



Explanatory Report to the European Outline Convention on Transfrontier Co-operation between Territorial Communities or Authorities

Madrid, 21.V.1980

I. The European Outline Convention on Transfrontier Co-operation between Territorial Communities or Authorities, drawn up within the Council of Europe by the Committee on Co-operation in Municipal and Regional Matters and adopted by the Committee of Ministers, was opened for signature by the member States of the Council of Europe on 21 May 1980.

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

Introduction

1. In September 1966 the Council of Europe's Consultative Assembly adopted Recommendation 470 on European co-operation between local authorities, in which it recommended that the Committee of Ministers have a draft European convention drawn up by a committee of experts on the basis of a draft appended to the recommendation. The Committee of Ministers did not act on this recommendation, but a few years later it did ask the Committee on Co-operation in Municipal and Regional Matters to make a study of problems concerning co-operation between local authorities in frontier regions.

2. In February 1974, after examining this study ⁽¹⁾, the Committee of Ministers adopted Resolution (74) 8 on co-operation between local communities in frontier areas, in which it recommended that Council of Europe member States, amongst other things:<

- promote European co-operation between local authorities in a number of specifically local fields recognised as such in national law;
- introduce into national legislation as soon as possible such changes as were necessary to remove any obstacles to transfrontier co-operation between local authorities;
- make administrative rules more flexible with a view to speeding up and simplifying protective procedures in regard to transfrontier co-operation between local authorities;
- supervise, if necessary, the establishment of regional transfrontier committees;

(1) Published in 1973 as No. 6 in the study series "Local and regional authorities in Europe".

- provide local authorities with the instruments appropriate for transfrontier co-operation.

3. At the same time the Committee of Ministers included the preparation of model agreements for transfrontier co-operation in the 1975-76 Intergovernmental Work Programme and gave the Committee on Co-operation in Municipal and Regional Matters the task of preparing them. The agreements were drafted by a group of experts composed of Mr Lindquist (Sweden), Mr Marrosu (Italy), Mr Orienne (Belgium), Mr Riva (Switzerland) and Mr Woehrling (France). The group completed its work in August 1976.

4. The preparation of a European Outline Convention was proposed by the European Ministers responsible for Local Government at their first conference, held in Paris on 20 and 21 November 1975. At their second conference, in Athens on 25-27 November 1976, the ministers considered the draft convention drawn up by the Committee on Co-operation in Municipal and Regional Matters and recommended its adoption by the Committee of Ministers. This proposal was subsequently supported by the Parliamentary Assembly (Recommendations 784 (1976) and 802 (1977)) and the Conference of Local and Regional Authorities of Europe (Resolution 90 (1977)). The draft convention was submitted to the Committee of Ministers in March 1977.

5. To finalise the text of the Convention, the Committee of Ministers had to reach agreement on various points, particularly concerning the legal force and application of the model agreements and arrangements appended to the Outline Convention as well as those to be subsequently drawn up within the Council of Europe. This matter was settled in Article 3, paragraphs 1-5, of the Convention.

6. The Committee of Ministers adopted the text of the Convention and decided to refer it to the Consultative Assembly for an opinion.

At the second part of its 31st Ordinary Session, on 11 October 1979, the Parliamentary Assembly adopted Opinion No. 96 (1979) on the draft European Outline Convention on Transfrontier Co-operation between Territorial Communities or Authorities, in which, after congratulating the Committee of Ministers on completing the draft convention, whose principles it believed "might afford a basis for a new doctrine of international law governing neighbourly relations across frontiers and the division of responsibilities among local authorities", it gave its endorsement to the draft convention.

This opinion was accompanied by a number of requests to the Committee of Ministers, notably the following:

- "to see that arrangements are made as from 1980 to circulate information on transfrontier co-operation among member States and the local and regional authorities concerned as provided for in the Convention (Articles 1, 6, 7 and 8)";
- to arrange for the adoption, within three years, of "a protocol clearly recognising the right of territorial authorities or communities to engage in transfrontier co-operation".

In the light of the Parliamentary Assembly's Opinion No. 96, the Committee of Ministers decided to open the European Outline Convention for signature on the occasion of the 4th Conference of European Ministers responsible for Local Government (Madrid, 21-23 May 1980).

General remarks

8. The purpose of the Outline Convention was defined as follows by the European Ministers responsible for Local Government at their first conference (Paris, 20-21 November 1975): to "outline the general, legal and common bases on which bilateral co-operation could be founded, in the framework of the national sovereignty of each country. This co-operation should be adapted to the specific conditions of each country and region."

9. As Stated in its preamble, the Convention is aimed at promoting transfrontier co-operation as far as possible and contributing to the economic and social progress of frontier regions, since the smooth functioning of transfrontier co-operation between municipalities and regions enables them to carry out their tasks more effectively and, hence, enables frontier areas to be improved and developed more harmoniously.

10. The Convention seeks, in the first place, to fill a legal gap by offering forms of transfrontier co-operation particularly suited to the needs of territorial communities and capable of providing an additional legal basis for any agreement which such authorities may conclude and, secondly, to furnish States with various means of supervision and control for ensuring observance of the principle of State sovereignty wherever necessary.

11. Because of the variety of situations and structures regarding local communities in member States and the wide range of problems to be solved, the technique chosen for regulating the subject was that of an outline convention embodying the major relevant undertakings, to which are appended a series of model and outline agreements, statutes and contracts designed to meet the various co-operation needs. For the same reason, the Convention is not intended to deal itself with all the problems concerned but frequently refers to the provisions of domestic legislation.

12. The graduated system of models and outlines appended to the Convention (out not forming an integral part thereof) is designed to provide States on the one hand, and territorial communities on the other, with a choice of forms of co-operation best suited to their problems. Accordingly, the Convention does not preclude either the use of different forms of agreements or the adaptation of the appended models to each specific case of transfrontier co-operation. Moreover, as may be seen from Article 3, paragraph 1, and Article 8, further model and arrangements between territorial communities or authorities may be drawn up within the Council of Europe.

13. Article 8, in particular, provides for the possibility of adding to or extending the Convention itself as well as the model agreements and arrangements. For this purpose, the forwarding to the Secretary General of the Council of Europe of all relevant information concerning the agreements and arrangements referred to in the Convention is of particular importance. This also accounts for the fact that the model agreements and outline arrangements include a final clause stipulating that the Secretary General shall be informed of the conclusion of such agreements and arrangements.

14. This scope for gradually extending the Convention's machinery is in line with a wish expressed by the European Ministers responsible for Local Government in a resolution (No. 1) adopted at their Athens conference, in 1976, where they recommended that the Committee of Ministers:

"ensure that the evolutive nature of the Convention comes into play, enabling it to be perfected and expanded in the light of experience acquired when implementing the provisions of the Convention and the appended model agreements, and for this purpose:

- i. devise a system whereby the States can inform each other about the way in which the Convention is being put into effect by their local and regional authorities,

- ii. give the Secretary General the resources needed for the organisation, under the supervision of the Committee on Co-operation, of an exchange of information, documentary material and experience relating to transfrontier co-operation."

Commentary on the Convention's provisions

Article 1

15. This article, which specifies the object and aim of the Convention, embodies an undertaking by Contracting Parties to facilitate and foster transfrontier co-operation between territorial communities or authorities within their jurisdiction and those within the jurisdiction of other Contracting Parties. This is an undertaking of a general kind which takes account of the situations in the various States ratifying the Convention. It implies a favourable attitude on their part towards any co-operation problems submitted to them, especially as regards the conclusion of agreements and arrangements.

16. The article refers to a principle of fundamental importance for the application of the whole Convention, namely that in the implementation of the Convention's provisions due regard shall be had to the constitutional rules of each Party. This provision should be regarded as tantamount to a "federal clause". The undertakings given by federal States are subject to the powers of their federate authorities in the matters covered by the Convention, in accordance with domestic law. The provision also implies that transfrontier co-operation conducted under the Convention cannot be regarded by one Contracting Party as a ground for encroaching on the powers of another.

Article 2

17. This article defines the concepts which are the most significant ones for the implementation of the Convention.

Paragraph 1

18. The transfrontier co-operation provided for in the Convention concerns neighbourhood relations at the limited level of territorial authorities and communities within the jurisdiction of two or more Contracting Parties.

On this subject it was expressly agreed in the Committee of Ministers' negotiations on the wording of this paragraph that "apart from bodies territorially adjacent to authorities or communities in another State, neighbourhood relations include those situated on a territorial strip extending to a distance from the national frontier which each Contracting Party may determine freely in a declaration at the time of signature or ratification". This declaration may, if appropriate, include particulars concerning the possibility validating concluded by communities outside the limits specified therein. In its precise sense, the term "neighbourhood" in international law implies a certain proximity, which should make it possible, even in cases where no territorial strip has been designated, to rule out unjustified requests from municipalities or regions not having any "neighbourhood" problems to settle with municipalities or regions on the other side of the frontier. This idea of neighbourhood is reinforced by the fact that, under Article 9, paragraph 2, "the Convention shall enter into force three months after the date of the deposit of the fourth instrument of ratification, acceptance or approval, provided that at least two of the States having carried out this formality possess a common frontier".

19. Furthermore, paragraph 1 of Article 2 makes it clear that transfrontier co-operation must at all events be conducted in the framework of territorial communities' or authorities' powers as defined in each State's law. The Convention does not *per se* entail any transfer of powers within the States concerned. It is nevertheless open to each State to amend its domestic law in order to foster transfrontier co-operation.

20. The extent of transfrontier co-operation is normally, therefore, determined (barring intervention by the States themselves or by federate States) by the powers of authorities and communities performing local and regional functions.

21. The Convention's authors accordingly preferred not to include in the Convention itself any lists of matters suitable for transfrontier co-operation. However, a list of a purely indicative kind is to be found in model agreement 1.2 appended to the Convention (model inter-State agreement on regional transfrontier consultation).

22. Lastly, paragraph 1 of Article 2 draws a distinction between the two main forms of transfrontier co-operation. One form is concerted action, which chiefly involves mutual consultation, exchanges of information, discussions and joint studies as well as co-ordination, i.e. joint planning of action, either in the field of regulations or in connection with practical projects. These are modes of co-operation which do not necessarily entail the establishment of legal links.

23. The other form is the conclusion of agreements or arrangements, which does involve the establishment of specific legal links. The purpose of such agreements and arrangements is defined in Article 3, to which reference should be made.

Paragraph 2

24. This paragraph specifies the Convention's scope regarding, first of all, the bodies concerned by transfrontier co-operation at local and regional level. Here, the criterion of the Convention's applicability is the concept of regional or local function. "Territorial communities or authorities" was chosen as a term for covering the various potential cases without having too close a connection with the existing law of any one member State.

The term "territorial" has a geographical connotation, denoting powers covering a smaller area than those of the State. It should not be interpreted as referring only to "territorial communities", a precise concept in the law of some member States which is too narrow for the Convention's purposes. It is intended to embrace the diversity of systems of administrative organisation at local and regional level in the States concerned.

25. However, the general definition adopted for the Convention is subject to certain limits:

26. Paragraph 2 of Article 2 also provides that a State may define in so far as it is concerned, either positively (by drawing up a list) or negatively (by excluding certain bodies or authorities from co-operation), the substance of the concept of territorial authority or community. It is thus always possible for a State to specify, for example, which of its regions fall within the Convention's scope and which ones are excluded therefrom. For the sake of the stability and clarity of legal situations and relations, it seems preferable that States intending to compile such a list or make such exclusions should give notice of such arrangements when signing the Convention. They will nevertheless still be able to make different arrangements subsequently by informing the Secretary General of the Council of Europe to that effect. In the case of States which do not deposit a list or make exclusions, domestic law will provide a basis for determining what authorities or communities are to be regarded as performing local or regional functions.

27. Paragraph 2 of Article 2 further enables States to preclude certain specified subjects and forms from the transfrontier co-operation provided for in the Convention. By "form" is meant, in particular, the various technical arrangements embodied in the models and outlines referred to in Article 3.

Article 3

28. This article is mainly concerned with the model agreements and arrangements drawn up within the Council of Europe.

Paragraphs 1 and 2

29. As Stated in paragraph 23 above, the text of the Convention draws a distinction between "agreements" concluded between States on the subject of transfrontier co-operation and "arrangements" concluded between territorial communities and authorities.

30. The models referred to in the Convention for these agreements and arrangements cover forms of co-operation already in existence. The Council of Europe compiled a catalogue of a large number of agreements reflecting the desire of territorial authorities and communities to develop their relations at frontier level. In the first of these paragraphs States undertake to encourage any initiative by territorial communities and authorities on the basis of the model and outline agreements, statutes and contracts appended to the Convention but not forming an integral part thereof. The two paragraphs make it clear that the international agreements and the arrangements between territorial communities or authorities are two modes of transfrontier co-operation.

The texts of these two paragraphs specify that States may conclude such inter-state agreements as they deem necessary for the conclusion of agreements and arrangements between territorial communities or authorities in order to stipulate more precisely the framework, forms and limits within which they would like territorial communities to act.

31. The texts further emphasise the importance which Contracting Parties attach to the model agreements and arrangements as illustrations of the possible subjects and forms of transfrontier cooperation. They imply an acknowledgement by Contracting Parties that the practical implementation of transfrontier co-operation presupposes the conclusion of agreements and/or arrangements of the kind embodied either in the models already drawn up or those yet to be drawn up within the Council of Europe. They also denote the readiness of Contracting Parties to take the models into consideration or be guided by them.

32. However, these are only "models" or standard forms proposed to States and territorial authorities or communities as a means of facilitating their co-operation efforts. The fact that they have been appended to the Convention does not oblige Contracting Parties to use them or even, if they do intend to use them, to apply them as they stand (see also paragraph 3 of Article 3). The reference to these models in the Convention does not give them treaty force but merely implies an undertaking by States to pay them all due attention. Moreover, the models are texts of a fairly general kind intended to be adapted to various cases. It will lie with the States concerned and with territorial authorities and communities to make all necessary arrangements in keeping with the texts' policy when they decide to conclude co-operation agreements. States and territorial communities will thus regard the models as examples and retain full freedom to adapt them to particular situations and co-operation objectives.

33. Lastly, paragraph 1 refers to the possibility of drawing up new model agreements or arrangements within the Council of Europe, a possibility which is confirmed in Article 8, paragraph 2. Such model agreements, including those already drafted and appended to the Convention, have no treaty value. It will therefore not be necessary to append to the Convention future models which may be drawn up within the framework of the Council of Europe. They could be subject to a procedure of notification to the authorities concerned.

Paragraph 3

34. The forms of co-operation proposed in the Convention are not intended as a mandatory framework for transfrontier co-operation. It is therefore specified that States may resort to other forms of transfrontier co-operation. Similarly, the Convention's entry into force does not *per se* have the effect of invalidating co-operation agreements already concluded between Contracting Parties.

Paragraph 4

35. This provision supplements the principle already laid down in Article 1 in two respects:

a. In no event are the central government's powers in general policy-making or the conduct of international relations affected by the Convention. The Convention does not have the effect of conferring an "international" character on transfrontier relations.

b. Each State's rules of control and supervision to which territorial authorities or communities are subject remain as prescribed by the State's domestic law. In the context of transfrontier co-operation, territorial authorities and communities are governed by the usual rules of control and supervision, unless the State to which they belong decides to modify the rules, in order, for example, to bring them closer into line with the circumstances of transfrontier co-operation.

36. As regards any conclusion of agreements that are incompatible with the powers provided for in each Contracting Party's domestic law in the matter of international relations and general policy-making or with the rules of control and supervision governing territorial communities or authorities, it was specified in the negotiations that any agreements and arrangements which departed from the standards laid down in national legislation would naturally be null and void. Moreover, it was emphasised that a State could still stipulate the conditions to which agreements were subject under its domestic law by making a declaration in accordance with paragraph 2 of Article 2 at the time of signature or ratification. Mention should also be made of the models and outlines appended to the Convention which provide solutions on this point (see, in particular, model 1.1, Article 6, which may be incorporated in all the other model international agreements; model 1.4, Article 5; model 1.5, Articles 7-9; and outline 2.4, Article 7).

Paragraph 5

37. The purpose of the optional communication provided for in this article is to ensure that the other Contracting Parties are informed which authorities are empowered to exercise control or supervision over the territorial communities or authorities concerned, so that they are aware of the existence of such control. Such information may be particularly useful for determining the validity of undertakings given by local communities or authorities belonging to another State.

Article 4

38. Transfrontier co-operation is liable to be hindered by various domestic law provisions such as:

- certain rules concerning public accountancy, especially as regards the layout of accounts or budgets;
- certain tax or customs regulations which may hamper exchanges of services;
- subsidisation techniques or loan conditions which may impede the synchronisation of joint financing arrangements;

- nationality conditions for the award of public works contracts, public utility concessions or supplies contracts (in the case of the EEC States, however, most restrictive rules of this kind are being eliminated);
- divergencies in reference standards applicable to this or that public utility as regards the specifications of services supplied;
- regulations governing currency exchange and transfers of capital.

There may be yet other administrative rules of this kind which make transfrontier co-operation considerably more difficult.

39. This means that States should attempt to make the necessary adjustments or exceptions to their law to take account of the specific nature of transfrontier co-operation. They are accordingly called upon to identify any points on which such difficulties may arise. Once these difficulties have been ascertained, ways of overcoming them will need to be sought. It is considered desirable that, before taking the measures concerned, States should confer with their partners and exchange any relevant information so that the measures may be co-ordinated as fully as possible and may allow for the legal and administrative system to which the foreign authorities or communities involved in transfrontier co-operation are subject.

40. The provisions of Article 4 do not affect the principle laid down in Article 2, paragraph 1, that the powers of territorial authorities and communities are not altered by the Convention. In the first place, the adjustments envisaged in Article 4 do not concern the actual powers of these authorities or communities but only certain conditions on which they are exercised; secondly, any changes made in accordance with Article 4 will not be a direct result of the Convention but will be decided on by each State in the light of practical experience of transfrontier co-operation.

Article 5

41. The purpose of this article is to emphasise that States which undertake to promote transfrontier co-operation should avoid any discrimination against territorial authorities and communities engaging in such co-operation and should, where appropriate, grant them the same advantages and facilities as they would normally have if they were acting in a purely national framework. This mainly concerns the technical and financial aid given to territorial authorities and communities, particularly in the form of grants.

Article 6

42. This article, like the next two, stresses that an important aspect of transfrontier co-operation is the exchange of information. It requires each Contracting Party to do its utmost to provide its partner with any information capable of facilitating transfrontier co-operation between territorial communities and authorities within their jurisdiction.

Article 7

43. The informing of territorial communities or authorities of the means of action available to them under the Convention is of particular importance for the implementation of the Convention's provisions. The expression "see to" (the informing of territorial communities or authorities) was chosen to allow for the fact that some States, particularly federal ones, are not authorised to supply information direct to local authorities. Such States nevertheless, in becoming Parties to the Convention, undertake to "see to it" that the information is provided by the responsible authorities and, where appropriate, that these authorities are assisted in their task by being furnished with the necessary particulars.

44. The information concerned relates, of course, to the contents of the Convention itself and of the model agreements and arrangements appended thereto as well as any agreements and arrangements drawn up in the Council of Europe in pursuance of Article 3, paragraph 1. It also relates to any means of action made available to territorial communities or authorities through the conclusion of international agreements as provided for in Article 3, paragraph 2. In addition, the communities and authorities should be informed of any legal, administrative or technical arrangements made by the Contracting Parties in pursuance of Article 4 for dealing with various difficulties in the implementation of transfrontier co-operation.

45. Contracting Parties should ensure that the information supplied to territorial authorities and communities is sufficiently comprehensive and precise. In particular, any decision or measure taken or declaration made under Article 2, paragraph 2, or Article 12 should be communicated to the communities or authorities concerned.

Article 8

46. The provisions of paragraph 1 relate to the implementation of the Convention, as the information to be forwarded concerns international agreements concluded between the Contracting Parties and arrangements made by territorial authorities or communities in accordance with Article 3. It should also be noted that the model agreements and arrangements included a stipulation that the Secretary General of the Council of Europe should be informed of the conclusion of such agreements and arrangements.

47. Paragraph 1 of Article 8 should not be dissociated from paragraph 2 of the same article, whose purpose is to ensure the Convention's further development by enabling Contracting Parties to make proposals for adding to or extending the Convention and the model agreements and arrangements. Such proposals are transmitted to the Secretary General, who submits them to the Committee of Ministers for a decision on action to be taken.

48. The Secretary General may gather information and documentation on the implementation of the Convention in the various States as well as on any agreements and arrangements concluded. Moreover, as Article 3, paragraph 1, provides for the possibility of other model agreements and arrangements being drawn up in the Council of Europe, the Secretary General may propose to the Committee of Ministers that further models be prepared as part of the Council of Europe's work programme by whatever procedure the Committee of Ministers chooses. Any decision to supplement or amend the Convention remains, of course, a matter for the Committee of Ministers ⁽¹⁾.

Articles 9-12

49. The final provisions in Articles 9-12 are in conformity with the model final clauses for treaties drawn up in the Council of Europe.

(1) Reference should be made in this connection to the recommendations made by the 2nd Conference of European Ministers responsible for Local Government (Athens, 1976), alluded to in the introduction to this report.

APPENDIX

Brief description of the system of model and outline agreements, statutes and contracts appended to the Convention

50. It should be remembered that, as Stated in Article 3, paragraph 1 (second sentence), these models and outlines are intended for guidance only and have no treaty value.

A. International agreements

51. The model agreements numbered 1.1 to 1.5 form a hierarchical or graduated system. One of them (model 1.2) deals with the regional level. It provides for the establishment of governmental regional commissions of which various examples are already in existence. The model is based on the sum of practical experience gained from the operation of these commissions and embodies the solutions regarded by the group of experts as the most appropriate to this kind of co-operation.

52. The three model inter-state agreements numbered 1.3 to 1.5 are concerned with three forms of co-operation between local authorities and communities. Although some States may well make use of these models for developing regional co-operation, the models are mainly aimed at local, intermunicipal and infra-regional co-operation. They relate to increasingly advanced forms of co-operation, namely:

- consultation,
- conclusion of contracts,
- establishment of organs of transfrontier co-operation.

53. The two first-named forms of co-operation may, domestic law permitting, be resorted to by Contracting States without any special convention authorising them to do so. In some cases, however, international agreements may be considered useful for specifying certain practical or legal arrangements concerning the use of these forms of co-operation, especially as regards contractual co-operation. An international agreement might prove necessary to provide a legal basis for the setting up of organisations for transfrontier co-operation (outline 2.6). There is no question, however, of organs governed by international law being set up in this connection. The aim is merely to enable a signatory State's local authorities to join another State's consortium or association of local authorities.

54. Model agreement 1.1 is a variant to the Convention's provisions which is proposed to States which would like to amplify or extend the Convention's contents at bilateral or multilateral level.

B. Arrangements between territorial communities or authorities

55. The outline agreements, contracts and statutes set out under this heading illustrate various forms of transfrontier co-operation between territorial communities or authorities.

56. The first subject dealt with is the setting up of transfrontier groups for consultation and co-ordination between local authorities. As they are concerned only with relations aimed at mutual information and consultation or the co-ordination of actions which continue to be the sole responsibility of each of the authorities concerned, such "exchange groups" are by no means very formal and do not need any special legal basis. This is the primary, least advanced form of transfrontier co-operation. A distinction may nevertheless be made between three levels:

- mere consultation (outline 2.1);
- co-ordination in the (separate) administration of matters of mutual interest (outline 2.2);
- contracts for the setting up of associations (outline 2.3) or for the provision of supplies or services between local authorities in frontier areas (outlines 2.4 and 2.5).

57. Outline 2.6, concerning the setting up of a transfrontier co-operation organisation in the form of a consortium of local authorities or between public law organisations, will usually entail the prior conclusion of an international agreement on the lines of model 1.5.