

5500/96

LIMITE

JUSTPEN 32

OUTCOME OF PROCEEDINGS

of: Working Party on Extradition

No. prev. doc.: 4364/96 JUSTPEN 11

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

At its meeting on 19 and 20 February 1996, the Working Party continued its examination of the draft Convention on the improvement of extradition between the Member States, on the basis of 4364/96 JUSTPEN 11.

A summary of the outcome of all the proceedings on the Convention is annexed hereto. The Annex also contains text of the provisions on political offences (Article 3) and the extradition of nationals (Article 5) following the discussions in the K.4 Committee on 27 and 28 February 1996.

**Draft
COUNCIL ACT
of**

**drawing up the Convention on the improvement
of extradition between the Member States
of the European Union**

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on European Union, and in particular Article K.3(2)(c) thereof,

Whereas, for the purposes of achieving the objectives of the European Union, the Member States regard the rules governing the improvement of extradition between the Member States of the European Union as a matter of common interest coming under the cooperation provided for in Title VI of the Treaty;

HAVING DECIDED that the Convention, the text of which is set out in the Annex and which is signed today by the Representatives of the Governments of the Member States of the Union, is hereby drawn up;

RECOMMENDS that it be adopted by the Member States in accordance with their respective constitutional rules.

Done at Brussels,

For the Council
The President

**CONVENTION
DRAWN UP ON THE BASIS OF ARTICLE K.3
OF THE TREATY ON EUROPEAN UNION,
ON THE IMPROVEMENT OF EXTRADITION BETWEEN
THE MEMBER STATES OF THE EUROPEAN UNION**

THE HIGH CONTRACTING PARTIES to this Convention, Member States of the European Union,

REFERRING to the Act of the Council of the European Union of,

DESIRING to improve judicial cooperation between the Member States in criminal matters, with regard both to proceedings and to the execution of sentences,

RECOGNIZING the importance of extradition in judicial cooperation to the achievement of these objectives,

STRESSING that every Member State has an interest in ensuring that extradition procedures operate efficiently and rapidly, to the extent that this is compatible with their fundamental legal principles, including the principles of the European Convention for the Protection of Human Rights and Fundamental Freedoms,

EXPRESSING their confidence in the structure and operation of their judicial systems and in the capacities of all Member States to ensure fair judgment,

BEARING IN MIND that on 10 March 1995 the Council drew up the Convention on simplified extradition procedure between the Member States of the European Union,

TAKING ACCOUNT of the advantage of concluding a convention between the Member States of the European Union supplementing the Council of Europe Convention of 13 December 1957 by improving extradition procedure,

CONSIDERING that the provisions of the European Convention on Extradition remain applicable for all matters not covered by this Convention,

HAVE AGREED AS FOLLOWS:

Article 1

General provisions

1. This Convention shall supplement the provisions and facilitate the application between the Member States of the European Union of the European Convention on Extradition of 13 December 1957, the Convention of 19 June 1990 applying the Schengen Agreement and, in relations between the Member States of the Benelux Economic Union, the first chapter of the Benelux Treaty of 17 June 1962 on Extradition and Mutual Assistance in Criminal Matters, as amended by the Protocol of 11 May 1974.

2. Paragraph 1 shall not affect the application of more favourable provisions in bilateral or multilateral agreements between certain Member States, nor shall it affect extradition arrangements agreed on the basis of uniform 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.

Article 2

Extraditable offences

1. Extradition shall also be granted in respect of offences which are punishable under the law of the requesting Party by deprivation of liberty or a detention order for a maximum period of at least twelve months and under the law of the requested Party 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 Party does not provide for the same type of detention order as the law of the requesting Party.
3. ⁽¹⁾ Where the offences on which the request is based are classified under the law of the requesting State as participation in a conspiracy or in an association to commit offences, and are punished by a maximum term of deprivation of liberty of not less than 12 months, extradition shall not be refused only on the ground that the law of the requested State does not provide for the same facts to be an offence, provided the conspiracy or the association has been established to commit one or more offences regarded as extraditable offences under paragraph 1 of this Article.

⁽¹⁾ A number of delegations accepted this provision as long as it was optional (in particular F/GR). Some other delegations (including B/E/I/P/D) accepted this paragraph as it stood. Other delegations could also accept it if it specified the conditions in which extradition should not take place (in particular NL/UK/IRL). The Presidency did not rule out the possibility of submitting a solution to a future meeting which would incorporate such conditions in the light of the comments made by delegations.

For the purpose of determining whether the conspiracy or the association has been established to commit one or more offences regarded as extraditable offences under paragraph 1 on this Article, the requested State shall take into consideration the information contained in the warrant of arrest or order having the same effect or in the conviction of the person whose extradition is requested as well as in the statement of the offences envisaged in Article 12, paragraph 2,b, of the European Convention on Extradition.

When depositing its instruments of ratification, acceptance or accession, any Member State may declare that it reserves the right not to apply paragraph 3(a) under certain specified conditions.

4. Article 2(2) of the European Convention on Extradition shall also apply where certain offences are punishable by pecuniary sanctions.

(¹)

(¹) It will need to be seen whether, and in what form, the following provision can be included in the Convention in the light of Portugal's reservation on Article 1 of the European Convention on Extradition:

"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."

Article 2a ⁽¹⁾

**Order of arrest for detention in a place
other than a penitentiary institution**

1. Extradition for the purpose of prosecution shall not be refused only because the request is supported, pursuant to Article 12, paragraph 2(a) of the European Convention on extradition, by an order of the judicial authorities of the requesting State to deprive the person of his liberty in a place other than a penitentiary institution.

⁽¹⁾ It was agreed to mention in the explanatory report that this Article

- does not modify the conditions upon which extradition is granted or refused;
- stipulates that it is in the interest of the requesting Member State to explain the legal scope and the intention of the arrest order. This information may prove particularly useful where the requested Member State is unfamiliar with this type of arrest order;
- is not aimed at laying down rules to be adopted at national level regarding arrest orders.

Article 3 ⁽¹⁾

1. For the purpose of extradition between the Member States no offence may be regarded by the requested State as a political offence, as an offence connected with a political offence or an offence inspired by political motives.
2. Each Member State may, when depositing its instrument of ratification, acceptance or accession, declare that it will apply paragraph 1 only in relation to the offences indicated in Article 1 and 2 of the European Convention on the suppression of terrorism [and in Article 2, paragraph 3 of this Convention]. ⁽²⁾
3. The rules contained in Article 3, paragraph 2 of the European Convention on Extradition and in Article 5 of the European Convention on the suppression of terrorism remain unaffected.
4. Reservations made under Article 13 of the European Convention on the suppression of terrorism shall not apply to extradition between Member States. ⁽³⁾

Joint statement

The Member States state that this Convention is without prejudice either to the right of asylum as recognized in their respective constitutions or to the application by the Member States of the provisions of the Convention relating to the Status of Refugees of 28 July 1951, as supplemented by the Convention relating to the Status of Stateless Persons of 28 September 1954 and by the Protocol relating to the Status of Refugees of 31 January 1967.

Preamble

(Fourth recital)

Stressing that the Member States have a common interest in ensuring that extradition procedures operate efficiently and rapidly inasmuch as their systems of Government are

⁽¹⁾ Scrutiny reservations by the B and E delegations.

⁽²⁾ The Spanish delegation wanted the phrase in square brackets included.

⁽³⁾ The explanatory report will give the reasons for retention of this paragraph.

based on democratic principles and they comply with the obligations laid down by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950.

Article 4

Fiscal offences

1. With regard to taxes, duties, customs and exchange, extradition under the conditions in this Convention and the European Convention on Extradition shall also be granted in respect of offences which correspond under the law of the requested State to a similar offence.
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.
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.

Article 6

Lapse of time

1. Extradition may not be refused on the ground that the prosecution or punishment of the person would be statute barred according to the law of the requested State.

2. The requested State shall have the option of not applying paragraph 1 where the request for extradition is motivated by acts coming under the jurisdiction of the requested State, under its own criminal law.

Article 5
Extradition of nationals

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.

3. Reservations referred to in paragraph 2 shall be valid for a maximum period of five years from the first day of application of the Convention in respect of the Member State concerned. However, such reservations may be renewed for successive periods of the same duration.

Twelve months before the date of expiry of the reservation, the depositary shall give notice of that expiry to each Member State which has entered a reservation.

No later than three months before the expiry of each five-year period, the Member State must notify the depositary whether it upholds its reservation, whether it intends to amend it to ease the conditions for extradition or whether it intends to withdraw it.

Failing the notification referred to in the third subparagraph, the depositary shall inform the Member State concerned that its reservation is considered to have been extended automatically for a period of six months, during which it must give notification. On expiry of that period, failure to notify shall cause the reservation to lapse.

Article 7

Amnesty

Extradition shall not be granted in respect of an offence covered by amnesty in the requested State where that State was competent to prosecute the offence under its own criminal law.

Article 8 ⁽¹⁾

1. A person who has been extradited may, in respect of acts committed before his surrender other than those for which he was extradited, without it being necessary to obtain the consent of the requested State:

- (a) be prosecuted or tried where the acts are not punishable by a custodial sentence;
- (b) be prosecuted or tried insofar as the criminal proceedings do not give rise to the application of a measure restricting his personal-liberty;
- (c) be subjected to a penalty not involving the deprivation of liberty, including a financial penalty or a measure which enforces that financial penalty, even if that enforcement measure may restrict or deprive him of his personal liberty; or
- (d) be prosecuted, tried, detained with a view to the execution of a sentence or of a security measure or subjected to any other restriction of his personal liberty if after his surrender he has expressly waived the benefit of the rule of speciality with regard to specific acts preceding his surrender.

2. Waiver on the part of the person extradited referred to in paragraph 1(d) shall be [given before] [obtained by] ⁽²⁾ the competent judicial authorities of the requesting State and shall be recorded in accordance with that State's national law.

3. Each Member State shall adopt the measures necessary to ensure that the waiver referred to in paragraph 1(d) is established in such a way as to show that the person has given it voluntarily and in full awareness of the consequences. To that end, the person extradited shall have the right to legal counsel.

4. When the requested State has made a declaration pursuant to Article 4(3), paragraph 1(a), (b) and (c) of this Article shall not apply to fiscal offences except those referred to in Article 4(3).

⁽¹⁾ Scrutiny reservation by the French delegation.

⁽²⁾ Wording to be reviewed when the text is finalized by the Legal/Linguistic Experts.

Article 8a ⁽¹⁾⁽²⁾

Each Member State may declare, when depositing its instrument of ratification, acceptance, approval or accession or at any time that, in its relations with all other Member States that have made the same declaration, the consent for the purposes of Article 14(1)(a) of the European Convention on Extradition and Article 13(1)(a) of the 1962 Benelux Treaty on Extradition and Mutual Assistance in Criminal Matters is presumed to have been given, unless when granting extradition in a particular case it indicates otherwise.

Where the Member State has indicated in any particular case that consent should not be deemed to have been given, Article 8 shall apply.

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- (¹) Scrutiny reservation by the Netherlands delegation.
(²) Reservation by the French delegation.

Article 9

Re-extradition to another Member State

1. Article 15 of the European Convention on Extradition and Article 14(1) of the Benelux Treaty shall not apply to requests for re-extradition from one Member State to another. ⁽¹⁾⁽²⁾

2. When depositing its instrument of ratification, acceptance or accession any Member State may declare that Article 15 of the European Convention on Extradition and Article 14(1) of the Benelux Treaty shall continue to apply except where the Convention on simplified extradition procedure otherwise provides or where a person consents to be re-extradited to another Member State. ⁽³⁾

⁽¹⁾ The explanatory report will specify:

- (a) the relationship between this paragraph and Article 13 of the Convention on simplified procedure on extradition;
- (b) the relationship between this paragraph and Article 8.

⁽²⁾ The German delegation requested the addition to this paragraph of a provision that assures consistency with Article 8a. This proposal will be considered at a future meeting.

⁽³⁾ Scrutiny reservation by the Netherlands delegation.

Article 10

Requests and supporting documents ⁽¹⁾

1. [Each Member State shall designate a central authority or, where the constitutional system so requires, central authorities responsible for transmitting and receiving extradition requests and the necessary supporting documents, as well as any other official correspondence relating to extradition requests [unless otherwise provided for in other provisions of this Convention].

2. Each Member State shall designate its authority, or authorities, in accordance with paragraph 1 when ratifying, approving or accepting this Convention and may alter the designation at any time thereafter.] ⁽²⁾

⁽¹⁾ It was agreed to provide a reference to the San Sebastian Convention in the preamble to this Convention and/or in the explanatory report.

⁽²⁾ Five delegations (A/NL/D/UK/S) asked that paragraphs 1 and 2 be maintained, or were in principle in favour of maintaining them. One of these delegations suggested that the use of diplomatic channels be considered. Three delegations (F/P/E) asked for deletion of the text. As an alternative, the French delegation suggested the inclusion of the entire text of the San Sebastian Agreement.

Article 11

Supplementary information

[The judicial authorities of the requested Party may, where appropriate, make requests directly to the judicial authorities of the requesting Party responsible for criminal proceedings against the person whose extradition is requested for supplementary information provided for respectively in Article 13 of the European Convention on Extradition and Article 12 of the Benelux Extradition Treaty.] ⁽¹⁾

Article 12

The documents which are transmitted under this Convention shall be exempted from authentication or any equivalent formality. ⁽²⁾

⁽¹⁾ Five delegations (A/E/D/B/L) wanted to maintain this Article as it stands, given its optional nature. All the other delegations wanted to delete it. The Presidency invited delegations to consider whether it might be appropriate to convert this provision into a declaration. The Presidency suggests the following text for consideration at a forthcoming meeting:

"Each Member State may, upon deposit of its instrument of ratification, acceptance, approval or accession, or at any other time, declare that in its relations with Member States who have made the same declaration, the judicial authorities of the requested State may, where appropriate, make requests directly to the judicial authorities of the requesting State responsible for criminal proceedings against the person whose extradition is requested for supplementary information provided for respectively in Article 13 of the European Convention on Extradition and Article 12 of the Benelux Extradition Treaty".

⁽²⁾ Text to be examined by the Working Party.

Article 13

Transit

In the case of transit, within the meaning of Article 21 of the European Convention on Extradition, through the territory of one Member State to another Member State, the following provisions shall apply:

1. in the case of transport by air without a scheduled stopover, no request or notification need be sent to the State of transit. In the case of an unscheduled landing, the requesting Member State shall provide the Member State in whose territory the landing is to take place with the information provided for in paragraph 2(b).
2. (a) in all other cases, the requesting State shall send a request to the State of transit, which may reject it where: ⁽¹⁾
 - [the offence concerned is regarded by it as being political in nature] ⁽²⁾ or where the offence is purely military in nature or a fiscal offence other than of the kind referred to in Article 4(3) in cases where the State of transit has made a declaration under that provision;
 - the person in respect of whom transit is requested is a national of that Member State and that State has made a declaration within the meaning of Article 5(2);
- (b) The request must contain sufficient information to enable the State of transit to assess the request with regard to the previous subparagraph and to take the constraint measures needed for execution of the transit vis-à-vis the extradited person.

To that end, the following information shall be sufficient: ⁽³⁾

- the identity of the person sought,
- the existence of an arrest warrant or other document having the same legal effect or of an enforceable judgment, ⁽⁴⁾
- the nature and legal description of the offence,
- a description of the circumstances in which the offence was committed, including the date and place.

⁽¹⁾ The Portuguese delegation wanted to include an additional indent in paragraph 2(a) along the following lines: "where transit is contrary to public order in that Member State". This request was made in order to take account of the declaration made by Portugal in the context of Article 21(5) of the European Convention on Extradition.

⁽²⁾ The inclusion or otherwise of the wording in square brackets depends on the discussions to be held on Article 3.

⁽³⁾ The explanatory report will state that nationality is one of the items of information to be provided in order to identify the person sought.

⁽⁴⁾ The explanatory report will state that house arrest is included in this indent.

3. The request for transit, and the information provided in accordance with paragraph 1, may be sent to the State of transit by any means leaving a written record. The State of transit shall make its decision known by the same method.

Article 14

Reservations

[For the record]

Article 15

Entry into force

1. This Convention shall be subject to ratification, acceptance or approval. Instruments of ratification, acceptance or approval shall be deposited with the General Secretariat of the Council of the European Union. The Secretary-General of the Council shall notify all Member States of such deposit.
2. This Convention shall enter into force ninety days after the date of deposit of the instrument of ratification, acceptance or approval by the last Member State to carry out this formality.
3. Until this Convention enters into force, any Member State may, when depositing its instrument of ratification, acceptance or approval, or at any other date, declare that the Convention shall apply to it in its relations with Member States that have made the same declaration 90 days after the date of deposit of its declaration.
4. Any declaration made pursuant to Article 9 shall take effect thirty days after deposit thereof, but no earlier than the date of the entry into force of this Convention or of the application thereof to the Member State concerned.
5. This Convention shall apply only to requests submitted after the date on which it enters into force or is applied between the requested State and the requesting State.

Article 16

Accession

1. This Convention shall be open to accession by any State that becomes a member of the European Union.
2. The text of this Convention in the language of the acceding State, drawn up by the General Secretariat of the Council of the European Union and approved by all the Member States, shall be equally authentic with the other authentic texts. The Secretary-General shall transmit a certified true copy of the text to each Member State.
3. The instruments of accession shall be deposited with the General Secretariat of the Council of the European Union.
4. This Convention shall enter into force with respect to any State that accedes to it ninety days after the deposit of its instrument of accession or on the date of entry into force of the Convention if it has not already entered into force at the time of expiry of the said period of ninety days.
5. Where this Convention is not yet in force at the time of the deposit of their instrument of accession, Article 16(3) shall apply to acceding Member States.

IN WITNESS WHEREOF, the undersigned Plenipotentiaries have hereunto set their hands.

DONE at Brussels, this _____ in a single original, in the Danish, Dutch, English, Finnish, French, German, Greek, Irish, Italian, Portuguese, Spanish and Swedish languages, each text being equally authentic, such original remaining deposited in the archives of the General Secretariat of the Council of the European Union. The Secretary-General shall transmit a certified true copy to each of the Member States.

COMMENTS TO BE MADE IN THE EXPLANATORY REPORT

Article 1

The explanatory report will indicate why this paragraph is worded differently from Article 1(1) of the Convention on simplified extradition procedure.

Article 2

It was agreed that it would be specified in the explanatory report on the Convention that the type of detention order provided for in paragraph 2 was that envisaged in Article 25 of the European Convention on Extradition.

Article 4

The explanatory report will specify that Member States that are parties to the Second Protocol to the European Convention on Extradition 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.

Article 6

The comments in the report on paragraph 1 should specify that Article 10 of the 1957 Convention on Extradition is being modified to the extent that a request for 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.

As regards paragraph 2 of this Article, the reasons why this provision has been made merely optional should be stated.

Article 8

The explanatory report will specify the reasons why paragraph 1 provides merely for an option, and not an obligation, to subject a person to one of the situations described in subparagraphs (a) to (d).

The report will also indicate the situations that arise more particularly in the context of Article 8(1)(c). In particular, it should indicate that conditional liberty is not one of the cases covered by this provision.

Article 8a

The explanatory report will indicate how the mechanics of Article 8a are to be interpreted. In particular, it will explain that, should a Member State have made a declaration within the meaning of Article 8a, the principles set out therein will apply, unless when taking a decision on any particular request for extradition it indicates otherwise.

Article 9

It should be specified that paragraph 1 applies only to requests for re-extradition from one Member State to another. In this context, requests for re-extradition originating in or addressed to a non-member State are excluded.