

7968/95

LIMITE

JUSTPEN 86

OUTCOME OF PROCEEDINGS

of : Article K.4 Committee

for: COREPER/Council

Subject: Draft Convention on extradition between the Member States of the European Union

1. At its meeting on 6 and 7 June 1995, the K.4 Committee examined the draft Convention on extradition between the Member States of the European Union. Discussions were based on the outcome of the proceedings of the Working Party and of Steering Group III, which gave the various questions arising extensive, detailed examination in the light of the written contributions submitted by a large number of delegations.
2. Progress has been made in the past six months on several aspects of the draft Convention, particularly on the following issues:
 - extraditable offences (Article 2(1));
 - fiscal offences (Article 4(1));
 - extradition of nationals (Article 5);
 - lapse of time (Article 6).

3. A number of issues nonetheless need to be examined in more depth, as is clear from the text annexed hereto. Some delegations have also expressed the wish to examine a number of additional questions during future discussions, in particular:

- house arrest (6427/95 JUSTPEN 51 – Italian delegation);
- the jurisdiction of the Court of Justice regarding the Convention (German and Netherlands delegations and Commission representative);
- Articles VIII and IX in 4309/95 JUSTPEN 6 (requests and supporting documents, supplementary information) (Netherlands delegation);
- transit (Austrian delegation, which commented that this subject was included in the Convention on simplified extradition procedure between the Member States of the European Union).

The German delegation reserved the right to add questions to this list.

4. At the K.4 Committee meeting the Presidency suggested that the Council address the following questions:

(a) Extradition of nationals (Article 5)

✓ Detailed discussion of this question has shown it to be a particularly difficult issue.

Several delegations wanted extradition of nationals without reservations while others could not accept that approach. Of the latter, six delegations (D/A/FIN/GR/P/S) made it known that extradition of nationals was forbidden by their countries' constitutions. The Danish delegation also made it clear that, while the Danish constitution did not include a prohibition, extradition of nationals would give rise to sensitive political problems.

Following the discussions, the current text of Article 5 (annexed hereto) provides that any Member State may declare that it will not grant extradition of its nationals or will authorize it only under certain specified conditions.

Can the Council/COREPER agree to that approach?

(b) Political offences (Article 3)

Aspects relating to political offences were extensively discussed at the various meetings. Delegations made several suggestions to the Working Party.

Consideration was given in particular to the following arrangements:

- the French delegation suggested a system whereby extradition would not be refused in the case of a number of political offences set out on a list; Member States would nonetheless be able to enter reservations on that possibility by means of a declaration ⁽¹⁾;
- various delegations wanted it established as a general principle that extradition would not be refused except in specific cases; however, the derogations they suggested varied and may be summarized as follows:
 - = the Belgian delegation suggested admitting reservations whereby the principle of non-refusal of extradition would apply only to one or more categories of offences enumerated in a list ⁽²⁾;
 - = the German delegation proposed admitting reservations whereby application of the general principle would be limited to a list of specified categories of political offences ⁽³⁾;
 - = the Netherlands delegation suggested admitting a reservation in respect of political offences which was based on constitutional law ⁽⁴⁾;

⁽¹⁾ See 4512/95 JUSTPEN 10.

⁽²⁾ See 8768/94 JUSTPEN 50.

⁽³⁾ See 6306/95 JUSTPEN 46.

⁽⁴⁾ See 4309/95 JUSTPEN 6.

- = the Portuguese delegation considered that extradition could be refused if the political offence in question was regarded as such by the requested State in relation to a requesting State which would avail itself of the possibility of derogating from its obligations under the Human Rights Convention pursuant to Article 15(1) thereof;
- = the Spanish delegation wanted no exceptions to the general principle of non-refusal of extradition in view of the mutual trust which should exist between Member States' judicial systems. Similarly, some delegations could agree to dispense with any article referring to political offences on the grounds that in practice there were no political offences which could prevent extradition within the European Union.

Owing to these differences of opinion, a compromise solution based on a list has been virtually ruled out. The proceedings have accordingly tended towards a general provision as set out in Article 3(1) of the annexed draft. Under that form of words, no offence is to be regarded as having a political complexion for purposes of extradition between Member States and, consequently, as constituting a ground for refusing extradition.

In order to safeguard the constitutional principles of some Member States, Article 3(2) provides that extradition will not take place if the requested State has substantial grounds for believing that the extradition request has been made for the purpose of prosecuting the person for the reasons mentioned in Article 3(2) of the European Convention on Extradition (race, religion, nationality or political opinion).

Can the Council agree to that approach? If so, under what conditions?

(c) **Double criminality requirement in the case of criminal organizations**

The Italian delegation suggests including a rule in the Convention to the effect that any form of association to commit offences established as offences by the requesting State's law is to be regarded as an extraditable offence. This would make it possible to derogate from the double criminality principle in the case of offences committed by criminal organizations.

Can the Council give a mandate to consider this question further?

5. Conclusion

COREPER/the Council is invited to discuss the three questions described in point 4 (criminal organizations, political offences and extradition of nationals) with a view to formulating guidelines for further work on this draft Convention.

DRAFT

Convention on extradition
between the Member States of the European Union

Article 1 – General provisions

1. The provisions of this Convention shall, in relations between Member States, supplement and facilitate the application of the European Convention on Extradition of 13 September 1957, the Convention on the Suppression of Terrorism of 27 January 1977 and the Convention of 19 June 1990 applying the Schengen Agreement and, in relations between the contracting Member States of the Benelux Economic Union, the first chapter of the Benelux Treaty of 17 June 1962 on Extradition and on Mutual Assistance in Criminal Matters, as amended by the Protocol of 11 May 1974 ⁽¹⁾.
2. Paragraph 1 shall not affect the application of more favourable provisions in the bilateral and multilateral agreements (...) between certain Member States, nor shall it affect extradition arrangements based on uniform laws or reciprocal laws providing for the execution in the territory of a Member State of warrants of arrest issued in the territory of another Member State, as provided for in Article 28(3) of the European Convention on Extradition of 13 December 1957 ⁽²⁾.

⁽¹⁾ Regarding paragraph 1:

- scrutiny reservation by the Danish delegation on the reference to the Convention on Terrorism;
- the text must not prevent amendment of the other conventions (United Kingdom delegation);
- the explanatory report will contain an explanation concerning paragraph 1, which is worded differently from Article 1(1) of the Convention on simplified extradition procedure between the Member States of the European Union.

⁽²⁾ The Finnish delegation has suggested that paragraph 2 be worded as follows:

- "2. The provisions of this Convention shall not affect any rules in force in or between Contracting Parties facilitating extradition procedures taking into account the legal safeguards of persons."

CHAPTER I

Article 2 – Extraditable offences ⁽¹⁾

1. Extradition shall also be granted in respect of offences which are punishable under the law of the requesting State by deprivation of liberty or a detention order for a maximum period of at least twelve months and under the law of the requested State by deprivation of liberty for a maximum period of at least six months.
2. Extradition may not be refused on the grounds that the law of the requested State does not provide for the same type of measure of deprivation of liberty, as envisaged in Article 25 of the European Convention on Extradition, as the law of the requesting State. ⁽²⁾
3. Article 2(2) of the European Convention on Extradition shall also apply where certain offences are punishable by pecuniary sanctions. ⁽³⁾

⁽¹⁾ The Italian delegation entered a reservation on the double criminality requirement in the case of criminal organizations and proposed that a provision worded as follows should be introduced:

"Any form of association to commit offences and any form of conspiracy to commit offences, established as offences by the law of the requesting State, shall likewise be considered as an extraditable offence."

At this stage, most delegations tabled reservations or scrutiny reservations on this proposal. The Working Party agreed to re-examine the proposal at a future meeting.

⁽²⁾ The French delegation wanted paragraph 2 replaced by the following text:

"2. For the purposes of this Convention, a "detention order" within the meaning of Article 25 of the European Convention on Extradition shall be regarded as a measure involving deprivation of liberty."

⁽³⁾ Scrutiny reservations by several delegations.

Article 3 – Political offences ⁽¹⁾

1. For the purpose of extradition between the Member States no offence shall be regarded by the requested State as a political offence, as an offence connected with a political offence or as an offence inspired by political motives.

2. However, extradition shall not be granted if the requested Member State has substantial grounds for believing that the request for extradition has been made for the purposes mentioned in Article 3, paragraph 2, of the European Convention on Extradition.

or

2. However, extradition shall not be granted if the requested Member State has substantial grounds for believing that the request for extradition has been made for the purpose of prosecuting or punishing a person on account of his race, religion, nationality or political opinion, or that that person's position may be prejudiced for any of these reasons.

⁽¹⁾ On Article 3:

- reservation from the French delegation which would prefer a system with a list along the lines of Article 3 in 5951/95 JUSTPEN 41;
- reservation from the Finnish delegation which would prefer the deletion of Article 3;
- reservation from the Irish delegation which would prefer a general rule with the possibility of reservations based on constitutional law;
- reservation from the Spanish delegation on paragraph 2 (either version);
- scrutiny reservations on Article 3 from the Danish, Luxembourg and Swedish delegations;
- scrutiny reservations from the Irish and United Kingdom delegations on paragraph 2;
- the Italian and Netherlands delegations considered that the words "or as an offence inspired by political motives" in paragraph 1 were linked with the reference in Article 1(1) to the Convention on terrorism and would have to be deleted if the said reference were to be deleted.
- Preference
 - for the first text of paragraph 2 from the German, Greek, Portuguese, Austrian, Luxembourg and Netherlands delegations,
 - for the second text of paragraph 2 from the Danish, Belgian, Swedish, Italian and United Kingdom delegations.

Article 4 – Fiscal offences

1. With regard to taxes, duties, customs and exchange, extradition shall also be granted in respect of (...) offences which correspond under the law of the requested State to a similar offence. ⁽¹⁾ ⁽²⁾
2. Extradition may not be refused on the ground that the law of the requested State does not impose the same type of taxes or duties or does not have the same type of provisions in connection with customs and exchange taxes and duties as the law of the requesting State. ⁽²⁾
3. When depositing its instrument of ratification, acceptance or accession any Member State may declare that it will grant extradition only for acts or omissions likely to constitute an offence in connection with excise, value-added tax and customs.

⁽¹⁾ The Legal/Linguistic Experts will examine whether the words "under the conditions in this Convention and the European Convention on Extradition" or something similar should be added. Scrutiny reservation by the United Kingdom delegation.

⁽²⁾ These paragraphs should be aligned on the text of Title II, Article 2, of the Second Additional Protocol to the European Convention on Extradition in all language versions.

Article 5 – Extradition of nationals ⁽¹⁾

1. Extradition may not be refused on the ground that the person claimed is a national of the requested State within the meaning of Article 6 of the European Convention on Extradition.
2. When depositing its instrument of ratification, acceptance or accession any Member State may declare that it will not grant extradition of its nationals or will authorize it only under certain specified conditions.

⁽¹⁾ Delegations were asked to consider in what circumstances Member States could extradite their nationals.

The German, Austrian, Finnish, Greek, Portuguese and Swedish delegations pointed out that in their countries extradition of nationals was forbidden under their constitutional law. The Danish delegation said that while its constitution did not provide for such prohibition, extradition of nationals was a very delicate political matter in Denmark.

The Italian delegation wanted the principle of reciprocity included in paragraph 2.

Reservation by the Netherlands delegation on Article 5.

It was suggested that explanations on this point should be included in the explanatory report.

The Working Party agreed to return to this Article at a future meeting.

Article 6 – Lapse of time ⁽¹⁾

1. Extradition may not be refused on the ground that the person claimed has, according to the law of the requested State, become immune by reason of lapse of time from prosecution or punishment.
2. Paragraph 1 shall not apply when the request for extradition refers to acts in respect of which the requested State has jurisdiction under its own criminal law.

or

Article 6 – Lapse of time ⁽²⁾

Extradition may be refused on the ground that the person has become immune by reason of lapse of time from prosecution or punishment according to the law of the requested State [only] if the offence in relation to which it was requested was subject to the criminal jurisdiction of that State.

¹⁾ Scrutiny reservation by the Danish delegation on Article 6.

Reservations by the Belgian and French delegations and scrutiny reservations by the Swedish and United Kingdom delegations on paragraph 2.

²⁾ Text proposed by the Italian delegation.

The Finnish, Portuguese and Spanish delegations favoured the Italian suggestion, whereas the Austrian, German, Swedish and United Kingdom delegations preferred a text with two paragraphs. Scrutiny reservation from the Austrian delegation. The United Kingdom delegation has suggested that in case of the Italian text the last part of the sentence should read "... was requested, was one in respect of which that State would have had criminal jurisdiction".

Article 6a – Amnesty ⁽¹⁾

Amnesty legislation enacted in the requested Member State shall not prevent extradition where that Member State did not have jurisdiction in respect of the offence for which extradition is requested.

Article 7 ⁽²⁾

1. The consent referred to in Article 14(1)(a) of the European Convention on Extradition is deemed to have been given if the person extradited, after he has been surrendered to a judicial authority of the requesting party and in accordance with the national law of that State, has expressly consented to being prosecuted, punished, and detained with a view to the carrying out of a sentence involving deprivation of liberty or of a detention order, for any offence committed prior to his being surrendered.
2. Every Member State shall adopt the measures necessary to ensure that the consent of the person extradited as referred to in paragraph 1 is established in such a way as to show that the person concerned has expressed his consent voluntarily and in full awareness of the consequences. To that end, the person extradited shall have the right to legal counsel.
3. The consent of the person extradited as referred to in paragraph 1 shall be recorded; the recording procedure shall be in accordance with the national law of the requesting State.
4. Any Member State may declare, when depositing its instrument of ratification, acceptance, approval or accession or at any other time, either that it will not implement the provisions laid down in this Article or under what circumstances it will implement them.

⁽¹⁾ Text proposed by the German delegation. Scrutiny reservations by the French, Greek, Irish and United Kingdom delegations.

⁽²⁾ The text was drafted on the basis of delegations' comments and will be re-examined at a future meeting.

The reasons why a provision stating that consent is irrevocable would not be justified will be set out in the explanatory report.

[Article 7a – Rule of speciality ⁽¹⁾]

A person extradited may be proceeded against or sentenced for any fact committed prior to his surrender, other than that for which the extradition was granted, to the extent that the criminal proceedings or the sanction do not imply the execution of a measure restricting his personal liberty].

Article 8 – Re-extradition between Member States ⁽²⁾

Surrender of the extradited person to another Member State by the requesting State for earlier offences shall not be subject to the consent of the requested State where Article 7 has been applied.

[Article X ⁽³⁾]

The Portuguese Republic will not grant the extradition of a person when it is requested for an offence punishable by a life sentence or detention order. However, extradition will be granted where the requesting State gives an assurance that it will encourage, in accordance with its law and practice regarding the carrying out of sentences, the application of any measures of clemency to which the person whose extradition is requested might be entitled].

(¹) This Article 7a, proposed by the Italian delegation (see 6427/95 JUSTPEN 51) received positive reactions from the Austrian, Portuguese and Netherlands delegations. At this stage, the German, French, Irish, Luxembourg, Danish, Belgian, Greek, Swedish and United Kingdom delegations tabled scrutiny reservations on the text.

Article 2(2) must be re-examined if Article 7a is adopted.

(²) The Austrian delegation proposed that Article 8 should read as follows :

"Article 15 of the European Convention on Extradition shall not apply in the case of re-extradition between Member States".

The Netherlands, German, Spanish and United Kingdom delegations and, without prejudice to a scrutiny reservation, the Italian delegation, were in favour of this text. However, the Finnish, Portuguese, French, Irish, Danish, Swedish and Greek delegations could not agree to the proposal.

(³) The Working Party agreed to ask the Council Legal Service to consider to what extent it was necessary to include "Article X" in the light of the reservation expressed by Portugal on Article 1 of the European Convention on Extradition when ratifying that Convention.