EUROPEAN UNION
THE COUNCIL

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LIMITE

JUSTPEN 77

PROGRESS REPORT

from: Permanent Representatives Committee (Part 2)

to : Council

No. prev. doc.: 7341/1/96 JUSTPEN 68 REV 1

Subject: Progress report on the draft Convention on the improvement of extradition between the Member States of the European Union

At its meeting on 19 and 20 March 1996 the Council requested that a complete draft Convention on extradition be submitted for its meeting in June 1996 with a view to agreement being reached at that meeting.

At its meeting on 29 May 1996, the Permanent Representatives Committee (Part 2) examined the draft Convention on the improvement of extradition between the Member States of the European Union. It agreed to submit this report, which explains the problems arising and the aspects on which the Council is requested to state a position. ([1])

The United Kingdom delegation entered a reservation linked to matters arising in the context of the common agricultural policy.

Article 2(3) (life sentences or detention orders)

Portugal entered a reservation in respect of the 1957 European Convention on Extradition to the effect that it would not grant the extradition of persons sought for an offence punishable by a life sentence or detention order.

([1]) Delegations' positions are given in greater detail in footnotes to the draft Convention (see the Annex).

However, under the 1990 Convention applying the Schengen Agreement, Portugal agreed to grant extradition in such cases, provided 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 2(3) of the draft Convention embodies the arrangement established under Schengen.

Recently, following a ruling by the Portuguese Constitutional Court, the Portuguese delegation stated that Portugal was able to grant extradition, in the case of an offence punishable by a life sentence or detention order, only if it was clear from the information provided by the requesting State that the enforcement of that life sentence or detention order in practice was a legal impossibility.

To resolve this problem, a number of solutions were put forward, in particular by the Portuguese delegation and by the Presidency ([1]). These proposals were examined by COREPER, most recently at its meeting on 29 May 1996 when it became apparent that the proposals were not entirely acceptable.

After the discussions, COREPER agreed to submit only one solution to the Council. This involves deleting the current Article 2(3) and issuing an interpretative statement on Article 2 of the draft Convention, as follows:

"Where extradition is sought for an offence punishable by a life sentence or detention order, Portugal, in compliance with the relevant provisions of its Constitution, as these are interpreted by its Constitutional Court, and in compliance with the existing international agreements to which it is party, will grant extradition only if it regards as sufficient the assurances given by the requesting Member State 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." ([2])

The Council is requested to comment on whether it is able to accept the inclusion of the above draft statement.

([1]) See 7155/96 JUSTPEN 62, 7463/96 JUSTPEN 70 and solutions put forward at the Steering Group III meeting on 29 May 1996.

([2]) This text was slightly adjusted after the COREPER meeting as the text on which COREPER conducted its discussions presupposed the retention of Article 2(3).

Articles 2a and 3 (departure from the principle of double criminality and political offences)

1. There are two issues to be considered in the context of these Articles. The first concerns the possibility of departing from the principle of double criminality. Bearing in mind that national laws do not deal in the same way with the concept of conspiracy and association to commit offences, Article 2a(1) makes provision for a departure from the principle of double criminality with regard to conspiracy or association to commit:

   (a) one or more of the offences indicated in Articles 1 and 2 of the European Convention on the Suppression of Terrorism, or

   (b) any other offence regarded as an extraditable offence under Article 2(1).

   However, Article 2a(3) enables Member States to enter a reservation so as not to apply the waiver of double criminality in the cases in (b) above. Seven delegations (DK/NL/IRL/EL/B/F/L) also wanted the option of entering such a reservation to be extended to the whole of the paragraph, including (a). The latter approach was unacceptable, especially to the Spanish delegation.

   In an effort to reach a compromise:

   - the Austrian delegation suggested allowing the possibility of entering reservations in respect of the cases in (a) solely under certain conditions specified by the Member State concerned ([1]);

([1]) When giving the notification referred to in Article 15(2), any Member State may declare that it reserves the right not to apply paragraph 1(b) or not to apply paragraph 1(a) and (b) under certain specified conditions.

– the Danish delegation also proposed introducing a system of temporary reservations on similar lines to that agreed on under Article 5(3). ([1])

In this connection, the Council should consider the approach to be followed as regards the possibility of:

- **making provision for the double criminality rule to be departed from, without any reservations, for offences involving conspiracy or association to commit one or more of the offences in Articles 1 and 2 of the European Convention on the Suppression of Terrorism (as in the present paragraph 3);**

- **making provision for the entry of reservations in respect of all cases referred to in Article 2a(1)(a) and (b);**

- **making provision, in the case of conspiracy or association to commit offences, for the possibility of entering reservations under certain conditions, as proposed by the Austrian delegation (as in footnote 1 on page 3);**

- **introducing a system of temporary reservations, as proposed by the Danish delegation (as in footnote 1 below).**

2. The second issue concerns the wisdom of clarifying the term "conspiracy and association to commit offences". The term is used in Articles 2 and 3 of the draft Convention. In view of its importance, it was thought worthwhile to spell out some aspects of the meaning of the term.

([1]) "Reservations referred to in paragraph 3 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 shall 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 paragraph 4, 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."

Two points could be considered by the Council. The first concerns the wording to be used with regard to the meaning of "conspiracy and association to commit offences". The Working Party has drawn up a draft wording with broad agreement ([1]). However, the Spanish delegation requires some adjustments in order to go along with that wording ([2]).

The second point is the legal status of that wording: ([3])

- the Presidency suggested including such a passage in the explanatory report on the Convention; a majority of delegations could agree to that arrangement;
- the Belgian delegation wanted this passage incorporated into Article 3 itself;
- the Spanish delegation wanted such a passage to appear in a joint declaration annexed to the Convention.

The Council is requested to:

- **approve the content of the passage describing the characteristic features of conspiracy and association to commit offences;**
- **decide what legal status that passage is to have (explanatory report, joint declaration annexed to the Convention or incorporation into Article 3 or another provision).**

([1]) It has been suggested that the use of the term "conspiracy or association to commit offences" in this Article and in Article 3 be clarified in the explanatory report by indicating:

1. *that under the national law of Member States different legal definitions may be applied to those offences, and*
2. *by specifying some of the most characteristic elements of "association to commit offences":*
   - *(i) behaviour by a person which effectively contributes to the commission of an offence or offences by the association, even if it does not require the participation of the person in the execution of the final act of the specific offence or offences;*
   - *(ii) the contribution of the person concerned must, depending on the law of the Member State concerned, be either*
     - *(a) intentional and based on full knowledge of the purposes and criminal activities of the association; or*
     - *(b) made knowing the intention of the association is to commit the offense or offences concerned.*

([2]) The Spanish delegation agrees, in general terms, with the text set out above, but asks for the deletion of:

- the word "final", in point 2(i), fourth line; some delegations (IRL/B/P) would be against this deletion,
- the word "full", in point 25(ii)(a); three delegations (IRL/I/P) could accept this deletion; the Belgian delegation would be against;
- point 2(ii)(b).

([3]) Regarding the legal status to be given to this text, the delegations' positions are as follows:

- Several delegations (F/D/S/FIN/EL/A/DK/I) have asked for, or would prefer, this text to be included in the explanatory report.
- Some delegations (B/ES/IRL/UK/P) have requested, or would accept, that the relevant points of this text should be included in a specific provision of the Convention. For this purpose it would be necessary to finalize the wording. In particular, the Belgian delegation has asked for such a text to be included in Article 3.
- Some delegations (IRL/ES) have asked for the text to be given in a declaration to be annexed to the Convention.

Article 5 (extradition of nationals)

Agreement has been reached on Article 5 by all delegations. On the basis that the meaning given to the term "national" by certain Member States (DK/S/FIN) under the 1957 European Extradition Convention was too broad, these delegations proposed the joint declaration contained in Annex II (page 35).

The text of this joint declaration was approved by all delegations. However, a decision needs to be taken on where it is to appear. At its meeting on 29 May 1996 COREPER moved towards the idea of annexing it to the Convention. Four delegations (DK/S/FIN/NL) entered scrutiny reservations on this proposal. In particular, the Danish, Swedish and Finnish delegations would have preferred the statement to be entered in the minutes of the Council meeting at which the Act drawing up the Convention is adopted.

The Council is asked to consider whether:

- **all delegations can agreed to the draft declaration being annexed to the Convention;**
- **the Spanish delegation is able to withdraw its scrutiny reservation on Article 5.**

Article 10 (facsimile transmission of documents)

In 1989 Member States drew up an Agreement on the Simplification and Modernization of Methods of Transmitting Extradition Requests in particular by facsimile transmission (the San Sebastián Convention). This has been signed by all Member States except Ireland and ratified by four of them (D/E/L/NL). Some other Member States are in the process of ratifying.

Discussions revealed a school of thought that such matters should be addressed in this draft Convention. The provisions of the San Sebastián Convention were accordingly included in Article 10. Three delegations (NL/D/L) had doubts about or were opposed to this approach.

A decision is sought from the Council on whether to include paragraphs 3, 4 and 5 in Article 10.

Article 14 (temporary reservations)

For the sake of compromise, delegations supported the view that there should be a system of temporary reservations enterable by Member States in respect of extradition of nationals (Article 5(3)).

The Netherlands delegation suggested going further and including in Article 14 a system of temporary reservations for all reservations under the Convention.

The Belgian delegation could support that proposal. The German and Spanish delegations thought it an interesting idea, but agreed not to include it in view of the number of delegations opposed to it. The Austrian, Danish and Italian delegations could entertain the idea of such a system in cases where it might actually enable reservations to be withdrawn. The other delegations (F/IRL/P/EL/S/L/FIN/UK) were opposed to the proposal.

A decision is sought from the Council on whether it is appropriate to introduce a system of temporary reservations for all reservations to be entered under this Convention, as proposed by the Netherlands delegation.

Article 14a

The Belgian delegation suggested including, after Article 14, a provision on unilateral suspension of cooperation and on dispute resolution ([1]).

Paragraph 1 of this proposal, concerning the unilateral suspension of cooperation in matters of extradition, was opposed by the majority of delegations. In the interests of a solution acceptable to everyone, the Belgian delegation suggested as an alternative that a joint declaration should be issued which retained the idea formulated in paragraph 1.

With regard to paragraphs 2 and 3, a large majority of delegations had reservations or doubts as to the advisability of including such a provision. Several of them wanted to address issues concerning dispute resolution when considering aspects of jurisdiction for the Court of Justice. On this point, mention should be made of the idea emerging from discussions that aspects of jurisdiction for the Court of Justice need to be considered separately, after work on the draft Convention has been completed.

A decision is sought from the Council on whether to include Article 14a in the draft Convention.

Article 15

Two issues arise regarding this Article.

The first concerns early implementation of the Convention for those Member States which have made a declaration to that effect (Article 15(4)).

([1]) "1. Without prejudice to the application of Articles 60 and 65 et seq. of the Vienna Convention on the Law of Treaties of 23 May 1969, no unilateral suspension of cooperation shall be permitted under this Convention.
2. In the event of any dispute regarding the interpretation or application of this Convention, Member States hereby undertake to engage in bilateral consultations in order to resolve the dispute in observance of the rules of national law and the sovereignty of each Member State concerned.
3. Any dispute not resolved by means of the bilateral consultations provided for in the preceding paragraph shall be submitted, at the request of any party to the dispute, for conciliation in the Council."

All delegations agreed to the paragraph as it stood except for the Spanish delegation, which wanted it to be deleted. While in favour of early application of the Convention, that delegation felt that any cooperation between two or more Member States should be based on Article K.7. It referred here to the precedent set under the CIS (Customs Information System) Convention. The Council Legal Service has prepared a legal opinion on the subject (7560/96 JUR 168).

The second issue was raised by the French delegation. In the light of earlier discussions, the French delegation suggested adding the following paragraph, to come after Article 15(5):

"When giving the notification referred to in paragraph 2, each Member State may declare that the Convention will apply only to requests first made after its entry into force in the case of offences referred to in Articles 1 and 2 of the European Convention on the Suppression of Terrorism or conspiracy or association to commit one or more offences.". ([1])

Several delegations could agree to this proposal. Others entered scrutiny reservations. The Spanish delegation entered a reservation on the inclusion of this paragraph.

A decision is sought from the Council on whether to:

- **opt for the present paragraph 4, in line with the wording laid down in March 1995 in the Convention on simplified extradition procedure, or for the course proposed by the Spanish delegation, as already used in the CIS (Customs Information System) Convention;**

- **follow the course put forward by the French delegation, as set out above.**

([1]) This text allows for the adjustments made at the Steering Group III meeting on 29 May 1996.

Draft

COUNCIL ACT

of _____

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

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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,

HAS DECIDED that the Convention set out in the Annex, 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 prosecution and to the execution of sentences,

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

STRESSING that Member States have a common interest in ensuring that extradition procedures operate efficiently and rapidly insofar as their systems of government are 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,

EXPRESSING their confidence in the structure and operation of their judicial systems and in the ability of all Member States to ensure a fair trial,

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 European Convention on Extradition of 13 December 1957 and other existing Conventions on the matter,

CONSIDERING that the provisions of those Conventions remain applicable for all matters not covered by this Convention,

HAVE AGREED AS FOLLOWS:

Article 1 ([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 (hereinafter referred to as European Convention on Extradition), the European Convention on the Suppression of Terrorism of 27 January 1977 (hereinafter referred to as European Convention on the Suppression of Terrorism), the Convention of 19 June 1990 applying the Schengen Agreement in relations between the Member States which are party to that Convention and the first chapter of the Benelux Treaty of 27 June 1962 on Extradition and Mutual Assistance in Criminal Matters, as amended by the Protocol of 11 May 1974, in relations between the Member States of the Benelux Economic Union (hereinafter referred to as Benelux Treaty).

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.

([1]) General reservation by the United Kingdom delegation linked to matters arising in the context of the common agricultural policy (beef and veal).

Article 2

Extraditable offences

1. Extradition shall also be granted in respect of offences which are punishable under the law of the requesting Member 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 Member State by deprivation of liberty or a detention order for a maximum period of at least six months.

2. Extradition may not be refused on the grounds that the law of the requested Member State does not provide for the same type of detention order as the law of the requesting Member State.

3. A Member State entering a reservation in respect of the European Convention on Extradition whereby the extradition of a person will not be granted when it is requested for an offence punishable by a life sentence or detention order will, however, grant extradition where the requesting Member 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])

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

([1]) COREPER agreed to submit to the Council only one proposal, that on page 2. During previous discussions, the following proposals had been put forward:
- The Presidency had suggested that the last four lines of the paragraph should read as follows:
  "(...) where the requesting Member State gives such assurance as the requested Member State considers sufficient 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".
  Several delegations were in favour of this proposal (E/EL/A/DK/S/FIN/I). The UK delegation entered reservations. The Portuguese delegation entered a scrutiny reservation on the proposal.
- As an alternative, the Portuguese delegation asked for a statement to be annexed to the Convention, which would read as follows:
  "In applying Article 2(3), Portugal, in compliance with the relevant provisions of the Constitution of the Portuguese Republic, as interpreted by its Constitutional Court, will grant extradition only if it considers the assurances provided by the requesting Member State to be adequate."
  Reservations or doubts by several delegations (NL/S/A/EL/D).
  Scrutiny reservations by some delegations on the whole discussion.
  The Portuguese delegation could also consider the possibility of deleting paragraph 3 of this Article. In this case it considered that the appropriate adjustments should be made to Article 2(2). In addition, it indicated that such a solution would result in the arrangements provided for in the Schengen Convention, facilitating in certain circumstances the extradition of persons wanted for an offence punishable by a life sentence, not being applicable to those States of the European Union which were not members of Schengen.

Article 2a [1][2]

Conspiracy and association to commit offences

1. Where the offence on which the request is based is classified under the law of the requesting Member State as a conspiracy or an association to commit offences and is punishable 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 Member State does not provide for the same facts to be an offence, provided the conspiracy or the association is to commit:

   (a) one or more of the offences indicated in Articles 1 and 2 of the European Convention on the Suppression of Terrorism, or

   (b) any other offence regarded as an extraditable offence under Article 2(1).

2. For the purpose of determining whether the conspiracy or the association is to commit one of the offences indicated under paragraph 1(a) or (b) of this Article, the requested Member 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(2)(b) of the European Convention on Extradition or in Article 11(2)(b) of the Benelux Treaty.

([1]) It has been suggested that the use of the term "conspiracy or association to commit offences" in this Article and in Article 3 be clarified in the explanatory report by indicating:

1. *that under the national law of Member States different legal definitions may be applied to those offences, and*
2. *by specifying some of the most characteristic elements of "association to commit offences":*
   - *(i) behaviour by a person which effectively contributes to the commission of an offence or offences by the association, even if it does not require the participation of the person in the execution of the final act of the specific offence or offences;*
   - *(ii) the contribution of the person concerned must, depending on the law of the Member State concerned, be either*
     - *(a) intentional and based on full knowledge of the purposes and criminal activities of the association, or*
     - *(b) made knowing the intention of the association is to commit the offence or offences concerned.*

The Spanish delegation agrees, in general terms, with the text set out above, but asks for the deletion of:

- the word "final", in point 2(i), fourth line; some delegations (IRL/B/P) would be against this deletion,
- the word "full", in point 2(ii)(a); three delegations (IRL/I/P) could accept this deletion; the Belgian delegation would be against;
- point 2(ii)(b).

Regarding the legal status to be given to this text, the delegations' positions are as follows:

- Several delegations (F/D/S/FIN/EL/A/DK/I) have asked for or would prefer, this text to be included in the explanatory report.
- Some delegations (B/E/IRL/UK/P) have requested, or would accept, that the relevant points of this text should be included in a specific provision of the Convention. For this purpose it would be necessary to finalize the wording. In particular, the Belgian delegation has asked for such a text to be included in Article 3.
- Some delegations (IRL/E) have asked for the text to be given in a declaration to be annexed to the Convention.

([2]) Scrutiny reservations by the Belgian and Greek delegations and reservation by the Spanish delegation.

3. When giving the notification referred to in Article 15(2), any Member State may declare that it reserves the right not to apply paragraph 1(b) or not to apply it under certain specified conditions. ([1])

[or alternatively: ([2])

3. When giving the notification referred to in Article 15(2) any Member State may declare that it reserves the right not to apply paragraph 1(b) or not to apply paragraph 1(a) and (b) under certain specified conditions. ([3])

4. ([4]) Reservations referred to in paragraph 3 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 shall 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 paragraph 4, 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.]

([1]) A number of delegations (D/E/L/I/UK/P/FIN/S) agreed to this paragraph as it stood. Seven delegations (DK/NL/IRL/EL/B/F/L) wanted the option of entering a reservation on the whole of paragraph 1, including subparagraph (a). Scrutiny reservation by the Austrian delegation.

([2]) Compromise based on suggestions from the Austrian delegation (new paragraph 3) and the Danish delegation (paragraph 4). For the sake of compromise, several delegations, including some questioning the departure from the principle of double criminality, were able to agree to these two paragraphs as a whole, in place of the present paragraph 3.

([3]) The E/F/NL/B delegations were unable to agree to this arrangement.

([4]) Some delegations could agree to this system in the context of this Article.

Article 2b

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

Extradition for the purpose of prosecution shall not be refused solely because the request is supported, pursuant to Article 12(2)(a) of the European Convention on Extradition or Article 11(2)(a) of the Benelux Treaty, by an order of the judicial authorities of the requesting Member State to deprive the person of his liberty in a place other than a penitentiary institution.

Article 3

Political offences

1. For the purposes of applying this Convention, no offence may be regarded by the requested Member 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 giving the notification referred to in Article 15(2), declare that it will apply paragraph 1 only in relation to:

   (a) the offences indicated in Articles 1 and 2 of the European Convention on the Suppression of Terrorism, and

   (b) ([1]) offences of conspiracy or association to commit one or more of the offences indicated in Articles 1 and 2 of the European Convention on the Suppression of Terrorism.

([2])

3. The rules contained in Article 3(2) of the European Convention on Extradition, in Article 3(3) of the Benelux Treaty 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.

([1]) Scrutiny reservation by the Irish delegation.
([2]) See comments in the footnotes concerning Article 2a.

Article 4

Fiscal offences

1. With regard to taxes, duties, customs and exchange, extradition under the conditions in this Convention, the European Convention on Extradition and the Benelux Treaty 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 Member 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 Member State.

3. When giving the notification referred to in Article 15(2), any Member State may declare that it will grant extradition only for acts or omissions which may constitute an offence in connection with excise, value-added tax or customs.

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 Member State within the meaning of Article 6 of the European Convention on Extradition and Article 6 of the Benelux Treaty.

2. When giving the notification referred to in Article 15(2), 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 shall 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 paragraph 3, 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.

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[1] Scrutiny reservation by the Spanish delegation, (see comments in footnotes to the Annex).

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 Member State.

2. The requested Member 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 7

Amnesty

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

Article 8

Acts other than those for which a person is being extradited

1. A person who has been extradited may, in respect of acts committed before his surrender other than those for which the request for extradition was made, 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 in lieu thereof, even if it may restrict his personal liberty, or

   (d) be prosecuted, tried, detained with a view to the execution of a sentence or of a detention order 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 as referred to in paragraph 1(d) shall be [given before] [obtained by] (1) 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).

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(1) To be reviewed when the text is finalized by the Legal/Linguistic Experts.

Article 8a

Presumption of consent of the requested State

Each Member State, when giving the notification referred to in Article 15(2) or at any time, may declare that, in its relations with other Member States that have made the same declaration, consent for the purposes of 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, unless it indicates otherwise when granting extradition in a particular case. Where the Member State has indicated in any particular case that consent should not be deemed to have been given, Article 8(1) still applies.

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.

2. When giving the notification referred to in Article 15(2), 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 Article 13 of the Convention on simplified extradition procedure provides otherwise or where a person consents to be re-extradited to another Member State.

Article 10

Central authority and transmission of documents by facsimile

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 this Convention.

2. Each Member State shall designate its authority or authorities in accordance with paragraph 1 when giving the notification referred to in Article 15(2) and may alter the designation at any time thereafter.

3. ([1]) The extradition request and the documents referred to in paragraph 1 may be sent by facsimile transmission. Each central authority shall be equipped with a facsimile machine for transmitting and receiving such documents and shall ensure that it is kept in proper working order.

4. ([1]) In order to ensure the authenticity and confidentiality of the transmission, a cryptographic device fitted to the facsimile machine possessed by the central authority shall be in operation when the equipment is being used to apply this Article.

   Member States shall consult each other on the practical arrangements for applying this Article.

5. ([1]) In order to guarantee the authenticity of extradition documents, the central aut haired of the requesting State shall state in its request that it certifies that the documents transmitted in support of the request correspond to the originals and shall describe the pagination. Where the requested Member State disputes that the documents correspond to the originals, its central authority shall be entitled to require the central authority of the requesting State to produce the original documents or a true copy thereof within a reasonable period through either diplomatic channels or any other mutually agreed channel.

([1]) Scrutiny reservations by the German and Luxembourg delegations and reservation by the Netherlands delegation on the inclusion of the provisions of the San Sebastián Convention (Telefax Convention) in Article 10.

Article 11

Supplementary information

When giving the notification referred to in Article 15(2), or at any other time, any Member State may declare that, in its relations with Member States which have made the same declaration, the judicial authorities or other competent authorities of the requested State may, where appropriate, make requests directly to the judicial authorities or other competent authorities of the requesting State responsible for criminal proceedings against the person whose extradition is requested for supplementary information in accordance with Article 13 of the European Convention on Extradition or Article 12 of the Benelux Treaty.

In making such a declaration, a Member State shall specify the judicial authorities or the competent authorities for making and receiving such requests.

Article 12

Authentication

Any document or copy of documents transmitted for the purposes of extradition shall be exempted from authentication or any other formality unless expressly required by the provisions of this Convention, of the European Convention on Extradition or of the Benelux Treaty.

In the latter case, copies of documents shall be considered to be authenticated when they have been certified true copies by the judicial authorities that issued the original or by the central authority designated under Article 10.

Article 13

Transit

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

1. Any request for transit must contain sufficient information to enable the Member State of transit to assess the request 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:

   - 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;
   - the nature and the legal description of the offence;
   - a description of the circumstances in which the offence was committed, including the date and place.

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

3. In the case of transport by air without a scheduled stopover, if an unscheduled landing occurs, the requesting Member State shall provide the transit Member State concerned with the information provided for in paragraph 1.

4. Subject to the provisions of this Convention, in particular Articles 2a, 3 and 5, Article 21(1), (2), (5) and (6) of the European Convention on Extradition shall continue to apply.

Article 14 ([1]) ([2])

Reservations

No reservations may be entered in respect of this Convention other than those expressly provided for in the Convention.

([1]) The Netherlands delegation suggested that provision for the system of temporary reservations laid down in Article 5(3) should be made in the context of this Article. It would thus be applicable to all the reservations entered under this Convention. The Belgian delegation could go along with that proposal. The D/E delegations thought it an interesting idea, but agreed not to include it in view of the number of delegations opposed to it. The Austrian, Danish and Italian delegations could entertain the idea of such a system in cases where it might actually enable reservations to be withdrawn. The other delegations opposed the proposal (F/IRL/P/EL/S/L/FIN/UK).

([2]) The Belgian delegation suggested including, after Article 14, a provision on unilateral suspension of cooperation and the settlement of disputes.

"1. Without prejudice to the application of Articles 60 and 65 et seq. of the Vienna Convention on the Law of Treaties of 23 May 1969, no unilateral suspension of cooperation shall be permitted under this Convention.

2. In the event of any dispute regarding the interpretation or application of this Convention, Member States hereby undertake to engage in bilateral consultations in order to resolve the dispute in observance of the rules of national law and the sovereignty of each Member State concerned.

3. Any dispute not resolved by means of the bilateral consultations provided for in the preceding paragraph shall be submitted, at the request of any party to the dispute, for conciliation in the Council"

A provision such as paragraph 1 was opposed by the majority of delegations. In the interests of a solution acceptable to everyone, the Belgian delegation suggested as an alternative that a joint declaration should be issued which retained the idea formulated in paragraph 1.

With regard to paragraphs 2 and 3, a large majority of delegations had reservations or doubts as to the advisability of including such a provision. Several of them wanted to address issues concerning dispute resolution when considering aspects of jurisdiction for the Court of Justice. On this point, mention should be made of the belief emerging from discussions that aspects of jurisdiction for the Court of Justice need to be considered separately, after work on the draft Convention has been completed.

Article 15

Entry into force

1. This Convention shall be subject to adoption by the Member States in accordance with their respective constitutional requirements.

2. Member States shall notify the Secretary-General of the Council of the European Union of the completion of the constitutional procedures for the adoption of this Convention.

3. This Convention shall enter into force ninety days after the notification referred to in paragraph 2 by the last Member State to complete that formality.

4. Until this Convention enters into force, any Member State may, when giving the notification referred to in paragraph 2, or at any later date, declare that as far as it is concerned the Convention shall apply to its relations with Member States that have made the same declaration. Such declarations shall apply ninety days after the date of deposit. ([1])

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.

6. When giving the notification referred to in paragraph 2, each Member State may declare that the Convention will apply only to requests first made after its entry into force in the case of offences referred to in Articles 1 and 2 of the European Convention on the Suppression of Terrorism or conspiracy or association to commit one or more offences. ([2])

7. This Convention may be referred to as the European Union Convention on Extradition.

([1]) The Spanish delegation called for this paragraph to be deleted. While in favour of early application of the Convention, it took the view that any cooperation between two or more Member States should be based on Article K.7. It referred here to the precedent set under the CIS (Customs Information System) Convention. The Council Legal Service has drawn up a legal opinion on the subject (7560/96 JUR 168).

([2]) Text suggested by the French delegation and acceptable to several delegations (DK/FIN/IRL/GR/P). Scrutiny reservations by other delegations (UK/B/NL/I/S/D/A). Reservation by the Spanish delegation.

Article 16

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 Council of the European Union, shall be authentic.

3. The instruments of accession shall be deposited with the depositary.

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 15(4) shall apply to acceding Member States.

Article 17

1. The Secretary-General of the Council of the European Union shall act as depositary of this Convention.

2. The depositary shall publish in the **Official Journal of the European Communities** information on the progress of adoptions and accessions, declarations and reservations, and also any other notification concerning this Convention.

DECLARATIONS TO BE ANNEXED TO THE CONVENTION

Joint Declaration

The Member States declare that this Convention is without prejudice either to the right of asylum to the extent to which it is 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.

Joint declaration by the Danish, Finnish and Swedish delegations

Denmark, Finland and Sweden confirm that they – as indicated during their negotiations on accession to the Schengen agreements – will not invoke, in relation to the other Member States, their declarations under Article 6(1) of the European Convention on Extradition as a ground for refusal of extradition of residents from non-Nordic States. ([1])

([1]) Text approved by all delegations. The Danish, Finnish, Swedish and Netherlands delegations entered scrutiny reservations on the idea that this declaration would be annexed to the Convention.

STATEMENTS FOR ENTRY IN THE MINUTES OF THE COUNCIL MEETING AT WHICH THE ACT ESTABLISHING THE CONVENTION IS ADOPTED

Statement by Greece re Article 3

Greece interprets Article 3 from the standpoint of paragraph 3 thereof. This approach ensures compliance with conditions laid down in the Greek constitution, which:

- expressly prohibits extradition of a foreigner pursued for activities for freedom, and

- distinguishes between political and so-called mixed offences, for which the rules are not the same as for political offences.

COUNCIL STATEMENT ON THE FOLLOW-UP TO THE CONVENTION

The Council states its view that there should be a regular review, on the basis of information supplied by the Member States, of:

- the implementation of this Convention;
- the functioning of this Convention after its entry into force;
- the possibility for Member States to amend the reservations entered in the framework of this Convention with a view to easing or removing the conditions for extradition;
- the general functioning of extradition procedures between the Member States.

COMMENTS WHICH THE WORKING PARTY WANTED TO BE MADE IN THE EXPLANATORY REPORT ON THE CONVENTION

Article 1

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

There should also be an explanation of the link between this Convention and 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 2b

The explanatory report will state that this Article:

- does not modify the conditions under which extradition is granted or refused;
- means that it is in the interest of the requesting Member State to explain the legal scope and the intentions 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

It will be specified that Article 3 as a whole relates to requests for extradition between Member States and to transit. Extradition may therefore be refused in the case of transit through a Member State where that Member State has entered a reservation within the meaning of Article 3(2).

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).

It should also be stated that subparagraphs (a) to (c) refer to offences which, in themselves, would not give rise to extradition of the person. In contrast, subparagraph (d) refers to offences that are serious enough to warrant extradition.

The report will also indicate the situations that are covered 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 the principles set out in a declaration deposited by a Member State within the meaning of Article 8a will apply, unless it indicates otherwise when taking a decision on any particular request for extradition.

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.

The explanatory report will also specify:

- the relationship between this Article and Article 13 of the Convention on simplified extradition procedure;
- the relationship between this Article and Article 8.

Article 10

The explanatory report must indicate that the text is to a large extent modelled on the Agreement on the Simplification and Modernization of Methods of Transmitting Extradition Requests (San Sebastián Convention). At the same time mention should also be made of the circumstances for which the system referred to in paragraph 5 came about.

Article 12

It will be specified that the term "judicial authorities" used in the second paragraph includes any officials other than magistrates and judges who are responsible in accordance with national rules for transmitting decisions adopted by national authorities.

Article 13

The explanatory report will state that nationality is one of the items of information to be provided in order to identify the person sought, in the framework of paragraph 2(b).

It will set out the link between this Article and Article 21(3) and (4), which are not mentioned in paragraph 4 of this Article and which are modified by the other paragraphs of Article 13.

It should also be stated that arrest for detention in a place other than a penitentiary institution is included in the second subparagraph of paragraph 1.

Article 14

It was agreed that the explanatory report would state the principle that reservations entered with respect to the European Convention on Extradition remain valid solely insofar as they are compatible with the provisions of this Convention, save where the Convention provides otherwise.

Article 16

The explanatory report will state that prospective Member States must be parties to the European Convention on Extradition before they can accede to the European Union. To that end, when negotiations with such States begin, it should be established that accession to the European Convention on Extradition constitutes a condition for their accession.