

CONVENTION

on simplified extradition procedure between the Member States of the European Union

EXPLANATORY REPORT

(96/C 375/03)

1. BACKGROUND

At the ministerial meeting at Limelette on 28 September 1993, the Justice Ministers of the Member States of the European Union agreed on a declaration setting out guidelines for improving extradition between Member States. The declaration was adopted by the Justice and Home Affairs Council at its meeting on 29 and 30 November 1993.

The declaration gave precise instructions to the relevant working structures under Title VI of the Treaty on European Union to examine the conditions for extradition with a view to making them more flexible, and extradition procedures with the aim of simplifying and accelerating them, to an extent compatible with the basic principles of the Member States' domestic legal arrangements.

An initial progress report was submitted to the Council at its meeting on 29 and 30 November 1993. At its meeting on 24 March 1994 the Council discussed certain questions of principle concerning the conditions for extradition.

A second interim report was submitted to the Council at its meeting on 20 June 1994. On that occasion, the Council's attention was drawn to the need for a more detailed examination of the possible procedural measures which, without affecting legal or political principles that would be difficult to set aside, would enable procedures to be simplified and accelerated to a significant extent. The Council agreed to pay particular attention to the procedures in which the persons involved consented to their extradition.

Subsequent to that meeting, the Belgian Justice Minister submitted a working document on this subject which has been used as a basis for the discussions that have taken place under the German and French Presidencies.

By an Act of 10 March 1995 (OJ No C 78, 30. 3. 1995, p. 1), the Council decided to draw up the Convention, which was signed the same day by representatives of the Governments of the Member States of the Union, and recommended that it be adopted by the Member States.

2. PRINCIPLES OF THE CONVENTION

The Convention originated from the following situation. From statistics gathered in the course of proceedings from the Member States concerning the number of extradition dossiers and the average duration of proceedings between the Member States (reference year: 1992) it emerged that, out of some 700 extradition applications made in 1992 between States that were members at the time, the person covered by the application consented in more than 30 % of cases. Despite such consent, the length of the procedure is still fairly long (up to several months), even where the person concerned is not prosecuted or detained for another reason in the requested State.

In the light of these findings, the Council took the view that in such cases the time required for extradition and any period of detention for the purposes of extradition should be reduced to a minimum.

This generally reflects the concern to improve and accelerate cooperation between Member States in the surrender of persons for purposes of prosecution and enforcement of penalties.

In cases where persons are detained purely for extradition purposes with a view to taking proceedings in the requesting State, it also meets the requirements of respect for the human rights and fundamental freedoms of the persons being prosecuted. In such cases the person arrested for the purpose of extradition is presumed to be innocent. Limits to his freedom therefore have to be strictly justified. If the person consents to his extradition, it is desirable that he should be surrendered as soon as possible to the requesting State so that he can lodge an appeal there against his detention.

Lastly, it fulfils the aim of efficiency in the criminal justice field. Until the person whose extradition is sought is handed over to the authorities of the requesting State, the procedure in that State is at a standstill, or at least slowed down. If slowing down means respect for the person's right to oppose his

extradition, it is in line with the principles of fair criminal proceedings. But if the person does not intend to oppose his extradition, there is no justification for this delay.

In the light of all these considerations, the Council concluded that a more suitable legal framework should be devised to allow quicker extradition where a person consents to his extradition.

The principle is as follows. If there is consent by the person concerned and agreement by the competent authority of the requested State, the person is surrendered without any need for an extradition request to be presented and without the formal extradition procedure being applied. The procedure takes place between the competent authority of the requested State and the authority of the requesting State which sought the arrest. The person is surrendered with a maximum of 40 days from the day after the person's consent is given.

It should be pointed out that the agreement of the competent authority of the requested State is independent of consent by the person. The authority remains free to assess the advisability of extradition, taking account of the content of the request, and also in the light of any proceedings in progress in respect of the same person in the requested State.

The Convention mainly applies to two types of situation. The first is where provisional arrest for extradition purposes is requested and where the person concerned, who gives his consent upon arrest (or within ten days of arrest), is not sought or held for another reason in the requested State. This is the main type of case, which is covered by Articles 3 to 11 of the Convention. The second situation is where the person consents after the 10-day period has expired but before the expiry of the 40-day period laid down in Article 16 of the European Convention on extradition of 13 December 1957 and before a request for extradition has been made.

The Convention will also apply to a third type of situation, provided the Member State concerned makes a declaration to that effect when it is ratified: the situation where the person consents to his extradition after an extradition request has been made, whether or not that request was preceded by a request for provisional arrest.

The Convention provides a flexible legal framework, since the procedure laid down is subject in all cases to the agreement of the competent authority of the requested State and its assessment concerning legality

and advisability. It is an instrument providing a legal basis for simpler and faster cooperation, although it has to be stressed that at the end of the day its effectiveness will largely depend on the willingness of the competent authorities to cooperate more fully in surrendering persons for the purposes of prosecution and enforcement of penalties.

3. COMMENTARY ON THE ARTICLES

Article 1

General provisions

This Article places this Convention in the context of the European Convention on Extradition. This Convention seeks to facilitate the application of the European Convention between the Member States of the European Union and supplement its provisions so as to deal more adequately with cases where persons sought for extradition consent to being handed over.

As is noted in the final recital of the preamble to the Convention, the consequence of placing the Convention in the framework of the European Convention is that the provisions of the European Convention remain applicable for all matters not covered by the new Convention. This is particularly the case as regards the conditions of extradition.

It follows from this general provision that the Convention does not alter the extradition rules for Member States linked together by an instrument other than the European Convention, as in the case of the Benelux countries, for example, which are linked by the Treaty on Extradition and Mutual Assistance in Criminal Matters of 27 June 1962, and for which Article 19 of that Treaty, laying down a summary extradition procedure, continues to apply.

As regards Member States whose relations are governed by the European Convention, Article 1 (2) of this Convention specifies that paragraph 1 does not affect the application of more favourable provisions in the bilateral and multilateral agreements and uniform legislation in force between certain Member States.

Article 2

Obligation to surrender persons

This Article sets out the basic principle of the Convention, namely the obligation to surrender persons sought for the purpose of extradition, subject to the consent of such persons to their surrender

under the simplified procedure, given in accordance with Articles 5 (1), 6 and 7, and the agreement of the requested State, given in accordance with Article 5 (2).

Article 3

Conditions for surrender

This Article concerns the main premise of the Convention, namely the simplified procedure following provisional arrest. It indicates that the starting-point is the request for provisional arrest as provided for in Article 16 of the European Convention. Between Member States party to the Convention applying the Schengen Agreement, another starting-point could be when a person is reported in the Schengen information system, in accordance with Article 96 of that Convention.

Article 3 (2) indicates the consequence that using the simplified procedure has for the extradition, i. e. in such case the submission of a request for extradition and the documents required by Article 12 of the European Convention are no longer necessary. Surrender operates on the basis of the information which is contained in the request for provisional arrest and which is specified in Article 4 of the Convention.

Article 4

Information to be provided

This Article specifies the information that must be provided to enable the simplified procedure to go ahead.

Information has to be communicated both to the arrested person, providing the basis on which consent to surrender may be given, and to the competent authority of the requested State, giving the necessary facts to enable the authority to examine the question of agreement to the surrender.

The items of information mentioned are the same as those required for reporting a person in the Schengen information system, with the addition of information on the identity of the person sought.

As a rule, this information should be regarded by the competent authority of the requested State as being sufficient for taking a decision on surrendering the person concerned. It comprises all the details needed for a proper examination of the question of agreement to the surrender both as regards the person concerned and the offence itself.

However, Article 4 (2) allows for the possibility of derogating from paragraph 1 and of requesting further information if the information supplied is insufficient to allow the competent authority of the requested State to give agreement to the surrender. The type of information is not specified and is left to the discretion of each State. This derogation may not in any circumstances conflict with Article 3 (2) of the Convention, whereby the submission of the documents specified by Article 12 of the European Convention cannot be required under the simplified procedure.

Article 5

Consent and agreement

This Article indicates the way in which the consent and agreement required by Article 2 are given. The consent of the person concerned has to be given under the conditions set by Articles 6 and 7. Regarding the agreement of the competent authority of the requested State, the Convention refers to States' own procedures.

Article 6

Information to be given to the person

This Article requires States to ensure that anyone arrested for the purpose of extradition is informed of the request concerning him and of the possibility of his consenting to his surrender under the simplified procedure. The information is to be given by the 'competent authority', i. e. the authority empowered to take persons into custody. It has to be given as soon as the person is taken into custody and in accordance with the domestic law of each State.

Article 7

Establishing consent

This Article deals with the way in which consent is given. It also applies to renunciation of entitlement to the speciality rule where the law of the requested State provides for such renunciation, as distinct from consent to extradition, in accordance with Article 9 (b).

The Convention does not specify at what point the person's consent must be established. Where the procedure is set in motion by the provisional arrest of the person, in accordance with Article 4, it follows from Article 6, which provides for the person to be informed as soon as he is arrested, and from Article 8, which provides for notification of consent within 10 days of the provisional arrest, that it must be

possible for the person to give his consent as soon as he is taken into custody.

Consent (and, where appropriate, renunciation of entitlement to the speciality rule) is established before the competent judicial authority of the requested State. The competent judicial authority may be a judge, a court or a magistrate from the public prosecutor's office, depending on the law of the requested State. When depositing its instrument of ratification, acceptance, approval or accession, each Member State will indicate which authority will be competent for its part, in accordance with the provisions of Article 15.

The forms in which consent (and, where appropriate, renunciation of entitlement to the speciality rule) is established are determined by the legislation of each Member State. Article 7 (2), however, requires Member States to adopt the measures necessary to ensure that consent (and, where appropriate, renunciation of entitlement to the speciality rule) is established in such a way as to show that the person concerned has expressed it voluntarily and in full awareness of the consequences (free and enlightened consent). It provides that, for this purpose, the arrested person shall have the right to legal counsel.

This provision implies that the person must be fully informed of the effects of his consent (and, where appropriate, his renunciation of entitlement to the speciality rule).

As to the effects of consent, the information he is given will concern renunciation of the guarantees of the ordinary procedure; the possible irrevocability of the consent given, in accordance with Article 7 (4); any effects on the speciality rule — and the possibility of being prosecuted on grounds other than those on which the extradition procedure is based — in accordance with Article 9 (a).

As regards the effects of renunciation of entitlement to the speciality rule, the information given will concern the effects of such renunciation, the speciality rule and the possible irrevocability of renunciation.

This provision also means that the procedure for establishing consent (and, where appropriate, renunciation of entitlement to the speciality rule) must be organized in such a way that it may be subsequently verified whether consent was given voluntarily and in full awareness of the consequences. Accordingly, Article 7 (3) provides that consent (and, where appropriate, renunciation of entitlement to the speciality rule) shall be recorded. The procedures and forms for such a record are left to the discretion of national legislators.

Article 7 (4) provides that consent (and, where appropriate, renunciation of entitlement to the speciality rule) may not be revoked. But to take account of the legal situation in some Member States, the same paragraph allows Member States an alternative whereby they can indicate that consent (and, where appropriate, renunciation of entitlement to the speciality rule) may be revoked, in accordance with the rules applicable under national law.

To ensure in the latter case that the revocation of consent by the person concerned cannot be prejudicial to the smooth conduct of the extradition procedure, paragraph 4 provides that the period between the notification of consent and notification of its revocation shall not be taken into consideration in establishing the periods of provisional arrest of 18 and 40 days provided for in Article 16 (4) of the European Convention. This means that where a person revokes his consent the requesting State will have as many days for submitting its request for extradition as it had when it received notification of the person's consent to his extradition and it ceased preparing the documents required under Article 12 of the European Convention.

Article 8

Notification of consent

This Article provides that the requested State shall immediately notify the requesting State of the person's consent. Immediate notification is essential to ensure the smooth running of the simplified procedure where its starting-point is the provisional arrest of the person, in accordance with Article 4 and subsequent Articles of the Convention. Notification enables the requesting State to suspend preparation of the documents required in support of the request for extradition pursuant to Article 12 of the European Convention.

To make it possible, where necessary, to submit a request in accordance with Article 12 of the European Convention within the 40 days specified by Article 16 of that Convention, Article 8 requires the requested State to inform the requesting State within 10 days after the provisional arrest whether or not the person has consented to his surrender. This period does not prevent the person's subsequent consent, which will be dealt with by Article 12 of the Convention, but it seeks to ensure that the uncertainty about the person's consent cannot be prejudicial to the smooth conduct of the extradition procedure, on account of the periods specified in Article 16 of the European Convention.

Also in the interests of promptness, paragraph 2 provides that information on a person's consent must be notified directly between the competent authorities of the Member States. This refers not to the authorities competent to receive the consent but to the authorities competent to deal with the simplified extradition procedure as specified by each Member State when it comes to deposit its instrument of ratification, acceptance, approval or accession in accordance with Article 15 of the Convention.

Article 9

Renunciation of entitlement to the speciality rule

Owing to the considerable differences between Member States' legislation as regards the effects which a person's consent to extradition has on whether the requesting State can bring proceedings against him on grounds other than those forming the subject of the request, the Convention does not contain any binding provisions in this respect. Article 9, which deals with this question, is concerned only with the need for reciprocal information. It provides that any Member State may declare that the speciality rule for extradition, as set out in Article 14 of the European Convention, will not apply in the case of the simplified procedure.

To allow for the differences between legal systems, two declarations are possible: one to the effect that the speciality rule will not apply when the person consents to his extradition, such consent automatically entailing renunciation of entitlement to the speciality rule, as in the case of the Benelux countries; the other to the effect that the speciality rule will not apply where the person who has consented to his extradition expressly and clearly renounces his entitlement of the speciality rule.

Article 10

Notification of the extradition decision

This Article provides that all notifications concerning the simplified procedure shall take place directly between the competent authority of the requested State — as determined by each Member State when depositing its instrument of ratification, acceptance, approval or accession pursuant to Article 15 — and the authority of the requesting State which requested the provisional arrest. The aim of this provision is to simplify and accelerate the procedure by allowing all notifications to take place between the authorities directly concerned by the procedure and enabling decisions on the use of the simplified procedure to be

taken by those authorities without any need to go via intermediate administrative authorities.

Paragraph 2 provides that the extradition decision taken by the competent authority of the requested State must be notified within 20 days from the day on which the person consented. Of course, this is a maximum period and it is desirable that, where there appears to be no obstacle to extradition, just as in the case where there appears to be a major obstacle, any decision, positive or negative, should be notified as soon as possible after the person concerned has consented.

In the case of refusal of extradition under the simplified procedure decided on by the competent authority of the requested State, the requesting State will still have — through a combination of the two periods provided for in Articles 8 (1) and 10 (2) — at least 10 days before the expiry of the 40-day provisional arrest period laid down in Article 16 of the European Convention in which to submit a request for extradition in accordance with Article 12 of the European Convention.

Article 11

Deadline for surrender

This Article provides that surrender shall take place within 20 days of the date on which the extradition decision was notified. This, too, is a maximum period, and surrender can of course take place as soon as the competent authority of the requested State takes the decision, insofar as it is a practical possibility at that time. This should apply particularly in cases of extradition between adjacent countries.

Paragraph 2 provides for the person to be released if he has not been surrendered to the requesting State within the period specified in paragraph 1. However, paragraph 3 allows a derogation from this period if surrender within the specified period has been prevented by circumstances beyond the control of the authority concerned. If the competent authority faced with circumstances beyond its control informs the competent authority of the other State within the 20-day period, the two authorities may agree on a new surrender date. If the person concerned is not surrendered to the requesting State within 20 days of that date, he will be released.

For the application of this provision, the concept of 'circumstances beyond the authority's control' needs to be interpreted strictly, in accordance with the interpretation given to the term in international criminal law: it refers to a situation which could not

have been foreseen and could not have been prevented (e. g. a transport accident, a strike preventing use of the expected means of transport with no possibility of using another means of transport, serious illness of the person to be extradited-requiring urgent hospitalization). The new date for surrender will have to be as close as possible to the original deadline.

Paragraph 4 provides that this Article does not apply in cases where the person is prosecuted in the requested State for another reason or has to serve a sentence for another act or where that State wishes to make use of Article 19 of the European Convention which deals with postponed or conditional surrender. In that case the applicable rules are those of the European Convention.

Article 12

Consent given after expiry of the deadline laid down in Article 8 or in other circumstances

While Articles 3 to 11 begin with the case where the person consents to his extradition subsequent to his provisional arrest, Article 12 deals with the legal arrangements applicable where the person consents independently of the conditions laid down in those Articles and in particular after the 10-day period specified in Article 8 (1) has expired.

In this second situation two cases have to be distinguished. The first is where the person consents after the expiry of the initial 10-day period but before the expiry of the 40-day period stipulated in Article 16 of the European Convention and before the requesting State has submitted a formal request for extradition. The second is where the person consents after an extradition request has been submitted by the requesting State, whether or not the request was preceded by a request for provisional arrest.

In the first case, Article 12 (1) provides that the requested State shall implement the simplified procedure provided for in the Convention. If no consent has been given when the initial 10-day period expires, the requesting State will of course have to prepare the request for extradition without waiting for the person to consent at a later stage in order to ensure that that request can be made within the maximum period of 40 days.

Regarding the second case, the use of the simplified procedure is optional and it is for each Member State to indicate in a declaration at the time of ratification whether it intends to use the simplified procedure in such cases and under what conditions it proposes to do so.

Article 13

Re-extradition to another Member State

This Article is in line with Article 9, which allows for the possibility of renouncing entitlement to the speciality rule. It traces the implications of that renunciation for the conditions applicable to re-extradition to another Member State. The rule is as follows: if, pursuant to Article 9, the person is no longer entitled to the speciality rule after his extradition to the requesting State, in such case, by way of derogation from Article 15 of the European Convention, the assent of the requesting State is no longer necessary for re-extradition to another Member State.

The explanation for this rule is the fact that, in the absence of speciality, the requesting State is authorized to institute criminal proceedings (and consequently to cooperate, through the process of extradition, in proceedings brought by other States) on any grounds other than those on which the extradition was granted.

It may be noted, however, that the Convention does not settle the question of re-extradition to a State which is party to the European Convention but is not a member of the European Union.

Article 14

Transit

This Article follows on from the simplification made by Articles 3 and 4 of the Convention. It simplifies the conditions applicable to transit as compared with those contained in Article 21 of the European Convention.

By way of derogation from Article 21 (3) of the European Convention, an application for transit may be made by any method which leaves a written record (including fax and electronic mail), and the decision of the State of transit may be made known by the same method. It does not have to be accompanied by the documents referred to in Article 12 (2) of the European Convention but only those provided for in Article 4 of the present Convention. Such information has to be deemed sufficient by the State of transit before the constraint measures needed for execution of the transit can be taken.

Article 15

Determining the competent authorities

This Article provides that at the time of ratification Member States shall indicate which authorities will be competent to apply the procedure introduced by the Convention, in particular those that will be

responsible for the procedure and will have to give their agreement to extradition by the simplified procedure, those that will receive the person's consent to his extradition and those that will be competent to authorize the transit of a person extradited by that procedure.

The aim of speed and efficiency would suggest that the competent authorities to be designated should be those which are specifically responsible for criminal proceedings in each Member State, so as to by-pass any intermediate authorities that are not essential to the smooth conduct of the procedure.

Article 16

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 ratification has been deposited.

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 States most concerned, paragraph 3 allows each Member State, at the time of its ratification or at any time subsequently, to 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 17

Accession

This Article provides that the Convention shall be open for accession by any State that becomes a member of the European Union, and lays down the arrangements for such accession.

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 16 (2). In that case the acceding State will also be able to make the declaration of advance application provided for in Article 16 (3).

It may be noted that, as a result of Article 16 (2), 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 ratification.
