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NOTE

Subject: Explanatory report on the Convention relating to extradition between the Member States of the European Union

Delegations will find attached the text of the abovementioned report, as revised by the Legal/Linguistic Experts' Working Party.

CONVENTION RELATING TO EXTRADITION BETWEEN THE MEMBER STATES OF THE EUROPEAN UNION

EXPLANATORY REPORT

1. GENERAL CONSIDERATIONS

(a) At the ministerial meeting at Limelette on 28 September 1993, the Ministers of Justice of the Member States agreed on a declaration, subsequently adopted by the Justice and Home Affairs Council at its meeting on 29 and 30 November 1993, whereby it empowered the competent bodies of the European Union to examine the advisability for the Member States to conclude among themselves an extradition convention to supplement the 1957 European Convention on extradition of the Council of Europe and to amend certain of its provisions.

For that purpose, a work programme was outlined providing for the examination of both extradition procedures and substantive conditions of extradition, with a view to making them simpler and faster and therefore facilitating the granting of extradition.

On 10 June 1994 the Council, in the light of the work carried out till then, decided that attention should first be paid to the specific questions that arise from proceedings in which persons consent to their own extradition. The Convention on the simplified extradition procedure, concerning the extradition of consenting persons, was thus drawn up by the Council and signed by all Member States on 10 March 1995 ([1]).

Subsequently, work continued on the remaining items of the original programme, on the basis of a set of draft articles which eventually included various provisions of a procedural as well as of a substantive character. Above all, the latter required the political intervention of the Council, which on various occasions gave precise instructions to the organs involved in drawing up the text.

([1]) OJ No C 78, 30.3.1995, p. 1.

On 27 September 1996, the Convention relating to extradition between the Member States of the European Union was drawn up by the Council and signed on the same date by all Member States ([1]).

The Convention consists of a preamble, twenty articles and six declarations contained in an annex which forms an integral part of the Convention.

(b) The reasons behind the development of the convention are stated clearly in the preamble.

As shown by the declaration adopted in 1993, the Council – from the start of the activities carried out under Title VI of the Treaty on European Union to improve judicial cooperation in criminal matters – held that extradition plays a fundamental role in facilitating the exercise of criminal jurisdiction by Member States.

At the same time, it was unanimously held that the considerable similarities in the criminal policies of Member States, and, above all, their mutual confidence in the proper functioning of national justice systems and, in particular, in the ability of Member States to ensure that criminal trials respect the obligations stemming from the Convention for the Protection of Human Rights and Fundamental Freedoms, justified a revision also of the fundamental aspects of extradition (conditions for extradition; grounds for refusal; rule of speciality; etc.).

([1]) OJ No C 313, 23.10.1996, p. 11.

The activity carried out within the framework of Title VI of the Treaty concerning various serious forms of crime, moreover, made it increasingly clear that – as far as extradition is concerned – only decisive intervention affecting substantive conditions would bring about a significant improvement of cooperation in the most important criminal proceedings, such as those for terrorist crimes or organized crime.

On this basis, therefore, it was possible to develop those articles of the Convention – relating to dual criminality, political offences, extradition of nationals and matters connected with the rule of speciality – which (more than the other provisions, however important) make the new instrument a genuine innovation for extradition, in full keeping with the general desire of the European Union to adapt the whole sector of judicial cooperation in criminal matters to the needs of today and tomorrow.

The desired adaptation leads to changes requiring the review of provisions in national legislation and sometimes even to the constitution of Member States. The goal is set in the different articles. Some of these articles allow for the possibility of making reservations. This possibility, however, has been restricted as much as possible. The most important reservations either have a limited content (as is the case for the political offence reservation in Article 5), or allow full derogation from the new principle, but give rise to an alternative obligation for the Member State entering them (this being the case for Article 3 on dual criminality), or are subject to a special regime of temporary validity to facilitate reconsideration of the matter by the Member State which entered the reservation (this being the case for the reservation to Article 7 governing extradition of nationals). Furthermore, the possibility of a periodical revision of all reservations, including those not subject to the said regime of temporary validity, is provided for in the Declaration of the Council on follow-up attached to the Convention.

(c) Already in its declaration of 1993, the Council held that the new instrument should not replace the existing conventions, but supplement them. This supplementary nature of the new Convention is stated in Article 1, and partly addressed in the preamble, where it is specified that the provisions of existing conventions remain in force for all matters which are not governed by this Convention. Thus, this Convention does not contain an obligation to extradite. Such obligation is to be found in the "mother" conventions.

This approach – which means that the text focuses on aspects genuinely demanding change – results in the outcome that the European system of extradition will be a web of various complex sets of treaty rules, not valid for all States, which will interact with national legislation. For this reason, inter alia, the Council, in its declaration on follow-up, stated that it will periodically examine not only the functioning of this Convention, but also "the general operation of extradition procedures between the Member States", which include the other conventions and national practices.

2. COMMENTS ON INDIVIDUAL ARTICLES

Article 1 – General provisions

The purpose of the Convention is to supplement and facilitate the application, inter alia in accordance with Article 28(2) of the European Convention on Extradition, between the Member States, of certain international instruments in the field of extradition to which some or all of the Member States have become Parties. These instruments are listed in Article 1(1) of this Convention.

The instruments mentioned in the said paragraph 1 are partly "mother conventions" (the European Convention on Extradition and the Benelux Treaty) and partly supplementary instruments to those conventions (the European Convention on the Suppression of Terrorism and the Convention applying the Schengen Agreement).

This Convention is a supplementary convention to all these agreements. Therefore, it cannot be used as the sole legal basis for extradition. As is noted in the general considerations to this explanatory report, a further consequence of placing this Convention in the framework of the European Convention on Extradition and the other instruments mentioned above, is that the provisions of those conventions remain in force for all matters not covered by this Convention. Similarly, all reservations and declarations to those Conventions are still applicable between Member States that are parties to this Convention to the extent that they are related to matters that are not regulated by the said Convention.

In this connection, attention should be drawn to the declaration made by Portugal, annexed to this Convention, relating to Portugal's reservation to Article 1 of the European Convention concerning extradition requested for an offence punishable by a life sentence or detention order. In that declaration, Portugal stated that it will grant extradition for such offences only if it regards as sufficient the assurances given by the requesting Member State that it will encourage the application of any measures of clemency to which the person sought might be entitled. It is pointed out in the declaration that Portugal will grant extradition under such condition in compliance with the relevant provisions of its constitution and the related interpretation of them by its Constitutional Court. At the same time, Portugal reaffirmed in the declaration that Article 5 of the Convention on Portuguese accession to the Convention applying the Schengen Agreement remains valid.

The supplementary character of this Convention also means that where it deals with a matter which is also dealt with in the conventions mentioned in paragraph 1 and the provisions conflict, the provisions of this Convention prevail. This is true even where declarations or reservations have been made to those other conventions unless it is expressly stated otherwise in this Convention. Where appropriate, this explanatory report indicates the relationship between this Convention and the other conventions.

There is also, as noted in the preamble, a link between this Convention and the Convention on simplified extradition procedure between the Member States of the European Union although this link is not specifically referred to in Article 1. When both Conventions have entered into force, there will be situations where the two instruments apply simultaneously since some of the issues dealt with in this Convention may arise also when the person sought gives his consent to the extradition.

This Article of the Convention has been worded differently to the corresponding Article 1 of the Convention on simplified extradition procedure because of the difference in the content and nature of the two instruments, although they both supplement existing conventions. In particular, this Convention modifies the conditions for extradition to a certain degree between the Member States by changing the existing legal regime for extradition as it operates on the basis of the "mother" conventions. The Convention on simplified extradition procedure, on the other hand, regulates the procedural aspects of some extradition cases which were not dealt with by the "mother" conventions.

Paragraph 2, which should be read in conjunction with Article 28(3) of the European Convention on Extradition, provides that paragraph 1 shall not affect the application of provisions in bilateral or multilateral agreements which offer Member States more favourable extradition arrangements, nor extradition agreements agreed on the basis of uniform laws (as for instance in the relationship between the Nordic countries), nor extradition agreements based on 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 for instance in the relationship between United Kingdom and Ireland).

Article 2 – Extraditable offences

Paragraph 1 specifies what offences are extraditable. The number of extraditable offences will most probably increase significantly through the application of this Article.

This paragraph provides that the offences must be punishable under the laws both of the requesting Member State and the requested Member State, so reaffirming the rule of double criminality already contained in the "mother" conventions (a special exception to that rule is dealt with in Article 3). It also changes the minimum penalty required for extradition, which is deprivation of liberty or a detention order for a maximum period of at least twelve months in relation to the law of the requesting Member State. This has been reduced to six months in relation to the law of the requested Member State.

The one year limit is the normal threshold under the European Convention on Extradition, but it is subject to reservations expressed on the matter by some States at the time of ratification. It follows from Article 17 of this Convention that reservations may not be made in this respect. This threshold of one year is also in line with the solution adopted in Article 61 of the Convention applying the Schengen Agreement. Article 2(1) of the Benelux Treaty provides for a threshold of six months in relation to the law of the requesting State, thus prevailing over this Convention because of its more favourable extradition nature, insofar as extradition arrangements are concerned between States parties to that Treaty.

The threshold of six months in relation to the requested Member State is an innovation for most Member States.

Insofar as paragraph 2 is concerned, certain Member States have refused to grant extradition because their national laws do not provide for detention orders comparable in nature to that on the basis of which extradition was requested, although those Member States have not entered any reservations in respect of Article 25 of the European Convention on Extradition. Paragraph 2 was drafted to make the legal situation clear so that extradition may not be refused between Member States on those grounds.

Paragraph 3 deals with so-called accessory extradition and contains a provision similar to that of Article 1 of the Second Protocol to the European Convention on Extradition. On the basis of this paragraph the requested Member State shall also have the right to grant extradition for offences which do not fulfil the conditions for extradition under paragraph 1 but which are punishable by fines. It has been considered that the grounds for non-extradition fall when the person sought is to be extradited for a serious offence which fulfils the conditions of paragraph 1. In this case the person in question ought not to escape prosecution for lesser offences and the courts of the requesting Member State will be in a position to pass a judgment on him for all the offences.

Another aspect of the question of non extraditable offences punishable by fines is governed by Article 10(1), which deals with cases where the request for extradition did not include such offences, but the requesting Member State may act in relation to them after the person has been extradited.

Article 3 - Conspiracy and association to commit offences

Since 1993, the European Union, within the framework of its measures against the most serious forms of crime, has held in particular that high priority should be given to the most serious forms of organized crime and terrorism. In this context, it has often been established that the domestic laws of the Member States lack homogeneous provisions criminalizing the aggregation of two or more persons with a view to committing crimes. This is due to different legal traditions but does not amount to differences in criminal policy. These differences may make judicial cooperation more difficult.

In particular, the differences between the various forms of association to commit offences covered by the criminal laws of Member States and those between the various forms of conspiracy – and even more the differences between offences of criminal association on the one hand and offences of conspiracy on the other – appeared to be particularly sensitive in the field of extradition in that, due to the lack of the necessary dual criminality, extradition may be prevented for crimes relevant to the fight against organized crime in all its forms.

Article 3 is intended to remedy this difficulty by providing an exception to the rule of dual criminality, derogating from Article 2(1), of this Convention and from the corresponding Article 2 of the European Convention on Extradition and Article 2 of the Benelux Treaty. To that effect paragraph 1 states that where the offence for which extradition is requested is classified by the law of the requesting Member State as an association to commit offences or a conspiracy, extradition may not be refused on the sole ground that the law of the requested Member State does not provide for the same conduct to be an offence. It is self-evident that the other grounds for refusal in this Convention or in other applicable conventions remain in force.

However, this important provision is subject to two conditions, both indicated in paragraph 1. The first is that the offence must, under the law of the requesting Member State, be punishable by a maximum term of deprivation of liberty or a detention order of a maximum of at least 12 months. For greater clarity, the threshold already indicated in Article 2 is explicitly reaffirmed.

The second is that the criminal association or the conspiracy must have as its objective the commission of:

(a) "one or more of the offences referred to in Articles 1 or 2 of the European Convention on the Suppression of Terrorism;" or

(b) "any other offence punishable by deprivation of liberty or a detention order of a maximum of at least 12 months in the field of drug trafficking and other forms of organized crime or other acts of violence against the life, physical integrity or liberty of a person, or creating a collective danger for persons." Paragraph 2 indicates the documentation which forms the basis on which the requested Member State shall decide whether this second condition is met.

The conditions show that the exceptional derogation from the requirement of dual criminality is justified and applies only in respect of particularly serious criminal associations or conspiracies and that the assessment of such seriousness must be based on the nature of the offences which are the aim of those persons who conspire, establish or take part in a criminal association. The offences regarded in this connection as serious by this Convention belong to three categories: terrorist offences, offences related to organized crime, including drug trafficking offences and violent offences.

By contrast, paragraph 1 does not contain a definition of criminal association or conspiracy, it being enough that the offence on which a request for extradition is based is classified as a criminal association or a conspiracy by the law of the requesting Member State.

However, since the principle of dual criminality is an established principle of extradition law for many Member States, it was considered appropriate to provide an alternative solution to paragraph 1. To that end, paragraphs 3 and 4 provide for a combination of a reservation to paragraph 1 and an obligation to make the behaviour described in paragraph 4 extraditable under the terms of Article 2(1).

Under paragraph 3, a Member State may reserve the right not to apply paragraph 1, or to apply it under certain conditions to be specified in the reservation. The Member State entering a reservation is free to decide on the content of such conditions.

Where a reservation has been made – with or without conditions – paragraph 4 will apply. This paragraph describes behaviour which Member States will make extraditable in their national law. For this purpose, without using concepts such as criminal association or conspiracy, a series of objective elements is used:

- It must be behaviour contributing to the commission by a group of persons acting with a common purpose of one or more offences of the types mentioned in paragraph 4.

- The contribution may be of any nature and it will be a matter of objective evaluation in a given case whether the behaviour contributes to the commission of one or more offences. As it is stated in this paragraph, the behaviour need not consist of the participation of the person in the actual execution of the offence or offences concerned. The contribution can in fact, be ancillary in nature (mere material preparation; logistic support to the movement or harbouring of persons and similar conduct). The paragraph does not provide that the person contributing to the commission of the offence must be a "member" of the group. Therefore, if a person having no part as a member of a closely organized group contributes to the criminal activity of the group – either occasionally or permanently – also this kind of contribution shall be covered by the provision in question, provided the other elements constituting the contribution, as indicated in paragraph 4, exist.

- As stated in the paragraph, "contribution shall be intentional and made having knowledge either of the purpose and the general criminal activity of the group or of the intention of the group to commit the offence or offences concerned". This text qualifies the contribution in two ways: firstly, the contribution must be intentional, so non intentional contributions are excluded. Secondly, the nature of criminal groups and the circumstances whereby the contribution is given vary and so there is a requirement that an element of knowledge is specified. In this regard the text provides that the element of knowledge shall be based on knowledge either of the purpose and general criminal activity of the group or of the intention of the group to commit one or more of the offences concerned.

- The offences of a group, to the commission of which a person contributes, are the same as those referred to in paragraph 1(a) and (b). Also in this case, the particular obligation of the provision in question is justified in the light of the seriousness of the offences committed or planned by the group.

Article 4 – Order for deprivation of liberty in a place other than a penitentiary institution

Article 12 of the European Convention on Extradition provides for an extradition request to be based on a judgment of conviction involving deprivation of liberty, on a detention order, or – in the event of an extradition for the purpose of prosecution – on a warrant of arrest or other order having the same effect. Under these orders a person is usually deprived of his liberty in a penitentiary institution.

However, new types of measures to restrict personal liberty in view of proceedings or even in place of serving sentences have been developed or are likely to be developed in the future. In some Member States the law allows the judicial authorities to resort to house arrest, or in any case, no matter what the measure is called, provides for a person to be deprived of his liberty in a place other than a penitentiary institution.

Since under those laws deprivation of liberty in a place other than a penitentiary institution is equivalent in purpose and legal regime to deprivation of liberty in a penitentiary institution, differing only in the place where the person is held in custody, it has been considered that this different procedure should not have a negative effect on extradition.

In order to avoid a narrow interpretation of the aforesaid Article of the European Convention on Extradition or the corresponding Article 11 of the Benelux Treaty being an impediment to extradition, Article 4 establishes that extradition cannot be refused only because the order on which the request is based provides for deprivation of liberty in a place other than a penitentiary institution.

This provision does not require that the national rules on arrest and deprivation of personal liberty be changed, not even with regard to extradition; nor does it change the other conditions for the granting of extradition, or the refusal thereof.

When requesting an extradition, it may be useful, in the interest of the requesting Member State, to explain the scope and legal nature of house arrest or of a similar order on which the request is based, especially when the deprivation of liberty in a place other than a penitentiary institution is not provided for in the requested Member State.

Article 5 – Political offences

Member States' common commitment to preventing and combating terrorism, often stressed by the European Council, and the consequential need to improve judicial cooperation for the purpose of precluding the risk of such conduct escaping punishment, led to a review of the question of political offences in relation to extradition.

In view of similarity in the political concepts between Member States and the basic trust in the functioning of the criminal justice systems in the Member States, it was logical to look again at whether the political offence exception should continue to be applied as a ground for refusal of extradition among Member States of the European Union. Article 5 was the outcome of this review.

The significant changes introduced by the new provisions are to be read in conjunction with the Joint Declaration of Member States attached to the Convention on the right of asylum (1951 Convention relating to the Status of Refugees, as amended by the 1967 New York Protocol) in which it is stated the relation between this Convention and the provisions on asylum contained in the constitutions of some Member States and the relevant international instruments.

Article 5 reflects a dual approach: on the one hand, paragraph 1 provides that for the purpose of extradition no offence may be regarded as a political offence; on the other hand, in paragraph 2, when admitting that a derogation may be made to this principle by means of a reservation, it specifies that a reservation concerning terrorist offences cannot be made. The aforesaid principle thus remains unprejudiced in this area.

Article 3 of the European Convention on Extradition and Article 3 of the Benelux Treaty exclude extradition for political offences. The European Convention on the Suppression of Terrorism contains in its Article 1 an exception to those rules, by providing for an obligation that an offence listed in that Article cannot be regarded as a political offence, or as an offence connected with a political offence or as an offence inspired by political motives. Furthermore the latter convention allows in Article 2 a State party to decide not to regard as such type of offences any serious offence involving an act of violence, other than one covered in Article 1, against the life, physical integrity or liberty of a person or a serious offence involving an act against property if the act created a collective danger for persons as well as in cases of an attempt to commit any of the foregoing offences or of participation as an accomplice of a person who commits or attempts to commit such an offence.

Paragraph 1 of this Article envisages the complete removal of the possibility of invoking the political offence exception.

Paragraph 1 takes up the wording of Article 1 of the European Convention on the Suppression of Terrorism, but the provision is no longer restricted to a list of offences. Paragraph 1 of this Convention thus prevails over Article 3(1) of the European Convention on Extradition and Article 3(1) of the Benelux Treaty, as well as over Articles 1 and 2 of the European Convention on the Suppression of Terrorism.

As stated in paragraph 3, paragraph 1 of this Article does not amend in any way the provisions of Article 3(2) of the European Convention on Extradition or those of Article 5 of the European Convention on the Suppression of Terrorism. Under those provisions, which may therefore be fully applied, the requested Member State may continue to refuse extradition if it has been requested for the purpose of prosecuting or punishing a person on account of his race, religion, nationality or political opinion, or if that person's position may be prejudiced for any of these reasons.

The possibility that these circumstances will apply between the Member States of the European Union in the course of an extradition procedure is probably academic. However, since respect for fundamental rights and liberties is an absolute principle of the European Union and, as already said, lies behind the progress which the Union intends to accomplish through this Convention, it was considered that the text should not depart from the aforesaid traditional rule of protecting persons against criminal proceedings affected by political discrimination and that the validity of that rule had to be explicitly stressed.

Paragraph 3 is also mentioned in the Declaration, annexed to the Convention, in which the Hellenic Republic specifies that from the standpoint of the provisions of that paragraph, it is possible to interpret the whole Article in compliance with the conditions of the Greek constitution.

Paragraph 2 – as stated before – provides that each Member State may make a reservation limiting the application of paragraph 1 to two categories of offences:

(a) those specified in Articles 1 and 2 of the European Convention on the Suppression of Terrorism (which cover the most serious offences, such as the taking of hostages, the use of firearms and explosives, acts of violence against the life or liberty of persons or which create a collective danger for persons);

(b) the offences of conspiracy or criminal association to commit one or more of the offences referred to in the preceding paragraph (a).

With regard to these last mentioned categories, this Convention goes beyond the scope of Article 1(f) of the European Convention on the Suppression of Terrorism which is limited to an attempt to commit any of the offences of Article 1 or participation as an accomplice of a person committing or attempting to commit them.

Contrary to what is contained in Article 3(1) of this Convention, the conspiracy and association referred to in paragraph 2(b) of this Article are considered only insofar as they constitute behaviour corresponding to the description contained in Article 3(4).

Finally, paragraph 4 completes the provisions of the Article providing that the reservations made under Article 13 of the European Convention on the Suppression of Terrorism shall no longer apply. Paragraph 4 is valid both for Member States which fully apply the principle specified in paragraph 1 as well as for those that make the declaration under paragraph 2.

Article 6 – Fiscal offences

Article 5 of the European Convention on Extradition and Article 4 of the Benelux Treaty provide that extradition for fiscal offences shall be granted only if States Parties have so decided in respect of any such offence or category of offences. Article 2 of the Second Additional Protocol to the European Convention lifts the restriction set out in Article 5 of that Convention, but the Protocol has not been ratified by all Member States and does not apply between Member States for which extradition arrangements other than the European Convention are in force. Article 63 of the Convention applying the Schengen Agreement partly lifts the restriction for fiscal offences.

Paragraphs 1 and 2 provide for all Member States the same legal regime as that of the Second Protocol to the European Convention, thus prevailing over the previously indicated articles of the European Convention and the Benelux Treaty as well as the Convention applying the Schengen Agreement.

Paragraph 1 lays down the principle that extradition shall also be granted for fiscal offences which correspond under the law of the requested Member State to a similar offence.

As the laws of the Member States may differ in respect of constituent elements of the various offences connected with taxes, duties, customs and exchange, it has been considered appropriate to allow a wide margin of appreciation to the requested Member State to assess whether an offence exists under its law which corresponds to the offence for which extradition is sought. Therefore, for the dual criminality requirement to be met, it is sufficient if an offence is considered to be "similar" (*).

Paragraph 2 lays down a similar rule to that provided for in the Second Protocol (**) which provides that extradition may not be refused on the ground that the law of the requested Member State does not impose the same type of fiscal levies as the law of the requesting State. Here again, the basic idea is that the essential constituent elements of the offence shall be decisive for ascertaining the application of the dual criminality principle.

Paragraph 3 allows for a reservation to be made in respect of offences which are not connected with excise, value-added tax or customs, which can be excluded from the scope of application of the Convention. By contrast, in respect of offences connected with excise, VAT or customs, paragraph 1 of the Article cannot be derogated from through the use of the reservation possibility. Where a reservation has been made, this is also relevant in relation to Article 10 as provided for in paragraph 4 of that Article.

(*) The fact that the Second Protocol uses the terms "an offence of the same nature" in the authentic English version and not "similar offence" as in this Convention, is not intended to create any difference between the system based on the two instruments but is merely due to technical reasons.

(**) The fact that the English text of the Convention is not exactly the same as the authentic English text of the Second Protocol is merely due to technical reasons.

Member States that are Parties to the Second Protocol may not prescribe a more restrictive system for extradition in connection with fiscal offences than that which they have already agreed to under the Second Protocol. It follows from this principle that Member States that are parties to the Second Protocol and who did not enter a reservation to Article 2 of the said Protocol cannot make the declaration provided for by paragraph 3.

Article 7 – Extradition of nationals

This Article should be read in conjunction with the declaration by the Council on the concept of nationals and the declaration by Denmark, Finland and Sweden concerning Article 7 of this Convention.

Few Member States extradite their own nationals. Article 6 of the European Convention provides for a discretionary refusal on grounds of nationality and Article 5 of the Benelux Treaty explicitly excludes extradition of nationals. Some Member States have constitutional barriers to extradition of nationals and others have a legislative prohibition.

Paragraph 1 establishes the principle that extradition may not be refused on the ground that the person claimed is a national of the requested Member State within the meaning of Article 6 of the European Convention on Extradition. This is an important step towards removing one of the traditional bars to extradition among Member States. The reasons for this change, as already emphasized in the general part of the explanatory report, are to be found in the shared values, common legal traditions and the mutual confidence in the proper functioning of the criminal justice systems of the Member States of the European Union.

The Article does not define the term "national" of a Member State but makes a reference to Article 6 of the European Convention on Extradition. That Article provides that each Party may, by a declaration, define the term "nationals".

Declarations in this respect have been made by several Member States, i.e. Denmark, Finland and Sweden. These three Member States have defined nationals as nationals of the Nordic States (Denmark, Finland, Iceland, Norway and Sweden) as well as aliens domiciled in the territory of one of those States. These declarations have been found to be too far-reaching. Therefore, within the context of this Convention, Denmark, Finland and Sweden, confirm, through the declaration annexed to the Convention that, in their relations with other Member States which ensure equal treatment, they will not invoke the definition of nationals made under the European Convention as a ground for refusal of extradition of residents from non-Nordic States.

Paragraph 2 provides for the possibility to derogate from the general principle laid down in paragraph 1. The reservation possibility in this regard was considered appropriate since the prohibition of extradition of nationals is established in constitutional law or in national laws which are based on long standing legal traditions, the change of which appears to be a complex matter. However, paragraph 3 provides for a system which will encourage a review of the reservations made.

Under paragraph 2, the reservation is made by declaring that extradition of nationals would not be granted or only granted under certain specified conditions, whose content is left to the discretion of each Member State which makes the declaration. For example, the Member State may indicate that it will not extradite its nationals for execution of sentences and that it will extradite them for purposes of prosecution only on condition that the person extradited must, if sentenced, be transferred back to it with a view to the enforcement of the sentence. Furthermore, a Member State may indicate that it will always apply to extradition of its own nationals the principle of dual criminality, the rule of speciality and the ban on re-extradition to another Member State.

In this connection, the declaration of the Council on the concept of "nationals" should be recalled. Under such declaration, the concept of national used under this Convention will not affect any different definitions operated or given under the Council of Europe Convention of 21 March 1983 on the Transfer of Sentenced Persons. This declaration does not prejudice any reservation made under the present Convention.

Paragraph 3 provides for the reservation to be valid for 5 years and for renewals for successive periods of the same duration. During this period, each Member State may, at any moment, withdraw in whole or in part a reservation which it has made. The paragraph provides for procedures which guarantee that reservations will not automatically expire without the Member State having been duly notified twice by the depositary of the Convention.

This procedure will have the following features. 12 months before the expiry of each period of five years, the depositary shall give notice to the Member State concerned of the fact that the reservation will expire on a given date. At the latest three months before that date, the Member State is required to notify the depositary in accordance with the third subparagraph of paragraph 3 of its intentions. Where the Member State has notified the depositary that it upholds the reservation, the reservation is renewed for a period of five years from the first day following the date of expiry of the reservation.

If the Member State does not indicate its intentions in accordance with the procedure laid down, the reservation is considered to be automatically extended for a period of six months which starts from the first day following the five year period. The depositary will inform the Member State of this automatic extension and of the final date when the reservation would definitively lapse. The depositary will remind the Member State in its notification of the provisions of the fourth subparagraph of paragraph 3 of the Article.

Where the Member State makes a notification to the effect that it upholds its reservation under paragraph 2 of the Article, the period of renewal of the reservation shall be considered in any case to run from the first day after the expiring date of the five year period under which the reservation was valid.

When upholding the reservation, the Member State may amend it to ease the conditions for extradition. In any case, a Member State cannot modify the reservation in a manner which would make its conditions for extradition more strict, such as by adding new conditions.

Article 8 – Lapse of time

Under Article 10 of the European Convention on Extradition and Article 9 of the Benelux Treaty, extradition shall not be granted when the person has become immune by reason of lapse of time from prosecution or punishment, according to the law of either the requesting or the requested State.

Paragraph 1 of this Article provides that a request for extradition may not be refused on the ground that the prosecution or the punishment has, according to the law of the requested Member State, become statute-barred. This approach will facilitate extradition between Member States.

Paragraph 2 makes the application of the Article optional so as to allow the law of the requested Member State to be taken into account when the offence is one for which that Member State has jurisdiction to prosecute or to execute a sentence. Article 9 contains a provision based on similar considerations.

Article 9 – Amnesty

This Article is new in relation to the European Convention on Extradition and the Benelux Treaty but it retains the rule already set out in Article 4 of the Second Additional Protocol to the European Convention. It is in line with Article 62(2) of the Convention on the application of the Schengen Agreement.

This Article provides that an amnesty declared in the requested Member State, in which that State had competence to prosecute the offence under its own criminal law, will constitute a mandatory reason for not granting extradition.

It should be noted that the fact that the amnesty impedes the extradition only when the requested Member State has jurisdiction over the offence, reflects the same kind of considerations which have been taken into account in respect of Article 8(2).

Article 10 – Offences other than those upon which extradition is based

Article 10 should be considered in relation with Article 14 of the European Convention on Extradition and the corresponding Article 13 of the Benelux Treaty. Article 10 contains new provisions whereby a Member State which has obtained an extradition can more easily exercise its criminal jurisdiction (as regards proceedings, trials and execution of penalties) in respect of offences, committed before the surrender of the person, other than those on which the extradition was requested. On the basis of Article 10, a requesting Member State can act for the aforesaid purpose without previously having to ask for and obtain the consent of the Member State which granted the extradition.

This facilitated system applies in the four cases mentioned in paragraph 1. Subparagraphs (a), (b) and (c) concern cases in which extradition could not necessarily have been requested; the case referred to in (d), on the contrary, concerns offences for which extradition could have been requested and obtained.

Under Article 10(1)(a), a requesting Member State may initiate or continue the prosecution of, or may try a person for an offence which is not punishable by a sanction restricting personal liberty.

Under Article 10(1)(b), a requesting Member State may start or continue prosecution, or try a person, even where the offence is punishable by a sanction restricting personal liberty, to the extent that the person is neither during the proceedings nor as a result of it restricted in his personal liberty. This means that if the person is sentenced to a penalty or a measure involving deprivation of liberty, this sentence cannot be executed unless the requesting Member State obtains the consent of either the person concerned as envisaged under Article 10(1)(d) or the consent of the requested State under Article 14 of the European Convention. Article 10(1)(b) also covers cases where the offence is punishable by imprisonment or fines. However, when the person has been sentenced to a fine, no consent is needed for the execution of the sentence.

Under Article 10(1)(c) a requesting Member State may enforce a final sentence involving a penalty or a measure not involving deprivation of liberty. It is stressed that this paragraph allows a State to execute not only fines, but also any measure in lieu thereof, even when that measure implies the restriction of personal liberty. Considering the formulation of this provision, a measure in lieu of a fine is in this case to be construed only as a measure which, according to domestic law, can be applied when the payment of the sum is not obtained. Therefore, this provision does not cover restrictions of liberty ordered as a consequence of a revocation of a measure of conditional liberty or any other similar measure.

In the case of Article 10(1)(d) a requesting Member State may prosecute, or try a person extradited or execute a penalty imposed on that person without the consent of the other State being required where the said person, after having been surrendered, has expressly waived the benefit of the rule of speciality with regard to specific offences. The paragraph can also cover situations in which – on the basis of the offence, the penalty and the measures provided therefor – a request for extradition might have been possible and, if the consent of the requested State had been required, such State might have been obliged to give its consent under the second sentence of paragraph 1(a) of Article 14 of the European Convention on Extradition.

The reason for the inclusion of Article 10(1)(d) lies in the fact that, in extradition relations between Member States, the interests of the extradited persons are regarded as sufficiently protected by the procedure of consent. The provision is similar to the considerations underlying Article 9 of the Convention on simplified extradition procedure and it permits to take into consideration cases where the person waives the rule of speciality after he has been surrendered.

In the same manner, paragraphs 2 and 3 repeat similar provisions of that Convention and aim at establishing an appropriate procedure to express a waiver of the rule of speciality, to ensure that it is voluntarily expressed and that its effects are fully known.

Paragraph 2 specifies that the waiver of the rule of speciality must be expressed with reference to "specific offences". This means that a general waiver for all facts prior to surrender, or a waiver in relation to categories of facts, will not be valid. This provision, which on this point differs from Article 9 of the Convention on simplified procedure, is a further guarantee for the person to be aware of the effects that the waiver will produce.

Paragraph 4 is connected with Article 6 and provides that in the application of Article 10(1)(a), (b) and (c), the consent of the requested Member State must be requested and obtained when the new facts amount to fiscal offences for which the requested Member State excluded extraditability by the declaration provided for in Article 6(3).

Article 11 – Presumption of consent of the requested Member State

Under Article 11, Member States wishing to do so may introduce – by declarations and on the basis of reciprocity – a further mechanism, different to that provided for in Article 10, to facilitate the exercise of criminal jurisdiction in the requesting Member State in relation to offences other than those for which extradition has been granted. Such mechanism consists of a derogation from the provisions concerning the rule of speciality in the "mother" conventions.

By means of this mechanism the consent of the requested State required by Article 14(1)(a) of the European Convention on Extradition and Article 13(1)(a) of the Benelux Treaty is presumed to have been given. Such a presumption will permit the requesting Member State to prosecute, try, execute the sentence or any detention order of the extradited person in relation to any offence different to those for which extradition was granted and committed prior to the surrender.

It has been deemed advisable, however, to grant a Member State which made the declaration the power to suspend the "presumption of consent" in a specific extradition request, on the basis of a decision determined by specific aspects of the case. To this end the requested Member State shall, on granting the extradition, express its will in this sense to the requesting Member State. When making the declaration, Member States that so wish may indicate in which type of cases they will suspend the "presumption of consent".

When the mechanism of the presumption of consent is in force, Article 10 is not applicable. As stated above, all situations covered by Article 10 are in fact fully governed by the presumption of consent. If, however, in a particular case a requested Member State has expressed its intention not to apply the presumption of consent, then Article 10 shall again be applicable. This interaction of the two Articles is provided for in the second paragraph of Article 11.

Article 12 – Re-extradition to another Member State

Article 15 of the European Convention on Extradition and Article 14(1) of the Benelux Treaty provide that the requesting State cannot surrender a person to a third State without the consent of the State which has granted the extradition of the person to it.

On the basis of paragraph 1 of this Article, that rule shall not apply any more and the Member State which has received a request for re-extradition is not required to ask for the consent of the Member State which granted the extradition.

This new provision, as expressly stated, only concerns the re-extradition from one Member State to another Member State. Furthermore, it only applies where the State which would, under Article 15 of the European Convention on Extradition, have to give its consent is a Member State.

Each Member State can derogate from the rule provided for in paragraph 1 by a declaration made under paragraph 2. The declaration will have the effect that Article 15 of the European Convention on Extradition and Article 14 of the Benelux Treaty will continue to apply, which means that consent by that State is needed for the re-extradition.

However, it was thought, on the basis of the same considerations as those underlying Article 10(1)(d), that the derogation from the general rule provided for in paragraph 1 of the Article would not be appropriate when the person consents to the re-extradition. It is assumed that the procedures for the expression of the consent set out in Article 10(2) and (3) will be used in this context.

Similarly, it was thought that the derogation provided for in paragraph 1 of this Article shall not apply when Article 13 of the Convention on simplified extradition procedure provides otherwise. This occurs when the person has consented to the extradition and where the rule of speciality does not apply pursuant to a declaration made by the Member State concerned under Article 9 of that Convention. Consequently, paragraph 2 expressly provides that the declaration made under the said paragraph will not have any effect in those two cases.

Article 13 – Central authority and transmission of documents by facsimile

This Article is to a large extent modelled on the Agreement of 26 May 1989 between the Member States of the European Communities on the Simplification and Modernization of Methods of Transmitting Extradition Requests (the San Sebastian Agreement, drafted within the framework of European Political Cooperation).

Paragraph 1 requires that each Member State shall designate a central authority. When, as in Germany, the constitutional system is such that certain functions that would in other States be performed by one central authority are performed by authorities which are competent at regional level, it is possible to designate more than one central authority.

The central authority will be a focal point for transmission and reception of extradition requests and necessary supporting documents. In a number of Member States, that authority would normally be the Ministry of Justice.

However, paragraph 1 does not apply when the Convention, as in Article 14, expressly authorizes a different channel for transmission and reception of documents.

Paragraph 3 gives the central authority the opportunity to send extradition requests and documents by facsimile. Paragraph 4 covers for the conditions under which the facsimile transmission may be used. These conditions ensure the authenticity and confidentiality of the transmission and consist of the use of the cryptographic devices mentioned in the Article.

The requesting Member State must have full confidence that the extradition documents are authentic, namely that they have been issued by an authority which is empowered to do so under the national law and that they are not falsified. This is in particular necessary in the case of warrants of arrest or other similar documents on the basis of which the requesting State may resort to measures which are intrusive on individual rights. If the authorities of the requested Member State have any doubts concerning the authenticity of the extradition document, its central authority is entitled to require the central authority of the requesting Member State to produce the original documents or a true copy thereof in the manner prescribed in paragraph 5. The Article does not provide for a right of the person concerned to claim that the document be transmitted in the traditional way.

It is envisaged that to ensure the proper functioning of this Article it may be necessary for Member States to consult each other on the practical arrangements to apply the Article.

This Article does not exclude future arrangements between Member States outside the framework of this Convention on transmission of documents by modern means of telecommunications other than facsimile.

Article 14 – Supplementary information

This Article provides for a right of declaration, on the basis of reciprocity, setting up a system of direct requests for supplementary information. Requests for supplementary information may often concern matters for which the judicial or other competent authority is the only authority which is able to answer the request. Consequently the request for supplementary information may be made directly with a view to speeding up the procedure.

It is implicit from the second paragraph of the Article that the authority which has received the request for supplementary information also may answer directly to the requesting authority.

This Article specifies that the supplementary information procedure will be in accordance with Article 13 of the European Convention on Extradition or Article 12 of the Benelux Treaty. Therefore, also in cases of direct request under this Article, the authorities of the Member State requesting the supplementary information may fix a time-limit for the receipt thereof.

Article 15 – Authentication

This Article aims at simplifying the formal requirements in relation to documentation for extradition. For that purpose, it establishes the general principle under which any document or copy thereof transmitted for the purposes of extradition shall be exempted from authentication or any other formality.

This principle does not apply when the European Convention on Extradition (Article 12(2)(a)), the Benelux Treaty (Article 11(2)(a)) or this Convention (Article 13(5)) require authentication or any other formality.

However, also in those cases, the Article provides for a considerable relief in the formal requirements, which have arisen in certain circumstances, in particular in relation to the special formalities which have been required by certain Member States by declarations made to the European Convention on Extradition. In accordance with this Article it will be sufficient in all circumstances that the copies of the document have been certified true copies by the judicial authorities that issued the original in accordance with the rules of the Member State where the document was issued or by the central authority referred to in Article 13. It aims at ensuring the authenticity of the document in case this is contested, either by the requested Member State or the person concerned.

Article 16 – Transit

The Article aims at simplifying the procedures for transit to be followed pursuant to Article 21 of the European Convention on Extradition and Article 21 of the Benelux Treaty.

As follows from subparagraph (a), the information to be provided to the requested Member State is reduced. By way of derogation from Article 21(3) of the European Convention on Extradition and Article 21(2) of the Benelux Treaty, documents such as a copy of the warrant of arrest need not be provided any longer. The information referred to in subparagraph (a) is the same as that which has to be provided in cases where the provisional arrest of a person is requested. Some of the elements of that information are also identical to the elements of information required under Article 4(1) of the Convention on Simplified Extradition Procedure and should be interpreted consistently under the two European Union Conventions.

In the light of Article 7, it was thought important to stress here that information on the identity of the person always include the nationality of the person sought.

As it was considered important to provide for rapid means of communications, subparagraph (b) provides for a choice on the means of communication. The only restriction is that the request must leave a written record. Therefore, any modern means of communications fulfilling this requirement falls within the scope of this provision.

It follows from subparagraph (c) that, by way of derogation from Article 21(4) of the European Convention on Extradition and Article 21(3) of the Benelux Treaty, in cases of transit by air directly from the requested to the requesting Member State, no request for transit needs to be made to any Member State whose territory is overflown. However, if on such a transport an unscheduled landing occurs, the information envisaged under subparagraph (a) shall be provided for as quickly as possible to the transit Member State. Subparagraph (b) may be used in such cases.

Subparagraph (d) deals with Article 21(1), (2), (5) and (6) of the European Convention on Extradition. It provides for the possibility of refusing the transit in certain cases specified therein. Paragraph 1 of that Article, concerning offences which are political or purely military, as well as paragraph 6, relating to so-called discriminatory prosecution, will continue to apply insofar as Articles 3 or 5 of this Convention do not restrict their application. In the same manner, paragraph 2 deals with nationals and will continue to apply, taking into account the restrictions of Article 7 of this Convention. Paragraph 5 has the same relationship to Article 6 of this Convention. Furthermore, paragraph 5 covers other cases of refusal of the transit that remain possible by virtue of a declaration, made by a Member State under that paragraph, on the basis of which the granting of the transit is submitted to some or all of the conditions on which the same State grants extradition.

Article 17 - Reservations

The Article provides that no reservations may be entered in respect of the Convention other than those for which it make express provision. Such reservations are provided for under Article 3(3), Article 5(2), Article 6(3), Article 7(2) and Article 12(2).

The abovementioned reservations shall be entered, by a declaration, when giving the notification referred to in Article 18(2). They cannot be made at any other time.

Article 18 – Entry into force

This Article governs the Convention's entry into force, in accordance with the rules established in this matter by the Council of the European Union. The Convention comes into force 90 days after the last instrument of adoption has been deposited by any State which was a Member of the European Union at the moment of the adoption by the Council of the Act establishing the Convention, i.e. 15 Member States. The Council adopted the Act on 27 September 1996.

However, as in the judicial cooperation agreements concluded previously between the Member States, to enable the Convention to be implemented as soon as possible between the Member States most concerned, paragraph 3 allows for the possibility whereby each Member State, at the time of its adoption or at any time subsequently, can issue a declaration making the Convention applicable in advance vis-à-vis any other Member States that have made the same declaration. The declaration will take effect 90 days after being deposited.

Article 19 – Accession of new Member States

This Article provides that the Convention shall be open for accession by any State which becomes a Member of the European Union, and lays down the arrangements for such accession. A State which is not a Member State may not accede to the Convention.

If the Convention is already in force when a new Member State accedes, it will come into force with respect to that Member State 90 days after the deposit of its instrument of accession. But if the Convention is still not in force 90 days after that State's accession, it will come into force with respect to that State at the time of entry into force specified in Article 18(3). In that case the acceding State will also be able to make a declaration of advance application provided for in Article 18(4).

It may be noted that, as a result of Article 18(3), if a State becomes a member of the European Union before entry into force of the Convention and does not accede to the Convention, the Convention will nevertheless come into force when all the States that were Members at the time of signing have deposited their instruments of adoption.

In the light of the additional nature of the present Convention as provided for in Article 1 of the Convention, it is a necessary precondition for accession to have ratified the 1957 European Convention on Extradition of the Council of Europe.

Article 20 – Depositary

This Article provides that the Secretary-General of the Council is the depositary of the Convention. The Secretary-General shall inform the Member States as quickly as possible of any notification received from the Member States which concerns the Convention. These notifications will be published in the Official Journal of the European Communities, part "C", as well as any information on the progress of adoptions, accessions, declarations and reservations.