limited to healthcare matters only, and two member states where advance directives in relation to healthcare matters are either binding but with narrow effect, or straightforwardly binding. In Germany, advance directives in relation to health matters have binding effect in respect that a *Betreuer*

⁵⁸ Belgium, Cyprus, Finland, France, Ireland, Norway, Sweden, Switzerland and UK – Scotland.

⁵⁹ Armenia, Austria, Belgium, Czech Republic, Republic of Moldova (draft law), Montenegro (proposed law), Romania, Slovenia and UK – Scotland.

⁶⁰ Cyprus, Finland, Germany, Ireland, Latvia, Netherlands, Norway, Sweden, Switzerland and Turkey.

⁶¹ Armenia, Bulgaria, Cyprus, Hungary, Montenegro, Norway, Sweden, Ukraine.

⁶² Denmark and Finland.

(guardian) or attorney is legally obliged to give effect to them; whereas in Ireland advance directives in the form of advance refusals of treatment are stated to be unqualifiedly legally binding⁶³.

63. The extent to which advance directives have binding effect would appear to be widest in Germany but, except in relation to healthcare matters as noted above, there is a general exception which is understood to mean that the wishes of the granter must be taken into account “as long as their fulfilment does not endanger higher-ranking rights of the person concerned or worsen his or her entire situation in life”. The range of exceptions in other member states from the binding quality of advance directives in relation to healthcare includes:

Czech Republic: “The quality of healthcare has already progressed in the meantime, or respecting it would actively cause death or endanger another person, or if the person providing treatment was unaware of the advance directive when commencing treatment, and that to cease the treatment after having commenced it would cause death”.

France: A life-threatening emergency where acting contrary to the advance directive is permitted “for the time required to make a full assessment of the situation”, or where compliance would be “patently inappropriate or incompatible with the medical situation and following a collective procedure”.

Lithuania: Where following the advance directive would be “manifestly incompatible with the best interests of the person” if that is established by a court.

Slovenia: The advance directive is only binding if not deemed to prevent serious risk to the granter’s health.

Switzerland (where advance directives can also apply to choice of guardian or equivalent): Advance directives are binding “unless they violate legal provisions or there are serious doubts that they are based on the patient’s free will or that they correspond to his/her presumed will in a given situation”.

UK – Scotland: Are binding at common law if issued in contemplation of a situation that has arisen and are not vitiated by change of circumstances. Under statutory provisions related to mental health treatment, the advance directive should be followed unless the professional giving care or treatment does not consider the document to be in the individual’s best interests.

64. In Austria and Croatia, advance directives may only be granted in relation to healthcare treatment, and in Croatia only in relation to specified healthcare matters, where they would appear to be binding if certain relatively complex procedures and formalities are followed. In Austria, the binding effect ceases after five years. In Croatia, advance directives may also be issued in relation to choice of guardian, where they are effective “where there are no obstacles prescribed by legislation to making the appointment accordingly”. In Romania, advance directives may only be issued in relation to appointment of guardians. The court “usually” appoints the nominee, but is not bound to do so.

Principle 17 – Revocation

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

65. In all member states which have advance directives and which responded, advance directives are revocable at any time. In some⁶⁴, there is an explicit requirement that the granter be capable when revoking. Where the advance directive relates to appointment of a guardian (see

⁶³ As would appear to be the general rule everywhere, a request for any specific treatment is not legally binding, and that is the position in Ireland, though such request must be taken into consideration.

⁶⁴ Belgium, Czech Republic (except where the procedure to enter the advance directive in the health notes has been followed, when the same procedure applies to revocation), Ireland, Switzerland, UK – England & Wales and (by virtue of certification requirements) Scotland. In Germany, the standard of capability is described as not full capability, but rather “ability to consent” (“einwilligungsfähig”).

paragraph 35), revocation is not possible after appointment of the guardian, or incapacitation leading to such appointment.

66. In many member states, however, advance directives cannot be revoked without any formalities. Formalities range through requirements for the revocation to be in writing (Ireland and Slovenia); in writing and witnessed (UK – Scotland); notarised (Montenegro proposal); and notarised by the same notary (or the same consular officer) who approved the advance directive (Lithuania). Only in France is it explicitly stated that no formalities are required for revocation.

CHAPTER III: REVIEW AND COMMENTARY – THE OTHER PRINCIPLES AND RELATED ISSUES

Introduction

67. This chapter reports, and comments upon, the Responses from member states to questions in the questionnaires relevant to, and arising from, all Principles other than the “fundamental Principles” addressed in Chapter II. These categories are explained in paragraphs 19 and 20.

Continuing powers of attorney (Part II)

Principle 3 – Content

States should consider whether it should be possible for a continuing power of attorney to cover economic and financial matters, as well as health, welfare and other personal matters, **and whether some particular matters should be excluded.**

68. For the purposes of this review, the options for CPAs of covering economic and financial matters, or health, welfare and other personal matters, or both categories, are treated as fundamental (as defined in paragraph 19). To that extent, Principle 3 is reviewed in Chapter II. That leaves the final element of Principle 3 – “whether some particular matters should be excluded” – for review here.

69. Austria and the Netherlands reported that there are no such exclusions. Germany, while reporting no specific exclusions, reported that certain legal acts require by law to be carried out in person and thus cannot be dealt with by an attorney or other representative, examples being marrying and making a Will. France, Germany and Turkey took this opportunity to mention matters for which certain special requirements apply. In France, there are no exclusions for acts in relation to financial and property matters under mandates drawn up and certified by a notary, but under those mandates the authorisation of a guardianship judge is required for an act of disposition free of charge, donation, division by amicable agreement, unconditional acceptance of a succession, waiver of a succession or legacy, and similar matters. Under French mandates established by private agreement, authorisation of a guardianship judge is required for acts of disposition which affect the grantor’s property, at present or in future, entering into or cancelling a lease of the grantor’s accommodation, consent to a mortgage, donation, court proceedings relating to any non-property right, change of family property system, and similar matters. In Germany, matters such as involuntary detention and coercive medical treatment can be dealt with under a CPA, but in addition require the court’s approval. In Turkey, there are no exclusions, but explicit authorisation is required in the CPA document for the following: to commence a court case, to settle a court case, to initiate an arbitration, to petition for bankruptcy (or for a bankruptcy adjournment or concordat), to commit to an exchange arrangement, to make a gift, to be a guarantor, to transfer real estate, or to restrict a right. The legislation in Ireland takes the converse route of listing all of the matters in respect of which powers may be conferred, rather than specifying exclusions: anything not in the list of included matters is thus excluded. Similarly, in Slovenia powers are limited to healthcare matters only, all other powers thus being excluded. In relation to Romania, see paragraph 32. In Romania, certain transactions such as disposing of property may require special authorisation. Twelve other member states reported express exclusions in terms of Principle 3, as follows:

Andorra: (a) A representative may not contract with himself personally, or with another representative “except for the case of commercial representation”. (b) Transactions which in essence may be entered into only in person, as well as other specified transactions, may not be entered through a representative.

Belgium: All health, welfare and other personal matters are excluded.

Cyprus: CPA provisions do not apply to persons who are not able to manage their property or regulate their affairs and for whom there is specific provision in another form (so that Cyprus

cannot be said to have implemented the requirement of Principle 1.2 that CPAs should be given priority over other methods of protection).

Czech Republic: Healthcare matters which may only be dealt with by advance directive are excluded, though the Civil Code does not expressly prohibit instructions about healthcare issues.

Denmark: Certain matters are excluded by other legislation. Examples are marriage formation and dissolution, and being moved into a nursing home against the granter's wishes.

Finland: Excluded are consent to marriage or adoption, acknowledgement of paternity or consent to an acknowledgement of paternity, making or revoking a Will, or representing the granter "in other matters of a comparably personal and individual nature", and entering contracts of "a comparably personal and individual nature".

France: Attorneys may not gratuitously alienate assets or rights (e.g. by cancellation of debt, free waiver of an acquired right, release from a mortgage or security without payment, free constitution of rights, etc.) except for "specifically foreseen" donations. Acts which "involve obtaining the granter's strictly personal consent" are excluded: examples are registration of birth of a child, recognition of a child, acts requiring parental authority, choosing or changing a child's name, consent to one's own adoption or that of a child. For acts which do not entail strictly personal consent, granters may take decisions themselves if capable, and any provision to the contrary is ineffective. There are various other exclusions.

Latvia: "Matters of highly personal nature regulated by specific legal provisions" are excluded.

Norway: Excluded are voting, marrying, acknowledging paternity, making or revoking a Will, consenting to organ donation or the use of coercion, or other matters classified as "especially personal", unless specifically provided by law. However, a CPA may authorise granting or refusing consent to donation of organs, cells and tissue. A CPA may cover financial and personal matters, but in matters of health and social care not beyond the role otherwise assigned to close relatives under other laws and provisions.

Slovenia: All matters other than healthcare matters are excluded.

Switzerland: Excluded are unlawful, impossible or immoral actions; and "absolute" strictly personal rights such as entering marriage, making a Will, or signing an inheritance agreement as testator.

UK – England & Wales: Decisions about deprivation of liberty are reserved to a specific procedure for that purpose. Advance directives take precedence if covering the same matters as CPAs. Attorneys cannot refuse basic nursing care and sustenance given in a natural way, nor refuse life-saving treatment unless clearly authorised to do so. Attorneys cannot demand specific forms of treatment. However that, in common perhaps with some of the foregoing exclusions, although mentioned explicitly in the Response from England & Wales, probably applies more widely.

UK – Scotland: Excluded are placement in hospital for treatment of mental disorder against the granter's will, certain excepted medical treatments, certain actions under Anatomy and Human Tissue Acts.

Principle 4 – Appointment of attorney

3. States may consider such restrictions as are deemed necessary for the protection of the granter.

70. Some Responses interpreted the wording of Principle 4.3 widely, and referred to information given in relation to other Principles. However, for the purposes of this review, Principle 4.3 has been

interpreted narrowly as encompassing restrictions in relation to who may be appointed, and may act, as attorney. The only restrictions reported in Responses which apply at time of granting and certification of the CPA document relate to:

Finland: Where the attorney must be a natural person, and the CPA must not be certified if there is a justified reason to suspect that the attorney is unfit or unsuitable to act as an attorney.

Romania: Where the exclusions noted below apply to both designation and appointment.

UK – England & Wales: Where persons under 18 are excluded from appointment, trust corporations may be appointed but only as financial attorneys, and persons who are bankrupt or subject to debt relief orders may not be appointed as financial attorneys.

71. The other relevant restrictions upon who may be attorney take effect at time of entry into force, rather than original granting of the CPA document. In Cyprus, the court may issue, amend or revoke any orders to protect the granter when capable, and this is a wide-ranging power which could disqualify the attorney from acting. In the Czech Republic, protections are available if there is a change of circumstances since the CPA was granted and it is shown that in consequence the granter would not have granted it at all, or would have granted it in different terms. In these circumstances the court may amend or cancel the CPA, if the granter would otherwise be “at risk of serious harm”. Before making any such decision, the court must make whatever effort is necessary to obtain the opinion of the granter, using any method of communication of the granter’s choice.

72. In Denmark, if the State Administration has any reservations regarding entry into force of the CPA, it must not allow the CPA to enter into force, unless the reservation concerns only specific powers or a specific attorney, in which case the State Administration can allow the CPA to enter into force partially. In France, there are restrictions upon who may carry out the duties of an attorney, rather than upon who may be appointed. Persons prohibited from carrying out the duties of an attorney are those who are themselves under legal protection measures, and also persons who have been prohibited from carrying out guardianship duties by a decision of a criminal court disqualifying them from exercising civic, civil and family rights. In Romania, the following may be neither designated nor appointed: minors, persons deprived of legal capacity or under guardianship, persons deprived of parental rights or declared incompetent to act as a guardian, persons otherwise subject to restriction or deprivation of relevant rights, insolvent persons, persons prevented by conflict of interest⁶⁵, and persons whose appointment “could harm the interest of the protected person”. Nine other member states⁶⁶ reported either that there were no restrictions in terms of Principle 4.3, or none other than those reported in relation to other Principles.

Principle 5 – Form

3. States should consider what other provisions and mechanisms may be required to ensure the validity of the document.

Issue: Is the validity of the CPA checked at time of granting as to (a) capacity of the granter, (b) freedom from undue influence, (c) any other factors?

73. How are these matters assessed? A feature in several member states is a requirement for notarisation, certification by a practising lawyer, or witnessing. The obligations of each, and thus the degrees of protection afforded, vary. Notarisation or certification by a practising lawyer, or involvement of a practising lawyer, generally involves either explicit requirements that elements (a), (b) and (c) be checked, or reliance upon this being done as a matter of professional duty⁶⁷. In Belgium, notarisation is required where powers in relation to immoveable property are included, and is

⁶⁵ It is notable that a conflict of interest results in disqualification, rather than that the conflict be suitably managed. See paragraphs 83 and 232.

⁶⁶ Belgium, Germany, Ireland, Latvia, Montenegro, Netherlands, Norway, Sweden and Switzerland.

⁶⁷ That applies to Andorra, Austria, Denmark, France, Latvia, Netherlands, Romania and UK – Scotland (where the certifier may also be a medical practitioner).

optional in other cases; with similar safeguards in the process of notarisation. In Germany, there is no mandatory requirement for the capacity of the granter to be checked at time of granting of the CPA, but notarisation is recommended because the notary must verify the capacity of the granter within the limits of what is possible and reasonable, and if the granter does not have relevant capacity the notary must refuse to notarise the document. In UK – England & Wales, certification is by a Certificate Provider, who must read through the document with the granter, in the absence of the proposed attorney. In a number of states the document must be witnessed and the witnesses are required to confirm the capability of the granter⁶⁸; or to record a note indicating that the granter understood the significance of the document, and to record other circumstances which they deem to have an effect on the validity of the document⁶⁹; or to take a careful note of factors relevant to the validity of the document⁷⁰. Alternatively, the witnesses have the option to add a written statement to the document⁷¹. In Slovenia, these factors are checked at time of entry in the Official Register. Four member states⁷² reported that these matters are not checked at time of granting, with the risk that a power of attorney may be found to be invalid only when it is about to be brought into force following loss of relevant capacity⁷³ or when some dispute subsequently arises. In these cases it will be too late to review matters in order to establish whether a valid CPA could after all be granted.

Are there other provisions and mechanisms designed to ensure the validity of the document?

74. Such further provisions and mechanisms vary, and are best stated individually, state by state. Matters of registration considered in relation to Principle 8 are not dealt with here. In Belgium, a district judge may rule on the validity of execution either *ex proprio motu*, or at the instance of the granter, the attorney, an interested party or the Crown Prosecutor. In Finland, the witnesses referred to in the preceding section must provide contact details and must state that they were simultaneously present when the document was executed. In France, whether the CPA is established by notarial document, or by a private agreement countersigned by a lawyer, the notary or lawyer must ensure “absolute official validity”. In Germany, as indicated in paragraph 73 above, certification, notarisation or similar is in general not mandatory but is recommended. The granter can opt to have the CPA notarised; or can have the granter’s signature certified by a notary or by the *Betreuungsbehörde* (which is a public authority whose duties include consultation regarding CPAs – see also paragraphs 94 and 95). In both cases this can assist in ensuring validity in relation to third parties. In UK – Scotland, the Public Guardian checks formal validity when the document is presented for registration.

75. The most extensive and robust arrangements to ensure validity reported in Responses are those applicable in Ireland. Ireland requires, at time of execution, a statement by the granter that he/she understands the implications of creating a CPA, intends it to be effective at any subsequent time when the granter lacks capacity, and is aware of his/her right to revoke. Legal practitioners must provide a statement that the granter understands the implications; that there is no reason to believe that it is granted as a result of fraud, undue pressure or coercion; and also that the granter is aware that he/she may vary or revoke prior to registration. There is a further requirement for a medical practitioner’s statement that the granter had capacity to understand the implications of creating the document. It is intended that in future a further statement by a healthcare professional will be required as to capacity to understand the implications of creating the power.

76. An additional safeguard in UK – England & Wales is that the granter can name up to five people who must be notified upon receipt of an application to register the CPA, and who may raise objections to registration before it occurs.

Related issue: Is the form and content of a CPA fixed by law, or is there freedom of form and content subject only to compliance with specified requirements?

⁶⁸ Czech Republic.

⁶⁹ Finland.

⁷⁰ Finland, where the same requirements apply to making a Will.

⁷¹ Norway, where there are limitations as to who may be the witnesses.

⁷² Cyprus, Switzerland and Turkey; and Belgium except where the document is notarised as described above.

⁷³ For example in Switzerland, where the Adult Protection Authority checks these factors at that point.

77. Some member states have specified fixed form documents⁷⁴. As was pointed out in the Response from Ireland, the benefit of having prescribed form and content is that there is less room for error, and in consequence a very low rejection rate at registration. In UK – England & Wales there is a fixed form, but it has space for the granter to insert individualised restrictions, special wishes or guidance (provided that these are lawful). Belgium has a variety of possibilities: the document may be an officially recorded instrument, a private written agreement, or even a letter. For all other member states which responded in this respect, there is no fixed form and content, but varying requirements for certain prescribed elements of content⁷⁵. In some member states certain particular matters must be expressly included in the document as a requirement of the legislation⁷⁶ and/or the requirements of common law⁷⁷.

Principle 7 – Entry into force

2. States should consider how incapacity should be determined and what evidence should be required.

78. In some member states incapacity is established by a court declaration⁷⁸ or by a relevant authority⁷⁹. In some member states assessment is by the attorney⁸⁰, though in Norway the attorney may ask the County Governor to confirm entry into force by submitting the document, evidence of notification to partner or relatives, and medical evidence. In several member states the principal requirement is for medical assessment and/or certification⁸¹. In Latvia, there is a further requirement for establishment of a commission of at least three medical practitioners, who provide an opinion on the basis of which a health institution issues a statement, which the attorney then presents to a notary, whereupon all of this information is registered and a notation is made on the CPA document. In some member states it is for the granter to specify how incapacity should be determined in the CPA document⁸². There are no specific requirements in remaining member states⁸³, though there is a different approach in Germany, where it is recommended that to avoid practical problems regarding evidence of incapacity, entry into force of the power should not be linked to loss of capacity in the CPA document itself (see the explanation in paragraph 44).

Principle 8 – Certification, registration and notification

States should consider introducing systems of certification, registration and/or notification when the continuing power of attorney is granted, revoked, enters into force or terminates.

79. Requirements for certification are addressed above in the context of provisions and mechanisms designed to ensure validity in terms of Principle 5.3 (see paragraphs 74 and 75). In a large proportion of member states from which Responses were received, there are arrangements for registration which are either obligatory⁸⁴ or voluntary⁸⁵. Some member states have reported no requirements or options for registration, or have not disclosed any⁸⁶.

⁷⁴ Andorra, France, Ireland (though the granter has the option to include additional matters, provided that these do not exceed the permitted scope of the legislation) and Latvia.

⁷⁵ Austria, Cyprus, Czech Republic, Denmark, Finland, Germany, Norway, Slovenia, Sweden, Switzerland, Turkey and UK – Scotland.

⁷⁶ E.g. Germany.

⁷⁷ E.g. UK - Scotland.

⁷⁸ Andorra, Belgium and Romania.

⁷⁹ The State Administration in Denmark, the Guardianship Authority in Finland, and the Adult Protection Authority in Switzerland.

⁸⁰ Belgium and Norway.

⁸¹ Austria, France, Ireland, Latvia and Slovenia.

⁸² Sweden and UK – Scotland.

⁸³ Czech Republic, Netherlands and Turkey.

⁸⁴ Belgium (the Central Register kept by the Royal Federation of Belgian Notaries), Denmark (the Danish Persons Registry), Finland (the Register of Guardianship Matters), France (a Special Register, the details of which are to be prescribed by decree by the Council of State), Ireland (the Register of Wards of Court, about

Associated issue: Is access to the registered information restricted?

80. Among member states which responded, only in Denmark and Sweden is registered information publicly available without restriction. That would appear to be the position on the face of the legislation in UK – Scotland, but in practice the Public Guardian limits access to provision of specific details. Where there are restrictions, they vary from state to state, and are accordingly summarised on a state-by-state basis.

81. In Andorra, access is limited by compliance with personal data protection obligations. In Austria, access to registered information is limited to the courts, social security bodies, social assistance bodies, the granter and the attorney. In Belgium, data in the register can be accessed by notaries, district judges, the Crown Prosecutor, the attorney or the granter, in each case on request, using a specified form. In Cyprus, all registered information is confidential and cannot be released without permission of the court. In the Czech Republic, access is controlled by the guardianship courts. In Finland, access is controlled by the Local Register Office: everyone has access to the register in order to find out whether a given person has a CPA in force, who is the attorney, and what are the powers of the attorney. In France, where the register is to be established, it is anticipated that the Council of State decree (see footnote 84) will contain provisions about access. In Germany, only the competent court (*Betreuungsgericht* – the Guardianship Court) has access to registered information. In Ireland, access is limited to (a) a body or class of persons prescribed by regulations and (b) any person who satisfies the Director that he or she has a legitimate interest to inspect. In Latvia, public bodies have right of access, but access by any private individual is at the discretion of the Registrar. In the Netherlands, only notaries have access. In Romania, only persons who can prove a legitimate interest may be permitted access. In Slovenia (where CPAs and advance directives may only be granted for healthcare purposes), only a person's medical staff have access. In Switzerland, the information is only available to "the person concerned" and the Adult Protection Authority.

Related issue: 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?

82. Only a minority of member states have confirmed that CPAs are fully and automatically effective and enforceable, if formalities have been complied with. In Andorra, the acts of a duly authorised attorney have the same effect as the same acts by the granter. In Austria, effectiveness is achieved by presenting the document confirming registration in the Central Register. In Cyprus, effectiveness is ensured by the court order bringing the CPA into force, and in Romania by the court appointment following upon the nomination by the granter. In Ireland, the CPA, upon being officially stamped as registered, is a formal legal document and must be accepted as such. In Slovenia where, as has been noted, CPAs are limited to healthcare matters, healthcare professionals must have informed consent and are therefore obliged to work with the appointed attorney. In UK – Scotland, the certificate of registration attached to the CPA document, or authenticated copies thereof, ought to be effective but in practice difficulty is not infrequently encountered in achieving effectiveness, particularly in dealings with banks. Similar difficulties are reported from UK – England & Wales. In Germany, that issue has been addressed in that the Federal Ministry of Justice has provided a form of wording, agreed with the Federal States and, as to banking activities, with the leading German banking sector associations, which is published in the Ministry's brochure and can be downloaded from the Ministry's website. This form of wording is regularly updated, is well used in practice, but its status is as a suggested form of wording, which is not binding. Numerous other forms of wording are published by notaries and lawyers. Apart from such essentially informal arrangements, effectiveness

to be changed to registration with the Director of the Decision Support Service), Latvia (the Registration of Continuing Powers of Attorney), Netherlands (the Central Register of Levenstestamenten), Romania (by the notary in the notary's own register, and in the National Notarial Register of Powers of Attorney and their Revocation), Slovenia (the official register), Switzerland (the Civil Registration Office) and UK – England & Wales and Scotland (registration with respective Public Guardians).

⁸⁵ Austria (the Central Register kept by Notaries Public), Czech Republic (registered in the Notarial Chamber), and Germany (the Central Register of Lasting Powers of Attorney kept by the Federal Chamber of German Civil Law Notaries).

⁸⁶ Andorra, Cyprus, Republic of Moldova (in proposals), Norway, Sweden and Turkey.

in Germany is generally achieved by presenting the original CPA document, though is better achieved if the document is notarised. In other member states⁸⁷, Responses indicate that the attorney should present the document to third parties, but there appears to be no assurance that it will be accepted as effective. Other Responses do not demonstrate automatic effectiveness in practice.

Principle 11 – Conflict of interest

States should consider regulating conflicts of the granter's and the attorney's interests.

83. A number of member states have express provisions which are triggered when a conflict of interest is identified, and which involve appointment of some other person to deal with the particular matter where the attorney is conflicted. In Belgium, the district judge may appoint an *ad hoc* attorney either *ex proprio motu* or upon request of the granter or any interested party. In the Czech Republic, a guardian *ad litem* is appointed by the court. In France, the courts may suspend operation of the CPA and may order judicial guardianship, appointing a special attorney to whom a particular task is entrusted. In Germany, a special kind of *Betreuer* (guardian), known as a *Kontrollbetreuer*, may be appointed to assert the granter's rights in relation to the attorney, if the granter is not capable of doing so and this is necessary for the protection of the granter. This can be done in situations of conflict of interest. In the Netherlands, the district court may be requested to appoint an administrator, curator or mentor, or to take any protective measures. In Norway, there is a prohibition upon an attorney acting in a situation of conflict of interest with the attorney, or with the attorney's spouse, cohabitant or near relatives. If such a conflict arises, the attorney or certain defined family members and others may request the County Governor to appoint a guardian with powers limited to addressing the matter in question. Likewise in Sweden, the attorney may not act in a situation of conflict of interest, but must request the Chief Guardian to appoint a legal guardian to act in that particular matter. In Switzerland, if a conflict of interest arises, the attorney must immediately notify the Adult Protection Authority which may then take action itself, instruct a third party, or appoint an administrator; whereupon the attorney's powers automatically cease to have effect. More generally, the matter can be addressed by the court in Cyprus; and in both UK – England & Wales and Scotland, the respective Public Guardians will often endeavour to address and resolve identified conflicts of interest, failing which such matters require to be resolved by the courts. There is a simple prohibition upon attorneys acting in a situation of potential conflict in Denmark. The matter is stated to be regulated by the general law in Andorra and Slovenia. In Ireland, the only relevant requirement is that the court must have regard to any conflict of interest in the event of an application to court as to whether an attorney is suitable. Only in Romania does a potential for conflict of interest disqualify from appointment.

Principle 12 – Supervision

2. States should consider introducing a system of supervision under which a competent authority is empowered to investigate. When an attorney is not acting in accordance with the continuing power of attorney or in the interests of the granter, the competent authority should have the power to intervene. Such intervention might include terminating the continuing power of attorney in part or in whole. The competent authority should be able to act on request or on its own motion.

Is there a system of supervision?

84. There appears to be a clear division between member states where supervision is automatic and ongoing, on the one hand, and those where there is only supervision if it is triggered by the order or actions of a court or other authority, on the other. In the latter case, in some member states the competent authority may act upon request, or upon information provided (see paragraph 88), and in some upon its own motion (see paragraph 89). The following member states reported automatic ongoing supervision: Finland, supervision by the Local Register Office; France, where the

⁸⁷ Such as France and Latvia.

guardianship judge and Public Prosecutor have general supervisory roles; Ireland, where supervision is by the Director of the Decision Support Service; Slovenia, where the Civil Court supervises; and Sweden, where the Chief Guardian supervises. In the Netherlands, where CPAs are non-statutory, there are no explicit provisions for supervision in either category.

85. Supervision may be triggered as follows:

Austria: The competent court may appoint a guardian if the attorney fails to act, fails to respect binding instructions, or acts contrary to the welfare or interests of the granter.

Belgium: At the request of the granter, the attorney, the Crown Prosecutor or any interested party, or by a judge *ex proprio motu*.

Cyprus: The court may appoint an investigator to examine the facts and submit a report to the court.

Denmark: The State Administration has powers to intervene if it is aware of circumstances which conflict with the granter's interests.

Germany: The competent court, if asked, may appoint a *Kontrollbetreuer* (see paragraph 83).

Latvia: The Public Prosecutor must act to protect the granter's rights and interests upon receiving information.

Norway: If the County Governor considers it necessary, in consequence of information provided by others, and in order to protect the granter's interests, the County Governor may seek information from the attorney and/or instruct the attorney to keep accounts and allow the County Governor access to those accounts.

Republic of Moldova: It is proposed that the court may intervene.

Romania: The court may intervene, and may request the co-operation of public authorities (including institutions and services).

Switzerland: The Adult Protection Authority may take necessary measures if the granter's interests are in jeopardy, or at risk of being jeopardised.

Turkey: A guardian or trustee may be appointed to supervise the attorney.

UK – England & Wales: The Public Guardian may investigate, and may refer matters to the Court of Protection.

UK – Scotland: In property and financial matters the Public Guardian may intervene, and in welfare, healthcare and other personal matters the local authority may intervene, in each case upon receipt of a complaint, or upon becoming aware of concerns.

Does a competent authority have power to intervene where an attorney is not acting in accordance with the CPA or is not acting in the interests of the granter?

86. In such circumstances, the same court or authority as is identified in the immediately preceding paragraph may intervene in Austria, Belgium, Cyprus, Denmark, Finland, France, Germany, Ireland, Latvia, Republic of Moldova, Netherlands, Norway, Sweden, Switzerland, Turkey and UK – England & Wales and Scotland.

Does such intervention include terminating the CPA in part or in whole?

87. This power is available in Austria (by appointing a guardian), Belgium, Cyprus, Denmark, France, Germany (where a *Kontrollbetreuer* – see paragraph 83 – may be specifically empowered to revoke the CPA), Ireland, Netherlands (by appointing an administrator, curator or mentor who may in turn apply to the court for revocation), Norway (but only by appointing the superseding or overlapping

or partially overlapping guardian), Romania (where the appointment following upon the nomination may be terminated), Sweden, Switzerland and Turkey. In both UK – England & Wales and Scotland, the CPA can be terminated by the court, but only by the court. There are no provisions for such termination in Finland or Slovenia.

May the competent authority act on request?

88. The competent authority may act upon request, or upon information provided, in Austria, Belgium, Cyprus, Denmark, Finland, France, Germany, Ireland, Latvia, Netherlands, Norway, Romania, Sweden, Switzerland, Turkey and both UK – England & Wales and Scotland.

May the competent authority act on its own motion?

89. The competent authority may act on its own motion in Austria, Belgium, Cyprus, Denmark, Finland, France, Germany, Ireland, Republic of Moldova, Romania, Sweden, Switzerland, Turkey and both UK – England & Wales and Scotland. It may not do so in Latvia, Netherlands or Norway.

Related issue: What is the threshold to permit the competent authority to interfere with an act or decision of the attorney, and what if any principles or standards are applicable to such intervention?

90. The competent authority may intervene as follows:

Austria: If the attorney fails to act, fails to respect binding instructions, or acts contrary to the welfare or interests of the granter.

Belgium: If the actions of the attorney threaten the granter's interests, or if it is necessary to replace the CPA completely or partially by a judicial protection measure that is more consonant with the granter's interests.

Cyprus: An investigator may be appointed whenever the court thinks fit.

Denmark: The State Administration may intervene if it deems it necessary.

Finland: There is no specific threshold.

France: The guardianship judge cannot interfere with the attorney's acts or decisions, and can only suspend or revoke the CPA if the attorney's actions are likely to harm the granter's interests (the test being whether the attorney's actions are compatible with the granter's interests).

Germany: Intervention requires *prima facie* grounds that the granter cannot assert his or her rights in relation to the attorney, incapacity alone of the granter not being sufficient for intervention. Power to the *Betreuer* to revoke must be explicit and, in view of the severe interference with the rights of the granter, must be the last resort and requires good cause.

Ireland: The competent authority may not intervene merely because it disagrees with the attorney. It must be shown that the attorney has acted improperly.

Latvia: The Public Prosecutor may intervene upon information that the activities of an attorney are contrary to the interests of the granter, or if the attorney does not fulfil the attorney's obligations at all.

Republic of Moldova: The Guardianship Authority may intervene only if the attorney's actions have damaged the interests of the granter, or are contrary to the granter's interests.

Norway: Intervention in the form of guardianship to terminate a CPA wholly or partly is only available in the event of abuse, or conflict of interest, or if the granter's needs for support are otherwise not properly safeguarded.

Romania: If the person appointed is not acting in compliance with relevant legal provisions or in the protected person's interests.

Sweden: The circumstances in which the Chief Guardian may intervene include grave neglect of the granter's interests, but there are no specific thresholds for the Chief Guardian, who may act as he or she deems necessary.

Switzerland: The Adult Protection Authority may intervene as soon as there is risk that the granter's interests have been jeopardised or might be jeopardised. It is not necessary for misconduct or breach of duty of diligence to be established, for the Authority to be entitled to intervene.

Turkey: Any supervision mechanisms stipulated in the CPA will apply. Otherwise, the purpose and limit of any intervention is to protect all interests related to personality and the assets of the granter.

UK – England & Wales: The requirement is "clear reasons for doing so".

UK – Scotland: The trigger is evidence of risk.

91. Intervention is governed by the same principles as are the actings of the attorney in Ireland, Latvia, Republic of Moldova and UK – Scotland.

Principle 13 – Termination

- 1. States should consider under which circumstances a continuing power of attorney ceases to have effect.**
- 2. When a continuing power of attorney ceases to have effect in part or in whole, the competent authority should consider which measures of protection might be taken.**

What are the circumstances under which, by law, a CPA ceases to have effect?

92. The circumstances under which, by law⁸⁸, a CPA ceases to have effect, stated by member states, are:

Andorra: Upon expiry; exhaustion of remit; revocation by the granter; renunciation by attorney; where an attorney which is a legal person has ceased to exist; the granter has died, or has been declared as having no or limited active legal capacity, or has been declared missing; attorney has died, or has been declared as having no or limited active legal capacity, or has been declared missing. A purported waiver of the right of the granter to revoke is null and void.

Austria: Upon revocation.

Belgium: If the granter is no longer entirely or partially incapable; in the case of profligacy, the granter is no longer profligate; renunciation by the attorney; revocation by the granter; death of either the granter or attorney, or their placement under judicial protection; by decision of the district court judge.

Cyprus: Upon termination by the court; or if the granter recovers capacity or dies; or if an attorney acts in bad faith or recklessly.

⁸⁸ There is room for debate as to whether "by law" includes revocation by the granter. The majority of member states, in their Responses, have included revocation by the granter here, presumably on the basis that a revocation initiated by the granter is regulated by law. So such revocation has been included here.

Denmark: If the granter or attorney is put into guardianship (in the case of the granter, with relevant powers); or if the granter dies; or a sole attorney resigns or has granted a CPA which enters into force; or upon termination by the State Administration in the event that the conditions for entry into force no longer apply.

Finland: Upon revocation, death of the granter, or notification of resignation by the attorney to the Local Register Office.

France: Upon recovery of capacity; death of the granter; placement of the granter under guardianship unless the judge decides otherwise; death of the attorney; placement of the attorney under a protection measure or the attorney's insolvency; revocation by a guardianship judge on grounds that the granter is able to act alone (which would permit a cohabiting spouse to act).

Germany: Upon revocation, and (unless otherwise stated in the CPA document) upon death of the granter.

Ireland: Upon death of the granter; revocation by the court upon the granter regaining capacity; a finding by the court that the CPA was induced by fraud or coercion; or upon determination by the court that the attorney is not suitable and there is no other attorney in a position to act.

Latvia: By mutual agreement; completion of the assignment; withdrawal by the granter; notice by the attorney; death of either party; expiry of the period of the CPA. Revocation by the granter must be in the form of notarial deed.

Republic of Moldova (proposed): Upon death of the granter; establishment of protective measures by the court; death of the attorney, or protective measures for the attorney; institution of insolvency proceedings (or liquidation) of the attorney; if the attorney has lost capacity; revocation by court decision at the request of an interested party; or upon suspension of the CPA by the court for the period needed to establish provisional protective measures.

Netherlands: Upon revocation by the granter, death or bankruptcy of the granter or the attorney, or termination by the attorney. The granter may lay down other circumstances under which the CPA comes to an end.

Norway: Upon appointment of a guardian with the same powers; or if the attorney dies or is no longer able to act, and no alternative attorney is available.

Romania: Only by revocation prior to incapacitation or appointment by the court (see paragraph 32).

Slovenia: Only by written revocation, and then only if serious health damage will not result.

Sweden (pending): Upon appointment of a legal guardian or administrator; if the granter recovers capacity; or upon revocation.

Switzerland: Upon revocation, death of the granter or attorney, recovery of capacity, or termination by the attorney.

Turkey: There is no specific regulation, but the CPA ceases if there is a fixed duration which expires. A guardian or trustee appointed to a supervisory role may terminate the effectiveness of the CPA.

UK – England & Wales: Death of granter or attorney, revocation, the identification of illegal clauses, disclaimer by the attorney, the dissolution or annulment of a marriage or civil partnership between the granter and the attorney.

UK – Scotland: Upon revocation by a capable granter, resignation by a sole attorney, revocation by the Sheriff Court, death of the granter, death of a sole attorney; where parties were married or in civil partnership, upon separation, divorce, etc. (unless the document specifies otherwise); or upon granting of a guardianship order with relevant powers.

Is the competent authority required to consider which measures of protection might be taken, where a CPA ceases to have effect in part or in whole?

93. The competent authority has such an obligation in Austria, Denmark, Finland, Germany, Republic of Moldova, Sweden and Switzerland. The competent authority is not expressly required to do so in other member states which have responded on this point.

General issues in relation to Principles 3 – 13

Are adequate legal and other services available to advise and assist granters; and are they available on a legally aided basis where necessary?

94. Seven member states⁸⁹ which responded on these points reported that services to advise and assist granters are available, and are available on a legally aided basis where necessary. Three member states⁹⁰ reported that such services are not available. Remaining member states provided limited or qualified Responses: in Austria, advice is available from notaries public and practising lawyers; in Denmark, the Ministry of Justice is currently preparing guidance for granters and attorneys, which will include templates for creating CPAs; in Germany, advice regarding CPAs from lawyers and notaries is on a fee-paying basis, with Legal Aid unavailable, but free consulting services are provided by the *Betreuungsbehörde* (a public authority, the functions of which include providing advisory services regarding CPAs – see also paragraphs 74 and 95) and *Betreuungsvereine* (private associations providing *inter alia* advisory services regarding CPAs); Ireland reports that services are available but need to be improved; Norway reports that no specific Legal Aid schemes are available, but advice and guidance is available from County Governors and the Civil Affairs Authority, and from the latter also by web-based information available for all. That information includes *inter alia* an example of a CPA. Switzerland reports that where granters opt for officially recorded powers of attorney the appropriate official “will probably advise the granter”, and that private organisations make standard documents available, and if necessary provide advice “often free of charge”; in UK – England & Wales, such services are available but not on a legally aided basis.

Are legal and other services available to advise and assist attorneys, where necessary on a legally aided basis?

95. Five member states⁹¹ reported that such services are available, where necessary on a legally aided basis, and six member states⁹² reported that such services are not available. As in the preceding section, other Responses were limited or qualified: in Austria, advice is available from notaries public and practising lawyers; in Denmark, the Ministry of Justice is preparing guidance for granters and attorneys; Germany reports that services of the *Betreuungsbehörde* (see also paragraphs 74 and 94) and associations are free, but Legal Aid is not available for services of lawyers or notaries; in Norway, the position for attorneys is the same for granters as described in paragraph 94; in Romania, advice is available where the nomination is by bilateral document (see paragraph 32); Latvia reported that there is no particular regulation of this; and in UK – England & Wales, such services are available but not on a legally aided basis.

General comment about Legal Aid

96. Comparisons regarding the availability of Legal Aid should be read subject to the following. The scope of Legal Aid arrangements in member states varies substantially. This diversity reflects

⁸⁹ Andorra, Cyprus, Finland, France, Latvia, Romania and UK – Scotland.

⁹⁰ Slovenia, Sweden and Turkey.

⁹¹ Andorra, Cyprus, France, Finland and UK – Scotland.

⁹² Ireland, Norway, Slovenia, Sweden, Switzerland and Turkey.

the variety of legal traditions, and substantial differences in government policies. Legal Aid funding, and the organisation of Legal Aid administration, also varies greatly. In some member states restrictions on total Legal Aid funding have significant practical impacts. In others, Legal Aid reforms have recently been implemented.

What is the practical experience of the operation of principles 3 – 13 inclusive, and in particular what (if any) particular issues have been identified?

97. Several member states felt that there was as yet insufficient experience. Austria reported that experience is “very positive”. France reported that the future protection mandate (CPA) has not achieved the expected levels of success. Legal professionals, particularly notaries, have raised problems regarding the lack of any system for registration and publicising. In consequence, a guardianship judge could be unaware of the existence of a CPA. This issue has been addressed by Law No 2015-1776 (of 28 December 2015) which provides for creation of a Special Register, to be regulated by a decree which is being prepared. When this Register is in force, it will enable guardianship judges to check for the existence of a CPA.

98. Germany reported that, overall, experience was very positive, that more and more people are making use of a CPA, and that in consequence appointment of a “*Betreuer*” can be avoided in many cases. Practical problems arise in some cases as to the form and wording of the CPA. The fact that there is no requirement as to form tends to cause practical problems, because third parties might in some cases not accept the document. Because the wording of the CPA is crucial, granters are always recommended to obtain professional advice, in order to ensure that the document contains legally binding wording, in accordance with the requirements of law and jurisprudence.

99. Ireland reports that CPAs have generally operated efficiently. There has been a limited number of rejections of registration applications. Hitherto, the only way of dealing with complaints was by costly High Court procedure. Latest legislation now permits any person to make a complaint to the Director of the Decision Support Service, who can investigate, if necessary informally without prejudice to the right of resort to the court.

100. UK – England & Wales reported complaints about the high cost of legal services to assist in granting CPAs.

101. UK – Scotland referred to comments noted in preceding sections.

Advance directives (Part III)

Principle 16 – Form

- 1. States should consider whether advance directives or certain types of advance directives should be made or recorded in writing if intended to have binding effect.**
- 2. States should consider what other provisions and mechanisms may be required to ensure the validity and effectiveness of those advance directives.**

102. Regarding Principle 16.1, the most advanced provisions reported are in Ireland, where advance statements must be in writing, or by voice and video recording or speech recognition technologies; and they must be signed by the designated healthcare representative (if there is one) and two witnesses. They must be in writing and notarised in Austria and Lithuania. In some member states they must be in writing for some purposes only: in Croatia, for nomination of a guardian, they must be in writing and notarised; in the Czech Republic, they must be in writing for healthcare purposes, but at or immediately before admission this may be done by an entry in the medical documentation signed by the patient; in Germany, they must be in writing for health matters; and in UK – Scotland, mental health advance statements must be in writing and witnessed by a medical or care professional or a solicitor, while as other advance directives are not regulated by statute there are no express provisions regarding form. There is no requirement for writing in the proposals for Montenegro, or in

Turkey. Advance directives require to be in writing in the remaining member states which responded⁹³.

103. Regarding Principle 16.2, several member states reported further provisions and mechanisms. In Austria, advance directives may be registered in the Central Register managed by the Austrian Chamber of Notaries, in co-operation with Austrian Red Cross (such registration being voluntary, and not a requirement for validity). In Belgium, they are recorded in the Central Register kept by the Royal Federation of Belgian Notaries. In Croatia, for nomination of a guardian, they must be notified to the Social Welfare Centre; and advance directives are registered in a register managed by the Croatian Chamber of Notaries. In the Czech Republic, to be valid and effective there must be a written explanation of the consequences of the patient's decision by a doctor with an officially verified (legalised) signature of the patient. In France, if the granter is contemplating a decision to restrict or discontinue treatment, the doctor must enquire about the possible existence of an advance directive (which in France can relate only to end-of-life situations). In Germany and in UK – Scotland, advance directives can be combined with a CPA. In addition, in Germany advance directives in health matters, and nominating the choice of *Betreuer* should one be required, may also be registered in the Central Register of Lasting Powers of Attorney (see footnote 85). In Ireland, if the advance directive relates to life-sustaining treatment, it must state explicitly that it is to apply even if life is put at risk. Necessary formalities in Ireland include the name, date of birth and contact details of the granter and of the designated healthcare representative (if any). In Switzerland, it is the doctor's responsibility to check for the existence and validity of advance directives: in the event of serious doubts as to whether the document was issued freely and in an informed manner, the doctor may disregard it. In UK – England & Wales, in order to be valid, an advance directive must have been made at a time when the individual had mental capacity; in order for the advance directive to be applicable, the wording has to be specific and relevant to the medical circumstances which have arisen; the advance directive must have been made when the individual was over 18 and fully informed about the consequences of refusing treatment, including the fact that refusal might hasten death; it must not have been made under undue influence; and if it relates to refusal of life-saving treatment, it must be written, signed and witnessed.

General issues in relation to Principles 14 – 17

104. Armenia responded that advance directives are normally included within CPAs. Austria responded that experience in practice of advance directives "is good". Belgium, Croatia and Turkey all responded that it was too soon to assess experience. Czech Republic reported no negative experience. Ireland reported that there are inconsistencies in practice, which it is hoped will be remedied when new legislation comes into force. Ireland also reported cross-border concerns about non-compliance in other jurisdictions. UK – England & Wales reported problems arising from general lack of knowledge amongst both public and medical professions about advance decisions. UK – Scotland reported problems of lack of use of advance directives, but also that professionals are not always aware of their existence. However, new measures have been introduced there to ensure that advance statements are kept with the person's medical records.

105. Three member states responded regarding compliance with UN CRPD. Croatia reported that review and possible reform is contemplated. Germany reported that its provisions are designed to ensure that the will and wishes of the granter are effectively ascertained and given effect, but that experience is that poor drafting results in doubts about effectiveness, and that professional advice is accordingly recommended. Ireland reported that a detailed code of practice is being developed to ensure compliance with UN CRPD.

106. Experience in France was reported at greater length. A law of 2005 provided that anyone could issue an advance directive to apply to situations where they could no longer express their wishes. Such advance directives were valid for three years. They could be amended at any time. Doctors were obliged to enquire about the existence of such an advance directive and to take them into account if the person was not in a position to express their wishes. However, although referred to as "directives", they did not have any binding force and there were no specific formalities for recording

⁹³ Armenia, Belgium, France, Slovenia, Switzerland and UK – England & Wales.

and keeping them. Furthermore, healthcare professionals largely disregarded the law of 2005 due to the far-reaching changes in medical practice and in relations between doctors and patients which were necessary for its full implementation.

107. In 2012, a Committee chaired by Professor Didier Sicard, former President of the National Consultative Ethics Committee for Health and Life Sciences ("CCNE"), was tasked with evaluating the 2005 law as part of a reflection on end-of-life care. The Committee's report, which was published in December 2012, recommended more effective enforcement of existing laws, reinforcement of the role of advance directives, and development of education relating to palliative care and the administration of terminal sedation under supervision. In addition, the CCNE also considered, in its opinion of 28 June 2013, that everyone should be afforded access to the right to palliative care and that the implementation of advance directives must become binding on healthcare staff.

108. Subsequently, under a parliamentary initiative, Law No 2016-87 of 2 February 2016 was adopted, which created new rights for patients and persons at the end of life and which clarified the situation regarding advance directives, such as those provided for in Article L.1111.11 of the Public Health Code, which can now be drafted by any adult, are used to express the person's wishes about their end of life in terms of the conditions for continuing, restricting, discontinuing or refusing treatment or medical interventions, can be reviewed and revoked at any time and by any means and, in particular, are binding on the doctor.

CHAPTER IV: IMPLEMENTATION IN THE WIDER CONTEXT

Introduction

109. The primary purpose of the Recommendation, as stated in Principle 1.1, is to “*promote self-determination for capable adults in the event of their future incapacity*”. In order to consider the extent to which, across Europe, that primary purpose has been realised, it was necessary to review and assess further matters, beyond the preceding review and assessment by reference to each of the individual Principles of the Recommendation. Such further review and assessment required examination of “promotion” not only by making legislative provision available, but by providing resources to facilitate implementation, and actively encouraging implementation. Also, the author’s remit included referencing the work of other relevant international organisations. Optional questions in the questionnaires sought information relevant to such wider aspects, and wider context, of implementation.

110. The foregoing review, Principle by Principle, was limited to information provided by member states in response to questionnaires, comment by the author being based upon that information. Because of the wider nature of the remit addressed in this chapter, it draws to a greater extent upon matters within the author’s knowledge.

PART A – MATTERS ADDRESSED IN BOTH FULL AND SHORT QUESTIONNAIRES

Experience of “significant cross-border issues”

111. Four member states⁹⁴ reported no such issues. Germany reported very few issues between “contracting states”, that is to say states which have ratified Hague 35. The figures quoted were three cases in 2011, four in 2012, seven in 2013, 13 in 2014, and 14 in 2015. Almost all of these raised questions of exchange of information between courts and authorities, and transfer of guardianship arrangements in cases of relocation (predominantly the establishment of new guardianship arrangements). Germany reported no issues with non-contracting states (that is to say, states which have not ratified Hague 35). Conversely, Switzerland reported no issues between contracting states, and significant issues with non-contracting states. Switzerland commented that it is much more difficult to prove the existence of protective measures and CPAs, and to have them recognised, in cross-border situations with non-contracting states, with whom it is difficult to establish direct contact between authorities to facilitate operation of protective measures and CPAs. UK – Scotland reported widespread and significant cross-border issues, with little difference between contracting states and non-contracting states.

112. The following explanation may be offered for the significant differences among these Responses. Contacts in Europe with legal, healthcare and social care professionals and the organisations employing them, and with banks, financial institutions and the like, indicate that cross-border problems are frequently encountered in practice, in particular in relation to CPAs. Evidence and submissions to the Legal Affairs Committee of the European Parliament, in the context referred to in paragraphs 125 and 126, demonstrate the same. Taking by way of example the contrast between the Responses from Switzerland and Germany as described above, it seems reasonable to deduce that Switzerland has responded in relation to problems encountered within that wider area of practice, whether or not they may have resulted in litigation, whereas Germany has clarified that it has responded only in relation to the issues identified in the preceding paragraph (exchange of information, transfer of guardianship upon relocation), and has been able to quote precise numbers of “cases” in each year, all apparently related to the particular procedures under Hague 35.

113. The relatively small number of member states responding on this particular issue, and the divergence of those Responses, do not allow firm conclusions to be drawn. If there are in practice significant difficulties in cross-border situations, whether or not they result in litigation, that is a

⁹⁴ Austria, Croatia, France and Lithuania.

limitation upon the effectiveness of measures intended to facilitate self-determination in the event of incapacity. It is accordingly discriminatory against citizens of Europe with intellectual disabilities which impair their capacity, compared with citizens without such disabilities. Subject to further enquiries into this issue by other agencies, this is an issue which warrants further investigation.

114. Finally in this context, Ireland reported concerns about non-compliance with advance directives in another jurisdiction. In respect that Ireland has recent legislation, designed to achieve compliance with UN CRPD, and having regard to the relative under-development of advance directives noted elsewhere in this report, it is suggested that this concern is significant, even although it has been expressed in only one Response.

Ratification of Hague 35

115. It is known that Hague 35 has been ratified by nine states, all of them member states of the Council of Europe. Six member states confirmed this in their Responses⁹⁵. It is encouraging that five member states reported progress towards ratification. Most positively, Ireland confirmed that it will ratify once its current legislation of 2015 is brought into force, and Latvia expects to ratify in 2017. Belgium has commenced procedure to ratify. Denmark is currently considering ratification, with a view to determining the legislative implications, though a timeframe for ratification cannot yet be indicated. Montenegro expects to ratify “in the future period”. Lithuania has not made any decision about ratification. Croatia reported that ratification is not at present planned. Ukraine and UK – England & Wales reported that they have not ratified.

Application of Articles 22 and 23 of Hague 35 to CPAs

116. Member states were asked in the questionnaires whether it would be helpful to the citizens of their member state for Articles 22 and 23 of Hague 35⁹⁶ (or provisions equivalent to those of Article 22 and Article 23 of Hague 35) to apply to CPAs, and (if so) whether it would be helpful to do so on a Europe-wide basis regardless of ratification of Hague 35. Article 22 of Hague 35 provides that measures to which it applies (which according to the original version of paragraph 146 of the Explanatory Memorandum by Professor Lagarde to Hague 35 do not include CPAs) 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. For recent developments in this regard, see paragraphs 122 – 124 below.

117. The Response from Switzerland on this issue is the response which accords most closely with those recent developments. Switzerland takes the view that Articles 22 and 23 of Hague 35 already apply in countries such as Switzerland, where there is a requirement for “confirmation” or “validation” of a CPA by the authorities. Switzerland takes the view that such validation constitutes a measure of protection within the meaning of Article 22. Beyond that, Switzerland takes the view that validity is provided by Article 15 of Hague 35⁹⁷, which also applies to countries which are not parties to Hague 35. Switzerland urges that European states which have not done so should be encouraged to ratify Hague 35. Switzerland suggests that it is better to address any issues under Hague 35 and take steps to improve them within the context of Hague 35, rather than to create “competition”, such as by European Union regulation, as that would risk confusion⁹⁸.

118. Quite separately, it has been suggested to the author that, if further regulation of voluntary measures in cross-border situations is required, then this should be within the scope of the work of the Hague Conference, though it has also been suggested that if further regulation by the Hague Conference is required, then this should be by a further Hague Convention specific to voluntary measures, rather than by revisiting Hague 35 (just as Council of Europe, rather than expanding or revisiting Recommendation No. R (99) 4 by developing it into a Convention, instead issued

⁹⁵ Austria, Czech Republic, France, Germany, Switzerland and the UK in respect of Scotland only. The remaining member states which have ratified are Estonia, Finland and Monaco.

⁹⁶ The texts of Articles 22 and 23 of Hague 35 are reproduced in Appendix III.

⁹⁷ The text of Article 15 of Hague 35 is reproduced in Appendix III.

⁹⁸ See section headed “Recent developments – European Union” (paragraphs 125 – 129).

Recommendation CM/Rec(2009)11 as a separate and subsequent Recommendation – as narrated in paragraph 2)⁹⁹.

119. Similarly, the Response from Germany recommended that the priority is to promote ratification of Hague 35; and that any improvement of the Hague 35 regime should be done within the framework of the Hague Conference, not through other organisations, because overlapping legal regimes on the same subject-matter lead to difficulties for practitioners.

120. Contrarily, the Response from Belgium expressed the opinion that it would be inadvisable to change the philosophy of Hague 35, as described by Professor Lagarde in his original Explanatory Memorandum to Hague 35, by including CPAs within the operation of Articles 22 and 23 of Hague 35. This and other Responses on this topic were however all submitted prior to the recent developments described below.

121. The Response from France suggested that applying Articles 22 and 23 of Hague 35 to CPAs would be helpful “in the long run, since such recognition would be a factor contributing to the development of these CPAs”. Montenegro and UK – Scotland replied simply that this would be helpful, and Latvia replied that it might be helpful, but should be thoroughly evaluated and discussed. Austria commented that this was “difficult to say”. UK – England & Wales replied that this would not be helpful, without explanation.

Recent developments – Hague Conference

122. In the period since distribution to member states of the questionnaires from which the foregoing information was derived, the Permanent Bureau of the Hague Conference has coordinated a revision of paragraph 146 of the Explanatory Report to Hague 35 (which relates to Article 38 of Hague 35¹⁰⁰) with the rapporteur, Professor Paul Lagarde. The revision has also involved the input of several delegations that participated in the negotiation of Hague 35: specifically, those which intervened on a proposed amendment to Article 38 of Hague 35 that gave rise to the original drafting of paragraph 146.

123. The original text of paragraph 146 provided that a confirmation of a power of representation was not a measure of protection within the meaning of Hague 35, based on a reading of the text of Article 38. However, the subsequent amendment of this paragraph acknowledges that where a power of representation (CPA) has been confirmed by a competent authority under Hague 35, it may constitute a measure of protection – provided that the act confirming the power has the same effect as a measure taken by a competent authority under Article 3 of Hague 35. If such an act does indeed fall under Article 3, it will be subject to the rules on recognition provided by the Convention (i.e., Articles 22 and 23). A revised version of the Explanatory Memorandum to Hague 35, including the amended paragraph 146, has been released by the Permanent Bureau. The revised version of paragraph 146 reads as follows:

“146. The concept of the confirmation of powers must give every guarantee of reliability and be seen in the light of legal systems which make provision for this confirmation and place it in the hands of a particular authority, judicial in Quebec, administrative elsewhere. The final version of this report, which was based on a reading of the Convention text, set forth that this confirmation is not a measure of protection within the meaning of the Convention. If this indeed were the case, there would be no need to mention it alongside the measures of protection in Article 38. However, some delegations have since asserted that this analysis is not one which, according to them, flows from the discussion, difficult as it was.^{95bis} According to this view, a confirmation could constitute a measure of protection within the meaning of Article 3 and it could only be given by the competent authority under the Convention. A consequence of this might be that, if the adult has, in accordance with Article 15, paragraph 2, submitted the conferred power to an applicable law other than that under which the authorities have jurisdiction under the Convention, the representative risks being deprived of the

⁹⁹ In particular, a conversation on 3 November 2016, in context of Alzheimer Europe Annual Conference, in Copenhagen.

¹⁰⁰ The text of Article 38 of Hague 35 is reproduced in Appendix III.

possibility of having his or her powers confirmed, for instance, by the competent authority of the State whose law is applicable to the power of representation.”

124. A joint conference organised by the Hague Conference and the European Commission on the promotion and implementation of Hague 35 in Europe and globally is scheduled to take place in January 2018. The operation of powers of representation (CPAs) under the Convention, among other matters, will be the subject of discussion during that joint conference.

Recent developments – European Union

125. Article 38(1) of Hague 35 provides that: *“The authorities of the Contracting State where a measure of protection has been taken or a power of representation confirmed may deliver to the person entrusted with protection of the adult’s person or property, on request, a certificate indicating the capacity in which that person is entitled to act and the powers conferred”*. Article 38(2) provides that: *“The capacity and powers indicated in the certificate are presumed to be vested in that person as of the date of the certificate, in the absence of proof to the contrary”*. Article 38(3) provides that: *“Each Contracting State shall designate the authorities competent to draw up the certificate”*. The Legal Affairs Committee of the European Parliament has given consideration to the possibility of such a certificate being prescribed by regulation for member states of the European Union.

126. The Legal Affairs Committee of the European Parliament in its draft report (2015/2085(INL)) presented a motion for a European Parliament resolution with recommendations that would *“[Call] on the Commission to submit to Parliament and the Council, before 31 March 2018 [...] a proposal for a regulation designed to improve cooperation among the Member States and the automatic recognition and enforcement of decisions on the protection of vulnerable adults and mandates in anticipation of incapacity [...]”*. This draft report *“encourages those Member States which have not yet signed or ratified [Hague 35] to do so as quickly as possible”*. Moreover, Amendment 87 to the draft report tabled on 31 January 2017 *“Notes that this report does not replace the Hague Convention, it supports the Convention and encourages Member States to ratify and implement it”*.

127. In the questionnaires, member states were asked whether it would be helpful to citizens of their state for standard Europe-wide certificates equivalent to those provided for in Article 38 of Hague 35 to have effect explicitly in relation to CPAs, on a Europe-wide basis. Four member states¹⁰¹ responded that this would be helpful. Austria’s Response was “maybe”. Latvia responded that this might be helpful, but should be evaluated and discussed. Consistently with its Response reported at paragraph 117, Switzerland responded that a certificate can already be used for CPAs that have been validated or confirmed by the authorities, and that it would be interesting to hear whether issues arise in practice for member states whose CPAs are valid without confirmation by the authorities.

128. France simply responded that there is at present no such certificate in the French system. UK – England & Wales replied that such certificates would not be helpful, without explanation.

129. Germany responded that such certificates would not be helpful, but rather misleading, because there is no underlying uniform substantive law on these issues. A uniform certificate would misleadingly obscure the fact that the effect of such a certificate in relation to an individual would depend upon the applicable national law. Such matters are best dealt with under the conflict of law rules in Article 15 of Hague 35.

Inter-relationship with other measures, including *ex lege* representation

130. The questionnaires enquired what is the experience within each member state of the inter-relationship between (a) voluntary (in the questionnaires “autonomous”) measures governed by the Recommendation and (b) the range of other measures for the protection of incapable adults. See also the more particular questions appearing as question 29.2 in the full questionnaire and question 22.2 in the short questionnaire.

¹⁰¹ Belgium, Ireland, Montenegro and UK – Scotland.

131. Austria reported that it has *ex lege* representation by next-of-kin for “contracts of daily life”. Switzerland also has two types of *ex lege* representation, which apply respectively in situations where there is no CPA or guardianship, and situations where there is no advance directive. In the first situation, the person’s spouse or registered partner, if living in the same household or providing regular personal assistance, has a statutory right to act as the person’s representative. That right includes (a) all legal acts normally required to meet the incapacitated person’s needs, (b) ordinary administration of income and other assets, and (c) if necessary, opening and dealing with correspondence. For legal acts involving exceptional asset management, the spouse or registered partner must obtain the consent of the Adult Protection Authority. In the second situation, concerning medical matters where there is no advance directive, the attending doctor must plan treatment in consultation with the person entitled to act as representative in medical matters. This applies to both out-patient and in-patient measures. The person entitled to act is the first in the following list: (a) a person appointed in an advance directive or CPA, (b) a guardian with relevant powers, (c) registered partner if living in the same household or providing regular personal assistance, (d) any other person who lives in the same household and provides regular personal assistance, (e) the first of the following who provides regular assistance – descendants, parents and siblings. Where two or more persons have the right to act, the doctor, acting in good faith, may assume that each acts with the agreement of the others. In the absence of instructions in an advance directive, the representative must decide according to the presumed wishes and interests of the person¹⁰².

132. Persons in Belgium have the right to be supported by a person of trust. Croatia reported that it already has guardianship, and that its Act on the Protection of Persons with Mental Disorders recognises the possibility of appointing a person of trust. The Czech Republic reported that an adult can make a “preliminary declaration” (similar to a CPA); can request appointment of a guardian without limitation of capacity, this being a provision for “an individual who has difficulty with administration of his or her assets and liabilities or with defending his or her rights due to his health condition”. In Czech Republic, a guardian usually acts jointly with the ward: if acting individually, the guardian must do so in accordance with the will of the ward. If the will of the ward cannot be ascertained, a decision must be made by the court on application of the guardian.

133. France reported that future protection mandates, like advance directives, are not yet widely used. The introduction of a Special Register¹⁰³ should foster their wider use. Concerning health matters, an adult may appoint a person of trust, to state the wishes of that adult. The evidence of the person of trust takes precedence over any other evidence. This appointment is made in writing and co-signed by the appointed person. A person may also appoint one or more persons to carry out the functions of guardian, should the person be placed under guardianship. The guardianship judge must abide by this choice, unless the nominee refuses or the protected person’s interests dictate that it should be excluded. The 2015 Law on Adjustment of Society to Ageing has extended the role of the person of trust to the social and medico-social sectors.

134. In Ireland, a person may establish a trust to come into effect upon incapacity. In Latvia, a CPA may include provision about who should be appointed guardian, if a guardianship is established.

135. In Lithuania, a capable person may enter a supported decision-making contract, in writing, which is made in notarial form and registered. Upon a court declaration of incapacity or of limited capacity, the court must establish a guardianship. Advance directives come into force upon such judgment, and must be integrated into the judgment.

136. Montenegro responded that laws such as anti-discrimination law are relevant. In proceedings, the court must ascertain whether a party has litigation capacity or an existing representative: if the person has neither, the court must appoint a temporary representative.

137. In Switzerland, alternatives (in addition to *ex lege* representation) are welfare guardianship, personal representation, and general guardianship.

¹⁰² A forthcoming article by Bianka Dörr (University of Lucerne and Head Legal, Kantonsspital St Gallen), following upon a project on “*Ex lege* representation rights for relatives and medical decision making”, is expected to address *inter alia* the compatibility of such arrangements with ECHR Article 6.

¹⁰³ See paragraph 97.

138. In UK – Scotland there is a substantial range of other measures. Within the Adults with Incapacity (Scotland) Act 2000, all other measures are involuntary rather than voluntary: simplified and restricted alternatives to guardianship known as access to funds and management by registered establishments; a simple provision that bank accounts in joint names may continue to be operated by one joint account holder (or remaining joint account holders) if one should lose capacity; specific provisions in relation to medical treatment and medical research; guardianship orders; and issue-specific intervention orders. Other measures mentioned in the Response from UK – Scotland include safeguarder, curator *ad litem*, independent advocate, DWP appointee, “and other measures”. UK – Scotland commented that the difference between autonomous (i.e. voluntary) and other measures has not been, and to some extent still is not, properly recognised; and that there is an issue about consistency of application across the country.

Ways in which member states’ own regimes could be improved

139. Member states were asked in the questionnaires whether there are ways in which their state believes that its own provisions regarding CPAs and/or advance directives could be improved. If so, they were asked to specify.

140. In Austria, revised legislation now provides explicitly that entry into force of a CPA does not affect legal capacity; that CPAs may only be made with a notary public, practising lawyer or authorised adult protection body; and that not only a natural person, but also an authorised adult protection body, may be appointed attorney under a CPA. The intention of these provisions is that Austrian law be brought fully into compliance with UN CRPD.

141. Belgium responded that its provisions on CPAs and advance directives need to be rendered more precise and developed. Croatia responded that advance directives are new, that there is much to be learned from experience, and that improvements are expected to be necessary.

142. France highlighted the institution of the proposed Register, mentioned elsewhere in this report. Ireland responded that it was too soon after passing of its new legislation to comment in this regard. Lithuania explained that monitoring of legal regulation is an element of the legislative process in Lithuania. UK – Scotland reported that it is considering ways to encompass fully the terms of UN CRPD, to ensure compliance with Article 5 of ECHR, and to consolidate in legislation more general learning from experience with its regime.

Experience which member states wish to share with others

143. Member states were asked whether they had experience which might be helpful to other member states. See the full terms of questions 30.2 in the full questionnaire and 23.2 in the short questionnaire. Two member states provided a substantive Response. Only three others responded¹⁰⁴. One substantive Response was from France. France explained that the date when the future protection mandate (CPA) is established is vitally important in relation to challenges, and also where there are successive mandates. It suggested that registration with tax authorities, or creating a Special Register, would be a partial remedy.

144. The author would comment that these comments from France highlight issues arising from the diversity of registration and other recording procedures. Dates of granting of a CPA or issue of an advance directive will be known in member states where the date of execution appears on the document. However, even in those cases the date of acceptance of appointment by the attorney under a CPA, and thus of establishment of the contract of mandate, may be unclear, and that may be further complicated by lack of clarity as to the date upon which a substitute appointment is triggered and accepted by the substitute attorney. Variations in relation to registration are (a) registration upon grant or issue, to achieve validity, (b) voluntary rather than essential registration, (c) registration at any time prior to coming into force, and (d) registration upon coming into force. Combinations of the

¹⁰⁴ The three others were Belgium, which explained that as its law came into force on 1 September 2014 there had been insufficient time to assess. Croatia simply responded “no”. UK – Scotland suggested that its relevant legislation was well known, and offered to share any specific learning.

foregoing, or lack thereof, provide further variability, such as registration both upon original grant or issue and upon entry into force, or only one of those events and not the other.

145. The second substantive Response was from UK – England & Wales, which has a National Mental Capacity Forum that looks at the implementation of the Mental Capacity Act, its use and how this can be better understood. This includes looking at the use of CPAs and advance directives and what actions – if any – should be taken to improve use and awareness.

146. This section should however be read in conjunction with Part B of Chapter IV below.

Was the Recommendation helpful in developing member states' own regimes?

147. Austria and UK – Scotland responded negatively, but only because relevant regimes were already in force when the Recommendation was issued. The five other member states which responded in this regard all did so positively. Belgian law is broadly based on the Recommendation. Croatia simply responded “yes”. Denmark responded that the Recommendation was very helpful in developing rules on CPAs, and has encouraged appropriate use of its provisions. France responded that Principle 8 was not reflected in its initial system, and adoption of Principle 8 (which addresses matters of certification, registration and notification) has provided added value, as well as compatibility with preserving capacity in accordance with Principle 9. Ireland responded that updating of its legislation had particular regard to the provisions of the Recommendation.

Has completing the questionnaire been helpful?

148. Two member states responded “no”¹⁰⁵. The remaining six member states who responded in this respect all did so positively. Belgium responded that the questionnaire had highlighted technical issues that require further development. France responded that it was helpful in terms of considering launching communication initiatives to publicise CPAs and advance directives. Lithuania responded that introduction of CPAs “could be further considered”. The three others responded with simple or emphasised affirmatives¹⁰⁶.

PART B – MATTERS ADDRESSED IN FULL QUESTIONNAIRES ONLY – PROACTIVE PROMOTION

149. Some of the questions in the full questionnaire were directed towards ascertaining the extent to which member states may have gone beyond making powers of attorney and advance directives passively available to their citizens. Those questions were designed to identify methods of education and active encouragement of the public to take up those possibilities. Relevant questions sought information on steps taken to make the Recommendation (including any translations) available within the member state; steps taken within the state actively to promote self-determination by the use of CPAs and advance directives; and any assessments of the effectiveness of such steps to promote self-determination.

150. As regards making the Recommendation available, it has been published on official websites in Bulgaria, Czech Republic and Ukraine; and in Austria, information about the Recommendation is available in juridical brochures.

151. As regards promotional measures, Austria reported that this has been done by legislation and by publicity. Denmark reported that in advance of its legislation being brought into force, the Ministry of Justice is preparing a guide for the general public with relevant information about CPAs, and templates which granters can choose if they wish. The Ministry of Justice is co-operating closely with relevant interest-groups. Latvia reported that the only action taken by the Ministry of Justice was training for relevant judges, prosecutors and court officials. Lithuania reported that the introduction of advance directives was promoted in the press, on radio and in television programmes. UK – England

¹⁰⁵ Austria; and UK – Scotland in that “it has not brought to light any issues we were not already aware of”.

¹⁰⁶ Croatia “yes”; Latvia “yes it does”; and Montenegro “yes, of course” – perhaps a suitable note upon which to end this Part of this Chapter.

& Wales reported that promotional measures included the code of practice to the Mental Capacity Act, regulations concerning CPAs, an online application process, and details of advance decisions on the official website of the National Health Service in England. No steps to assess effectiveness of those measures were reported by the foregoing states. Four further Responses on this topic, including reports of assessments of effectiveness, are given under the following four headings.

Czech Republic

152. Various Ministries and other bodies have participated in efforts to educate the public, and to promote use of CPAs and advance directives. The Ministry of Labour and Social Welfare made extensive efforts to promote the concept of the CPA. Several documents were developed to promote the rights of people with disabilities, especially their right to self-determination. They are available free for download. These materials cover the topics of legal capacity, guardianship and CPAs. That Ministry and other Ministries have helped with dissemination.

153. Several seminars and conferences were held on the topic of new instruments for supported decision-making and new provisions of the Civil Code. These were organised by both the Ministry of Justice and the Ministry of Interior Affairs. The Czech Judicial Academy¹⁰⁷ organised several seminars on this topic. The Ministry of Health supports projects that inform people about advance directives and how to use them in practice¹⁰⁸. A major promotion of advance directives from many other non-governmental organisations, legal offices, ministry information services and so forth was also put in place. The media, including but not limited to public television and broadcasting, also played an important role in the promotion of CPAs and advance directives. No specific research into the effectiveness of these measures has yet been undertaken in the Czech Republic.

France

154. The French National Authority for Health (“HAS”) has produced guides to assist the public, and professionals from the healthcare, medico-social and social sectors, in drafting advance directives based on an optional template established by decree, and proposed by order of the Minister of Health. This information will be made available *inter alia* on the HAS website. With the aim of promoting this advance directive template, and of allowing everyone to assert these new rights, an information campaign, targeting healthcare professionals and the general public, was due to be launched at the end of 2016 under the auspices of the National Centre for Palliative and End-of-Life Care. Law No 2015-1776 (of 28 December 2015) on the adjustment of society to ageing has made provision for communication initiatives, such as producing films, which will be utilised by the School of Public Health.

Ireland

155. The Irish Hospice Foundation has produced a “Think Ahead” document, which is a citizen-led (as opposed to clinician-led) advance planning tool for the end of life. The statutory functions of the Director of Decision Support Service will include providing information to relevant persons in relation to their options, which include CPAs and advance directives.

156. The Irish Hospice Foundation is currently evaluating the effectiveness of its “Think Ahead” initiative. As-yet unpublished data indicates that there has been a marked increase in the awareness of the programme since 2014. Over 50,000 copies of the “Think Ahead” document have been distributed throughout the island of Ireland. The Foundation has engaged in a widespread outreach programme to raise awareness of the initiative, engaging with over 48 civic groups.

UK - Scotland

157. Much information is available in Office of the Public Guardian (“OPG”) publications and on the OPG website. OPG conducts outreach training. There has been a range of local campaigns, utilising

¹⁰⁷ The Czech central body which provides education and training for judges, state attorneys, court clerks, judges’ assistants and so forth.

¹⁰⁸ An example is the work of the non-governmental organisation Cesta Domu (“The Way Home”), which launched a project available on its website.

a variety of media. In particular, a CPA campaign began in late 2013, originally in Glasgow City, as a call for people to “Start the Conversation” with their loved ones about decision-making in the event of loss of capacity. A website was set up to provide information on CPAs, and a series of television advertisements was shown over Christmas/New Year 2013/14. This was followed by further television advertisements, public space advertising and social media advertising, through a number of campaign phases (April 2014; summer 2014; Christmas 2014; summer 2015; Christmas 2015; summer 2016). During 2014 the website changed from “starttheconversation” to “mypowerofattorney” as brand recognition increased. Other local authorities joined the campaign during this time, and in summer 2016 Glasgow City Council worked with seven other Council areas (Tayside, Lanarkshire, Inverclyde, East Renfrewshire, Renfrewshire, East Dunbartonshire and West Dunbartonshire). This was extended to at least four other Council areas for the planned Christmas 2016 campaign.

158. The ‘mypowerofattorney’ website has a wealth of resources, as well as local pages for each area that has joined the campaign. A number of videos (including someone with a diagnosis of dementia, and a carer for someone with dementia) can be viewed on the website. During the summer 2016 campaign, use of social media was increased; specifically through a series of “myth-busting” advertisements made in conjunction with OPG. The response from social media was significant, with over 200,000 views of the four myth-busting advertisements; and this also drove increased traffic to the website. Some of the other statistics from the summer 2016 campaign are: over 1 million television viewers reached; over 8,400 visits to the website; and just under 13,000 page views. The second most frequently visited webpage (after the home page) is “how much does it cost”.

159. Figures for the number of new CPA registrations looked modest for 2016 at time of responding, but there was a high volume awaiting OPG processing, a volume which represented an increase in the number of registrations received. Other research was undertaken. Welfare power of attorney (WPOA) registration data was analysed between January 2010 and June 2015. Multilevel Poisson models for WPOA registrations nested by council and annual quarter were run, adjusting for (a) time; (b) campaign (a variable ranging between 0-4 dependent on intensity of campaign received); and (c) offset term mid-year population estimate for those aged 25 years+. Results were that WPOA registrations saw a reduction between 2010 and 2011, but overall increased between 2010 and 2015. WPOA registrations rose by 33.3% in Glasgow City between 2013 and 2014, while the rest of Scotland saw a rise of 17.3%. When all data was modelled, the relative probability (relative risk – “RR”) of a registration for those living in an area with the highest intensity campaign was significantly greater than those receiving no campaign (RR and 95% CI = 1.16 (1.14, 1.19)). Relative probability of a registration increased with increasing intensity in an approximately step-wise way. Variations between councils persisted after adjustment for campaign (Variance= 0.059 (0.015)). A random slope for the time variable suggested that variance between councils increased over time.

160. The campaign originated from concerns over substantial delays in discharge from hospital of patients who were no longer able to return home but were not capable of making valid decisions about where they should reside following discharge. The author was asked how procedures to make a decision to authorise this could be accelerated. He pointed out that where a patient had already granted a CPA with relevant powers, there would be no such delay. Assessment of the effects of the advertising campaign indicate that savings to public funds from resulting reductions in periods of delayed discharge from hospital have more than covered the cost of the campaign. As well as saving the daily cost of maintaining a patient in a hospital bed, also saved have been the human costs of people remaining for significant periods in hospital when they no longer need to be there, and resulting reduction in availability of hospital beds for other people who do require them.

161. The conclusions to be drawn from assessment of the Scottish campaign were as follows. During the period of the campaign, area-level increases in WPOA registrations were observed directly correlated to campaign intensity and location. This could be due to the public awareness WPOA campaign which began in Glasgow City. The campaign appears to have achieved, and to be likely to achieve increasingly into the future, the financial and human savings identified in the preceding paragraph.

PART C - MATTERS ADDRESSED IN FULL QUESTIONNAIRES ONLY - OTHER MATTERS

Dates when provisions entered into force

162. This information is best used in conjunction with the statistics in Table C in Appendix IV. It accordingly appears in Table D.

Proposals to alter the scope of CPAs

163. The full questionnaire enquired whether there were, in each member state, any proposals to alter the scope of matters which might be dealt with in a CPA. In Austria, revised legislation for CPAs was prepared, after wide consultation, by the Ministry of Justice. Following much discussion, it has been enacted without major changes, and will enter into force on 1 July 2018. UK – Scotland reported that the potential scope of matters which might be dealt with in a CPA is under review but that change is unlikely. However, recent proposals from the Scottish Law Commission suggested that all attorneys holding welfare powers could be presumed to be empowered to authorise restrictions of liberty, unless the CPA document explicitly states otherwise. The remaining Responses to this question¹⁰⁹ were all negative. Ireland pointed out that its 2015 Act had recently updated the statutory provisions.

Do general powers of attorney have any continuing effect?

164. The full questionnaire asked to what extent, if any, might general powers of attorney automatically have effect as CPAs. Clear Responses to the effect that they do not were received from Austria, Ireland, Latvia, UK – England & Wales and UK – Scotland. France explained in rather more detail that Article 2003 of the Civil Code, regarding mandates in general, provides that they are permanent in nature. That applies in principle to powers of attorney. They terminate when revoked by the attorney, when the attorney resigns, through natural death or “legal death”, through placement of the granter under guardianship, or through the personal insolvency of the granter or the attorney.

Role of attorneys in relation to deprivations of liberty

165. The full questionnaire asked what role (if any) are attorneys permitted to have in relation to deprivations of liberty in terms of Article 5 of ECHR. Article 5 is reproduced in Appendix III. Having regard to the jurisprudence of the European Court of Human Rights, and academic commentary on the subject, there is doubt as to whether an attorney can be empowered to authorise a deprivation of liberty. If an attorney can be so empowered, then it seems likely that a regime of automatic independent review must thereafter apply. In only two member states does it appear that the relationship between CPAs and Article 5 has been expressly dealt with. In UK – England & Wales, granters of CPAs cannot authorise the attorney to consent to deprivation of liberty, except in order to do so either by court order or by following the deprivation of liberty safeguarding processes applicable in UK – England & Wales. The Law Commission for England & Wales has however recently further considered this issue¹¹⁰.

166. In Ireland, attorneys did not have power to authorise a deprivation of liberty under the 1996 Act. The matter has however been addressed in the 2015 Act, though it is understood that legislation on the issue of deprivation of liberty generally is at present being prepared¹¹¹. However, the relevant provisions of the 2015 Act are worth quoting:

¹⁰⁹ Czech Republic, France, Ireland and UK – England & Wales.

¹¹⁰ See proposals published 13 March 2017 at <http://www.lawcom.gov.uk/project/mental-capacity-and-deprivation-of-liberty/>

¹¹¹ On 8 December 2017, Ireland published for consultation draft legislation under which an attorney could be empowered by the granter to authorise a deprivation of liberty.

“(1) Where an enduring power of attorney confers authority in relation to personal welfare, the power does not authorise an attorney to do an act that is intended to restrain the donor [i.e. granter], unless there are exceptional emergency circumstances and –

- (a) the donor lacks capacity in relation to the matter in question or the attorney reasonably believes that the donor lacks such capacity,*
- (b) the attorney reasonably believes that it is necessary to do the act in order to prevent an imminent risk of serious harm to the donor or to another person, and*
- (c) the act is a proportionate response to the likelihood of the harm referred to in paragraph (b) and to the seriousness of such harm.*

(2) For the purposes of this section, an attorney restrains a donor if he or she –

- (a) uses, or indicates an intention to use, force to secure the doing of an act which the donor resists,*
- (b) intentionally restricts the donor’s liberty of voluntary movement or behaviour, whether or not the donor resists,*
- (c) administers a medication, which is not necessary for a medically identified condition, with the intention of controlling or modifying the donor’s behaviour or ensuring that he or she is compliant or not capable of resistance, or*
- (d) authorises another person to do any of the things referred to in paragraphs (a) to (c).*

(3) An attorney who restrains a donor shall cease the restraint immediately upon the restraint no longer being necessary in order to prevent an imminent risk of serious harm to the donor or to another person.”

Any restraint by an attorney is a matter that must be reported to the Director of the Decision Support Service.

167. Austria reported that there is no specific regulation of this matter. Czech Republic reported that entry into force of a CPA has no effect on mental capacity and does not permit consent to non-consensual hospitalisation. Denmark reported that there is nothing explicit in Danish legislation, though special rules apply where the granter resists, for example, a move into a nursing home, even though the action in question might be necessary for health reasons. In France, there are no provisions specific to future protection mandates (CPAs) in relation to deprivation of liberty. Moreover, relevant provisions applicable to guardians do not apply to attorneys. Under Article 706-113 of the Criminal Procedure Code, guardians must be informed of any proceedings involving the adult. They have the right of access to documents, and are fully entitled to a visiting permit. However, these provisions in relation to guardians do not apply to attorneys. Latvia has no specific legal provisions in respect of CPAs regarding deprivation of liberty, and accordingly attorneys have no special role in that regard. In UK – Scotland, the question of what might be the role of attorneys in relation to deprivation of liberty is currently under discussion. Scottish Law Commission has suggested that attorneys with welfare powers be deemed to authorise a restriction of liberty (defined to include deprivation of liberty), provided that an appropriate procedure for restriction of liberty is followed.

Issues regarding the scope and effect of powers contained in CPAs

168. The full questionnaire enquired whether issues had arisen regarding the scope and effect of powers contained in CPAs. Three member states (Czech Republic, Ireland and UK – Scotland) reported issues. The Czech Republic reported that an NGO has proposed measures to ensure that the “last wish of the person” in health and social care matters be effectively implemented, and that the person will not face the risk of his or her instructions being invalid because they are in imperfect form. It is proposed that the Ministry of Justice should prepare an analysis of the effectiveness of using “the new tool of supported decision-making”.

169. Ireland reports that an issue has arisen in practice regarding the making of gifts by attorneys of property belonging to the granter. The 1996 Act had clear limitations on making such gifts, but it had no reporting requirements. The lack of reporting requirements gave rise to concerns. The 2015 Act accordingly contains detailed safeguarding provisions, which include mandatory reporting requirements for attorneys, coupled with requirements to keep and produce accounts. Reports must include details of any reimbursement of expenses, and of any gifts made. In any event, gifts may be

made only if expressly provided for in the CPA document. The 2015 Act provides for offences and sanctions in the event of non-compliance with these provisions.

170. UK – Scotland reported that issues regularly arise regarding the scope and/or effect of powers. Scottish Government guidance advises attorneys how to resolve disputes. The Public Guardian, the relevant local authority, and the Mental Welfare Commission for Scotland have roles in assisting a resolution of such issues and disputes. The court may be asked to give directions.

171. Austria reported that no such issues have arisen. Denmark commented that relevant provisions are not yet in force. France reported that no such issues have arisen, but that this is probably because of the low number of future protection mandates (CPAs) which have been established, and also because the vast majority of them are certified by a notary, thus guaranteeing the quality of the document and that there are appropriate safeguards. Latvia reported that its Ministry of Justice is not aware of such issues. UK – England & Wales reported no such issues.

Issues where there are joint attorneys

172. The full questionnaire sought information as to whether there were issues where there are joint attorneys; as to mechanisms to resolve such issues; and as to the extent to which such mechanisms have been effective. Austria reported that no difficulties have arisen. Austria, France and UK – England & Wales all simply indicated that disagreements among joint attorneys, if not otherwise resolved, are referred to the relevant court for resolution.

173. UK – Scotland reported that issues do arise of conflicts of interest and conflicting views where there are joint attorneys. Extensive guidance has been produced by Scottish Government to address such issues. Advice may be sought from the Public Guardian. If matters are not otherwise resolved, an application may be made to the court. While these various methods have been relatively successful, there is a view in Scotland that mediation – if it were to be available – might be more helpful.

174. Ireland replied that in practice there have not been apparent difficulties where more than one attorney has been appointed. In fact, the appointment of more than one attorney gives rise to greater protection from abuse (particularly financial abuse) for the granter. Granters who have a number of children often wish to appoint more than one child as attorney. There is also provision in the legislation for the attorney to consult with others. Granters who have more than two children (whom they appoint as attorneys) sometimes provide that the other children must be consulted. This helps to maintain family harmony. Another advantage of appointing more than one attorney is that if one attorney dies or is unable to act for any reason (including disqualification), the remaining attorney can act. This is particularly useful where the granter has not provided for a substitute attorney. Under the 1996 Act, there is provision for an application to the High Court where difficulties arise. The 2015 Act makes provisions that matters can first of all be referred to the Director of the Decision Support Service, and ultimately (if required) to the Circuit Court.

175. Denmark replied that although legislation is not yet in force, the Ministry of Justice anticipates that the existence of several attorneys could result in disagreements that would challenge the effectiveness of the CPA. CPAs are based on the premise that they are a simple and private alternative to guardianship, based on the granter's choice of persons whom the granter trusts to be attorney(s). If several attorneys are chosen, the premise is that they are trusted to be able to cooperate. Unlike guardianships, CPAs are not actively supervised by the authorities. If disagreements occur, there might be reason to doubt whether the granter's interests are being properly safeguarded. If the State Administration becomes aware of such disagreements, it could revoke the CPA, and if the State Administration deemed it relevant, it could initiate a guardianship application.

176. It will be noted that there is interesting diversity in reports as to whether significant issues arise in relation to joint attorneys or not, and more generally as to views about the relative advantages and disadvantages of joint appointments. This diversity may in part be a consequence of the extent to which public authorities are not involved in what are often, to a significant extent, essentially private arrangements.

Are supervising attorneys mandatory?

177. In addition to addressing the requirements of Principle 12.1 (see paragraph 61), the full questionnaire asked whether supervising attorneys are required. None of the member states who replied reported that a supervising attorney is required.

Issues particular to sole attorneys

178. The full questionnaire enquired about issues arising with sole attorneys which do not arise where there is more than one attorney. Austria reported no such issues, and Latvia reported none of which the Ministry of Justice is currently aware. Ireland and UK – Scotland reported greater risk of financial abuse where there is a sole attorney. Ireland commented that this arose particularly in the case of appointments under the 1996 Act, where there are no mandatory reporting requirements. UK – Scotland reported that with a sole attorney there is also greater risk of general financial maladministration, as well as difficulties that arise not uncommonly where a sole attorney becomes unable to fulfil the responsibilities of attorney for any reason (which of course is not an issue if there is a named substitute, who is willing to act). Denmark responded that notwithstanding its concerns about joint appointments, joint appointments nevertheless have advantages over sole appointments: joint attorneys can support each other, attorneys with different areas of expertise may be appointed, and if there are substitutes or joint attorneys who continue to act, then the CPA will remain in force even if an attorney becomes unable to act.

Electronic granting or registration

179. In Denmark, a CPA must be created electronically in the CPA Register by the granter, by using a secure self-service solution. The system is currently under development. The granter will be required to enter his or her Social Security number and that of the attorney. Thereafter the granter acknowledges the CPA before a notary. The notary checks the identity and capacity of the granter, and that the granter is not under undue influence. In France, in theory, as from 1 October 2016 such legal documents may be drawn up and kept in electronic form. However, there is a requirement for the Court Registrar to approve the mandate and enter its date of effect, and as matters stand in relation to the equipment available in courts, this cannot be done electronically. In Ireland, electronic granting is not currently available, but it is anticipated that this facility will be available following commencement of the relevant provisions of the 2015 Act. In UK – Scotland, there is a portal within the website of the Office of the Public Guardian which permits CPAs to be submitted electronically for registration, with certificates and the relevant document returned electronically, and accessed by the same portal.

180. Austria, Latvia and UK – England & Wales reported that neither electronic granting nor electronic registration are available.

Written acceptance of appointment

181. The full questionnaire enquired whether an appointment as attorney requires to be accepted in writing, before the attorney may act. Five member states¹¹² reported that such acceptance in writing is necessary. In France, where the mandate is established by official deed, the attorney's acceptance must also be by official deed; and where the mandate is established by private agreement, the attorney must accept the mandate by signing the document. In Latvia, where the CPA is a contract in the form of a notarial deed, the notary has a duty to ensure that both granter and attorney know and understand the content (though the granter may prepare his/her own document and submit it to the notary). Slightly differently, in the Czech Republic consent to act must be given before the court in court proceedings, either in writing or orally. Only Denmark responded negatively to this question. In Denmark, the concept of the CPA is "based on the trust which the granter has in the attorney".

¹¹² Austria, France, Ireland, Latvia and UK – Scotland.

Easy-read and other forms helpful to persons with disabilities

182. In member states where there are no prescribed or compulsory forms of document¹¹³, easy-read or other helpful forms of document may be used. In UK – England & Wales, an easy-read form may be used on request, in either English-language or Welsh-language form. In Latvia, the notarial deed is normally in standardised form, but the granter may prepare his or her own document, which may be in a simpler form, and may submit that document to the notary. The solution available in Denmark is an alternative procedure for granting CPAs. Under the alternative procedure, the CPA can be created and signed physically before the State Administration, rather than being acknowledged before a notary, and a simpler form is possible. The State Administration checks identities, and the capacity of the granter. In Ireland, where forms are prescribed, they are not currently available in easy-read format, but this is to be reviewed following phased commencement of the 2015 Act. Austria reported that it has no specific regulation in this regard.

Other mechanisms for revocation

183. The full questionnaire sought specification of any further or different provisions or mechanisms for revocation, beyond those reported in paragraphs 45 and 92. Denmark reported that the granter may empower a supervising attorney to revoke the CPA partly or in whole before the State Administration. Latvia re-confirmed that revocation is by notarial deed. UK – England & Wales reported that CPAs may be revoked: by the Court of Protection if the granter has lost capacity; by the bankruptcy of the granter in the case of financial CPAs; by the bankruptcy or loss of capacity of the attorney; disclaimer by the attorney; and dissolution or annulment of marriage or civil partnership between the granter and attorney. Austria, Republic of Moldova and UK – Scotland reported that there are no such further or different provisions.

Experience of the practical operation of revocations

184. The full questionnaire enquired about any notable experience of the practical operation of revocations, and of the requirements for revocations. France reported that if revocation is notified only to the attorney, it cannot be invoked against third parties who have acted without any knowledge of the revocation. Ireland reported that the 1996 Act contains provisions for the protection of the attorney acting in good faith, and for the protection of third parties where the registered power is invalid or not in force.

185. UK – Scotland responded at greater length that the most common issues are family disputes. Despite the author of the capacity certificate being required to testify to no undue influence, there are regular complaints that the granter was being influenced – usually to revoke the CPA made in favour of A and to remake it in favour of B. It is not uncommon to have a CPA “flip” to and fro between A and B at regular intervals. This cycle is usually broken by the Public Guardian challenging the situation on the grounds of apparent undue influence. Another issue, again not uncommon, is people revoking the CPA (that they put in place to protect themselves) as they begin to lose capacity and experience the “paranoia” that can occur in early dementia. As there is no intimation required on the attorney before revocation, the attorney does not know that revocation has occurred until after the event. It becomes evident at this advanced stage that in fact the person no longer had capacity so cannot remake a CPA, leaving them in a position they had, whilst capable, intended to avoid. One can see the argument that a capable person should be permitted to do whatsoever they wish, and that this should be no concern of the attorney, but this relies on a robust and accurate capacity assessment (of the person remaining capable and so able to revoke the CPA) which experience demonstrates does not always happen. UK – Scotland does not (at least yet) have a test case for cancelling a purported revocation. The author would comment that the procedure in Scotland is to give “notice of revocation” to the Public Guardian, and it could accordingly be argued that a revocation notice cannot properly be certified unless revocation – requiring intimation to the attorney – has already taken place; but the practical experience narrated in the Response from UK - Scotland nevertheless demonstrates a general need for revocation procedures to take account of the potential factors identified above, as well as the practicalities of protecting the positions of attorneys and third parties acting in good faith when unaware of a purported revocation. Austria and Latvia reported no known problems.

¹¹³ Czech Republic, France, Republic of Moldova and UK – Scotland.

Determination by granter regarding entry into force and assessment of incapacity

186. The full questionnaire enquired to what extent granters are permitted to determine matters of entry into force, and assessment of incapacity. UK – England & Wales reported that granters may place restrictions upon when the CPA comes into force, and UK – Scotland reported that the method of determination of incapacity may be stated by the granter in the CPA document. No other positive replies were received to this question. Austria reported that no regulation exists. Czech Republic reported that there are no rules for such a procedure. More explicitly, Ireland has a fixed procedure, and in Latvia granters are not permitted to determine the entry into force.

Categorisation in law of CPAs

187. The full questionnaire enquired whether a CPA is categorised as a contract of mandate, which may only be established upon acceptance, and if so what was the precise categorisation in law. If not, it was also asked what was the precise categorisation in law. The reported positions were very variable. At one extreme, Austria and France responded that a CPA document is a contract of mandate (and France added that the general provisions of the Civil Code relating to mandates apply, insofar as not incompatible with specific provisions of law for the future protection mandate). At the other extreme, Denmark and Ireland responded that CPAs are not a contract, though Ireland described the CPA as “an arrangement which is created and regulated by statute and the statute requires the attorney to confirm acceptance”. Czech Republic responded that acceptance is required, except for appointment of the Public Guardian as attorney. Latvia replied that a CPA is a bilateral authorisation contract. Republic of Moldova replied that under its draft law CPAs are considered as contracts, and that the draft law provides that where a CPA is granted unilaterally, the attorney may accept it by signing. UK – England & Wales responded simply that a CPA “must be created by deed”, without further clarification in relation to the questions asked. In UK – Scotland, it was reported that there is ongoing debate, though CPAs may only be operated if registered, and the prescribed form of application to register must be signed by the attorney(s) to the effect of accepting appointment.

Required contents of the register

188. The full questionnaire enquired what are the required contents of the register. The Responses were particular to each member state, and cannot readily be grouped. They are accordingly here stated by member state, as follows:

Austria: Personal data regarding the granter and the attorney; the place where the CPA is kept.

Czech Republic: (a) Information about the document, (b) name, surname, date of birth and residence of granter, (c) name, surname, date of birth and residence of appointee, (d) particulars of notary who made the notarial record, date of the record, register number, (e) identification of the notary and where the declaration is held, and (f) date and time of registration.

Denmark: The CPA document itself, as part of the electronic granting and processing explained in paragraph 179.

France: Implementation is pending, and particulars of required contents will be issued shortly.

Ireland: The register contains the CPA documents. Under the 2015 Act, the register is to be in such form as the Director considers appropriate.

Latvia: The register contains the following data: granter, attorney, date when the CPA document was issued, its number, term and particulars of the certifying notary, date when the attorney becomes entitled to act, or when the attorney’s powers have been suspended, as

well as supporting documents, particulars of any revocation, data concerning public denouncement of any revocation in the official gazette, and any other notes.

Republic of Moldova: No registration requirements.

UK – England & Wales: Information about the granter and the attorney.

UK – Scotland: Scottish Ministers have power to prescribe the content of the Public Guardian's registers, but have failed to do so. In practice, the Public Guardian retains a copy of the CPA document and records the following information: name of granter, whether welfare or financial, date of registration, name(s) of attorney(s), whether attorneys are sole, joint or substitute, current status of attorneys (e.g. active or revoked), and current status of the CPA document (e.g. open, revoked).

Principles or standards applicable to the attorney

189. The full questionnaire enquired what are the principles or standards with which an attorney under a CPA must comply. Again, the Responses were particular to each member state, as follows:

Austria: The attorney must act in accordance with clear instructions given by the granter in the CPA document. Wishes voiced by the granter after incapability should be taken into account if they are not contrary to the welfare of the granter.

Czech Republic: The appointee must fulfil the legal declarations of the granter and respect his opinions, including past opinions, and including beliefs or creed; must systematically take them into account; and must deal with matters accordingly. If that is not possible, the appointee must act according to the interests of the granter. The attorney must ensure that the way of life of the granter is not in conflict with his abilities, and that it corresponds to the specific ideas and wishes of the granter, unless they can be reasonably opposed.

Denmark: The attorney must act as instructed by the granter, and must take into account the interests of the granter. In consequence, the attorney must involve the granter when possible "especially when the CPA is used in important matters".

France: The attorney must act in accordance with the CPA, cannot go beyond the provisions of the CPA, and must act in the interests of the granter. This provision is common to all measures for safeguarding protected adults.

Ireland: An attorney is required (in a detailed statement) to undertake to act in accordance with his/her functions as specified in the CPA document and in accordance with the guiding principles in the legislation, and to comply with the reporting obligations. Codes of practice under the 2015 Act will include a code of standards for attorneys.

Latvia: The attorney must act with utmost care, must not give false information to the granter, must act within the limits of the powers conferred and, in compliance with the granter's instructions, must not make personal profit, must ensure that the granter receives all relevant profits, interest, etc., and must account to the granter for his/her actions.

UK – England & Wales: The attorney must act in the best interests of the granter at all times.

UK – Scotland: The attorney has a fiduciary duty to the granter and must act in accordance with the principles set out in section 1 of the Adults with Incapacity (Scotland) Act 2000, which are not to intervene unless there is benefit to the granter, to intervene in the manner least restrictive of the freedom of the granter, to take account of the past and present wishes and feelings of the granter, so far as practicable to take account of the views of other key persons, and to encourage exercise and development of capabilities by the granter. In addition, a provision applicable to attorneys but not to other appointees is that they are not required to do something which would be unduly burdensome in relation to its utility.

Application of advance directives to other matters

190. The full questionnaire enquired whether advance directives may apply to matters other than those already disclosed in Responses. Only four relevant replies were received. Austria and UK – Scotland replied negatively. Croatia reported that advance directives may be applied for representation in procedures for pronouncing people legally incompetent. Also, under the Family Act a parent who exercises parental care may use an advance directive to appoint a person to look after his or her children in the event of his or her death, and in some other situations. In Lithuania, the granter of an advance directive may specify the place where the granter would like to live; a person who would be responsible for dealing with financial and other matters; not only the choice of possible guardian or curator but persons who should not be appointed; and other instructions or directives. In other words, where (as in Lithuania) advance directives and not CPAs are available, the full potential for advance directives seems to have been better explored and provided for¹¹⁴. This is among the points considered further in the next chapter.

¹¹⁴ On the other hand, to the extent that advance directives can, in Lithuania, be used to determine appointments under what would otherwise be categorised as involuntary arrangements, they could be said to cross the line of rather arbitrary judgement which, in paragraph 32, was taken as setting the provision in Romania there described as lying at the limit of categorisation as a CPA.

CHAPTER V: PROPOSALS AND SUGGESTIONS

191. The proposals and suggestions in this chapter are addressed to all 47 Council of Europe member states as well as to the Council of Europe itself. They draw upon the information received from the 29 member states¹¹⁵ listed in Table A of Appendix IV, which the author supplemented with information within his own knowledge where he has so indicated. The author considers that this information is of sufficient general relevance to provide the basis for his proposals and suggestions, which are solely those of the author and do not necessarily reflect the views of CDCJ, the Council of Europe or its member states.

192. In this chapter, “Proposal” and “Suggestion” refer to proposals and suggestions in this chapter; “relevant provision” means provision in law designed to promote self-determination for capable adults by means of CPAs and advance directives; “practice” means all aspects of practice in the application of relevant provision; and “promote” and “promotion” of relevant provision means methods to encourage citizens to make full use of relevant provision.

193. It is commendable that much has been done, and continues to be done¹¹⁶, by member states towards promoting self-determination for capable adults in the event of future incapacity by means of CPAs and advance directives. However, the general picture across Europe is that outcomes envisaged by the Recommendation are only at an early stage of development, leaving many member states still with much to be done. Ten member states¹¹⁷ currently have all of the areas of relevant provision of: (1) CPAs to cover economic and financial matters; (2) CPAs to cover health, welfare and other personal matters; and (3) advance directives as defined in Principle 2.3¹¹⁸. Ireland will have all of those areas of provision when legislation already passed comes into full force. Only Ireland, when that legislation comes fully into force, will have implemented all of the Principles identified as fundamental in Chapter II. That should be seen not as criticism of all other member states, but rather as encouragement to continue the ongoing processes of review and development across Europe, as reflected in this report. In doing so, member states may be assisted by the wealth of comparative material contributed by member states and reflected in this report, including as to ways in which particular issues have been addressed, and as to experience in practice. In a time of dynamic development across our continent, guided by the common Principles in the Recommendation, this report should be seen as a starting-point for further collaborative progress. Member states are encouraged to continue to share information, initiatives and experience. Member states are encouraged to contact the DGI Secretariat with proposals for joint projects, conferences and the like.

¹¹⁵ Including, in the case of the United Kingdom, England & Wales and Scotland.

¹¹⁶ As exemplified by the categories in Appendix IV, Table A of legislation in force, legislation passed but not yet in force, proposals before legislatures, and proposals not yet before legislatures.

¹¹⁷ Including, in the case of the United Kingdom, England & Wales and Scotland.

¹¹⁸ “Instructions given or wishes made by a capable adult concerning issues that may arise in the event of his or her incapacity”. The availability of non-binding advance statements only has been excluded from the total of eight.

PROPOSAL 1:

(A) – That all member states should, on an ongoing basis, continue to review and develop provisions and practices to promote self-determination for capable adults in the event of future incapacity by means of continuing powers of attorney and advance directives.

(B) – That in doing so, member states should have regard to such assistance as may be provided by the solutions to issues, and experience in practice, of other states as described in this report; should continue to share information, initiatives and experience; and should where appropriate, and in conjunction with Council of Europe, promote joint projects, conferences and the like.

194. The broad picture provided by the information reflected in this report is one of diversity¹¹⁹. This diversity appears to be referable to the diversity of legal regimes into which relevant provision has been introduced, of stages of progress reached in developing relevant provision, and of experience in doing so. One might expect a general trend from divergence towards a degree of convergence as experience is shared and relevant provision is developed. However, a general feature is the under-development of provision for advance directives, compared with CPAs. The overall purpose of the Recommendation can reasonably be viewed as to maximise the overall provision for self-determination by a combination of two methods, namely by bilateral arrangements under which an attorney is appointed, and by unilateral arrangements under which an advance directive is issued. Those two methods may overlap in practice and, in such case, it is important that they are coordinated in order to avoid inconsistencies.

195. Bilateral arrangements in the form of CPAs have the advantages that the instructions and wishes in a CPA are directed to the attorney, who is responsible for implementing them, and (within the scope of powers conferred) for safeguarding and promoting the rights and interests of the granter. CPAs are however a potential source of vulnerability in that the implementation of those responsibilities is mediated through the attorney, with a concentration of much power in the attorney, and resultant risk of actions and outcomes which might be inconsistent with those desired by the granter, or which would have been desired if the granter had been in a position to formulate and communicate the granter's desires. Some matters might be better and more safely contained in advance directives addressed directly to those involved in any relevant way with the granter, and not mediated through an attorney. It has not been possible to identify in any member states clear legislative provision (1) maximising the scope of self-determination by advance directives, so as, in conjunction with CPAs, to maximise the total range of provision for self-determination, (2) addressing the full possible range of application of advance directives, envisaged in Principle 14, "to health, welfare and other personal matters, to economic and financial matters, and to the choice of a guardian, should one be appointed", and (3) containing a reasoned allocation to the two categories, specified in the definition of advance directives in Principle 2.3, of (binding) "instructions given" and (non-binding) "wishes made".

PROPOSAL 2:

(A) – That member states consider, in particular, developing provision for advance directives, as a component in the overall promotion of self-determination in conjunction with CPAs, having regard to the full potential scope of application of advance directives to all health, welfare and other personal matters, to economic and financial matters, and to the choice of a guardian should one be appointed; and with appropriate distinction between the categories of instructions given and wishes made.

(B) – That Council of Europe should consider promoting research and consideration at a European level, and issue of guidance or recommendations, with a view to assisting member states in implementing Proposal 2 (A).

196. CPAs and advance directives present a fundamental potential contradiction in applying the principles of autonomy and self-determination. On the one hand, the establishment of such voluntary

¹¹⁹ Paragraphs 29 – 34, and Chapters III and IV generally.

arrangements, and the terms upon which they are established including in the case of a CPA the choice of attorney, represents a clear exercise of self-determination. But on the other, a granter with some impairment of capabilities may subsequently express opposition to exercise of the powers conferred, or wish to terminate the appointment of the attorney, or to revoke or amend an advance directive.

197. Principle 1 of the Recommendation refers to promotion of “self-determination for capable adults in the event of their future incapacity”. As noted in paragraph 49 of this report, and in paragraphs 39 and 40 of the Explanatory Memorandum to the Recommendation, “capacity” and “incapacity” in the Recommendation relate to impairment of an adult’s ability to make decisions, to assert, exercise and safeguard rights, and so forth. Those terms do not imply restriction upon rights and status as a person in law. Rather, measures such as CPAs and advance directives are mechanisms intended to overcome incapacities by providing ways to ensure that rights are asserted, exercised and safeguarded. It is generally accepted that incapacity, in the sense of incapability, should be viewed as occurring at a particular time in relation to a particular act or decision, and not in any general all-encompassing way. Even with that qualification, however, it is no longer either accurate or acceptable to envisage a simplistic boundary between capability and incapability.

198. Article 12 of UN CRPD¹²⁰ not only reaffirms that persons with disabilities have the right to recognition everywhere as persons before the law (UN CRPD Article 12.1), and requires States Parties to that Convention to recognise that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life (UN CRPD Article 12.2). It also requires States Parties to take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity (UN CRPD Article 12.3). It also requires States Parties to ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law (UN CRPD Article 12.4). Prominent among those safeguards is the requirement to ensure respect for the rights, will and preferences of the person. That requirement focuses the potential contradiction referred to at the outset of paragraph 196. A CPA or advance directive issued subject to all necessary safeguards at time of issue is designed to reflect the will and preferences of the granter at that time. But Article 12.4 of UN CRPD requires respect for the rights, will and preferences of the granter at all times, including at time of exercise of the powers conferred by a CPA, of application of the instructions in an advance directive, or when the wishes in an advance directive are to be followed. That requirement applies however great the granter’s intellectual disabilities at the relevant time. Apparent expressions of the granter’s will and preferences at that time may differ from, or even directly contradict, those expressed at time of granting.

199. One example of such a potential contradiction is in relation to the provisions of Article 5 of ECHR reproduced in Appendix III. The author has experience of clear instructions from granters, at time of granting a CPA, that their chosen attorney, and no-one else, should decide about measures amounting to a deprivation of liberty in order to safeguard the granter’s safety, even though the granter may have lost any sense of danger by that time, and in consequence resist the application of such restrictions.

200. According to Responses received, the particular example of deprivation of liberty under a CPA is, in countries that have responded, addressed only in UK - England & Wales and in Ireland (see paragraphs 165 and 166). The issue is however wider than the question of deprivation of liberty, extending to any conflict between past and present expressions of will and preferences. The great volume of academic and other discussion of the interpretation and application of UN CRPD pays scant regard to CPAs and advance directives. They are not addressed in General Comment No 1 (2014) by the UN Committee on the Rights of Persons with Disabilities entitled “Article 12: Equal Recognition before the Law”. Closely related to that more general issue, and to each other, are: (a) the requirements of Principle 10.1 that the attorney should act in accordance with the CPA and in the interests of the granter (considered in paragraphs 50 – 54); (b) the requirement of Principle 10.2 to inform and consult the granter on an ongoing basis (considered in paragraph 55); (c) the requirement in Principle 10.2 that the attorney should, as far as possible, ascertain and take account of the past and present wishes and feelings of the granter and give them due respect (considered in

¹²⁰ Reproduced in Appendix III of this report.

paragraphs 56 and 57); and (d) the question of the principles applicable to the actings of the attorney (considered in paragraph 89).

201. States Parties to UN CRPD are obliged to ensure that measures relating to the exercise of legal capacity “respect the rights, will and preferences of the person”¹²¹. CPAs and advance directives are measures within the scope of that requirement. Situations arise where there is conflict among the elements of “rights, will and preferences”. The UN Committee has placed particular emphasis upon the elements of “will” and “preferences”. In paragraph 21 of General Comment No 1 they write:

“Where, after significant efforts have been made, it is not practicable to determine the will and preferences of an individual, the ‘best interpretation of will and preferences’ must replace the ‘best interests’ determinations. This respects the rights, will and preferences of the individual, in accordance with article 12, paragraph 4. The ‘best interests’ principle is not a safeguard which complies with article 12 in relation to adults. The ‘will and preferences’ paradigm must replace the ‘best interests’ paradigm to ensure that persons with disabilities enjoy the right to legal capacity on an equal basis with others.”

This should be read in conjunction with the call in paragraph 7 of General Comment No 1, quoted in paragraphs 10 and 214 of this report, for abolition of all involuntary measures.

202. The author was a co-author of the Essex Autonomy Three Jurisdictions Project Final Report (available at <http://autonomy.essex.ac.uk/eap-three-jurisdictions-report>) which addressed how the requirements of Article 12.4 of UN CRPD, and the views of the UN Committee, could appropriately be applied to the three regimes of the United Kingdom. Recommendation 1 of the Three Jurisdictions Report is as follows:

“Respect for the full range of the rights, will and preferences of everyone must lie at the heart of every legal regime. That must be achieved regardless of the existence and nature of any disabilities. Achieving such respect must be the prime responsibility of anyone who has a role in taking action or making a decision, with legal effect, on behalf of a person whose ability to take that action or make that decision is impaired. The role may arise from authorisation or obligation. The individual with that role should be obliged to operate with the rebuttable presumption that effect should be given to the person's reasonably ascertainable will and preferences, subject to the constraints of possibility and non-criminality. That presumption should be rebuttable only if stringent criteria are satisfied. Action which contravenes the person's known will and preferences should only be permissible if it is shown to be a proportional and necessary means of effectively protecting the full range of the person's rights, freedoms and interests.”

203. The requirement for a more balanced approach than that advocated by the UN Committee has now been authoritatively established, at least within Europe, by the European Court of Human Rights in its judgment of 23 March 2017 in the case of *A.-M.V. v. Finland* (Application No 53251/13). On the general question of balance, the court held that: “*The Court is mindful of the need for the domestic authorities to reach, in each particular case, a balance between the respect for the dignity and self-determination of the individual and the need to protect the individual and safeguard his or her interests, especially under circumstances where his or her individual qualities or situation place the person in a particularly vulnerable position.*”

204. Applying that balanced approach to the case before it, the court held that: “*The Court considers that a proper balance was struck in the present case: there were effective safeguards in the domestic proceedings to prevent abuse, as required by the standards of international human rights law, ensuring that the applicant's rights, will and preferences were taken into account. The applicant was involved at all stages of the proceedings: he was heard in person and he could put forward his wishes. The interference was proportional and tailored to the applicant's circumstances, and was subject to review by competent, independent and impartial domestic courts. The measure taken was*

¹²¹ UN CRPD Article 12.4: see Appendix III.

also consonant with the legitimate aim of protecting the applicant's health, in a broader sense of his well-being.”

205. *A.-M.V. v. Finland* concerned a dispute between a man with intellectual disabilities and his mentor, appointed by a court¹²². Similar disputes can and do arise between granters and attorneys. Generally, however, the safeguards narrated above will not apply in the situation where the attorney has been appointed voluntarily by the granter, rather than involuntarily through a court process. This again emphasises the contradiction identified in paragraph 196. The exercise of self-determination in establishing a voluntary arrangement may lead to the same subsequent conflicts as under an involuntary arrangement, with less procedural protections against subsequent apparent exercises of the right to self-determination being overridden. In what circumstances, if any, might it be permissible for an earlier exercise of self-determination to overrule a subsequent exercise of self-determination? It has long been recognised that a person's views when faced with the actuality of a situation, such as the impact of serious and permanent injuries, may be different from the same person's views when considering such a situation hypothetically, and that the person's personality may have changed, perhaps as a consequence of such injuries¹²³. It does not seem possible, in any relevant jurisdiction, to discern clear and consistent guiding principles as to how such contradictions should be addressed. For example, reported relatively recently in UK – England & Wales have been the cases of *Briggs v Briggs* [2016] EWCOP 53 and *SAD and ACD v SED* [2017] EWCOP 3. In the first of these¹²⁴, the court referred to “a fundamental principle is that a person with capacity can make decisions that determine what is to happen to them in the future and so ‘an earlier self can bind a future and different self’”. That principle was applied to justify the discontinuance of life-sustaining treatment where to do so was in accordance with evidence of the patient's past views. The second case concerned the granter of a CPA with bipolar disorder, who sought to have the CPA revoked when she was stated to be in a hypo-manic state and the court accepted that she lacked capacity. The court nevertheless concluded that “although it was her intention that her close family members should be responsible for managing her personal finances, now that she has experienced that in practical terms she finds the reversal of roles, where her daughters are exerting financial control, uncomfortable”. The court accordingly refused to reinstate the purportedly revoked CPA.

206. The foregoing issues give rise to the next two Proposals. The first of these (Proposal 3) arises from the review of implementation of Principles 10.1 and 10.2 in paragraphs 50 – 57, and of the principles applicable to the actings of attorneys in paragraph 189. These indicate that it would appear to be appropriate for member states to review aspects of their regimes for CPAs in the light of (a) Article 12.4 of UN CRPD; (b) the views of the UN Committee, including in particular the views expressed in General Comment No 1; and (c) the developing international jurisprudence in relation to these matters.

PROPOSAL 3:

That member states review laws relating to CPAs to ensure –

(A) That in relation to all acts and decisions in their role as attorneys, attorneys are required to take all practicable steps to ascertain the will and preferences of the granter, or failing that the best interpretation of the will and preferences of the granter.

(B) That in their acts and decisions on behalf of the granter attorneys are required to give effect to the will and preferences of the granter (or best interpretation thereof) except only where stringent criteria for doing otherwise, set forth in law, are satisfied.

¹²² *A.-M.V. v. Finland* can be seen as establishing a trend in European jurisprudence, following as it does upon the decision of the German Federal Constitutional Court of 26 July 2016 (1 BvL 8/15) establishing circumstances in which it was held to be appropriate to override the opposition of a woman with mental health issues to treatment for breast cancer.

¹²³ For an early example of this, see *Neuropsychological assessment after extremely severe head injury in a case of life or death* (T.M. McMillan, “Brain Injury”, 1997, Vol. 11, No 7, 483-490) and *Neuropsychological assessment of a potential “euthanasia” case: a 5 year follow up* (T.M. McMillan and C.M. Herbert, “Brain Injury”, 2000, Vol. 14, No 2, 197-203).

¹²⁴ That is to say, the first to be reported and stated here, though not in fact the first to be decided.

(C) That the requirement to inform and consult the granter on an ongoing basis includes a requirement (i) to present to the granter, in the form that the granter is most likely to understand, the information necessary to enable the granter to formulate and communicate his or her will and preferences, (ii) to provide the granter with all reasonable support towards enabling the granter to formulate and communicate the granter's will and preferences, and (iii) to keep the granter informed of acts and decisions taken and implemented.

207. Proposal 3 would strengthen the requirement to ascertain and respect the current will and preferences of the granter. However, a further question – also arising from the issues discussed above – remains. That is the question as to the circumstances, if any, in which the current will and preferences of the granter may be overridden¹²⁵. That is a general question, but it applies particularly acutely to whether, and in what circumstances, an attorney acting with the authority conferred by a CPA can competently authorise a deprivation of liberty in terms of Article 5 of ECHR. It is necessary, for the further promotion of self-determination by means of CPAs and advance directives, that the potential contradiction identified above be addressed, and if possible resolved.

PROPOSAL 4:

(A) – That Council of Europe give consideration to promoting discussion and research with a view to clarifying matters relevant to situations of conflict between the terms of a continuing power of attorney or advance directive, on the one hand, and on the other the apparent will and preferences of the granter at time of exercise of powers conferred by a CPA, or of implementation of instructions in an advance directive, or when wishes expressed in an advance directive are to be followed.

208. Further consequences follow from (firstly) recognition of the wide range of impairments of relevant capabilities, with no clearcut boundary between capability and incapability, (secondly) acceptance of the obligation to provide support in the exercise of legal capacity, and (thirdly) the extent to which appropriate support can enhance capabilities.

209. One consequence is that CPAs and advance directives should be seen as potentially instruments available to all, if sufficient support is given. Principle 1.1 of the Recommendation, and the definition of CPA in Principle 2.1, should be interpreted in light of the recognition in paragraph 15 of the Explanatory Memorandum to the Recommendation that *"certain people with some degree of incapacity, including those with lifelong incapacities, may be able to grant a valid continuing power of attorney to appoint a person of their choice to deal with matters which they themselves would find very difficult, if not beyond their capacity"*; and that *"[S]ome legislation recognises that people may have adequate legal capacity to select an attorney and grant a continuing power of attorney even though they might not have adequate capacity to do themselves everything which the attorney is appointed to do on their behalf"*. Interpretations should be further developed to take account of the obligation to provide support for exercise of legal capacity, and the beneficial effects of providing appropriate support. One element in making regimes of CPAs and advance directives as inclusive as possible is adopting simple, easy-to-read documents. The author can confirm from his own experience that such simplified documents have been used, in conjunction with supportive arrangements and techniques, to enable both people with static impairments of their capabilities, and also people with developing impairments of their capabilities, to grant valid CPAs. Paragraph 182 mentions a limited number of states where easy-read and other helpful forms of document can be used. Such arrangements require to be developed and applied more widely.

210. A second consequence of the factors described in paragraph 208 above is that CPAs can be adapted to enhance the support provided to maximise the participation of the granter in exercising legal capacity, by conferring upon the attorney the roles of supporter to the granter, and co-decision-maker with the granter. Under co-decision-making provisions, there is no need to analyse the capability of the granter in relation to any particular act, decision or transaction where both granter and attorney participate as parties: such an act, decision or transaction is deemed to be that of the

¹²⁵ In its judgment in *A.-M.V. v. Finland* mentioned in paragraphs 203 - 205 above, the European Court of Human Rights held that, in the particular circumstances of that case, it was appropriate to override the will and preferences of an adult (subject to a form of guardianship, not the granter of a CPA).

granter to the extent that the granter has relevant capabilities, and that of the duly authorised attorney to the extent that the granter does not.

PROPOSAL 5:

(A) – That member states facilitate and encourage the use of continuing powers of attorney and advance directives in forms helpful to people with disabilities, including in easy-read form, and the maximisation of support to enable people with disabilities to exercise their legal capacity by granting CPAs and issuing advance directives.

(B) – That member states facilitate and encourage the incorporation of supported decision-making and co-decision-making provisions in continuing powers of attorney.

(C) – That Council of Europe develops and issues guidance or recommendations to assist member states in implementing Proposals 5 (A) and (B).

211. A narrow approach to reviewing implementation would not go beyond answering the question: “What relevant provision is available in each member state?”. A more realistic approach would ask, firstly: “To what extent do citizens of member states take up the opportunity to grant CPAs and/or issue advance directives?”; secondly: “To what extent, in what ways and how effectively, do member states educate citizens about CPAs and advance directives, and encourage citizens to grant CPAs and advance directives?”; and thirdly: “What barriers exist to the full recognition and effectiveness in practice of CPAs and advance directives?”

212. The extent of uptake of voluntary measures is recorded in the statistics in Appendix IV, Table C. In paragraph 39, it is suggested that there is *prima facie* cause to investigate the great variation in uptake¹²⁶. Proactive promotion within some member states is described in Part B of Chapter IV. The strongest linkage between proactive promotion and uptake is demonstrated in the case of UK – Scotland. In UK – Scotland, the proactive promotion campaigns started within a distinct area, and were then extended to further distinct areas. Analysis has shown that uptake has been greater in the areas where those campaigns have taken place.

213. There is a circularity in suggesting that proactive promotion correlates with increased uptake, as that is of course the purpose of such promotion. There are however large variations in uptake which do not correlate with proactive promotion. A possible link may be the relationship between availability of voluntary measures such as CPAs and advance directives on the one hand, and availability of very simply established involuntary measures on the other. Paragraphs 130 – 138 survey the inter-relationship between CPAs and advance directives, on the one hand, and other measures – both voluntary and involuntary – on the other. It is possible that there may be some correlation between lower levels of uptake of CPAs and advance directives in member states such as the Czech Republic and France, and the availability in those states of relatively simply established involuntary measures, such as those termed *ex lege* representation in this report. Any simplistic assumptions about such linkage would however be counter-indicated by Austria, which has *ex lege* representation but relatively high levels (in relation to population) of uptake of CPAs and advance directives. These are issues which could well warrant research beyond review of the data in this report.

214. There is an issue of principle regarding the relationship and balance between voluntary and involuntary measures. It would be reasonable to encapsulate the position of the UN Committee on the Rights of Persons with Disabilities as being that all involuntary measures should be abolished (see, for example, the explicit assertion to that effect in paragraph 7 of General Comment No 1 issued by the UN Committee), that all relevant provision should be by voluntary measures, and that under voluntary measures the protections of Article 12.4 of UN CRPD should be applied in full. The practices of States Parties to UN CRPD¹²⁷ and the trend of recent judicial decisions¹²⁸ point towards a

¹²⁶ See also references to these statistics in paragraphs 22, 28, 34 and 38.

¹²⁷ Vienna Convention on the Law of Treaties, Article 31.3(b).

¹²⁸ See for example Decision of the German Federal Constitutional Court of 26 July 2016 (1 BvL 8/15) referred to in footnote 5 (to paragraph 10 above), the judgment of the European Court of Human Rights in *A.-M.V.*

continuing need for involuntary measures, albeit subject to stringent application of Article 12.4 safeguards. There appears however to be unity among relevant international organisations, and the requirements and recommendations of relevant international instruments, that voluntary measures are to be preferred to involuntary measures. That preference is explicit in Principle 1.2 of the Recommendation.

215. The foregoing leads to the various aspects of the following Proposal:

PROPOSAL 6:

That member states should:

(A) – Educate citizens about CPAs and advance directives, and proactively promote the granting of CPAs and the issue of advance directives.

(B) – Assess whether financial savings achieved by higher levels of uptake of CPAs and advance directives would make it economically prudent to fund such public education and promotion, and/or to subsidise the costs of granting CPAs and issuing advance directives.

(C) – Review whether all available involuntary measures comply with international human rights requirements, and whether they avoid inhibiting uptake of voluntary measures.

(D) – Review and address any barriers, internally or in cross-border situations, to the full recognition and effectiveness in practice of CPAs and advance directives.

SUGGESTIONS: COUNCIL OF EUROPE (AND MEMBER STATES)

216. It is suggested that Council of Europe (and member states) may wish to consider and/or address the following suggestions:

SUGGESTION 1

217. Having regard to the great diversity in the extent to which registered information is publicly available (see paragraphs 80 and 81), Council of Europe may wish to consider developing guidance as to what limitations, if any, should be placed upon the availability of registered information, with a view to developing greater consistency.

SUGGESTION 2

218. Having regard to the difficulties in persuading some banks and other financial institutions to act upon CPAs in some member states, and in cross-border situations, member states should consider adopting the solution in Germany reported in paragraph 82, and Council of Europe may wish to consider developing such solutions at a European level, including in cross-border situations (see Proposal 6(D)).

SUGGESTION 3

219. Having regard to the discussion in paragraphs 116 – 129, rather than addressing difficulties in cross-border matters in other ways, Council of Europe and its member states should concentrate: (a) on encouraging ratification of Hague 35; (b) on working with the Permanent Bureau of the Hague Conference to clarify better the status of CPAs and advance directives under Hague 35; and (c) in view of the reluctance of many member states to ratify Hague 35 for reasons including perceptions that it strays into areas of public law as well as private law, on exploring actively, and if necessary

v. Finland, no 53251/13, 23 March 2017, referred to in paragraphs 203 – 205 above, and footnote 125 (to paragraph 207 above).

pursuing, the possibility of a further Hague Convention limited to provision for CPAs, advance directives and other voluntary measures in cross-border situations (see Proposal 6(D)).

SUGGESTION 4

220. That in implement of Proposal 2, Council of Europe consider formulating and making supplementary recommendations regarding development of the concept of advance directives, referring both to the varying ranges of relevant provision identified in paragraphs 35 and 62, and also the same issues about whether advance directives should be treated as binding even when at the time of application that is contrary to the will and preferences of the granter, as are addressed in Proposal 4.

SUGGESTIONS: MEMBER STATES

221. It is suggested that member states may wish to consider and/or address the following suggestions, and the issues identified in them, insofar as the matters addressed in them are not already provided for:

SUGGESTION 5

222. Where not already available, all of the possibilities of joint, concurrent, separate and substitute attorneys (under reference to paragraphs 40 and 41) and of supervisory attorneys/third party supervisors (under reference to paragraph 61) should be made available.

SUGGESTION 6

223. Some member states might wish to consider the solution described in paragraph 44 to the question of whether the act by the attorney, who is only authorised to act during relevant incapacity and has so acted, is relevant only to contractual arrangements between granter and attorney, not affecting the validity of dealings with third parties by the attorney.

SUGGESTION 7

224. Should there be prohibitions on contracting out of some requirements, such as the provision in Armenia (paragraph 45) that purported renunciation of the right to revoke is null and void?

SUGGESTION 8

225. Under reference to paragraphs 46 and 47, there should be clarity about regulation of entry into force of CPAs, in particular as to whether this should be regulated by general law or by the CPA document, with preference for the latter in accordance with principles of self-determination.

SUGGESTION 9

226. Member states should consider providing explicitly that entry into force of a CPA does not as such affect legal capacity of the granter. This should not be a matter of inference from other provisions – see paragraphs 48 and 49.

SUGGESTION 10

227. In member states where entry into force is not registered, a system of availability of official certification of entry into force, as in Norway (see paragraph 78), should be adopted.

SUGGESTION 11

228. There should be simplified procedures for obtaining authority for an attorney to do something not explicitly authorised in the CPA document (see the example of Switzerland in paragraph 51) but that there should also be requirements for special authorisation for some important acts even though they are within the powers conferred (see position in Germany in paragraph 69).

SUGGESTION 12

229. Member states should ensure that the requirement to keep sufficient records in terms of Principle 10.4 applies not only to economic and financial matters, but also to health, welfare and other personal matters (referring to paragraph 60).

SUGGESTION 13

230. In respect that Principle 17 recommends that advance directives shall be revocable at any time and without any formalities, but this is only explicitly stated by law in France (as per paragraph 66), all member states should adopt the provisions of Principle 17.

SUGGESTION 14

231. Member states should consider the possible adoption of extensive and robust arrangements to ensure validity of CPAs such as those in Ireland described in paragraph 75, and whether similar arrangements should be applied to advance directives that are intended to have binding effect.

SUGGESTION 15

232. Under reference to the varying provisions in relation to conflict of interest described in paragraph 83, member states should recognise that the best persons to be attorneys may often be those who could be in potential situations of conflict of interest and, rather than disqualifying them temporarily or permanently from acting, should institute methods for managing such conflicts of interest.

SUGGESTION 16

233. As regards the form in which advance directives may be granted, member states should have regard to the methods of granting provided for in Ireland, as described in paragraph 102.

SUGGESTION 17

234. With reference to the discussion in paragraph 103, member states should consider introducing arrangements for registration of all advance directives.

SUGGESTION 18

235. Member states should consider statutory time limits upon the period of applicability of advance directives, such as in France as described in paragraph 106.

SUGGESTION 19

236. Member states should consider instituting regimes to permit maximum self-determination, integrating the use of advance directives, in relation to end-of-life situations, having regard to the recent French provisions described in paragraph 108.

SUGGESTION 20

237. With reference to paragraphs 130 – 138 all member states should, at the next opportunity, introduce into their legislation express provision that voluntary measures have priority over all other measures (where that does not already appear in their legislation); but that the roles of supporters, persons of trust, advocates and so forth should be incorporated into provisions for voluntary measures, and that where relevant these roles should be exercisable to support granters in their dealings with attorneys.

SUGGESTION 21

238. Member states should develop mediation services to address situations of dispute and conflict in relation not only to voluntary measures but also to other measures.

SUGGESTION 22

239. With reference to paragraphs 143 and 144, issues can arise after CPAs have entered into force as to the capacity of the granter, and potential issues of undue influence and other vitiating factors, at the point in time when the CPA was executed by the granter and/or the point in time at which appointment was accepted and the contract of mandate established. Where procedures in member states do not yet do so, it is suggested that they be amended to ensure that these dates be clearly recorded. Moreover, with reference to paragraph 187, it is important that there be clarity (where it does not already exist) as to the precise categorisation in law of CPAs, whether as contracts of mandate or some other species. Where the CPA is categorised as a contract of mandate, it is also significant to determine whether the requirement for capacity arises only at time of granting, or at time of acceptance of appointment and conclusion of the contract of mandate. It is suggested that the former be explicitly provided in law, having regard to possible lapse of time between granting and acceptance, and the possibility of substitute attorneys accepting appointment only after original attorneys have for any reason ceased to act.

SUGGESTION 23

240. It is suggested that member states which do not have them should consider the establishment of an oversight body monitoring all aspects of the implementation of provisions for voluntary measures and other measures. The example in UK – England & Wales of the National Mental Capacity Forum is mentioned in paragraph 145. Matters which such a body could oversee on a national basis would include the preparation and updating of regulations, codes of practice, official guidance and other materials subsidiary to primary legislation; training and education of relevant professionals, administrators and others; and practical methods of public education, and generation of public awareness.

SUGGESTION 24

241. With reference to paragraph 164, in some member states general powers of attorney may to some extent continue in force following the granter's loss of relevant capacity even though provisions according to the Recommendation do not apply to them. It is suggested that such member states provide (but not retrospectively) that such general powers of attorney should not have continuing effect, and that only CPAs regulated in accordance with the Recommendation should have continuing effect.

SUGGESTION 25

242. Member states should consider requirements for making of gifts by attorneys, and taking reimbursement of expenses, to be reported to a relevant authority: see the example in Ireland described in paragraph 169.

SUGGESTION 26

243. Responses to issues arising where there are joint attorneys (see paragraphs 172 – 176) focus mainly upon mechanisms for resolving such issues once they have arisen. It is suggested that member states shift the emphasis towards strategies to minimise the risk of such issues arising. They should ensure that granters, at time of granting, are adequately informed and advised, by general public information and/or explicit requirements upon advisers preparing CPAs. By such means, granters should be well-informed at time of granting of the risks as well as the advantages of entrusting decision-making to attorneys, particularly in matters of personal welfare; how those risks might be mitigated by joint appointments; of the absolute need to specify with clarity requirements upon attorneys to consult other specified persons; and to specify with clarity, where there are joint appointments, the matters (if any) in which they may act individually, the matters in which they may

only act jointly, the requirement that there be express or generic authority from all attorneys for one to act alone, and the requirement for full consultation and prompt reporting whenever one acts alone.

SUGGESTION 27

244. Member states should address the particular issues relating to revocations of CPAs, including the issue described in paragraph 185 of people revoking a CPA as they begin to experience the “paranoia” that can occur in early dementia, sometimes resulting in serial revocations and fresh CPAs. Member states may find helpful the various solutions to issues concerning revocations described in paragraphs 183 – 185. It may be helpful to have regard also to the example in paragraph 140 of provisions that CPAs may only be prepared by suitably qualified persons or bodies.

SUGGESTION 28

245. It is suggested that to the maximum extent granters should themselves be able to determine matters of entry into force, and related matters of what evidence should be required for entry into force.

SUGGESTION 29

246. Member states should give consideration to full and precise regulation of the information which should be recorded in registers of CPAs and advance directives, and the provision for and/or regulation of accessibility to information on those registers, having regard to the need to balance issues of clarity, of ensuring that the existence of such measures and their contents be fully available to ensure that the intentions of granters are respected, but on the other hand providing protection of sensitive data to reduce the risk of abuse (paragraphs 80-81 and 188).

SUGGESTION 30

247. With reference to paragraph 189, member states should ensure that there is clarity as to the principles or standards applicable to attorneys in respect of the implementation of CPAs, and that such principles include compliance with the requirements of UN CRPD (paragraph 198).

APPENDIX I: SHORT 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.
- 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.

- 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?
- 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?

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?

APPENDIX II: FULL 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, and (if possible) supply a copy of the translation (or each translation).
- 2.2. What steps have been taken to make the Recommendation (including any translations) available within your state/law district?
- 2.3. 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.
- 2.4. 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.
- 2.5. Does the law of your state/law district permit the issuing of advance directives? YES/NO
- 2.6. If the answer to any of 2.3, 2.4 or 2.5 is NO, are there proposals (or is there pending legislation) to introduce CPAs and advance directives, and by when? YES/NO/WHEN?
- 2.7. If the answer to any of 2.3, 2.4 or 2.5 is YES, are such autonomous measures given priority, in accordance with the principles of self-determination and subsidiarity, over all other measures?
- 2.8. What steps (if any) have been taken within your state/law district to promote self-determination by means of continuing powers of attorney and advance directives, including any (a) by legislation (except as covered above), regulation, official guidance or otherwise, and (b) by publicity, advertising or other promotions? If possible, please supply selected representative copies of relevant material.
- 2.9. Has the effectiveness of steps taken in accordance with Q2.8 been assessed? If so, please provide details of the method and outcome.

Part II – continuing powers of attorney

Principle 3 – content

3. Content of continuing powers of attorney – economic and financial matters

- 3.1. If the answer to 2.3 is YES:
 - 3.1.1. When did the current provisions enter into force?
 - 3.1.2. Are any matters specifically excluded from those which may be dealt with in a continuing power of attorney? Please specify.
 - 3.1.3. Are there proposals (or is there pending legislation) to alter the scope of matters which may be dealt with in a continuing power of attorney?
 - 3.1.4. To what extent, if any, do general powers of attorney automatically have effect as continuing powers of attorney?
- 3.2. If the answer to 2.3 is NO, are there proposals (or is there pending legislation) to introduce continuing powers of attorney to cover economic and financial matters? If so, please give details.

4. Content of continuing powers of attorney – health, welfare and other personal matters

- 4.1. If the answer to 2.4 is YES:
 - 4.1.1. When did the current provisions enter into force?
 - 4.1.2. Are any matters specifically excluded from those which may be dealt with in a continuing power of attorney? Please specify.
 - 4.1.3. Are there proposals (or is there pending legislation) to alter the scope of matters which may be dealt with in a continuing power of attorney?
- 4.2. If the answer to 2.4 is NO, are there proposals (or is there pending legislation) to introduce continuing powers of attorney to cover health, welfare or other personal matters (or any of them)? If so, please give details.
- 4.3. What role (if any) does your state/law district permit attorneys to have in relation to authorisation of deprivations of liberty in terms of Article 5 of ECHR; and subject to what conditions?

5. Issues

- 5.1. Have any issues arisen in your state/law district (including but not limited to any issues arising in litigation) regarding the scope and effect of powers contained in continuing powers of attorney?

Principle 4 – appointment of attorney**6. Appointees under continuing powers of attorney**

- 6.1. May granters appoint as attorney under a continuing power of attorney any natural person whom the granter considers to be appropriate?
- 6.2. May granters appoint as attorney under a continuing power of attorney any entities other than natural persons whom the granter considers to be appropriate?
- 6.3. Please specify any limitation on the range of persons or entities who may be appointed as attorneys.
- 6.4. Please provide details as to whether more than one attorney may be appointed, and (if so) the extent to which they may be appointed to act jointly, concurrently, separately, or as substitutes.
- 6.5. Please give a general indication of any issues or difficulties which have arisen where there is more than one attorney; the mechanisms available to resolve such issues; and the extent to which such mechanisms have been effective.
- 6.6. Is there a requirement, or alternatively is it permitted, to appoint a supervising attorney (or similar)?
- 6.7. Please provide details of any restrictions which your state/law district has imposed, as being deemed to be necessary for the protection of the granter (in terms of Principle 4.3).
- 6.8. Are there any issues or difficulties which have arisen where there is a sole attorney (and no supervising attorney, where competent) which do not arise, or which arise to a significantly lesser extent, where more than one attorney has been appointed?

Principle 5 – form**7. Form of document**

- 7.1. Must all continuing powers of attorney be in writing? YES/NO
- 7.2. May continuing powers of attorney be granted and/or registered electronically? YES/NO. If YES, please provide details.
- 7.3. Is there a general rule that all powers of attorney may enter into force, or shall remain in force, in the event of the granter's incapacity (in other words, is there a general rule that all powers of attorney are continuing powers of attorney as defined in the Recommendation)? YES/NO
- 7.4. If the answer to 7.3 is NO, is it a requirement for all continuing powers of attorney that the document shall explicitly state that it shall enter into force or remain in force in the event of the granter's incapacity?
- 7.5. Does the appointment as attorney require to be accepted in writing by the attorney, and a contract of mandate (or equivalent) thus established, before the attorney is authorised to act?
- 7.6. To what extent are the form and content of continuing powers of attorney specified by law, and to what extent are granters each free to determine their own individual form and content? When answering, please indicate the reasons for the method adopted, and any perceived strengths or weaknesses of the method adopted in that respect.

- 7.7. Can power of attorney documents be presented and executed in forms helpful to people with disabilities, for example in easy-read form?

8. Ensuring validity

- 8.1. What provisions and mechanisms (in addition to those specified in section 7 above) apply to ensure the validity of the continuing power of attorney document?
- 8.2. 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.
- 8.3. Do relevant provisions and mechanisms as a whole ensure that your state/law district provides, in relation to the granting of continuing powers of attorney, all of the safeguards required by UN CRPD Article 12.4? Please provide details in support of your answer.

Principle 6 – revocation

9. Revocation – form and safeguards

- 9.1. May a granter who is capable of doing so revoke a continuing power of attorney at any time? YES/NO
- 9.2. Do all of the requirements described in your answers to Q7 and Q8 (except Q7.5 and Q7.6) apply to revocation of a continuing power of attorney? YES/NO. If your answer is NO, please give details.
- 9.3. How are the matters listed in 8.2 assessed in relation to revocations?
- 9.4. Please specify any further or different provisions or mechanisms for revocation.
- 9.5. May a CPA be revoked by a court, or by any other person or entity? YES/NO. If YES, please give details.
- 9.6. Please outline any notable experience of the practical operation of revocations and their requirements.

Principle 7 – entry into force

10. Entry into force

- 10.1. Please state what provisions exist regulating the manner of entry into force of continuing powers of attorney in the event of the granter's incapacity.
- 10.2. What provisions exist as to how incapacity should be determined, and what evidence should be required?
- 10.3. Please state the extent (if any) to which granters are permitted to determine the matters addressed in Q10.1 and Q10.2.

- 10.4. 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.
- 10.5. Is a continuing power of attorney categorised as a species of contract of mandate (or similar), established (and only established) upon acceptance of appointment by the attorney, such acceptance being a prerequisite for entry into force? If so, please confirm the precise categorisation of that contract in the law of your state/law district. If not, please specify the precise categorisation in law of a continuing power of attorney.

Principle 8 – certification, registration, notification and ensuring effectiveness

11. Certification

- 11.1. Please specify any requirements by law for certification of continuing powers of attorney, including the point(s) in the procedural sequence at which it is required, and the matters which must be addressed in the certificate.
- 11.2. Who may certify, and what are the procedural requirements for certification?
- 11.3. Please provide similar information regarding any requirements for certification of revocation.

12. Registration

- 12.1. Please specify the requirements for registration of continuing powers of attorney and related certificates, including the point in the procedural sequence at which registration is required.
- 12.2. Where/with whom is registration effective?
- 12.3. What are the required contents of the register?
- 12.4. To what extent are the contents of the register publicly available, or alternatively available subject to what restrictions?
- 12.5. Please provide similar information in relation to registration of revocations.

13. Notification

- 13.1. What are the requirements for notification, including at what points in the procedural sequence or upon what events, to whom, and by whom?

14. General

- 14.1. Insofar as not covered above, please specify the requirements and systems for certification, registration and/or notification when a continuing power of attorney is granted, revoked, enters into force or terminates.

15. Ensuring effectiveness

- 15.1. 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

16. Effect upon capacity

- 16.1. Does the law of your state/law district explicitly provide that the entry into force of a continuing power of attorney does not as such affect the legal capacity of the granter?
- 16.2. To what extent (if any) may the attorney act in matters for which the granter has capacity?
- 16.3. To what extent (if any) may the granter continue to act, or alternatively may not act, after entry into force of powers in relation to those matters contained in a continuing power of attorney?
- 16.4. How does the law of your state/law district resolve contradictory acts and/or decisions (or purported acts and/or decisions) of the granter and of the attorney?

Principle 10 – role of the attorney

17. Role of the attorney

- 17.1. Is the attorney required to act in accordance with the continuing power of attorney and in the interests of the granter? YES/NO If YES, please state the principles or standards with which the attorney must comply.
- 17.2. What (if any) requirements are there upon the attorney to inform and consult the granter on an ongoing basis?
- 17.3. 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?
- 17.4. To what extent (if any) is the attorney explicitly required to give due respect to the past and present wishes and feelings of the granter; and to respect the rights, will and preferences of the granter (in terms of Article 12 of UN CRPD); and what (if any) rules or principles of law apply in the event that there is conflict between (a) the attorney's view of what is in the interests of the granter and (b) the past and present wishes and feelings of the granter, the will and preferences of the granter, or (in absence of direct evidence of the will and preferences of the granter) the best interpretation of the will and preferences of the granter?
- 17.5. 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?
- 17.6. Is the attorney required to keep sufficient records in order to demonstrate the proper exercise of the attorney's mandate?
- 17.7. May the attorney be reimbursed for out-of-pocket costs incurred in the performance of the attorney's duties? YES/NO

- 17.8. 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

18. Conflict of interest

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

Principle 12 – supervision

19. Supervision

- 19.1. Does the law of your state/law district permit the granter to appoint a third party to supervise the attorney?
- 19.2. Is there a system of supervision under which a competent authority is empowered to investigate? If so:
- 19.2.1. Does the competent authority have power to intervene when an attorney is not acting in accordance with the continuing power of attorney, or is not acting in the interests of the granter?
- 19.2.2. Does such intervention include power to terminate the continuing power of attorney in part or in whole?
- 19.2.3. May the competent authority act on request by any person?
- 19.2.4. May the competent authority act on its own motion?
- 19.2.5. What is the competent authority or, if more than one, what are the competent authorities and what are their respective roles?
- 19.2.6. (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 Q17.1?

Principle 13 – termination

20. Termination

- 20.1. What are the circumstances under which, by law, a continuing power of attorney ceases to have effect?
- 20.2. Is a competent authority required to consider which measures of protection might be taken, where a continuing power of attorney ceases to have effect in part or in whole?
- 20.3. Is the competent authority, or are the competent authorities, for this purpose the same as per Q19.2.5? YES/NO. If NO, please give details.

Principles 3–13: general

21. Powers of attorney – general

- 21.1. Are adequate legal and other services available to advise and assist granters? Are they available on a legally aided basis where necessary?
- 21.2. Are legal and other services available to advise and assist attorneys? Are they available on a legally aided basis where necessary?
- 21.3. 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

22. Content of advance directives

- 22.1. If your answer to question 2.5 was YES, may advance directives apply:
 - 22.1.1. to health, welfare and other personal matters (if only some of these, specify which)?
 - 22.1.2. to economic and financial matters?
 - 22.1.3. to the choice of a guardian or equivalent, should one be appointed?
 - 22.1.4. To any other matter(s)?

Principle 15 – effect

23. Effect of advance directives

- 23.1. To what extent (if any) do advance directives have binding effect ?
- 23.2. Where advance directives do not have binding effect, must they be treated as statements of wishes and be given due respect as such ?
- 23.3. 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

24. Form of advance directives

- 24.1. To what extent do advance directives, or certain types of advance directives, require to be made or recorded in writing in order to have binding effect? YES/NO. If YES, but this applies only to certain types, please specify which types.

- 24.2. What other provisions and mechanisms are required to ensure the validity and effectiveness of advance directives intended to have binding effect?
- 24.3. Are there different forms of advance directives (or equivalent) for different purposes, e.g. for mental health purposes and for other purposes?

Principle 17 – revocation

25. Revocation of advance directives

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

Principles 14-17 – general

26. Advance directives – general

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

The Recommendation – general

The remaining questions below apply to all autonomous measures to which the Recommendation relates, that is to say to continuing powers of attorney and to advance directives, and to equivalents by any name. Where answers are different for different categories of autonomous measures, please specify. Optionally, answers may be included in respect of any other categories of autonomous measure, beyond those to which the Recommendation relates.

27. Statistics

- 27.1. 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.
- 27.2. 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?

28. Cross-border issues

- 28.1. Has your state/law district experienced significant cross-border issues:
- 28.1.1. between Contracting States under Hague 35;
 - 28.1.2. between a Contracting State on the one hand and a Non-Contracting State on the other;
 - 28.1.3. between Non-Contracting States?
- 28.2. Has your state/law district ratified Hague 35? If not, when is it expected that your state/law district will ratify Hague 35?
- 28.3. 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?
- 28.4. 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?

29. Inter-relationship with other measures

- 29.1. 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?

29.2. In particular:

29.2.1. 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?

29.2.2. 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?

30. Learning from experience

30.1. 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.

30.2. 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.

30.3. Was the Recommendation helpful in developing provision of continuing powers of attorney and advance directives, and in encouraging appropriate use of them?

30.4. 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?

APPENDIX III: EXTRACTS FROM INTERNATIONAL INSTRUMENTS

Article 5 of ECHR

Article 5 – Right to liberty and security

1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
 - (a) the lawful detention of a person after conviction by a competent court;
 - (b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
 - (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
 - (d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
 - (e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;
 - (f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.
2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.
3. Everyone arrested or detained in accordance with the provisions of paragraph 1.c of this article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.
4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.
5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation.

Article 12 of UN CRPD

Article 12 – Equal recognition before the law

1. States Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law.
2. States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.
3. States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.

4. States Parties shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person's circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect the person's rights and interests.
5. Subject to the provisions of this article, States Parties shall take all appropriate and effective measures to ensure the equal right of persons with disabilities to own or inherit property, to control their own financial affairs and to have equal access to bank loans, mortgages and other forms of financial credit, and shall ensure that persons with disabilities are not arbitrarily deprived of their property.

Articles 15, 22, 23 and 38 of Hague 35

Article 15

- (1) The existence, extent, modification and extinction of powers of representation granted by an adult, either under an agreement or by a unilateral act, to be exercised when such adult is not in a position to protect his or her interests, are governed by the law of the State of the adult's habitual residence at the time of the agreement or act, unless one of the laws mentioned in paragraph 2 has been designated expressly in writing.
- (2) The States whose laws may be designated are –
 - a) a State of which the adult is a national;
 - b) the State of a former habitual residence of the adult;
 - c) a State in which property of the adult is located, with respect to that property.
- (3) The manner of exercise of such powers of representation is governed by the law of the State in which they are exercised.

Article 22

- (1) The measures taken by the authorities of a Contracting State shall be recognised by operation of law in all other Contracting States.
- (2) Recognition may however be refused –
 - a) If the measure was taken by an authority whose jurisdiction was not based on, or was not in accordance with, one of the grounds provided for by the provisions of Chapter II;
 - b) If the measure was taken, except in a case of urgency, in the context of a judicial or administrative proceeding, without the adult having been provided the opportunity to be heard, in violation of fundamental principles of procedure of the required State;
 - c) If such recognition is manifestly contrary to public policy of the requested State, or conflicts with a provision of the law of that State which is mandatory whatever law would otherwise be applicable;
 - d) If the measure is incompatible with a later measure taken in a non-contracting State which would have had jurisdiction under Articles 5 to 9, where this later measure fulfils the requirements for recognition in the requested State;
 - e) If the procedure provided in Article 33 has not been complied with.

Article 23

Without prejudice to Article 22, paragraph 1, any interested person may request from the competent authorities of a Contracting State that they decide on the recognition or non-recognition of a measure taken in another Contracting State. The procedure is governed by the law of the requested State.

Article 38

- (1) The authorities of the Contracting State where a measure of protection has been taken or a power of representation confirmed may deliver to the person entrusted with protection of the adult's person or property, on request, a certificate indicating the capacity in which that person is entitled to act and the powers conferred.
- (2) The capacity and powers indicated in the certificate are presumed to be vested in that person as of the date of the certificate, in the absence of proof to the contrary.
- (3) Each Contracting State shall designate the authorities competent to draw up the certificate.

APPENDIX IV: TABLES

TABLE A

- Responses received and primary classification

Column 1: Name of country: * denotes Response received in French, translated into English

Column 2: F = full questionnaire; S = short questionnaire; A = abbreviated form; C = comments provided, questionnaire not answered; E = information by email only

Column 3: CPAs available for economic and financial matters?: Y = yes; Y(I) = yes, operable during incapacity only; Y1 = legislation passed, not yet in force; Y2 = proposals before legislature; Y3 = proposals, not yet before legislature; N = no

Column 4: Continuing powers available for health, welfare or other personal matters? Y = yes; Y(H) – yes, healthcare matters only; Y(H/S) = healthcare only, supporter may be appointed for other welfare matters; Y(P) = yes, personal care only, not healthcare; Y1 = legislation passed, not yet in force; Y1(H) = legislation passed, healthcare matters only, not yet in force; Y2 = proposals before legislature; Y3 = proposals, not yet before legislature; N = no; N1 = probably no, but may be possible in very limited circumstances

Column 5: Advance directives? Y = yes; Y1 = legislation passed, not yet in force; Y2 = proposals before legislature; Y3 = proposals, not yet before legislature; AS = non-binding advance statements only; N = no

Country	Full/short/abbreviated/comments/email	CPAs - economic etc?	CPAs - welfare etc?	Advance directives?	Notes
Andorra *	S	Y3	Y3	Y3	
Armenia	S	Y	Y	N	
Austria	F	Y	Y	Y	
Belgium *	S	Y	N	Y	
Bulgaria	F	N	N	N	
Croatia	F	Y3	Y3	Y	May choose guardian
Cyprus	S	Y	Y	N	
Czech Republic	F	Y	Y	Y	
Denmark	F	Y	Y	AS	Legislation entered into force on 1 September 2017
Finland	S	Y	Y	N	
France *	F	Y	Y	Y	<i>Fiducie</i> (or trust) also available
Germany	S	Y	Y	Y	
Hungary	C	N	N	N	Prior legal statement re conservatorship may be made
Ireland	F	Y	Y(P) Y1(H)	Y1	ADs currently recognised by courts

Country	Full/short/abbreviated/comments/email	CPAs - economic etc?	CPAs - welfare etc?	Advance directives?	Notes
Italy	E	N	Y(H)	N	Legislation completed its parliamentary passage on 14 December 2017
Latvia	F	Y	Y	N	
Lithuania	F	N	N	Y	
Republic of Moldova	F	Y	Y	Y	Law entered into force on 2 June 2017
Montenegro	S	N	N	N	
Netherlands	S	Y	Y	N	
Norway	S	Y	Y	N	
Romania *	F & S	Y	N1	Y	ADs for choice of guardian only. Generally see paragraph 32 of report
Slovenia	S	N	Y(H)	Y	
Spain	A	Y	Y	Y	Also, separately, in the Autonomous Community of Catalonia
Sweden	S	Y	Y(P)	N	Legislation entered into force on 1 July 2017
Switzerland *	S	Y	Y(H/S)	Y	
Turkey	S	Y	Y	Y	CPAs are unregulated
Ukraine	F	N	N	N	
UK – England & Wales	F	Y	Y	Y	
UK – Scotland	F	Y	Y	Y	

TABLE B**- Languages in which the Recommendation is available****Official languages:**

English
French

Unofficial translations:

Bulgarian
Czech
German
Turkish (limited circulation to permit provision of replies to questionnaire)
Ukrainian

TABLE C**- Statistics**

Note: Belgium commented that it had not been possible to obtain relevant statistics in the time available, and that the relevant law entered into force on 1 September 2014. For several member states relevant law is recent, and Table 2 includes states where legislation has been passed but is not yet in force, or is before the legislature, or has been proposed. It might be useful to seek similar statistical information after (say) five years.

CPAs – registrations following upon granting**Austria**

Date	Cumulative registrations
31 October 2008	5,155
30 November 2015	62,674
31 August 2016	78,638

Czech Republic

Year	Total	Cumulative total
2014	64	64
2015	67	131

Czech Republic has also provided the following statistics on judicial decisions of the guardianship courts in relation to CPAs, as follows:

<u>CPA</u>	2014	2015	2016 /1-8m/	Total
Fulfilment of the condition of CPA				
- It was fulfilled	25	2	3	30
- It wasn't fulfilled	0	0	0	0
- Another result	1	1	0	2
Change or abolition of CPA				
- It was changed	1	0	0	1
- It was abolished	2	0	0	2
- Another result	3	0	0	3

Finland

Provisions entered into force November 2007. "Steady increase" since then from 5 to over 4,000.

France

Year	Notarised document	By private agreement	Together	Proportion of notarised documents (as %)
2009-2017				
2009	114	26	140	81,4
2010	226	58	284	79,6
2011	333	61	394	84,5
2012	465	71	536	86,8
2013	595	85	680	87,5
2014	655	92	747	87,7
2015	822	87	909	90,4
2016	993	91	1084	91,6
2017	1054	110	1164	90,5

Germany

Year	New registrations	Cumulative total
2011	290,789	1,520,848
2012	335,746	1,856,594
2013	421,962	2,278,556
Year	New registrations	Cumulative total
2014	370,375	2,648,931
2015	382,292	3,031,223

Germany also provided annual figures for applications for appointment of a *Betreuer* refused because it was identified that a CPA was already in force, as follows:

Year	Annual figure
2012	12,140
2013	11,831
2014	11,427
2015	12,177

Latvia

Year	Annual figure
2014	9
2015	6
2016	18
2017	16

UK – Scotland

Annual registrations (year to 31 March)

Year	Financial	Welfare	Both	Total
2011/2012	1,622	960	37,933	40,515
2012/2013	1,460	998	40,070	42,528
2013/2014	1,349	888	43,339	45,576
2014/2015	1,123	736	53,668	55,527
2015/2016	785	631	53,591	55,007

CPAs registered upon entry into force***Ireland***

Year	Annual figure
2012	489
2013	542
2014	620
2015	661

Advance directives***Croatia***

Statistics relating to advance directives (related to Family Law) are available for 2014 and 2015 (Ministry of Social Politics and Youth, annual statistical reports):

2014: Number of appointed special guardians: 4,458 out of which 47 based on advance directives.
Number of appointed guardians: 6,294 out of which 194 based on advance directives.

2015: Number of appointed special guardians: 3,972 out of which 13 based on advance directives.
Number of appointed guardians: 6,495 out of which 6 based on advance directives.

Statistic relating to advance directives – binding statements (related to APPMD) is available for 2015 – only one binding statement has been deposited within the Croatian Notary Public Chamber so far. (Information given by the Croatian Notary Public Chamber)

These data were collected from social welfare centres and indicate the relevant data on 31 December of 2014 and 2015. As stated earlier, the public notary is obliged to inform the social welfare centre on advance directives appointing a guardian (upon registration).

Lithuania

Advance directives are registered in the Register since 01/01/2016. Four advance directives have been registered since then.

TABLE D**- Dates when provisions entered into force**

Country	Economic and financial matters	Health, welfare and other personal matters
Austria	1 July 2007	1 July 2007
Czech Republic	1 January 2014	1 January 2015
Denmark	1 September 2017	1 September 2017
France	1 January 2009	1 January 2009

Country	Economic and financial matters	Health, welfare and other personal matters
Ireland	1 August 1996 (for 1996 Act CPAs)	1996 ¹²⁹ , 2015 ¹³⁰
Latvia	1 July 2013	1 July 2013
Republic of Moldova	2 June 2017 ¹³¹	2 June 2017 ¹²⁸
Sweden	1 July 2017	1 July 2017
UK – England & Wales	1 October 2007	1 October 2007
UK – Scotland	2 April 2001	2 April 2001

¹²⁹ Personal care decisions came into force in 1996.

¹³⁰ Personal welfare decisions are provided for in 2015 Act.

¹³¹ Law no 171-180, Article 297.

APPENDIX V: VOLUNTARY MEASURES

The Explanatory Memorandum to Recommendation CM/Rec(2009)11 on principles concerning continuing powers of attorney and advance directives for incapacity explained that:

*“Measures to address incapacity may be put into two broad categories: responsive and anticipatory. Responsive measures are initiated after impairment of capacity, responding to that incapacity, and generally require judicial or other public intervention. Anticipatory measures, on the other hand, are put in place by a capable person, prior to any impairment of capacity.”*¹³²

By the time that the Explanatory Memorandum was written, that terminology was well established, as was the further category of “third party measures”, for arrangements such as trusts put in place by third parties to cover actual or possible impairment of relevant capabilities of an intended beneficiary¹³³. However, in a rapidly evolving area of law, perceptions develop, requiring review of terminology. That applies to “anticipatory”, for two reasons. Firstly, the Explanatory Memorandum pointed out that:

*“[...] certain people with some degree of incapacity, including those with lifelong incapacities, may be able to grant a valid continuing power of attorney to appoint a person of their choice to deal with matters which they themselves would find very difficult, if not beyond their capacity.”*¹³⁴

This already moves beyond the concept in Principle 2 of the Recommendation of acts “by a capable adult” addressing “the event of [his or her] incapacity”. Secondly, such language could imply a reversion to even more outdated concepts of a black-and-white world of full capacity or total incapacity. Reality is an infinite variability in nature and degree of impairments of relevant capabilities.

“Autonomous measure” emerged as a more adequate term for measures put in place by people themselves to take account of existing or possible future impairments of their own capabilities. “Autonomous measures” was thus defined and used in the questionnaires reproduced in Appendices I and II. However, informal consultation by the author with some international experts identified an objection to that term. It is potentially ambiguous. It could be read as applying to measures which come automatically into force in the event of a person’s incapacity. The category described as “*ex lege* representation” in this report could be seen as “autonomous” in that sense. They do not represent an exercise of self-determination by persons to whom they are applied.

In consequence, “voluntary measures” has been adopted in this report with the meaning explained under “Definitions and abbreviations” on page 12, encompassing but not limited to CPAs and advance directives. The proposal to use that term met with the approval of the experts referred to in the preceding paragraph. In an era when the UN Committee on the Rights of Persons with Disabilities is advocating the abolition of all “involuntary measures”, and where international instruments all give precedence to exercise of rights of autonomy and self-determination by creating CPAs, advance directives and other measures which could reasonably be described as “voluntary measures”, the term “voluntary measures” indicates not only a category but a sense of direction which would appear to command unanimous international support¹³⁵.

¹³² Paragraph 12 of the Explanatory Memorandum.

¹³³ For an earlier explanation of each of these three categories, see 1-25, 1-26 and 1-27 of *Ward Adult Incapacity*, W Green (2003).

¹³⁴ Paragraph 15 of the Explanatory Memorandum; see also the easy-read style of CPA for such use offered in *Ward op sit*, paragraph 6-19; and paragraphs 182 and 209 of this report.

¹³⁵ The categories of “preventative and voluntary measures” and “curative and judicial measures” were employed in a presentation entitled “Powers of attorney and legal incapacity in France and Scotland” by a team of students from the Masters Degree Course in Notarial Law (Master 2 Droit Notarial, Immobilier Patrimonial) from the Law School of Nancy – University of Lorraine to the Association des Juristes Franco-Britannique/Franco-British Lawyers Society at Edinburgh Law School on 15 March 2017. The use of “voluntary measures” in this report derives from that presentation. The student team subsequently confirmed that the terminology “voluntary measures” was devised by them, rather than derived from any other source.

The converse characterisation of some measures as “involuntary measures” can even less be viewed in absolute terms. Aspects of voluntariness within them are mentioned under “Voluntary measures” in paragraph 13. However, these are all measures imposed by a court or other authority, or by operation of law (*ex lege* representation), rather than put in place by people themselves, voluntarily¹³⁶.

¹³⁶ The broad categorisation of “voluntary measures” and “involuntary measures” were put [by the author of this report] to a plenary session of the Conference of the International Society for Family Law in Amsterdam on 28 July 2017. Any dissent or comments were invited. There were none. This terminology was in fact adopted by speakers at some subsequent sessions of that Conference.