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**EUROPEAN COMMITTEE ON CRIME PROBLEMS**  
**(CDPC)**

**COMMITTEE OF EXPERTS**  
**ON THE OPERATION OF EUROPEAN CONVENTIONS**  
**ON CO-OPERATION IN CRIMINAL MATTERS**  
**PC-OC**

**Options for consolidating the Council of Europe instruments on extradition**

Secretariat memorandum prepared by  
the Directorate General of Human Rights and Legal Affairs (DG-HL)

As the PC-OC is working on the modernisation of the European Convention on Extradition, and as the first and second additional protocols to this Convention date from 1975 and 1978, the PC-OC could consider whether there is scope for the consolidation of the existing additional protocols.

In the treaty practice of the Council of Europe, three possibilities could be envisaged in this respect. These are (1) an amending protocol, (2) a revised convention, and (3) a new additional protocol.

## 1 . Amending Protocol

An amending protocol forms an integral part of a treaty, once it is ratified by all states parties to that treaty. It thus allows for a consolidated version of this treaty to enter into force, and subsequent signatures and ratifications concern the treaty as amended. The standard operative clause for such amending protocols usually follows the following wording:

“This protocol shall enter into force on the first day of the month following the expiration of a period of three months after the date on which all Parties to the [treaty] have expressed their consent to be bound by the Protocol”

Advantages: Amending protocols allow for a great deal of clarity and legal certainty, as the treaty is amended in one step, rather than a gradual and piecemeal entry into force as between the parties, which avoids the situation where different legal norms on the same subject matter exist in parallel. The treaty in question is also amended vis-à-vis states who have not yet ratified it, and who may only accede to the consolidated version once the protocol enters into force.

Disadvantages: Amending protocols do not enter into force until they are ratified by all states parties to the corresponding treaty, which means that in effect any contracting state can block this entry into force. As a result, some amending protocols of the Council of Europe have never formally entered into force, owing to incomplete ratifications, such as the Protocol amending the European Convention on the Suppression of Terrorism (ETS No. 190) of 2003 or the Protocol amending the European Social Charter (ETS No. 142) of 1991. This problem would be even more acute for the European Convention on Extradition with its 49 existing States Parties.

As regards this problem, the Protocol amending the European Convention on Transfrontier Television (ETS No. 132) introduced a “tacit consent” clause<sup>1</sup>, which might have facilitated its entry into force. However, the possibility would still exist for any party to block the entry into force or considerably delay it, by raising an objection.

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<sup>1</sup> Article 35 of the Protocol provides:

- “2 However, this Protocol shall enter into force following the expiry of a period of two years after the date on which it has been opened to acceptance, unless a Party to the Convention has notified the Secretary General of the Council of Europe of an objection to its entry into force. The right to make an objection shall be reserved to those States or the European Community which expressed their consent to be bound by the Convention prior to the expiry of a period of three months after the opening for acceptance of this Protocol.
- 3 Should such an objection be notified, the Protocol shall enter into force on the first day of the month following the date on which the Party to the Convention which has notified the objection has deposited its instrument of acceptance with the Secretary General of the Council of Europe.
- 4 A Party to the Convention may, at any time, declare that it will apply the Protocol on a provisional basis.”

## 2. Revised Convention

This technique involves the comprehensive redrafting of the relevant treaty and the opening for signature of a new treaty which supersedes the original treaty with respect to states that ratify the revised treaty. A notable example is the Revised European Social Charter (ETS No. 163)<sup>2</sup>. More recently, the Committee of Ministers opened for signature the Revised European Convention on the Adoption of Children (CETS No. 202)<sup>3</sup> in 2008.

Advantages: A revised treaty allows for the smooth consolidation of the treaty and its existing protocols in a single text, while at the same time amending their provisions. A revised treaty does not have to be ratified by all existing states parties to the original treaty before entering into force, but can eventually replace the treaty it revises.

Disadvantages: Contrary to an amending protocol, a revised treaty allows for two sets of obligations to be applicable simultaneously, at least until all parties to the original treaty ratify the revised treaty. This period is likely to be relatively long for the European Convention on Extradition given the 49 States Parties it already has, during which the co-existence of two conventions could be confusing for practitioners.

Compared to the existing revised treaties, this aspect would be more problematic for the Convention on Extradition, as the latter essentially regulates the relations between its States Parties. This would mean that states ratifying the revised convention would have to continue applying two parallel conventions, depending on the treaties ratified by their counterparts.

## 3. Additional protocol

An additional protocol allows for amendments of a treaty, as between the Parties to that protocol. Additional protocols are generally used for the partial updating of the treaties they relate to, and may contain amendments to the existing provisions of that treaty, new provisions altogether or both (for example, as in the case of the Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters, ETS No. 182).

It could be envisaged that the existing two additional protocols to the European Convention on Extradition be consolidated with a future Fourth Additional Protocol, which could include the relevant provisions of the two first additional protocols and a final clause along the following lines: "This Protocol shall supersede, as between its Parties, the Additional Protocol and the Second Additional Protocol to the Convention".

Advantages: Additional protocols are practical, flexible and familiar. The reviews of the Council of Europe instruments on legal co-operation in criminal matters have been mainly through additional protocols (with the exception of the Protocol amending the European Convention on the

<sup>2</sup> Article B of the Revised Charter on the links with the original Charter and the 1988 Additional Protocol provides that "Acceptance of the obligations of any provision of this Charter shall, from the date of entry into force of those obligations for the Party concerned, result in the corresponding provision of the European Social Charter and, where appropriate, of its Additional Protocol of 1988 ceasing to apply to the Party concerned in the event of that Party being bound by the first of those instruments or by both instruments".

<sup>3</sup> Article 23 of the revised European Convention on the Adoption of Children provides that  
 "1 This Convention shall replace, as regards its States Parties, the European Convention on the Adoption of Children, which was open for signature on 24 April 1967.  
 2 In relations between a Party to the present Convention and a Party to the 1967 Convention which has not ratified the present Convention, Article 14 of the 1967 Convention shall continue to apply."

Suppression of Terrorism, ETS No. 190, which has never entered into force). They allow for a relatively speedy entry into force of the amended treaty obligations between their states parties.

Disadvantages: While allowing for the consolidation of existing protocols, an additional protocol does not, strictly speaking, incorporate them in the treaty itself and the revised or new provisions remain always dissociable from the treaty.

As regards extradition, although a new additional protocol replacing the existing protocols would significantly improve the current situation, where applicable rules change according to the protocols ratified by a Party and by its counterpart, as well as their reservations, it would still allow for a two-track system depending on the ratification of the consolidated protocol (a disadvantage this option shares with a possible revised convention).

As regards third countries acceding to the Convention, it would be possible for them to do so without acceding to the new protocol.

Finally, it might not be feasible to change certain clauses of the Convention with such a protocol, such as the provision relating to accession which requires the unanimous agreement of States Parties to the Convention, or the regime for reservations to the Convention.

### **Other techniques**

the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (CETS No. 198), which was opened for signature in 2005, is an example of another technique: this convention does not formally supersede the convention which it relates to, namely the 1990 Convention on laundering, search, seizure and confiscation of the proceeds from crime (ETS No. 141).

As regards the 2005 Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism, having set out to draw up a protocol to the 1990 Convention, the drafters felt that the new text should be a self-standing Convention, owing to the extent of the modifications and the enlargement of the scope. For States having ratified the two conventions, both treaties remain in force indefinitely. As regards the mutual relationships between States Parties, the Convention provides in its Article 49, paragraph 6, that:

- “As from its entry into force, Parties to this Convention, which are at the same time Parties to the 1990 Convention:
- a shall apply the provisions of this Convention in their mutual relationships;
  - b shall continue to apply the provisions of the 1990 Convention in their relations with other Parties to the said Convention, but not to the present Convention. “

It is doubtful that this technique could be applied to the review of the European Convention on Extradition without increasing the legal complexity compared to the existing situation.