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# RESTREINT UE



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THE EUROPEAN UNION**

**Brussels, 19 December 2002**

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**JUR 475  
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## **OPINION OF THE LEGAL SERVICE**

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Subject : EU-US negotiations for an agreement on international cooperation in criminal matters - interpretation of Article 24 of the Treaty on European Union - relationship with the bilateral agreements between the Member States and the United States of America

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### Introduction

1. In accordance with Article 24 of the Treaty on European Union (TEU),<sup>1</sup> the Council (on 26 April 2002) authorised the Presidency to negotiate, on behalf of the European Union (EU), an agreement on cooperation in criminal matters with the United States of America (USA). This agreement will essentially contain provisions on extradition and mutual legal assistance.

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<sup>1</sup> Article 24 of the TEU provides that when the Council considers necessary to enter into an agreement with a third State or an international organisation, it may authorise the Presidency to start negotiations. Such agreements are concluded by the Council upon recommendation from the Presidency. The procedure of Article 24 also applies to agreements on subject-matters falling under Title VI of the TEU (cf. paragraph 2 of Article 24 and Article 38).

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2. The Council Legal Service was requested, at the meeting of the Council ("Justice and Home Affairs") of 29 November 2002, to provide an opinion on the interpretation to be given to Article 24 of the TEU, notably regarding the extent of the power of the EU to conclude international agreements on such a subject-matter. In particular, the Legal Service has been requested to examine Declaration No. 4 annexed to the Final Act of the Treaty of Amsterdam, as well as the question of the relationship between the future agreement and the bilateral treaties on extradition and mutual legal assistance which are presently in force between the Member States and the USA or which may be concluded in the future. The opinion of the Legal Service is set out hereafter.

### "Necessity" to conclude an international agreement on the basis of Article 24 TEU

3. Article 24 TEU envisages the negotiation and conclusion of agreements by the EU "*when it is necessary*". Likewise, Article 38 indicates that agreements under Article 24 "*may*" cover subject-matters falling under Title VI. No other provision of Title VI, or any secondary legislation adopted by the Council on this basis, sets out an obligation for the EU to conclude such agreements. It is thus for the Council to assess whether the conclusion of a particular agreement between the EU and one or more States or an international organisation is indeed necessary. This is to a large extent a matter of political appreciation. It is therefore for the Council to determine whether the relations with the USA in the domain concerned can be managed effectively through the existing bilateral agreements between the Member States and the USA or if an agreement between the EU and the USA is required to improve cooperation.
4. On this legal point, the situation is comparable to that under the EC-Treaty (TEC), where similar wording can be found for determining a competence of the European Community (EC) to act. For example, Article 308 TEC states that "*If action ... should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community ...the Council shall ...take the appropriate measures*"; Article 133 (paragraph 3) TEC provides that "*Where agreements with one or more States or international organisations need to be negotiated, ...the Council ...shall authorise the Commission to open the necessary negotiations*". In the EC context, it has always been acknowledged that the Council has a

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relatively wide margin of appreciation for determining whether the competence needs to be exercised or not. The same should apply in the context of the TEU. It has, however, to be recalled that assessments of the Council as to the need to conclude agreements pursuant to Article 24 TEU are not subject to control by the Court of Justice (Article 46 TEU).

5. In the present case, the Council has authorised the Presidency to enter into negotiations with the USA on behalf of the EU and on the basis of an agreed negotiating mandate. In doing so, it has already determined that it deems it necessary for the EU to negotiate (and conclude) such an agreement.

### EU as contracting party to international agreements concluded under Article 24 of the TEU

6. Article 24, which was introduced into the TEU by the Treaty of Amsterdam, provides for a procedure for the negotiation and conclusion of international agreements on subject-matters falling under Title V (Common Foreign and Security Policy - CFSP) as well as Title VI of the TEU (cf. second paragraph of Article 24 and Article 38).
7. In the opinion of the Legal Service, it clearly follows from this provision, if interpreted in the light of its wording and in the context of the other relevant provisions of the TEU, that any agreement concluded thereunder is concluded on behalf of the EU and not on behalf of the Member States.<sup>2</sup> Indeed, Article 24 provides that the Agreements are negotiated by the Presidency, which is representing the EU in relation to third States (cf. Articles 18 paragraph 1 and 37 paragraph 2). They are concluded by the Council, which is an institution of the EU and not acting on behalf of the Member States.<sup>3</sup>

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<sup>2</sup> See opinions of the Legal Service of 17 November 1999, doc. 12993/99; of 11 January 2001, doc. 5250/00 and of 28 February 2001, doc. 6642/01.

<sup>3</sup> This is further confirmed by the modifications of Article 24 introduced by the Treaty of Nice, (due to enter into force on 1 February 2003), whereby the words "to them" in relation to the possibility of provisional application of agreements under Article 24 have been deleted.

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8. It is moreover apparent from the other provisions of Title V of the TEU that the EU is acting as an entity which is distinct from its Member States: Article 11 paragraph 1 provides that "*The Union shall define and implement a common foreign and security policy ...*"; paragraph 2 provides that "*The Member States shall support the Union's external and security policy ...*". Article 12 sets out the instruments by which the Union can pursue the objectives of the CFSP.
9. In the present case, therefore, the only Contracting Parties to the agreement under negotiation would be the EU and the USA.

### Declaration No. 4 annexed to the Final Act of the Amsterdam Treaty

10. Declaration No.4 annexed to Final Act of the Treaty of Amsterdam reads as follows: "*The provisions of Articles J.14 and K.10 [Articles 24 and 38] of the Treaty on European Union and any agreement resulting from them shall not imply any transfer of competence from the Member States to the European Union*". As the Legal Service has indicated previously,<sup>4</sup> the above interpretation of Article 24, namely that agreements under this provision are concluded on behalf of the EU, is confirmed by this Declaration: if an agreement concluded on the basis of Article 24 was to be concluded on behalf of the Member States, this would by definition not imply any transfer at all of competences from them to the EU (and the Declaration would have been superfluous). Indeed, Article 24 only contains a procedure for the negotiation and conclusion of international agreements by the EU. It does not itself provide for any substantive transfer of competence from the Member States to the EU. The competence of the EU to act must already exist on the basis of the other provisions of Title V and the provisions of Title VI, which are not modified by Articles 24 and 38.

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<sup>4</sup> Opinion of 17 November 1999 (supra footnote 2), par. 3.

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11. Obviously, Declaration n° 4 could not be interpreted so as to deny any treaty making power to the EU for the reason that the Member States would have retained the exclusive power to enter into international agreements in that field. Such an interpretation would deprive Articles 24 and 38 TEU entirely of their effect ("effet utile" principle). In cases where the Council decides, unanimously, to authorise the Presidency to open negotiations with a view to concluding an agreement with a third State pursuant to Article 24 TEU, such an authorisation by the Council constitutes effectively a mandate to negotiate an agreement which is to become binding on the Member States as a result of their membership of the EU, instead of their being Contracting Parties to the agreement.
12. The respective competences of the EU and the Member States under Titles V and VI in principle remain "parallel", in the sense that the EU does not acquire an exclusive competence for the whole subject matter when the Council decides to act. However, the conclusion of an agreement by the EU with a third State should be interpreted as excluding the competence of Member States to enter individually into negotiations with that third State with a view to concluding an agreement which would cover the same precise issues which have been covered by the EU agreement, in particular when the latter agreement would create inconsistencies with the agreement concluded by the EU.

### Binding character of an agreement concluded under Article 24 for the Member States

13. Article 24 of the TEU does not expressly provide that Member States are bound by agreements concluded by the EU. However, it must be interpreted in that sense: in the event that no Member of the Council invokes the necessity to comply with its constitutional requirements, it follows *a contrario* from the third sentence of Article 24 that Member States are, as a general rule, bound by any agreement concluded by the EU.

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14. Even in the event that a Member of the Council were to invoke its constitutional requirements, this would in practice only mean that the Council would not be in a position to adopt a final decision on conclusion until the Member State concerned has complied with its constitutional requirements. In the meantime, according to Article 24, the other Members of the Council could decide on a provisional application of the agreement. If no such decision is taken, the Council decision on conclusion would be deferred until completion of any national constitutional procedures. The completion of any such procedures would have to be notified to the Council, and not to the third State or organisation with which the agreement is to be concluded. Once the notification of the Member concerned has been received by the Council, the latter will be in a position to adopt the decision on conclusion of the agreement and to express the consent of the EU to be bound by the agreement vis-à-vis the other contracting party.
15. After conclusion of the agreement by the Council and as of its entry into force, the agreement would thus be binding on all EU Member States as a matter of EU law, in the same way that Member States are bound by agreements concluded by the EC (cf. Article 300 paragraph 7 TEC). Even if they would not be bound directly, as contracting parties, vis-à-vis the US, they would be obliged to implement the agreed arrangements.
16. The fact that agreements concluded by the EU are binding for the EU Member States means that they must implement their provisions and that they must not take any measures which are contrary to such agreement or which would render it ineffective. As the case may be, they would have to take all necessary measures in order to be able to act in accordance with such agreement in their relations with the third State concerned. In the field of the CFSP, these principles are expressly laid down in Article 11 paragraph 2 of the TEU ("*The Member States shall support the Union's external and security policy actively and unreservedly in a spirit of loyalty and mutual solidarity*"). Such a principle also exists under EC law, as expressed in Article 10 of the TEC: "*Member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community's task.*"

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17. The same principle must also apply in the case of an agreement on a subject-matter falling under Title VI. The EU Member States must act in good faith and loyalty vis-à-vis the EU. Good faith would be at stake, for instance, if the EU were to conclude an agreement with a third State and one Member State would at the same time or subsequently come to an arrangement with the same third State which would take away the effects of the EU Agreement for that Member State. And it would be contrary to the required loyalty vis-à-vis the EU if a Member State would conclude an agreement with a third State where it had been decided by the Council under Article 24 that an agreement on the same issues of the same subject-matter was to be concluded by the EU.

### Relationship between the future EU agreement with the USA and the existing bilateral treaties concluded by the Member States with the USA

18. In the present case, in view of the substantive nature of the draft agreement between the EU and the USA and the fact that it will be upon the Member States to apply most of its provisions in practice, its binding character for the Member States would mean that they must take the necessary measures to be able to apply its provisions in their bilateral relations with the USA, together with their bilateral treaties presently in force with the USA on the same subject-matter.
19. In the view of the Legal Service, it follows from the binding character of the EU agreement for the Member States that in the event of an inconsistency between a particular provision of the EU agreement and a provision of a bilateral treaty in force between a Member State and the USA, that provision must be interpreted and applied in such a way as to give full effect to the EU agreement. If this is not possible, i.e. to the extent that the application of the substantive provisions of the bilateral treaty would be incompatible with the application of the provisions of the EU Agreement, the provisions of the latter must be applied in lieu of those of the bilateral treaty. The provisions of the EU Agreement must therefore prevail in case of inconsistencies (principle of the primacy of EU law).<sup>5</sup>

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<sup>5</sup> This conclusion would also be in conformity with the principle reflected in Article 30 paragraph 3 of the 1969 Vienna Convention on the Law of Treaties, according to which a subsequent treaty on the same subject-matter prevails over the provisions of a prior treaty in case of inconsistencies.



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20. The relationship between the EU Agreement and these existing bilateral treaties between Member States and the USA could be addressed in the following ways in the EU Agreement, depending on the objectives sought with the various provisions and also in order to avoid potential inconsistencies and to fully respect the principles of transparency and legal security:
- it should be specified that to the extent that some provisions of the EU Agreement deal with matters that are not covered by bilateral treaties, such provisions shall be applied in addition to the provisions of bilateral treaties;
  - it should be specified which provisions of the EU Agreement shall be applied in lieu of corresponding provisions in bilateral treaties which regulate a particular issue in a different way; it may, however, also be specified that provisions of bilateral treaties which deal more extensively with a particular matter than the EU Agreement will continue to be applied;
  - it should be specified which provisions in existing bilateral treaties on matters of procedure or safeguards for individuals not covered by the EU agreement would also apply to matters governed by the EU Agreement;
  - and similarly, it should be specified whether provisions in the EU Agreement introducing certain safeguards for individuals would also apply to matters which continue to be governed by the provisions of bilateral treaties.
21. In the opinion of the Legal Service, if such provisions were to be included in the EU Agreement, it would follow from its binding character that the Member States will be obliged to apply it as set out in these provisions and that no further expression of consent or "confirmation" of this obligation in their relations with the USA would be necessary.
22. Ideally, the Member States should in the interest of legal security endeavour to eliminate incompatibilities between existing bilateral agreements with the USA before or at the time of conclusion of the Agreement between the EU and the USA. This could be reflected through side letters or references in Annexes to the EU Agreement and would thus enhance transparency of the rules for practitioners who would have to apply the EU Agreement and bilateral treaties and for those in respect of whom these rules would have to be applied.

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23. Finally, the envisaged EU Agreement should also address the possibility of new bilateral treaties or modifications to existing bilateral treaties between Member States and the USA, which may have a bearing on the application of the provisions of the EU Agreement. Any such provision should have the purpose of precluding inconsistencies between the provisions of the EU Agreement and any such new or modified bilateral treaties.

### Conclusion

In conclusion, the Legal Service is of the opinion that:

- 1) The conclusion by the Council, on behalf of the EU, of the envisaged Agreement with the USA on international cooperation in criminal matters, would be within the powers of the EU under Title VI of the TEU.
- 2) The Agreement would be binding on the Member States as of its entry into force and it would prevail over provisions of bilateral treaties on the same subject-matter between the Member States and the United States of America should there be an inconsistency between the provisions of such bilateral treaties and any provision of the EU agreement.

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