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COUNCIL OF
THE EUROPEAN UNION

Brussels, 5 April 2002

6438/2/02
REV 2

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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."

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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.

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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,

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- 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).

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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.

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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 2002), 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 ¹.

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".

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 22 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".

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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.

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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.

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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

Line to take

7. Improving cooperation in the area of investigations into financial elements of serious crime, including organized crime, terrorism and financial crime	<ul style="list-style-type: none">- 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
8. Improve practical cooperation and reducing delays in mutual legal assistance	<ul style="list-style-type: none">- 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
9. Joint Investigative Teams	creating a legal basis for the setting up of joint investigative teams or for facilitating practical cooperation in such teams
10. Videoconferencing	creating a legal basis for the use of videoconferences, in particular in relation to witnesses

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11. Improve investigation procedures	<ul style="list-style-type: none"> - creating a common approach to searches, seizures, interception of telecommunications - specify responsibility for costs of execution of certain acts
12. Confidence building measures	<ul style="list-style-type: none"> - 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

Line to take

13. Data protection	<ul style="list-style-type: none"> - 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: <ul style="list-style-type: none"> [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	inform the USA that some Member States may wish to have specific provisions in this regard
15. Life imprisonment	inform the USA that some Member States may wish to have specific provisions in this regard

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Issues raised by the USA

Line to take

16. Possibility in cases concerning several EU countries to deal with a single contact point.	<ul style="list-style-type: none">- 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.	<ul style="list-style-type: none">- 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

Line to take

18. Delays in handling of requests	<ul style="list-style-type: none">- 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	<ul style="list-style-type: none">- 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

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20. Re-extradition	- 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
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Issues raised by USA

Line to take

21. Narrowing down the political offence exception. ¹	<ul style="list-style-type: none"> - 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.	<ul style="list-style-type: none"> - 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 <i>aut dedere, aut iudicare</i> 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.	Explore the possibility of including an optional provision

¹ [For Member States: consider whether necessary, for political or other reasons, to enter into negotiations on this topic]

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<p>24. Improving efficiency of the extradition process generally (simplified extradition, channels of transmission, delays)</p>	<ul style="list-style-type: none"> - 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
<p>25. Limiting application of statute of limitations</p>	<p>Request more information to the USA and explore the possibilities of solutions found in recent Treaty practice</p>
<p>26. Enabling extradition based on a "penalty threshold" approach (and not use lists of offences).</p>	<p>Explore possibilities for some Member States to make their cooperation with the USA more efficient and in line with modern Treaty practice</p>

Guarantees and safeguards¹

Line to take

<p>27. Death penalty</p>	<p>[Option 1: Death sentence may not be imposed or carried out.]</p> <p>[Option 2: Death sentence may not be imposed, or, if imposed, may not be carried out]</p>
<p>28. Life imprisonment and real life time sentences</p>	<p>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</p>

¹ 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.

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29. Special courts	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
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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.

