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from : Gunnar LUND, Permanent Representative of Sweden

date of receipt : 13 June 2001

to : Javier SOLANA, Secretary-General/High Representative

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Subject : Communication from the Kingdom of Sweden

- Initiative of the Kingdom of Sweden for the adoption by the Council of a draft Decision determining which provisions of the 1995 Convention on simplified extradition procedure between the Member States of the European Union and of the 1996 Convention relating to extradition between the Member States of the European Union constitute developments of the Schengen acquis in accordance with the Agreement concerning the Republic of Iceland's and the Kingdom of Norway's association with the implementation, application and development of the Schengen acquis
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Please find attached the explanatory memorandum from the Kingdom of Sweden on the above initiative.

## EXPLANATORY NOTE

**on the initiative for a Council Decision determining which provisions of the 1995 Convention on simplified extradition procedure between the Member States of the European Union and of the 1996 Convention relating to extradition between the Member States of the European Union constitute developments of the Schengen acquis in accordance with the Agreement concerning the Republic of Iceland's and the Kingdom of Norway's association with the implementation, application and development of the Schengen acquis**

### I. CONTENT AND GENERAL OBJECTIVE OF THE INITIATIVE

1. The initiative determines the provisions of the Convention on simplified extradition procedure between the Member States of the European Union <sup>1</sup> (hereinafter the "Simplified Extradition Convention") and the Convention relating to extradition between the Member States of the European Union <sup>2</sup> (hereinafter the "Extradition Convention") which constitute a development of the Schengen acquis within the meaning of Article 2(3) of the Agreement with the Republic of Iceland and the Kingdom of Norway concerning the latter's association with the implementation, application and development of the Schengen acquis <sup>3</sup> (hereinafter the "Association Agreement"). The initiative thereby aims at clarifying the relationship between the various provisions on extradition at European Union level and at associating Iceland and Norway with the application of these provisions in so far as they constitute a development of the Schengen acquis.

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<sup>1</sup> OJ C 78, 30.3.1995, p. 2.

<sup>2</sup> OJ C 313, 23.10.1996, p. 12.

<sup>3</sup> OJ L 176, 10.7.1999, p. 36.

## II. BACKGROUND

### 1) Provisions on extradition in the Schengen Convention

2. Title III, Chapter IV (Articles 59 to 66) of the Convention of 19 June 1990 implementing the Schengen Agreement of 14 June 1985 on the gradual abolition of checks at common borders <sup>1</sup> (hereinafter the "Schengen Convention") contains provisions on extradition. Apart from Article 60, those provisions form part of the Schengen acquis, the legal basis of which the Council determined, in accordance with the provisions of the Treaties, in Council Decision 1999/436/EC of 20 May 1999 <sup>2</sup>. Those provisions of the Schengen Convention were applied between Belgium, Germany, Greece, Spain, France, Italy, Luxembourg, the Netherlands, Austria and Portugal. <sup>3</sup>
3. By Decision 1999/439/EC of 17 May 1999 <sup>4</sup>, the Council approved the Association Agreement. According to Article 2(1) of the Association Agreement, the provisions of the Schengen acquis as listed in Annex A to the Agreement shall be implemented and applied by Iceland and Norway. In that Annex appear all the provisions of Chapter IV of the Schengen Convention except Article 60. Those provisions are applicable for Iceland and Norway and for Denmark, Finland and Sweden as from 25 March 2001 <sup>5</sup>.

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<sup>1</sup> Published in OJ L 239, 22.9.2000, p. 19.

<sup>2</sup> Council Decision of 20 May 1999 determining, in conformity with the relevant provisions of the Treaty establishing the European Community and the Treaty on European Union, the legal basis for each of the provisions or decisions which constitute the Schengen acquis, OJ L 176, 10.7.1999, p. 17.

<sup>3</sup> The date of entry into force of these provisions for the United Kingdom will be determined by the Council in accordance with Article 6 of Council Decision 2000/365/EC concerning the request of the United Kingdom of Great Britain and Northern Ireland to take part in some of the provisions of the Schengen acquis, OJ L 131, 1.6.2000, p. 43. On Ireland's request to take part, the Council has not yet ruled in accordance with Article 4 of the Protocol integrating the Schengen acquis into the framework of the European Union.

<sup>4</sup> OJ L 176, 10.7.1999, p. 35.

<sup>5</sup> See Council Decision of 1.12.2000 on the application of the Schengen acquis in Denmark, Finland and Sweden, and in Iceland and Norway, OJ L 309, 9.12.2000, p. 24.

## 2) The EU Conventions on Extradition

4. Before the entry into force of the Treaty of Amsterdam, the Council, by an act of 10 March 1995, drew up on the basis of Article K.3 of the TEU, the Simplified Extradition Convention. By an act of 27 September 1996, the Council drew up on the same legal basis the Extradition Convention. According to Article 1 thereof, the purpose of the latter Convention is to supplement the provisions and facilitate the application of several other instruments and in particular of the Schengen Convention. The Simplified Extradition Convention and the Extradition Convention have not yet come into force, but their provisions are already being applied in relations between certain Member States which have ratified them and have made a declaration to that effect.
5. According to Article 2(2) of the Association Agreement, the provisions of the acts of the European Community listed in Annex B to the Agreement shall be implemented and applied by Iceland and Norway, to the extent that they have replaced corresponding provisions of, or been adopted pursuant to, the Schengen Convention. The Simplified Extradition Convention and the Extradition Convention are not mentioned in Annex B to the Association Agreement, those Conventions not constituting acts of the Community.
6. According to Article 2(3) of the Association Agreement, the acts and the measures taken by the European Union amending or building upon the provisions referred to in Annexes A and B to the Agreement, to which the procedures set out in the Association Agreement have been applied, shall also be accepted, implemented and applied by Iceland and Norway. The Simplified Extradition Convention and the Extradition Convention clearly contain provisions amending or building upon the provisions of Title III, Chapter IV of the Schengen Convention. But those Conventions were drawn up by the Council before the Association Agreement entered into force and before the provisional application of those provisions. Therefore, the procedures laid down in the Association Agreement could not be applied in relation to them.
7. The provisions of the Simplified Extradition Convention and of the Extradition Convention therefore do not at present apply to Iceland and Norway.

### 3) Conclusion

8. It follows from the above that the provisions of Title III, Chapter IV of the Schengen Convention apply in Iceland and Norway as from 25 March 2001. In contrast, the provisions of the Simplified Extradition Convention and the Extradition Convention, to the extent that they constitute developments of the provisions of Title III, Chapter IV of the Schengen Convention, do not yet apply in the relations with those two States.
9. This situation is unsatisfactory. First of all, to ensure that there is clear and unambiguous legal basis, the relationship between the provisions of Title III, Chapter IV of the Schengen Convention and the provisions of the Simplified Extradition Convention and the Extradition Convention should be clarified, in particular by repealing those provisions of the Schengen Convention that become obsolete following the entry into force of the Simplified Extradition Convention and the Extradition Convention<sup>1</sup>. In addition, Iceland and Norway should be associated with the application of the Extradition Convention and the Simplified Extradition Convention to the extent that the latter constitute a development of the Schengen acquis, since it follows from Article 6 of the Protocol integrating the Schengen acquis into the framework of the European Union that those two states should be associated not only with the implementation of the Schengen acquis but also with its continuing development.
10. For that reason, it is necessary to determine the provisions of the Simplified Extradition Convention and of the Extradition Convention which constitute a development of the Schengen acquis within the meaning of Article 2(3) of the Association Agreement, so as to have those provisions applied by Iceland and Norway too.

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<sup>1</sup> Thus, Article 2 of the Convention established by the Council in accordance with Article 34 of the Treaty on European Union on Mutual Assistance in Criminal Matters between the Member States of the European Union (OJ C 197, 12.7.2000, p. 3) lists those of its provisions which are linked to the Schengen acquis and the provisions of the Schengen Convention which are repealed.

### III. LEGAL BASIS AND FORM OF THE INSTRUMENT AS WELL AS PROCEDURES

11. The initiative is founded on Articles 31(b) and 34 of the EU Treaty<sup>1</sup> According to Article 31(b), common action on judicial cooperation in criminal matters shall include facilitating extradition between Member States. Although the instruments on extradition and on simplified extradition procedure are in the form of Conventions, the appropriate legal form for determining which provisions of those Conventions constitute a development of the Schengen acquis is a decision within the meaning of Article 34(2)(c) of the TEU. The reason for this is that it would be a legally binding instrument which does not refer to the approximation of the laws and regulations of the Member States. However, the decision does not modify the substance of either of the two Conventions.
12. Regarding the procedure for adopting such a decision, it follows from Article 34(2) of the TEU that the Council acts unanimously on the initiative of any Member State or of the Commission. According to Article 39(1) of the TEU, the Council must consult the European Parliament before adopting the Decision.
13. Given that that Decision determines which provisions of the Simplified Extradition Convention and the Extradition Convention constitute a development of the Schengen acquis, it has itself to be considered as a measure amending or building upon the provisions of the Schengen acquis within the meaning of Article 2(3) of the Association Agreement. The procedures laid down in the Association Agreement and more particularly the Mixed Committee procedure in accordance with Article 4 of the Association Agreement will therefore have to be applied.

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<sup>1</sup> Council Decision 1999/436/EC of 20 May 1999 (see footnote 2 on p. 3) assigned Articles 31(b) and 34 of the TEU as the legal basis for the provisions of the Schengen Convention concerning extradition.

#### **IV. SUBSIDIARITY AND PROPORTIONALITY**

14. The initiative aims at clarifying the relationship between the various provisions on extradition at European Union level and at associating Iceland and Norway with the application of those provisions in so far as they constitute a development of the Schengen acquis. This objective cannot be achieved by the Member States alone. It can only be achieved at European Union level.
15. The initiative does not contain any new substantive provisions relating to extradition between the Member States of the Union. It is limited to the determination of the provisions of the Simplified Extradition Convention and the Extradition Convention which constitute a development of the Schengen acquis. The initiative does not therefore go beyond what is necessary to achieve that objective.

#### **V. RELATION TO THE WORKING PROGRAMMES OF THE COUNCIL**

16. The initiative pursues the integration of the Schengen acquis into the European Union, an objective expressly foreseen in the Treaty of Amsterdam.
17. Although the initiative is not specifically mentioned in any of the working programmes of the Council, it is acknowledged in the action plan to combat organised crime that the Simplified Extradition Convention and the Extradition Convention are essential to the fight against organised crime.<sup>1</sup> Furthermore, the Vienna Action Plan<sup>2</sup> and the conclusions of the European Council in Tampere<sup>3</sup> call for consideration of whether substantive and formal improvements can still be made to extradition procedures. Finally, according to the European Union Strategy for the beginning of the new millennium ("The prevention and control of organised crime"), consideration should be given to the long-term possibility of the creation of a single European legal area for extradition.<sup>4</sup> Consequently, the scoreboard to review progress on the creation of an area of "freedom, security and justice" mentions several measures relating to the facilitation of extradition between the Member States of the European Union.

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<sup>1</sup> OJ C 251, 15.8.1997, p. 1, Part III, points 13 and 14.

<sup>2</sup> OJ C 19, 23.1.1999, p. 1, point 49(a).

<sup>3</sup> Point 35.

<sup>4</sup> OJ C 124, 3.5.2000, p. 1, Recommendation 28.

18. In view of these considerations and of the fact that the present situation appears to be unsatisfactory, it is justified to submit the initiative at this point in time.

#### **IV. COMMENTS ON THE INDIVIDUAL PROVISIONS OF THE INITIATIVE**

##### **1) Article 1**

19. Article 1 provides that the entire Simplified Extradition Convention constitutes a development of Article 66 of the Schengen Convention.

##### **2) Article 2**

20. Article 2 lists those provisions of the Extradition Convention that constitute a development of the provisions of the Schengen acquis, and the corresponding provisions of the Schengen Convention.

##### **3) Article 3**

21. Article 3 determines the date of entry into force for Iceland and Norway of the provisions of the Simplified Extradition Convention and of the Extradition Convention mentioned in Articles 1 and 2 of the Decision. Without prejudice to Article 8 of the Association Agreement, those provisions are to enter into force for Iceland and Norway on the date when the respective Conventions enter into force, but in any case not earlier than [1 July 2001].
22. Article 3 of the Decision also provides that Iceland and/or Norway may declare that the provisions of the Simplified Extradition Convention and of the Extradition Convention mentioned in Articles 1 and 2 of the Decision apply before the respective dates of entry into force of those Conventions in their mutual relations and in their relations with the Member States that have made the same declaration under the abovementioned Conventions.



**4) Article 4**

23. Article 4 repeals the provisions of the Schengen Convention which will be replaced by the provisions of the Simplified Extradition Convention and the Extradition Convention mentioned in Articles 1 and 2 of the Decision. In principle, those provisions of the Schengen Convention are repealed on the date when the Simplified Extradition Convention and the Extradition Convention respectively enter into force. However, those provisions of the Schengen Convention will continue to apply for extradition requests submitted before that date, unless the Member States concerned are already applying the Simplified Extradition Convention or the Extradition Convention between themselves pursuant to declarations made in accordance with the provisions of those two Conventions on their anticipated application.

**5) Article 5**

24. This provision determines the date of entry into force of the Decision as the day following that of its publication in the Official Journal of the European Communities.

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