

Title	Toolkit on the law applicable to the Existence, Extent, Modification, Withdrawal and Extinction of Powers of Representation
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Toolkit on the law applicable to the Existence, Extent, Modification, Withdrawal and Extinction of Powers of Representation

I. Introduction

- 1 This Toolkit aims to provide practical information to individuals who come across foreign powers of representation or professionals who are called upon to exercise, execute or give effect to them, more specifically, to judges, civil law notaries and notaries public who may require general information about relevant foreign law.¹ Although this Toolkit does not purport to be comprehensive, readers may refer to it to obtain general information when examining whether powers of representation created in another jurisdiction can operate and be given effect in their jurisdiction. As powers of representation differ considerably from one State to another, this Toolkit provides general information as to a few types of powers of representation that exist and their different forms. This Toolkit also provides examples² as to how those powers of representation may come into effect, how they are regulated and how they can be modified or terminated. Providing for powers of representation in their domestic laws may assist Contracting Parties in their implementation and operation of the *Convention of 13 January 2000 on the International Protection of Adults* (the 2000 Convention).
- 2 This Toolkit does not purport to develop models or best practices nor to definitively compare the variety of domestic legal solutions that have been adopted with regard to powers of representation, which are constantly developing and evolving. Country Profiles will guide competent authorities to the specific provisions of the legislation of another Contracting Party.
- 3 Rather, this Toolkit aims to provide competent authorities and interested parties with general information, by providing examples of how powers of representation may operate in some domestic legal systems, in order to better facilitate the implementation of the 2000 Convention rules on the matter. Particularly, this Toolkit covers the conflict of law rules under Articles 15 and 16 of the Convention that make the existence, extent, modification, extinction or withdrawal of powers of representation subject to the applicable domestic law.³ In addition to those points, this Toolkit also aims to help differentiate issues that could be governed by a foreign law from a) the “manner of exercise” which is governed by the law of the State where the powers are exercised (Art. 15(3)), and b) the issues that could be governed by mandatory provisions of that State (Art. 20).
- 4 Readers who are dealing with confirmed powers of representation that are accompanied by the certificate provided under Article 38 of the 2000 Convention need not necessarily refer to the first two chapters of this Toolkit, on the existence and extent of powers, as the certificate will cover those two areas to some extent.⁴ It may be more relevant for those readers to refer directly to the final two chapters of this Toolkit, namely the chapters on modification and extinction or withdrawal.

¹ According to Art. 15, such foreign law could be the law of habitual residence of the adult (Art. 15(1)), the law of a State of which the adult is a national (Art. 15(2)(a)), the law of a State of former habitual residence of the adult (Art. 15(2)(b)) or the law of the State in which property of the adult is located, for matters relating to powers of representation made in respect of that property (Art. 15(2)(c)).

² In preparing this Toolkit the laws and / or responses to “Questionnaire on the practical operation of the HCCH 2000 Protection of Adults Convention”, Prel. Doc. No 2 of September 2020 for the attention of the First Meeting of the Special Commission on the Practical Operation of the 2000 Adult Protection Convention (available on the HCCH website at www.hcch.net, under “Protection of Adults Section” and “First Meeting of the Special Commission”) from the following States were consulted: Argentina, Austria, Belgium, Brazil, Canada – British Columbia, Canada – Quebec, Croatia, Cyprus, Czech Republic, Estonia, Finland, France, Germany, Hungary, Italy, Latvia, Luxembourg, Mexico, Netherlands, Portugal, Slovakia, Sweden, Switzerland, United Kingdom – England and Wales, United Kingdom – Scotland.

³ See, *supra*, note 1.

⁴ For an Art. 38 certificate to be issued, powers of representation have to be confirmed by a competent authority. See, *infra*, part A, section 5 and part G. See also “Revised draft Practical Handbook on the Operation of the 2000 Protection of Adults Convention”, Prel. Doc. No 4 of July 2022 (first revised version) for the attention of the First Meeting of the

- 5 For readers who are dealing with powers of representation that are not accompanied by an Article 38 certificate, it is necessary to examine the divergent regulations and formalities that may exist under the applicable law in order to ensure the operability of foreign powers of representation. For the cross-border operability of powers of representation, given that there is considerable international diversity in the domestic laws governing such powers, one may have to apply a “double filter” provided, firstly, by the requirements of Article 15(1) of the 2000 Convention and, secondly, by the effects of Article 15(3). For instance, a reading of a power of representation document in the receiving State might indicate that the representative has a power which is permissible in that State. However, if that power is excluded by the law of the State of origin (either because it is prohibited altogether or because it has not met particular formal requirements), the representative will not be able to exercise that power in the receiving State. More examples of such situations can be found in the first two chapters of this Toolkit, namely the chapters on the existence and extent of powers of representation.
- 6 It should also be noted that the reader does not need to refer to this Toolkit for matters relating to *ex lege* representation. This subject is covered in chapter 3 of the Practical Handbook on the Operation of the 2000 Protection of Adults Convention.⁵

II. Existence of powers of representation

- 7 When any authority or actor intervenes in the interests of an adult (e.g., personal, medical, health needs) or their property and must verify, in the context of Article 15 of the 2000 Convention, the existence of a power of representation invoked by a representative under foreign law, the following elements will have to be considered.
- A. The definition of powers of representation, in order to understand whether the case in question falls under Article 15.
 - B. The capacity of the adult at different stages of their life.
 - C. The formal validity of the document establishing the powers of representation (*i.e.*, the requirements of the applicable law) and the probative force of the powers, depending on their form.
 - D. The appointment of a representative and any conditions, limitations or exclusions thereto provided for by the applicable law.
 - E. The requirements, if any, by the law applicable that the powers of representation be registered (either as a condition of their validity or entry into force).
 - F. The manner in which the powers of representation are to be given effect and the regulations surrounding their coming into effect, in accordance with applicable law.
 - G. The confirmation of the powers of representation by a competent authority and the delivery of a certificate under Article 38 of the Convention.
 - H. Compliance with control and supervision mechanisms foreseen by the powers of representation and/or the applicable law.

Special Commission on the Practical Operation of the 2000 Adult Protection Convention (see path indicated in note 2) (hereinafter, “Practical Handbook”), **chapters 3 and 10** and “Confirmation of powers of representation for the purposes of the certificate issued under Article 38”, Prel. Doc. No 11 of October 2022 for the attention of the First Meeting of the Special Commission on the Practical Operation of the 2000 Adult Protection Convention (see path indicated in note 2)-.

⁵ See Practical Handbook, **chapter 3**, para. 3.55. See also “Application of the 2000 Protection of Adults Convention to *ex lege* representation”, Prel. Doc. No 5 of March 2022 for the attention of the First Meeting of the Special Commission on the Practical Operation of the 2000 Adult Protection Convention (see path indicated in note 2).

A. Definitions

1. Powers of representation

8 Powers of representation are voluntary measures expressing the will, preferences, instructions and wishes of the adult. They are documents (unilateral acts or agreements) which enable the adult⁶ to plan, in advance, how they want to be supported in the exercise of their legal capacity and autonomy when they are not in a position to protect their interests. Such documents can contain instructions or preferences on how to support / care for the adult and/or how to manage their property, in the event that their personal faculties become impaired to the extent that they are, totally or partially, unable to protect their own interests without assistance or any other measure. Such an impairment, and by extension such powers of representation, may be permanent or temporary. [In the spirit of the UNCRPD,⁷ unilateral acts containing instructions given and wishes made⁸ also fall under the scope of the 2000 Convention.⁹]

9 Depending on the domestic laws that provide for such voluntary measures, powers of representation may take multiple forms and appear under various names, some of which may be:

- Acts of self-protection;
- Advance arrangements, advance directives, advance statements, advance healthcare decisions, advance directions in the health field;
- Continuing or lasting powers of attorney;
- Directives anticipées;
- Disposizioni anticipate di trattamento;
- Documento de Voluntades Anticipada;
- Edunvalvontavaltuutukset;
- Enduring powers of attorney;
- Framtidsfullmakter;
- Intressebevakningsfullmakter;
- Joint accounts (when operable by any signatory if the other loses relevant capacity);
- Levenstestament (« will for life »);
- Living wills;
- Mandat de protection future;
- Mandat extrajudiciaire;
- Mandat pour cause d'incapacité;
- Mandato com vista a futuro acompanhamento;

⁶ In most cases, the person granting the powers of representation is the adult themselves. However, in some cases, it may be that the person granting the powers of representation is not the adult (see part B, section 2).

⁷ UNCRPD, see item (n) of Preamble and Art. 3(a).

⁸ [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), Appendix to Recommendation CM/Rec(2009)11, Principle 2(3). See also, *infra*, part A, sections 2 and 4.

⁹ See "Instructions given and wishes made by the adult within the scope of the 2000 Protection of Adults Convention", Prel. Doc. No 6 of September 2022 (revised version) for the attention of the First Meeting of the Special Commission on the Practical Operation of the 2000 Adult Protection Convention (see path indicated in note 2).

- Nākotnes pilnvarojums;
- Patientenverfügung;
- Patient decrees;
- Powers of family members and carers;
- Powers of attorney;
- Private mandate;
- Poder Preventivo;
- Procuração para cuidados de saúde;
- Representation agreement;
- Self-established guardianship;
- Springing powers of attorney;
- Testamento vital;
- Vorsorgevollmacht;
- Vorsorgeauftrag;
- Welfare powers;
- Zogvolmacht.

2. Agreement or unilateral act

10 Depending on domestic law, the document establishing the powers of representation may be:

- an entirely unilateral document signed by the adult alone; or
- a contract or bilateral agreement
 - ⇒ which evidences an express agreement between the adult and the representative; or
 - ⇒ in which the agreement of the representative is implied¹⁰ and may occur at the time of the coming into effect of the powers of representation.

3. Relationship between general mandates (e.g., powers of attorney) and powers of representation in the context of the 2000 Convention

11 In some legal systems, powers of representation may be granted in accordance with the terms of the law applicable to a general mandate (e.g., a power of attorney) and may remain in force when the capacity of the adult is impaired, without any further special requirements. It is important to note that such powers of representation will only fall within the scope of the 2000 Convention when the adult concerned finds themselves impaired.¹¹

12 In order for a general mandate (e.g., a power of attorney) to continue being operational following the impairment or insufficiency of the personal faculties of the adult, the law may require that an express clause be included in the document stating that the powers of representation should continue to have effect following the onset of the adult's impairment. Upon the adult's impairment, the general mandate (e.g., the power of attorney) becomes a power of representation under Articles

¹⁰ It should be noted that, in this context, the agreement of the representative is implied by the fact that they take on the role of representative and by the factual exercise of the powers of representation.

¹¹ The general conflict-of-law rules on legal representation or the *Convention of 14 March 1978 on Legal Representation* apply for the previous period.

15 and 16. Otherwise, a document can be specifically drawn up to take effect only once the adult's personal faculties have been impaired.

13 In so doing, the adult makes a voluntary, anticipatory act, intended to be respected and fulfilled on the day when they will be unable to fully exercise their autonomy, with regard to a particular matter or various matters. Contrary to general mandates (e.g., powers of attorney), these situations call for safeguards that protect the adult while respecting their autonomy by means of external, either institutional or contractual, supervision of the exercise of the mandate (see part H). In some jurisdictions, powers of representation are only exercisable in the period during which the personal faculties of an adult are impaired. Other jurisdictions may require evidence that the adult's personal faculties have been impaired to the extent that necessitates the coming into effect of the powers of representation.

14 In this context, it may be important for notaries and other legal practitioners to include a choice of law clause such as those found under Article 15(2) in the instruments they draft and / or authenticate, in order to ensure the document continues to be operational as intended.

4. Instructions given and wishes made by the adult

15 Instructions and wishes expressed by an adult, in anticipation of a future impairment of their personal faculties, frame the existence and extent of a power of representation falling under Articles 15 and 16. Such instructions and wishes can be found in many types of voluntary, anticipatory acts, such as advance directives, advance arrangements, advance decisions in the health field or (continuing) powers of attorney.¹²

16 Generally, voluntary anticipatory acts such as advance directives relate to instructions or wishes in relation to medical matters, but they can also cover other issues. Some jurisdictions may regulate or exclude end-of-life instructions or wishes, either through legislation or established practices and jurisprudence where such issues are not explicitly regulated in statutory law.

B. The person conferring the powers of representation

1. The capacity of the adult at the moment of granting the powers of representation as a validity requirement

17 Powers of representation defined above in part A, section 1, must be established by a person with the capacity to do so, even though the powers are intended to be used at a time when the adult's personal faculties have been impaired, and they are totally or partially unable to manage their own interests.

18 Establishing powers of representation is an anticipatory act. Therefore, it is necessary to verify that the adult validly expressed their consent at the time they established those powers under the applicable law.

19 The criteria for determining an adult's capacity (and, by extension, their capacity to give valid consent) may differ from jurisdiction to jurisdiction. Some jurisdictions may distinguish legal capacity from *de facto* capacity, which may differ in some cases. In some States, the impairment of the personal faculties of the adult may lead to a loss of their legal capacity but not necessarily in all matters. Depending on domestic law and the particular case, there may be nuances to how the adult's capacity is determined. This is because an adult may experience intermittent periods of higher capacity followed by periods of lower capacity or complete loss of capacity. Alternatively, an adult may have capacity according to medical standards (which may, in some cases, determine

¹² See "Instructions given and wishes made by the adult within the scope of the 2000 Protection of Adults Convention", Prel. Doc. No 6 of September 2022 (revised version) (*op. cit.* note 9).

legal capacity) but may be unable to make certain decisions for themselves (e.g., financial decisions). Reversely, an adult could have retained their legal capacity even though their *de facto* capacity to make certain decisions may be impaired. In most jurisdictions, an adult must have full (both legal and *de facto*) capacity in order to validly establish powers of representation.

- 20 In principle, neither the establishment of powers of representation nor their entry into force (which depends on a determination of the adult's *de facto* capacity) have an effect on the legal capacity of the adult. Depending on the applicable law, the entry into force of powers of representation, in and of itself, may not necessarily determine whether or not the adult is able to modify those powers. If domestic law so requires, a separate capacity assessment may need to be undertaken at the time the adult seeks to make the modification (see chapter IV).

C. Formal requirements and their objectives

- 21 Domestic laws that regulate powers of representation may provide for various formal requirements which intend to ensure important safeguards, such as:

- To assess the capacity of the adult at the time of establishing the powers of representation;
- To verify that the person signing the powers of representation is the adult;
- To witness the signature of the powers of representation;
- To verify that the powers of representation are in conformity with the law (including the conditions to be met by the representative);
- To verify that the adult is aware of the implications of establishing powers of representation and that they understand the contents of the document¹³;
- To verify that the powers of representation align with the will, preferences, instructions and wishes of the adult¹⁴;
- To confirm that there is no undue influence¹⁵;
- To guarantee that the document will have probative value by providing a fixed signature date.

- 22 With the above objectives in mind, one can find one or more of the following formal requirements, some of which may be mandatory and some of which may be optional, depending on the jurisdiction,

1. Notarisation

- 23 The functions of the notary and the scope of their practice will differ depending on the legal tradition in which they operate. Generally, a notary is a public officer whose task it is to authenticate / certify documents, either for domestic or cross-border purposes. Notaries can be broadly categorised into civil law notaries and common law notaries (*i.e.*, notaries public).

a. Civil law notaries

- 24 A civil law notary is a public officer, appointed by a public authority, who is a certified legal practitioner specialised in private law. Their task is to draw up non-contentious, civil legal deeds and authenticate them, thus making the document self-executing and conferring to it a high probative value. These documents are known as authentic instruments. The civil law notary is also authorised to offer legal advice and verify that the contents of the document they are authenticating is accurate and in conformity with the law. A civil law notary may draft a power of representation in

¹³ Art. 12(4) UNCRPD

¹⁴ *Ibid.*

¹⁵ *Ibid.*

the form of an authentic instrument. In some jurisdictions, this may be a formal requirement for establishing valid powers.

b. Notaries public

25 A notary public is also a public officer, appointed by a public authority, tasked to serve the public in non-contentious matters. The functions of a notary public are markedly different from their civil law counterparts. Depending on the jurisdiction, the main functions of a notary public are validating signatures, administering oaths and affirmations, taking affidavits and statutory declarations (including from witnesses), authenticating the execution of certain types of documents and providing notarial (*i.e.*, certified) copies of documents. In a few common law jurisdictions, some notaries public are not qualified lawyers (known as lay notaries) and are, therefore, not authorised to draft legal documents and offer legal advice. In those States, notaries public may be requested to simply certify the document establishing the power of representation and validate the signatures. Where notaries public are also qualified lawyers, they may offer legal advice and draft legal documents (known as notarial acts / deeds) which have probative value and executory force, like in civil law jurisdictions. In those States, notaries public may also draft the powers of representation in the form of a notarial deed.

26 In some jurisdictions, notarising a power of representation may not be compulsory. However, authentication or certification (either by a civil law notary or notary public) ensures trust among third parties to powers of representation and may allow the powers to be applicable to certain acts (*e.g.*, real estate transactions - see chapter III, section 1, sub-section c).

2. The power of representation as a certified and / or witnessed document

27 Some jurisdictions, where the concept of notarisation, *per se*, is unfamiliar, may still require some type of certification at the time the power of representation is established, or later, in order to guarantee the validity of the document and its compliance with the law. Such jurisdictions will offer equivalent ways of authenticating and certifying documents.

28 For instance, this certification may be achieved by the signature of:

- a guardianship authority or court;
- a clerk;
- a lawyer;
- a certifying officer;
- a medical practitioner.

29 Separate from, or in addition to, the requirements described above, some domestic laws may require the presence of one or more witnesses at the time of signing the document establishing the powers of representation. These witnesses must, in some legal systems, meet certain professional requirements. In certain jurisdictions, a professional witness may reduce the requirement for multiple witnesses.

3. Other formal requirements

30 Some other formal requirements could be, among others:

- The obligation for the adult to write the deed entirely by hand, including the date and signature;
- The legal requirement to use particular forms containing the minimum mandatory information;

- The requirement that separate forms are drawn up to be completed by the representative and the adult;
- The requirement that the adult files the document in person before a public officer;
- For individuals whose impairment affects their ability to read the document conferring the powers of representation, there may be a requirement to have the document read aloud to them by a witness who has not participated in the drafting of the document. It may also be possible for the adult to confer the powers of representation in an alternative manner, such as via video recording when they are unable to meet any of the aforementioned requirements.

4. Registration as a formal requirement

31 In addition to the possible requirements mentioned above, some States may impose an obligation to register the document establishing the powers of representation. Such registration, that is accompanied by a certain degree of accessibility or publicity (e.g., in a public registry), may be a condition for the validity of the powers of representation. This matter will be further elaborated upon in part E of this chapter. Matters of data protection will be discussed in part E, section 9.

5. The agreement without any formal requirement

32 Some jurisdictions may not provide for any specific formal requirements for the establishment of powers of representation, other than that they be in writing and comply with the rules of ordinary contract law. The domestic laws of some States may foresee an exception to this flexible approach when it comes to certain powers of representation, particularly those regarding sensitive matters such as medical decisions.

D. The choice of the representative

1. The characteristics of the representative

33 Although the adult exercises full autonomy in their choice of representative, it may be necessary to verify that the appointed representative meets the criteria of the domestic law applicable, which may provide for various criteria and responsibilities depending on whether the representation relates to the person or property of the adult.

a. Personal matters

34 The representative chosen to act on behalf of the adult regarding personal matters, especially relating to their medical needs, may be a close relative, parent, descendant, a spouse, or any trusted individual.

35 Some States have provided that the public body in charge of the protection of adults may be designated by the adult to act and decide on their behalf regarding personal matters.

36 Domestic law may explicitly provide that the representative must have reached the age of majority or be an emancipated minor to be entitled to represent the adult in personal matters.¹⁶

¹⁶ In some legal systems, an emancipated minor is a person under the legal age of majority who, under very specific circumstances, has been granted legal capacity by a competent authority (which, in most cases, would be a juvenile court).

b. Financial and property matters

- 37 For matters relating to their finances and property, the adult may choose a trusted person to represent them who possesses a particular skillset in asset management. This representative may be a close relative of the adult or an independent professional.
- 38 Unless otherwise provided by the relevant domestic law, the person representing the adult in matters relating to their property may be a natural or a legal person.
- 39 When it comes to legal persons, domestic law may limit the appointments to legal persons included in a list of judicial representatives dedicated to the protection of adults or to entities with a specific social objective (e.g., trust corporation, recognised charitable foundation, public body).
- 40 Domestic law may explicitly provide that the representative must have reached the age of majority or be an emancipated minor¹⁷ and have the required capacity to manage the financial and property matters of the adult.

2. Specific exclusions or priorities (safeguards)

- 41 It is advisable to verify if the applicable law provides for any legal exclusions regarding the choice of a representative. Sometimes, the exclusions for the appointment of a judicial or administrative representative provided for by law also apply to the appointment of a representative by the adult themselves.
- 42 Some examples of legal exclusions could be:
- Persons under judicial protection;
 - Legal entities;
 - Persons who are likely to have a conflict of interest or persons who have demonstrated by their behaviour and the nature of their relationship with the adult that they will not be able to carry out their duties in accordance with the interests of the adult;
 - Persons who have, personally or through their spouse, a lifetime obligation to support the adult;
 - Persons engaged in a medical profession, unless they are close to the family circle;
 - The staff and management of the institution where the adult resides.
- 43 In addition to the above exclusions, one can also find exclusions which are specific to the area of financial and property management, which may include:
- A trustee designated in a trust agreement;
 - Persons who cannot freely dispose of their property;
 - Persons who have declared bankruptcy;
 - Persons who have been convicted of a crime.

3. Multiple representatives

- 44 Unless otherwise provided by the relevant domestic law, the adult may appoint several representatives, who may act jointly or separately, simultaneously or in order of subsidiarity or in any manner prescribed by the adult.
- 45 So as not to overburden the joint exercise of the powers of representation with day-to-day matters, the document establishing the powers of representation may limit the necessity for joint action to

¹⁷ *Id.*

specified types of acts or decisions. For example, the adult may specify in the powers that decisions relating to alienating or acquiring specific assets and / or property would require the involvement of multiple representatives.

46 Whether and to what extent a representative can designate another person to substitute them may be regulated by domestic law or by the powers of representation themselves.

E. Registration of powers of representation

47 Powers of representation may be registered at the time of their establishment or upon the onset of an impairment of the personal faculties of the adult concerned. This registration can either be a validity requirement of the powers of representation (see part E, section 5) or a prerequisite for their entry into force (see part F, section 5). In some jurisdictions, such registration may be optional.

48 In some jurisdictions, registration may ensure that the relevant persons or authorities have recourse to the powers of representation upon the impairment of the adult and that the powers take precedence over any protective measure taken by competent authorities. Thus, in those States, competent authorities would be required to consult the registry before taking a protective measure.

49 In other jurisdictions, the registration of powers of representation can serve to publicise the extent of the powers granted.

50 Whether or not such registration is mandatory, the accessibility of the registered powers, the information to be registered and the authority responsible for the registration will all depend on the objective sought.

1. Public registry / private registry or filing with a competent authority

51 There are various systems of registration of powers of representation provided under domestic laws, such as:

- Registers maintained by associations of notaries or other private bodies;
- Registers maintained by the competent authority for the protection of adults;
- Registers maintained by the civil status administrations in the locality where the adult resides.

52 It is important to note that the registration of powers of representation referred to in this section may not necessarily be the same as the registration of protective measures taken by competent authorities. However, when powers of representation are the object of a decision taken by a competent authority, it may be possible for those powers to be registered in the same register as protective measures (see part A, section 5).

2. Mandatory or optional registration

53 In some jurisdictions, only certain types of powers of representation can be registered. For example, in some States, only notarised powers of representation can be registered.

54 In States where the registration of instructions given and wishes made by the adult is optional, domestic law may provide that, if unregistered, they must at least be clear and unambiguous and must contain all the necessary elements of validity to be equally effective (see parts B and C).

3. Registration before or after the impairment of the adult's personal faculties

55 Where registration is a condition of the validity of the powers of representation, some States may provide that the powers must be registered prior to the onset of the impairment or insufficiency of the personal faculties of the adult.

56 Other jurisdictions may allow for the registration of powers upon their entry into force once the
personal faculties of the adult have been impaired (see part F, section 5).

4. Level of details to be recorded in the register

57 Depending on the purpose of the registration, the registrar may only record the existence of the
powers of representation, the date and the place where the document is kept.

58 In other cases, the register may also contain the personal data of the adult and the representative.
In some States, the entire contents of the document establishing the powers of representation may
be recorded.

59 It should be noted that domestic regulations around the protection of personal data may require
limiting the disclosure of information only to that which is essential for the intended purpose.

5. The legal effect of the registration: Registration as a validity requirement and/or the registration that implies a formal validity check

60 In some jurisdictions, the validity of powers of representation may be conditional upon their
registration. In such jurisdictions, any mandate which was operational prior to the impairment of
the personal faculties of the adult and was drawn up with the intention that it should continue to
be in force following such impairment, but was not registered as such, may cease to have effect.

61 It should be noted that, in some States, registration may be a validity requirement for the powers
of representation but may not provide any guarantee as to their validity, if the public officer who
receives the document for registration is not competent to verify the conformity of the powers of
representation with domestic law.

62 Some jurisdictions may provide for a procedure which involves the formal verification of the
document establishing the powers of representation by the authority before which the powers are
filed for registration. Other jurisdictions may foresee an obligation to go through a professional (e.g.,
a civil law notary, notary public or lawyer) who will verify the powers of representation before
proceeding with their registration.

63 Depending on domestic law, the legal effect of registering powers of representation upon their
establishment may differ from the legal effect of registering powers following their entry into force
(see part F, section 5).

6. Notifications to be made by the registrar, delivery of a registration certificate

64 When powers of representation are submitted for registration, the registrar may be required by
domestic law to give notice to the adult and to the representative or to any third parties.

65 Registration is likely to be accompanied by the issuance of a document (receipt / certificate) which
attests to the registration. This is to be distinguished from the certificate referred to in Article 38 of
the 2000 Convention, which concerns a certificate issued where a measure of protection was taken
or power of representation was confirmed by a competent authority, attesting to the capacity and
powers of the person entrusted with the protection of the person or property of the adult (see part
G).

66 Some jurisdictions may place the obligation to notify third parties on the adult (if they have the
capacity to do so at the time) or their representative. This obligation may be independent from the
registration and may concern persons designated by law, such as a spouse, certain relatives, etc.

7. The registration of the evolution of the powers of representation: coming into effect, modifications, extinction

- 67 Powers of representation may evolve over time after they have been established. For example, they can be modified or revoked by the adult themselves, as long as they have decision-making capacity. Powers of representation could also be modified or withdrawn by a competent authority after their entry into force or the representative may renounce them.¹⁸
- 68 Domestic laws may provide that any modification or extinction of the powers must be registered, even if the modification or the extinction did not involve an intervention by a competent authority (see chapter IV, section 4 and chapter V, section 5).
- 69 It may also be useful to register the entry into force of a power of representation in case a certain aspect of the power becomes the subject of a dispute, or a measure of protection taken by a competent authority.
- 70 If and when a competent authority takes a measure in relation to a power of representation under Article 3 of the Convention (e.g., regarding the impairment of the adult's personal faculties or the designation / replacement of a representative), such measures could constitute a confirmation of the powers and as such, would be subject to the domestic rules on the registration of such measures.

8. Registration of instructions given and wishes made by an adult

- 71 In some States, instructions and wishes made by the adult in the event of an impairment of their personal faculties may be registered in the same register as powers of representation, while other States may provide for a separate registration. (see part A, section 4).
- 72 In other States, registration may be limited to those instructions and wishes concerning the choice of an administrator, guardian or trusted person to be designated by a competent authority for the purpose of supporting, assisting, or representing the adult (chapter III, section 8, sub-section c).
- 73 The domestic laws of some States may only foresee the registration of instructions and wishes regarding medical or end-of-life matters.
- 74 Instructions and wishes registered in a public registry or enclosed within a health insurance policy may need to be exercised in a jurisdiction where there are no laws requiring healthcare professionals to consult the registry or insurance policy prior to administering treatment. In this regard, a Country Profile would be extremely helpful in explaining to foreign healthcare professionals how to access such registries in non-emergency situations.

9. Data protection: the right to access information and the duration of data conservation

- 75 Any conservation of data implies the existence of a data controller and of protective regulations around:
- the right of the adult concerned and their representative to access said information and modify it;
 - who may access the data;
 - how long the data is to be conserved;
 - the limitation of data processing to that which is strictly necessary for the determined purpose; and

¹⁸ Practical Handbook, **Chapter 9**, paras 9.22 - 9.24.

- the access modalities.

76 Depending on the applicable law, access to the register of powers of representation as well as to the register of measures of protection (if different) can be granted, *inter alia*, to civil law notaries, notaries public, competent authorities, public prosecutors, court clerks, administrators, guardians, lawyers, bailiffs, Central Authorities, public registrars, in addition to the individual who filed the powers for registration.

77 Some domestic laws may also provide that access is open to any person who demonstrates a legitimate interest in the information concerned.

10. Consultation possibility for foreign actors

78 Practice will show whether, and to what extent, foreign actors who demonstrate a legitimate interest will be able to access information concerning the existence of a power of representation contained in the register of a Contracting Party.

79 For the proper functioning of the 2000 Convention, it is important for a competent authority which has been seised to take a measure of protection to know, for example, if a power of representation has been established by the adult in the State of their previous habitual residence or in the State of their nationality.

11. Registration of powers of representation that are governed by the law of another State

80 To further promote the efficient functioning of the 2000 Convention, it may be useful for powers of representation drawn up abroad to be registered in the State where the adult habitually resides.

81 It may, therefore, be necessary to check whether the domestic procedures for the registration of powers of representation allow for the registration of foreign powers of representation and what the requirements for a valid registration would be in that State.

F. Coming into effect of powers of representation

82 Domestic laws provide for a variety of rules regarding the entry into force of powers of representation which aim to achieve a balance between respecting the autonomy of the adult and ensuring the necessary protection of the adult.

1. The entry into force without any intervention of a competent authority

83 Domestic laws may provide for either or both of the following options to promote the autonomy of the adult:

- The adult determines, within the powers of representation, the conditions that will make those powers come into effect.
- The representative determines the moment when the powers of representation come into effect by assessing the occurrence of the impairment of the adult.

2. The competent authority determines the moment when the powers of representation come into effect

84 Some domestic laws may provide that powers of representation can only enter into force upon a decision of a competent authority, whose task it will be, among other things, to assess the capacity of the adult, the validity of the powers of representation and verify whether the entry into force of the powers of representation is in the interests of the adult.

85 This decision by the competent authority is to be distinguished from situations where the intervention of the competent authority is required in order to designate a representative in

accordance with an instruction given or wishes made by the adult in a voluntary, anticipatory act such as an advance directive (see chapter III, section 8, sub-section c).

- 86 This intervention is also to be distinguished from any formal verification that may be carried out by a public official in order to register the powers of representation with a view to issuing a document validating their entry into force. In this case, the intervention by a competent authority would only be necessary in case of doubt or conflict.
- 87 The intervention by a competent authority may go hand in hand with notifying the persons and / or authorities¹⁹ concerned that the powers of representation have entered into force.
- 88 The mandatory intervention by a competent authority for the entry into force of the powers of representation may emanate from the law, from which the powers cannot derogate, but it may also emanate from the will and preferences of the adult themselves, expressed in the document establishing powers of representation.
- 89 Finally, domestic law may provide for this as an optional feature, in which case it is left to the discretion of the representative, who may have an interest in obtaining confirmation of the entry into force of their powers from the relevant competent authority.

3. Immediate entry into force of the powers of representation

- 90 Some domestic laws may provide for the possibility of the powers of representation to come into force immediately upon their establishment, while the adult still has decision-making capacity (see part B, section 1). In some jurisdictions, this may only be possible for powers of representation that relate to property matters and not for powers which concern medical or welfare decisions.
- 91 When domestic law allows for the powers of representation to come into force immediately, it must be concluded that, in the first instance, such powers do not fall within the scope of the 2000 Convention (see part A, section 3) as the adult's personal faculties are not impaired at that moment in time. For the period during which the powers are operable prior to the impairment of the adult's personal faculties, general conflict of law rules on legal representation or the HCCH Convention of 14 March 1978 on Law Applicable to Agency may be applicable in cross-border contexts.
- 92 Upon an impairment or insufficiency of the personal faculties of the adult, these powers of representation will come under the scope of the 2000 Convention. In order to make a clear distinction between the power of representation prior to and following the impairment of the adult's personal faculties, it may be appropriate for the representative or the family of the adult to obtain evidence of the date upon which the personal faculties of the adult have become impaired. Following the impairment of the personal faculties of the adult, the representative must be aware of and respect any limitations provided by domestic law as well as those contained in the powers themselves (e.g., supervision and control mechanisms, the exclusion of certain types of representatives).
- 93 In this context, the onset of the insufficiency or impairment of the personal faculties of the adult will have an impact purely on the relationship between the adult and their representative (and not towards third parties or any authority).
- 94 When drawing up powers of representation which will become operational immediately, it may be appropriate for notaries and legal practitioners to keep the choice of law clause of the 2000 Convention (Art. 15(2)) in mind.

¹⁹ Such as a public registry or official gazette of the State.

4. Capacity assessment

95 For powers of representation to come into effect for the purposes of the 2000 Convention, the impairment or insufficiency of the personal faculties of the adult must be assessed. In some jurisdictions, it may be possible for the adult to be able to specify, in the document establishing the powers of representation, how their capacity is to be assessed and by whom. In other jurisdictions, such an assessment may only be made by a competent authority. In others, the representative themselves may be able to assess the capacity of the adult. Upon concluding that the personal faculties of the adult are impaired or insufficient, the representative must arrange for the assistance and support required by the situation and by the adult themselves in the powers of representation.

96 Regardless of the circumstances under which the capacity of the adult is to be assessed, in order for the powers of representation to come into force, it is common in some jurisdictions for the representative to be required to have a certificate from one or two doctors (accreditation of the doctor is sometimes required) who can certify that the adult can indeed no longer look after their own interests.

5. The legal effect of the registration: Registration as a requirement for the entry into force of the powers of representation

97 In some cases, the registration of the powers of representation may be a prerequisite for the entry into force of the powers of representation. For example, in order for the powers to enter into force, some jurisdictions may require medical documents and certificates to be provided, verified and registered. In some jurisdictions, this registration of documents and certificates may be preceded by a notification to various interested persons, which may also be an essential condition for the entry into force of the powers of representation.

98 It should be noted that this process is distinct from the registration which must take place before the powers enter into force, *i.e.*, at a time when the adult still has decision-making capacity, which is required in some jurisdictions. In such cases, the registration may be considered a condition for the validity of the powers (see part E, section 5).

6. Impact of the coming into effect of the powers on the legal capacity of the adult

99 In principle, neither the establishment of powers of representation nor their entry into force (which depends on a *de facto* incapacity) influence the legal capacity of the adult, as provided by the UNCPRD (see part B, section 1). However, depending on the circumstances of the case and the domestic law of a particular State, the entry into force of the powers may have an effect on the adult's ability to continue making decisions for themselves in relation to those areas in which they are still capable.

100 According to the domestic law of some States, only a protective measure taken by a competent authority may deprive an adult of their legal capacity. In some other States, not even a protective measure can have that effect.

G. Issuance of a certificate for confirmed powers of representation (Art. 38)²⁰

1. Confirmation of the powers of representation

101 Article 38 provides for a certificate to be delivered to every person entrusted with the protection of the person or property of the adult acting under a **confirmed** power of representation, indicating

²⁰ More about this certificate can be found in **chapter 11** of the Practical Handbook and "Confirmation of powers of representation for the purposes of the certificate issued under Article 38", Prel. Doc. No 11 of October 2022 (*op. cit.* note 4).

the capacity in which the person is entitled to act, and the powers conferred.²¹ Since the 2000 Convention does not prescribe a particular process of confirmation, it is left to Contracting Parties to regulate at the domestic level.²² Although confirmation may differ from jurisdiction to jurisdiction, the Explanatory Report provides that it “must give every guarantee of reliability”.²³ This is to provide the highest possible degree of legal certainty and predictability to the individuals who are tasked with exercising such powers of representation.²⁴

102 The certificate under Article 38 is an important instrument for the free circulation of confirmed powers of representation as it provides practitioners with security and reliability. In addition, a certificate having probative force in all Contracting Parties could reduce costs and disputes.²⁵

103 The certificate mentions the capacity and the powers of the person(s) entrusted with the protection of the adult or their property, whether they have been designated through a measure of protection or by the adult themselves.²⁶

104 If relevant, the certificate may also indicate what powers the designated representative(s) do(es) not have. For instance, a certificate may mention that the legal representative of an adult having their habitual residence in one Contracting Party does not have the power to administer the property that this adult possesses in another Contracting Party.²⁷

2. On request of the person entrusted with the protection of the person or property of the adult or ex officio by the competent authority

105 Once powers of representation have been confirmed, the Contracting Parties who wish to deliver a certificate under Article 38 attesting to this confirmation must designate the public authority which would be competent to draw up and deliver such certificates and to indicate whether such issuance may take place *ex officio* and / or at the request of the person entrusted with the protection of the person or property of the adult or of any other interested person.²⁸

3. Issuance of a certificate (Art. 38) or any other sort of evidence

106 The certificate under Article 38 must be distinguished from the certificate or receipt which may be issued by an authority attesting to the registration of the power of representation (see part E, section 6).

4. Confirmation of powers of representation governed by the law of another State

107 At the time of confirmation and certification, when the powers of representation are subject to the law of a State other than that which has primary jurisdiction, it may be necessary to verify whether the competent authority is able to carry out this confirmation, even if this procedure is unknown to

²¹ Art. 38(1).

²² The Explanatory report at para. 146 reports that some legal systems did provide for “confirmation” of powers of representation; see also *Proceedings of the Special Commission of a diplomatic character (1999), Protection of Adults*, SDU Publishers, The Hague, 2003 (available on the HCCH website at www.hcch.net, under “Publications” and “Proceedings of the Diplomatic Sessions”), pp. 294-296, in particular at p. 295, “In Quebec, for example, there was an existing law that ascribes this power to a judicial authority. In other States the authority might be administrative. The aim was not to place limits to who the authority might be.” [...] “Under Australian law, there was also a notion of confirmation of powers of representation. He did not consider that there would be problems of liability for the confirming authority, so long as this matter was dealt with by the national law.”

²³ P. Lagarde, *Explanatory Report on the HCCH Protection of Adults Convention*, New and Revised Edition, The Hague, 2017 (hereinafter, “Explanatory Report”), para 146.

²⁴ *Ibid.*, para 144.

²⁵ *Ibid.*

²⁶ *Ibid.*

²⁷ *Ibid.*

²⁸ See “2000 Protection of Adults Convention Draft Country Profile”, Prel. Doc. No 7 of June 2022 for the attention of the First Meeting of the Special Commission on the Practical Operation of the 2000 Adult Protection Convention (see path indicated in note 2).

its domestic legal system and, as a result, if a foreign law must be applied to the confirmation (see chapter 4 of the Practical Handbook).

H. Supervision / control mechanisms of powers of representation

- 108 This section concerns supervision and control mechanisms that may be available **after** the entry into force of the powers of representation. The applicable law may require that the assets of the adult and the representative be kept separate. The representative may be liable for mismanagement or fraud under general law.
- 109 The supervision and control mechanisms that regulate the exercise of powers of representation seek to achieve a balance between respecting the autonomy of the adult concerned and the need to protect the adult, whose personal faculties have become impaired. On the one hand, the adult may have chosen to designate a representative in whom they have placed their trust and, on the other hand, domestic law may require that a supervision mechanism be put in place, in order to prevent any potential abuses and negligence on the part of the representative that could jeopardise the interests of the adult at a time when they are no longer able to look after them by themselves (Art. 12(4) of the UNCRPD).
- 110 In addition, given the specificity of powers of representation conferred, the supervision and control mechanisms provided for, either by law or in the instrument establishing the powers of representation, are an essential element of their existence. They, therefore, fall under the applicable law rules provided for in Articles 15 and 16 of the Convention.

1. Supervision foreseen by the law versus supervision foreseen by the powers of representation themselves

- 111 The adult can appoint, in the powers themselves, a trusted third person or group to supervise the exercise of the powers of representation. For example, if a relative has been appointed as a representative, the adult may specify that supervision may be carried out by one or more other relatives. In certain legal systems, the adult may also be able to assign the task of supervision to a legal entity (e.g., a company or corporation). It may also be possible for the adult to entrust this task to a public body, such as a competent authority.
- 112 The supervision by the appointed trusted person(s) or legal entity, as provided for in the powers of representation, may involve verifying that the representative is exercising the powers properly and in accordance with the will, preferences, instructions, wishes and interests of the adult.
- 113 In some domestic laws, where the representative is not acting in good faith and is exercising their powers in a manner inconsistent with the interests of the adult, the supervisory person(s) or entity may be authorised by a competent authority to revoke the powers of representation.
- 114 In some States, the adult putting such supervision and control mechanisms in place may be a condition for the validity of the powers of representation. To that effect, the powers must follow a format prescribed by the domestic law of the relevant jurisdiction, which will be verified when they come into force.
- 115 In addition to the supervision and control mechanism foreseen by the powers themselves, a supervision and control mechanism will, generally, also be put in place by the law itself. However, this form of supervision and control mechanism is not always automatic or systematic. Rather, such a mechanism, which is undertaken by competent authorities, is additional and supplementary to the supervision mechanism outlined in the powers of representation.
- 116 Some domestic laws may not provide for any supervision and control mechanisms specific to powers of representation. In that case, competent authorities may exercise their general

competence to take measures of protection in relation to powers of representation which are governed by their law, in the interests of the adult.

2. Priority given to the powers of representation above the taking of protective measures

117 If the supervision and control mechanism put in place by a power of representation is sufficient to ensure that the representative is properly exercising their powers, there will most likely be no need for a competent authority to intervene and supervise.

118 However, in some domestic laws, the supervision and control by competent authorities may be automatic. It may also not be possible for the adult to exempt a representative from them in the powers of representation.

119 In practice, any intervention by a competent authority to supervise the exercise of the powers of representation will most likely take into account the principles of proportionality and subsidiarity. Therefore, priority will be given to the preservation of what has been provided for by the adult themselves, in the powers of representation. Where such provisions are determined to be insufficient, the competent authority involved may take a measure of protection, modifying only what is strictly necessary, to promote the interests of the adult.

3. Impact of the application of formal requirements

120 In most of the legal systems consulted during the process of drafting this Toolkit, the form of the power of representation has no impact on the supervision and control mechanisms.

121 In at least one State, the law of which offers the possibility that the power of representation be drawn up or registered as an authentic instrument, the representative may be accountable to the notary who processed the document. The notary may have a duty of supervision and a responsibility to alert the competent authorities of any unjustified movement of funds or any act that does not appear to comply with the powers of representation. Alternatively, in jurisdictions where powers of representation can be granted through a private deed, a representative may only need to keep an inventory of all their actions, accompanied with the relevant supporting documents, for some years, without prejudice to the supervision and control by a trusted third person or persons designated in the powers and the general supervisory capacity of a competent authority, where necessary.

4. Possible intervention by a competent authority

122 In all States whose domestic laws provide for powers of representation, where an issue arises concerning the exercise of the powers by a representative, competent authorities may intervene through a supervision and control mechanism which is in place. Depending on the domestic applicable law, such interventions can be in different forms, such as:

- Interpreting the powers of representation;
- Amending or completing the powers of representation (e.g., the extent of the powers of the representative, the ways in which the powers are to be carried out);
- Authorising the representative to make a specific intervention which is not provided for by the powers of representation or to make a specific intervention which is provided for by the powers but requires authorisation;
- Giving instructions to the representative, such as ordering the submission of periodic reports;
- Substituting the representative, if alternative representatives are specified in the powers;
- Appointing a person or entity to supervise the representative;
- Appointing an *ad hoc* representative in the event of a conflict of interest;

- Resolving a dispute between two or more designated representatives;
- Making a decision in the event of a disagreement between the adult and the representative, or between the representative and a healthcare provider of the adult (e.g., on a proposed medical treatment);
- Taking a protective measure in addition to the powers of representation;
- Revoking the powers of representation and, if necessary, replacing them with a protective measure under Article 3 and appointing a new representative for the adult.

123 In making any of the above interventions, the competent authority may carry out any necessary investigations.

5. Reporting obligation of the representative

124 The powers of representation may contain details regarding the obligation of the representative to keep records of and report on the decisions and actions they take in the exercise of their powers. For instance, the powers may specify the frequency and manner in which the representative is expected to report.

125 If the powers of representation do not provide any details regarding the responsibility of the representative to keep records and report, this obligation may be provided for in the applicable law.

126 This responsibility of the representative may involve keeping records and reporting on the income and expenses of the adult, drawing up an inventory of the assets of the adult upon the entry into force of the powers of representation and providing an updated inventory if and when they cease. These inventories may have to comply with legal or contractual requirements and formalities as regards their form or the requirement of witnesses.

127 Some jurisdictions may specify the length of time for which reports and inventories must be kept.

128 The domestic law of other jurisdictions may not provide for a requirement to keep records and report, except for when a competent authority specifically orders it under particular circumstances.

129 The person(s) or entity to whom such records and reports should be sent (e.g., an accountant, an expert or a relative) may also be indicated in the powers of representation. The powers may stipulate that the records and reports must be sent to a competent authority or to the notary who authenticated the powers of representation.

6. *Ex officio*, ongoing supervision or on request

130 Generally, the supervision and control mechanism put in place by the adult is to be implemented without the intervention of a competent authority and must be exercised on a regular basis.

131 On the other hand, depending on the applicable domestic laws, supervision by a competent authority may take place in one of the following ways:

- *Ex officio*, outside of any request, either on a recurring and automatic basis or only when the competent authority itself becomes aware of a problematic situation;
- Only upon request of the adult, a representative, a trusted third person or entity tasked to supervise, the civil law notary who drafted or certified the authentic instrument or any interested person. A prosecutor may also raise their concerns to the competent authority regarding the exercise of the powers of representation. In this context, the supervision by the competent authority would not happen on a recurring and automatic basis.

7. Regulation of conflicts of interests

- 132 It could be appropriate for the powers of representation to include provisions regarding the resolution of a conflict of interest which may arise between the adult and the representative. The powers of representation may, for example, provide for the appointment of an *ad hoc* representative, who may or may not be named in the document, who will intervene when a conflict of interest arises. For example, a conflict of interest may occur when a representative is simultaneously serving as the representative of another adult in the same transaction (e.g., a child representing both parents).
- 133 Where a possible *ad hoc* representative is not named in the power of representation, a competent authority can be seized to appoint one, in the interests of the adult.
- 134 Some jurisdictions may also provide that, where a conflict of interest arises between the adult and the representative, the powers of that representative are to be terminated by operation of law.

III. Extent of the powers of representation

- 135 Powers of representation granted by an adult may be of a general nature (allowing for all acts to be taken except for those acts explicitly excluded in the document or by the law) or specific (listing and defining specific actions and decisions which may or may not be taken).
- 136 The extent of powers of representation may be regulated by the applicable law, by reference to domestic provisions on protective measures. The applicable law may also provide that the extent of the powers of representation differs depending on whether the representative is designated by a competent authority or by the adult themselves (see, *infra*, section 7). It may also be that some elements of the powers of representation are to be regulated by the applicable law while other aspects are not. Where domestic law provides no specific regulations around powers of representation established by an adult, a competent authority may have to determine the extent of these powers on a case-by-case basis, without necessarily making reference to the rules applicable to powers where a representative was appointed under a protective measure.

1. Legal limits to powers of representation of a general nature

- 137 The applicable law will likely determine the areas in which an adult may establish powers of representation and any limitations to the powers of a representative.

a. Personal matters

- 138 Powers of representation regarding personal matters may concern, among other things, the adult's choice of residence, their social relations, their nutrition and personal style preferences, their personal hygiene and leisure activities. They may also concern medical and therapeutic decisions that require the informed consent of the adult.
- 139 Some States do not provide for powers of representation relating to personal matters and only know of powers of representation in the context of financial and property matters. In these jurisdictions, only a protective measure taken by a competent authority or a legal provision of *ex lege* representation can confer powers of representation for decisions regarding personal matters.
- 140 Sometimes, powers of representation in the medical field may be regulated in the context of domestic legislation on voluntary, anticipatory acts such as advance directives.

b. Financial and property matters

- 141 Powers of representation of a general nature may cover all the financial and property decisions made in the interests of the adult.

142 However, it may be necessary to distinguish between acts of simple day-to-day management of the affairs of the adult which may not require representation (e.g., paying bills, buying daily consumer goods, collecting mail) and acts that may require representation. Among the latter, a distinction can be made between administrative acts (e.g., buying valuable consumer goods, signing a lease, opening a bank account, filing a tax return, applying for a pension or social assistance, collecting income, making investments) and acts of disposal (e.g., selling, alienating, mortgaging, giving away movable or immovable assets). Finally, acts of disposal may be further divided into acts done in exchange for valuable consideration and those acts made free of charge (e.g., gifts, donations).

143 In certain jurisdictions, powers of representation of a general nature may only concern the day-to-day management of the affairs of the adult and administrative acts. In order to extend to acts of disposal, such acts must be explicitly provided for in the document establishing the powers of representation.

144 At the time of writing this document, some jurisdictions do not provide for powers of representation in relation to property matters.

145 Regarding financial and property matters, some jurisdictions may regulate the extent of powers of representation in a manner similar to general mandates such as powers of attorney.

c. The different formal requirements and their effects on the extent of powers of representation

146 In order for the representative to perform certain legal acts that require particular formalities to be met (e.g., authentication or certification), certain jurisdictions may require that the document establishing the powers of representation must be constituted in a particular form.

147 For example, powers of representation in the form of a private agreement will not allow the representative to carry out acts relating to immovable property if, under the applicable law, such acts require the involvement of a notary.

148 Furthermore, depending on whether the power of representation is in the form of an authentic instrument or a private agreement, there may be a difference in the acts that require authorisation by a competent authority.

2. Legal limits to specific powers of representation

149 Specific powers of representation, as opposed to powers of representation of a general nature, are powers that explicitly specify the areas in which the representative may and may not act.

a. Personal matters

150 Specific powers of representation regarding personal matters may concern, for example, the choice of where the adult will reside, the choice of medical care and treatment of the adult, the inspection of personal documents (e.g., correspondence, personal notes), the right to have access to and modify personal and confidential data, the receipt of mail.

151 It may be necessary to check whether the applicable law allows for specific powers of representation to cover serious medical decisions such as whether or not the adult should undergo an invasive procedure (e.g., surgery).

b. Financial and property matters

152 Specific powers of representation relating to financial and property matters may concern, for example, the sale of a specific immovable property, the management of a company of which the adult is the owner and director, or the management of an estate to which the adult is an heir.

3. Acts needing specific authorisation by a competent authority as required by law or by the powers of representation themselves

153 The powers themselves or the applicable law may require that, in order to be carried out, certain provisions detailed in powers of representation (e.g., transactions regarding immovable property) must be subject to authorisation by a competent authority to verify whether the provision(s) in question are in the interests of the adult.

154 In some jurisdictions, such specific authorisation would be required regardless of whether the representative was appointed by the adult or a competent authority. In other jurisdictions, representatives appointed by a competent authority may be required to seek such specific authorisation more often, compared to representatives appointed by an adult.

155 The requirement to obtain authorisation by a competent authority to perform certain acts under a power of representation is a restriction on the extent of the powers. This requirement may emanate from the powers of representation themselves or from the applicable law. A competent authority may also be able to authorise the representative to perform acts that are not included in the powers of representation.

156 The powers or the law applicable may require the representative to seek authorisation from a competent authority for decisions which are extremely personal or significant, for instance in relation to a decision concerning a high-risk medical treatment, forced medical treatment or the involuntary placement of an adult (see, *infra*, section 5, sub-section b). It is also possible that the powers or the law applicable only require the representative to obtain authorisation by a competent authority for acts of disposal of movable or immovable property which were made free of charge (e.g., donations, gifts). At least one jurisdiction of those consulted in the drafting of this paper allows for a representative to change the beneficiary, for example of a life insurance policy, with the authorisation of a competent authority.

4. Acts requiring consultation as provided for in the powers of representation

157 Before taking certain decisions, the power of representation may oblige a representative, to consult one (or more) other designated persons (e.g., a professional, relatives of the adult or persons close to them) to exchange views on the interpretation of the will, preferences, instructions and wishes of the adult.

5. Acts or categories of acts excluded by law

a. Acts which are extremely personal or significant

158 Some jurisdictions may forbid or limit²⁹ certain acts from being included in a power of representation as they may be considered too personal in nature or significant to be taken on behalf of the adult. Such acts may include:

- consent to marriage or divorce;
- recognition of a child of the adult;
- consent to adoption by the adult;
- exercise of parental rights by the adult;
- choice of a child's name;
- consent to sterilisation or medically assisted reproduction;

²⁹ See, *supra*, paras 153-156.

- request for / consent to euthanasia;
- voluntary termination of pregnancy;
- consent to invasive medical procedures (e.g., surgery).

159 In some jurisdictions, the right to vote may also fall into this category of acts which are too personal or significant to be taken on behalf of the adult in the context of a power of representation. For some jurisdictions, the choice of residence and the choice of relationships are decisions which must rest exclusively with the adult. Only in cases when it is impossible for the adult to make such a decision are they to be submitted before a competent authority.

160 In the medical field, particular laws regulating the rights of patients are often considered mandatory and of public policy and may, therefore, affect the extent to which powers of representation validly established in another State can be exercised. For example, end-of-life directives which may be valid in one State, might be inoperable in the requested State as it may conflict with public policy.

161 In some jurisdictions, a representative may only be able to take medical decisions on behalf of the adult if a medical / health care professional has diagnosed the adult and / or confirmed the impairment of their personal faculties. Where the adult has given instructions or expressed wishes and preferences in relation to the provision of life-sustaining treatment, the domestic law may affect whether or not the representative is able to carry out such instructions, wishes or preferences out.

162 With regards to financial and property matters, the establishment or revocation of testamentary dispositions is generally considered an extremely personal act and, thus, may not be the subject of a decision taken by the representative in the context of exercising their powers of representation.

b. Deprivation of liberty

163 A special case is when the adult must be deprived of their freedom of movement or their decision-making capacity due to the fact that the impairment or insufficiency of their personal faculties puts the adult themselves or others at risk. This issue may also involve the administration of medication, to modify or control the behaviour of the adult and prevent them from resisting the measures taken for their own protection or the protection of individuals around them.

164 Some States have put rules in place that precisely delineate the powers of a representative when a compelling emergency requires a decision to be made that restricts the liberty of an adult and / or requires the use of force on the adult, in order to prevent an imminent risk. Other jurisdictions may provide an express exclusion for such decisions to be made under a power of representation. Some domestic laws may forbid a representative from dissenting to the forced placement of the adult in a mental health institution or to the provision of psychiatric treatment.

c. Donations

165 Some jurisdictions may explicitly exclude the possibility of the representative to make an *inter vivos* gift (i.e., to make a gift on behalf of the adult while they are still alive). Such an exclusion may, however, be qualified by the existence of instructions given and wishes made by the adult, for donations that relate to their assets.

166 Some domestic laws may only authorise donations for reasonable amounts and stipulate that such donations be directed to persons related to the adult by blood or marriage, or to causes which the adult would have been likely to donate to, before the occurrence of an insufficiency or impairment of their personal faculties.

d. Acts which may imply a conflict of interest

167 Generally, most jurisdictions regulate the conflict of interest that may arise with respect to the representative by excluding from the powers of representation all acts in which the representative may be a beneficiary, either personally or indirectly through their relatives. Some jurisdictions also limit or prohibit representatives from taking a decision on behalf of an adult they represent while also serving as representative of another adult in the same transaction (e.g., a child representing both parents). The law applicable to the powers of representation will also govern and regulate the conflict of interest (Art. 15). Another solution is for the adult to deal with any conflict of interest themselves by providing for the appointment of an *ad hoc* representative in the powers of representation, who will substitute the main representative in those decisions or acts that present a conflict of interest (see chapter II, part H, section 7).

6. Topic focus: supported decision-making, co-decision-making and similar arrangements

168 The extent of the powers of representation, and by extension the extent of the representative's powers, can depend on the type and level of support needed by the adult. It may be that the adult's personal faculties are intermittently or mildly impaired, necessitating occasional support or assistance only in certain areas of the adult's life. In such cases, supported decision-making or co-decision-making arrangements may best meet the needs of the adult. Such arrangements allow the adult to continue exercising their legal capacity to some extent while providing them with support and assistance in making their personal, financial or property decisions. However, if the powers only provide for supported or co-decision-making arrangements and the personal faculties of the adult further deteriorate, necessitating a higher degree of representation, the person assisting or supporting them may need to seize a competent authority and obtain authorisation to represent the adult in more areas of their life, or to take more decisions on their behalf and in their interests (substituted decision-making).

7. Differences in the extent of powers of representation designated by the adult themselves and powers of representation conferred by a competent authority

169 Depending on the jurisdiction, there may or may not be significant difference between the scope of powers that have been granted by the adult themselves, unilaterally or by way of agreement, and powers that have been granted to a representative by a competent authority through a measure of protection. In any case, the context in which the powers of presentation are granted may be different. When an adult themselves establishes powers of representation, they do so with full autonomy and knowledge of the facts. This provides flexibility.

170 Differences / nuances can, therefore, be found in:

- Which acts will be subject to authorisation by a competent authority (e.g., acts of disposal).
- Which acts will be excluded from the powers of representation, even if authorisation is obtained.

8. Instructions given and wishes made by the adult

171 If kept up to date, the instructions given and wishes made by an adult represent an accurate depiction of their will and preferences. To ensure that such instructions and wishes will be taken into consideration in the case where a representative or attorney may not be in a position to act, an adult may have established a separate unilateral document indicating the instructions and wishes that will remain valid even after the extinction of the powers.

172 Some jurisdictions provide for, and give effect to, voluntary, anticipatory acts containing the instructions and wishes of the adult, such as advance directives. The domestic rules that govern

such voluntary anticipatory acts may differ from those concerning powers of representation, particularly in terms of the form, validity and content.

173 Voluntary, anticipatory acts such as advance directives may be subject to formal requirements, such as being in writing, dated and signed. Many States offer the use of non-mandatory standard forms to establish these voluntary, anticipatory acts.

174 Voluntary, anticipatory acts such as advance directives may also be subject to notification requirements (see, *supra*, part E, section 6).

175 In some States, it may be possible for a person close to the adult to request, from a competent authority, a declaration of the validity and the binding force of the instructions given and wishes made by the adult. This person may also seize the competent authority to verify whether a representative is acting in accordance with the instructions and wishes.

a. Personal matters: Instructions and wishes regarding welfare/care

176 The adult can express their wishes and give instructions with regards to their daily living (e.g., hygiene, food, clothing, activities, hobbies and vacations, friendships, social and family relationships, pets, living arrangements). Such instructions and wishes may also relate to the adult's choice of residence, home care or assisted living. Often these will be "end-of-life" arrangements.

b. Personal matters: Instructions and wishes regarding health and medical matters

177 Depending on the applicable law, instructions and wishes regarding medical and health matters may, among other things, relate to:

- the continuation, limitation, cessation or refusal of medical treatments and procedures, including palliative care;
- the wish for or against life-sustaining treatments³⁰;
- preferences for certain types of healthcare or medical treatments;
- choice of health / medical professionals.

178 These instructions or wishes may be part of "end-of-life" arrangements. In some jurisdictions, they may be regulated by domestic laws relating to patient protection. This may include rules around obtaining informed consent (from the adult, the representative or both, as the case may be), the duty of the health professional to inform the representative and any limitations on the extent of the representative's decision-making powers in this area (see, *infra*, section 9, sub-section a).

c. Personal matters: the choice/preference/exclusion of a person to be appointed as a representative/guardian/ assistant of the adult

179 A voluntary, anticipatory act such as an advance directive may contain the instructions or wishes of the adult as to the person who could, if necessary, be appointed as representative / guardian / assistant by a competent authority. In this case, the instructions and wishes are addressed to the competent authority which, when taking a protective measure, is strongly encouraged to take them into consideration. The instructions and wishes may also indicate a person or persons whom the adult wishes to exclude from such an appointment. The applicable law may also provide for additional exclusions regarding the choice of the representative (see chapter II, part D, section 2).

³⁰ The term "life-sustaining treatments" refers to the wide scope of medical interventions which can be offered to an adult, ranging from comfort care only to hospitalisation and full resuscitation.

180 To ensure that the instructions and wishes are brought to the attention of the relevant competent authority, it may be advisable to register the document containing them in accordance with the applicable laws.

d. Personal matters: Instructions and wishes regarding the choice of a jurisdiction

181 Instructions and wishes may also cover which State might have international jurisdiction to take protective measures when the adult is unable to protect their interests due to an impairment or insufficiency of their personal faculties. Such a provision may be taken into account by a competent authority having primary jurisdiction under Article 5 or 6 of the 2000 Convention for a possible transfer of jurisdiction under Article 8 of the 2000 Convention.

e. Instructions and wishes regarding financial and property matters

182 The adult may express wishes or give instructions as to how their assets are to be managed. They can also indicate, for example, how they wish to dispose of a particular movable or immovable property when the adult moves into an institution or assisted living facility. These wishes and instructions can resemble a will and testament, except that these instructions and wishes are intended for the period when the adult is temporarily or permanently unable to take charge of their property. By contrast, a will only takes effect upon the death of the testator.

f. Post-mortem directives

183 Although they could be included in the same type of document, the wishes expressed in relation to how an adult and / or their property is to be cared for and / or managed after their death are not powers of representation within the meaning of the 2000 Convention. *Post-mortem* directives regarding the person of an adult may include the refusal of *post-mortem* organ donation.

184 The instructions given or wishes made by the adult as to the management / disposal of their assets after death are excluded from the notion of advance directives and powers of representation in the broad sense. Such instructions and wishes will fall under the scope of provisions relating to successions and are excluded from the scope of the 2000 Convention.

9. Are the instructions given or wishes made by the adult legally binding?

185 Some voluntary, anticipatory acts contain binding instructions, and some simply contain wishes for the future.³¹ The binding nature of instructions given or wishes made will most likely be addressed by domestic legislation or by competent authorities on a case-by-case basis. Domestic legislation regulating voluntary, anticipatory acts such as advance directives may also provide for the (re)assessment of the binding nature of the instructions and wishes contained therein, if there has been a substantial change of circumstances (e.g., a medical procedure the adult stated they did not want to undergo has been improved). The binding nature of instructions given or wishes made by the adult can also change where circumstances have arisen that the adult could not have anticipated at the time of establishing them, which render the instructions or wishes inapplicable or even contrary to their interests.

186 Where the adult appoints a representative in a voluntary, anticipatory act such as an advance directive, the intended representative is not obliged to accept such a position. However, if they do accept, they are bound by the instructions given by the adult and must take their wishes into account to the extent specified by the applicable law.

³¹ Council of Europe, [Recommendation CM/Rec\(2009\)11 on principles concerning continuing powers of attorney and advance directives for incapacity](#)), see Explanatory Memorandum, paras 178 - 181.

187 In the context of the supervision and control mechanism related to powers of representation, a competent authority or the person / entity designated to supervise the exercise of the powers ought to take into consideration the will, preferences, instructions or wishes of the adult and verify whether they are met by the representative (see chapter II, part H). If not, the competent authority or individual / entity tasked with supervision may consider taking the necessary measures. In a cross-border situation, Article 16 of the 2000 Convention may apply.

a. Personal matters

188 The representative of an adult may be legally required to consult or involve the adult, insofar as possible, in making decisions that affect them. If it is not possible to ascertain the current will, preferences, instructions or wishes of the adult or if they cannot reasonably be carried out, the representative can refer to the content of the voluntary, anticipatory act as originally established by the adult prior to their impairment.

189 Although the binding nature of instructions given and wishes made by the adult will depend on domestic legislation or competent authorities, in some jurisdictions the binding nature of instructions or wishes in the medical field may be distinguished from that of non-medical instructions or wishes. In some jurisdictions, non-medical instructions or wishes must be respected as far as possible and if doing so is not possible, the representative may deviate from them. On the other hand, instructions or wishes which are medical in nature may carry more weight and must be respected. However, some domestic laws may allow medical professionals to reconsider them under specific circumstances and provide reasons for departing from the original instructions or wishes. The applicable law may outline that medical instructions or wishes may be departed from if, among other things:

- they violate the law;
- there are serious doubts that they are not an expression of the free will of the adult;
- they do not correspond to the presumed will of the adult in the given situation;
- there has been progress in medicine following their establishment which could have an impact on the will of the adult;
- there is a life-threatening emergency;
- their execution is manifestly contrary to the interests of the adult, specifically in the event of a change in circumstances.

190 Instructions or wishes regarding medical treatment are often regulated in specific laws concerning the protection of patients, which contain provisions considered to be mandatory public policy (see, *supra*, section 5, sub-section a). Consequently, voluntary, anticipatory acts such as advance directives which are valid in the State where they were established may be considered invalid or inoperable in the requested State because it is contrary to the public policy of that State. This may be the case, for example, for directives concerning the practice of end-of-life assistance (*i.e.*, euthanasia).

191 In some jurisdictions, the representative may not be able to refuse life-sustaining treatment on behalf of the adult, even if the adult has expressed objections to such treatment in the voluntary, anticipatory act containing their instructions or wishes.

b. Financial and property matters

192 The binding nature of instructions or wishes in relation to the management of the financial and property interests of the adult will depend on the domestic law or the competent authority seized of the matter.

c. *Impact of a formal requirement on the binding nature of instructions given or wishes made by the adult*

193 Where the law applicable provides a legal framework for voluntary, anticipatory acts such as advance directives in terms of formal validity (e.g., registration, authentication / certification), those instructions or wishes may be more binding than those for which there is no legal framework.

IV. Modification of powers of representation

194 The rules of applicable law governed by Article 15 of the 2000 Convention also apply to the modification of powers of representation.

195 Article 16 of the Convention allows a competent authority of a Contracting Party having jurisdiction under the Convention to modify powers of representation which have been established in another Contracting Party, in the event that those powers are not exercised in a manner sufficient to guarantee the protection of the person or property of the adult. Article 16 also requires that the law applicable to the powers of representation, in accordance with Article 15, be taken into consideration insofar as possible.

196 The powers of representation which are discussed in this Toolkit include, unless otherwise specified, the powers that may be granted (by an agreement or a unilateral act) to a person appointed to act as a representative and all instructions and wishes expressed, separately or together with such appointment.

197 When verifying the validity of a modified power of representation under the law of another State or contemplating the use of the law of another State to modify powers of representation, one should pay attention to the following issues.

1. Who can modify powers of representation and at what point?

198 At the very core of establishing powers of representation lies the intention to ensure the autonomy of the adult upon an impairment or insufficiency of their personal faculties. Thus, generally speaking, only an adult who has capacity is able to modify their powers of representation and may do so at any moment, without justification.

199 Similarly, in many legal systems, an adult with capacity can modify instructions they gave or wishes they made.

200 The modification of powers of representation by the adult themselves, without the intervention of a competent authority, can be made before or after their coming into force³² but might depend on the assessment of the capacity of the adult.

201 Once the personal faculties of the adult have been impaired, they may lack the capacity to modify the powers of representation. In some jurisdictions then, the powers may only be modified by a competent authority, taking to account the will, preferences, instructions and wishes of the adult.

2. What provisions can be modified?

a. *Modification by the adult themselves, prior to their impairment*

202 The modification of powers of representation by the adult may concern any of the following substantive elements, among others:

³² Powers of representation may come into force immediately or after a certain lapse of time, following a capacity assessment of the adult. In some jurisdictions, powers of representation may only be able to come into force with an intervention by a competent authority, perhaps in accordance with conditions determined by the adult in their powers of representation. See chapter II, part F.

- The appointment of the representative (see chapter II, part D);
- The modalities of decision-making in the case of joint, several and / or substituted appointments where there are multiple representatives (see chapter II, part D, section 3);
- The conditions for the coming into effect of the powers of representation (see chapter II, part F);
- The supervision modalities (see chapter II, part H);
- The extent of the granted powers of representation *i.e.*, the acts that are excluded or included (see chapter III);
- The instructions given or wishes made (see chapter III, section 8);
- The preferred person to be appointed by a competent authority, when needed, as a guardian, assistant or trusted person (see chapter III, section 8, sub-section c);
- The person(s) to be consulted by the representative.

203 Under Article 15(2) of the Convention, the adult is able to designate expressly in writing the law applicable to the powers of representation. Therefore, it is conceivable that this choice could also be modified by the adult, prior to the impairment or insufficiency of their personal faculties. The newly chosen applicable law must be in conformity with Article 15(2) of the 2000 Convention and, depending on the case, the previously established powers of representation should remain valid under the newly chosen applicable law.

b. Modification by a competent authority after the impairment of the personal faculties of the adult

204 The extent to which powers of representation may be modified by a competent authority will depend on the law applicable. Consequently, this may differ greatly from jurisdiction to jurisdiction.

205 In some legal systems, powers of representation cannot be split into different elements to be modified individually. Therefore, if any element of a document establishing powers of representation requires modification by a competent authority, this may entail the total withdrawal of the powers of representation and, as the case may be, their replacement by a protective measure. Other legal systems may allow competent authorities to decide on the modification of certain elements of powers of representation while keeping other elements unchanged. It is also possible that a competent authority which is unable to modify the powers, may still appoint a supervisor to the representative.

206 The extent to which a competent authority is able to modify powers of representation may also depend on the type of provision to be modified and how essential that provision is to the establishment and exercise of the powers of representation. For instance, it may be possible for a competent authority to modify the supervision requirements, to add instructions to the representative or to limit some of the powers granted to the representative, without affecting the operability of the powers as a whole.

207 In some legal systems, it may not be possible to modify the most essential aspect of the powers of representation, which is the provision designating the representative of the adult. Indeed, some legal systems may consider that changing the designated representative terminates the powers of representation and requires, if necessary, a competent authority to take a measure of protection under Article 3 (e.g., designation of a guardian or other analogous representative). On the other hand, if the adult themselves has designated a person as a substitute or alternative representative in the document establishing the powers of representation, a competent authority may give effect to such a modification, without changing the nature of the powers themselves.

208 In some legal systems, if the powers of representation lack clarity on certain points or create uncertainty for the representative, a competent authority may interpret the powers or rectify the document, in a manner that respects the will, preferences, instructions and wishes of the adult.³³

209 It may happen that, due to a substantial change in circumstances, instructions previously given or wishes previously made by the adult may become incompatible with their own interests. Under some legal systems, the competent authority may be able to amend or revoke those instructions or wishes or declare them to be inapplicable to a particular situation, while keeping the powers of representation unchanged (see chapter III, section 9). Before making any such decision, the competent authority may be obliged to make the necessary efforts to obtain the opinion of the adult, if practicable.

3. Formal requirements and related safeguards

210 It should be noted that the process of modification by an adult with capacity may also differ from jurisdiction to jurisdiction.

211 In some jurisdictions, the modification of the powers by the adult may be subject to the same formal requirements under the applicable law as their establishment (see chapter II, part C). For instance, the modification may require a similar authentication / certification to that required when the powers of representation were initially established. An adult with capacity seeking to modify powers of representation may also be required to do so in writing and in the presence of witnesses.

212 A possible safeguard for the modification of powers of representations may be that there must be a final decision issued by a competent authority on the matter, especially when the powers have already been registered.

4. The registration of the modification of the powers of representation as a publicity requirement

213 In jurisdictions which provide for the possibility or obligation to register the powers of representation, it may be relevant to verify whether an obligation exists to register any subsequent modification to the registered powers to ensure the validity of the modification.

214 To avoid uncertainty regarding the existence and modification of powers of representation, it may be useful to provide for a registration system that enables competent authorities or a person close to the adult to check whether or not the powers of representation validly established in another State have been subsequently modified or even extinguished, in conformity with the domestic law of that State (see chapter II, part E, section 7).

V. Extinction (Art. 15) and Withdrawal (Art. 16) of powers of representation

215 Article 15 of the 2000 Convention also applies to the extinction of powers of representation.

216 Article 16 of the 2000 Convention allows a competent authority of a Contracting Party having jurisdiction under the Convention to withdraw powers of representation which have been established in another Contracting Party, in the event that those powers are not exercised in a manner sufficient to guarantee the protection of the person or property of the adult. Article 16 also requires that the law applicable to the powers of representation, in accordance with Article 15, be taken into consideration insofar as possible.

³³ This may depend on general domestic provisions for rectifying documents rather than provisions regarding particular types of documents.

217 When verifying the validity of the extinction of powers of representation under the law of another State or contemplating their withdrawal in accordance with the law of another State, one should pay attention on the following issues.

1. Possible conditions for extinction due to circumstances concerning the adult or the representative, or due to an intervention by a competent authority

218 Depending on the applicable law and on the provisions of the powers of representation themselves, the extinction of powers of representation may occur under the following circumstances, among others:

a. Circumstances concerning the adult:

- The adult has recovered their capacity;
- The adult has died;
- The adult has revoked the powers of representation prior to the impairment of their personal faculties;
- The adult has revoked the powers of representation after the impairment of their personal faculties, an action which may require authorisation / confirmation by a competent authority;
- The adult has appointed another representative, which may imply the extinction of earlier powers of representation, unless such an appointment is supplementary;
- The adult has been declared bankrupt or insolvent (in the context of powers of representation dealing with financial and / or property matters).

b. Circumstances concerning the representative:

- The representative has died;
- The representative has resigned;
- The representative refuses to assume their duties, upon the impairment of the personal faculties of the adult;
- The representative's personal faculties have been impaired and / or a competent authority has taken a measure of protection on their behalf;
- The representative has been declared bankrupt or insolvent;
- The representative of the adult is their spouse / civil partner and the powers of representation provide that, upon separation, divorce or nullity of their marriage or civil partnership, the powers are to be extinguished;
- The representative and the adult are in a conflict of interest (see chapter II, part H, section 7).

c. Intervention by a competent authority:

- When a competent authority takes, a decision to withdraw the powers of representation due to the representative not carrying out their duties in a manner sufficient to guarantee the protection of the person or property of the adult (see chapter II, part H);
- When a competent authority appoints a guardian with the same powers as those established in the powers of representation.

219 In addition to what is listed under the three sub-sections above, the powers of representation themselves may describe any other circumstances for their extinction.

- 220 In several legal systems, the adult themselves can decide on the extinction of the powers of representation, as long as they have capacity to do so, notwithstanding the entry into force of the powers of representation. In such cases, some legal systems would require the adult to justify their decision, in order for the competent authority to make an assessment as to the need for a protective measure. In other legal systems, the adult may be able to decide on the extinction of the powers of representation, even when they have no capacity. For instance, the adult may indicate, orally or through their behaviour, a serious misunderstanding between the adult and their representative. In such cases, this would generally mean that a competent authority must intervene with a protective measure. In other legal systems, if the adult decides on the extinction of the powers of representation they established at an earlier date, which have been confirmed by a competent authority, have been registered or have entered into force, a competent authority may need to affirm their extinction by assessing the capacity of the adult at the time they decide on the extinction of the powers of representation.
- 221 In some jurisdictions, the resignation of a representative may be conditional upon giving advance notice to the adult or obtaining authorisation by a competent authority.
- 222 In some legal systems, the document establishing the powers of representation can stipulate that the powers therein are irrevocable or at least that they do not terminate when the adult becomes the subject of a protective measure or upon their death.

2. Automatic extinction versus decision by a competent authority

- 223 Several of the factual circumstances that are listed above under section 1, sub-section (a) can, depending on the applicable law, cause the automatic extinction of the powers of representation (*i.e.*, by operation of law), without the need for a competent authority to assess, validate or affirm such extinction.
- 224 Some legal systems providing for an automatic extinction of powers of representation in certain situations (*e.g.*, in case of the recovery of the capacity of the adult), may still recognise actions taken by the representative on behalf of the adult, until the personal faculties of the adult allow them to look after their own interests once again or until the representative becomes informed of the extinction.
- 225 When it comes to the extinction of powers of representation by operation of law, certain formal conditions specified by the law applicable may need to be met before the extinction can take effect. For instance, it may be necessary to notify an authority of the event that led to the extinction of the powers of representation or file the medical documentation certifying that the adult has recovered from the condition that impaired their personal faculties.
- 226 Conversely, in jurisdictions which do not provide for the automatic extinction of powers of representation under certain circumstances, an intervention by a competent authority may be required in order to assess any situation that may lead to an extinction of the powers of representation (*e.g.*, bankruptcy, loss of legal capacity of the representative, divorce).
- 227 Additionally, the extinction of the powers of representation can take place pursuant to a decision to withdraw taken by a competent authority, in the exercise of its supervisory function. Such withdrawal may happen when the representative abuses their powers or neglects their duties (see chapter II, part H).

3. Impact of the application of formal requirements to the powers of representation

- 228 For the adult themselves to validly revoke powers of representation the same formality requirements that were attached to their establishment may apply (see chapter II, part C). For instance, the extinction of powers of representation which have been established by an authentic

instrument may require the same formality. In other jurisdictions, a document in writing may suffice for the revocation of powers of representation by the adult themselves.

- 229 In cases of emergency that preclude the adult from following the same formal requirements, some legal systems may accept that the powers of representation be revoked by other means, such as a verbal statement or via videotape (recorded by a doctor or other health professional), perhaps with the assistance of witnesses, or the conduct of the adult implying revocation.

4. After the death of the adult

- 230 Depending on the law applicable but also on the powers of representation themselves, the powers may not terminate automatically and by operation of law when the adult dies. For example, the representative or the next of kin of the adult may need to provide a competent authority with the death certificate of the adult. In some jurisdictions, the representative may, under certain circumstances and unless otherwise provided in the powers of representation, remain empowered to take some limited actions concerning the person or property of the adult after their death (e.g., funeral arrangements, urgent actions to protect the assets of the adult).

5. The registration of the extinction of the powers of representation

- 231 Depending on the applicable law, the extinction of powers of representation can be registered in the same place where the document establishing those powers were registered. The document establishing the powers of representation may, then, be removed from the register or the registration of the establishment of the powers of representation would be cancelled.
- 232 As previously mentioned under the section discussing the modification of powers of representation, a system for the publicity of the extinction and / or withdrawal of powers of representation may be useful, to avoid the circulation of expired powers of representation and any potential abuse by a former representative.

6. Impact of extinction on third parties

- 233 Following the extinction of powers of representation, questions may arise as to the effect of such an extinction on any possible third parties. For instance, the representative may have entered contractual obligations on behalf of the adult, the validity or endurance of which may be called into question upon the extinction of the powers of representation.
- 234 Depending on the applicable law, it may be possible that contracts concluded between the representative and *bona fide* third parties may endure following the extinction of the powers of representation. For example, if a representative signed a lease agreement with tenants to rent out a property belonging to the adult, that contract may continue to be valid to protect the tenants, so long as they did not know or could not have known that the powers were extinguished.

