



Explanatory Report to Protocol No. 2 to the European Outline Convention on Transfrontier Co- operation between Territorial Communities or Authorities concerning interterritorial co-operation

Strasbourg, 5.V.1998

Introduction

1. In 1993, the Standing Conference of Local and Regional Authorities of Europe adopted Resolution 248 on interterritorial co-operation recommending that the Committee of Ministers prepare a draft Convention based on the text which it had formulated and appended to the said resolution. In the Vienna Declaration of 9 October 1993 the heads of State and Government urged the Organisation to continue its work in the field of transfrontier co-operation and to expand co-operation between non-adjacent regions.

2. The Committee of Ministers responded to the CLRAE's resolution and the recommendation of the heads of state and government by instructing the Steering Committee on Local and Regional Authorities (CDLR) to "study, in the light of the draft Convention on Interterritorial Co-operation worked out by the CLRAE, the question of a legal basis for co-operation between non-adjacent local and regional authorities and, if appropriate, to prepare a draft Convention which would follow the example of the European Outline Convention on Transfrontier Co-operation between Territorial Communities or Authorities (ETS No. 106)".

The CDLR in turn assigned this task to its Select Committee of Experts on Transfrontier Co-operation (LR-R-CT).

3. The Select Committee considered the possibility of preparing a specific convention on interterritorial co-operation, but rejected the idea because this subject could be effectively dealt with by reference to the European Outline Convention on Transfrontier Co-operation between Territorial Communities or Authorities (hereinafter referred to as "the Outline Convention") and its Additional Protocol (hereinafter referred to as "the Additional Protocol") considering that the legal nature of the problems involved is similar. The Select Committee decided to concentrate exclusively on co-operation between territorial communities, excluding aspects related to their external relations (eg participation in decision-making on international texts of relevance to them and representation in international organisations). This latter aspect has no real bearing on interterritorial co-operation.

4. Having considered the question whether to draw up a recommendation or a Protocol to the Outline Convention, the Select Committee came down in favour of the latter instrument for the following reasons:

- a. The Statute of the Council of Europe stipulates that the adoption of a recommendation requires the unanimous vote of the representatives casting a vote and of a majority of the representatives entitled to sit on the Committee of Ministers. Furthermore, Article 15 (b) of the Statute empowers the Committee of Ministers to request member States to inform it of the action taken by them with regard to recommendations.

The fact is that transfrontier co-operation and interterritorial co-operation raise similar problems, and since many member States have not yet signed or ratified the Outline Convention, a recommendation on this matter would be unlikely to achieve unanimity;

b. The additional protocol is a flexible instrument, since after it is opened for signature it is binding only on those States which subsequently ratify it. There is no legal obligation on signature and ratification, whereas recommendations apply to all member States. An additional protocol is therefore both flexible and dynamic because it engages those States that ratify right away, thus enabling them to acquire experience which would be useful to other States subsequently joining them.

5. Accordingly, drawing on the work of the Select Committee and the proposals submitted by the CDLR, the Committee of Ministers has decided to adopt Protocol No. 2 to the Outline Convention and open it for signature.

General considerations

6. The Outline Convention and its Additional Protocol are concerned with relations between adjacent communities, i.e. communities which are geographically connected either directly (via a common border) or indirectly (via membership of a group of territorial communities making up a group sharing common borders).

7. However, relations between territorial communities across national borders have been so dynamic that agreements have emerged between geographically remote authorities. Such inter-regional agreements have been drawn up, for instance, between Spain, France, Italy and Belgium in connection with high-tech economic development poles. Many twinning agreements between towns or regions are in fact advanced co-operation agreements covering fields which have traditionally been excluded from conventional twinning arrangements. Such contacts between territorial communities are bound to undergo considerable expansion in the future.

8. Therefore, the question is whether such schemes should remain without a legal framework at the international level or whether they should be placed from the outset into a well-known, tried and tested framework.

9. The legal technique selected for the preparation of Protocol No. 2 consists in addressing interterritorial co-operation by reference to the two existing legal instruments on transfrontier co-operation, that is to say the Outline Convention and its Additional Protocol.

Comments on the articles

Article 1

10. This article defines "interterritorial co-operation" on the basis of what we might term a "negative criterion": interterritorial co-operation means any concerted action between territorial communities which is not considered as being transfrontier within the meaning of the Outline Convention and its Additional Protocol.

11. This definition might give rise to problems of interpretation in certain marginal cases, but any such problems should still be solvable because the main feature of interterritorial co-operation is the lack of territorial contiguity between communities or groups of communities.

Article 2

12. This article recognises the principle of the right of territorial communities or authorities to conclude mutual agreements within the framework of interterritorial co-operation. This right is to be recognised and respected by the states and exercised under the conditions and within the limits defined by the Outline Convention, its Additional Protocol and by the present Protocol.

13. For example, it should be remembered that under the terms of this article interterritorial co-operation agreements are to be concluded:

- a. within the framework of the responsibilities of the territorial communities or authorities bound by them;
- b. in accordance with the procedures laid down in the statutes of the territorial communities or authorities;
- c. in compliance with the international commitments of the states to which the territorial communities or authorities belong;
- d. in accordance with the individual state's national law on the status of international co-operation bodies.

14. One important requirement is inherent in the expression "equivalent fields of responsibility". It indicates that in order to conclude an agreement all the territorial communities or authorities concerned must have responsibility for the subject dealt with. This means that if the responsibility is delegated or shared rather than being exclusive, the territorial community or authority in question must have complied with all the requirements of the national law governing the subject.

15. The expression "in conformity with national law" indicates that when concluding and implementing their agreements the territorial communities or authorities must respect the procedures and other rules laid down in the national law of the state to which they belong. The link with the expression "equivalent fields of responsibility" means that when concluding an interterritorial co-operation agreement the territorial communities or authorities cannot acquire responsibilities which are not recognised by national law or create any new category of local authority.

16. The article does not deal with interactions between interterritorial co-operation agreements and the international commitments concluded by the Contracting Parties subsequently to these agreements.

17. Paragraph 2 clearly states that the conclusion or implementation of an interterritorial co-operation agreement between territorial communities or authorities can in no case entail the responsibility of the state or any other authority which is not a signatory to the agreement.

Articles 3 and 4

18. These articles relate to the substantive provisions on interterritorial co-operation. The provisions applicable are determined by reference to the substance of other relevant international instruments, i.e. the Outline Convention and its Additional Protocol.

19. Nevertheless, since interterritorial co-operation and transfrontier co-operation may differ in some respects, when referring to the Outline Convention and its Additional Protocol Articles 3 and 4 point out that these instruments are to be applied "*mutatis mutandis*".

20. It follows that the clarifications made on the interpretation of the Outline Convention and its Additional Protocol by their explanatory reports are also relevant to the present Protocol, to the extent that the provisions of these two instruments are applicable to interterritorial co-operation.

Article 5

21. Even though the expression "*mutatis mutandis*" is well-known and has been used frequently in international legal instruments, it was deemed necessary to define it for the purposes of the implementation of this Protocol.

22. As a result of this definition, the provisions of the Outline Convention and its Additional Protocol are applied to interterritorial co-operation, with the words "transfrontier co-operation" being read as if they were "interterritorial co-operation".

Article 6

23. The *raison d'être* for this article is that under Article 3 of the Additional Protocol to the Outline Convention a transfrontier co-operation agreement concluded by territorial communities or authorities may set up a transfrontier co-operation body which may be considered as either a public or private law entity. Article 8 of Additional Protocol stipulates that each Contracting Party should indicate whether it will apply the provisions of Articles 4 and 5 or one of those Articles only. Article 4 of the Additional Protocol makes provision for the case of a transfrontier co-operation body having legal personality. Article 5 deals specifically with measures taken by a co-operation body regarded by the Contracting Parties as a public law entity.

24. Considering that the Contracting Parties can choose for the implementation of the present Protocol a solution different from the one retained for the implementation of the Additional Protocol, for instance, applying a public law system to a transfrontier co-operation body and a private law system to an interterritorial co-operation body, they are required to declare whether they will apply the provisions of Articles 4 and 5 of the Additional Protocol or one of those articles only.

Articles 9 - 14

25. The final provisions in Articles 9 to 14 generally correspond to the model final clauses for treaties drawn up in the Council of Europe.