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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**

**Reflection paper on the feasibility of proposing simplified procedures for the amendment of the European Treaties on co-operation in criminal matters**

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

## Vienna Convention on the law of treaties

Council of Europe practice in respect of treaty law is broadly based on the rules of international law codified by the Vienna Convention of 23 May 1969 on the Law of Treaties. Article 39 of that Convention sets out a general rule on the amendment of treaties in the following terms: "A treaty may be amended by agreement between the parties". Accordingly, the will of the parties is paramount in this field.

### Amending protocols:

In Council of Europe practice, conventions have generally been amended by means of amending protocols, requiring the ratification of all states parties in order to enter into force.

As an alternative to ratification, a few recent Council of Europe Treaties introduced an acceptance procedure instead. The Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (ETS N° 141) and the Convention on cybercrime (ETS 185) contain an example of such procedure:

Convention on cybercrime

#### Article 44 – Amendments

- 1 *Amendments to this Convention may be proposed by any Party, and shall be communicated by the Secretary General of the Council of Europe to the member States of the Council of Europe, to the non-member States which have participated in the elaboration of this Convention as well as to any State which has acceded to, or has been invited to accede to, this Convention in accordance with the provisions of Article 37.*
- 2 *Any amendment proposed by a Party shall be communicated to the European Committee on Crime Problems (CDPC), which shall submit to the Committee of Ministers its opinion on that proposed amendment.*
- 3 *The Committee of Ministers shall consider the proposed amendment and the opinion submitted by the CDPC and, following consultation with the non-member States Parties to this Convention, may adopt the amendment.*
- 4 *The text of any amendment adopted by the Committee of Ministers in accordance with paragraph 3 of this article shall be forwarded to the Parties for acceptance.*
- 5 *Any amendment adopted in accordance with paragraph 3 of this article shall come into force on the thirtieth day after all Parties have informed the Secretary General of their acceptance thereof.*

It follows from the explanatory report to both these Conventions that this amendment procedure is mostly thought to be for relatively minor changes of a procedural and technical character. Experts considered that major changes to these Conventions could be made in the form of additional/amending protocols.

With a view to shortening the time lapse before the entry into force of an amending protocol, a small number of amending protocols to Council of Europe Treaties <sup>1</sup> contained a tacit acceptance clause (in addition to providing for an entry into force following the deposit of instruments of acceptance by all the State Parties).

An example of such tacit acceptance clause appears in the protocol amending the European Convention on Transfrontier Television (ETS 171):

**Article 34**

*This Protocol shall be open for acceptance by the Parties to the Convention. No reservation may be made.*

**Article 35**

- 1 *This Protocol shall enter into force on the first day of the month following the date on which the last of the Parties to the Convention has deposited its instrument of acceptance with the Secretary General of the Council of Europe.*
- 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.*

It is to be noted that all these procedures require adhesion (ratification, acceptance or non-objection) to the amendment by all the Parties to the Convention concerned. This may be problematic when the convention to be amended has been ratified by a large number of states. Ratification or acceptance by all the states may well delay or obstruct the entry into force of an amending protocol.

**Additional protocols:**

One way of overcoming this constraint has been to draw up “additional” protocols which contain clauses amending a convention and which can enter into force on the basis of a limited number of ratifications. This approach has been used in particular for co-operation conventions functioning primarily on a bilateral basis. The most recent example was the Protocol amending the

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<sup>1</sup> The European Agreement on the Exchange of Therapeutic Substances of Human Origin (ETS 26, 1958); the Agreement on the Temporary Importation, Free of Duty, of Medical, Surgical and Laboratory Equipment for Use on Free Loan in Hospitals and Other Medical Institutions for Purposes of Diagnosis or Treatment (ETS 33, 1960); and the European Agreement on the Exchanges of Blood-Grouping Reagents (ETS 39, 1962) and the European Convention on Transfrontier Television (ETS 132) amended by respectively ETS 109, 110, 111 and 171

Convention on Mutual Administrative Assistance in Tax Matters, of 27 May 2010 (CETS No. 208), which entered into force following 5 ratifications. Similar protocols have also been adopted in the field of legal co-operation in criminal matters. Such is the case for the first two additional protocols to the European Convention on Extradition (ETS Nos. 86 and 98) and the Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters (ETS No. 182). The principle common to these protocols is that the amended provisions of the original convention apply only in the mutual relations between the states which are parties to those protocols.

The disadvantage of adopting this approach of amendments by means of additional protocols, is that it sets up several treaty regimes which vary in line with the commitments entered into by each state (depending on whether or not they have ratified the protocols, made reservations, etc.).