



Explanatory Report to the Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters

Strasbourg, 8.XI.2001

I. The Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters, drawn up within the Council of Europe by the Committee of Experts on the Operation of European Conventions in the Penal Field (PC-OC), under the authority of the European Committee on Crime Problems (CDPC), has been opened for signature by the member States of the Council of Europe, in Strasbourg, on 8 November 2001, on the occasion of the 109th Session of the Committee of Ministers of the Council of Europe.

II. The text of the explanatory report, prepared on the basis of that Committee's discussions and submitted to the Committee of Ministers of the Council of Europe, does not constitute an instrument providing an authoritative interpretation of the text of this Protocol although it may facilitate the understanding of its provisions.

Introduction

1. Under the authority of the European Committee on Crime Problems (CDPC), the Committee of Experts on the Operation of European Conventions in the Penal Field (PC-OC) is entrusted *inter alia* with examining the functioning and implementation of Council of Europe Conventions and Agreements in the field of crime problems, with a view to adapting them and improving their practical application where necessary.

2. Within the framework of its tasks, the PC-OC identified certain difficulties that States met when operating under the European Convention on Mutual Assistance in Criminal Matters, as well as its Protocol. It also identified situations bordering the area covered by that Convention, yet not included in its scope.

3. Having studied various options, the PC-OC agreed that a second additional protocol to the Convention was the most appropriate and pragmatic response for some of the difficulties encountered, while other difficulties could be dealt with by way of recommendations. It therefore prepared a draft Second Additional Protocol.

4. The draft Second Additional Protocol was examined and approved by the CDPC at its 50th plenary session (June 2001) and submitted to the Committee of Ministers.

5. At the 765th meeting of their Deputies on 19 September 2001, the Committee of Ministers adopted the text of the Second Additional Protocol and decided to open it for signature, in Strasbourg, on 8 November 2001, on the occasion of its 109th Session.

General considerations

6. The purpose of this Protocol is to reinforce the ability of member States, as well as partner States, adequately to respond to crime. This purpose is intended to be reached by improving and supplementing the European Convention on Mutual Assistance in Criminal Matters done at Strasbourg on 20 April 1959, (henceforth "the Convention") as well as the Additional Protocol thereto, done at Strasbourg on 17 March 1978 (henceforth Protocol 1). [At the same time, it takes into consideration the need to protect individual rights within the processing of personal data.]

7. That purpose is achieved by way of modernising the existing provisions governing mutual assistance, extending the range of circumstances in which mutual assistance may be requested, facilitating assistance and making it quicker and more flexible.

8. It takes due account of political and social developments in Europe and technological changes worldwide.

9. Thus, in many provisions it follows very closely, often literally, the Convention of 29 May 2000 on Mutual Assistance in Criminal Matters between the member States of the European Union (henceforth EU), while in other provisions it follows the Convention of 14 June 1990 (henceforth Schengen) implementing the Schengen Agreement of 14 June 1985. It also follows, as indicated, the draft European Comprehensive Convention on International Co-operation in Criminal Matters (henceforth Comprehensive).

10. The draft Comprehensive Convention is a text prepared by the PC-OC and submitted in due time to the CDPC. While the CDPC did not approve the text, it decided that drafters of future treaty provisions should take inspiration on that text.

11. With regard to the interpretation of the provisions of this Protocol that follow the EU Convention, the reader is directed to the Explanatory Report of the latter.

12. Article 30 of the Vienna Convention on the Law of Treaties, concerning the application of successive treaties relating to the same subject-matter, regulates the relations between this Protocol and, respectively, the Convention and Protocol I.

13. The provisions of this Protocol are grouped in three chapters. Chapter I contains the provisions that replace the wording of articles of the mother Convention. Chapter II contains all the other operational articles of the Protocol. Chapter III contains the final provisions.

Commentaries on the Articles of the Protocol

Chapter I

Article 1 – Scope

14. This article amends Article 1 of the Convention in three ways.

15. Firstly, by adding the adverb "promptly" to the wording of the Convention, it introduces a requirement of swiftness in responding to requests for mutual assistance.

16. Secondly, it (paragraph 3) extends the scope of the Convention to cover the whole field of "administrative criminal law".

17. Thirdly, paragraph 4 makes it clear that the scope of the Convention covers mutual assistance in proceedings against legal persons or in proceedings in respect of facts for which a legal person may be held liable.

18. Concerning paragraph 1, the requirement of swiftness is one of a general nature. In particular, this Protocol does not follow the EU Convention in requiring that deadlines indicated by the requesting Party be met by the requested Party. However, the drafters wished to underline that tardiness will often defeat the purpose of mutual assistance, while risking to violate Article 6, paragraph 1, of the European Convention on Human Rights.

19. Again concerning paragraph 1, the drafters discussed and refused a proposal to the effect of inserting the words underlined, as follows "The Parties undertake promptly to afford each other, in accordance with the provisions of this Convention, the widest measure of mutual assistance in all stages of proceedings [...]". The drafters deemed that throughout the life of the Convention no difficulties had arisen that could be solved by adding the proposed words. It has indeed always been understood by all that the Convention applies at all stages of proceedings.

20. The final phrase of paragraph 1 should not be read to exclude from the scope of the Convention or its Protocols mutual assistance in respect of offences the punishment of which falls within the jurisdiction of the judicial authorities of two or more States.

21. Concerning paragraph 3, the legal category of "administrative criminal law" is often described by reference to its German variety, namely the *Ordnungswidrigkeit*. Although unknown to the legal systems of a number of member and partner States, it is largely followed in many other countries and thus is familiar to practitioners of international mutual assistance. According to its Explanatory Report, already the drafters of the Convention had *Ordnungswidrigkeiten* in their minds over forty years ago.

22. The purpose of paragraph 3 is to bring under the same treaty provisions on mutual assistance applicable to two types of national proceedings, namely (a) proceedings in respect of criminal offences and (b) proceedings in respect of infringements (sometimes called regulatory offences) punishable under criminal/administrative law. The rationale lies in that the same facts (e.g. severe pollution due to negligence, or traffic offences) are often the subject of criminal proceedings in one State and the subject of criminal/administrative proceedings in another State.

23. Because criminal/administrative offences are unknown to some States, there is no common language to express such a concept. Thus paragraph 3 describes the concept. Because the drafters were aware of the risk that it be misinterpreted to include administrative procedures not of a "criminal" nature, they worded paragraph 3 in such a way as to leave behind any doubts.

24. Under paragraph 3, the Convention applies regardless of whether initially the proceedings in question fall within the jurisdiction of an administrative or a criminal authority in one State or the other, if only, at a later stage, it is legally possible to bring such proceedings before a court having jurisdiction in particular in criminal matters. The inclusion of "in particular" at the end of the paragraph makes it clear that the court before which the proceedings may be brought does not have to be one that deals exclusively with criminal cases.

25. Mutual assistance in administrative matters, including administrative/criminal matters, is presently covered by Conventions ETS 94 ⁽¹⁾ and ETS 100 ⁽²⁾.

(1) European Convention on the service abroad of documents relating to Administrative Matters (ETS No. 94, 1977).

(2) European Convention on the obtaining abroad of information and evidence in Administrative Matters (ETS No. 100, 1978).

26. The drafters intended paragraph 3 to have the same meaning and effect as Article 49 (a) of Schengen. Thus they used the same language, save for the words "or both" which were not reproduced for reasons of pure logic. The drafters were aware that the Schengen language is possibly not the clearest language available. However they measured the advantages of following Schengen against the disadvantages of finding new language and opted for the former course of action.

27. The qualification of the facts under the law of the requested Party, in particular the question of whether the facts are punishable or not, is entirely irrelevant for purposes of mutual assistance under the Convention and its Protocols. The phrase "punishable under the national law of the [...] requested Party" must therefore be read under that proviso. In particular that phrase does not conceal any intention of introducing a requirement for double incrimination. As it does not in any way change the existing rules concerning the execution of letters rogatory for search or seizure of property under Article 5 of the Convention.

28. For the definition of "administrative authorities" for the purposes of this Protocol, see Article 26.

29. References: Article 3 / EU; Article 1 / ETS 70 ⁽¹⁾; Article 1 / ETS 73 ⁽²⁾; Art. III.1 / Comprehensive; Art. 49.a / Schengen.

Article 2 – Presence of officials of the requesting Party

30. This article introduces a new paragraph (paragraph 2) in Article 4 of the Convention.

31. This article is based on the assumption that in many instances, the presence of officials or interested persons, as provided for in Article 4 of the Convention, will contribute to the efficiency of mutual assistance. To that extent, such presence should be facilitated.

Article 3 – Temporary transfer of detained persons to the requesting Party

32. This article rewords Article 11 of the Convention.

33. This article introduces the following changes in Article 11 of the Convention:

- in paragraph 1, it replaces the words "personal appearance as a witness or for purposes of confrontation" for the words "personal appearance for evidentiary purposes other than for standing trial";
- in paragraph 4 it replaces the words "unless the Party from whom transfer is requested applies for his release" for the words "unless the Party from whom transfer is requested applies for his or her release".

34. In the first case, the reason for the change is that the replies to a questionnaire launched by the Committee that drafted this Protocol indicated that there are many different and sometimes conflicting interpretations of the original wording, whereas the wording taken from the Comprehensive Convention translates a more straightforward and unambiguous meaning.

35. In the other case, changes endeavour to clarify without interfering with the substance.

(1) European Convention on the International Validity of Criminal Judgments (ETS No. 70, 1970).

(2) European Convention on the Transfer of Proceedings in Criminal Matters (ETS No. 73, 1972).

36. "Standing trial" is used in its restrictive meaning to include only the last phase of criminal proceedings, where the person is brought before a court for the purpose of being at that time tried by that court.

37. In the minds of the drafters, the transfer of a person for the purpose of standing trial amounts to extradition, while the transfer of a person for "evidentiary purposes other than for standing trial" excludes the idea of extradition.

38. The provisions of this article apply equally to nationals and not nationals. This implies in particular that even in the cases where a person is transferred to the country of his or her nationality, that country must be ready to live up to its obligation under paragraph 1 of Article 11 (newly drafted) to "send back" the person.

39. Even countries that do not extradite their own nationals should, or may, contribute to proceedings taken in any other country against any national of theirs because (a) the proceedings against one person / national may also concern other persons / not nationals and (b) the proceedings may lead to their being transferred (transfer of proceedings), as opposed to leading to a request for extradition.

40. References: Article III.9 / Comprehensive.

Article 4 – Channels of communication

41. This article rewords Article 15 of the Convention. In particular it introduces language more familiar to member States of the Council of Europe than that used in Article 15 of the Convention.

42. The reference to the "return" of requests is to be read under the proviso that the nature of the request calls for a "return".

43. This article establishes in particular that:

- as a general rule, requests are in writing;
- as a general rule requests are channelled via Ministries of Justice;
- communications as mentioned in Para 2 must always be channelled via Ministries of Justice;
- as a general rule requests may always be forwarded directly from judicial authority to judicial authority;
- where applicable requests concerning "administrative/criminal" offences may be forwarded directly from administrative authority to administrative authority – or to judicial authority where that authority is the competent authority. It is not excluded that a judicial authority may forward to an administrative authority.

44. Finally, this article opens the way to the use of telecommunications in the transmission of requests and other communications.

45. It should be noted that the Interpol channel is left open for urgent cases only.

46. References: Article 15 / Convention; Article 6.8.b / EU.

Article 5 – Costs

47. This article rewords Article 20 of the Convention.

48. The drafters underlined the importance of keeping mutual assistance disconnected from costs, the general rule being that of gratuity.

49. The provisions of paragraph 1 (c) of this article apply only to costs that are both significant (not minor) and reasonable (not excessive when measured against the service provided or when compared with prices usually due for comparable services).

50. The extraordinary nature of the costs may result, for example, from requests requiring a given formality or procedure, unfamiliar to the requested Party, to be followed. The same would apply to costs entailed with storing, keeping, protecting or transporting property under seizure.

51. References: Article I.6 / Comprehensive

Article 6 – Judicial authorities

52. This article rewords Article 24 of the Convention mainly in order to:

- introduce an obligation for States always to indicate which authorities are deemed to be judicial authorities for the purposes of the Convention; In fact, such an indication facilitates the application of the Convention;

- authorise Parties to change their initial declaration each time that the law or the circumstances change.

Chapter II

Article 7 – Postponed execution of requests

53. This article permits the requested Party to postpone, rather than refuse, assistance where immediate action on the request would be prejudicial to investigations or proceedings in the requested Party. For example, where the requesting Party has sought to obtain evidence or witness testimony for purposes of investigation or trial, and the same evidence or witness are needed for use at a trial that is about to commence in the requested Party, the requested Party would be justified in postponing the providing of assistance.

51. It further provides that where the assistance sought would otherwise be refused or postponed, the requested Party may instead provide assistance subject to conditions. If the conditions are not agreeable to the requesting Party, the requested Party may modify them, or it may exercise its right to refuse or postpone assistance. Since the requested Party has an obligation to provide the widest possible measure of assistance, it was agreed that both grounds for refusal and conditions should be exercised with restraint.

55. Finally, it obliges the requested Party to give reasons in case of postponement of assistance. To give reasons can, inter alia, assist the requesting Party in understanding how the requested Party interprets the requirements of this article, provide a basis for consultation in order to improve the future efficiency of mutual assistance, and provide to the requesting Party previously unknown factual information about the availability or condition of witnesses or evidence.

56. This article supplements Article 19 of the Convention; it does not replace it.

57. References: Article 27, paragraphs 5, 6 and 7 of the draft Convention on Cybercrime.

Article 8 – Procedure

58. The underlying philosophy of mutual assistance is that the requested Party carries out action on behalf of the requesting Party, for purposes relating only to proceedings pending in the latter: "in its place".

59. Where mutual legal assistance is requested, the main interest at stake is that justice be done. Admittedly that interest is shared by both States; however it is predominantly held by the State where proceedings have been engaged, i.e. the requesting Party. The requesting Party alone would carry out the proceedings if it were not for the fact that the sovereignty of another State stops it at some border. Hence the reason for requesting another State to assist in carrying out its proceedings.

60. Possibly for practical reasons, the Convention did not integrate the implications of this philosophy. Though not precluding Parties from carrying out the action requested where such action was not provided for by their law, the Convention indeed provided (Article 3) that the requested Party should carry out the action requested to it "in the manner provided for by its law".

61. In strict legal terms, that provision is inapplicable unless the law of the requested Party provides for the manner in which to carry out actions that belong to the criminal procedure of third States.

62. Presently, the need is recognised by all to open new frontiers to judicial co-operation. The first such new frontier consists in coming back to basics and executing what is requested, as opposed to executing equivalent actions. What is requested is often no more than what is legally required in the requesting Party for evidentiary purposes. Equivalent action executed instead of what is requested often is not admissible in the requesting Party for evidentiary purposes.

63. Obviously, States cannot undertake to carry out action in just any manner requested. There must be a limit. That limit is to be found in the requirement that the action sought is not contrary to fundamental principles of the legal system of the requested Party.

64. Such a limit is broad enough to ensure that most requests will be executed; yet it fulfils its role of freeing States from any obligation to take action that would go against their "nature".

65. "Formalities or procedures » should be interpreted in a broad sense to include, for example:

- "Miranda warnings";
- formalities relating to formulae or documents;
- requirements to the effect that the defence counsel be present;
- requirements to the effect that the person whose hearing is sought be examined and cross-examined, either directly or through the examining authority, by the defence counsel and the prosecution.

66. "Fundamental principles of its law" means "fundamental principles of its legal system".

67. Considering the burden that this article places on requested Parties, requesting Parties are expected to require only those formalities and procedures which are indispensable for their investigations.

68. This article does not affect declarations made by Contracting States under Article 5 of the Convention.

69. References: Article 4 / EU; Article 6.1.b / ETS 94.

Article 9 – Hearing by video conference

70. This article reproduces almost entirely Article 10 of the EU Convention.

71. The development of technology has made it largely possible for persons located in different points around the globe to communicate with each other, in such a way that they all can simultaneously hear each other and see each other in real-time, via a video link.

72. The drafters considered that video links would probably be more and more used henceforth, in the framework of proceedings involving persons located in different points, either in the same country or in two or more different countries. This is especially true where it is not possible, or desirable, or practical, or economic to bring such persons together in the same point.

73. This article is designed to serve as a basis for the use across borders of this procedure.

74. In paragraph 1, "not desirable" could apply for example to cases where the witness is very young, very old or in bad health; "not possible" could apply for example to cases where the witness would be exposed to serious danger if appearing in the requesting Party.

75. Paragraphs 1 and 3 both incorporate a requirement concerning the desirability and possibility of a given course of action. Those requirements must be assessed against the law of the requesting Party.

76. In the context of paragraph 2 the reference to "fundamental principles of law" implies that a request may not be refused for the sole reason that hearing of witnesses and experts by videoconference is not provided under the law of the requested Party, or that one or more detailed conditions for a hearing by videoconference would not be met under national law.

77. The word "minutes" in paragraph 6 – as most other words in this article – was taken from the EU Convention. In the context of this Protocol, this word is intended to mean a record in writing ascertaining that the hearing took place and indicating the date and place of the hearing, the identity of the person heard, the identities and functions of all other persons participating in the hearing, any oaths taken and the technical conditions under which the hearing took place. The word is not intended to mean any summary of what was said at the hearing.

78. In contrast with Article 10 of the EU Convention, this article makes no reference to costs. In this Protocol, all provisions relating to costs are included in Article 14.

79. Concerning paragraph 7, efficiency commands that the law applicable be the law of the State where the person is, i.e. the place where the person may immediately, without further steps, be prosecuted, if appropriate, for perjury. Moreover, this paragraph is intended to guarantee that the witness, in case of non-compliance with an obligation to testify, is subject to consequences similar to those applicable in a domestic case not involving videoconference.

80. Where the difficulties mentioned in paragraph 7 occur, the requesting and the requested Parties may communicate with each other in relation to the application of the paragraph. This will normally imply that the authority of the requesting Party conducting the hearing as soon as possible provides the authority of the requested Party with the information necessary to enable the latter to take appropriate measures against the witness or expert.

81. This article applies generally to hearings of experts and witnesses. However, under paragraph 8, it may, under certain conditions, also apply to hearings of the accused persons.

82. Paragraph 8 borrows from paragraph 9 of Article 10 of the EU text. However, it was not taken word by word. The differences are:

- where the EU text reads "videoconference involving an accused person", this Protocol reads "video conference involving the accused person or the suspect";
- this Protocol does not make provision for any notification by Parties declaring that they "will not apply" paragraph 8, the reason being that paragraph 8 is already abundantly clear in that respect when it states that "Parties may at their discretion also apply the provisions of this article".

83. Concerning the first difference, it must be clear that the provision does not apply to any "accused person" but solely to the person who is the accused person in the criminal proceedings in respect of which mutual assistance was requested. Furthermore, because, from one country to another, the concept of "accused person" largely overlaps with neighbouring concepts, in particular the concept of "suspect", the drafters wished to clarify that there was no intent to exclude the latter category.

84. Paragraph 8 should be interpreted and applied on the understanding that it must not prevent the provisions of paragraph 4 from applying to a video-conference whereby a witness in one country is "confronted" with a suspect in another country. Otherwise, video-conferences would not be possible during a trial.

85. Hearings by videoconference in respect of the accused person or the suspect may not take place unless the Parties concerned specifically agree to it. Parties that do not intend ever to agree on such a course of action, may declare so and thus avoid useless initiatives from their partners.

86. References: Article 10 / EU

Article 10 – Hearing by telephone conference

87. This article reproduces almost entirely Article 11 of the EU Convention.

88. This article does not include a threshold provision – as is the case with Article 9 – because its application is limited to both the requirements of national law and the consent of the person concerned. Moreover, it is up to the national law of the requesting Party to regulate or not telephone conferences, hence opening or closing the way to international co-operation in this field.

89. According to paragraph 1, where a person is in the territory of the requested Party and has to be heard as a witness or expert by judicial authorities of the requesting Party, the requesting Party may, where its national law so provides, request assistance from the requested Party to enable the hearing to take place by telephone conference.

90. The drafters discussed a proposal for the Protocol to include provisions designed to harmonise domestic legislation in the field of telephone conference. They thought that such an exercise would better be done by way of recommendations.

91. In contrast with Article 11 of the EU Convention, this article makes no reference to costs. In this Protocol, all provisions relating to costs are included in Article 14.

92. References: Article 11 / EU.

Article 11 – Spontaneous information

93. This article extends to mutual assistance in general what was until now only recognised in the limited field of money laundering, namely the possibility for Parties, without prior request, to forward to each other information about investigations or proceedings which might contribute to the common aim of responding to crime.

94. It should be noted that this provision introduces a possibility; it does not place obligations on Parties. Moreover, it expressly provides that the relevant exchanges are to be carried out within the limits of national law.

95. The competent authorities in the "sending" Party are those authorities who deal with the case within which the information came up; the competent authorities in the "receiving" Party are the authorities who are likely to use the information forwarded or who have the powers to do it.

96. In accordance with paragraph 2, conditions may be attached to the use of information provided under this article, and paragraph 3 provides that, if that should be the case, the receiving Party is bound by those conditions. In reality, the sending Party only binds the receiving Party to the extent that the receiving Party accepts the unsolicited information. By accepting the information, it also accepts to be bound by the conditions attached to the transmission of that information. In this sense, Article 7 creates a "take it or leave it" situation.

97. The conditions attached to the use of the information may for example be a condition that the information transmitted will not be used or re-transmitted by the authorities of the receiving State for investigations or proceedings as specified by the sending State.

98. Because some States might have difficulties in not accepting the information once it has been transmitted, for example where their national law puts a positive duty upon authorities who have access to such information, paragraph 4 opens the possibility for States to declare that information must not be transmitted without their prior consent should the sending State attach conditions on the use of such information.

99. References: Concerning paragraph 1: Article 10 / ETS 141 ⁽¹⁾; concerning paragraphs 2 and 3: Article 6 / EU.

Article 12 – Restitution

100. The terminology used in this article is familiar to Council of Europe texts. The term "restitution" is used to mean "return", in particular return of articles to their rightful owners; it is not used with any meaning carrying a connotation of "compensation".

101. This article applies to property in general, tangible as well as intangible, goods as well as money (*objets et valeurs*);

102. The provisions of this article do not in any way carry any implicit obligation for the requesting State to take any action.

103. In many States it is one of the Prosecutor's duties to lay hands on the instrumentalities as well as the proceeds of each offence under his or her jurisdiction.

(1) Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (ETS No. 141, 1990).

104. This article introduces arrangements whereby mutual assistance requests may be made in order to have articles obtained by criminal means, stolen goods for example, placed at the disposal of the requesting Party with a view to returning them to their rightful owners. Paragraph 1 permits, but does not oblige, a requested Party to give effect to such a request. The requested Party may, for example, refuse to grant such a request where property has been seized for evidential purposes in that Party.

105. Paragraph 1 is not intended to bring about any change in national law with respect to confiscation.

106. Paragraph 1 is intended to apply only in cases where there is no dispute as to who rightfully owns the property. It also operates without prejudice to the rights of bona fide third parties. This ensures that legitimate claims involving the property will be fully preserved.

107. References : Article 8 / EU; Articles III.5.bis and III.6.3 / Comprehensive ; Article 1 of Resolution (77) 36 ⁽¹⁾.

Article 13 – Temporary transfer of detained persons to the requested Party

108. The substance of this article is intended to be the same as that of Article 11 of the Convention – as amended by Article 3 of this Protocol - except that the transfer in question is operated the other way round.

109. Paragraph 1 is intended to mean that, where any requesting Party requires that a person held under custody on its territory be present on the territory of the requested Party for the purposes of the assistance sought, the first mentioned Party may temporarily transfer that person to the territory of the second mentioned Party, subject to an agreement to that effect between the competent authorities of both Parties. Practice has shown that in certain cases it is not possible to carry out the assistance sought in the requested Party, in a satisfactory way, unless by transferring the person to the territory of that Party.

110. According to paragraph 2, such agreement must cover the arrangements to be made for the transfer and specify a date for the return of the person concerned.

111. References: Article 9 / EU.

Article 14 – Personal appearance of transferred sentenced persons

112. This article aims at fulfilling a gap in the Convention on the Transfer of Sentenced Persons. It is in no way related to extradition. The purpose of this article is to put States in a situation where they can meet the legitimate expectations of transferred prisoners not to jeopardise, on account of their absence, the review of their judgement, if and where such a review takes place.

113. The assumption is that review of judgments is a procedure which is engaged in the interest of the sentenced person. Where that should not be the case and where the person concerned does not consent to his temporary transfer, this Article should not apply.

114. It should be recalled that, under the Protocol to the Convention on the Transfer of Sentenced Persons, the person concerned may under certain conditions be transferred without his or her consent.

(1) Resolution (77) 36 on the practical application of the European Convention on Mutual Assistance in Criminal Matters.

115. The restrictions set out in Article 12 of the Convention shall not apply to the act or omission for which the person has been sentenced in the sentencing State and which is the subject of the review.

Article 15 – Language of procedural documents and judicial decisions to be served

116. This article is designed to supplement Articles 7 et seq. of the Convention. It should be read in conjunction with Article 16 of the Convention. It applies to any request, irrespective of the channel or form of communication used, save where otherwise provided for in this Protocol.

117. In using, both in this article and in Article 16, the terms "procedural documents" and "judicial decisions", the drafters' intention was not to depart from the scope of Article 7, but rather to use a form of words which they thought reflects the present situation in a large number of countries, as compared with the language used in Article 7 ("writs and records of judicial verdicts") of the Convention which is very much based in one only legal system.

118. The term "judicial decisions" means both judicial decisions and records of judicial decisions. The term "paper" is used to encompass both "procedural documents" and "judicial decisions".

119. This article does not prevent Article 16 of the Convention from applying to the request. This means that, with respect to languages, Article 16 of the Convention applies to the request proper, while this article applies to papers or "annexed documents" as Article 16 names them.

120. Experience shows that papers the service of which is requested are often produced in the original language only. This raises two questions, namely (a) the requested Party's interest in having access to a translation and (b) the interest – or the right – of the person concerned in that the paper served to him is drafted in a language that he understands.

121. As to the first question, the drafters thought that, in accepting direct service by post, the States show that their interest in having access to the paper served is not a major interest. Furthermore, once Article 16 of the Convention continues to apply to the request, Parties do not lose the right to require a translation of the request – provided of course that they made in good time a declaration to that effect. Access to a translation of the request accommodates to a great extent the Parties' interest in having access to the papers proper.

122. Moreover, the requested Party's interest in having access to the contents of the papers served is met with the provisions of paragraph 4 that require a "short summary of its contents". In the view of the drafters, this means not more than some lines explaining what the papers are about.

123. The drafters gave priority to the second question. Under Article 6.3.(a) of the European Convention on Human Rights (ECHR), everyone charged with a criminal offence has the minimum right *inter alia* "to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him". Article 6 of the ECHR applies both (a) where the person concerned is in that way being served with charges for a criminal offence and (b) where the person is charged with a criminal offence and immediate access to the document served is instrumental in organising his defence. Even if Article 6 will not apply to every instances in which papers are served, it is practical to rule with respect to all instances that, where there are indications that the person served does not have a good command of the language in which the papers to be served were drawn up, the requesting Party must enclose a translation of the papers, or at least of its main passages, into a language comprehensible to the person concerned.

124. The law of the requested Party applies to the conditions under which the person may refuse the service.

125. References: Article 5 / EU; Article 52, paragraphs 1 and 2, / Schengen.

Article 16 – Service by post

126. Mutual assistance, as provided for in the Convention and in this Protocol, usually translates into action taken by one State at the request of another. In the particular case of this article, the assistance takes the form of an implied authorisation by State A for State B to take action which has effect on the territory of State A.

127. The objective of this article is to ensure that procedural documents and judicial decisions can be sent and served as speedily as possible by a Party where the recipient is present in the territory of another Party.

128. This article applies also to papers served under Article 3 (a) of Protocol 1.

129. The law of the requested Party applies to the conditions under which the person may refuse the service.

130. This article is open to reservations.

131. References: Article 5 / EU.

Article 17 – Cross-border observations

132. This article reproduces almost entirely Article 40 of the above-mentioned Schengen Convention. The drafters would have wished to improve on the language borrowed. However, for lack of time, they abstained from doing so.

133. Two changes were introduced.

134. Firstly, in paragraph 1, one phrase was added to the Schengen version, in order to extend the scope of the article to cases in which the police are keeping under observation "a person who it is strongly believed will lead to the identification or location" of an otherwise wanted person. This can be particularly useful in practice. The drafters had in mind in particular in cases of kidnapping where a member of the family, or a bank employee, is carrying across a border the money to pay the ransom with.

135. Secondly, two offences were added to the list in paragraph 6, namely smuggling of aliens and sexual abuse of children.

136. The purpose of the drafters when taking account of cross-border observations in this Protocol was not to include police or other forms of non-judicial co-operation within the scope of this Protocol, but rather to take in cross-border observations as a form of mutual legal assistance.

137. For the purposes of this article, the word "border" includes any border, be it on land, sea or air.

138. In paragraph 1, the phrase "conditions may be attached to the authorisation" should be read to mean *inter alia* that the requested State may impose conditions as to the or the territorial limitation of the observation.

139. Extraditable offences are offences with respect to which, *in abstracto*, extradition is possible either under a treaty or under domestic legislation. The concrete circumstances of the case, such as the nationality of the person concerned, may not be used in order to characterise an offence as extraditable or not.

140. Reservations may be made to the whole of or part of this article.

141. References: Article 40 / Schengen.

Article 18 – Controlled delivery

142. This article reproduces almost entirely Article 12 of the EU Convention.

143. The purpose of the drafters when taking account of controlled delivery in this Protocol was not to include police or other forms of non-judicial co-operation within the scope of this Protocol, but rather to take in controlled delivery as a form of mutual legal assistance.

144. This article applies to the controlled delivery of goods and money.

145. Under Article 1 (g) of the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (Vienna,1988), "controlled delivery" means the technique of allowing illicit or suspect consignments of goods or money, or items substituted for them, to pass out of, through or into the territory of one or more States, with the knowledge and under the supervision of their competent authorities, with a view to identifying persons involved in the commission of offences.

146. That definition, while providing a general guideline, cannot entirely apply to the concept used in this article, in particular because it does not necessarily cover offences such as smuggling of aliens or traffic in human beings.

147. This article imposes on Parties an obligation to make, in law or in practice, controlled deliveries possible in their respective territories. Once that obligation met, Parties are free to accept or to refuse requests to carry out controlled deliveries.

148. The law applicable is the law of the requested Party.

149. Paragraph 2 provides that it is for the requested Party to decide whether or not a controlled delivery should take place on its territory. These decisions must be taken on a case-by-case basis and within the framework of the relevant domestic rules of the requested Party.

150. While the practical arrangements to be undertaken for controlled deliveries will require close consultation and co-operation between the relevant agencies and authorities of the Parties concerned, paragraph 3 makes it clear that such deliveries must be made in conformity with the procedures of the requested Party, thus derogating from the general rule.

151. Reservations may be made to the whole of or part of this article.

152. References: Article 12 / EU.

Article 19 – Covert investigations

153. This article reproduces almost entirely Article 14 of the EU Convention.

154. The purpose of the drafters when taking account of covert investigations in this Protocol was not to include police or other forms of non-judicial co-operation within the scope of this Protocol, but rather to take in covert investigations as a form of mutual legal assistance.

155. In the mind of the drafters the requesting Party should not make a request under this article unless it would be impossible or very difficult to investigate the facts without resorting to covert investigations;

156. Covert investigations should be limited to precise missions of a precise duration .

157. Reservations may be made to the whole of or part of this article. In particular, States may reserve their right not to apply this article unless to criminal proceedings in respect of extraditable offences.

158. References: Article 14 / EU.

Article 20 – Joint investigation teams

159. This article reproduces almost entirely Article 13 of the EU Convention.

160. Experience has shown that where a State is investigating an offence with a cross-border dimension, particularly in relation to organised crime, the investigation can benefit from the participation of authorities from other States in which there are links to the offences in question, or where co-ordination is otherwise useful.

161. One of the obstacles which has arisen insofar as joint investigation teams (JIT) are concerned has been the lack of a specific framework within which such teams should be established and operate. This article aims at meeting that concern.

162. Paragraph 1 places no limitation on the number of Parties which may be involved in a JIT.

163. JITs operate for a specified period of time. It may be extended by mutual consent. The composition of the JIT should be specified in the agreement. Depending on the States concerned and the nature of the facts under investigation, membership is likely to include prosecutors, judges, law enforcement officers and experts.

164. Where agreement is achieved on the setting up of a JIT, the JIT will normally be established in the State in which the main part of the investigations is expected to be carried out. The States concerned will have to take into account the question of costs, including the daily allowances for the members of the team.

165. Paragraph 3 establishes that a JIT will operate on the basis that its leader will be a representative of the competent authority participating in criminal investigations for the State in which the JIT operates. This means, in particular, that the leadership of the JIT will change, for the specific purposes concerned, if investigations are carried out by the JIT in more than one State. The leader of the JIT must act within the requirements of his or her national law. In addition, the JIT must fully abide to the law of the State where it operates.

166. When compared with the EU text, the scope of paragraph 3.b was enlarged to include the seconded members of the team. In fact, it appears that such had been the intention of the drafters of the EU text.

167. Members of a JIT who are not operating in their own State (seconded members) are permitted, under paragraph 5, to be present when investigative measures are taken in the State of operation. However, the JIT leader may, for particular reasons, in accordance with the law of the State where the JIT is operating, decide otherwise. In this context, the expression "particular reasons" has not been defined but it can be taken to include, for example, situations where evidence is being taken in cases involving sexual crimes, especially where the victims are children. Any decision to exclude a seconded member from being present may not be based on the sole fact that the member is a foreigner. In certain cases operational reasons may form the basis for such decisions.

168. Paragraph 6 permits seconded members to carry out investigative measures in the State of operation, in accordance with the national law of that State. This will be done on the instructions of the JIT leader. They may not carry it out unless they have the approval of the competent authorities of the State of operation and the seconding State. Such approval may be included in the agreement establishing the JIT, or it may be granted at a later stage. It may also apply in general terms or it may be restricted to specific cases or circumstances.

169. One of the most innovative aspects of this article is provided for in paragraph 7. The effect of this provision is that it enables a seconded member to request his or her own national authorities to take measures which are required by the JIT. In that case it will not be necessary for the State of operation to submit a request for assistance and the relevant measures will be considered in the State in question in accordance with the conditions that would apply if they had been sought in a national investigation.

170. Paragraph 8 covers the situation where assistance is required from a State which was not involved in establishing the team or a third State. In these circumstances the assistance will be sought by the State of operation, according to the rules normally applicable.

171. Paragraph 9 facilitates the work of the JITs by opening the way for a seconded member to share with the JIT information which is available in his or her State and is relevant to the investigations being conducted by the JIT. However, this will only be possible where it can be undertaken within the scope of the seconded member's national law and the limits of his or her competence.

172. Paragraph 10 is concerned with the conditions for the use of information lawfully obtained by a member or a seconded member of a JIT where the information in question would not otherwise be available to the competent authorities of the States concerned.

173. Paragraph 12 paves the way for the States that have established a JIT to agree that persons who are not representatives of their competent authorities can take part in the activities of the JIT. What the drafters had in mind was that additional assistance and expertise could be provided to a joint investigation team by appropriate persons from other States or international organisations (e.g. Interpol or Europol)

174. Persons who are authorised to participate in a JIT under paragraph 12 will act primarily in a supportive or advisory role and are not permitted to exercise the functions conferred on members or seconded members of the JIT or to use the information referred to in paragraph 10 unless this is permitted under the relevant agreement between the States concerned.

175. Reservations may be made to the whole of or part of this article.

176. References: Article 13 / EU.

Article 21 – Criminal liability regarding officials

177. This article reproduces almost entirely Article 15 of the EU Convention.

178. In this article the expression "Party of operation" is intended to mean the Party where the operation is taking place.

179. References: Article 42 / Schengen ; Article 15 / EU.

Article 22 – Civil liability regarding officials

180. This article reproduces almost entirely Article 16 of the EU Convention.

181. Nothing in this article should be read to mean that the rights of victims, in particular the right to exclaim compensation or damages from public authorities or private persons, can in any way be infringed by any agreement between States.

182. The word "liability" is used here with the meaning of responsibility (in French "*responsabilité civile*").

183. References: Article 26 / ETS 156 ⁽¹⁾; Article 43 / Schengen ; Article 16 / EU.

Article 23 – Protection of witnesses

184. In the understanding of the drafters, this article is to apply only where a request for assistance has been made under the Convention or one of its Protocols in respect of a witness at risk of intimidation or in need of protection.

185. It belongs primarily to the requesting Party, not to the person concerned, to evaluate whether or not the witness is at risk of intimidation or in need of protection.

186. This article clearly subordinates any practical effects deriving from its application to an agreement between the Parties involved. The obligation deriving from the article is not one to act with practical effects, but rather one to endeavour to agree.

187. Thus in no way does this article imply any obligation for Parties to take legislative or other measures of a general nature in the field of witness protection.

188. The drafters used the terms "witness" and "intimidation" with the meaning given to them in Recommendation R (97) 13 concerning intimidation of witnesses and the rights of the defence, as follows:

- "witness" means any person, irrespective of his status under national criminal procedural law, who possesses information relevant to criminal proceedings. This definition includes experts as well as interpreters;
- "intimidation" means any direct, indirect or potential threat to a witness, which may lead to interference with his duty to give testimony free from influence of any kind whatsoever. This includes intimidation resulting either (i) from the mere existence of a criminal organisation having a strong reputation of violence and reprisal, or (ii) from the mere fact that the witness belongs to a closed social group and is in a position of weakness therein;

189. References : Recommendation R (97) 13 ⁽²⁾.

(1) Agreement on Illicit Traffic by Sea, implementing Article 17 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (ETS No. 156, 1995).
(2) Recommendation R (97) 13 of the Committee of Ministers to the governments of member States concerning intimidation of witnesses and the rights of the defence.

Article 24 – Provisional measures

190. This article enables the requested Party, upon a demand from the requesting Party, to take provisional measures. The fact that provisional measures have been taken is an indication that the requirements dictated by the law of the requested Party are met. In practice, it has been observed that the success of an investigation often depends on the speed with which provisional measures are taken by the requested Party.

191. References: Article I.15 / Comprehensive; Article 27 of the draft Convention on Cybercrime

Article 25 – Confidentiality

192. This article aims at recognising that the requesting State is entitled to impose a duty of confidentiality on the requested State.

193. References: Article III.6 bis / Comprehensive

Article 26 – Data protection

194. This article applies to personal data transferred from one Party to another as a result of the execution of a request made under the Convention or any of its Protocols. It applies regardless of whether data are transferred because they are communicated by a "sending State" or because they are otherwise obtained by a "receiving State".

195. This article does not apply to personal data that is obtained by a Party as a result of the execution of a request made under the Convention or any of its Protocols, by that Party or any other Party, where that data are not transferred from one Party to another.

196. The expression "personal data" is used within the meaning of Article 2(a) of the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, of 28 January 1981. According to Article 2(a) "personal data" means any information relating to an identified or identifiable individual ("data subject").

197. That definition applies irrespective of the way in which the personal data concerned are filed or processed. Consequently, Article 24 of this Protocol applies both to data processed automatically and to data not processed automatically.

198. The definition is to be understood as implying that an identifiable person is one who can be identified, directly or indirectly, by reference to an identification number or to one or more factors specific to his or her physical, mental, economic, cultural or social identity.

199. This article does not affect the obligations of States under the 1981 Convention.

200. References: Article 23 / EU

Article 27 – Administrative authorities

201. This article calls for no comments.

Article 28 – Relations with other treaties

202. This article, as is the case with Article 9 of the Additional Protocol to the Convention, is designed to ensure the smooth co-existence of this Second Protocol with any bilateral or multilateral agreements concluded in pursuance of Article 26.3 of the Convention.

203. References: Article 9 / Protocol 1.

Article 29 – Friendly settlement

204. This article which makes the European Committee on Crime Problems the guardian over the interpretation and application of the Convention and its Protocols follows the precedents established in other European conventions in the penal field. It also follows Recommendation (99) 20 of the Committee of Ministers, concerning the friendly settlement of any difficulty that may arise out of the application of the Council of Europe conventions in the penal field. The reporting requirement which it lays down is intended to keep the European Committee on Crime Problems informed about possible difficulties in interpreting and applying the Convention and its Protocols, so that it may contribute to facilitating friendly settlements and proposing amendments to the Convention and its Protocols which might prove necessary.

205. References : Article 23 / ETS 112 ⁽¹⁾; Recommendation (99) 20 ⁽²⁾.

Chapter III

Articles 30 to 35 – Final clauses

206. Articles 30 to 35 are based both on the "Model final clauses for conventions and agreements concluded within the Council of Europe" which were approved by the Committee of Ministers at the 315th meeting of their Deputies in February 1980, and the final clauses of the Convention.

207. Concerning Article 33 (reservations), the drafters gave consideration to the possibility of introducing provisions aimed at limiting in time the validity of reservations and thus encouraging States periodically to examine the possibility of lifting or softening reservations. Inspiration was taken from Article VI.7 of the Comprehensive Convention, Article 38 of the Criminal Law Convention on Corruption, Article 25 of the Convention on the Adoption of Children and Article 14 of the Convention on the Legal Status of Children Born out of Wedlock.

208. That idea finally could not be put into practice because of the specific nature of this Protocol, which does not replace the Convention or Protocol I, but rather supplements them. And reservations have already been registered with respect to each of them.

209. It is underlined that under the provisions of Article 33.1 ratification of this Protocol does not automatically entail any change in the reservations entered by States to provisions of the mother Convention which are amended by this Protocol.

210. References in respect of Article 32: Article 8.1 / Protocol 1.

(1) Convention on the Transfer of Sentenced Persons (ETS No. 112, 1983).

(2) Recommendation No. R (99) 20 of the Committee of Ministers to the governments of members States, concerning the friendly settlement of any difficulty that may arise out of the application of the Council of Europe conventions in the penal field.