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**EUROPEAN COMMITTEE ON CRIME PROBLEMS**  
**(CDPC)**

**COMMITTEE OF EXPERTS**  
**ON THE OPERATION OF EUROPEAN CONVENTIONS**  
**ON CO-OPERATION IN CRIMINAL MATTERS**  
**(PC-OC)**

**DRAFT EXPLANATORY REPORT TO THE THIRD ADDITIONAL PROTOCOL TO THE  
EUROPEAN CONVENTION ON MUTUAL ASSISTANCE IN CRIMINAL MATTERS**

*Document revised by the PC-OC Mod at its 36<sup>th</sup> meeting on 24-26 September 2024*

I. The Third 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 ..., on the occasion of the ...th 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 on Co-operation in Criminal Matters (PC-OC) is entrusted, in particular, with examining the functioning and implementation of Council of Europe conventions and agreements in the field of international co-operation in criminal matters, with a view to adapting them and improving their practical application where necessary.

2. Within the framework of its tasks, the PC-OC identified the need to update a number of provisions of the European Convention on Mutual Assistance in Criminal Matters of 1959 ("the Convention"), as well as of its Second Additional Protocol, in order to take account of the rapid evolution of practices and support systems relating to mutual assistance in recent years, including an increased use of video-conferencing and other technological tools, notably in the context of the COVID19 pandemic. It also identified areas where the provisions of the Convention and its Additional Protocols could be complemented to take account of certain shortcomings identified by practitioners.

3. Having explored various options, the PC-OC agreed that an additional protocol to the Convention was the most appropriate and pragmatic response to modernise the Convention in light of these considerations. This proposal was approved by the CDPC and the preparation of a new Protocol to the Convention was consequently included in the terms of reference of the PC-OC for the period 2022-2025 by the Committee of Ministers of the Council of Europe.

4. The PC-OC drew up a Third Additional Protocol to the Convention on the basis of proposals made by various delegations. The draft Third Additional Protocol was finalised by the PC-OC at its 86th meeting (12-14 November 2024) and submitted to the CDPC for approval.

5. The draft Third Additional Protocol was examined and approved by the CDPC at its ... plenary session (November 2024) and submitted to the Committee of Ministers.

6. At the ... meeting of their Deputies in ..., the Committee of Ministers adopted the text of the Third Additional Protocol and decided to open it for signature on ....

## **General considerations**

7. 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 two Additional Protocols thereto.

8. 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.

9. This Protocol takes due account of political and social developments in Europe and technological changes worldwide.

10. 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 the Convention, as well as the First and Second Additional Protocols thereto.

## **Commentaries on the Articles of the Third Additional Protocol**

### **Article 1 – Channels of communication**

11. The drafters took account of rapidly changing practices regarding the use of electronic means of communication in the context of mutual assistance in criminal matters. They considered that the use of electronic transmission for mutual assistance requests and other communications has clear benefits to both requesting and requested Parties. These include facilitating a more efficient process, reducing the time taken to process requests, creating a more secure route, improved compliance with data protection requirements and reduced costs as compared to paper-based transmission. The stipulation in paragraph 1 that requests shall be addressed in writing is to be understood as excluding communications that do not leave a written trace, such as an oral exchange, and has no bearing on the form of the written communication, whether by electronic means or by post, for example.

12. Improving upon the approach adopted in the Second Additional Protocol, which introduced the use of electronic means of communication as a possibility for the first time, this provision establishes electronic communications as the preferred means in all cases of sending and receiving mutual assistance requests and other communications in the mutual assistance process.

13. There was general agreement within the PC-OC that transmission of encrypted communications via secure IT systems was the most efficient method in this respect, and preferable to broader electronic transmission (for example via email), which in turn is preferable to paper-based or fax transmission. Given the wide variety of practices and mindful of future-proofing, however, it was not considered necessary to make this hierarchy explicit in the text of the provision itself.

14. “Any other communications” mentioned in paragraph 9 include, but are not limited to, notifications made in accordance with Article 3.

15. The drafters also wished to acknowledge the clear direction towards the use of electronic signature of documents, by including a reference to it in this provision, in order to allow the Convention to encourage and better accommodate this evolution. They agreed that electronic signature should be considered an accepted certification method in the context of mutual legal assistance.

16. The drafters furthermore noted that some Contracting Parties had entirely dematerialised their judicial document management systems, thus rendering obsolete the traditional distinction between paper originals and electronic versions. They considered that this *de facto* situation, which is likely to become increasingly widespread in the future, should not create an impediment for practitioners when co-operating on the basis of the Convention.

17. Although there is a clear tendency towards the use of electronic communications over paper transmission, the drafters agreed that there might be cases where the use of other means of communication may still be necessary for various reasons, including the requirements of the applicable national legal framework. In such cases, this provision would still allow the requested State to request the originals or certified copies of the mutual assistance request and supporting documents.

18. The declaration required under paragraph 11 concerns the conditions under which Parties are willing to accept electronic communications sent in accordance with paragraphs 8 and 9 of this Article.

### **Article 2 – Hearing by video conference**

19. The PC-OC observed that the use of video conference in judicial proceedings had grown notably during the COVID19 pandemic and that it was increasingly being used to facilitate incoming mutual assistance requests, particularly in the case of voluntary witness testimonies. The drafters also agreed that video conferencing proved itself a useful, resource-efficient and reliable tool, and a practice to be encouraged in appropriate circumstances. Consequently, they considered that the text of the relevant provision in the Second Additional Protocol (Article 9) should be updated to allow for greater flexibility

and increased use of video conferencing where mutual assistance requests meet the conditions and requirements of the requested and requesting States.

20. The changes in text to paragraphs 1 and 3 of this provision re-balance their wording to ensure that hearing by video conference is not treated as a secondary option for the hearing of witnesses and experts. While there may be instances where video conferencing is a less favoured alternative to physical attendance, video conferencing is a valuable tool in and of itself and can offer a more efficient and cost-effective method of facilitating proceedings including where there are logistical challenges such as long distance between respective Parties, costs of travelling, security concerns, or reduced mobility of witnesses or experts. The decision to request a hearing by video conference should be considered on a case-by-case basis and depend on whether such a hearing would be the most efficient and effective way for an individual to give evidence, while also ensuring relevant safeguards, including the right of defence.

21. In the context of paragraphs 2 and 5, 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 video conference is not provided under the law of the requested Party, or that one or more detailed conditions for a hearing by video conference would not be met under national law.

22. The drafters also considered it expedient to add a new paragraph in order to specify that Contracting Parties can use special bilateral or multilateral agreements or arrangements to replace or supplement the provisions of the Convention. It is understood that such agreements or arrangements are entered into in accordance with the national law of the Contracting Parties and can only affect their territories. The drafters considered that the term "competent authorities" should not be understood in a narrow sense as only referring to central authorities, but can refer to other authorities and agencies involved in the organisation of hearings by video conference.

23. One example considered by the drafters where such an arrangement could be envisaged concerned cases where the requested State considers that the obligation to ensure the presence of its judicial authorities in hearings by video conference may be dispensed with, subject to appropriate conditions being met and the agreement of the requesting State, the intention being to alleviate the burden on the courts of the requested State. This could for example relate to cases where the witness or expert consents/volunteers to provide evidence and where there are no particular issues regarding the protection of their rights.

### **Article 3 - Use of technical recording devices in the territory of another Party**

24. Recording devices (GPS, audio, etc.) are effective tools in the fight against the most serious forms of transnational crime. However, the drafters observed that the use of such devices is severely hampered by legal and practical difficulties, in particular in border regions with significant cross-border flows. It is not foreseeable in all cases if and when a device installed by the competent authorities in one Party will leave that Party's territory, as the movement of these devices is not under the control of the authorities who authorise their installation. In such cases, non-compliance with the regulations of another State Party can lead to vital evidence of criminal activity being considered inadmissible. The drafters considered that the definition of recording devices for the purposes of this Article could also include the use of software.

25. This article establishes a framework of co-operation in such cases, in order to take account of current circumstances and to facilitate mutual assistance and co-operation in this particular area, while acknowledging the need for a speedy communication between the Parties, and while ensuring that a mutual assistance request remains the preferred option whenever it is feasible. Provided that the Party using the technical recording device was not in a position to send such a mutual assistance request in advance or that a request to that effect could not be executed by the requested Party prior to the entry of the device into its territory, the Article provides for an accelerated notification procedure, by way of derogation from Article 14 of the Convention. This procedure allows the technical recording devices to remain active following entry into the territory of another State Party, pending definitive authorisation by that Party regarding the use of the data collected there. In the framework of this procedure, the Parties are referred to as the "notifying Party" and "notified Party" in paragraphs 2 to 5.

26. Paragraph 2 lists the relevant information that this notification must contain, with a view to allowing the requested Party to take a swift decision without the need for complementary information. For this list, the drafters took account, *mutatis mutandis*, of relevant international standards, including the Convention of 29 May 2000 on Mutual Assistance in Criminal Matters between the Member States of the European Union. The intention behind the inclusion of sub-paragraph 2.c was the facilitation of a proportionality test for the notified Party.

27. Paragraph 3 requires the Party which is using the technical recording device to notify other Parties in situations where it is foreseeable that the device will cross their border, for example based on its co-ordinates and trajectory, or other relevant information.

28. When appropriately notified by the notifying Party, the notified Party shall indicate as soon as possible whether it allows such devices to remain active on its territory and whether their past activity up to that point is to be considered valid. Considering the nature of proceedings with respect to which such recording devices are generally used and the need for the Party to know as soon as possible whether it may or may not use the data obtained on the territory of another Party in these proceedings, the drafters agreed on the need for a speedy response from the notified Party. Drawing inspiration from the Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters as regards interception where no technical assistance is needed from another Member State, they agreed that 96 hours were an appropriate benchmark. The drafters agreed that failure by the notified Party to respond within this time frame should not be considered as a form of tacit authorisation and that an explicit authorisation would be required. Where it is unable to respond to the notification within this time frame, the competent authority of the notified Party should immediately enter into contact with its counterpart in the notifying Party to agree on a different time frame.

29. The notified Party may refuse authorisation to use technical recording devices on its territory, in particular when recording of this type would not be authorised in a similar domestic case. Recording shall cease as soon as the notified Party so requests. Paragraph 4 further specifies that the notified Party can impose conditions even if it authorises the continued use of technical recording devices in its territory, which may include specific places where recording would not be permitted or the submission of a full mutual assistance request, in accordance with the pertinent articles of the Convention, including Articles 14 and 15. The notified Party can furthermore order the notifying Party to destroy, fully or in part, any data collected within its territory.

30. As this type of co-operation requires a swift and specialised response from the notified Party, and considering that some Parties might not have put in place specialised authorities or procedures for these types of requests, paragraph 5 requires Parties ratifying this Protocol to identify the authorities to submit and receive requests under this Article, by way of derogation from Article 15 of the Convention, in order to reduce uncertainty and increase efficiency. Parties need not give the name and address of a specific individual but may identify an office or unit that has been deemed competent for the purposes of sending and receiving requests under this article. Also in the interest of a speedy response, Parties shall declare the language(s) in which these notifications are to be addressed to them, by way of derogation from Article 16 of the Convention.

31. Paragraph 6 provides for a series of declarations, allowing Contracting Parties to exclude the accelerated notification procedure in certain cases.

[32. Paragraph 7 gives the possibility to Parties, if they mutually agree, to extend the notification procedure of this Article to the interception of telecommunications in the territory of another Party without the technical assistance of that Party. This is primarily intended to cover situations where a person's communications are intercepted in a Party, where the operator is also located, and when that person moves into the territory of another Party. This is a situation which is different from those envisaged under Article 4, as collection of data would be technically possible for the notifying Party without the assistance of the notified Party. The drafters considered that these are situations that arise regularly in practice and wished not to leave a legal vacuum concerning co-operation in such cases.]

#### **Article 4 – Letters rogatory for the interception of telecommunications**

33. States Parties to the Convention regularly need to resort to the interception of telecommunications for the purpose of investigating criminal offences. The advances in technology since the entry into force of the Convention, as well as the evolving nature of criminality, including increased mobility in the context of transborder organised crime, make the interception of telecommunications also increasingly relevant for the purposes of mutual assistance in criminal matters.

34. Article 1, paragraph 1 of the Convention allows States Parties to co-operate regarding the interception of telecommunications. This was confirmed and developed by the 1985 Recommendation No. R (85) 10 of the Committee of Ministers of the Council of Europe on letters rogatory for the interception of telecommunications. The drafters nevertheless considered that a specific provision in the Third Additional Protocol would better guide practitioners, facilitate co-operation in this area and promote a more uniform application of the Convention.

35. The wording of this Article follows very closely the aforementioned Recommendation, while also taking account of more recent standards, in particular those developed within the framework of the European Union with the Convention of 29 May 2000 on Mutual Assistance in Criminal Matters between the Member States of the European Union and the Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters. Similarly to the Recommendation and these standards, the drafters decided that it was not necessary to define the term ‘telecommunications’, which is not limited to telephone conversations and should be understood in the widest sense of the word. The purpose of this choice is to ensure that the provisions of this Article may apply to all forms of communication made possible by current and future technologies.

36. Paragraph 1 sets out the information a letter rogatory for the interception of communications shall contain in addition to the indications of Article 14. This is to be seen in conjunction with paragraph 2, which allows the requested Party to refuse execution in cases where interception would not be justified or permitted according to its legislation and practice in an analogous domestic case. The intention behind the inclusion of sub-paragraph 1.b is the facilitation of a proportionality test for the requested Party. In that spirit, it is to be understood that the requested Party may ask for complementary information to assess the compatibility of the interception request with its legislation. In the spirit of Article 1, paragraph 1 of the Convention, the desired outcome of this provision is a similar treatment in the requested Party between warrants emanating from its own national authorities and requests made under the Convention by the competent judicial authorities of other States Parties.

37. The drafters of the Protocol agreed that the additional ground for refusal defined in paragraph 2, namely that the interception of telecommunications would not have been authorised in a similar domestic case, is broad enough to cover a range of considerations for the requested Party. This would allow the requested Party to refuse execution in cases where the request falls outside the scope of a catalogue of offences for which interception of communications might be authorised. It also covers any refusal based on human rights concerns assessed according to the law of the requested Party, in particular as regards the right to respect for private and family life or protection against discrimination on any prohibited ground.

38. Paragraph 3 corresponds to the need for further co-ordination and information exchange where the period of time during which interception is requested is longer than what would be permissible in the legislation and practice of the requested Party.

39. Paragraph 4 gives the possibility to the requested Party to make the execution of letters rogatory for the interception of telecommunications subject to a limited list of conditions enumerated in paragraph 4. Among these, sub-paragraph c enshrines a kind of “rule of speciality”, similar to the principle underpinning extradition proceedings. Thus, if the records resulting from an interception contain any evidence of an offence which did not underlie the original letter rogatory for interception, such evidence cannot be used by the requesting Party without having obtained the explicit consent of the requested Party for this purpose.

40. Paragraph 5 allows the requesting Party to specifically request the transcription, decoding or decrypting of the recording resulting from the interception. This provision is inspired by Article 30,

paragraph 7 of the Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters. Given the considerable resources these acts imply, the drafters decided to leave it up to the requested Party to assess their feasibility in a given case.

41. Paragraph 6 enshrines the right of the requested Party to eliminate, of its own initiative, the parts of the records which are not relevant for the criminal proceedings in respect of which the letter rogatory has been sent, before transmitting the results of the interception to the requesting Party.

42. When the records of the interception show evidence of a crime committed within the territory of the requested Party, paragraph 7 of this Article encourages the requesting Party to lay information with a view to proceedings in the courts of the requested Party, in accordance with Article 21 of the Convention.

## **Article 5 – Costs**

43. This provision amends Article 20 of the Convention, as modified by Article 5 of the Second Additional Protocol. More specifically, it introduces two new exceptions in paragraph 2 to the principle that Parties shall not claim the refund of costs resulting from the execution of mutual assistance requests. Both of these exceptions concern the interception of communications, which reflects the drafters' observation that, in certain cases, the execution of letters rogatory for the interception of communications may engender substantial costs for the requested Party compared to other types of mutual assistance.

## **Article 6 – Time limit for the execution of requests for mutual assistance**

44. The drafters considered that it would be expedient to introduce a provision regarding time limits for the execution of mutual assistance requests, with a view to increasing the effectiveness of and expediting mutual assistance under the Convention, as delays constitute a major impediment to cross-border crime fighting.

45. The drafters considered that a time limit of 180 days was a reasonable reference point for the vast majority of mutual assistance requests. However, this Article gives due consideration to the fact that in special cases, such as those involving deprivation of liberty, faster execution may be necessary, while in some exceptional cases, execution within the usual time limits is not possible. While the drafters decided against setting a maximum period for the execution of mutual assistance requests, this provision seeks to clarify the duty for both Parties to keep communication channels open with a view to ensuring that execution takes place in the most time and resource-efficient manner as possible.

## **Article 7 – Data protection**

46. This provision is based on Article 26 of the 2<sup>nd</sup> Additional Protocol and follows the same approach. The text reflects the fact that the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (ETS No. 108) was modernised with the Protocol amending it (CETS No. 223), which was opened for signature in 2018.

47. The drafters agreed that it was not a precondition for Contracting Parties to the Protocol to have ratified, accepted or acceded to this Protocol in order to raise data protection concerns on the basis of the modernised Convention 108, or for the Amending Protocol to have entered into force. This forward-thinking approach is analogous to the situation at the moment of the opening for signature of the Second Additional Protocol to the Convention, when not all States Parties to the Convention had ratified the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data.

48. 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".

49. 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.

50. 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 1981. 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.

51. 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.

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

#### **Article 8 – Friendly settlement**

53. 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.

#### **Article 9 - Relations with the Convention and its Additional Protocols**

54. This provision specifies the provisions of the Second Additional Protocol to the Convention which shall be superseded by the provisions of the Third Additional Protocol. It also explicitly states that the Third Additional Protocol shall not affect the application of Article 26 of the Convention, be it regarding bilateral or multilateral agreements on mutual assistance in criminal matters, or the possibility of States Parties to regulate their mutual relations in this field exclusively on the basis of uniform legislation or of a special system.

#### **Articles 10 to 15 – Final clauses**

55. These articles are based on the " Revised draft model final clauses for conventions, additional protocols and amending protocols concluded within the Council of Europe" adopted by the Committee of Ministers at the 1291<sup>st</sup> meeting of their Deputies on 5 July 2017, and the final clauses of the Convention.