



Statewatch analysis no 12

## Secret EU-US agreement on criminal cooperation being negotiated

- secret agreement on criminal matters, investigative procedures and joint teams being negotiated without the the European or national parliaments being consulted

- Statewatch refused access to full-text of documents because: "the interest of protecting the Council's objectives outweighs the interest in "democratic control".. which is referred to by the applicant"

### Introduction

Statewatch has obtained a copy of the secret negotiating agenda for an agreement (treaty) between the EU and the US on judicial cooperation in criminal matters which would have major implications for peoples' rights and liberties.

The draft agreement is going to be discussed in depth for the first time at the Informal Meeting of EU Justice and Home Affairs Ministers in Copenhagen on 13 September - US Attorney General Ashcroft will take part in these discussions.

The proposed agreement started out as one on combating terrorism but it now extends to crime in general. The Council of the European Union (the 15 governments) has authorised the EU Presidency to:

*"open negotiations with the United States for the purpose of concluding one or several agreements on cooperation in **criminal matters** between the EU and the US. The negotiations should be.. conducted in the spirit of cooperation between likeminded and equal partners" (emphasis added)*

In the negotiations with the US the EU governments appear to be willing to drop or modify (in a negative way) a number of basic rights and protections built into EU law and protected by the European Convention on Human Rights. The agreement (and any future agreements) will be negotiated and agreed in secret under Articles 38 and 24 of the Treaty on the European Union. Neither national or European parliaments are required to be consulted let alone civil society.

Tony Bunyan, Statewatch editor, comments:

*"It is quite unacceptable in a democracy that an agreement should be negotiated with a non-EU state in secret, without the European and national parliaments or civil society having any say whatsoever.*

*This is a primary example of fundamental rights and protections built up in the EU over decades being put up for negotiation by EU governments to meet US demands in the so-called "war on terrorism".*

### The "line to take"

The negotiating mandate is divided into two parts: "Issues to be raised by the EU" and "Issues raised by USA" and against each issue raised is the EU "Line to take". The issues raised are the result of informal talks between the EU and US that began on 29 September last year.

As regards "serious crime" the EU wants to "facilitate search and seizure in bank accounts" and on improving cooperation and "reducing delays" proposing the creation of "contact points in

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each Member State and in the USA".

The EU is also making two major proposals: First, that the legal basis should be made for:

*"the setting up of joint investigative teams"*

to conduct undercover police operations. There is no reference to rules on the civil or criminal liability of team members or to the legal rules to be applied to their operations.

Second, under the heading: "Improve investigation procedures" the EU is proposing:

*"creating a common approach to searches, seizures, interception of telecommunications"*

There is no mention of Article 8 of the ECHR (the right to private and family life) nor any reservations on issues such as dual criminality or extraditability.

The EU positions under the heading "Guarantees and safeguards" make no mention of the European Convention on Human Rights and worryingly says the issue of "data protection" should be "raised by the EU at a later stage" - which is going to be difficult because the USA does not have a data protection act.

Most extraordinary of all, under the same heading, on the issue of the "death penalty" the EU "line to take" is:

*"inform the USA that **some Member States** may wish to have specific provisions in this regard" (emphasis added)*

It appears that "some" EU Member States are willing to become "accomplices" to the death penalty, by supplying evidence and witnesses to the US in death penalty trials - even though all EU member states have ratified Protocol 6 to the ECHR and have signed Protocol 13 to the ECHR (which ban the death penalty absolutely).

The "Issues raised by the USA" cover "narrowing down the political offence exception" (to extradition), extradition of nationals and "Special courts" (on which the EU is to "seek assurances" that those extradited will be the subject of ordinary US courts proceedings).

On the issues raised by the US on extradition the traditional "political offence" exception to extradition could be weakened by "taking a modern approach" and many EU member states may have to drop constitutional bans on extraditing their own nationals. This latter protection is to be dropped under the proposed EU Framework Decision on arrest warrants but within the EU this is still subject to the ECHR and EU court judgements and to make such changes in this context is highly questionable.

Nor is there any mention of a refusal to extradite, for example, to give protection against "double jeopardy" (which means that a person cannot be tried on the same facts where a judgement has already been given in one state).

All EU measures agreed in this field are based on the principle that all member states have ratified the European Convention on Human Rights. The US has not ratified the ECHR and cannot because it is not a member of the EU.

There are grave doubts about adequate parliamentary or judicial control over the ratification and implementation of the treaty. It is not clear whether the usual powers of the EU Court of Justice on criminal law and policing matters will extend to such a treaty and data protection is to be taken up at a "later date".

## **From terrorism to crime in general**

In the immediate aftermath of 11 September the EU's Justice and Home Affairs Council on 20

September agreed that an agreement should be negotiated with the USA on "penal cooperation on **terrorism**" (emphasis added).

On 21 September the US Mission in Brussels wrote to the EU Presidency in response calling for: "a formal agreement with the EU on judicial cooperation in **criminal matters**" (emphasis added).

On 29 September informal exploratory talks were started between "the US authorities and the [EU] Troika operational in Washington" on an agreement - this was followed up when "a high-level Troika from Ministries of Interior and Justice, the Commission and the [Council] General Secretariat visited Washington DC on 18 October 2001". At the Gent European Council (the 15 EU prime ministers) on 19 October the EU agreed to the broadening of an EU-US agreement from "terrorism" to "criminal" matters in general (including terrorism).

At the informal meeting of the Justice and Home Affairs Council (JHA) on 14-15 February the Ministers endorsed the opening of negotiations with the US on: "one or several agreements on cooperation in criminal matters" and to "continue the informal exploratory talks with the US side". The JHA Council on 25-26 April authorised the EU Presidency (then held by Spain, now Denmark has taken over) to: "negotiate an agreement on judicial cooperation in criminal matters, including terrorism, on the basis of Articles 38 and 24 TEU" (Council press release).

### **Secret treaty-making**

Articles 38 and 24 of the Treaty on European Union, as agreed at Amsterdam in 1997, allow the Council of the European Union (the 15 governments) to negotiate and conclude agreements with non-EU states. The Articles do not provide for any parliamentary involvement (national or European) at the stage of agreeing the mandate for negotiations or during the negotiations - in fact, right up to the conclusion of any negotiations the content of the talks are, in principle, secret.

On 13 March Statewatch applied to the Council for the first two drafts of the EU discussions on the negotiations (neither of which is listed on its public register of documents). On 3 April the Council refused access because it would be "prejudicial" to the EU's interests "in the efficient conduct of negotiations with a third country". Statewatch appealed against this decision on the grounds that to withhold access on an issue which could have:

*"huge implications for peoples' rights and liberties.. [and] it is quite unacceptable in a democracy that such an agreement should be negotiated and agreed in complete secrecy"*

In response the Council said on the issue of "public interest" that the:

*"interest of protecting the Council's objectives outweighs the interest in "democratic control" of the negotiating process which is referred to by the applicant"*

Statewatch has received the official reply with two documents which the Council gives "partial access" (with text blocked out) subject to the exception (under Article 4.1.a: International relations of the 2001 Regulation on access). However, Statewatch obtained a later version of the documents in question which shows that many of the rights and protections built into EU laws and judgements are under imminent threat.

## **Statewatch analysis**

### **EU/US agreement on extradition and mutual assistance**

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#### **Introduction**

Council document 6438/2/02 sets out the secret negotiating agenda for a treaty between the EU and the US on extradition and mutual assistance in criminal matters.

This document suggests that the treaty between the EU and the US could drop or significantly weaken many of the traditional protections for the individual found in extradition and mutual assistance treaties, without expressly planning to provide for sufficient protection for human rights and civil liberties which the EU and the US claim to protect.

In particular:

- some Member States are willing to become 'accomplices' to the death penalty, by supplying evidence and witnesses to the US in death penalty trials;
- protection for suspects and witnesses could be reduced;
- civil liberties guarantees against search and seizure, confiscation of property and interception of telecommunications could be weakened;
- the traditional 'political offence' exception to extradition could be weakened;
- many Member States' constitutional ban on extraditing their own nationals could be dropped; and
- many other traditional grounds for refusal to extradite are not mentioned; and
- there are grave doubts about adequate parliamentary or judicial control over the ratification and implementation of the treaty.

#### **Background**

The planned treaty with the US will be, if agreed and implemented, the first comprehensive treaty between the EU as a whole and any non-EU state on criminal law or policing issues. Following the Treaty of Amsterdam, which came into force 1 May 1999, the EU has the power under Article 38 of the Treaty on European Union (TEU) to negotiate and agree such treaties, and it is this Article which will be used to agree the planned treaty with the US.

To date, the only formal agreed link between the EU and any non-EU state in policing or criminal stems from the previous "association" with the Schengen Convention agreed between the EU and Norway and Iceland. However, a similar "association" with the Schengen rules is being negotiated with Switzerland. Also, the EU Council has since July 2001 been trying to apply Article 38 of the TEU to negotiate a treaty with Norway and Iceland to extend to those countries all EU rules on extradition and mutual assistance which have been agreed on top of the extradition and mutual assistance rules set out in the Schengen Convention, or which build upon those Schengen rules (such rules already apply to Norway and Iceland).

The treaty with the US will build on the existing treaties which most Member States have with the US as regards mutual assistance (which governs the collection and provision of evidence, but which extends in EU practice to cover such controversial matters as undercover policing operations and interception of telecommunications), and which all Member States have with the US as regards extradition.

#### **General concerns**

The first general concern is the parliamentary control over the treaty. Given the importance of

the planned treaty for the rights of accused persons, and its likely broad scope given the scope of the planned treaty and the extent of Member States' links with the US, parliamentary control is essential. However, Article 38 of the TEU does not provide for any parliamentary involvement (of national parliaments or the European Parliament) at the stage of agreeing the mandate for negotiations or during the negotiations. In fact, up until conclusion of any negotiations, the content of those talks is, in principle, secret. While there is a long-established practice of involving the European Parliament (EP) informally at the early stages of negotiating treaties which will bind the European Community, this practice apparently has not been extended to policing and criminal matters.

As for the conclusion of the agreement, Article 38 TEU makes no reference to any involvement of the European Parliament. While it is arguable that conclusion of such agreements will be covered by the general obligation to consult the European Parliament on all EU policing and criminal law measures as set out in Article 39 TEU, it is not clear yet whether the EU Council and the Member States agree with this interpretation. In any event, Article 39 of the TEU only gives the EP the right to be consulted, not to veto or to insist on amendments to a proposed treaty.

Despite this limited or non-existent role for the EP, can national parliaments nonetheless assert control over implementation of the planned treaty? The answer is no. Article 38 TEU only gives each Member State the option (acting individually) to require national parliamentary assent before conclusion of a treaty on criminal law or policing. It remains to be seen whether any Member States will insist on this requirement. In fact, no Member State required national parliamentary assent when the EU last year agreed foreign policy treaties, subject to identical decision-making rules (according to Article 24 TEU), with the Federal Republic of Yugoslavia and the Former Yugoslav Republic of Macedonia. Even if some individual Member States do insist on national ratification of the future treaty, Article 38 TEU permits the other Member States to decide that the treaty will nonetheless apply to them provisionally. So the only way that national parliaments can block the application of the planned treaty is if (improbably) all Member States opt to require national parliamentary assent before the treaty is concluded, or if those Member States which do not submit the treaty to their national parliaments decide that they will not apply the future treaty provisionally.

What about judicial control? It is not clear whether the usual powers of the EU Court of Justice over criminal law and policing matters will apply to treaties concluded following the application of Article 38 of the TEU. In any event, the UK, Ireland and Denmark have decided to date that the Court of Justice will have no powers to receive any cases from their national courts concerning any aspect of EU policing and criminal law.

The draft mandate is also vague as regards human rights protection. In recent years, the argument for accelerated extradition proceedings and measures to ensure more mutual assistance in criminal matters within the EU has been based on the principle that all Member States have ratified the European Convention on Human Rights (ECHR), so all can be assumed to guarantee a minimum level of protection in criminal trials. Obviously, the US has not ratified the ECHR and cannot ratify it, any more than the EU or its Member States can apply the United States Bill of Rights. But there is no suggestion in the Council document that the future treaty will have a general provision allowing extradition or mutual assistance to be refused in particular cases where there are grounds for doubting that a person will receive a fair trial, particularly where the standards that would be applied are below the minimum guarantees in the ECHR or the Bill of Rights respectively.

### **Concerns on mutual assistance**

The mandate provisions on banking secrecy make no references to the limits on banking secrecy which were agreed within the EU when the Member States negotiated the Protocol to the EU Mutual Assistance Convention (signed in October 2001).

There is also limited specific reference to data protection concerns, which are particularly relevant to banking enquiries. The mandate indicates that these issues will only be raised by the EU side at a later date in the negotiations, raising the risk that an adequate level of data

protection will not be agreed at the outset.

The mandate suggests that the 'probable cause' requirement will be dropped by the US side. This will likely also entail dropping any such requirement applied by the common law Member States of the EU (the UK and Ireland) as regards requests from the United States. Historically, this requirement has been considered essential by common law countries to ensure that requests for mutual assistance are genuinely motivated.

Next, the mandate envisions US participation in joint investigation teams. But there is no reference to the controls on such teams set out in the EU Mutual Assistance Convention or the proposed framework decision on such teams, such as data protection rules, rules on the civil and criminal liability of team members and the legal rules applied to the operation of the teams. The provisions on videoconferencing similarly omit to mention the protections in the EU Mutual Assistance Convention, such as the protection of either state's law as regards the refusal to testify, the power of a suspect to refuse to testify, and protections for a suspect under the ECHR and possible further measures.

As for investigation procedures, the mandate foresees measures on searches and seizure and interception of telecommunications. There is no express reference to protecting the reservations on many grounds (for instance, dual criminality, extraditability, national law rules) which EU Member States can maintain to refuse to apply a search and seizure request from another Member State, even after extensive discussion of this issue when agreeing the EU Mutual Assistance Convention and its Protocol. Similarly, there is no express reference to the need to ensure that the guarantees of Article 8 of the ECHR (concerning the right to private and family life) and any higher standards applied by national law of the Member States, along with the corresponding protections in the US Bill of Rights, are applied fully when the two sides cooperate on interception of telecommunications.

Next, as regards the death penalty, it is highly questionable that some Member States appear willing to assist the US in cases where the death penalty might be applied, even though all Member States have ratified Protocol 6 to the ECHR (which bans the death penalty except in wartime) and all have signed the very recent Protocol 13 to the ECHR (which bans the death penalty absolutely). It is clear that assisting a state to carry out the death penalty amounts to complicity with the application of that punishment, and so at the very least violates the spirit of the Member States' obligation to abolish that penalty and the EU's frequently-expressed commitment to abolish it world-wide.

Finally, as regards asset forfeiture and confiscation, there is no reference to the protections provided for in Protocol 1 to the ECHR on property rights or Article 6 ECHR on the right to a fair trial.

### **Concerns on extradition**

The EU wants the US to remove the probable cause requirement for extradition, a traditional safeguard which common law countries require to ensure that all intended prosecutions following an extradition are genuine, particularly to protect their own nationals from facing an unfair trial in a foreign country. This could well mean that the UK and Ireland have to remove any similar protection against extradition to the United States.

The mandate suggests reducing the scope of the classic political offence exception to extradition. Within the Council of Europe, where all states have ratified the ECHR, this protection has only been weakened for certain specified very serious offences closely connected with terrorism, subject to possible reservations (see the European Convention on Suppression of Terrorism). Even within the EU, where the exception would be abolished completely by the Framework Decision on the European Arrest Warrant, there is still a possibility of refusing extradition in cases of persecution of the requested person, according to the preamble to the Framework Decision. In relations with the United States, given the differences in the legal, political and constitutional structures of the two sides, any significant reduction in the scope of the exception would be highly questionable.

As for extradition of nationals, a ban on extraditing nationals is considered an essential protection in a number of Member States, featuring in national constitutions. While the EU Framework Decision on arrest warrants will require Member States to drop that protection as between the Member States, this protection has been dropped in the context of a common citizenship of the European Union, a move toward harmonising criminal law in the EU, the creation of an area of 'freedom, security and justice' and ratification of the ECHR by all Member States. It is rather more questionable to drop this protection with a non-Member State which has, moreover, not ratified the ECHR.

As regards the limitation period for crime, the EU Extradition Convention of 1996 still permits a requested State to refuse to extradite a fugitive where the requesting state has run out of time to prosecute that person. In fact, the Council of Europe Convention on extradition still permits refusal due to lapse of time in either the requesting or requested state. It is obviously questionable whether the EU should go further than these provisions in a treaty with the US.

Finally, the mandate makes no reference to further reasons for refusing to extradite. For example, there is no reference to protection against double jeopardy for persons subject to extradition requests. This rule (often referred to as *ne bis in idem*) protects against a second criminal trial for the same facts in a Member State after a person has been finally judged in another Member State. It is set out in the Schengen Convention and also in the EU Charter of Fundamental Rights, and is a mandatory reason for refusing to execute a European arrest warrant, according to the Framework Decision on that issue. Because it is in the Schengen Convention, the rule also covers Norway and Iceland, and will cover Switzerland if that state becomes associated to the Schengen rules. Moreover, the Council of Europe Convention on extradition also sets out a more limited rule on *ne bis in idem*, and a Protocol to that Convention ratified by most EU Member States extends that principle further. In light of this, it is questionable whether an extradition treaty should be concluded with the US without the inclusion of this essential protection. Logically, the rule should also be a mandatory ground for refusal to cooperate with a mutual assistance request, as it arguably is at present within the EU (along with Norway and Iceland).

Similarly, following other essential protections in EU and Council of Europe measures, it will be questionable if the planned treaty fails to include rules regarding refusal to extradite if one state does not recognise the criminal jurisdictional rules of the other, or where the requested person should not be moved on humanitarian grounds.

## **Full-text of the draft EU-US negotiating mandate - doc no 6438/2/02**

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**RESTREINT UE**

**COUNCIL OF THE EUROPEAN UNION**

Brussels, 5 April 2002

6438/2/02

REV 2

**RESTREINT UE**

CATS 5

USA 4

NOTE

from: Presidency  
to: Article 36 Committee

Subject: Request for a negotiation mandate for the Presidency on judicial cooperation in criminal matters on the basis of Articles 38 and 24 TEU

## A. INTRODUCTION

At its extraordinary meeting on 20 September 2001 the Council agreed on the necessity for the Union to speed up the process of creating an area of freedom, security and justice and to step up cooperation with its partners, especially the United States. More specifically, the Council adopted the following conclusion (see 12156/01 JAI 99):

*"7. The Council agrees on the principle of proposing to the United States that an agreement be negotiated between the European Union and the United States, on the basis of Article 38 of the TEU, in the field of penal cooperation on terrorism."*

On 21 September 2001 the US reacted to these conclusions in the following way (letter from the US Mission in Brussels to the Presidency):

*"Judicial cooperation: The US is prepared to explore the possibilities for a formal agreement with the EU on judicial cooperation in criminal matters, with a view to overcoming impediments in existing agreements with EU Member States."*

In the Plan of Action, adopted by the European Council at its extraordinary meeting on 21 September, it is provided that the European Union will cooperate with the United States in bringing to justice and punishing the perpetrators, sponsors and accomplices of the barbaric terrorist attacks.

In the declaration by the heads of State or government of the EU and the President of the Commission, adopted at the European Council at Gent, it is provided that:

*"in the same context, the European Council has also examined the concrete proposals for cooperation which the US authorities made following the meeting on 27 September 2001 between the President of the European Council and the President of the United States. Technical examination of those proposals has already been initiated and they are already the subject of discussions between the US authorities and the Troika operational in Washington. Most of those proposals are already covered by the European Union's action plan. The Union is moreover prepared to engage with the United States in reciprocal initiatives such as:*

*- facilitation of mutual judicial assistance between the competent authorities of the United States and of the Member States, as well as extradition in connection with terrorism in accordance with the constitutional rules of the Member States."*

President Bush indicated in a letter on 16 October, following a request made by Prime Minister Verhofstadt, a list of proposed actions that the EU might undertake to help the US in the international efforts against terrorism. Among the actions are measures relating to mutual legal assistance and extradition.

On the basis of an initiative of the Belgian Presidency, a high-level Troika from Ministries of Interior and Justice, the Commission and the General Secretariat visited Washington DC on 18 October 2001. At that visit, it was agreed that the Presidency would undertake informal, exploratory talks with the US side to assess the feasibility of entering into an agreement with the US, either on extradition or on mutual assistance or both, and that such discussions would take place in Brussels.



This issue was included in the CATS Troika meeting with the United States, which took place in Madrid on 8 February 2002.

During the informal meeting of the Ministers of Justice and Home Affairs, in Santiago de Compostela, on 14 and 15 February 2002, the Ministers gave their political endorsement to this process and committed themselves to the opening of negotiations with the US as soon as possible. They underlined the necessity of including appropriate safeguards concerning in particular fundamental rights, data protection, death penalty, real lifetime sentences, conditions for detention, due process and other sensitive matters.

The Council (JHA), at its meeting on 28 February 2002 (see doc 6648/1/02 CATS 6 USA 7 REV 1):

- agreed to pursue further work on the Presidency orientations,
- requested the Presidency to examine this issue in a forthcoming meeting of the Article 36 Committee, assisted, where appropriate, by experts on cooperation with the USA with a view further to flesh out the position of the EU in the future discussions with the USA,
- asked the Permanent Representatives Committee to define rapidly after that meeting the possible scope and elements of one or several agreements on cooperation in criminal matters between the European Union and the United States,
- agreed that on the basis of this work, the mandate should be adopted, if possible, at the JHA Council on 25 April 2002,
- noted that the Presidency, assisted by the General Secretariat, together with the future Presidency and the Commission, will continue the informal exploratory talks with the US side, and feed the results of these talks into the process.

On the basis of the discussions with the US side, which have been conducted with the assistance of the future Presidency, the Commission and the General Secretariat the Presidency submits the following request for a negotiation mandate under Articles 24 and 38 TEU.

## **B. RESULTS OF DISCUSSIONS WITH THE US SIDE**

Without any firm commitment, but expressing a willingness to further explore the matter in negotiations, the US side has indicated that they could further explore the topics reproduced hereunder. The topics that should be raised by the EU are found in part E of this mandate. The US has indicated their interest in particular in issues relating to extradition, but have declared their readiness to further explore issues concerning mutual legal assistance, subject to further consultations.

### **Extradition**

The following issues have in particular been raised by the US side:

- a. Narrowing down the political offence exception.
- b. Problems connected with extradition of nationals.
- c. Temporary surrender for trials and sending back to extraditing country.
- d. Improving efficiency of the extradition process generally (simplified extradition, channels of transmission, delays)
- e. Limiting application of statute of limitations.

f. Enabling extradition based on a "penalty threshold" approach (and not use lists of offences).

## **Mutual legal assistance**

The US side has indicated an interest in further exploring the following topics:

- a. Possibility in cases concerning several EU countries to deal with a single contact point (while maintaining bilateral cooperation), such as Eurojust, within its competence. To the extent that it cannot be covered by an agreement with Eurojust, use of Eurojust as a vehicle for cooperation.
- b. Asset sharing, cooperation in confiscation and asset forfeiture.

## **C. BACKGROUND**

The terrorist attacks in the United States on 11 September 2001 highlighted the vital need for closer international cooperation in criminal matters to fight the various forms of organised crime, particularly terrorism, more effectively.

The need for States to grant one another the widest possible mutual legal assistance has been raised on several occasions. Article 18 of the United Nations Convention against Transnational Organised Crime signed in Palermo in December 2000, regulates very important aspects of international judicial cooperation in proceedings relating to the offences covered by that Convention, which the European Community and the Member States as well as the United States have signed.

The G 7/8 countries have made several joint declarations undertaking to step up the fight against transnational crime and organised crime.

The Convention on Mutual Assistance on Criminal Matters between the Member States of the European Union was signed on 29 May 2000, followed by a Protocol on 16 October 2001.

In terms of bilateral relations, it should be noted that 11 of the Member States of the European Union have already signed and/or ratified a Mutual Legal Assistance Agreement with the United States. These States are: Austria (signed in 1995, entry into force 1998), Belgium (1988/2000), France (1998/2001), Greece (1999/2001), Spain (1990/1993), Italy (1982/1985), Ireland (2001), Luxembourg (1997/2001), Sweden (2001), the Netherlands (1981/1983) and the United Kingdom (1994/1996). Germany is close to completing discussions on such an agreement. All the Member States have extradition arrangements. Some have concluded supplementary agreements, but in general the agreements date back a relatively long way. The situation is as follows: Austria (1998) Belgium (1987), Denmark (1972). Greece (1931), Finland (1976), France (1909, suppl. 1970; 1996: in force 2002), Germany (1978, suppl. agreement 1993), Ireland (1983), Italy (1983), Luxembourg (1996; in force 2009), Netherlands (1980), Portugal (1908), Spain (1970, suppl 1975, 1988 and 1996), Sweden (1961, suppl. 1983), United Kingdom (1972, suppl. 1985).

The need to coordinate action against the various forms of transnational crime and strengthen judicial cooperation has been raised a number of times in proceedings at the Council, particularly at the high-level meetings with the United States and Canada [footnote 1].

*[footnote 1: See, for example. 13270/00 JAI 134 CDN 15 of 22 November 2000: "High level meeting between European Union and Canada on Justice and Home Affairs matters (9 November 2000)" and 6061/01 COPEN 5 of 29 February 2001: "Preparation of a forthcoming meeting between experts on cooperation in criminal matters of the EU and of the USA and Canada - Data protection and restrictions on use in the field of mutual assistance in criminal matters in external relations"]*

Conclusion No 60 of the Tampere European Council states that "full use must be made of the

new possibilities offered by the Treaty of Amsterdam for external action and in particular of Common Strategies as well as Community agreements and agreements based on Article 38 TEU". Paragraph 17 of the 1998 Vienna Action Plan affirms a need "for improving and speeding up judicial cooperation in criminal matters both among Member States and with third countries. specially in view of intensified police cooperation. However effective it may be. judicial cooperation in criminal matters is hard pressed today to deal with phenomena such as organised crime, unless there is facilitation of procedures and where necessary approximation of legislation".

Lastly, paragraph 22 of the Action Plan states that "[...] In those subjects which remain in Title VI of TEU, the Union can also make use of the possibility for the Council to conclude international agreements in matters relating to Title VI of the Treaty, as well as for the Presidency, assisted by the Secretary General of the Council and in full association with the Commission, to represent the Union in these areas".

## **D. LEGAL BASIS**

**Article 38 TEU** makes it possible to conclude agreements as referred to in Article 24 TEU on matters which come under Title VI "Police and judicial cooperation in criminal matters".

**Article 24 TEU** states that "when it is necessary to conclude an agreement with one or more States or international organisations in implementation of this Title, the Council, acting unanimously, may authorise the Presidency, assisted by the Commission as appropriate, to open negotiations to that effect. Such agreements shall be concluded by the Council acting unanimously on a recommendation from the Presidency. No agreement shall be binding on a Member State whose representative in the Council states that it has to comply with the requirements of its own constitutional procedure; the other members of the Council may agree that the agreement shall apply provisionally to them. The provisions of this Article shall also apply to matters falling under Title VI".

The European Union has already used Article 24 TEU in the context of its relations with the Federal Republic of Yugoslavia (FRY), and just recently the Council mandated the Presidency, under Articles 24 and 38 TEU, to negotiate with Norway and Iceland the application by those two countries of the 1996 Convention relating to extradition between the Member States of the EU, and also of those provisions of the 2000 Convention on Mutual Assistance which are not developments of the Schengen acquis.

The Presidency proposes that the Council take the following decisions on the basis of Articles 24 and 38 TEU.

## **E. DRAFT COUNCIL AUTHORISATION**

### **a) General matters**

1. The Council authorises the Presidency, assisted by the Commission, to open negotiations with the United States for the purpose of conclusion of one or several agreements on cooperation in criminal matters between the European Union and the United States. The negotiations should be based on the concept of reciprocity and be conducted in a spirit of cooperation between likeminded and equal partners.

2. The agreement(s) must contain the necessary guarantees for the protection of human rights and fundamental freedoms and should respect the constitutional principles of the Member States. Further instructions of the Council in this respect are found below under b).

3. The future agreement [should in all cases safeguard the results achieved in the existing bilateral or multi-lateral agreements between the Member States and the USA] [Option suggested by NL: shall be without prejudice to the existing bilateral arrangements, conventions or treaties between Member States and the USA and not preclude any future arrangements, conventions or treaties on co-operation in criminal matters between Member States and the USA]. The scope of any future agreement(s) should in principle be general and not limited to certain offences.

4. Negotiations should focus on the issues referred to below under b) with the aim of achieving an added value to existing cooperation. The issues raised should be considered to be a package. The Presidency might however from a technical standpoint wish to aim at the conclusion of separate agreements.

5. The agreement(s) should contain a provision under which it (they) shall not create obligations in respect of a Member State whose representative in the Council has stated that it has to comply with the requirements under its own constitutional procedure before being bound by the agreement or agreements until that Member State has concluded these procedures. The agreement should take account of the procedures contemplated in Article 24 TEU.

#### **b) EU priorities and response to USA**

6. Within the framework of the general matters indicated under a) and following the procedure specified in c), the Council authorises the Presidency, assisted by the Commission, to negotiate with the USA the following issues in accordance with the negotiating instructions set out hereafter:

##### **Mutual Legal Assistance**

##### **Issues to be raised by the EU**

7. Improving cooperation in the area of investigations into financial elements of serious crime, including organized crime, terrorism and financial crime

##### **Line to take**

- explore the possibility to create a specific legal basis to obtain information on bank accounts, financial transactions and ensure that bank secrecy is not an obstacle to efficient cooperation;
- facilitate search and seizure in bank accounts

##### **Issues to be raised by the EU**

8. Improve practical cooperation and reducing delays in mutual legal assistance

##### **Line to take**

- alleviate probable cause requirements
- alleviate legalisation and certification requirements
- improve channels of transmission, in particular in urgent cases. and facilitate direct contacts between central authorities

- create contact points in each Member State and in the USA
- use of new technologies in the transmission of requests

### **Issues to be raised by the EU**

#### 9. Joint Investigative Teams

##### **Line to take**

- creating a legal basis for the setting up of joint investigative teams or for facilitating practical cooperation in such teams

### **Issues to be raised by the EU**

#### 10. Videoconferencing

##### **Line to take**

- creating a legal basis for the use of videoconferences, in particular in relation to witnesses
- Issues to be raised by the EU

#### 11. Improve investigation procedures

##### **Line to take**

- creating a common approach to searches, seizures, interception of telecommunications
  - specify responsibility for costs of execution of certain acts
- Issues to be raised by the EU

#### 12. Confidence building measures

##### **Line to take**

- explore possibility of exchange of officials for short periods,
- periodic consultations, training or joint sessions for magistrates to implement mutual legal assistance,
- explore possibility to invite US magistrates to European Networks

### **Guarantees and safeguards**

#### 13. Data protection

##### **Line to take**

- announce to the USA that this issue will be raised by the EU at a later stage in the discussions.
- explore the following options with Member States: (a) maintaining national regimes] b)

inserting necessary and stringent provisions while taking account of solutions found in recent treaties, such as the Council of Europe Cybercrime Convention]

14. Death penalty

**Line to take**

- inform the USA that some Member States may wish to have specific provisions in this regard

15. Life imprisonment

**Line to take**

- inform the USA that some Member States may wish to have specific provisions in this regard

**Issues raised by the USA**

16. Possibility in cases concerning several EU countries to deal with a single contact point.

**Line to take**

- request the USA to provide more detailed information on the issue.

- if this matter involves Eurojust, query the number of cases and resources that might be needed.

- explore possible use of European Judicial Network

17. Asset sharing, cooperation in confiscation and asset forfeiture.

**Line to take**

- generally negative attitude towards asset sharing; some Member States might wish to explore further possibilities

- request the USA to provide more detailed information on the issue, show positive attitude to strengthening cooperation in confiscation and asset forfeiture

**Extradition**

**Issues to be raised by the EU**

18. Delays in handling of requests

**Line to take**

- alleviate or do away with probable cause requirement,

- simplifying documentation to be provided,

- improve channels of transmission, in particular in urgent cases concerning provisional arrest, and facilitate direct contacts between central authorities; examine the possibility of doing away with diplomatic channels,

- reducing delays in the administrative part of the procedures

#### 19. Speciality

##### **Line to take**

- inform the USA that Member States that have this rule in the bilateral treaty will maintain it and that one Member state will wish to have an explicit provision

#### 20. Re-extradition

##### **Line to take**

- inform the USA that Member States that have this rule in the bilateral Treaty will maintain it and that one Member state will wish to have an explicit provision

#### **Issues raised by USA**

21. Narrowing down the political offence exception. [footnote: [For Member States: consider whether necessary, for political or other reasons, to enter negotiations on this topic]

##### **Line to take**

- explore the possibility of taking a modern approach in this question, in particular as regards terrorism,

- explore the possibility of defining a list of serious offences which would not be considered political offences

22. Problems connected with extradition of nationals.

##### **Line to take**

- presidency must respect constitutional provisions in several Member States

- examine the possibility of using temporary surrender for trial and serving sentence in Member State

- examine possibilities of using aut dedere, aut iudicare in this matter

- where extradition of nationals could be included, further guarantees should be asked by the EU and in particular the possibility of adapting the sentence to the standards of the extraditing EU Member State

23. Temporary surrender for trials and sending back to extraditing country.

##### **Line to take**

- the possibility of including an optional provision

24. Improving efficiency of the extradition process generally (simplified extradition. channels of transmission, delays)

### **Line to take**

- simplified extradition should be with the consent of the person concerned and full guarantees of due process
- seek objective and simplified rules on simplified extradition
- define special channels of transmission for certain categories of crimes, thus speeding up the procedures
- reduce delays in other ways without however prejudicing recourse to legal remedies

### 25. Limiting application of statute of limitations

#### **Line to take**

- Request more information to the USA and explore the possibilities of solutions found in recent Treaty practice

### 26. Enabling extradition based on a "penalty threshold" approach (and not use lists of offences).

#### **Line to take**

- Explore possibilities for some Member States to make their cooperation with the USA more efficient and in line with modern Treaty practice

### **Guarantees and safeguards (see footnote \*)**

### 27. Death penalty

#### **Line to take**

- [Option 1: Death sentence may not be imposed]
- [Option 2: Death sentence may not be imposed. or, if imposed, may not be carried out]

### 28. Life imprisonment and real life time sentences

#### **Line to take**

- Inform the USA that some Member States may wish to have specific provisions in this regard, for instance as to periodic review of the sentence

*[\* footnote: Some delegations have suggested to include additional safeguards concerning non-discrimination and conditions for imprisonment. The Presidency considers that this item is already included in the reference to fundamental rights and freedoms and proposes to examine this matter at a later stage in the process]*

### 29. Special courts

#### **Line to take**

- Seek assurances from USA that extradited persons from Member States will be subject of ordinary proceedings before ordinary US courts respecting fundamental rights and freedoms
- c) Procedure



30. The Presidency will keep the Council fully and regularly informed of the progress of discussions With the United States, and of any problems concerning the negotiations, by means of regular reports to the Article 36 Committee and Coreper.

31. Coreper will be requested to institute or mandate a working group of experts to follow the negotiations at expert level. In that context, Coreper is invited to consider how best to involve the candidate countries in the process of negotiations. After each meeting with the US side, a detailed report shall be made by the Presidency on the outcome of the discussions. The Presidency shall take account of the wishes of the delegations expressed in the Council. The Council authorises the working party referred to in this paragraph to make necessary precision to the mandate, as negotiations progress.

32. At the end of the negotiations, the draft agreement(s) will be submitted to the Council, in accordance with the procedure laid down in Article 24 TEU, for signing and conclusion.

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The full-text of all background documents are available on:

**[www.statewatch.org/news/2002/jul/11Auseu.htm](http://www.statewatch.org/news/2002/jul/11Auseu.htm)**

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