

EU/US: FIRST GLIMPSE OF EXTRADITION AND LEGAL ASSISTANCE PACT

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The EU Council of Ministers has decided to give the public its first glimpse of the draft Agreements it has negotiated with the United States on extradition and mutual legal assistance. The EU side seems to have done fairly well on the death penalty issue, with the Member States entitled to reject extradition requests if there is a chance of the person being executed. In return, on the issue of "competing requests" the US has succeeded in securing equal treatment for their extradition requests to those from EU Member States. The accords, kept under close wraps until now, were de-classified recently following pressure from some Member States that wanted their parliaments to be able to properly study them. EU Justice and Home Affairs Ministers discussed but did not endorse the Agreements at their May 8 Council, with some voicing constitutional and human rights concerns (see separate article, same section).

BODY:

These two Agreements are the first the EU has brokered with another country that deal with police and judicial co-operation on criminal matters. The legal basis for concluding such agreements is provided by Article 24 and 38 of the EU Treaty. The political impetus for it was created by the September 11, 2001 terrorists attacks on the United States.

Extradition.

The draft extradition treaty covers all offences punishable by at least one year in prison in both the state making the request for extradition (the "requesting state") and the country in which the offender is located (the "requested state"). Granting extradition does not depend upon the two parties having the same legal definition of the crime concerned. Requests for extradition or provisional arrest should be transmitted either between Justice Ministries or Foreign Affairs Ministries. The death penalty clause (Article 13) says that EU Member States may grant extradition on the condition that a death sentence is not imposed or, if legally it has to be imposed, is not carried out. If such an assurance is not forthcoming the Member State could - although is not obliged to - deny the request.

In cases where several countries demand someone's extradition, the text sets out criteria for deciding which one should have precedence. The criteria are where the act was committed, the states' respective interests, the gravity of the crime, the victim's nationality and the chronological order in which the requests were received. Crucially, extradition requests made by the US will be treated in the same way as European arrest warrants issued by other EU Member States. The arrest warrant, which replaces extradition with a simple transfer of individuals and is intended to de-politicise the process, is due to take effect EU-wide on January 1, 2004. An explanatory note - apparently inserted to reassure the Netherlands - says that these provisions have no effect on states' duties to hand people over to The Hague-based International Criminal Court. The US has notably refused to recognise the ICC while the EU strongly supports it.

Mutual Legal Assistance.

The second draft treaty requires "requested states" to "ascertain if the banks located on their territory possess information on whether an identified natural or legal person suspected of or charged with a criminal offence is the holder of a bank account or accounts". This would also apply to other financial institutions and to "financial transactions unrelated to accounts". Requests for assistance should be sent between national authorities responsible for investigating or prosecuting criminal offences. There are quite generous grounds for refusing assistance. A state could insist that the offence involved must be deemed "serious" in both states. Alternatively it could apply a prison sentence threshold: punishable by four years in the requesting state and two years in the state in which the offender is located. However, assistance could not be refused on the grounds of banking secrecy.

The accord provides a legal basis for setting up joint investigation teams, although leaves it up to the states involved to decide on the precise organisational details of such teams. It requires the EU and US to have a video-conferencing facility, which would be used for sending evidence or testimony from a witness or expert located in the requested state. The requesting state would cover the costs of establishing and servicing the video transmission. The Agreement allows requests to be sent by e-mail or fax provided this is followed up with a letter. It says assistance can also be given to national administrative (as opposed to police and judicial) authorities but only if the latter is "investigating conduct with a view to a criminal prosecution".

The data protection article limits the use of information provided to criminal investigations or for combating threats to public security. If the requesting state wants to use it for any other reason, it must get the consent of the "requested state". But the explanatory notes stresses - most probably to reassure the US side - that refusing assistance on "data protection grounds may be invoked only in exceptional cases". In particular, it says that the fact that the two sides have different data protection systems is not grounds for refusing to co-operate.

Common clauses.

There are several provisions that apply to the two Agreements. They both cover offences committed before and after the accords enter into force but only to requests made after they take effect. As well as applying to US and EU territories, the Member States may extend its scope to overseas territories whose external relations they are responsible for. The Agreements would enter into force three months after the EU and US have ratified them. They could be terminated at any time and would be reviewed at the latest five years after taking effect.

What happens to bilateral treaties?

All the EU Member States already have bilateral accords with the US on extradition and most of them have mutual legal assistance pacts but some of these are very old and need to be updated. The EU-US Agreements will complement the bilateral treaties on certain

aspects but on others they will replace them. For example, the extradition accord replaces bilateral treaties' rules concerning the offences covered and the procedure for transmitting requests. It "may" be applied in place of or in the absence of bilateral rules on the death penalty. It "shall" apply if there are no bilateral provisions on data protection.

As for the mutual legal assistance accord, the parts dealing with banking information, joint investigations and video conferencing are complementary to bilateral treaties. The provisions on personal data replace bilateral arrangements. Interestingly, an existing US accord with Luxembourg allowing the latter to refuse assistance for certain tax offences can continue to apply. Finally, the Member States are not prohibited from concluding bilateral agreements in the future - either on extradition or legal assistance.