

<b>Title</b>	<b>Comments of Germany on Prel. Doc. No 6 of April 2022 – Advance Directives within the scope of the 2000 Protection of Adults Convention</b>
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<b>Author</b>	Germany
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<b>Annexes</b>	N/A
<b>Related Documents</b>	Prel. Doc. No 6 of April 2022 – Advance Directives within the scope of the 2000 Protection of Adults Convention

## Comments of Germany on Prel. Doc. No 6 on Advance Directives

10.06.2022

Germany thanks the Permanent Bureau for its work on a common understanding of the scope of the convention. We support the idea to explore the scope of the Convention to reach a common understanding during the Special Commission. Nevertheless, we do not fully agree with the understanding of the scope of the Convention given in in the proposed paper.

We agree that the respect of autonomy and self-determination of adults who are not able to protect their interest is a core element of superior importance when protecting measures are implemented. Thus, a maximum of respect should be given to the expressed will and the preferences of adults concerned.

We also consent that the Convention should be interpreted with regard to its autonomous nature and its objects as well as to its international character and uniformity in its application.

We do not generally oppose the idea that advance directives might fall within the scope of the Convention in the light of Art. 3 and Art. 4 though we do not think that for instance the internal relationship between a patient and a physician is covered by the Convention even if an advanced directive may be of importance for the relationship. The aims of Art. 1 do not justify an application on contracts on medical treatments.

To our understanding, standalone advance directives i.e. directives not conferring power of representation to another person and not authorizing another person to act on behalf of the granter do not fall under the scope of Art. 15 and Art. 16. Anyway, we would ask the PB to be more precise on the consequences and the improvement that could be achieved by the proposed extended understanding of the scope of these articles.

To our understanding, there is a difference between an advance directive where only instructions are given and no representative is appointed and an agreement / unilateral act giving powers of representation. Assisting an adult without legal power or representation towards a third person cannot not be considered as an acting as a representative under Art. 15 and Art. 16. Neither the text nor the logic of these articles support the idea that standalone directives without any will of the adult to transfer legal power of representation to a third person should be included.

In line with these findings the definition of power of attorney referred to under para. 5 of the draft clearly points out that Art. 15 and 16 were developed and constructed as regulations of 2 the applicable law in cases of the legal attribution of power of representation. Standalone advanced directives do not meet these requirements. Standalone directives do not give any power to take decisions.

Furthermore, to our legal understanding Art. 15 and Art. 16 of the Convention are regulations concerning (only) the external power to act but do not concern the internal right to act in relation to the represented person. German law clearly makes a distinction between the internal relationship and the power of attorney or the resulting power of representation. Under German law the person acting may in German Law may have more external power than internal rights. External power and internal relationship have thus to be regarded distinctly. Art. 15 and Art. 16 of the Convention are, to our understanding, regulations concerning the external power to act. The inclusion of standalone directives in the scope of the Articles could have a substantial impact on this understanding as they clearly refer to the internal relationship between the adult and the person acting on their behalf.

The certificate in Art. 38 of the Convention is implemented to legitimate the attorney/donnee/mandatory/agent when acting on behalf of the granter. The sample

recommended by the Special Commission 1999 reflects this understanding. A certificate giving details of a standalone advanced directive does not correspond to the certificate the Convention implemented. A standalone directive does not contain any entitlement to act on behalf of another person and does not confer power. It might anyway be helpful for our understanding if the PB could clearly point out what content and what importance a Certificate concerning a standalone directive should have.

Broadening the scope of Art. 15 of the Convention as proposed furthermore has consequences on the then applicable law that have to be examined in detail. Advance directives may exist in cases where a guardian has to be appointed by a court. The applicable law for the guardianship thus determined by Art. 13, would existing standalone advance directives and the question to what extent a guardian appointed by a court is bound by them nevertheless fall under the scope of Art. 15 of the Convention? The consequences are not yet clear. Questions of the ordre public may be more frequently risen if the law of the adult's habitual residence at the time of the act is applicable.

We support the proposal to refer to the various types and forms of advance directives and the publicity measures in the Country Profiles