



COUNCIL OF EUROPE CONSEIL DE L'EUROPE

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EUROPEAN COMMITTEE ON CRIME PROBLEMS
(CDPC)

**DRAFT OPINION ON CRITERIA AND PROCEDURE FOR ACCESSION BY
NON-MEMBER-STATES TO COUNCIL OF EUROPE CRIMINAL LAW CONVENTIONS**

Introduction

1. At its 1095th meeting (13 October 2010), the Committee of Ministers:

“invited the CDPC to provide an opinion to the Committee of Ministers on the criteria and procedure to be followed as regards the accession of non-member states to Council of Europe conventions in the criminal law field, in order to contribute to the extension of these conventions beyond Europe.”

2. The European Committee on Crime Problems (CDPC) welcomes the request by the Committee of Ministers for an opinion on such an important issue, noting in particular that the fight against serious and organised crime is increasingly becoming a global challenge involving not only states of the same region as partners. Thus, the Committee is of the opinion that the question of how to facilitate accession to certain Council of Europe conventions in the criminal law field by non-member states in order to promote adherence to these international legal instruments beyond Europe itself merits further consideration.

3. The Committee underlines that the below recommendations are not intended to cover the general matter of the accession to Council of Europe criminal law conventions by the European Union.

4. When examining the issue of the extension of criminal law conventions of the Council of Europe to States beyond Europe, it is the view of the Committee that focus should be on identifying the criminal law conventions that could meaningfully be opened for participation by non-member states rather than on identifying certain non-member states which should be invited to accede to all relevant conventions.

Criteria for differentiating between criminal law conventions

5. In this regard, the Committee is of the opinion that effective use and application of certain Council of Europe criminal law conventions which provide a legal basis for cross-border cooperation (such as e. g. the Convention on Extradition (CETS No. 24) have as a prerequisite a high degree of mutual trust based on fact that all parties to such a convention are also Parties to the European Convention on Human Rights (CETS No. 5) and share Council of Europe core values (in particular its human rights standards) and are willing to subject themselves to regular monitoring by the designated Council of Europe bodies, including the European Committee for the Prevention of Torture (CPT), and the legal control by the European Court of Human Rights. This category of instruments will be referred to below as “conventions of the 1st category”.

6. In the case of the conventions of the 1st category, the Committee, for both technical and political reasons, recommends that the Committee of Ministers should only invite non-member states to accede where the mutual trust, on which effective cooperation under these conventions depends, is preserved. The necessary mutual trust may indeed suffer, if non-member states adhering to lower human rights standards were to accede. As regards the procedure for accession of non-member states to conventions

of the 1st category, the Committee is of the opinion that the existing procedure should remain unchanged.

7. On the other hand, the Committee considers that there could be advisable to foresee a “lighter” procedure for accession by non-member-states to conventions which focus on certain matters of substantive criminal law and which set minimum standards on criminalisation of certain conduct, primarily in the area of organised crime. Such conventions mostly have limited provisions on cross-border cooperation, merely referring to applicable other instruments or arrangements on cross-border cooperation (such as e. g. the Lanzarote Convention (CETS No. 201) and the Medicrime Convention) or they do contain some specific provisions on cross-border cooperation, but also provide for conditions and safeguards (such as in Art.15 of the Convention on Cybercrime (CETS No. 185). The Committee believes that larger adherence to those conventions beyond Europe may indeed substantially increase their effectiveness as their main objective is to more efficiently fight transnational (organised) criminal groups. This category of instruments will be referred to below as “conventions of the 2nd category”. A list of conventions of the 1st and 2nd categories is appended to this opinion.

Technical criteria

8. One of the main obstacles to the promotion of Council of Europe legal instruments beyond Europe is a perceived lack of transparency as to the basis on which the Committee of Ministers and the Parties decide on a request for accession to such instruments.

9. In order to facilitate accession by non-member states to certain already existing Council of Europe criminal law instruments (conventions of the 2nd category), the Committee recommends to provide for a more transparent review process by developing a set of technical minimum criteria, which any non-member state requesting accession to such conventions and instruments must fulfill.

10. Based on practical experience, the Committee recommends that the following technical criteria for reviewing a request for accession to an already existing Council of Europe criminal law instrument are applied:

a) The requesting non-member state has the necessary legal framework in place to apply the minimum standards of the instrument in question or has expressed its firm commitment to have in place such a legal framework no later than at the time of ratification/accession. Indicators may include, for example: the enactment of legal provisions and/or administrative guidelines implementing the instrument in question in the domestic law.

b) The requesting non-member state has expressed its firm commitment to put in place the mechanisms (e. g. efficient administrative infrastructures, training of staff) necessary to enforce the instrument in question and co-operate with other Parties to the widest extent possible. Indicators may include, for example:

- the existence of efficient administrative infrastructures;
- the availability of trained staff; or

- the requesting non-member state has indicated its willingness to work with other Parties on a bilateral basis and/or the Council of Europe on training of its staff.
- c) The requesting non-member state is committed to participate actively in the Committee of the Parties of the instrument in question, and thus to realise the aims of that instrument. Indicators may include, for example:
- the requesting non-member state has already an established record of co-operation relevant for the subject matter of the instrument in question under bilateral or international treaties and agreements; or
 - the requesting non-member state has received or will be able to receive technical assistance from the Council of Europe, and/or from other Parties on a bilateral basis, with satisfying results.

Procedure

11. The Committee notes that the conventions of the Council of Europe usually contain specific provisions governing the procedure for accession by non-member states after the entry into force of the instrument in question. The recently adopted Medicrime Convention, as a first, even allows for non-member states, upon invitation by the Committee of Ministers, to sign and ratify that Convention from the outset.

12. Under the current procedure, the Committee of Ministers is not systematically provided with technical reviews of the capabilities of non-member states requesting accession to Council of Europe criminal law instruments. The Committee proposes a new procedure according to which the Committee of Ministers will have to take into account the outcome of a technical review by the competent steering committee and the relevant committees of the Parties when deciding on a request for accession by a non-member state.

13. In order to make the best possible use of the expertise available to the Council of Europe, the review of whether the aforementioned technical criteria are fulfilled by a non-member state could be carried out under the auspices of the Committee of the Parties of the criminal law instrument in question and, through the CDPC, be submitted to the Committee of Ministers and the Parties for the final decision on accession in accordance with the procedures prescribed by that instrument.

14. In terms of facilitating the existing procedure for processing requests for accession by non-member states to existing instruments of the 2nd category, the Committee recommends the following:

15. When approached by a non-member state with a request to be invited to accede to a convention of the 2nd category, the Secretary General shall simultaneously inform the Committee of Ministers, the CDPC and the Committee of the Parties of the instrument in question about the request.

16. The Committee of Ministers shall task the Committee of the Parties of the instrument in question, in close cooperation with the CDPC, to provide it with a review according to the criteria set out above.

17. The Committee of the Parties of the instrument in question shall, through the CDPC, provide the Committee of Ministers with the results of its review as soon as possible, and not later than three months after the receipt of the request from a non-member state to be invited to accede, or provide an explanation why the deadline could not be met.

18. Where the Committee of the Parties, and the CDPC respectively, unanimously agree on the review of the request for accession of a non-member state, they will recommend the Committee of Ministers to invite this non-member state to accede to the instrument in question.

19. Where an agreement could not be reached in the Committee of the Parties of the instrument in question and/or the CDPC on the review of the request for accession of a non-member state, the opinion shall set out the views of the majority, as well as the dissenting views.

20. The review by the Committee of the Parties of the instrument in question and the CDPC should always be presented in a general form without any reference to the position taken by individual Parties or member states' delegations to the CDPC.

21. The request by the non-member state will be examined, in the light of the review by the Committee of the Parties of the instrument in question and the CDPC, by the Committee of Ministers or, where appropriate, by one of its rapporteur groups. Once there is agreement in within the Committee of Ministers to give a positive reply to a request, the decision to invite the non-member state in question shall become definitive. An invitation to accede to the instrument in question will be sent to the state concerned by the Secretariat General.

22. As stated above, the main purpose of introducing a mandatory hearing of the CDPC and relevant committees of the Parties as regards the technical capabilities of the requesting non-member state is to provide more certainty and clarity to the accession procedure for non-member states, in comparison to the existing procedure.

Future Council of Europe criminal law instruments

23. The Committee takes note of the ongoing discussions within the Committee of Ministers to examine ways to extend certain Council of Europe criminal law conventions beyond Europe, in particular by opening them for participation by non-member states.

24. As regards future Council of Europe criminal law instruments of the 2nd category which the Committee of Ministers may wish to promote beyond Europe, the Committee considers that a new set of standard provisions aiming at significantly facilitating the accession by non-member states should be examined and prepared in order to be included in those future instruments.

25. Moreover, the feasibility of introducing provisions on the mandatory financial contribution of non-member states to the activities related to the instruments to which they are Parties, including how they could be involved more directly in the relevant decision-making process, should also be examined and proposals be prepared. In the view of the Committee such provisions may lead to a heightened interest by non-member states in acceding to Council of Europe instruments in the field of criminal law.

26. Finally, the Committee recommends that when in the future the Committee of Ministers may decide to adopt terms of reference for committees tasked with drafting new criminal law instruments of the 2nd category, which should be promoted beyond Europe, the Council of Europe should take all necessary measures to inform non-member states about the upcoming negotiations, including by liaising with the United Nations at global level and other relevant inter-governmental organisations at regional level.

27. The Committee remains available to work on new proposals with regard to the aforesaid new set of standard provisions for future Council of Europe criminal law instruments of the 2nd category.

ANNEX

Council of Europe criminal law instruments of the 1st category:

- CETS No 24: European Convention on Extradition*
- CETS No 30: European Convention on Mutual Assistance in Criminal Matters*
- CETS No 51: European Convention on the Supervision of Conditionally Sentenced or Conditionally Released Offenders
- CETS No 70: European Convention on the International Validity of Criminal Judgments
- CETS No 73: European Convention on the Transfer of Proceedings in Criminal Matters
- CETS No 86: Additional Protocol to the European Convention on Extradition*
- CETS No 98: Second Additional Protocol to the European Convention on Extradition*
- CETS No 99: Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters
- CETS No 112: Convention on the Transfer of Sentenced Persons
- CETS No 141: Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime
- CETS No 167: Additional Protocol to the Convention on the Transfer of Sentenced Persons
- CETS No 182: Second Additional protocol to the European Convention on Mutual Assistance in Criminal Matters*
- CETS No 209: Third Additional Protocol to the European Convention on Extradition*

*(Treaties marked with an * also have non-member states as Parties (Israel, Korea, South Africa))*

Council of Europe criminal law instruments of the 2nd category:

- CETS No 52: European Convention on the Punishment of Road Traffic Offences
- CETS No 116: European Convention on the Compensation of Victims of Violent Crimes
- CETS No 119: European Convention on Offences relating to Cultural Property
- CETS No 130: Convention on Insider Trading
- CETS No 133: Protocol to the Convention on Insider Trading

- CETS No 172: Convention on the protection of Environment through Criminal Law
- CETS No 173: Criminal Law Convention on Corruption
- CETS No 185: Convention on Cybercrime
- CETS No 189: Additional Protocol to the Convention on Cybercrime concerning the Criminalisation of Acts of a Racist and Xenophobic Nature committed through Computer Systems
- CETS No 191: Additional Protocol to the Criminal Law Convention on Corruption
- CETS No 197: Council of Europe Convention on Action against Trafficking in Human Beings
- CETS No 201: Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse
- CETS No 210: Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence
- (CETS No 21X: Council of Europe Convention on Counterfeiting of Medical Products and Similar Crimes involving Threats to Public Health)