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NOTE

From :	Incoming Italian Presidency
To :	JHA Counsellors
No. prev. doc. :	8296/2/03 CATS 21 USA 30 REV 2; 9153/03 CATS 28 USA 41 + COR 1(fr) + COR 2(fr,it,nl,en,el,es,pt) + COR 3(sv) + COR 4(da) + COR 5 + COR 6(el); 10618/1/03 CATS 37 USA 60 REV 1
Subject :	Co-ordination of the Member States' position regarding the Agreements on judicial cooperation with the USA

Background

In accordance with Article 2 of the Council decision of 6 June 2003, set out in doc. 8296/2/03 REV 2 CATS 21 USA 30, the Article 36 Committee, at its meeting on 23 June 2003, instructed the Presidency to co-ordinate Member States' positions on the drawing up of written instruments between them and the USA as contemplated in Article 3 (2) of the EU-US Agreement on Extradition and Article 3 (2) and (3) of the EU-US Agreement on Mutual Legal Assistance (see doc. 10618/1/03 CATS 37 USA 60 REV 1).

The US President will have to submit the EU-US agreements on extradition and on mutual legal assistance to the US Senate for ratification together with written instrument to be negotiated with all Member States. This means that the United States cannot start the ratification process as long as these bilateral "written instruments" have not been negotiated with all Member States. It is important to point out that this includes the Acceding States and that the United States of America intends to start (and possibly finish) the negotiations of these bilateral agreements with the Acceding States before they become full EU Member States.

Possible approaches to bilateral "written instruments"

The idea has been mooted that two model "written instruments" should be drawn up, one for extradition and one for mutual legal assistance by EU and US representatives. This model could then be used in the context of the bilateral negotiations between the United States and each individual Member State. The Presidency has been informed that the USA, for understandable practical reasons, would prefer that, after exchanges of written text proposals, these *bilateral* negotiations could take place at one time (albeit of course successively), for example at the premises of the Council of the European Union in Brussels. If agreeable to the Member States, such an approach could indeed facilitate the process.

It follows from Articles 3(1) of the EU-US Agreements that the wording and content of such a bilateral "written instrument" will differ from Member State to Member State as they depend on the scope of the existing bilateral instruments. The said articles of the EU-US Agreements stipulate that some of its provisions will be applied only in the absence of bilateral treaty provisions, whereas others will be applied in addition to or even in lieu of the provisions of existing bilateral treaties. Whilst these two models will therefore obviously have to be tailored to the specific needs of the bilateral extradition and mutual legal assistance relationships, the Presidency deems that, from a practical point of view, a model will contribute to a homogeneous implementation of the EU-US agreements in the Member States.

Moreover, the existence of one (or more) model(s) should allow the bilateral negotiations to be conducted in a more efficient manner. As it is likely that the United States will, in its bilateral negotiations with the Member States and Acceding States, use a model, it is in the interest of the Member States to be involved, through the Presidency, in the drafting of such model.

The United States of America is of the opinion that these bilateral "written instruments" should be drafted as protocols to the existing bilateral extradition and mutual legal assistance treaties or as treaties in case there as yet no bilateral mutual legal assistance treaty between the Member State concerned and the US (all Member States and Acceding States have a bilateral extradition treaty with the US). The US envisages that the protocols would literally copy those provisions of the EU-US agreements that are applicable to the Member State concerned. The US have pointed to several reasons underpinning this option:

a) A bilateral instrument that has the status of a protocol to an existing bilateral treaty, would avoid possible litigation on the precise legal status of the EU-US Agreements and in particular their effect on the existing bilateral extradition treaties, in extradition cases before US courts. This argument also goes, albeit to a lesser extent, for mutual legal assistance cases.

b) Tied into this, is the argument that the US need a direct treaty law relationship with every Member State. This also explains why the US insist on a bilateral "written instrument" for mutual legal assistance, also with those Member States with which they have as yet no bilateral mutual legal assistance treaty.

c) A protocol that copies the text of the applicable provisions of the EU-US Agreements into a bilateral instrument, will make it much more readable and easily understandable for practitioners than if there were just to be an exchange of letters.

The alternative avenue for the drawing up of written instruments between the Member States and the USA as contemplated in Article 3 (2) of the Agreement on Extradition and Article 3 (2) and (3) of the Agreement on Mutual Legal Assistance, would indeed be an agreement in the form of exchange of letters between each Member State and the US. Such an exchange of letters would merely confirm the application in the bilateral relationship, of the provisions of the EU-US Agreements. Such an exchange of letters could then, for example, contain language along the lines of "Article ... of the Treaty of Extradition between the United States of America and ... shall be suspended and Article 4 of the Agreement of 25 June 2003 between the European Union and the United States of America on Extradition shall be applied in lieu thereof;" or "Article 9 of the Agreement of 25 June 2003 between the European Union and the United States of America on Extradition shall be applied in addition to the Treaty of Extradition between the United States of America and ...; ".

Whilst both options are viable and Member States may have a preference for either model, it is important to emphasise that, from an EU law point of view, the bilateral "written instruments" are merely restatements of Member States' obligations pursuant to the EU-US Agreements.

Questions

The Presidency would like to be informed on Member States positions on the following questions:

1) Is there any impediment for Acceding States to engage in the bilateral negotiations before accession?

2) The United States government intends to have these bilateral written instruments, which the US considers to be protocols to the existing bilateral treaties, ratified by the US Senate. Which Member States and Acceding States intend to lay these bilateral written instruments before their parliaments or follow similar constitutional procedures?

3) Do Member States have a strong preference for a letters of exchange model or a protocol model? Is it possible to work on both approaches or are there any major objections against either approach?