DRAFT REPORT

from: Permanent Representatives Committee

to: Council (Justice and Home Affairs)

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Subject: Interim report to the Council concerning current discussions on extradition

Following the meeting of Ministers of Justice at Limelette on 28 September 1993 and the statement on extradition adopted at that meeting, the Group was instructed to examine extradition conditions with a view to making them more flexible, and extradition procedures with a view to simplifying and streamlining them as far as was compatible with the fundamental principles of Member States' domestic law.

A number of specific measures listed in the statement are to be examined by the Group, which will report to the Council within a year, i.e. by the end of 1994.

In addition, to obtain guidance as soon as possible on which measures could be the subject of consensus in the immediate future, the Ministers stated at their meeting on 28 September 1993 that they wanted an interim report on this issue for the Council meeting on 29 and 30 November 1993.
Steering Group III (Judicial Co-operation - criminal matters) conducted its discussions accordingly at its meetings on 6 and 7 October 1993 and 15 November 1993.

Extradition requirements had already been the subject of substantive discussions at earlier meetings, under first the United Kingdom and then the Danish Presidency. On this aspect of its brief, the Group asked delegations to confirm their positions in writing, mentioning any proposals they might have for going beyond the measures provided for in the statement, with a view to drawing up a summary of delegations’ replies and determining the measures on which consensus might be reached.

Regarding extradition procedures - which issue has not yet been fully discussed within the Group - a questionnaire was adopted to give a detailed picture of how domestic law stood on extradition procedures and how Member States thought progress could be made in this field.

The group furthermore drafted and adopted a questionnaire on the frequency and duration of extradition procedures between Member States. The replies to this questionnaire received or awaited from delegations will show the volume of extraditions between Member States, the duration of procedures and in particular the various stages of internal procedures, identifying where appropriate those stages which cause unnecessary delays. This information will help the Group to draft measures which might improve extradition between Member States. It will be included in the report which the Group will submit to the Council at the end of its examination.
At the present stage of the Group's work, the aim of this report is, in accordance with the wish expressed by the Ministers, to indicate the general trends emerging from the Group's discussions to date on these two aspects of its brief.

1. **EXTRADITION CONDITIONS**

   **Preliminary remark**

   Several delegations considered that the proposals in the statement should be taken together, forming a single whole to be discussed as a package in view of the interrelationship between the various elements.

   From this standpoint, the Irish delegation insisted in particular on the interrelationship between the possibility of extraditing nationals and other extradition conditions.

   The Group will have to pay attention to such interrelationships between the various suggested measures in its further discussions and in looking for solutions.

1.1. **Extraditable offences**

   Regarding conditions relating to extraditable offences, two particular measures were suggested to the Group.

   The *first measure* consisted in reducing to one year in all Member States the imprisonment threshold required for extradition. This is the normal threshold for extradition under the European Convention on Extradition, although subject to reservations expressed on the matter by States at the time of ratification.
Eleven Member States were in favour of this measure. One Member State (Denmark) was prepared to discuss it.

One delegation (Germany) here added that it was prepared to accept a lower threshold if there were proof of the need for it. However, extradition for offences carrying a custodial penalty of less than one year would be pointless unless accompanied by a considerable speeding-up of procedures.

The second measure was removal of the requirement for an imprisonment threshold for the requested State, provided that the offence carried a custodial penalty in that State and could result in extradition under the law of the requesting State.

Most Member States could accept this measure. One Member State (Denmark) was prepared to discuss it. Two delegations had reservations (Luxembourg/Ireland). The Luxembourg delegation entered a reservation on the principle. The Irish delegation however expressed doubts regarding the wisdom of extradition for minor offences, fearing that custody pending extradition might exceed the maximum penalty laid down for such offences. It could nonetheless consider lowering the threshold in the requested State (e.g. to six months).

Apart from these two proposals, two delegations (Italy/United Kingdom) wanted to go further in relaxing the dual-criminality requirement because of the respect and trust existing among Member States with regard to their respective criminal justice systems.
The United Kingdom delegation considered that this requirement ought no longer to exist among the Twelve and suggested its abolition. Should there be no agreement on straightforward abolition, this delegation would favour an interim solution which would allow extradition also for administrative offences in the requested State or for offences which, while criminal, do not carry a custodial penalty in the requested State.

The Italian delegation made several proposals for relaxation of the dual-criminality requirement. It suggested that dual criminality should initially no longer be regarded as a requirement for extradition but only as optional grounds for refusal at the discretion of the requested State. A further step might be to limit it to cases where the absence of dual criminality in the strict sense would constitute a breach of public order in the requested State. A third step might be to render these optional grounds for refusal inapplicable to a number of specific offences, in particular that of criminal association.

The Italian and Netherlands delegations also proposed that the dual-criminality requirement should be abolished with regard to accessory extradition.

1.2. Political offences

Concerning political offences, the measure put to the Group was that of excluding the political nature of the offence as grounds for refusal of extradition in requests made between Member States for one of the offences defined in Article 1 or covered by Article 2 of the European Convention on the Suppression of Terrorism of 27 January 1977.
Most delegations were generally in favour of this measure, considering that it was justifiable in view of the homogeneity of the political systems of the Member States, which were based on democratic principles and respect for basic human rights.

In the view of some Member States, a minimum measure would be to withdraw the reservations tabled at the time of ratification of the European Convention on the Suppression of Terrorism, under Article 13 of that Convention. The German delegation, however, felt that such a measure would by itself be insufficient to allow extradition for offences covered by Articles 1 or 2 of the Convention, inasmuch as even in those cases political asylum - traditionally associated with political offences - would still hinder extradition. The Spanish delegation also emphasized the hindrance that asylum might be to extradition for political offences.

Four delegations (Germany/Italy/Netherlands/United Kingdom) expressed their desire to go beyond the solution contained in the European Convention on the Suppression of Terrorism and to abolish the exception altogether, regardless of the offence or category of offence concerned. Such a solution was based on the idea that the substantive issue here did not relate to the nature of the offences committed but to that of relations between Member States.

Three delegations (Denmark/France/Ireland) however had greater reservations on this measure in view of the questions of principle which it raised.
1.3 Fiscal offences

Concerning fiscal offences, the measure put before the Group was to treat fiscal offences in the same way as ordinary criminal law offences for extradition purposes, at least in respect of excise, value added tax and customs.

All Member States were in favour of this measure.

Several delegations (Germany/Netherlands) said it should go further and cover also offences relating to direct taxation. Moreover, six Member States (Denmark/Germany/Italy/Netherlands/Portugal/Spain) had ratified the second additional protocol to the European Convention on Extradition, which provided for this possibility with regard to direct and indirect taxation.

1.4 Period of limitation

With regard to the period of limitation, the proposal is that assessment of the period of limitation of the public prosecution procedure or of the penalty should be by exclusive reference to the law of the requesting State.

Most Member States were fully in favour of this measure.

The United Kingdom and Ireland nonetheless pointed out that their legal systems did not recognize the concept of limitation but applied the concept of reasonable time limits.

The Netherlands delegation considered that limitation should constitute a reason for refusal only in cases where the requested State had jurisdiction in respect of the offence under its own legislation.
The French and Portuguese delegations wanted to limit this measure to the rules relating to interruption of the period of limitation, in line with the solution adopted in the Convention applying the Schengen Agreement (Article 62.1). However, the Portuguese delegation might agree to examine the possibility of exclusive reference to the law of the requesting State with regard to certain specific offences relating to terrorism and violent and highly organized crime.

The Danish delegation expressed doubts about this measure because it entailed reducing the rights of the person to be extradited, and the delegation felt that adoption of such a measure should be backed by a thorough comparative study of the rules of the Member States on the matter.

The Luxembourg delegation thought that the solution contained in the European Convention was balanced and should be retained.

The Greek delegation considered that this measure raised a difficulty with regard to the principle of legality.

1.5. Extradition of nationals

The proposed measure would allow the extradition of nationals, where appropriate on condition that certain conditions were met.

Four Member States already applied such a measure; one generally (United Kingdom), three under certain circumstances (Ireland/Italy: on a reciprocal basis; the Netherlands: on condition that if sentenced, the person concerned could be transferred to the requested State to serve the sentence).
Three other Member States were in favour of such a measure (Germany/Belgium/Spain), in some cases with conditions attached (subsequent transfer: Belgium). One Member State (France), although not at present in favour of the measure, was nonetheless ready to discuss this possibility.

Two Member States (Denmark/Luxembourg) were hesitant. Luxembourg could, however, contemplate the measure provided that all the Member States applied it and subject to retention of the one-year imprisonment threshold for the requested State and to the speciality rule.

Two Member States (Greece/Portugal) tabled reservations for constitutional reasons. The Portuguese delegation, however, suggested examining an alternative solution whereby the person concerned would be temporarily handed over for prosecution in cases of serious crime (criminal association, possibly certain specific offences relating to terrorism, and violent and highly organized crime). The temporary handing over would follow the model of mutual judicial assistance.

1.6. Life sentence

As regards life custodial sentences, the proposed measure consisted in allowing extradition for offences punishable by life imprisonment under the law of the requesting State, where such a sentence is not provided for under the law of the requested State, provided that the requesting State guarantees to encourage, in accordance with its law and practice regarding the enforcement of penalties, such mitigating measures as the person to be extradited might have available. The measure was modelled on that on the same subject in the Convention applying the Schengen Agreement.

Most Member States agreed to this measure. The Portuguese delegation could contemplate a provision of this kind in a convention among the Member States.
1.7. **Speciality rule**

Concerning the speciality rule, the measure put to the Group was renunciation of the rule in certain cases, to be specified.

Several delegations (Germany/Spain/Italy/United Kingdom) were in general agreement with this measure.

Other delegations (Belgium/Denmark/France/Greece/Luxembourg/Netherlands/Portugal) could accept the measure in cases where the persons concerned agreed to this renunciation. In such a case, consent should nevertheless be given in accordance with specific formalities (before a judicial authority, after being duly informed of the consequences of giving consent, etc.).

Two delegations (Germany/Netherlands) also raised the question of retaining the speciality rule in the event of re-extradition to another Member State. They suggested that re-extradition should not be subject to the agreement of the State granting the original extradition.

2. **EXTRADITION PROCEDURES**

2.1. **Simplification of judicial control**

In all the Member States there is judicial control of the decision to extradite a person. However, the nature and scope of the intervention differ from one State to another.
In one Member State (Portugal), the decision of the judicial authority is binding on the executive power in all cases. In the majority of Member States, the opinion expressed by the judge is binding on the executive power only if it is negative. In one Member State (Belgium), the intervention of the judicial authority is limited to a purely advisory opinion.

In all the Member States, intervention by a judicial authority is dependent on a constitutional, fundamental or general principle of their law (protection of the freedom of the individual, control of the executive, protection of national sovereignty, security, public order or (Spain) other vital interests of the State).

For that reason, total abolition of such control cannot be contemplated by the majority of Member States, even within the framework of intra-Community relations. One Member State (Spain) is, however, prepared to agree to abolition of judicial control, but only in the global context of a more advanced judicial area among the Twelve.

Two Member States (France/Netherlands) nevertheless consider that, without bringing the principle of judicial control into question, a reduction in the time necessary for the judicial decision to be taken under the extradition procedure could be envisaged.

More generally, two Member States (Germany/Netherlands) would like to reduce judicial control.

A large majority of Member States consider that judicial control is not necessary in cases where the person involved consents to his extradition. However, several delegations (Belgium/ France/Luxembourg/Netherlands/Italy) pointed out that it should remain possible to establish whether consent was given freely and in full knowledge of the facts.
However, one Member State (Portugal) cannot agree to abolition of judicial control, even in such cases.

Apart from the eventuality of a person consenting to his extradition, the delegations raised no other possible situations in which abolition of judicial control could be considered.

2.2. **Simplification of political control**

(controls by the executive)

The decision to extradite is taken, according to the State involved, either by an individual member of the government (Minister for Justice, Home Secretary) (Belgium/Denmark/Greece/Ireland/Ireland/Italy/Netherlands/United Kingdom), by the government in the person of the Prime Minister (France), or in council (Germany/Spain/Luxembourg/Portugal). Delegation of power from the Council of Ministers to a minister is possible (Portugal, where power is delegated to the Minister for Justice; Germany, where it can be delegated to the Ministers for Justice of the Länder).

Member States are divided over the possibility of abolishing control by the executive in the framework of relations between the Member States of the European Communities, in favour of direct contacts between the prosecuting authorities and those responsible for enforcing sentences.

Several States (Denmark/France/Luxembourg) are against the idea in principle.

However, some Member States (Belgium/Germany/Spain/Italy/Portugal) can envisage the general possibility, either in the long term, within the framework of
discussions on the abolition of formal extradition procedures (Germany), or within
the framework of discussions among the Twelve on the subject
(Belgium/Italy/Portugal), or in the broader framework of a more advanced judicial
area among the Twelve (Spain).

One Member State (Netherlands), which has no provision for political or executive
control if the person gives his consent, would make this form of simplification
conditional upon the results of the study on the duration of procedures, which will
reveal whether such a procedure is likely to speed matters up to any real degree.
One Member State (United Kingdom) can consider this possibility, but only where
it is the requesting State.

Several Member States (Belgium/Denmark/Spain/Greece/Italy) consider that
political or executive control could in any event be abolished or reduced in cases
where the person consents to his extradition. However, consent should be given
before a judicial authority.

One Member State (Spain) can consider cutting down the administrative stage of
extradition by conferring upon an administrative body the power to take the
decision to extradite. In one Member State it is an administrative body which
takes the decision to extradite in the majority of cases (Denmark, where the
decision is taken by the Minister for Justice).

2.3. **Possibility of direct extradition between prosecuting authorities and those
responsible for the enforcement of sentences**

The Benelux States (Belgium/Luxembourg/Netherlands) provide for a direct
extradition procedure between the prosecuting authorities and those responsible
for the enforcement of sentences, in cases where the person consents to
extradition. One Member State has similar procedures in its relations with
non-Member States (Denmark, in the context of co-operation with the Nordic states). One Member State (Germany) may contemplate introducing such a procedure in the context of long-term discussions on the abolition of formal extradition proceedings.

2.4. **Duration of internal procedures**

Several Member States emphasize that the question of internal procedures is primarily the responsibility of the individual Member State and that it is up to each Member State to ascertain whether its procedure is sufficiently simple and swift to cope with the requirements of co-operation under the European Union. One Member State (Netherlands) was hoping to reduce its internal extradition procedures to a maximum of 3 months.

The Group will have to examine this question in detail when it is in possession of information on the frequency and duration of procedures in the different Member States.

2.5. **Relationship between requests from Member States and those from third countries**

In the context of improved extradition procedures between Member States, one delegation (Germany) suggested that the Group envisage the possibility of establishing a priority for Community requests in the event of competing requests, as against requests for the same offences and in respect of the same persons from non-member States.
3. **FORM OF THE INSTRUMENT TO BE DEVIS ED**

The United Kingdom delegation considered that the various measures should be incorporated in a convention between the Member States.

However, the Luxembourg delegation was not keen to conclude a further convention in the field of extradition, as the proliferation of multilateral and bilateral conventions which affected extradition proceedings made matters very difficult for those enforcing them and it would be better to concentrate on facilitating the correct enforcement of existing conventions.

Once it has determined more precisely the types of measures which might attract consensus among the Member States, the Group will have to define the legal form which the instrument should take.