



Explanatory Report to the Additional Protocol to the European Convention on Information on Foreign Law

Strasbourg, 15.III.1978

I. The European Convention on Information on Foreign Law was opened to signature by the member states of the Council of Europe on 7 June 1968, and entered into force on 17 December 1969.

II. The Additional Protocol to the Convention was prepared under the joint authority of the European Committee on Legal Co-operation (CDCJ) and the European Committee on Crime Problems (CDCP). The provisions relating to criminal law and procedure were prepared by the CDCP and those relating to the field of legal aid and advice by the Committee of Experts on Economic and other Obstacles to Civil Proceedings *inter alia*, Abroad, set up by the CDCJ. The Additional Protocol was opened to the signature of the member states of the Council of Europe, signatory to the European Convention on Information on Foreign Law, on 13 February 1978.

III. The text of the explanatory report prepared by respectively the CDCP and the committee of experts as revised by the CDCJ does not constitute an instrument providing an authoritative interpretation of the text of the Additional Protocol although it may be of such nature as to facilitate the understanding of the provisions of the Protocol.

Introduction

1. The European Convention on Information on Foreign Law, which was opened for signature by member states of the Council of Europe in London, on 7 June 1968, and entered into force on 17 December 1969, has a limited scope. According to Article 1, "the Contracting Parties undertake to supply one another... with information on their law and procedure in civil and commercial fields as well as on their judicial organisation." Article 4, paragraph 3 states that the request for information "may include questions in fields other than those referred to in Article 1, paragraph 1", but on the condition that these questions "relate to the principal questions specified in the request". With this qualification, the Convention does not therefore cover the criminal field.

2. Under Article 3, paragraph 1 of the Convention, requests for information shall always emanate from a judicial authority. Paragraph 3 of the same article provides that Contracting Parties may extend as between themselves the Convention to requests from authorities other than judicial authorities.

3. An extension of the provisions of the Convention to the criminal field, as proposed by Austria and France during the 24th Plenary Session of the European Committee on Crime Problems (ECCP) of the Council of Europe, would certainly seem to be desirable. In fact, none of the European Conventions concluded in criminal matters (Convention on Mutual Assistance in Criminal Matters, Convention on the International Validity of Criminal Judgments, Convention on the Transfer of Proceedings in Criminal Matters) provide for any general mechanism for the exchange of information between the Contracting Parties in

criminal law matters. Such a mechanism would, however, be useful, particularly in that several member states, such as Austria and France, make punishable certain offences committed abroad by their nationals, on the condition that the acts committed are also punishable under the criminal law of the foreign state. In such a case full knowledge of the foreign criminal law is an essential prerequisite for the proceedings which might be instituted, and the possibility for the national authorities to obtain automatically information on that law would considerably facilitate their task.

4. For these reasons the ECCP decided to prepare an Additional Protocol to the Convention and approved, during the 25th Plenary Session, the text which now appears in Chapter I of the Protocol as it was finally adopted. It decided on a multilateral agreement as an extension of the 1968 Convention, which has the inherent advantage of avoiding a multiplicity of instruments and of providing a uniform solution to problems of substance.

5. At the proposal of the Norwegian delegation, the European Committee on Legal Co-operation, at its 25th meeting in July 1976, decided for its part to examine the question whether to extend the scope of the Convention to permit requests to be made outside court proceedings and by authorities other than judicial authorities. This question was referred to the Committee of Experts on Economic and other Obstacles to Civil Proceedings *inter alia*, Abroad. The committee of experts accordingly prepared a draft additional protocol to the Convention incorporating the text already approved by the ECCP. This text was then submitted to the European Committee on Legal Co-operation which approved it at its 27th meeting in June-July 1977.

Commentary on the provisions of the Additional Protocol

Article 1

6. The drafting of this provision accords with that of Article 1, paragraph 1 of the Convention, which is deliberately built around the term "field". The extension is thus directed towards information concerning substantive and procedural law and judicial organisation in the criminal field, and the enforcement of penal measures. It is made clear that the organisation of the prosecuting authorities is also comprised by Article 1. The second sentence of the article ensures that, in the case of regulatory offences (*Ordnungswidrigkeiten*) the authorities may supply and obtain information to the same extent to which they will grant and request legal assistance under the European Convention on Mutual Assistance in Criminal Matters.

Article 2

7. A particular problem arose in connection with the provision in Article 3, paragraph 1 of the Convention, under which the request for information "may be made only where proceedings have actually been instituted". Article 3, paragraph 3 of the Convention cannot be interpreted as allowing two or more Contracting Parties to extend, as between themselves, the application of the Convention to requests for information made without proceedings actually having been instituted. In fact, Article 3, paragraph 1 sets out two distinct conditions for requesting information: on the one hand, the request for information should, in principle, emanate from a judicial authority; on the other hand, it may be made only where proceedings have actually been instituted. Paragraph 3 of this article allows a derogation from the first of these conditions but not the second. However, it is clear that States which make punishable offences committed in a foreign state on condition that they are punishable in that state, have an interest in knowing the criminal law of that state before instituting – and so as to be able to decide whether to institute – proceedings against one of their nationals.

It was therefore necessary to include in the Protocol a provision which, without detracting from the general conditions referred to above, would nevertheless allow them to be set aside in respect of requests for information in criminal matters. Such a provision should nevertheless include some limitations in order to exclude requests for information which have no link with any concrete case for the application of foreign law.

The formula which has been adopted provides the necessary flexibility while at the same time avoiding requests which are only of academic interest; thus it limits requests for information to cases where the institution of criminal proceedings is envisaged, either where the decision to institute proceedings has already been taken, or where the information is requested with a view to taking that decision.

Article 3

8. It was thought desirable to enable authorities and persons with the task of providing legal aid and advice to make requests for information in order to facilitate their work. To avoid an unreasonable number of requests it was considered necessary to limit such requests to authorities or persons acting within an official legal aid or advice system.

The access to information on foreign law at an early stage may avoid the need for actually instituting court proceedings. It is therefore provided that requests for information may be made even before proceedings have actually been instituted, on condition that the institution of such proceedings is envisaged. This means that the provision may not be used for the purpose of obtaining information in other circumstances, e.g. for drawing up a contract. It should be noted that, under Article 1, paragraph 1 of the Convention, requests for information should relate to civil and commercial fields or to judicial organisations. However, by virtue of Article 4, paragraph 3 of the Convention, the request may include questions in fields other than those referred to in Article 1, paragraph 1, where they relate to the principal questions specified in the request.

Article 4

9. This article makes the appointment of a transmitting agency obligatory. As under Article 3.a of this Protocol, requests for information will no longer be subject to the scrutiny of a judicial authority; it has been considered desirable that requests should always pass through a transmitting agency. A result of the text is that, when transmitting a request in accordance with Article 3, the transmitting agency should in particular ensure that the provisions of that article have been observed.

Article 5

10. This article provides that a Contracting Party to the Convention has a choice between accepting either all the provisions of this Protocol or only Chapter I, which relates to criminal law or Chapter II, which relates to civil and commercial law.

If a Contracting Party has declared that it will only be bound by one of the chapters of the Protocol, it is provided that this Party cannot avail itself of the provisions of the chapter it has excluded in relation to other Parties which have not made such a declaration.