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USA 57

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Delegations will find attached the declassified version of the above document.

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THE EUROPEAN UNION**

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NOTE

from : Presidency
to : Heads of CATS delegations

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Subject : Report of the meeting 12-14 November 2002 with the United States of America

1. Treaty law issues

The EU delegation, which comprised a representative from the Council's Legal Service, and the US delegation, which comprised representatives from the US Department of State Treaty Office, entered into detailed discussions about treaty law questions arising from the particular character of this type of Article 24/38 Agreement.

The particular nature of this type of agreement results from the fact that this is an agreement between the European Union and the United States, the Member States not being Contracting Parties to this agreement. The object of this agreement is, however, to improve co-operation in criminal matters between the United States of America on the hand and the Member States on the other hand. The main question therefore is how this EU-US agreement will have an impact on co-

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operation under the bilateral treaties (or in the case of mutual legal assistance, in the absence of a bilateral treaty). There was consensus among the delegations that upon the entry into force of this EU-US agreement, the United States of America and the Member States (as a matter of internal EU law) will have to apply the provisions of this agreement next to, and in some instances, in lieu of the provisions of the bilateral agreements.

It is also clear that this Agreement will not amend the existing bilateral treaties. This is in accordance with the negotiation mandate that was given to the Presidency and in line with the logic of an Article 24/38 Agreement. Since the Contracting Parties (European Union and the United States of America) are different from the ones of the bilateral treaties (Member States and the United States of America), it is from a treaty law perspective impossible to amend the bilateral treaties.

It is clear that the Member States will be bound to apply the terms of this agreement under the so-called Article 24 decision by which the Council will approve of the agreement. This implies that Member States cannot derogate from the terms of this agreement by concluding bilateral agreements with the United States of America the content of which would run counter to the objectives and principles of this agreement. The US delegation, however, deems that it should retain its full freedom to negotiate other terms of co-operation with each of the Member States, if it would wish to do so. It was agreed to return to this matter at the next round of negotiations.

The United States of America thought that it was necessary to have the utmost clarity on the legal situation after the entry into force and notably the question of which provisions of the bilateral treaties would no longer be applied and which would continue to apply. Delegations agreed, subject to further consultations of the Member States, on the following method to clarify this. The agreement itself will contain two articles, one for extradition and one for mutual legal assistance (at present Articles 5 and 17 of the draft Agreement, see doc 14377/02 CATS 68 USA 55 CONFIDENTIEL UE), which would specify which articles of the agreement would be applied in place of and/or in the absence of provisions of bilateral agreements (and domestic law, in the case of mutual legal assistance). In addition to this, the agreement will specify (see present Article 27 of the draft Agreement) that it will only enter into force after the European Union and the United States of America have exchanged instruments between them indicating that they have completed

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their internal procedures for this purpose and indicating that the United States of America and each Member State of the European Union have, in written instruments, confirmed their consent to apply this agreement and their bilateral extradition and mutual legal assistance treaties in force in accordance with these two articles from the EU-US agreement. It is hereby understood that that the United States of America will exchange bilateral notes with each Member State indicating which provisions of the bilateral treaties would no longer be applied and which would continue to apply after the entry into force of the EU-US agreement. These bilateral notes will not amend the existing bilateral treaties, they will merely suspend the application of some provisions of the bilateral treaties during the application of the EU-US agreement. (In the unlikely event that the EU-US Agreement would be terminated by one of the Contracting Parties, these provisions of the bilateral treaties would hence apply anew.)

It is envisaged that the European Union and the United States of America will draw up a uniform model bilateral note. This model could thereafter be used to lay down agreement between the United States of America and each Member State on how to implement the EU-US Agreement in its bilateral relationship. For this purpose the articles in the draft Agreement (at present Articles 5 and 17) that specify which articles of the agreement would applied in place of and/or in the absence of provisions of bilateral agreements will serve as an "instruction page" to bilateral negotiators. The United States of America has indicated that it would like to conclude these bilateral instruments pursuant to Article 27, preferably at one time. These bilateral notes would need to be exchanged before the entry into force of the EU-US Agreement, as the European Union and the United States of America will exchange their notes only after these bilateral notes have been exchanged between all Member States and the United States. Upon the accession of new Member States after the entry into force of the EU-US Agreement, these new Member States will likewise have to exchange bilateral notes with the United States of America before the EU-US Agreement can enter into force as far as they are concerned (see Article 4).

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From what precedes it also follows that there will be thus a "time gap" between the political agreement between the EU and US on this agreement and the entry into force. One possible way to address this issue internally by the EU would be to adopt two Article 24 decisions: a first one by which the Council would authorise a designated person to sign the agreement and would demand the Member States to exchange the notes under Article 27 with the United States of America on the implementation of this agreement into their bilateral extradition and mutual legal assistance relations with the United States of America and a second decision by which the Council would conclude the Agreement in accordance with Article 24 of the Treaty and authorise a designated person to exchange the instruments between the contracting parties which under Article 27 indicate that the internal procedures have been completed and which make the Agreement enter into force.

2. Territorial application of the Agreement

Delegations discussed whether this agreement should have a specific clause on its territorial scope. This question is especially relevant with regard to the overseas and dependent territories of some Member States. Different options were scrutinised: (i) limit the territorial scope to the territories of the Member States (question of definition of these territories); (ii) expand it to all overseas and dependent territories of Member States; or (iii) implicitly or explicitly apply the agreement to the same territories as those covered by the bilateral agreements.

It was agreed that the Presidency would, after consultation of the Member States, further reflect on this issue. For purposes of further discussions, the Presidency would suggest that option (iii) would be the most logical - as the Agreement does not modify the bilateral agreements but supplements them, the territorial application should be the same as the bilateral agreement. The Presidency would therefore suggest that there should not be any mention of territorial application in the Agreement.

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3. Transmission and authentication of extradition documents

Delegations agreed to maintain the diplomatic channel and, in cases of extradition requests following a provisional arrest (upon request of the requesting state), to allow for transmission of extradition requests by the Central Authority (e.g. the Ministry of Justice) in a Member State to submit an extradition request directly to the US Embassy in the Member State concerned, after which the US embassy would then transmit the request directly to the US State Department. (With regard to US extradition requests these would be sent from the US Department of State to the relevant Member State's embassy in the United States.) Member States that had other arrangements, for instance transmission directly from the Central Authority to that Member State's Embassy in Washington and then to the State Department, would not be affected but would be able to maintain that channel of transmission.

With regard to certification and authentication of extraditions requests, the United States of America stressed that certification made by the central authority of the requesting Member State would be sufficient according to US law provided that such certification is in accordance with national law of that Member State.

4. Probable cause

The delegations discussed this topic based on several proposals from the EU-side. The US delegation was reluctant to include any provisions in the agreement concerning probable cause, but it was agreed that the US delegation would reflect on the issue in order to revert to the topic at the next negotiation session.

5. Anti-litigation clause concerning mutual legal assistance

The United States of America proposed that a so-called anti-litigation clause be inserted into the agreement as far as mutual legal assistance is concerned. As this type of clause has been inserted in 10 existing MLAT's between EU Member States and the United States of America, the EU Presidency saw in principle no objection to inserting a similar clause in this agreement (see Article 17(3) which reflects the text of 9 of the current bilateral treaties). It was agreed that the exact wording would be further scrutinised by the European Union.

6. Bank Information

Delegations again discussed the scope of the future mutual obligation to identify bank accounts in the context of a criminal investigation. The EU delegation conveyed to the United States that the European Union was unable to accept a mandatory extension of the obligations to accounts at “non-bank financial institutions”, but was willing to agree to an optional provision in this respect. The United States of America in principle agreed to this.

On the US demand to expand the scope of requests for identification of bank accounts to be made also in relation to convicted persons (i.e. besides persons subject to investigation or prosecution) with a view to enforcement of sentence and confiscation, the EU Presidency explained the reluctance of Member States and it was agreed not to pursue this further at this stage.

The EU delegation also conveyed the refusal of Member States to accept US requests that would not require information indicating in which specific Member State the account to be identified is located, but would merely contain information that makes it likely that the person concerned has a bank account somewhere in the European Union (without specifying in which one of the Member States). The United States of America stated that it very much regretted this EU position, but in principle accepted it.

Delegations further agreed to allow the transmission of such requests between designated authorities responsible for prevention, investigation or prosecution of criminal offences. The EU side made it clear that for its part, requests would always be transmitted by the Central Authorities to the relevant US agency (see Article 19:3) whereas the relevant US agency (e.g. the FBI) would have the possibility to address itself to the EU Central authority. The United States of America was not yet able to specify to which authorities this paragraph would apply as it had to consult with the agencies concerned, but it was foreseen that the main law enforcement agencies would be concerned (FBI and DEA for the most part). It was agreed that before putting this mechanism in place, procedures would have to be agreed between the contracting parties (see article 19:3).

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7. Mutual legal assistance to administrative authorities with criminal referral jurisdiction (see Article 18 of the draft Agreement)

Delegations agreed in principle to afford mutual legal assistance to US federal or EU national administrative authorities that are investigating criminal conduct for potential referral to criminal prosecution. This obligation is restricted to requests from US federal authorities or from federal/national authorities of EU Member States, but assistance may on an optional basis also be granted to administrative authorities of other levels (e.g. US State authorities). It was also agreed that the Member States and the United States of America might agree to transmit these requests through other channels than the Ministry of Justice-to- Ministry of Justice channel.

The United States of America was not yet in a position to specify to which federal authorities this article might apply, but indicated that it had in particular in mind the SEC, FTC, INS, CFTC, ENR, FDA and the IRS. Consultations with those authorities had first to be carried out. The United States of America indicated however that it thought that the number of requests would be relatively small and that, as the requests had resource implications also to the US Central Authority, it had a vested interest to ensure that only important cases would be relevant in this context.

It was agreed that the wording would be further scrutinised and clarified, if necessary.

8. Data protection and confidentiality

Delegations in principle agreed, subject to further necessary consultations, on a draft provision (see Article 24 of the draft Agreement), modelled on Article 23 of the 2000 EU Mutual Assistance Convention. Delegations further agreed on the possibility to impose, in exceptional cases, more stringent conditions than the ones flowing from that provision. This could, for example, comprise exceptional confidentiality to be observed with regard to the *response* to a mutual legal assistance request. As far as confidentiality of *requests* was concerned, delegations agreed on a provision by which the requested state is bound to use its “best efforts” to keep this confidential, when so requested (see Article 25 of the draft Agreement). Further discussions needed to be carried out concerning paragraph 269 of the explanatory report to the CoE Convention on Cybercrime.

9. US unwillingness to pursue negotiations on a number of issues

Extradition

The United States of America announced that based on discussions to this date and bilateral consultations with certain Member States the US delegation found that the results that could be envisaged with regard to extradition of nationals would not be satisfactory to the United States. For this reason the United States of America did not wish to pursue this matter any further in relation to the EU-US agreement.

Furthermore, the United States of America informed that if Member States were not willing to go further in their relationship with the United States of America in relation to the political offence exception, the United States of America would not wish to pursue this matter any further either.

In addition, the United States of America stressed that a provision concerning lapse of time along the lines of the European Arrest Warrant would not be acceptable to the United States of America and that the United States of America in this situation would have to consider whether including such a provision would constitute added value to existing co-operation.

Mutual legal assistance and death penalty

The United States of America declared itself unwilling to negotiate further on this issue, on which it has always shown the greatest reluctance to negotiate.

The Presidency took note of the US position and indicated that it would consult the Member States on this.