



Explanatory Report to the Additional Protocol to the European Outline Convention on Transfrontier Co-operation between Territorial Communities or Authorities

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Introduction

1. The Outline Convention on Transfrontier Co-operation between territorial communities or authorities was opened for signature in Madrid on 21 May 1980 and came into force on 22 December 1981. It is currently binding on 19 States. *(NB. 38 States as of 31.XII.2014.)*

2. It has achieved significant results but a study which the Secretariat of the Council of Europe conducted in 1990-91 showed that there were serious obstacles, particularly of a legal nature, to its proper implementation.

3. The findings of the study agreed with those of the Standing Conference of Local and Regional Authorities of Europe (CLRAE), whose Resolution 227 of March 1991 observed:

"17. ... the European Outline Convention on Transfrontier Co-operation between Territorial Communities or Authorities provides a suitable framework for relations between border communities in neighbouring States, but ... the major obstacle to the effective application of the convention is that the acts accomplished in this way by local and regional authorities have no legal value within their respective States".

4. On a proposal from the Select Committee of Experts on Transfrontier Co-operation, the Committee of Ministers accordingly decided to draw up an additional Protocol to the Outline Convention so as to strengthen transfrontier co-operation by removing some legal obstacles to transfrontier projects.

General comments

5. Studies by the Secretariat and discussions with the CLRAE have revealed two main obstacles:

a) the Outline Convention does not contain any specific undertaking by States, which are merely invited to "facilitate", "promote" or "encourage" initiatives by territorial communities or authorities. There is no real recognition of the right of such communities or authorities to conclude transfrontier co-operation agreements;

b) the Outline Convention does not bring sufficient legal details to Contracting Parties' national law to resolve the problems arising from transfrontier co-operation, such as:

i) the putting into effect of transfrontier co-operation between territorial communities or authorities within a public law framework;

ii) the legal force in the national law of each State of the measures taken in the context of transfrontier co-operation by territorial communities or authorities;

iii) the legal personality and public or private law status granted to any transfrontier co-operation bodies which may be set up by territorial communities or authorities.

6. The Outline Convention's drafters regarded the possibility of making implementation of the Outline Convention conditional on the conclusion of bilateral agreements as a way of dealing with the implications in national law of an agreement between territorial communities or authorities.

7. Certain States have therefore concluded bilateral agreements where the need was felt, or have defined, each within its national law, legal instruments appropriate to transfrontier co-operation, in order to compensate for this lack of detail.

8. The numerous bilateral agreements reached since the Outline Convention came into force and the progress in legislation of certain signatory States are signs of the dynamics of transfrontier co-operation among territorial communities or authorities and of the relevance of the Outline Convention. It is nevertheless useful to add to the Convention a protocol describing legal instruments proven by experience, unifying the fundamental principles of transfrontier co-operation among territorial communities or authorities and suggesting appropriate solutions to the Contracting Parties.

9. The present Protocol is therefore designed to solve legal problems arising in national law from the Outline Convention.

Comments on the articles

Article 1

10. This article lays down the right of territorial communities or authorities to conclude agreements among themselves within the framework of transfrontier co-operation. This right, acknowledged and respected by States, is exercised pursuant to the conditions and restrictions laid down by both the Outline Convention and this Protocol.

11. For example, this article requires that transfrontier co-operation agreements of territorial communities or authorities:

a) be confined to matters which lie within the field of responsibility of the territorial communities or authorities bound by them;

b) comply with the procedure laid down in the statutes of the territorial communities or authorities concerned;

c) be compatible with international commitments entered into by the States of which the territorial communities or authorities form part;

d) take account, where necessary, of each State's national law relating to the status of the transfrontier co-operation bodies (Article 3).

12. The words "equivalent fields of responsibility" lay down an important requirement for the conclusion of an agreement, whereby all the territorial communities or authorities concerned must have responsibility for the matter with which the agreement deals. If their responsibility for the matter is not sole but delegated or shared, the respective territorial communities or authorities will have to comply with all the requirements of national law which apply in such a case.

13. The words "in conformity with national law" mean that territorial communities or authorities must comply with the procedures and other rules laid down by the national law of the State to which they belong when concluding and implementing their agreements. In conjunction with the words "equivalent fields of competence", the meaning is that territorial communities or authorities, when concluding a transfrontier co-operation agreement, may neither acquire responsibilities which national law does not allow them to have nor create a new category of local authorities.

14. This article does not deal with the relations between existing transfrontier co-operation agreements and subsequent international commitments of the Contracting Parties.

15. Paragraph 2 clearly states that no responsibility of the State or of any other community or authority which has not signed the agreement may derive from the conclusion or implementation of a transfrontier co-operation agreement between territorial communities or authorities.

Article 2

16. This article lays down the conditions in which territorial communities or authorities implement the measures agreed by them under any transfrontier co-operation agreement. These provisions apply in the event that these communities or authorities do not set up a transfrontier co-operation body as provided for in Articles 3 to 5, but also in the cases when the transfrontier co-operation body intends to take measures which apply generally and is not empowered to do so in conformity with Articles 4 (2b) and 5 (2).

17. The principle adopted is that a decision by an advisory body does not in itself have any legal force or legal effects and has to be the subject of a decision by each of the territorial communities or authorities party to the agreement so that it is, "transposed" into the national legal system to which the territorial communities or authorities belong, complying with the rules and procedures linking them. The same principle also applies to the measures taken by transfrontier co-operation bodies in accordance with Articles 4(2b) and 5(2). This 'transposition' may be carried out, depending on the law of each signatory State, in different ways, such as a vote on a decision of the municipal council or a vote on a resolution reiterating the content of the joint decision of the territorial communities or authorities in the transfrontier context, ... etc.

18. At all events, although for the purposes of national law it is the "conversion" decision that matters, from the substantive viewpoint, the "conversion" decision is closely linked to the decision jointly taken under the transfrontier co-operation agreement, which is thus the benchmark decision.

19. Once a decision has been implemented in the national legal systems in the required manner, it has the same legal force and effect as a measure taken in the national context by each of the territorial communities or authorities party to the agreement. The legal force of a decision may therefore have a different legal force in the different national legal systems of the territorial communities or authorities party to the agreement.

20. It should also be noticed that Article 2 is drafted in such a way as to imply a legal obligation for the territorial communities or authorities party to the agreement to take the necessary measures to incorporate in the national legal system the decisions taken in the framework of the transfrontier co-operation agreement.

Article 3

21. This article allows the transfrontier co-operation agreement to set up a co-operation body to be responsible for decisions taken within the framework of transfrontier co-operation.

22. The words "regard being had to the ... provisions of national law" mean that it is for States to specify in their national legal systems the legal (public or private law) status of the body concerned, making, if necessary, the appropriate legal provisions. The ensuing situations may differ, depending on the States' legal organisation. In some States, national law will encompass legal categories of entities empowered to engage in transfrontier co-operation and to include foreign territorial communities or authorities, while in other States, national law will merely specify whether the establishment is public or private.

Article 4

23. This article lays down the powers of the transfrontier co-operation body endowed with legal personality, which may be either a public law or a private law body. Articles 4 and 5 present two different concepts of the functioning of the co-operation body endowed with legal personality. The operative provisions of Article 4 follow a "double" legal logic, since the transfrontier co-operation body is governed solely by the national law of the State where it has its headquarters. On the other hand, the operative provisions of Article 5 follow a logic of legal pluralism, laying down that the body's measures have the same legal validity, wherever they are applied.

24. The article provides that the legal personality of the transfrontier co-operation body is defined solely by the law of the State where this body's headquarters is located. That law may provide, depending on the State concerned, a public law or a private law status for transfrontier co-operation bodies. Territorial communities or authorities, depending on the State where the body has its headquarters, will opt for a legal personality in the light of, on the one hand, the possibilities available under the law of the State where the body has its headquarters, and, on the other hand, the tasks they intend to give to this body.

25. The legal force of the measures taken by the transfrontier co-operation body is also determined by that body's public or private law status. Since such a body can have a public or private law character (see preceding paragraph), the legal value of its acts may be different from State to State, depending on the legal provisions governing, in each State, the acts of the territorial communities or authorities party to the co-operation agreements.

26. Article 4, paragraph 2, deals with the functions of the transfrontier co-operation body. In addition to the requirements covered in paragraphs 11 to 13 above, Article 4 requires that such functions be "assigned" and therefore specific. There is thus no question of the body's having general responsibilities. *A contrario*, a transfrontier co-operation body having only consultation purposes and without legal personality, might have general responsibilities and its functioning will be governed by Article 2.

27. However, Article 4 (paragraph 2, b and c) places an important restriction on the transfrontier co-operation body's ability to take action in that it prohibits it from taking acts which are inherent in the sovereignty and which belong exclusively to the territorial communities or authorities. Such a body therefore cannot:

- a) engage in general law-making (for example, issue regulations or decrees) applying to all the citizens;

b) take decisions capable of affecting the rights and freedoms of individuals or of the territorial communities or authorities party to the agreement (compulsory-purchase decisions, or decisions to levy user fees, for instance);

c) impose taxes or charges.

If such measures were necessary for implementing a transfrontier co-operation agreement they would have to be taken by each of the territorial communities or authorities within the respective national legal systems.

Article 5

28. Article 5 allows the Contracting Parties to set up public law transfrontier co-operation bodies taking action under public law in the territory of all territorial communities or authorities party to the agreement. There is provision, for instance, for such an arrangement in the Benelux Convention of 12 September 1986 on transfrontier co-operation between territorial communities or authorities, which in actual fact created a new type of transfrontier authority.

29. The second paragraph of Article 5 is concerned with the case where an act taken by a transfrontier co-operation body is likely to affect individual rights and freedoms. In such a case, a State may provide that the implementation of the act in question must be exclusively carried out by the territorial community or authority. A State may also provide that a transfrontier co-operation body of the type indicated in Article 5 cannot have general responsibilities or take measures which apply generally.

30. Articles 4 and 5 provide for two different types of transfrontier co-operation bodies which can co-exist in a country or be alternative. For this purpose, Article 8 provides for Contracting Parties to declare, when signing the Protocol or when depositing its instrument of ratification, acceptance or approval, that they accept the two types or only that provided for in Article 4 or in Article 5.

Article 6

31. This article deals with the various possible forms of supervision of measures taken under a transfrontier co-operation agreement. Three cases are covered.

32. Paragraph 1 concerns measures taken by participating territorial communities or authorities on the basis of the agreements for which Article 2 provides. These are subject to the usual supervision provided for by the national law of the State to which the territorial community or authority belongs.

33. Paragraph 2 concerns transfrontier co-operation bodies. These are supervised as provided for by the State in which they have their headquarters. However, as these bodies are of interest to the territorial communities or authorities of countries other than the one where their headquarters are located, the responsible supervisory authorities must not forget when effecting supervision to take into consideration the interests of the territorial communities or authorities of the other States. To this end, Article 6 recommends that the supervisory authorities among themselves find means of coordination and information concerning the functioning of the transfrontier co-operation bodies.

34. Paragraph 3 concerns the transfrontier co-operation bodies recognised as public law entities by all the States to which the territorial communities or authorities belong which have concluded the agreement. In this case, the supervision provided for by each of the Parties applies to this body.

Article 7

35. This article deals with disputes and access to courts.

36. The general wording of Article 7 provides comprehensive arrangements for access to the courts in the event of disputes. The main aim is to guarantee third parties' rights, so that this provision does not alter the access available before the entry into force of this Protocol.

Article 8

37. This article obliges Contracting Parties to declare whether they take into account both types of transfrontier co-operation bodies provided for in Articles 4 and 5, or only one of them. Articles 4 and 5 make it possible to set up transfrontier co-operation bodies according to two different kinds of logic, and the Protocol does not oblige States to adopt both formulae. Article 8, in contrast, provides that each Contracting Party shall be free to indicate which formula it adopts. This declaration could of course subsequently be amended.

Articles 9-14

38. The final provisions in Articles 9-14 are in conformity with the model final clauses for treaties drawn up in the Council of Europe.