

**Recommendation CM/Rec(2009)11
of the Committee of Ministers to member states**

on principles concerning continuing powers of attorney and advance directives for incapacity

*(Adopted by the Committee of Ministers on 9 December 2009
at the 1073rd meeting of the Ministers' Deputies)*

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

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

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

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

Having regard to relevant instruments of the Council of Europe, including the Convention for the Protection of Human Rights and Fundamental Freedoms (ETS No. 5, 1950), the Convention on Human Rights and Biomedicine (Oviedo Convention, ETS No. 164, 1997) and Recommendation [Rec\(2006\)5](#) of the Committee of Ministers to member states on the Council of Europe Action Plan to promote the rights and full participation of people with disabilities in society: improving the quality of life of people with disabilities in Europe 2006-2015;

Having regard to the Hague Convention on the International Protection of Adults (2000) and the United Nations Convention on the Rights of Persons with Disabilities (2006);

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

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

Noting that the above recommendation and the legislation of the member states concerning adults with incapacity strongly promotes self-determination and autonomy;

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

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

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

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

Recognising that there are considerable disparities between the legislation of member states as regards these issues;

Building upon the principles of subsidiarity and necessity contained in Recommendation No. R (99) 4 and supplementing it with principles on self-determination,

Recommends that governments of member states promote self-determination for capable adults by introducing legislation on continuing powers of attorney and advance directives or by amending existing legislation with a view to implementing the principles contained in the appendix to this recommendation.

Appendix to Recommendation CM/Rec(2009)11

Part I – Scope of application

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 2 – Definition of terms used in the present recommendation

1. A “continuing power of attorney” is a mandate given by a capable adult with the purpose that it shall remain in force, or enter into force, in the event of the granter’s incapacity.
2. The “granter” is the person giving the continuing power of attorney. The person mandated to act on behalf of the granter is referred to as the “attorney”.
3. “Advance directives” are instructions given or wishes made by a capable adult concerning issues that may arise in the event of his or her incapacity.

Part II – Continuing powers of attorney

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.

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

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.

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

Principle 6 – Revocation

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

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 grantor's incapacity.

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

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.

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 grantor.

Principle 10 – Role of the attorney

1. The attorney acts in accordance with the continuing power of attorney and in the interests of the grantor.

2. The attorney, as far as possible, informs and consults the grantor on an ongoing basis. The attorney, as far as possible, ascertains and takes account of the past and present wishes and feelings of the grantor and gives them due respect.

3. The grantor'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 11 – Conflict of interest

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

Principle 12 – Supervision

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

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 grantor, 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.

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.

Part III – Advance directives

Principle 14 – Content

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.

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.

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.

Principle 17 – Revocation

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