

# EUROPEAN PARLIAMENT

1999



2004

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*Session document*

FINAL  
**A5-0172/2003**

22 May 2003

## **REPORT**

containing a proposal for a European Parliament recommendation to the Council on the EU-USA agreements on judicial cooperation in criminal matters and extradition (2003/2003(INI))

Committee on Citizens' Freedoms and Rights, Justice and Home Affairs

Rapporteur: Jorge Salvador Hernández Mollar

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## PROCEDURAL PAGE

At the sitting of 16 January 2003 the President of Parliament announced that he had referred the proposal for a recommendation on the EU-USA agreements on judicial cooperation in criminal matters and extradition, tabled by Kathalijne Maria Buitenweg, on behalf of the Verts/ALE (B5-0540/2002) pursuant to Rule 49(1) of the Rules of Procedure, to the Committee on Citizens' Freedoms and Rights, Justice and Home Affairs as the committee responsible.

At its meeting of 21 January 2003 the Committee on Citizens' Freedoms and Rights, Justice and Home Affairs decided to draw up a report on this subject pursuant to Rule 49(3) and Rule 107 and appointed Jorge Salvador Hernández Mollar rapporteur (2003/2003(INI)).

The committee considered the draft report at its meetings of 19 and 20 May 2003.

At the latter meeting it adopted the proposal for a recommendation by 25 votes to 5.

The following were present for the vote: Jorge Salvador Hernández Mollar, chairman and rapporteur; Robert J.E. Evans, vice-chairman; Johanna L.A. Boogerd-Quaak, vice-chairman; María Antonia Avilés Perea (for Marcelino Oreja Arburúa), Juan José Bayona de Perogordo (for Mary Elizabeth Banotti), Mario Borghezio, Alima Boumediene-Thiery, Giuseppe Brienza, Marco Cappato (for Maurizio Turco), Charlotte Cederschiöld, Ozan Ceyhun, Carlos Coelho, Thierry Cornillet, Gérard M.J. Deprez, Ewa Hedkvist Petersen (for Adeline Hazan), Ole Krarup, Baroness Sarah Ludford, Lucio Manisco (for Giuseppe Di Lello Finuoli), Manuel Medina Ortega (for Sérgio Sousa Pinto), Hartmut Nassauer, Bill Newton Dunn, Elena Ornella Paciotti, Hubert Pirker, José Ribeiro e Castro, Martine Roure, Heide Rühle, Ingo Schmitt (for Timothy Kirkhope), Ilka Schröder, Joke Swiebel and Anna Terrón i Cusí.

The report was tabled on 22 May 2003.

**PROPOSAL FOR A RECOMMENDATION  
OF THE EUROPEAN PARLIAMENT TO THE COUNCIL**

**on the EU-USA agreements on judicial cooperation in criminal matters and extradition  
(2003/2003(INI))**

*The European Parliament,*

- having regard to the proposal for a recommendation to the Council tabled by Kathalijne Maria Buitenweg, on behalf of the Greens/EFA Group (B5-0540/2002),
- having regard to Rules 49(3) and 107 of its Rules of Procedure,
- having regard to the report of the Committee on Citizens' Freedoms and Rights, Justice and Home Affairs (A5-0172/2003),
- A. having noted the draft agreements (Doc. ST 8295/03) between the European Union and the United States of America on extradition and judicial cooperation in criminal matters, which were debated at the meeting of the Justice and Home Affairs Council of 8 May 2003,
- B. whereas, since the agreements are the first agreements on extradition and judicial cooperation to be concluded between the EU as a whole and a third country, they must serve as a model for negotiations for any agreements to be concluded with other third countries,
- C. strongly convinced that the cooperation between the EU and the US should be truly mutual and that the US should cooperate by handing over evidence in order to ensure that European citizens who have committed a crime (in part) on European territory are tried in their own country instead of being extradited to the US,
- D. whereas the judicial system of some US States does not offer the same level of guarantees that the ECHR and EU measures seek to provide for EU Member States,
- E. whereas it is paradoxical to sign an agreement with the United States when several European Union citizens are still being held at the US military base at Guantánamo Bay, quite unlawfully under both US and international law and without the slightest guarantee that they will receive a fair trial,
- F. recalling its resolution of 13 December 2001<sup>1</sup> in which it indicated the principles of which account must be taken in the negotiations on judicial cooperation between the European Union and the United States of America, including:
  - (a) full respect for the European Convention on Human Rights and, consequently, for the minimum procedural guarantees with regard to a fair trial, as confirmed by the

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<sup>1</sup> B5-0813/2001.

- European Court of Human Rights, which are common to all the Member States, irrespective of their legal system,
- (b) the fact that authorisation must never be given for the extradition from the Member States of the European Union to the United States of persons who would be brought before a military tribunal,
  - (c) the fact that extradition must not be possible if the accused might face the death penalty,
  - (d) the need to ensure that data-protection standards must be proportionate, efficacious and limited in time and not to authorise any provision requiring the storage of data which might infringe a right and a guarantee, whatever form they might take,
- G. having carefully noted the information about the progress of the negotiations which the Council Presidency gave to the parliamentary committee on 17 February and to the House on 14 May 2003,
- H. welcoming the Council's decision to declassify the texts of the two draft agreements before their signature, with the result that they may be debated in the European Parliament and in the national parliaments,

*as regards the political scope of the agreements*

1. Takes the view that, if ratified, and if account is taken of the concerns set out in this recommendation, these initial agreements on extradition and judicial cooperation in criminal matters would constitute a significant political step forward in at least three respects:
  - **with respect to the efficacy of the fight against international crime**, since they would cover two important areas of the world, Europe and the United States, and would consequently clear the way for other agreements of a similar nature with other countries, such as Russia, and would also indirectly strengthen the implementation of the UN Convention Against Transnational Organised Crime,
  - **with respect to the strengthening of the European Judicial Area**, since the implementation of the agreements would oblige the Member States and, before long, the applicant countries to tighten up their relations and cooperation by implementing, initially among themselves, the European conventions signed but not yet ratified which serve as the basic texts for the agreements with the United States. Furthermore, the requirement to respect international obligations should encourage the Member States once and for all to regulate data-protection standards in a less chaotic and less arbitrary manner,
  - **with respect to the strengthening of guarantees for the accused**, since the agreements will confirm the guarantees already laid down in the bilateral agreements between the Member States and the United States, while adding thereto the guarantees deriving from European legislation;

*as regards the legal and institutional aspects*

2. Recommends that the agreements should refer explicitly to Article 6(1) of the Treaty on European Union and to the Charter of Fundamental Rights of the European Union so that the provisions of those agreements are binding: firstly, because the Union may not lawfully negotiate in areas outside the powers conferred and constraints imposed on it by its founding treaty and, secondly, on grounds of good faith towards the United States which, being a party neither to the European Convention nor to its control mechanisms, must not be surprised by the constraints on the Union deriving therefrom; believes that an explicit reference to the Charter of Fundamental Rights (where appropriate, in the explanatory notes to the agreements) would also be more than appropriate, given that the Council announced it formally in December 2000;
3. Recommends that the agreements should explicitly exclude every form of judicial cooperation with American exceptional and/or military courts and that all discrimination should be abolished between European and American citizens which might arise from application of the Patriot Act and of the Homeland Security Act;
4. Takes the view that Article 13 of the draft agreement on extradition must expressly specify that no person may be extradited to the USA who might be sentenced to death or executed;
5. **Reiterates its concern about the procedure to be applied to data protection;** deems the fact that the agreement on judicial cooperation is based on Article 23 of the European Convention on Mutual Assistance in Criminal Matters of 29 May 2000 to be inadequate, given that the United States is party neither to that Convention nor to the Council of Europe's Convention on Cybercrime (signed in Budapest on 23 November 2001) **and that there are, therefore, no common principles on which to act with regard to (a) the correct use of data, (b) the integrity thereof and (c) the rights of the data subject** to rectification and erasure if the data are inaccurate; believes, further, that, since US legislation is not subject to verification for compliance with the principle of proportionality that is required by European law, a very detailed study should be made of the possible impact of US legislation, such as the Homeland Security Act, before the agreement in question is ratified; **recommends that the agreements should provide for data-protection guarantees that are at least equivalent to the provisions of the Council of Europe's Convention dated 28 January 1981;**
6. Considers that, given the scope thereof and the fact that they affect the rights and freedoms of individual citizens, these agreements must be deemed by the Council to be **'basic choices'** for the Union and that, **consequently, Parliament must be consulted** pursuant to Articles 21, 34(2)(c) and 39(1) of the EU Treaty; believes, furthermore, that simple information of Parliament during the ratification phase, which the Council referred to in the House, cannot be deemed to be satisfactory from either a political or a constitutional point of view; calls on the Council as a matter of urgency to consult the European Parliament in the same way as the American authorities consult the US Congress;

7. Reminds the Council, with regard to procedure, that its practice of **excluding the national parliaments and the European Parliament from the conclusion of agreements based on Article 24 of the EU Treaty** is a flagrant breach of the democratic principle on which the Union claims to be founded (Article 6(1) of the EU Treaty);
8. Deems it essential that these agreements should also become the **transparent framework for EU-US cooperation, including for the European agencies such as Europol, Eurojust and OLAF**, and calls for **joint monitoring committees to be established, including at parliamentary level**, with a view to the prevention of any disputes as to interpretation and problems in implementation;
9. Recommends that, with regard to the specific provisions of the draft agreement on extradition:
  - (a) no request for extradition submitted by a third country should take precedence over a request for surrender from a Member State in the execution of a European arrest warrant,
  - (b) Member States should ensure that, when faced with several competing extradition demands, they respect their obligations under the Rome Statute regarding surrender to the International Criminal Court;
  - (c) the EU accession countries and associated states should align themselves with the EU common position on the International Criminal Court and on the processing of US requests for the signature of immunity agreements;
10. Recommends that, with regard to the specific provisions of the draft agreement concerning cooperation in criminal matters, the agreements should include appropriate provisions with regard to legal and linguistic aid;
11. Calls as a matter of urgency for inclusion in the agreements, and in the Decision authorising signature thereof, of a provision relating to the establishment of an interparliamentary committee responsible for monitoring the agreements in question;
12. Recommends as a matter of urgency to the European authorities that they should make the signature of these agreements conditional upon the finding of a fair solution to the problem of the situation of the persons, especially the Europeans, held at the base in Guantánamo Bay;
13. Instructs its President to forward this resolution to the Council, the Commission, the governments and parliaments of the Member States and to the US Congress and the US Administration.

## EXPLANATORY STATEMENT

### Background

1. The idea of an agreement between the EU and the USA was first raised by the Justice and Home Affairs (JHA) Council at its extraordinary meeting of 20 September 2001, immediately after the attacks which took place on 11 September. The Council said that it agreed '*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*' (Section III, paragraph 7 of the conclusions). The idea was passed on the following day by the European Council. The United States expressed an interest, and letters were exchanged between President Bush and Mr Verhofstadt. The Council adopted a new position at its meeting of 20 October 2001 in Ghent<sup>1</sup>.
2. Having noted these initiatives, the European Parliament adopted, on 13 December 2001, a resolution (B5-0813/2001) which, while referring to certain worrying features involved in the legislation adopted by the USA, such as the Patriot Act and the President's Executive Order on military tribunals, emphasised the need for any international agreement on judicial cooperation in criminal matters to 'fully respect the European Convention on Human Rights' with regard to both the abolition of the death penalty and to procedural guarantees to a fair trial. In accordance with those principles, the EP resolution declared that 'no extradition could be allowed to the US from Member States for people who are to be tried before military tribunals' and that 'extradition cannot take place if the defendant could be sentenced to death'.

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<sup>1</sup> At that meeting, the European Council stated that it had '*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*'.



3. Similar reservations relating to the protection of fundamental rights appeared subsequently in the negotiating mandate<sup>1</sup> conferred by the JHA Council of 25-26 April 2002 on the Presidency, assisted by the Commission<sup>2</sup>. Negotiations began in July 2002 and, after several meetings held to discuss technical matters, constituted the subject of an in-depth debate at the JHA Council meetings of 28/29 November and 9 December 2002 and, finally, of 23 February 2003, when a decision was taken to suspend the negotiations so as to allow the Member States to inform the national parliaments before the agreements were signed and to consult them and any other bodies for which such provision is made in the national legal system concerned. In order to facilitate consultation and to respond to the reservations expressed in the European Parliament and in the national parliaments that texts of such importance for individual citizens were to be treated as confidential, the Council, in agreement with the USA, declassified the draft agreements on 6 May 2003<sup>3</sup>. The Council Presidency is now seeking to secure authorisation to sign the agreements on behalf of the Union when the JHA Council meets on 5/6 June 2003.

***As regards the substance – a manifest political success; as regards procedure and form - could do better***

4. The negotiations conducted to date by the Council may be assessed in two different ways, one from a political, the other from a legal and institutional point of view. From the political point of view, three fundamental questions need to be answered with regard to the draft agreements in question: (a) will they increase the effectiveness of the fight against international organised crime; (b) will they strengthen the European Judicial Area; (c) will they constitute added value for the guarantees given to accused persons compared with the agreements already negotiated bilaterally between the Member States and the USA?

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<sup>1</sup> (Doc. 6438/40/02/REV4 RESTREINT UE).

<sup>2</sup> The press release covering the meeting (7991/02 (Presse 104) - page 13) stated that: *'In the general framework of the Union's police and judicial cooperation with the United States of America, the Council authorised the Presidency to negotiate an agreement on judicial cooperation in criminal matters, including terrorism, on the basis of Articles 38 and 24 TEU. The negotiating mandate covers in particular*  
*- extradition, including the temporary surrender for trials*  
*- and mutual legal assistance including exchange of data, the setting up of joint investigation teams, the giving of evidence (via video conference) and the establishment of single contact points.*

*As regards extradition, the Union will make any agreement on extradition conditional on the provision of guarantees on the non-imposition of capital punishment sentences, and the securing of existing levels of constitutional guarantees with regard to life sentences. The future agreement should in all cases safeguard the efficiency of the existing bilateral agreements between the Member States and the USA. Negotiations will be led by the Presidency assisted by the Commission. The Presidency will report to the Council on progress made after each negotiation meeting with the US'.*

<sup>3</sup> This text serves as the basis for this proposal for a recommendation (Doc. 8295/1/03 REV1).

5. The answer to the first question seems to be in the affirmative. **We take the view that the establishment of genuine judicial cooperation between the two most economically developed areas on the planet will clearly help in the fight against financial crime, money-laundering, cybercrime, trafficking in human beings and terrorism.** These agreements will constitute a powerful corollary to the UN Convention Against Transnational Organised Crime signed in Palermo in 2000. It is also clear that such agreements might result in similar agreements being signed with other third countries such as Canada or even Russia. Although globalisation of law-enforcement is lagging well behind globalisation of crime, agreements of this nature should enable the most serious shortcomings to be eliminated. **Given those prospects, it would, however, be appropriate for the agreements to provide for joint monitoring bodies at administrative and interparliamentary level so that any malfunctioning thereof might be assessed.**
6. The answer to the second question also seems to be in the affirmative, since the agreements are based on the implementation of measures already adopted by the Union, although, paradoxically, **they have not yet been transposed into the national law of the Member States.** The agreements concerned are the Convention on Mutual Assistance in Criminal Matters of 29 May 2000, the Protocol annexed thereto on money-laundering, framework decisions relating the European arrest warrant, and the decision on the setting up of joint investigation teams, etc. The need to ratify these agreements with the United States will oblige the Member States and the applicant countries to speed up the ratification of outstanding European legislation.
7. The answer to the third question on the strengthening of procedural guarantees for accused persons is also positive since, if ratified, **the European agreements will operate alongside current bilateral agreements with regard to both the facilities to be granted to accused persons and to the guarantees which may be imposed in the interests of such persons.**
8. Nevertheless, two issues merit at least explanatory notes to the text of the two agreements: (a) **the fact that the agreement may not involve military tribunals**, as called for by the European Parliament in 2001, and (b) the fact that, in the criminal law field, this agreement does not confer most-favoured-nation status on the United States, as is the case with commercial agreements. Accordingly, the final decision will depend on judicial policy considerations of the Member State in question. In other words, the Member States of the Union must remain free to choose, should they receive **simultaneous requests for extradition from the United States and requests for surrender on the basis of a European arrest warrant or requests for extradition from the International Criminal Court.** That being said, any Member State which decided to give priority to a request for extradition from the United States should, on manifest grounds of fair play between members of one and the same Union, at least inform the other Member State of the grounds for its decision. Of course, if the procedure for extradition to the United States were to be selected, it should follow the normal rules and could not follow the procedural provisions specific to the arrest warrant. Similar arguments which would acknowledge the decision taken by the Member State concerned must also apply in the event of **simultaneous requests for extradition from the International Criminal Court.**

***Legal aspects: legal basis: procedure, scope and substance of the agreements***

9. Since these will be the first agreements to be negotiated by the Union on judicial and police cooperation (third pillar), and since they may serve as a model for agreements with other third countries and international organisations, an in-depth analysis of form and substance is essential. **As regards procedure**, in accordance with the Vienna Convention on the Law of Treaties, the agreements will not enter into force until signed and ratified by the two contracting parties. Their conclusion will also definitively enshrine on the international stage the Union's capacity to negotiate international agreements and, hence, its legal personality, despite the absence of any treaty provision to that effect<sup>1</sup>.
10. Since the conclusion procedure in the Union is governed by Article 24 of the EU Treaty<sup>2</sup> (referred to in Article 38 under the third pillar), (a) **signature** is the responsibility of the Council Presidency which requires, in this instance, unanimous authorisation from the Council of the Union<sup>3</sup>; (b) **ratification** results in a second Council decision, once any 'constitutional reservations' have been lifted by the Member States which must secure prior agreement of their national parliaments. While not being formally involved at Union level, those parliaments may seek clarification and assurances which the respective governments must themselves secure from the Union, which itself must secure them, where necessary, from the United States. It should be noted that constitutional reservations do not prevent the agreements from being applied provisionally, even if such application cannot involve the country which has expressed such reservations.

It should also be noted that the representatives of some Member States have already announced that they will lift any constitutional reservations so that their national parliaments may take a formal decision on the substance of these agreements. The votes taken in the national parliaments would not constitute 'ratification' under international law, since the contracting party would still be the European Union (and the Member States only indirectly) but might prevent the securing of unanimity in the Council when the decision to ratify the agreements on behalf of the Union was taken.

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<sup>1</sup> With regard to the CFSP, the EU has already concluded, on the basis of Article 24 of the EU Treaty, agreements with

- Albania, on the activities of the European Union Monitoring Mission (EUMM) (*OJL 93, 10.4.2003*)
- the Former Yugoslav Republic of Macedonia, on the status of the European Union-led forces in the Former Yugoslav Republic of Macedonia (*OJL 82, 29.3.2003*)
- NATO, on the Security of Information (*OJL 80, 27.3.2003*)
- Poland, on the participation of the Republic of Poland in the European Union Police Mission (EUPM) in Bosnia-Herzegovina (*OJL 64, 7.3.2003*)
- Bosnia-Herzegovina, on the activities of the European Union Police Mission (EUPM) (*OJL 293, 29.10.2002*)
- the Former Yugoslav Republic of Macedonia, on the activities of the European Union Monitoring Mission (EUMM) (*OJL 241, 11.9.2001*)
- the Federal Republic of Yugoslavia, on the activities of the European Union Monitoring Mission (EUMM) (*OJL 125, 5.5.2001*).

<sup>2</sup> Article 24(1) reads: Where it is necessary to conclude an agreement with one or more states or international organisations in implementation of this title, the Council may authorise the Presidency, assisted by the Commission as appropriate, to open negotiations to that effect. Such agreements shall be concluded by the Council on a recommendation from the Presidency.

<sup>3</sup> The Council acts unanimously where the agreement involves an issue in respect of which unanimity is required for the adoption of internal decisions.

11. **Another important issue is the one to which reference has already been made, that of the relationship between the agreements concluded by the Union and the bilateral agreements** already concluded by each Member State. Over the decades, several bilateral agreements in these areas have been concluded between Member States and the United States. **That has provided an opportunity not only for upgrading<sup>1</sup> the European agreements but also for significantly increasing the guarantees compared with the most recent agreements** (such as the one between France and the United States ratified in 2001). Since the Union's agreements are more recent than the agreements of the Member States, they take precedence over any incompatible provisions in the latter<sup>2</sup>. To that rule of international law must be added the obligation incumbent upon the Member States of loyal cooperation between Member States which would be jeopardised if a Member State did not meet the obligations of the agreement negotiated by the Union in the common interest. That being said, and with a view to preventing any doubts as to interpretation, Article 3 in both agreements regulate any possible conflict with current or future bilateral agreements (since the Member States are entitled, if they so wish, to negotiate more favourable terms).
12. **Given the importance of these agreements, what will become of democratic scrutiny by the European Parliament?** The situation is far from being clear and satisfactory. To date, the European Parliament has not been consulted on any of the agreements concluded on the basis of Article 24 of the EU Treaty. While it is true that there is no express provision for such consultation in that Article, consultation is required by Article 21 when 'the main aspects and the basic choices of the common foreign and security policy' are involved. Can we imagine that the agreements with NATO or third countries such as Yugoslavia, the Former Yugoslav Republic of Macedonia, Albania and, in this instance, the United States do not constitute 'basic choices' of the CFSP and, hence, require consultation of the European Parliament? That is, indeed, the interpretation given hitherto by the Council and accepted, to date, by the European Parliament.

The question which now arises is to ascertain whether the same treatment may also be given to international agreements concluded by the Union which are based not only on Article 24 but also on Article 38 of the Treaty on European Union and relate to judicial and police cooperation. The Committee on Citizens' Freedoms and Rights, Justice and Home Affairs takes the view that such agreements still require consultation of Parliament on several grounds:

- firstly, because such consultation is now the rule for the adoption of acts covered by the third pillar, including instances where such acts constitute international agreements (see, for example, the conventions between the Member States on extradition and judicial and police cooperation in criminal matters);
- secondly, because parliamentary scrutiny of such agreements is the rule in all the Member States and must therefore be deemed to be a common principle on which the Union must base its actions in accordance with Article 6 of the Treaty on European Union. This consideration is strengthened by the fact that parliamentary scrutiny at national level of agreements concluded pursuant to Article 24 of the

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<sup>1</sup> The Council acts by qualified majority when adopting any decision implementing a joint action or a common position (Article 23(2) of the EU Treaty).

<sup>2</sup> Article 30(3) of the 1969 Vienna Convention on the Law of Treaties.

EU Treaty becomes less direct, since ratification is carried out at Union level. Accordingly, parliamentary scrutiny should be carried out at the same level;

- thirdly, because, given the theoretically possible alternatives, consultation of Parliament is the procedure which best respects the principles of democracy and the rule of law set out in Article 6(1) of the EU Treaty;
- finally, because the agreements directly affect fundamental rights and are binding on those Member States which have not yet legislated on certain issues. Defence of the primacy of Union law, as was the case for Community law, would become very difficult if it became clear that the procedure for the adoption of these agreements left serious doubts as to respect for the democratic principle.

13. For all these reasons, the Committee on Citizens' Freedoms and Rights, Justice and Home Affairs deems it necessary for the Council to adopt the principle of the consultation of the European Parliament in every instance where the issue involved concerns judicial and police cooperation in criminal matters. That is perfectly possible from the formal point of view as well, since the Treaty does not rule out such consultation (which is even obligatory with regard to the basic choices referred to in Article 21 of the same Title).

From the point of view of institutional policy, this option, already proposed by the Commission in a statement annexed to the minutes of the Council meeting, would also correspond to the majority policy guideline emerging at the Convention on the reform of the treaties. Why, then, should we not anticipate in practice a procedure which will subsequently be imposed?

Finally, such an approach would have the advantage of cutting the ground from under the feet of anyone who might be tempted to bring an action before the European courts in Strasbourg or even Luxembourg on the grounds that the agreements in question breached democratic principles and the rule of law in the Union. Your rapporteur feels that what is at stake, with regard to the substance and the procedure followed for the conclusion of the agreements, is such that, by analogy with the current provisions of Community law, it would even be in the Council's own interests to seek a preliminary ruling from the Court.

14. **As regards the scope of the agreements**, they concern extradition and judicial cooperation in criminal matters, which concepts are more or less identical for the contracting parties. Nevertheless, since domestic legislative and institutional frameworks are so different, problems with the interpretation of certain provisions cannot be ruled out. The most glaring example concerns the standards for the protection of fundamental freedoms or the concept of a fair trial, concepts which, for the Member States, derive from Article 6 of the EU Treaty and the Convention on Fundamental Rights and, for the United States, on the interpretation of its Constitution. Since neither party may impose its view on the other, and with a view to preventing a plethora of conflicts of interpretation, provision is made for consultation, together with the **possibility for the Member States to continue to refuse extradition on grounds connected with their constitutional principles** (Articles 15 and 16a of the agreement on extradition). **The four Member States which have not yet negotiated judicial cooperation agreements may refuse such cooperation on the grounds of principles applicable to their domestic law**, including instances where execution of the request would infringe upon their sovereignty,

security, ordre public or other essential interests (Articles 11 and 13 of the agreement on judicial cooperation).

15. **As far as the European Union is concerned**, the agreements incorporate the principles of bodies of legislation adopted more recently such as (a) the European Convention on Mutual Assistance in Criminal Matters and the Protocol annexed thereto<sup>1</sup>, together with the framework decisions on terrorism and the European arrest warrant and the Schengen acquis<sup>2</sup>. **Your rapporteur takes the view that it would have been in the interests of both parties, in a bid to prevent inconsistencies (for example, with regard to data protection), for the agreements to regulate at the same time the terms for cooperation between US authorities and European agencies such as Eurojust, OLAF and Europol (even if the status of that institution within the Union remains ambiguous).** The application of different standards and systems will only increase opacity in an area which is already complex and sensitive. The two agreements also provide for a **most interesting review clause<sup>3</sup> which will enable the agreements to be reviewed in five years time as well as in the event of the adoption of the Union's new constitutional treaty.** This is a most extraordinary provision in international law where the rule is that issues relating to domestic constitutional order may not be invoked as a reason for failing to abide by an obligation deriving from an agreement that has been concluded<sup>4</sup>.
16. The most important exception (to which reference had already been made in December 2001 in the EP's first resolution on the negotiation of this agreement) concerns a person who, if extradited, might be **sentenced to death** (a penalty abolished in Europe by the European Convention on Fundamental Rights and by the constitutional principles of the Member States). However, the guarantees laid down in Article 13 of the draft agreement on extradition provide that a suspect who might face the death penalty may be extradited to the United States only on receipt of satisfactory assurances that **the death sentence will not be imposed or, if imposed, not carried out.** What is more, the procedure envisaged to ensure compliance with this principle seems to be even more protective than the one laid down in the most recent bilateral agreements, such as the Franco-American bilateral treaty signed in 2001. In this respect, the draft agreement clearly states that **the non-imposition of the death sentence constitutes the underlying principle.** A death sentence not carried out might, however, be imposed only in cases where, on procedural grounds connected with the criminal law system in some individual US states, it is not possible to secure an assurance that the death penalty will not be imposed. More generally, Article 16a of the draft agreement lays down that 'the constitutional principles

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<sup>1</sup> Communication by the Secretary-General of the Council of the European Union under Article 30(2) of the Convention, established by the Council in accordance with Article 34 of the Treaty on European Union, on Mutual Assistance in Criminal Matters between the Member States of the European Union (OJ C 197, 12.7.2000) – Explanatory report on the Convention of 29 May 2000 on Mutual Assistance in Criminal Matters between the Member States of the European Union (Text approved by the Council on 30 November 2000)(OJ C 379, 29.12.2000).

<sup>2</sup> Framework decision of the Council of 13 June 2002 on the European arrest warrant and surrender procedures between Member States (2002/584/JHA).

<sup>3</sup> See Article 19a of the agreement on extradition and Article 16a of the agreement on judicial cooperation.

<sup>4</sup> This is a situation well known to the Member States which have, on several occasions, been obliged to adapt their constitutions in order to ratify treaties amending the Communities and/or the Union.

of the requested State may pose an impediment to fulfilment of its obligation to extradite.’

**Member States that wish to continue their bilateral practice will, however, be able to do so by not applying this provision and/or by making a declaration on a bilateral level with the United States.** Contrary to what is the case at present under almost all bilateral extradition treaties, the *non-execution* of the death penalty by the US Administration is not contingent upon assurances on a case-by-case basis to be provided by the US Administration in every case on an ad hoc basis, it may be imposed as a **condition** by an EU Member State from which the United States seeks the extradition of a person. Moreover, EU Member States may impose the **condition** that the United States do not *impose* the death penalty. The United States of America will then be bound by this condition, save where it is impossible to uphold this condition on procedural grounds, for example because the death penalty has already been imposed prior to the surrender of the person or where the prosecution of the offence with which the person is charged automatically entails the possibility for the competent US court of imposing the death penalty (as is the case in very few States of the USA).

17. The draft agreement includes some provisions that seek to reduce the **delays** in the processing of extradition requests. One important simplification of the extradition procedure between the United States and Member States which will be brought about by the draft agreement is that it significantly alleviates legalisation and certification requirements for the documents to be provided in support of an extradition request. It also allows provisional arrest requests, as well as requests for additional information, to be transmitted directly between the Ministry of Justice of the Member State concerned and the US Department of State (instead of via the diplomatic channels through Foreign Ministries), in all cases where this is still not yet possible. In cases where a provisional arrest has been made, the draft agreement will allow for the formal extradition request to be presented to the Embassy of the requested State in the requesting State. This will reduce delays and detention times pending proceedings. It should, however, be emphasised that this simplification of the procedure will not be to the detriment of the individual concerned and that the draft agreement specifically makes proviso for domestic case law that is more stringent.
18. The draft agreement also addresses some issues that have been dealt with in a number of bilateral extradition treaties between Member States and the United States of America, but not in all of them. Consequently, the following cooperation possibilities are relevant only in the extradition relationships between the United States and those Member States where these are not covered in the bilateral treaties:
  - The possibility of **temporarily** surrendering a person for the purpose of prosecution where that person is being tried or is serving a term of imprisonment in the requested State and the legal guarantees connected therewith.
  - Simplified extradition proceedings (i.e. with the **consent** of the person concerned) in accordance with the procedures and principles of the requested State's legal system.

- The possibility of granting **transit** (i.e. the possibility to transit the territory of the State concerned) in case of extradition between either the United States of America and a third country or between an EU Member State and a third country.
- Where **sensitive** information is involved, the draft agreement allows for consultations so as to determine the extent to which information included in a request may be protected by the requested State.

### *The agreement on judicial cooperation*

19. If we take as the basic text the European Convention on Mutual Assistance in Criminal Matters and the Protocol on money-laundering annexed thereto, the issues which merit effective cooperation with the USA might be the following:

#### **(a) Data protection**

The draft agreement on mutual legal assistance includes an extensive provision on **data protection**, which is broadly modelled on Article 23 of the Convention of 29 May 2000 on Mutual Assistance in Criminal Matters between the Member States of the European Union. This is one of the most sensitive issues **in respect of which, firstly, the EU has not yet succeeded in devising common rules** and, secondly, **the USA takes into account solely data protection with regard to its own citizens**. As far as the European Union is concerned, the principles generally applicable are those set out in the Council of Europe's 1981 Convention 108 and its 1987 Recommendation and Article 23 of the Convention of 29 May 2000 (as regards relations between Member States). Articles 27 and 28 of the Convention on Cybercrime (signed in Budapest on 23 November 2001) might constitute other reference texts. **Parliament cannot but regret the absence of clear and uniform criteria on this issue in both Union law and the existing bilateral agreements**. That makes it very difficult to verify, in the event of data transfer, whether such data are being used for purposes other than those for which they were transferred or are being used by authorities other than those which requested them, as well as whether the data are correct and if they may be rectified or, where appropriate, erased. Furthermore, the data subject, whether or a not a US citizen, should have the right of access to his/her personal data. **An in-depth analysis should be made of the impact of the recent Homeland Security Act with regard to data transferred by the Union or its agencies (Europol/Eurojust)**.

#### **(b) Exchange of data on financial transfers**

This issue is dealt with in the Protocol to the Convention on Mutual Assistance in Criminal Matters<sup>1</sup> which provides for mutual assistance with respect to bank accounts. Articles 1-4 of the Protocol include provisions designed to improve cooperation relating to information held by banks. Article 1 may be applied in order to secure information about bank accounts in cases where the requesting State considers that such information is likely to be of fundamental interest to an investigation being conducted. Article 2 includes provisions relating to cooperation with a view to securing information about transactions carried out

<sup>1</sup> Council Act of 16 October 2001 establishing, in accordance with Article 34 of the Treaty on European Union, the Protocol to the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union (OJ C 326, 21.11.2001) – Explanatory report on the Protocol to the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union of 29 May 2000 (Text approved by the Council on 14 October 2002) (OJ C 257, 24.10.2002).



over a specified period and involving a specified bank account. The provisions of Article 3 relate to cooperation in the monitoring of transactions which might, in the future, be carried out and involving a specified bank account. Article 4 includes provisions seeking to guarantee that information made available in accordance with Articles 1-3 of the Protocol is not supplied to the bank customer concerned or to a third party. The Member States and the United States will be able to define the range of offences for which this mutual obligation will apply, but it will cover at least organised crime and terrorism.

**(c) Establishment of joint investigation teams**

The constitution of joint investigation teams has already been accepted by the European Council and might be based on Article 13 of the Convention of 29 May 2000, on the Decision establishing Eurojust and on the current discussions concerning Europol. The most obvious risk is, therefore, the plethora of available models which might also be included in this agreement and in the other agreements negotiated or to be negotiated with Europol and Eurojust. Your rapporteur takes the view that the agreement should target cooperation between ordinary judicial authorities and should not, therefore, involve cooperation with special tribunals.

**(d) Videoconferencing**

The draft agreement includes provisions enabling the use of **joint investigation teams** and the possibilities of **videoconferencing** between Member States and the United States. These provisions enable the Member States to use these possibilities but do not oblige them to use them. As far as joint investigation teams are concerned, it will be for the competent authorities of the United States and the Member State concerned to agree upon the composition, duration, location, organisation, functions, purpose and terms of participation of the team members.

Use of this technology might be of significant interest, not only for the hearing of witnesses but in all other cases where it would facilitate consultation between judicial authorities (see Article 10 of the European Convention on Mutual Assistance in Criminal Matters).

**(e) Simplification of administrative procedures**

The new information technologies and the appropriate measures relating to electronic signatures should become the rule, with a view to speeding up investigation and trial proceedings.

**(f) The draft agreement allows for the use of modern telecommunications facilities** (fax, e-mail), with formal confirmation to follow for the exchange of mutual legal assistance requests and replies.

**(g) Mutual legal assistance** will also be afforded, to the extent that this not yet the case under bilateral treaties, to US **federal administrative authorities** which are and to **Member States' national administrative authorities** investigating conduct with a view to criminal prosecution of the conduct or with a view to referral of such conduct to criminal investigation or prosecution authorities.

**(h) Legal aid measures for accused persons**

It would be more than appropriate for the future agreement to review the arrangements for ensuring, on a reciprocal basis, that European citizens do not suffer discrimination by comparison with American citizens with regard to the guarantees of a fair trial, with

particular regard to cases involving the implementation of the provisions of the Patriot Act to non-American citizens and that they may receive legal aid (interpretation, assistance, etc.). For their part, the EU and the Member States should provide for comparable assistance for US citizens.

**Conclusion: safeguard clauses**

20. As in the case of every international agreement, this agreement should include **safeguard clauses** with a view to solving any serious problems which might appear when it is implemented. More specifically, in this area, the most important clause to be included would be one requiring compliance with a clause to be invoked should one of the contracting parties deem fundamental rights to be threatened, as suggested by the United Nations in its model Convention on Extradition and by the framework decision on the European arrest warrant.

## MINORITY OPINION

Tabled by Ole Krarup, Ilka Schröder, Giuseppe Di Lello, Lucio Manisco and others, on behalf of the GUE/NGL Group

to the Hernández Mollar report (2003/2003(INI), PE 326.115) on the EU-USA agreements on extradition and judicial cooperation in criminal matters

We cannot vote in favour of a report which, although criticising the substance of the agreements, still supports the two agreements between the EU and the USA which:

- not only involve a dubious approach to the combating of terrorism but are also principally concerned with extradition and judicial cooperation in criminal matters *in general*;
- involve a serious risk of watering down EU data-protection standards which are already inadequate,
- will lead to self-regulating joint investigation teams operating in Europe without any scrutiny or accountability procedures – a development that we have already opposed in the case of Europol,
- will apply, moreover, to any suspected offence which carries a prison sentence of one year or more, which is an exceptionally low standard for the arrest and deportation of a suspect to another continent. That also applies to attempted offences, conspiracy and aiding and abetting an offence.

Furthermore, we cannot support agreements which set up general cooperation with a country which still carries out the death penalty, since that would not fully protect European citizens from such a threat of their basic human rights being violated. No European citizen should be extradited to a country which still carries out the death penalty.

Given these two major criticisms involving threats to the basic guarantees of law and order, we urge the Council to reject the two agreements in their present form.

**B5-0540/2002**

**Recommendation on EU-US agreement on judicial cooperation in criminal matters**

*The European Parliament recommends to the Council:*

- to inform the EP as well as the national Parliaments about the progress of the negotiations;
- to consult the EP before any final agreement;
- to take into account its concerns as to the lack of safeguards in the US penal law and penal procedure with respect to European norms as well as the lack of a data protection legislation in the US;
- to accept such an agreement only if it contains a clear provision prohibiting death penalty;
- to accept such an agreement only if it contains guarantees as regards extradition, such as : the right to refuse extradition on the basis of the principle of double jeopardy, the right to refuse extradition if the offence was committed (partly) on the territory of the requested Member State and in such cases to institute legal proceedings in the requested Member State, the guarantee that once an extradited EU national has received a final sentence, he or she will be sent back to serve his or her sentence in his or her Member State of origin;
- to make sure that such an agreement contains provisions insuring that European citizens have the guarantee of a fair trial and that they are given legal aid (interpretation, assistance, etc).