

Title	Comments of Switzerland on Prel. Doc. No 6 of April 2022 – Advance Directives within the scope of the 2000 Protection of Adults Convention
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Related Documents	Prel. Doc. No 6 of April 2022 – Advance Directives within the scope of the 2000 Protection of Adults Convention

Ladies and Gentlemen,

Switzerland welcomes the work done on Preliminary Document No. 6 and thanks the Permanent Bureau for the opportunity to express its views. Below you will find our comments.

Do advance directives fall within the scope of the Convention?

In our opinion, advance directives can fall within the scope of the Convention. Even if one were to conclude that no article of the Convention explicitly applies to advance directives, the collaboration provisions do apply. We think it would be appropriate for the Preliminary Document to distinguish even more clearly between this question and the question of whether advance directives constitute powers of representation within the meaning of articles 15 and 16 of the Convention.

The notion of "power of representation" under articles 15 and 16

The definition of "power of representation" given in No. 4 of the Preliminary Document is too vague and does not help to understand what kind of acts would constitute powers of representation within the meaning of articles 15 and 16 of the Convention. In No. 4 (the same remark applies to No. 30), it is written that "It should be emphasized that although a representative or assistant is often designated by name, this designation is in no way imposed in the text of the Convention itself", referring to the Explanatory Report, para. 95, whereas in the latter, Paul Lagarde precisely states that "This article envisages the situation in which the adult himself or herself organizes in advance his or her protection for the time when he or she will no longer be able to look after his or her own interests. He does so by conferring on a person of his choice, by an act of will which may be an agreement concluded with that person or a unilateral act, powers of representation. The argument in #4 is not convincing.

Do advance directives fall under articles 15 and 16 of the Convention?

It is important to emphasize that by means of advance directives, an adult expresses his or her will, often without giving powers of representation and without leaving any room for manoeuvre: it is not correct to equate them simply with powers of representation, without distinction. The elements and arguments provided in this preliminary document are not, in our opinion, sufficient to explain why we should consider that advance directives in which the adult does not grant powers of representation (or which are not contained in a document granting powers of representation) correspond to "powers of representation" and fall under articles 15 and 16 of the Convention.

In the Preliminary Document, in order to arrive at the conclusion that any kind of advance directive is covered by articles 15 and 16, a very extensive teleological interpretation of the Convention has been made without any really sharp and convincing arguments. Contrary to what is argued in No. 39 of the Preliminary Document, the text of the Convention is clear, and if one wants to depart from it in order to admit the application of articles 15 and 16 to all types of advance directives, one will have to provide more relevant arguments. The few vague references to advance directives in the Proceedings and Documents of the 1999 Special Commission of a Diplomatic Character do not suggest that such an interpretation would be warranted; to the extent that it does not reflect that further discussions have taken place, the Explanatory Report confirms this.

On the other hand, we consider that advance directives in which the adult grants powers of representation fall in principle within the scope of articles 15 and 16 of the Convention, as do

advance directives contained in a document granting powers of representation, as the advance directive may in such a context help to define the scope of the powers of representation.

Furthermore, in the Executive Summary, the Permanent Bureau mentions that the preliminary document is the result of the work of the Working Group responsible for the preparation of the Practical Handbook on the Operation of the 2000 Hague Convention on the Protection of Adults. However, Preliminary Document No. 6 does not correspond in all respects to the outcome of the work of the working group. In the working group, there was some consensus that Articles 15 and 16 apply to advance directives that would contain (or be contained in) powers of representation. There was no consensus on the applicability of these sections to advance directives that do not contain (or are not contained in) powers of representation.

We are happy to answer any questions you may have.

With our best regards,

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