



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

Strasbourg, 17.III.1978

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I. The Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters, drawn up within the Council of Europe by a committee of governmental experts under the authority of the European Committee on Crime Problems (ECCP) was opened to signature by the member states of the Council of Europe on 17 March 1978.

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 the Protocol although it may facilitate the understanding of the Convention's provisions.

### **Introduction**

1. The preparation of this Additional Protocol has its origin in a meeting which the Council of Europe organised in June 1970 for the persons responsible at national level for the implementation of the European Convention on Mutual Assistance in Criminal Matters. The participants in this meeting examined the problems arising in connection with the implementation of the Convention and adopted a number of conclusions including, *inter alia*, certain proposals aimed at facilitating the application of the Convention in the future.

2. These conclusions were examined by the European Committee on Crime Problems (ECCP) at its 23rd Plenary Session, and Sub-committee No. XXXI which the ECCP had set up in 1971 to examine the practical application of the European Convention on Extradition was also given the supplementary terms of reference to examine, on the basis of the conclusions of the 1970 meeting, the general application of the European Convention on Mutual Assistance in Criminal Matters, with the exception of the problems already covered by Resolution (71) 43 of the Committee of Ministers. The sub-committee was instructed to propose the appropriate means for implementing the conclusions reached at the 1970 meeting.

3. The sub-committee met under the chairmanship of Mr R. Linke (Austria). The secretariat was provided by the Division of Crime Problems of the Directorate of Legal Affairs of the Council of Europe.

4. During the meetings held from 22 to 25 April 1975 and from 15 to 19 March 1976, the sub-committee prepared, *inter alia*, the Protocol which is the subject of this report.

5. For the purpose of examining the draft texts, the ECCP decided, at its 25th Plenary Session in 1976, to enlarge the composition of the subcommittee so as to comprise experts from all member States as well as from the Contracting Parties which are not members of the Council of Europe.

The enlarged sub-committee met from 6 to 10 September 1976 and from 7 to 11 March 1977.

6. The draft Additional Protocol as amended by the enlarged subcommittee was submitted to the 26th Plenary Session of the ECCP in May 1977 which decided to transmit it to the Committee of Ministers.

7. The Committee of Ministers of the Council of Europe adopted the text of the Additional Protocol at the 279th meeting of the Ministers' Deputies in November 1977 and decided to open it for signature.

### **General observations**

8. When preparing the Protocol, the sub-committee was faced with a basic choice: either to elaborate separate instruments for each of the subjects to be dealt with, or to elaborate one Protocol. Following the method already adopted for the Additional Protocol to the Extradition Convention of 15 October 1975, the sub-committee decided in favour of the latter approach. Consequently the Protocol contains provisions on a number of different topics; they relate to:

- the extension of the Convention to fiscal offences (Chapter I);
- mutual assistance in matters concerning the enforcement of sentences and similar measures (Chapter II); and
- the communication of information from judicial records (Chapter III).

9. It should be noted that whereas Chapter I modifies the existing text of the Convention, Chapters II and III complement the system of mutual assistance established under the Convention.

### **Commentary on the articles of the Protocol**

#### **Chapter I – Fiscal offences**

10. According to Article 2.a of the Convention, assistance may be refused if the request concerns an offence which the requested Party considers a fiscal offence.

11. The effect of Article 1 of the Protocol is to remove the possibility under Article 2.a of the Convention for States to refuse assistance simply because the request concerns a fiscal offence. The Protocol thus puts fiscal and "ordinary" offences on the same footing. It would, of course, remain possible for States not Party to the Protocol to grant such assistance under the Convention itself.

12. The text, rather than defining the expression "fiscal offence", the meaning of which varies from one country to another, repeats the words appearing in the Convention itself. In this connection it should be noted that in Article 5 of the European Convention on Extradition "fiscal offences" are described as "offences in connection with taxes, duties, customs and exchange".

13. Article 2.b of the Convention is left untouched, so that States Party to the Protocol could refuse assistance in the case of a fiscal offence on one of the grounds stated therein. The sub-committee considered it unnecessary to add, for fiscal offences, further grounds of refusal, those listed in Article 2.b being sufficiently wide to cover for example, secrecy and certain individual, or general, economic interests.

With regard to secrecy, the situation might arise that the requested Party considers that the information to be furnished shall not be disclosed to persons who are not connected with the proceedings for which it has been requested. The sub-committee was of the opinion that in such a case the requested Party should inform the requesting Party of its views as soon as possible after having received the request. This would enable the requesting Party to decide at an early stage whether such a condition is compatible with its domestic legislation.

14. Article 2 of the Protocol introduces for mutual assistance principles similar to those adopted, in the context of extradition, for the interpretation of the principle of dual criminal liability, where a State has declared, under Article 5.1.a of the Convention, that this principle is to apply to the execution of letters rogatory for search or seizure of property, or where a State has made a reservation to this effect.

However, as the laws of member States differ in respect of the constituent elements of the various "fiscal offences", Article 2 provides that the condition of dual criminal liability laid down in Article 5.1.a of the Convention is fulfilled if the offence corresponds to "an offence of the same nature" under the law of the requested Party.

15. The fact that the law of the requested Party does not impose the same kind of tax or duty or does not contain the same fiscal regulation as the law of the requesting Party is no ground for refusing the request for assistance (Article 2, second sentence).

## **Chapter II – Mutual assistance concerning the enforcement of sentences and similar measures**

16. Assistance concerning the enforcement of judgments is at present excluded from the scope of the Convention by virtue of Article 1.2, one of the reasons being that the Convention applies only to judicial proceedings and that in some member States the measures concerning the enforcement of sentences are taken by administrative authorities or by public prosecutors who, in some States, are regarded as administrative authorities. In the practical application of the Convention some doubts arose as to what kind of assistance was in fact excluded by this provision.

17. Article 3 extends the scope of application of the Convention in two respects. Assistance is to be granted:

- a. with regard to the service of documents concerning the enforcement of a sentence or similar measures, as the recovery of a fine or the payment of costs, as well as
- b. with regard to certain measures concerning the enforcement of the sentence (suspension, conditional release, deferment of the commencement, interruption of the enforcement, pardon).

18. Where the document to be served does not emanate from a judicial authority or where one of the measures mentioned in Article 3.b is not taken by a judicial authority, the provision is applicable only if the Contracting Party concerned has declared that it considers the authority in question a judicial authority for the purposes of the Convention (Article 24 of the Convention). To that end, Article 8.1 of the Protocol provides that declarations made under Article 24 of the Convention shall be applicable also to the Protocol, unless the Contracting Party declares otherwise.

19. Article 3.a is particularly designed to cover the case where, prior to taking a measure of enforcement, a formal notice concerning the enforcement must be served on a person abroad.

### **Chapter III – Communication of information from judicial records**

20. Article 22 of the Convention, as it stands at present, provides for the automatic periodical mutual information of all criminal convictions and subsequent measures which are entered into the judicial records of the State where sentence was passed.

Article 4 of the Protocol complements this general exchange of information by providing for the case that the requesting Party, following the automatic communication under Article 22, requires a copy of the conviction, or of any subsequent measure (e.g. concerning the rehabilitation of the convicted person), or some other information relevant to the specific case. The communication of these copies or of any additional information is intended to enable the requesting Party to consider whether any measures consequent upon the sentence (e.g. the revocation of a driving licence) need be taken by it.

21. The phrase "any other information relevant thereto" is meant to limit the information which may be obtained to indications on the content, meaning and nature of the conviction or measure in question.

22. The information is communicated between the Ministries of Justice concerned. This is the same channel of communication as provided for by Article 22 of the Convention (Article 22, second sentence).

In this regard it should be noted that a reservation made to the Convention concerning a different channel of communication applies also to this Protocol, unless there is a declaration to the contrary under Article 8.1.

### **Chapter IV – Final clauses**

23. The provisions contained in Chapter IV are, for the most part, based on the model clauses of agreements and conventions which were approved by the Committee of Ministers of the Council of Europe at the 113th meeting of their Deputies. Most of these articles do not call for specific comments, but the following points require some explanation.

24. As regards Article 5, it should be noted that member States of the Council of Europe which have signed but not ratified the Mutual Assistance Convention may sign the Protocol before ratifying the Convention. However, paragraph 4 of this article makes it clear that the Protocol may be ratified, accepted or approved only by a member State which has ratified the Convention. There is no obligation on a member State ratifying the Convention in the future to become a Contracting Party to the Protocol.

25. The Protocol may be acceded to by a non-member State only if it has acceded to the Convention (Article 6).

Accession to the Convention by non-member States of the Council of Europe has been and remains conditional on invitation from the Committee of Ministers, but no such invitation is required for accession to the Protocol. A non-member State which has at any time acceded to the Convention thus has an automatic right (but not an obligation) to accede to the Protocol; the only limitation is that no such accession may be effected until after the Protocol's entry into force which, under Article 5.2, is conditional on ratification, acceptance or approval by three member States.

26. With regard to reservations, Article 8.1 lays down the principle that, in the absence of a declaration to the contrary, existing reservations to the Mutual Assistance Convention apply also to the Protocol. The same applies to declarations made by virtue of Article 24 of the Convention, it being understood that the scope of application of such declarations may be limited to Article 3 of the Protocol.

27. Article 8.2 refers to the possibility for Contracting Parties not to accept one or more of the three chapters and to limit their nonacceptance of Chapter I to certain offences or certain categories of offences. Contracting States have wide discretion in defining the categories of offences in respect of which they wish to accept Chapter I, for instance, by reference to the acts constituting an offence, or by reference to the fiscal regulations which are affected. Furthermore, Article 8.2 allows Contracting States not to comply with letters rogatory for search or seizure of property if they concern a fiscal offence.

These provisions were inserted in order to enable States which, for the time being, find it impossible to accept all chapters, or to accept

Chapter I fully, to become nevertheless Parties to the Protocol as a whole. They may withdraw any reservation made under Article 8.2 (see Article 8, paragraph 3).

28. Article 9 is designed to ensure the smooth co-existence of the Protocol with any bilateral or multilateral agreements concluded in pursuance of Article 26.3 of the Convention which permits Contracting States to conclude agreements for the purpose of either supplementing the provisions of the Convention or of facilitating the application of its principles. According to the rule established by Article 9, such agreements shall supersede the provisions of the Protocol to the extent that they provide for more extensive mutual assistance.