



# Advance directives

Summary of the legal provisions relating to advance directives per country

## **Introduction**

This report contains information about the legal status of advance directives in a number of countries in Europe. Most of the information was obtained from legal experts, government representatives (contacted through the Council of Europe) and Alzheimer associations. In some cases, this was supplemented by information taken directly from the relevant legal texts and from literature on this subject.

As laws differ greatly from one country to the next, the same information could not be provided for each country. For example, in some countries the law does not state what can or cannot be included in an advance directive. In others, it is unclear to what extent doctors are legally bound to comply with advance directives and/or in which circumstances.

In some countries, such as Austria, Luxembourg and Switzerland, law proposals have been made which are likely to significantly affect the status and use of advance directives in these countries. For this reason, although the final law may eventually differ somewhat from the law proposal, details have been included in the sections for these countries.

In a few countries (e.g. Greece, Portugal and Turkey), the concept of advance directives is practically unknown and advance directives do not have legal status. Consequently, it was not possible to include information for these countries.

## Contents

Introduction.....	2
Austria.....	4
Belgium.....	7
Denmark.....	8
Estonia.....	10
Finland .....	12
France.....	14
Georgia.....	15
Germany.....	17
Hungary.....	21
Ireland .....	23
Italy .....	24
Luxembourg.....	25
the Netherlands .....	27
Norway.....	28
Spain .....	30
Switzerland .....	31
the United Kingdom.....	34

## Austria

### **A. The legal status of advance directives in Austria**

Advance statements do not currently have legal status in Austria. However, according to §10 of the Hospital Establishment Law of 1957 (KAKuG), it is obligatory when recording a patients' case history in hospitals and clinics to document instructions from the patient regarding certain forms of treatment which should not be carried out in the case of future incapacity. These instructions must then be taken into account by doctors in the event of the patient's future incapacity.

It is possible for a competent person to appoint someone to make health care decisions on their behalf at a time in the future when they no longer have the necessary capacity to make health care decisions themselves.

In Austria, it is possible to write an advance directive (a "Patientenverfügung") and/or to appoint a trusted person to act on one's behalf ("Vorsorgevollmacht"). The duties of the trusted person may be limited to financial, administrative and/or care issues, but may also (or alternatively) cover health care decisions.

A draft proposal for a new law on advance directives was recently presented by the Ministry for Health and Women to the Austrian Parliament. According to a text accompanying the draft proposal, there is a general legal consensus that advance directives are legally binding provided that the person definitely had legal capacity at the time the document was written, was not under any pressure and that the advance directive refers to concrete health care situations. The proposed law would merely provide the necessary clarification of the legal situation.

### **B. Conditions surrounding the writing, validity and registering of an advance directive**

Anyone can write an advance directive. Printed forms exist but it is also possible to write one's own advance directive by hand. It is advisable but not obligatory to involve a lawyer or notary when drawing up an advance directive and/or appointing a health care proxy.

Capacity is presumed. In case of doubt, it is assessed by a doctor - either a doctor of the person's own choice or an independent doctor.

The person writing the advance directive must state their wishes clearly and be free from any physical, mental or social pressure. Furthermore, they must have been informed of the consequences of any refusal of treatment.

According to the law proposal, an advance directive can also be made orally by a hospitalised patient. For non-hospitalised patients who have not personally written or signed their advance directive, it must contain the signature of a doctor who certifies that he/she has provided the person with the relevant information relating to the decisions made by the patient.

There is currently no registration system for advance directives. However, in line with the law proposal, the creation of a national registry is foreseen which would keep a copy of the latest version of a person's advance directive. There are also plans for the electronic registration of advance directives.

An advance directive which was not written in a hospital or clinic is only valid for 3 years, after which time it can be renewed.

### **C. What an advance directive can cover**

The health care proxy (the trusted person with responsibility for health care decisions) can make decisions covering:

- The treatment of straightforward medical conditions (for more complicated conditions/treatment, the approval of a court is necessary);
- The treatment of a psychiatric condition (for simple treatment only; if the person has been interned in a closed department or psychiatric institution, the law on forced internment would apply);
- Care and welfare decisions.

As health care proxies are supposed to make decisions that are in the interests of the person they are representing, the refusal of basic care would not be justified.

If the law proposal is successful, it will be possible for an advance directive to cover:

- The treatment of medical conditions;
- The treatment of a psychiatric condition;
- Life-supporting treatment and
- Life-saving treatment.

### **D. Obligation to comply with instructions contained in an advance directive**

Doctors are currently expected to comply with instructions contained in an advance directive. According to the law proposal, in order to be legally binding, the advance directive must be clearly applicable to the person's health condition and the proposed treatment. If this is not the case, or if the advance directive has not been updated, it should be considered as being advisory.

### **E. Amending, renewing and cancelling advance directives**

According to the law proposal, an advance directive can be cancelled or amended at any time without any formal requirements or the necessity to provide justification. This can be done orally, in writing or through clear behavioural signs. If the advance directive was not written in a hospital or clinic, it must be renewed after 3 years.

If a person is no longer able to renew the advance directive, they can be assisted by the doctor responsible for their care or by an officially appointed patient representative. Advance directives made orally in a hospital lose their validity when the patient is discharged.

## **Belgium**

### **A. The legal status of advance directives in Belgium**

The Law of 22 August 2002 relating to Patients' Rights (article 8, paragraph 4) states that if a person, whilst still capable according to the terms of the said law, declared in writing their refusal of a specific form of treatment proposed by a medical practitioner, this refusal must be respected from that point on, unless they regain capacity and revoke it.

### **B. Conditions surrounding the writing, validity and registering of an advance directive**

To make a valid advance directive, a person must have the necessary capacity to do so. The advance directive must be made in writing.

### **C. What an advance directive can cover**

The Law relating to Patients' Rights mentions the refusal of a specific form of treatment. Article 14 further states that a person can appoint in writing in advance of incapacity a "mandataire désigné par le patient" (a health care proxy). A special mandate must be dated and signed by the proxy and the patient to confirm that the former is authorised and agrees to consent on behalf of the latter.

The Law on Euthanasia of 2002 allows doctors to perform euthanasia to patients who are unconscious or cannot express their will. In such cases, the patient must have made the advance directive for euthanasia within 5 years of having lost capacity and it must have been added to their medical file. The document must be written, dated and signed in the presence of two adult witnesses, and any appointed health care proxies. At least one of the witnesses must have no material interest in the person's death. Doctors must follow a certain procedure and respect certain conditions which differ from those concerning requests made by people with capacity.

### **D. Obligation to comply with instructions contained in an advance directive**

The law states that an advance directive refusing specific forms of treatment must be respected provided that the person has not revoked it.

### **E. Amending, renewing and cancelling advance directives**

An advance directive can be revoked at any time in writing by the person who made it.

# **Denmark**

## **A. The legal status of advance directives in Denmark**

Advance directives have legal status in Denmark according to the Law on Patients' Legal Status (No. 482, 1998). They are legally binding in certain circumstances and advisory in others (please see section D for details). Some people express their future wishes in powers of attorney documents. Such wishes are not legally binding but may serve as guidelines for the attorneys who have been appointed.

## **B. Conditions surrounding the writing, validity and registering of an advance directive**

Any person over the age of 18 who is not already under guardianship can write an advance directive. Capacity is presumed. It is not necessary to involve a doctor or notary.

There is a registration procedure in that advance directories must be sent to a Central Registry. The registration procedure currently costs about Euro 7.

The validity of advance directives is not limited to a set period of time.

## **C. What an advance directive can cover**

Advance directives can include decisions relating to:

- The treatment of medical conditions and
- Life-supporting treatment.

but not life-saving treatment.

## **D. Obligation to comply with instructions contained in an advance directive**

A person may specify in an advance directive that life-supporting treatment is not desired should they be facing unavoidable death i.e. where there is no outlook for cure, improvement or alleviation but only to a certain prolongation of life. In such cases, doctors must consult the Will Registry to check whether the patient has made an advance directive. If so, it is considered as legally binding.

A person may also or alternatively specify in an advance directive that life-supporting treatment is not desired in case of illness, advanced debilitation due to old age, accidents, heart failure or similar situations that cause such a severe invalidity that they would be permanently unable to take care of themselves physically and mentally. In such cases,



doctors must again consult the Will Registry to check whether the patient has made an advance directive. If so, it is considered as advisory.

If a person expresses wishes just before losing capacity which differ from those contained in the advance directive, doctors normally take these wishes into account.

#### **E. Amending, renewing and cancelling advance directives**

An advance directive can be amended or cancelled at any time simply by informing the Will Registry. This can be done by a person with and presumably without capacity (provided that they have sufficient capacity to be able to inform the Will Registry).

# Estonia

## **A. The legal status of advance directives in Estonia**

Advance directives are legally binding according to the Law of Obligations. Paragraph 767 of this law which covers the provision of health care services to patients without capacity to exercise their will states:

“(1) If a patient is unconscious or incapable of exercising his or her will for any other reason (a patient without the capacity to exercise his or her will) and if he or she does not have a legal representative or his or her legal representative cannot be reached, the provision of health care services is permitted without the consent of the patient if this is in the interests of the patient and **corresponds to the intentions expressed by him or her earlier** or to his or her presumed intentions and if failure to provide health care services promptly would put the life of the patient at risk or significantly damage his or her health. The intentions expressed earlier by a patient or his or her presumed intentions shall, if possible, be ascertained using the help of his or her immediate family. The immediate family of the patient shall be informed of his or her state of health, the provision of health care services and the associated risks if this is possible in the circumstances.”

## **B. Conditions surrounding the writing, validity and registering of an advance directive**

Capacity is presumed unless proven otherwise. Advance directives are not limited to a set period of time.

## **C. What an advance directive can cover**

An advance directive can cover:

- The treatment of medical conditions;
- The treatment of a psychiatric condition;
- Care and welfare decisions;
- Life-supporting treatment;
- Life-saving treatment; and
- Basic care (there is no definition of what this includes but as all care can be refused, it should be possible to refuse basic care).

#### **D. Obligation to comply with instructions contained in an advance directive**

A doctor cannot be obliged to provide treatment that he/she does not consider to be in the best interests of a patient. However, a doctor can be obliged to discontinue treatment, including life-supporting and life-saving treatment.

The currently expressed wishes of a person with incapacity may take precedence over those expressed in an advance directive provided that the patient is able to reasonably consider the pros and cons of the situation.

#### **E. Amending, renewing and cancelling advance directives**

An advance directive can be withdrawn by a person with or without capacity. An advance directive can be renewed simply by writing a new one.

#### **F. Additional comments**

Many doctors are not aware of the law (Nömper, 2004)

## **Finland**

### **A. The legal status of advance directives in Finland**

Advance directives have legal status in Finland according to regulation 8 of the Act on the Status and Rights of Patients (1992).

Regulation 8 deals with emergency treatment and states that doctors cannot give treatment to a person who is unconscious or unable to express their will if such treatment would be against that person's will, as expressed steadfastly and competently at some point in the past.

In 1999, an amendment to regulation 6 of the above-mentioned law made it necessary for legal representatives, next-of-kin or close friends who are making decisions on behalf of a person with incapacity to take into account their previously expressed wishes.

In Spring 2005, the Act on the Status and Rights of Patients will be amended again. A new regulation (6a) will make it clearer how decisions will be made on behalf of an adult with incapacity. Decisions will be made on the following basis:

1. according to instructions contained in an advance directive (if one has been made, it will always come first);
2. through consultation with a court appointed trustee (a guardian) in health care issues;
3. through consultation with a trustee who has been appointed by the patient to make health care decisions (i.e. a health care proxy);
4. through consultation with a parent, child or close friend or relative.

### **B. Conditions surrounding the writing, validity and registering of an advance directive**

A person must have sufficient capacity to make a valid advance directive. Competence is presumed unless proven otherwise. In case of doubt, a doctor should assess a person's capacity.

There is no set procedure for writing or registering advance directives but they should be recorded in the patient's medical file. An advance directive can be made orally (e.g. by a person in hospital) or in writing. If made in writing, it is advisable to have two witnesses. A doctor and/or lawyer may be involved in the process of making an advance directive but this is not necessary.

Advance directives are not limited to a set period of time.

### **C. What an advance directive can cover**

An advance directive can cover:

- The treatment of medical conditions;
- The treatment of a psychiatric condition;
- Care and welfare decisions;
- Research;
- Basic care (there is no definition of what this includes but as all care can be refused, it should be possible to refuse basic care);
- Life-supporting treatment;
- Life-saving treatment; and
- The appointment of a health care proxy.

### **D. Obligation to comply with instructions contained in an advance directive**

In the case of emergency treatment, advance directives are legally binding. In other cases, they are advisory and it is good medical practice to comply with them.

After an amendment in 2005 to regulation 6 of the Act on the Status and Rights of Patients, doctors will not be obliged to comply with advance directives if it is obvious that the advance directive is based on a person's false perception of their health condition, the nature of the illness or the effectiveness of the treatment methods and medication proposed. Similarly, doctors should not comply with an advance directive if the patient's will concerning treatment and care has changed for the above-mentioned or a similar reason.

If it would be against a doctor's personal beliefs to comply with instructions contained in an advance directive, the doctor must find a colleague who is willing to take over the treatment of the patient.

### **E. Amending, renewing and cancelling advance directives**

An advance directive can be amended, renewed or cancelled at any time. This can be done verbally, in writing or through behaviour which clearly indicates this decision. It is not necessary for a person to have full legal capacity (i.e. in every domain) as a greater level of capacity is needed to write an advance directive than to cancel it. This has been discussed in medical circles as well as in literature on jurisprudence.

## **France**

### **A. The legal status of advance directives in France**

Advance statements do not have legal status in France. However, the Law of 4 March 2002 relating to Patients' Rights and the Modernisation of the Health Care System gives people the right to appoint in writing a health care proxy.

The health care proxy, known as a “personne de confiance” (trusted person), must be consulted whenever the person is unable to express their wishes or to understand the health care information provided in connection with proposed treatment. The health care proxy also has the right to support the person and be present during medical consultations in order to facilitate decision-making if the latter so desires. The health care proxy could be a relative, friend or doctor.

### **B. Conditions surrounding the appointment of a health care proxy**

A health care proxy must be appointed in writing and can be cancelled at any time.

When patients are hospitalised, they are systematically asked whether they would like to appoint one. The appointment of a health care proxy in this case is limited to the duration of the hospital stay unless the patient decides otherwise.

The right to appoint a health care proxy does not apply to people who are already under guardianship. If court proceedings are underway to appoint a guardian and a health care proxy has already been appointed, the judge decides whether the health care proxy should maintain or be relieved of his/her duties.

## Georgia

### **A. The legal status of advance directives in Georgia**

Advance directives were granted legal status in Georgia in 1997 through the “Law on Health Care”. Later, the Law on the Rights of Patients of 2000 further strengthened the legal basis for the concept of advance directives. Article 24 of the Law on the Rights of Patients states:

“Every citizen of Georgia has the right to express in advance his/her wishes (consent or refusal) in written form concerning the provision of resuscitation, life-saving treatment or palliative care when the patient becomes incompetent or loses decision-making capacity only if this condition is caused by:

- a) the terminal stage of an incurable disease or
- b) a disease which inevitably will cause serious disability.”

As can be seen above, advance directives are only binding in the final stages of a terminal illness or a disease involving severe disability. However, according to the Law on Health Care, an advance directive must be “taken into account” by health care professionals. Article 11 states that:

“the provision of medical treatment to a person who is unable to consent, or his/her involvement in the process of education and scientific research is only admissible if his/her previously expressed will (when he/she was able to consent) is taken into consideration .”

Article 149 of the same law states:

“An unconscious patient is provided with relevant treatment, except in cases where he/she has previously (when he/she had decision making capacity) refused resuscitation, life-saving or palliative treatment.”

It is possible to appoint in an advance directive a health care proxy who can make legally binding decisions on behalf of the author when the latter becomes incompetent or loses decision-making capacity but only in certain circumstances (please see section D).

### **B. Conditions surrounding the writing, validity and registering of an advance directive**

People are entitled to express their wishes in advance in written form. However, there is no set procedure for doing this. There is no set procedure for registering advance directives and they are not limited to a set period of time.

### **C. What an advance directive can cover**

An advance directive can cover:

- Life-saving treatment;
- Life-supporting treatment;
- Palliative care
- Research;
- Resuscitation; and
- The appointment of a health care proxy.

The law does not differentiate between medical and psychiatric care. Advance directives cannot cover care and welfare decisions or the refusal of basic care.

### **D. Obligation to comply with instructions contained in an advance directive**

The refusal of life-supporting and life-saving treatment is only possible when it concerns the final stages of a terminal disease or a disease involving severe disability. This also applies to decisions made by health care proxies. The law does not state whether doctors are obliged to comply with advance directives which do not seem to be in the best interests of a patient.

### **E. Amending, renewing and cancelling advance directives**

A person with capacity can renew an advance directive at any time. Similarly, he/she can withdraw an advance directive. The law does not deal with the possibility of a person lacking capacity withdrawing an advance directive.

### **F. Additional comments**

In practice, the legal provisions that are currently in force are not always respected. The concept of advance directives is relatively new. There is no tradition of expressing wishes for health care and treatment in advance. Moreover, detailed procedures for making advance directives have not yet been developed and enforced. This is considered a major obstacle for the implementation of legal provisions relating to advance directives in Georgia (Javashvili and Kiknadze, 2004).



# **Germany**

## **A. The legal status of advance directives in Germany**

There is no legally recognised form for advance directives in Germany. However, in current medical practice, it is widely recognised that advance directives reflect a citizen's right to self-determination and are linked to the issue of consent to treatment. Therefore, it is possible for people to refuse or limit specific treatments in advance of their incapacity by means of advance directives.

An advance directive may in certain circumstances be considered as binding e.g. if there is no indication of a change of will related to the specific situation and if the instruction is based on sufficient medical information for the medical treatment proposed. In such cases, a decision that is clearly in favour of withdrawing treatment and is clearly the manifest desire of the patient must be complied with (Council of Europe, 2003).

There is currently a law proposal to add 8 paragraphs on living wills to Book 4 of the Civil Code (BGB) (Family Law, Section 3, Heading 2, Legal guardianship). The proposal also includes an amendment to §1896, par. 1 BGB. Please see section G for further details.

## **B. Conditions surrounding the writing, validity and registering of an advance directive**

An advance directive can only be written by a person who has capacity and is not subject to external pressure. It is assumed that a person has capacity but confirmation of this by a notary may be helpful. The advance directive should refer to specific treatment or situations and cannot include a request for something that is illegal e.g. assisted suicide. Advice from a doctor is advisable but not necessary.

There is no set procedure for registering advance directives and they are not limited to a set period of time.

## **C. What an advance directive can cover**

An advance directive can cover:

- The treatment of medical conditions;
- The treatment of a psychiatric condition;
- Care and welfare decisions;
- Research;
- Basic care;
- Life-supporting treatment;
- Life-saving treatment; and
- The appointment of a health care proxy.

In the above-mentioned law proposal on living wills it is stated that it will not be possible to refuse basic care.

#### **D. Obligation to comply with instructions contained in an advance directive**

Generally speaking, advance directives in Germany containing decisions about future care are expected to be used by doctors in order to determine the patient's will in case of incapacity. If a doctor treats a patient despite the patient's refusal of such treatment (as expressed in an advance directive), he/she may be charged with physical injury.

Starting, ending and/or continuing any medical intervention can be refused in an advance directive. This includes life-saving and life-supporting treatment. Although there is no clear definition of what the term "basic care" covers, there is currently much debate in Germany amongst members of the medical profession about this issue.

The current wishes of a person with incapacity can in certain circumstances take precedence over those expressed in an advance directive. This tends to be decided on a case by case basis.

Doctors who have personal objections to complying with an advance directive must hand over treatment of the patient to a colleague.

#### **E. Amending, renewing and cancelling advance directives**

An advance directive can be amended, renewed or cancelled at any time. This can be done verbally, in writing or through behaviour which clearly indicates this decision. It is not necessary for a person to have full legal capacity (volle Geschäftsfähigkeit) in order to withdraw an advance directive.

#### **F. Additional comments**

It is often difficult for doctors to determine whether instructions/wishes expressed in an advance directive correspond to the current situation. For some, it is also unclear whether failure to initiate or end life-supporting treatment/measures is permitted or, on the contrary, fulfils the criteria for the criminal offence of "murder at the request of the victim" (Mathy and Godschalk, 2004).

#### **G. The text of the law proposal**

Bürgerliches Gesetzbuch (Civil Code)  
Book Four, Family Law, Section 3, Heading 2 Legal Guardianship

##### §1901 b [Living will]

- 1) Individuals with the capacity to give consent may determine in writing which medical procedures they desire or reject in the event of loss of their capacity to give consent

(living will). Capacity to give consent exists when the individual can judge the significance, scope and purport of the declaration. Basic care procedures cannot be ruled out by a living will.

- 2) The guardian has to examine the living will. If there is no reason to believe that the protected person has changed his mind or, if he knew of the present circumstances, would have reached a different decision and if the decision taken in the living will relates to the current situation, the guardian has to implement the living will.
- 3) If the purpose of the living will is to refuse or withdraw a life-supporting procedure that is medically indicated or proposed by a doctor, the guardian may only implement the living will if the underlying disease is irreversible and, in spite of medical treatment would, according to the best medical knowledge, lead to death.
- 4) If an individual capable of giving consent has stated verbally or expressed in any other way which medical procedures he would desire or refuse in the event of loss of the capacity to give consent, the guardian must take this declaration as an indication in determining the wishes of the protected person. A life-supporting procedure that is medically indicated or proposed by the doctor may only be refused if the underlying disease is irreversible and in spite of medical treatment would, according to the best medical knowledge, lead to death.
- 5) In case of doubt in the implementation of a living will or of a verbal declaration, the wellbeing of the patient and protection of his life takes precedence.
- 6) Faced with a decision as in paragraph 3 and paragraph 4 sentence 2, the guardian must obtain the view of a case conference. The case conference must involve at least the doctor providing treatment, a representative of the nursing staff and, if available, a relative. The deliberations of the case conference must deal in particular with the following questions:
  - whether the living will is formally valid
  - whether there is any indication of an appreciable current change of mind
  - whether and to what extent the actual current medical situation matches one of the situations described in the living will
  - how the wishes expressed in the living will can be applied to the actual medically indicated treatment.The discussion takes place in the form of a joint conference with the guardian, the findings of which are to be recorded.
- 7) Refusal of the consent of the guardian to the introduction or continuation of a medical procedure as in paragraph 3 and paragraph 4 sentence 2 is permissible only with the approval of the Court of Protection.
- 8) Paragraphs 1 to 7 apply analogously to a decision by the attorney. The power of attorney is valid only if it has been granted in writing and expressly incorporates the procedures mentioned in paragraph 1.

§1896 para. 1, BGB

In paragraph 1 after sentence 1 the following sentence is to be inserted:

“This also applies if a living will exists.”.

## **Hungary**

### **A. The legal status of advance directives in Hungary**

The new Health Act, which was adopted in 1997 (valid in July 1998), states that a patient can prepare a written declaration, an advance directive, to be used in the event of subsequent incapacity.

### **B. Conditions surrounding the writing, validity and registering of an advance directive**

To write an advance directive, a person must have “full disposing capacity”. The advance directive must be in the form of notarial document. In order to be considered valid, a board-certified psychiatrist must have confirmed in a medical opinion, given not more than a month earlier, that the person had made the decision in full awareness of its consequences. If a person is unable to write, the advance directive must be made in the presence of two witnesses who should also sign the document.

### **C. What an advance directive can cover**

In the advance directive, people can refuse specific forms of treatment. Life-supporting or life-saving interventions may be refused if the patient suffers from a serious illness which, according to the current state of medical science, will lead to death within a short period of time even with adequate health care, and is incurable. Certain life-supporting or life-saving interventions may be refused if a person has an incurable disease and as a consequence of the disease is unable to care for him/herself physically or suffers pain that cannot be eased with appropriate therapy.

Concerning organ and tissue donation, it is possible to make an advance directive in order to forbid donation in case of death.

A person can also appoint someone with capacity to consent and/or refuse health care/treatment on his/her behalf in case of subsequent incapacity (i.e. a health care proxy). According to the Health Act, if a person has no legal representative (and presumably no valid advance directive) close relatives can refuse or consent to treatment on their behalf. The Act contains a list describing which people have the right of consent and refusal and in which order. However, it can be stated in the advance directive which of these people should not be given medical information or granted the right to refuse or consent to treatment on their behalf. This can be done irrespective of whether a health care proxy is appointed, and this option is open to minors over 16 also.

It is interesting to note that minors (under the age of 18) are not allowed to refuse treatment, but the appointment of a proxy is allowed for those over 16 years of age.

#### **D. Obligation to comply with instructions contained in an advance directive**

Doctors are obliged to respect wishes contained in advance directives even if they consider that such wishes are not in the best interests of the patients concerned.

However, for the termination of life-supporting treatment, a refusal may be ignored if there is any doubt concerning the patient's wishes. In section 16 (5) of the Health Act it is stated, "In making decisions on the health care to be provided, the opinion of a patient with no disposing capacity or with limited disposing capacity shall be taken into account to the extent professionally possible..."

Moreover, if there is reason to believe that the correct legal procedure (e.g. concerning the opinion of the board of psychiatrists, the notarial document or the time period to be respected) was not followed, there would be grounds to challenge the advance directive.

The patient's opinion must always be taken into consideration to the greatest possible extent, even if he/she is incapable.

#### **E. Amending, renewing and cancelling advance directives**

Advance directives must be renewed every 2 years. Only the person who made the advance directive can cancel or amend it. An advance directive may be withdrawn at any time without any formal obligations, even if the patient is not competent. Article 56 of the Hungarian Constitution states, "In the Republic of Hungary, everyone is legally capable." To amend an advance directive, the same formalities apply as for the creation of an advance directive

#### **F. Additional comments**

Patients are still not sufficiently aware of the existence of options such as advance directives or the appointment of a health care proxy. Also, advance directives concern only a very narrow range of situations which means that there is no way for patients to escape unnecessary suffering should their disease not be one which leads to death within a short period of time even with full treatment (E. Csernus, 2004).

## Ireland

### **A. The legal status of advance directives in Ireland**

Advance directives are not legally binding in Ireland. However, according to Costello (1998), in a recent Ward of Court case, certain comments were made by the Supreme Court to the effect that views expressed by a person in relation to future medical treatment (which could have been written in an advance directive) would be taken into account by the Court in coming to decisions in relation to the termination of treatment.

It is possible for a person to complete an Enduring Power of Attorney to sort out their financial affairs and put in place funding arrangements for future care. In addition, a person can give instructions in relation to personal care decisions such as:

- where they should live
- with whom they should live
- whom they should see or not see
- what training or rehabilitation the person should receive
- the person's diet/dress
- who may inspect the person's personal papers
- what housing, social welfare or other benefits the person needs

Nevertheless, a person cannot express wishes regarding treatment that are legally binding.

## Italy

### **A. The legal status of advance directives in Italy**

There is no legally recognised form for advance directives in Italy. Therefore, anyone can make an advance directive concerning the type of care that they would or would not like to receive in specific situations when they are no longer able to express their wishes. Although the advance directive would be merely advisory, it is possible, according to Law no. 6/2004 to designate a support curator and to write the advance directive for his/her attention and for the attention of the tutelary judge.

### **B. Conditions surrounding the writing, validity and registering of an advance directive**

The advance directive should refer to specific treatment or situations and cannot include a request for something that is illegal.

To designate a support curator by means of an advance directive, a person must have the necessary capacity to do so. The designation must be made in writing in the form of notarial document. It is in this document that the person can write an advance directive for the attention of the support curator and the tutelary judge.

### **C. What an advance directive can cover**

The advance directive can cover:

- The treatment of medical conditions;
- Care and welfare decisions;
- Research;
- Basic care;
- Life-supporting treatment;
- Life-saving treatment



## Luxembourg

### **A. The legal status of advance directives in Luxembourg**

Advance directives do not currently have legal status in Luxembourg. However, a law proposal has been presented to the Parliament to pass the “Loi relative aux soins palliatifs et à l’accompagnement en fin de vie” (Law relating to palliative care and accompaniment at the end-of-life). The following information is based on the legal provisions which will come into force, should the law proposal be successful.

### **B. Conditions surrounding the writing, validity and registering of an advance directive**

In order to make an advance directive, a person must be an adult or an “emancipated minor”, have capacity and be a resident of Luxembourg. There is no test of capacity. It is sufficient to be an adult and not subject to a guardianship measure at the time of writing the advance directive. The advance directive must be made in writing and be dated and signed by the person making it.

To register an advance directive, it must be sent by registered mail to the “Direction de la Santé” (Department of Health). The duration of validity of advance directives is not limited to a set period of time.

### **C. What an advance directive can cover**

An advance directive can cover palliative care and assistance at the end-of-life as well as the refusal of treatment, examinations in view of treatment, life-supporting treatment and life-saving treatment. It *cannot* be used to cover decisions relating to:

- The treatment of a psychiatric condition;
- Care and welfare decisions;
- Research;
- Basic care; or
- The appointment of a health care proxy.

### **D. Obligation to comply with instructions contained in an advance directive**

Doctors are obliged to comply with refusals expressed in advance directives in the case of incurable and terminal illnesses where the proposed treatment is unlikely to bring either relief or an improvement in the patient’s condition. Doctors are bound to take into account an advance directive but also the evolution of medical knowledge since the advance directive was written. If an advance directive is contrary to the beliefs or values of the doctor in charge of a patient’s treatment and he/she therefore does not want to comply with it, he/she is obliged to transfer the treatment of the patient to a colleague who is willing to do so.

### **E. Amending, renewing and cancelling advance directives**

An advance directive can be amended, renewed or cancelled at any time by sending a new version or instructions to cancel it to the Department of Health by registered mail. Usually this can only be done by a person with capacity but according to the Ministry of Health (Mousty, 2004), a doctor could decide whether to comply with a request to cancel an advance directive made by a person lacking capacity. A doctor could also decide whether to respect currently expressed wishes made a person lacking capacity in cases where they differ from those previously expressed in an advance directive.

## **the Netherlands**

### **A. The legal status of advance directives in the Netherlands**

Article 450 of the Medical Treatment Contracts Act (WGBO) of 1994 contains a paragraph which can be interpreted as referring to advance directives. It is stated therein that if a patient aged 16 or over cannot be deemed capable of reasonably assessing his/her interests with regard to care, the care provider shall comply with the apparent opinion of the patient expressed in writing while he/she was still capable of reasonable assessment.

### **B. Conditions surrounding the writing, validity and registering of an advance directive**

As stated above, to make a valid advance directive, a person must be aged 16 or over and have the necessary capacity to do so.

### **C. What an advance directive can cover**

It is not stated what an advance directive can and cannot cover.

### **D. Obligation to comply with instructions contained in an advance directive**

Care providers are not legally bound by advance directives and may deviate from them if there are good reasons for doing so. In a fact sheet produced by the Ministry of Health, Welfare and Sport (1995), it is stated that care providers are not obliged to search for such statements in emergency situations and that in any case, advance directives must be clear and have been made fairly recently.

The Termination of Life on Request and Assisted Suicide (Review Procedures) Act of 2002 contains provisions on advance directives relating to euthanasia. Such a directive may be regarded as a request for euthanasia by the patient if he/she becomes unable to express his/her will. Physicians are not required to perform euthanasia but those physicians who are willing to do so must regard an advance directive as an expression of the will of the patient (Council of Europe, 2003). However, Wortmann (2004) has suggested that an advance directive cannot be used to request active voluntary euthanasia in the case of patients with dementia as the request must have been expressed continuously and steadfastly by the patient over a long period of time.

### **E. Amending, renewing and cancelling advance directives**

Patients may retract or modify an advance directive at any time.

## **Norway**

### **A. The legal status of advance directives in Norway**

Advance directives are not legally binding in Norway. People do nevertheless write them.

In some situations, patients have a right to decide whether treatment that is life-saving, at least in the short run, should be provided or not. According to section 4-9 of the Patients' Rights Act, a patient with serious personal convictions may refuse to receive blood or blood products (e.g. a Jehovah's witness). Similarly, a person may refuse to call off an ongoing hunger strike.

### **B. Conditions surrounding the writing, validity and registering of an advance directive**

In Norway, there is an organisation called "mitt livstestamente" which offers help, advice and assistance in filling in advance directive forms. Independent witnesses are required.

### **C. What an advance directive can cover**

An advance directive can cover:

- The treatment of medical conditions;
- The treatment of a psychiatric condition;
- Care and welfare decisions;
- Research;
- Life-supporting treatment; and
- Life-saving treatment.

It cannot cover the refusal of basic care.

### **D. Obligation to comply with instructions contained in an advance directive**

Paragraph 7 of The Health Personnel Act of 1999 deals with the question of emergency health care. It states: Health personnel shall immediately provide the health care they are capable of when it must be assumed that the health care is of vital importance. Pursuant to the limitations laid down by the Patients' Rights Act § 4-9, necessary health care shall be given, even if the patient is incapable of granting his consent thereto, and even if the patient objects to the treatment.

However, § 4-9 of the Patients' Rights Act states that a dying patient is entitled to object to life-supporting treatment. If a dying patient is incapable of communicating their wishes concerning treatment, the health care personnel may withdraw health care provided that the patient's next of kin so requests and that the health care personnel, based on an

independent evaluation, find that this also corresponds with the patient's wishes. Presumably, such wishes could be recorded in an advance directive.

Health care personnel must ensure that a patient is of age, that they have been given adequate information and that they have understood the possible consequences on their own health of refusing treatment.

#### **E. Amending, renewing and cancelling advance directives**

An advance directive may be withdrawn or amended at any time by a person with capacity.

## **Spain**

### **A. The legal status of advance directives in Spain**

Advance directives have been legal in Spain since 14 November 2002. The Basic Law 41/2002 regulating the Autonomy of the Patient and Rights and Duties related to Clinical Information and Documentation is applicable throughout the whole of Spain. It permits people to state their wishes with regard to medical treatment whilst they still have the capacity to do so.

### **B. Conditions surrounding the writing, validity and registering of an advance directive**

In order to write a valid advance directive, a person must be at least 18 years of age, free from pressure and have the necessary capacity to do so.

In Spain, everyone is presumed to have capacity unless proven otherwise. Therefore, unless a person has been declared legally incompetent, they can write an advance directive. If the document is signed in the presence of a notary, the notary has to confirm that the person has the necessary capacity to sign such a document. However, it is not necessary to involve a notary.

In most of the autonomous communities advance directives are made either in the presence of a notary or privately with three witnesses. These witnesses should be named and also sign the advance directive. It is presumed that by signing the document they are also confirming that the person writing the advance directive has the capacity to do so. Two out of the three witnesses must not be family members or have any economic/business relationship with the person making the advance directive. In some autonomous communities, where very few advance directives are made, it is possible to just sign the document in front of a health care professional or the person who is in charge of the advance directives registry.

Several autonomous regions have advance directive registries so people writing advance directives must ensure that they follow the formal procedure of the region in which they reside. Legislation is pending to create a national register for advance directives.

Other conditions governing the validity of advance directives include the following:

- The instructions contained in the advance directive should not be against the law;
- The instructions contained in the advance directive should not be contrary to “lex artis” or good medical practice;
- The circumstances must correspond to those previously envisaged.

Advance directives are not limited to a set period of time.

### **C. What an advance directive can cover**

The Basic Law 41/2002 does not specify what an advance directive can or cannot cover. It can therefore be presumed that it could cover:

- The treatment of medical conditions;
- The treatment of a psychiatric condition;
- Care and welfare decisions;
- Research;
- Basic care;
- Life-supporting treatment; and
- Life-saving treatment.

It can also be presumed that advance directives could cover the appointment of a health care proxy, information about a person's beliefs, philosophy of life or ethical principles, values, situations in which the instructions should be taken into account, organ donation etc. (Rovira, 2004)

#### **D. Obligation to comply with instructions contained in an advance directive**

With regard to the refusal of life-supporting and life-saving treatment, some lawyers point out that doctors are faced with the conflicting duty of complying with the patient's request and fulfilling their own obligation to preserve life and maintain health. Nevertheless, the law states that doctors can only ignore instructions contained in an advance directive if the instructions are against the law, contrary to good medical practice or do not correspond to the situation previously envisaged. If a doctor fails to comply with instructions contained in an advance directive and cannot justify the decision on the basis of the three above-mentioned conditions, he/she must state why the patient's instructions were ignored.

#### **E. Amending, renewing and cancelling advance directives**

Advance directives can be amended, renewed or cancelled at any time provided that the person has the necessary capacity to do so. This must be done in writing. Some people involve a notary or the organisation EXIT. It is unlikely that a person lacking capacity would be allowed to withdraw an advance directive. If several advance directives have been made, the last one will be considered valid and any previous ones considered invalid.

## **Switzerland**

## **A. The legal status of advance directives in Switzerland**

There is currently no specific legislation relating to advance directives at federal level in Switzerland. However, in a few cantons (e.g. Aargau, Appenzell, Ausserrhoden, Genf, Lucerne, Wallis and Zurich), advance directives are covered by health care legislation. For example, in the Health Law of 1996 of the canton of Vallais, article 20 states:

- 1) Everyone can make an advance directive concerning the type of care that they would or would not like to receive in specific situations when they are no longer able to express their wishes.
- 2) In the same way, everyone can designate a person who will be responsible for making decisions on their behalf concerning the choice of care to be provided in these same circumstances.

If such a law exists, then advance directives must be respected. Otherwise, there tends to be a lack of legal clarity although in “doctrine” and according to jurisprudence the general opinion is that they should be respected as long as they correspond to the current situation and there is no indication that the patient’s will has changed.

Advance directives are also governed by laws related to the protection of privacy and personal liberty (article 27 of the Swiss civil code and article 10 of the constitution). However, there are different legal organisations in each canton which are responsible for the enforcement of these laws.

In the foreseeable future, there will be a reform (at federal level) of the guardianship law which will be known as the “Erwachsenenschutzrecht”.

Article 370 of this law proposal allows for a competent adult to appoint in writing one or more people who in the event of his/her incapacity can consent to medical treatment on his/her behalf (i.e. a health care proxy).

The law proposal also deals with advance directives. Article 373 states that a person can write an advance directive covering the acceptance or refusal of medical treatment.

## **B. Conditions surrounding the writing, validity and registering of an advance directive**

There is no time limit on the duration of advance directives. However, in the reform on guardianship, it is proposed that the appointment of a health care proxy should only be valid if the person who made the appointment loses capacity within 10 years. It is also planned in the reform that the appointment of a health care proxy should be publicly certified and the document deposited at an official organisation.



With regard to advance directives, it is specified in the law proposal that an advance directive must be sufficiently precise, correspond to the author's presumed wishes and be an expression of the author's free will.

It is not necessary to have witnesses or to involve officials when writing an advance directive. The document must however be in writing or print and must be signed. Several organisations (e.g. the Swiss Patients Organisation) have ready-made advance directives that people can use.

Capacity is presumed but in case of doubt, experts are called in to try to determine whether the author of the advance directive had the necessary capacity at the time the document was produced.

### **C. What an advance directive can cover**

There are no conditions regarding the content of advance directives. They cannot, however, contain wishes or instructions that are against the law e.g. for active euthanasia. Consent or refusal of life-supporting and/or life-saving treatment is possible.

### **D. Obligation to comply with instructions contained in an advance directive**

It is generally accepted that doctors should comply with instructions/wishes contained in an advance directive provided that the conditions for making a valid advance directive have been fulfilled. In case of doubt, relatives should be consulted and, if need be, an ethics committee and guardianship officials. Such provisions can be found in certain cantonal laws.

Doctors are not obliged to comply with an advance directive if there are grounds to believe that the document no longer corresponds to the patient's wishes. This is difficult to determine once a person has lost capacity. However, in the law of the canton of Aargau, in case of doubt doctors are expected to decide in favour of the suspected will and interests of the patient.

### **E. Amending, renewing and cancelling advance directives**

An advance directive can be amended, renewed or cancelled at any time.

## **the United Kingdom (England and Wales)**

### **A. The legal status of advance directives in England and Wales**

Until recently, no-one was legally authorised to consent or refuse particular medical treatment on behalf of an adult lacking capacity and there was no statute directly governing the use of advance directives in the United Kingdom. Advance directives had legal status in England and Wales under Common Law but an advance directive concerning a person's treatment for mental disorder would not be legally binding if the person who made it was subject to compulsory powers under the Mental Health Act 1983. However, an advance directive concerning a physical disorder unrelated to the mental disorder would not be affected by a person's detention under the Mental Health Act.

In April 2005, the Mental Capacity Bill received Royal Assent and became the Mental Capacity Act 2005. It provides a statutory framework in England and Wales for people who may not be able to make their own decisions due to a mental health problem, a learning disability or an illness such as dementia. Sections 24 to 26 deal with advance decisions to refuse treatment. Other decisions are presumably covered by common law provisions governing consent to treatment.

### **B. Conditions surrounding the writing, validity and registering of an advance directive**

A person must be over 18 and have sufficient capacity to make an advance directive. This means that a person may lack capacity in one domain (e.g. to make financial decisions), but still be considered capable of writing an advance directive. Capacity is presumed but in case of doubt, it can be established by a court of law. Although advance directives are usually written documents, they may also be witnessed oral statements, signed printed cards or discussion notes recorded in patients' medical files. Advance directives do not need to be witnessed by a solicitor and there is no registration procedure.

In England and Wales, people under the age of 18 can make advance directives but they are not legally binding.

With specific reference to advance directives containing decisions to refuse treatment, the Mental Capacity Act 2005 has the following conditions (§25):

- (1) An advance decision does not affect the liability which a person may incur for carrying out or continuing a treatment in relation to P (the person who made the advance directive) unless the decision is at the material time (a) valid, and (b) applicable to the treatment.
- (2) An advance decision is not valid if P -
  - (a) has withdrawn the decision at a time when he [sic] had capacity to do so,

- (b) has, under a lasting power of attorney created after the advance decision was made, conferred authority on the donee (or, if more than one, any of them) to give or refuse consent to the treatment to which the advance decision relates, or
  - (c) has done anything else clearly inconsistent with the advance decision remaining his fixed decision.
- (3) An advance decision is not applicable to the treatment in question if at the material time P has capacity to give or refuse consent to it.
- (4) An advance decision is not applicable to the treatment in question if -
- (a) that treatment is not the treatment specified in the advance decision,
  - (b) any circumstances specified in the advance decision are absent, or
  - (c) there are reasonable grounds for believing that circumstances exist which P did not anticipate at the time of the advance decision and which would have affected his decision had he anticipated them
- (5) An advance decision is not applicable to life-sustaining treatment unless -
- (a) the decision is verified by a statement by P to the effect that it is to apply to that treatment even if life is at risk, and
  - (b) the decision and statement comply with subsection (6).
- (6) A decision or statement complies with this subsection only if -
- (a) it is in writing,
  - (b) it is signed by P or by another person in P's presence and by P's direction,
  - (c) the signature is made or acknowledged by P in the presence of a witness, and
  - (d) the witness signs it, or acknowledges his signature, in P's presence.
- (7) The existence of any lasting power of attorney other than one of a description mentioned in subsection (2)(b) does not prevent the advance decision from being regarded as valid and applicable.

### **C. What an advance directive can cover**

Advance directives can include decisions relating to:

- Treatment of medical conditions;
- Treatment of psychiatric conditions;
- Care and welfare decisions;
- Life-supporting treatment;
- Life-saving treatment;
- Appointment of a health care proxy and
- Research

but not the refusal of basic care (procedures essential to keep the person comfortable, e.g. warmth, shelter, pain relief and the management of distressing symptoms), the offer of food and drink by mouth or requests for euthanasia or unreasonable treatment.

#### **D. Obligation to comply with instructions contained in an advance directive**

To be considered legally binding, an advance directive must be clear, unambiguous and reasonably proximate. Doctors have a legal and ethical obligation to act in the best interests of patients which in addition to clinical factors involves taking into account the past and present wishes of patients. Advance directives are binding only when they concern the refusal of treatment. General statements or preferences should be taken into account and respected if appropriate but they are not legally binding. Section 4 (6) of the Mental Capacity Act states that in determining what is in a person's best interests, the person making the determination "must consider, so far as is reasonably ascertainable,

- a) the person's past and present wishes and feelings (and in particular, any relevant written statement made by him [sic] when he had the capacity)
- b) the beliefs and values that would be likely to influence his decision if he had capacity, and
- c) the other factors that he would be likely to consider if he were able to do so."

In all cases, a contemporaneous decision by a competent person overrides any decision made in an advance directive. As competence is not an all-or-none affair, it should also be possible to challenge or express disagreement with a particular decision recorded in an advance directive provided that the person has sufficient capacity with regard to that decision. Doctors should comply with advance directives even if they go against their personal beliefs or values. They may arrange for a colleague to take over a patient's treatment but if this is not possible, they must comply with a valid advance directive.

Concerning advance decisions to refuse treatment, the Mental Capacity Act (section 26, §5) states "Nothing in an apparent advance decision stops a person – (a) providing life-sustaining treatment, or (b) doing any act he [sic] reasonably believes to be necessary to prevent a serious deterioration in P's condition, while a decision as respects any relevant issue is sought from the court."

#### **E. Amending, renewing and cancelling advance directives**

An advance directive can be amended or cancelled at any time provided that a person has the capacity to do so. A withdrawal, partial withdrawal or alteration of an advance decision to refuse treatment need not be in writing unless it refers to life-sustaining treatment (Mental Capacity Act, Section 24, §§4-5)

## **the United Kingdom (Scotland)**

### **A. The legal status of advance directives in Scotland**

There is no statute directly governing the use of advance directives in the United Kingdom. However, the Department of Health's Reference Guide to Consent for Examination or Treatment (2001) contains the following section on advance refusals of treatment which provides more precision:

“While professionals cannot be required by such directives to provide particular treatments (which might be inappropriate), case law is now clear that an advance refusal of treatment which is valid and applicable to subsequent circumstances in which the patient lacks capacity is legally binding. An advance directive is valid if made voluntarily by an appropriately informed person with capacity. Failure to respect such an advance refusal can result in legal action against the practitioner.”

The Adults with Incapacity (Scotland) Act 2000 is the main legislation on proxy decision making for adults with incapacity in Scotland but it makes no reference to advance directives. It covers financial decisions (except wills) and welfare decisions, which include all health care, except compulsory treatment for mental disorder under the Mental Health (Scotland) Act 1984. In the Adults with Incapacity (Scotland) Act 2000, an advance refusal does not seem to have a direct effect. Rather, a person needs to ensure that their guardian/welfare attorney is aware of their wishes and it is the refusal of the guardian/welfare attorney of the treatment in question that is binding – subject to appeals procedures etc.

### **B. Conditions surrounding the writing, validity and registering of an advance directive**

A person must be over 18 and have sufficient capacity to make an advance directive. This means that a person may lack capacity in one domain (e.g. to make financial decisions), but still be considered capable of writing an advance directive. Capacity is presumed but in case of doubt, it can be established by a court of law. Although advance directives are usually written documents, they may also be witnessed oral statements, signed printed cards or discussion notes recorded in patients' medical files. They must be witnessed by a solicitor and registered with the office of the Public Guardian.

In Scotland, to appoint a health care proxy (i.e. a welfare attorney), a person must be aged 16 or over and must obtain a certificate from a solicitor confirming that they understand what is involved and are not acting under undue influence.

### **C. What an advance directive can cover**

Advance directives can include decisions relating to:

- Treatment of medical conditions;

- Treatment of psychiatric conditions;
- Care and welfare decisions;
- Life-supporting treatment;
- Life-saving treatment;
- Appointment of a health care proxy and
- Research

but not the refusal of basic care (procedures essential to keep the person comfortable, e.g. warmth, shelter, pain relief and the management of distressing symptoms), the offer of food and drink by mouth or requests for euthanasia or unreasonable treatment.

According to the Adults with Incapacity (Scotland) Act 2000, health care proxies must be consulted about treatment decisions unless it is impracticable or unreasonable to do so.

#### **D. Obligation to comply with instructions contained in an advance directive**

To be considered legally binding, an advance directive must be clear, unambiguous and reasonably proximate. Doctors have a legal and ethical obligation to act in the best interests of patients which in addition to clinical factors involves taking into account the past and present wishes of patients. Advance directives are binding only when they concern the refusal of treatment. General statements or preferences should be taken into account and respected if appropriate but they are not legally binding.

In all cases, a contemporaneous decision by a competent person overrides any decision made in an advance directive. As competence is not an all-or-none affair, it should also be possible to challenge or express disagreement with a particular decision recorded in an advance directive provided that the person has sufficient capacity with regard to that decision.

Section 1 of the Adults with Incapacity (Scotland) Act 2000 provides five Principles, which must be followed by those who intervene in the finances or welfare of an adult with incapacity under the terms of the Act. The third Principle requires that anyone intervening must take into account the ‘past and present wishes and feelings’ of the adult as far as these are ascertainable. The final decision on what action to take rests with the person given responsibility for the intervention under the Act. This may be an attorney appointed by the adult when capable, a doctor authorised to give medical treatment, a researcher, an intervener or a guardian.

Doctors should comply with advance directives even if they go against their personal beliefs or values. They may arrange for a colleague to take over a patient’s treatment but if this is not possible, they must comply with a valid advance directive.

#### **E. Amending, renewing and cancelling advance directives**

An advance directive can be amended or cancelled at any time provided that a person has the capacity to do so.

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### Countries where provisions exist:

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