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Explanatory Report
to Protocol No. 3 to the European Outline Convention on Transfrontier Co-operation between Territorial Communities or Authorities concerning Euroregional Co-operation Groupings (ECGs)

Utrecht, 16.XI.2009

The Third Protocol was drawn up within the Council of Europe by the European Committee for Local and Regional Democracy (CDLR). It was opened to signature by the Signatories to the European Outline Convention on Transfrontier Co-operation on 16 November 2009.

The text of the explanatory report prepared on the basis of the 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 the Third Protocol, although it may facilitate the understanding of its provisions.

I. General remarks

The development of transfrontier co-operation between territorial communities or authorities has been a constant priority for the Council of Europe. Its main contribution to the definition of the legal framework for this co-operation has been the European Outline Convention on transfrontier co-operation between territorial communities or authorities (the Madrid Convention) of 1980, followed by two protocols adopted respectively on 9 November 1995 and 5 May 1998.

These three main legal instruments have been supplemented by a number of recommendations adopted by the Committee of Ministers, in particular Recommendation Rec(2005)2 on good practices in and reducing obstacles to transfrontier and interterritorial cooperation between territorial communities or authorities.

Across Europe, the one area where most developments have been recorded since the 1980s, is the establishment of groupings of territorial communities or authorities – often self-labelled "Euroregions" – that aim at fostering mutual information, co-ordination of activities and direct action, depending on means and circumstances, between the members. The proliferation of "Euroregions" in most if not all European States and across Europe's multiple borders has prompted requests for the harmonisation of the rules applicable to them. The legal status of these groupings varies widely from State to State and they enjoy no recognition at European level.

The European ministers responsible for local and regional government, meeting in Budapest on 24-25 February 2005, acknowledged the need for "a clear and effective legal framework for institutionalised co-operation between territorial communities or authorities (euro-regions)" (Agenda for Delivering good local and regional governance, "Budapest Agenda"). The Heads of State and government of the member States of the Council of Europe, meeting in Warsaw on 16-17 May 2005, decided "to develop further transfrontier co-operation, as necessary, and standards of democracy and good governance, including proper functioning of our civil services". At their subsequent session (Valencia, 15-16 October 2007) the European ministers confirmed the goal of establishing a "clear and effective legal framework for

institutionalised co-operation" and agreed to "continue the work engaged in the Council of Europe on a draft Protocol to the Madrid Outline Convention on Euroregional co-operation Groupings".

The work on a draft third protocol started in 2004 in the Committee of experts on transfrontier co-operation (LR-CT) under the authority of the European Committee on Local and Regional Democracy (CDLR). The initial objective was the drawing up of a convention containing a "uniform law" on the legal status of transfrontier and interterritorial co-operation bodies. After the European Community started working on a regulation on the legal status of crossborder co-operation bodies (Commission proposal of 14 July 2004, to become Regulation (EC) No 1082/2006 of the European Parliament and of the Council of 5 July 2006 on a European Grouping of territorial co-operation (EGCT)), the work was reoriented towards the drafting of a third protocol to the Madrid Convention, that would provide the core provisions for the establishment and functioning of transfrontier and interterritorial co-operation bodies while at the same time being fully compatible with the EC Regulation.

This work was conducted in the LR-CT committee and its successor committee, the LR-IC (Committee of experts on local and regional institutions and co-operation). The European Committee on Local and Regional Democracy approved the draft third protocol on 24 April 2009. The Committee of Ministers of the Council of Europe adopted the text of the protocol on 9 September 2009 and agreed to open it for signature and ratification on the occasion of the 16th session of the Council of Europe conference of ministers responsible for local and regional government, meeting in Utrecht (The Netherlands), on 16-17 November 2009.

The third protocol

If the Madrid Convention and its Additional protocol have cleared the way to the establishment of fruitful forms of dialogue and co-operation between territorial communities or authorities across two or more borders, the structured co-operation between the same territorial entities is faced with huge difficulties. Crossborder co-operation between member States of the Council of Europe, be it at interstate level or at the level of territorial communities or authorities, is still hampered by a number of factors related to the differences in the political systems, functions and powers of territorial communities or authorities, legal traditions, languages, etc.

The simple solution offered by the Additional protocol consists of enabling the establishment of transfrontier co-operation bodies with or without legal personality, and in the latter case, linking the legal personality to the law applicable in the headquarter State (article 4, paragraph 1). Accordingly, the nature and extent of the legal personality of the body in question may vary considerably depending on the law of the headquarter State.

The third protocol provides a solution to the situation arising from this wide variety of situations, through the provision of "hard core" rules on the establishment, membership, operations and responsibilities of the groupings, thus enabling the establishment of ECGs that, while still subject to the law of the headquarter State, have nevertheless in common an "harmonised" set of governing rules.

This can only enhance the legal security of the entities establishing the ECG and of the parties that enter into any legal relationship with it.

The existing transfrontier and interterritorial co-operation bodies are not required to transform themselves into the "new" ECG. The bodies that already exist may continue to operate under the existing arrangements.

Territorial communities or authorities and the other entities concerned may also use the provisions of Regulation (EC) 1082/2006 in order to establish a European Grouping of Territorial Co-operation. The two bodies do not exclude each other. However, prospective members will choose, in view of the objectives of their co-operation and the means at their disposal, which of the two instruments may accommodate their expectations and goals adequately.

In order for the basic requirements of the protocol to be fully met, the Parties may have to adjust, review or adopt implementing legislation or provisions. In order to facilitate this task, the third protocol – following the example of the Madrid Outline Convention – foresees the establishment of model legislation that the Parties – but also any member State wishing to become a Party to the protocol – may adopt as such or reformulate according to their legal traditions. These provisions will be drafted by the European Committee on Local and Regional Democracy (CDLR) and approved by the Committee of Ministers before they are appended to the third protocol.

In conclusion, the third protocol constitutes a further step towards the simplification of the procedures enabling the creation of effective transfrontier co-operation bodies. Experience will show whether the provisions of this protocol meet the needs of territorial communities or authorities.

II. Commentary on the provisions of the Protocol

Article 1

The article is broadly drafted to ensure a maximum flexibility in co-operation, while limiting co-operation from two important aspects: firstly it is made clear from the very beginning that this protocol does not create new fields of competences. Local and regional authorities will always have their own spheres of competences defined by the constitutional and legal order of their member State and co-operation is thus limited to these spheres of competences. Secondly, since co-operation in a legal form also requires agreement-making powers, the limitation further guarantees that no additional agreement-making powers are conferred on local or regional communities or authorities under this Protocol.

The ECG must be established on the territory of a Council of Europe member State which is also a Party to the Protocol. Its membership shall therefore include entites that belong to Parties, subject to the provision of Article 3, paragraph 2.

The term “national law” used throughout the text and comments follows the same terminology which is already used by the Additional Protocol and Protocol No. 2. National law covers the entire constitutional and legal system of the respective Council of Europe member State, i.e. including not only the law created by the national, regional or local authorities (and the subsquent executive provisions: regulations, decrees, etc.), but also Community law if the state in question is a member State of the European Union. Moreover, it is made clear from the very beginning that an ECG can only be established in a member State of the Council of Europe, Party to the Protocol.

The name “Euroregional Co-operation Grouping” (ECG) tries to reflect the fact that local and regional communities and authorities established on a territorial basis and other public or private law entities as specified in more detail under Article 3 that participate in transfrontier and interregional co-operation intend to create sustainable networks and not new territorial entities.

Article 2

For the sake of legal certainty and simplicity, paragraph 1 provides that the legal personality of the ECG is obligatory, in contrast to the provision in this regard of the Additional Protocol (Article 3). Secondly, the law applicable to the agreement and to the actions of the ECG shall be the law of the State in which the ECG has its headquarters. However, there are several instances where the law of other States is also applicable as can be seen from Article 1, paragraph 2; Article 7, paragraphs 1, 2 and 4 (with regard to restrictions); Article 4, paragraphs 7 and 9, Article 9, paragraphs 2 and 3 (with regard to liabilities); Article 10, paragraph 2 (on dispute settlement); Article 11, paragraph 3 (on administrative and judicial review); Article 12, paragraph 2 (on auditing) and Part II on implementing provisions.

Paragraph 2 endows the ECG with the most extensive legal capacity available to legal persons in the member States where it is established. This capacity may be that of the legal persons mentioned under Article 3, paragraph 1, the choice being left to the members when establishing the ECG.

Paragraph 3 makes clear that the members shall choose the type of legal entity that suits their needs, having regard to the solutions available in the legal order of the headquarter State.

Paragraph 4 establishes the principle of budgetary autonomy and paragraph 5 enumerates in a non-exhaustive list other legal capacities necessary for the proper functioning of a body with legal personality without excluding the possibilities which might follow from the Appendix.

Article 3

Paragraph 1 defines the possible members. ECGs are primarily established by and for territorial communities or authorities of the Parties. However, under this provision member States themselves may become members if one or more of their territorial communities or authorities are members.

The other legal persons listed under paragraph 1 of this article entitled to be members include those created specifically for goals of general interest, but not industrial or commercial goals, as long as their activity is financed mainly by the State, a territorial community or authority, or similar body; or their management is subject to the control of these entities; or half the members of their administrative, managerial or supervisory organ are appointed by the State, a territorial community or authority or similar body.

Paragraph 2 must be seen in the form of an “opening clause” under which territorial communities or authorities from non-Parties to this Protocol may take part in founding or become members of an ECG.

For this to happen, these authorities must belong to a State that has a frontier with a Party to the Protocol which is or will become the headquarter state for the ECG and that State must have concluded an agreement (treaty) with that Party.

This agreement would only make the accession of these new members envisageable.

The words “without prejudice to the provisions of this Protocol” ensure that the agreement concluded between the non-Party State and the State in which the ECG has its headquarters respect and protect the provisions of the Third Protocol, and therefore the (possible) other States whose territorial communities or authorities are members of this ECG.

With regard to paragraph 3, it has to be taken into consideration that Council of Europe legal instruments foresee territorial and functional cooperation by territorial communities or authorities as their main purpose since they carry out tasks in the general interest of their populations. However, other legal persons pursuing goals of general interest may be members. In order to avoid the risk of these special interest organisations overruling territorial communities or authorities in the policy development and decision-making processes of the respective ECG, paragraph 3 makes it clear that territorial communities or authorities of the Parties must retain the majority of the voting rights in an ECG and therefore its control.

Article 4

Under paragraph 1, an ECG must be established by the written agreement of its founding members thereby implying unanimity.

Paragraph 2 constitutes a guarantee that prospective members will comply with all necessary procedures and requirements in their respective legal system, thus making sure that when they join the ECG they are fully authorised to do so.

Under paragraph 3, the agreement must specify the essential and therefore mandatory characteristics of the ECG, namely the list of members, name, headquarters, duration, object and tasks, plus the geographical scope. Furthermore, under Article 9 paragraph 1, ECG members may be jointly liable and, if the liability of at least one ECG member is limited as a result of the national law under which it is established, then paragraph 3 additionally provides that the name of the ECG shall include the word “limited”. The national law of the other ECG members will determine whether they too can limit their liability.

Under paragraph 4, the territorial communities or authorities must inform, formally notify or request and obtain authorisation from their national authorities that they wish to become a founding member of an ECG or to accede to an ECG. On the basis of notification, the central authorities can have recourse to their national supervisory legal instruments in order to control the legality or constitutionality of a draft agreement; second, the provisions of Article 16 allow each State already at the time of ratification to designate all the types of territorial communities or authorities and public or private law entities it wants to exclude from the scope of application of this Protocol. Finally, most countries in any case prescribe in their national constitutional systems that regional or local authorities have to seek prior consent for such activities.

In some States however, these requirements (information, notification, prior consent) may not be applicable. Under paragraph 6, these states can therefore declare, at the moment of ratification or later on, that they do not intend to make use of these provisions, either in general, or for specific types of territorial communities or authorities, or for specific types of co-operation.

Paragraph 5 is a well-known clause for protecting public policy or the political interests of the state.

The registration or publication requirement in paragraph 7 provides legal certainty and maintains the transparency of the work of public entities such as territorial communities or authorities. Registration or publication must conform to the legal practice of the States concerned. For agreements setting up public law entities this may include publication in the national Official Gazettes, whereas agreements setting up private law entities are usually registered with administrative or judicial authorities.

Paragraph 8 adds to the legal security by introducing a requirement of information of the States to which the members belong about the entry into force of the ECG.

The agreement shall be written in the language(s) of the headquarter State and of the members, whereby all versions shall have the same legal validity. This avoids the problem of the "authentic" language for the purposes of interpretation and disputes. This does not exclude, however, if it is agreed, an agreement drawn up in fewer languages, provided they are the languages of the members.

Article 5

Paragraph 1 makes it clear that the provisions specifying the detailed structure for the operation of an ECG must be set out in the accompanying statutes which nevertheless form an integral part of the agreement to be concluded unanimously by the founding members.

The list of contents of the statutes is non-exhaustive and lays down the minimum requirements. The law applicable to all issues to be included in the statutes may not always be the law of the State in which the ECG has its headquarters, as was already outlined in the comment under Article 2.

Paragraph 2 determines the language(s) of the text for the sake of legal certainty, in line with the provisions of Article 4 paragraph 5. The working language need not be one of the languages of the statutes or the agreement.

Paragraph 3 mentions explicitly the obligation for the statutes to contain rules on membership, including the withdrawal of members, and the consequences of it. The circumstances under which members may wish to opt out of the ECG and the conditions of such opting out shall be specified in the statutes. These may include withdrawal with immediate effect, for example if the members fundamentally disagree with the action of the ECG and believe they are not in a position to oppose it. The statutes shall also cover the dissolution of the ECG and its legal consequences.

Article 6

For the sake of legal certainty, it is stipulated that any amendments to the agreement and any major amendments to the statutes need to follow the same procedure that was followed for the establishment of the agreement and statutes. This applies to the requirements of information, notification or prior approval, as well as publication, languages etc.

Article 7

Paragraph 1 provides for maximum flexibility as regards the reasons why an ECG shall be established: either for particular issues such as disaster prevention or for overall territorial co-operation in all areas of competence of the prospective members. The tasks of the ECG may also include the implementation of territorial co-operation programmes co-financed by the European Union, notably the Structural Funds, as well as the management of any financial resources allocated to the ECG and the granting of financial aid to third parties. This goal may be pursued without the ECG having to adopt the status of an European Grouping of Territorial Co-operation (EGTC) under EC Regulation 1082/2006.

The second sentence of paragraph 1 again makes clear that neither this Protocol nor an agreement can create new competences which the members do not already enjoy.

Paragraphs 2 and 3 must be read in conjunction. Paragraph 2 again provides for the utmost flexibility with regard to what sort of legal acts may be used for achieving the tasks of the ECG under the national law of the State in which the ECG has its headquarters. In addition, members – according to the subsidiarity principle – must facilitate the implementation of the ECG's decisions where it lacks the necessary executive power or effective legal mechanisms to enforce them.

Paragraphs 3, in contrast, sets the limits by prohibiting ECGs from exercising regulatory powers, legislative competences, measures to affect the rights and freedoms of individuals or levying taxes. For reasons of consistency of legal terminology within the Council of Europe legal framework, its wording is based on the more abstract formulation of Article 4, paragraph 2, letters b and c of the Additional Protocol to the Outline Convention.

In member States, local or regional communities or authorities may exercise not only their "own", i.e. exclusive or shared competences according to the constitutional division of powers, but also those of the State, if these have been delegated to them. In order to avoid "subdelegation" without the consent of the original authority, paragraph 4 prohibits, as a rule, members other than the States themselves from delegating the implementation of central authority competences to ECGs.

Article 8

These provisions are included for the sake of legal clarity. They do not contain any rules on withdrawal or exclusion of members which should be regulated by the Statutes in accordance with national law.

Article 9

Paragraphs 1 to 3 provide a comprehensive system of liabilities for any possible breach of law by the ECG's bodies or the ECGs themselves. The joint liability of members – if the ECG cannot be held liable itself – follows a similar "subsidiarity" provision in Article 12 of the EC Regulation. It is clear that the liability of the ECG includes debts of whatever nature and the joint responsibility of the members is incurred if the assets of the ECG are not sufficient to honour its obligations.

The wording "any breach of the law to which it may be subject" covers the national law of the state where the ECG has its headquarters, the law of the territories where the ECG operates and the founding agreement including the statutes. If a member acts on behalf of an ECG, such as under Article 7 paragraph 2, and violates the respective law so that the ECG is held responsible by a third party in accordance with paragraph 1 of this article, then the ECG has the right to seek redress against the member under the provision in Article 10 paragraph 1. However, as follows from Article 2 paragraph 2, the liability of members may be limited.

Paragraphs 4 and 5 thus follow the same system insofar as other members may then also limit their liability or – if this is not possible under national law – the prospective headquarter State may prevent the establishment of such an ECG. It is understood that limited liability covers the case of members which, under the national law under which they are established, have no liability at all.

Article 10

Rules on dispute settlement are a necessary part of providing legal security for all members and third parties involved in territorial co-operation activities. Since there is no transnational court system which may be addressed, any institutionalised dispute settlement must either provide rules for the choice of courts of one of the member States involved or provide for arbitration mechanisms.

Dispute settlement must be effective and fair. Paragraphs 1 and 2 provide the rules for deciding which organs or courts are competent and therefore which law is applicable for deciding disputes, either between the members of the ECG or between an ECG and third parties, as long as the parties concerned fall under the jurisdiction of Council of Europe member States which are bound to democracy and the rule of law. Thus paragraph 3, despite its general formulation, provides for arbitration mechanisms in particular for situations where neither the claimant nor the defendant fall under the jurisdiction of a Council of Europe member State. Paragraphs 2 and 3 therefore provide for a differentiated approach with regard

to third parties which are usually beneficiaries: as a rule (see paragraph 2), the competent organs or courts in disputes with third parties are those where the third party resides or has its seat or headquarters as long as this is within the jurisdiction of a Council of Europe member State. However, the first sentence of paragraph 3 allows also for the conclusion of an arbitration agreement as an exception from this rule if the parties involved agree on this in advance. The second sentence of paragraph 3 makes the prior conclusion of an arbitration agreement a binding obligation for ECGs in their dealings with third parties if they do not reside or do not have their seat or headquarters in a Council of Europe member State.

Paragraphs 4 and 5 specify the rights of third parties in more detail. In particular, paragraph 5 establishes a minimum standard for the use of legal remedies which can also be found in the EC Regulation.

Article 11

For the sake of legal security, paragraph 1 enumerates all types of review of ECG that may be possible according to the law in force in the States Parties to the Protocol. Thus, the acts of the ECG shall be subject to the same type of supervision and administrative and judicial review as may exist in the headquarter State for the acts of legal persons made of territorial communities or authorities. Moreover, the exercise of supervision and administrative and judicial review implies the obligation for ECGs to provide any information necessary for the competent authorities to be able to carry out their supervisory function.

In the same way, the acts of the members which are territorial communities or authorities shall continue to be subject to the usual supervision and administrative and judicial review under the national law applicable to them. These provisions are meant simply to confirm what is already provided in Article 3, paragraph 4 of the Madrid Outline Convention and in Article 6 of its Additional Protocol.

Paragraph 4 repeats a general safeguard clause that protects the States against activities of the ECG that are against public order or fundamental interests in the States in which it operates. Negative decisions by the competent authorities or bodies of the State in question shall be subject to judicial review.

Paragraph 5 provides for the possibility of the ECG being wound up if it acts outside its tasks.

Article 12

Paragraphs 1 and 2 regulate the requirements for the financial audit of the management of an ECG. In paragraph 1, the reference to “national law” must be understood as covering also administrative and technical regulations that may not have legislative status but need to be complied with. Paragraph 1 contains for the state carrying out the audits an obligation to inform all States concerned, for the sake of legal certainty.

In particular paragraph 2 makes it clear that not only auditing bodies established under the national law of the State in which the ECG has its headquarters may carry out financial audits, but also other States in which the ECG is operational. The information may prove especially helpful if the audit concerns an ECG which has a State among its members, in order to prevent any conflict arising from states auditing each other.

With regard to auditing standards the States of members of an ECG will have to use their own standards under national law which may acknowledge internationally accepted audit standards or Council of Europe standards.

Article 13

This article serves the purpose of making it clear that implementing measures must follow in the Parties, even if no deadline is given for these measures to be adopted. In order to facilitate the drafting of national legislation applicable to ECGs, an Appendix will contain model legislation to be used by the Parties that so wish. It is also explicitly stated that the Appendix is optional and can be used as such or redrafted in full or in part. In any case, the Appendix is not an authoritative interpretation of this Protocol. In the event of conflict, the courts remain free to decide whether national law complies with the Protocol, even in cases where the Appendix has been copied and incorporated.

The Appendix may be drafted at a later stage and subsequently added to the Protocol. The provision of paragraph 6 follows those of Article 3 of the Madrid Outline Convention. It differs, however, from the Madrid Convention in that the approval of the Committee of Ministers is required. In this way, the provisions of the Appendix will be more authoritative and also be better known by the Parties.

Article 14

The purpose of this provision is threefold: first, the information of territorial communities or authorities on implementing measures will enable them to decide whether they wish to create or join an ECG or not; second, the notification to the Secretary General and through him/her the information of other Parties will provide them with the relevant information on the legislation in force in neighbouring States, for instance, and facilitate the decision of potential partners to create or join an ECG; thirdly, once ECGs are established, information on their scope, membership, statutes, etc. may prove very useful to other Parties and public opinion in general.

Article 15

This provision repeats a well-known clause for protecting the freedom of action of the Parties.

Article 16

This article enables the States to specify according to their national law which types of territorial communities or authorities or other legal persons pursuing goals of general interest. It corresponds to the similar provision of Article 2 paragraph 2 of the Madrid Outline Convention in respect of territorial communities or authorities.

Paragraph 2 covers Länder, Cantons, autonomous regions and other entities which constitutionally may not be considered as “territorial communities or authorities” in the States in which they are situated, but are nonetheless covered by the same terminology for the purpose of this Protocol.

For the sake of legal security, the categories of entities that the member State may refuse the possibility of establishing or joining in an ECG must be listed in a notification that, in accordance with paragraph 1, is mandatory. The list may be modified, however, at any time. At the time of the notification, the State is not yet a Party to the Protocol.

Article 17

Since one of the difficulties in the field of territorial co-operation identified in the preambular provisions is the diversity of national law, the body of provisions from Part I of the Protocol must be seen as the minimum regulatory requirement for overcoming this obstacle. Moreover, the detailed rules from the Appendix are optional and in no way binding. Hence, there is no need to allow reservations.

Article 18

This is a standard provision aimed at ensuing consistency of interpretation between the various legal instruments of the Council of Europe on transfrontier co-operation.

Article 19

It is understood that only Parties to the Madrid Outline Convention can be Parties to this Protocol. It is not necessary additionally to be a Party to the Additional Protocol or Protocol No. 2 to the Madrid Outline Convention.

Article 20 – Accession

Article 21 – Denunciation

Article 22 – Notifications

These last articles are standard provisions in line with Council of Europe's legal practice.