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The Lord Grenfell
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Millbank House
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27th March 2003

DRAFT AGREEMENTS BETWEEN THE EU AND US ON MUTUAL LEGAL ASSISTANCE AND EXTRADITION

Thank you for your letter of 24 March. As requested, I am writing to provide you with a copy of the draft EU-US Agreements on mutual legal assistance and extradition. I ask that you treat this document in confidence given its EU confidential classification.

I am aware that at least one Member State has already provided this text to its Parliament which has made public its assessment of the proposal. However, whilst the document retains its EU confidential status, I take the view that it should not be subject to the usual public scrutiny arrangements in the UK and would ask therefore that the Committee respect the classification in line with agreed arrangements for the handling of sensitive information. I will deposit the unclassified draft Council Decision authorising the Presidency to sign the Agreements in due course. I am advised that it should be available over the Easter period. It will not however be accompanied by the text of the Agreements.

You may recall that in previous negotiations for EU third country agreements we have not received an unclassified version of the text until it has been signed, signature marking the closure of negotiations with the third country and the start of internal EU procedures for completion. My officials have nonetheless emphasised to the Council Secretariat the importance of receiving an early unclassified version of the text. They have advised that this may not be possible until after signature, but they will examine the possibility of preparing a document following discussions on the Agreements at the May JHA Council. I will keep you informed on this matter.

The JHA Council on 27-28 February agreed that negotiations on these Agreements should be suspended in order to allow Member States to consult national Parliaments on the text or carry out any constitutional requirements prior to the adoption of the Council Decision authorising the Presidency to sign the Agreements. The Presidency may seek such authorisation at the JHA Council on 8 May, although this could be pushed back to the JHA Council on 5-6 June given that signature is, at present, provisionally planned for an EU-US summit on 25 June.

If it would assist the Committee in its consideration of these proposals, I or my officials would be happy to appear before the Committee in the coming weeks to provide further explanation of the substance of the draft Agreements and answer your queries. Given the confidential nature of the text, this could not however take place in a public meeting.

Anticipating that proposals of his nature are usually sifted to Sub-Committee E of the European Union Committee, I would also ask that it be considered by that Sub-Committee on 2 April given that I understand they will probably not meet again until 7 May. As I have indicated, the Agreements will be discussed again at the JHA Council on 8 May and it would be useful to have the Committee's initial reactions to the text in advance of that meeting. I appreciate however that the Committee will require more time in which to undertake a thorough examination of the text.

Background

The Agreements were proposed as part of the counter-terrorism package agreed at the extraordinary JHA Council in September 2001, following the events of September 11. They are designed to improve judicial co-operation between the Member States of the European Union and the United States of America, including in relation to terrorism and associated offences. The Agreements supplement existing bi-lateral treaties between individual Member States and the US, or where no such treaties exist, create a framework for judicial co-operation. They are based on Articles 24 and 38 of the Treaty establishing the European Union.

The Agreements seek to extend to the US some judicial co-operation arrangements which have been agreed between the Member States. In particular, the provisions of the EU Mutual Legal Assistance Convention 2000, and its Protocol, along with some extradition provisions deriving from the European Convention on Extradition, Schengen Convention and the Framework Decision establishing the European Arrest Warrant. However, none of the "mutual recognition" provisions, for example the partial abolition of dual criminality or the recognition of judicial decisions, in the latter Framework Decision are to be applied to the US.

Policy and legislative implications

The United Kingdom has, particularly in comparison with other EU Member States, effective judicial co-operation mechanisms with the US. These are based on the MLA Treaty of 1994, as amended, and the Extradition Treaty of 1972, as amended. The Government has announced that it is negotiating a revision to the Extradition Treaty.

The Government's policy in relation to these Agreements was that they should add value to existing bi-lateral treaties, for other Member States, even if not for the UK, and that they should neither inhibit existing bi-lateral co-operation, nor the conclusion of future bi-lateral Treaties with the US. The Government is satisfied that the provisions of the draft EU/US Agreements meet these objectives. Articles 3 (both agreements), 17 (Extradition) or 14 (MLA), and 18 (Extradition) or 17 (MLA) enable full clarification of the relationship between existing bi-lateral arrangements and the EU/US agreement. For example, the provisions of Article 4, especially subsection (2), of the Extradition Agreement would not apply to the UK because the UK/US bilateral treaty will apply a sentence threshold, not a list of offences, to extraditable offences. In addition, the exchange of designations and notifications will allow further clarification of the relationship between these Agreements and UK/US bilateral arrangements.

Similarly the Government wished to ensure that the Article 38 Agreement, the first with legislative consequences, did not give rise to excessive interference in UK/US relations. We are satisfied that neither ECJ jurisdiction, nor infraction proceedings would apply. The method by which the EU would ensure UK compliance with the agreement, following the specified consultation procedures, would be through pressure at JHA Council.

The Government had hoped that more of the key concerns of the USA could have been covered by these Agreements. The Agreements do not require the extradition of own nationals, the abolition of the political offence exception for terrorist offences or the effective enforcement of US determinate sentences for nationals returned to other EU Member States. Similarly, discussions on the application of provisions equivalent to the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds of Crime (1990) have been delayed to a possible future agreement.

In response, the US has negotiated hard to ensure that there remain some elements of added value. The Presidency is of the view that further negotiation would be unlikely to produce any more changes to the text, and might endanger the whole agreement. In particular the USA was anxious to retain Article 10(2) of the Extradition Agreement and to avoid specific references to the International Criminal Court or the Special Courts (Military Tribunals) which could be used to try some terrorism cases. The Government is satisfied that the text of the Agreement would not inhibit the UK from giving ICC requests priority, or from refusing extradition to face a Military Tribunal which did not meet the fair trial requirements of the ECHR or Human Rights Act.

Whilst there are elements of the text which are not ideally drafted from a UK perspective, the Government agrees with the Presidency's assessment that further negotiations with the US are unlikely to be productive. The text reflects the differing concerns of the 15 Member States and the USA. However, the Government is satisfied that explanatory notes are sufficient for it to determine the extent of its obligations under the agreement. In particular, that Article 8 of the MLA Agreement does not impose an obligation to provide information to administrative bodies which have no criminal investigation function, because that would go beyond the competence of an Article 38 Agreement. It is therefore consistent with both the UK/US bilateral (Article 7 refers to administrative hearings), and Section 4 of the Criminal Justice (International Co-operation) Act of 1990.

The Extradition Agreement provides for some administrative procedures to be changed, which will speed up the process of delivering extradition requests. The UK/US Treaty already provides for most other provisions. The current Extradition Bill provides for others and, as I have already indicated, the UK and US are in the process of revising its bi-lateral extradition Treaty. Thus the Extradition Agreement has little added value for the UK, but has more impact on extradition between some other Member States and the US.

Article 4 of the MLA Agreement, in effect, extends the provisions of the Protocol to the EU Mutual Legal assistance Convention of 2000, to the USA. Subsection (4)(b) is required for those Member States which either have no bilateral MLA Treaty, or where those treaties do not already provide for account identification assistance, or where the Member State has not criminalised the laundering of the proceeds of the offender's own crime, including terrorist financing. The UK already provides assistance on banking account identification for a wide range of offences.

The joint investigation team provisions at Article 5 of the MLA Agreement will require legislation in the UK to extend existing provisions and those in the Crime (International Co-operation) Bill to the USA. The Government is currently considering whether the best means of delivering this provision would be by means of primary or secondary legislation under Section 88 of the Police Act, 1996 (as amended by Sec. 103 of Police Reform Act, 2002). Secondary legislation might be possible either by virtue of this Agreement, or as the result of a separate bi-lateral Treaty (supplementary to the UK/US MLA Treaty). The provisions in clauses 16 and 18 can be brought into effect in relation to the USA only if we designate under section 88 of the Police Act 1996. Officials have commenced discussions with their opposite numbers in the USA in order to explore this possibility.

Article 9 of the draft MLA Agreement has sufficient flexibility as to enable the UK to indicate that evidence provided may only be used in relation to the case for which it was provided.

The provisions of Article 14 of the draft Extradition Agreement are already common practice in UK/US extradition cases, where either side has concerns about the public disclosure of sensitive information (for example relating to sources of intelligence or identifying potentially vulnerable witnesses).

The provisions in Article 9 of the draft Extradition Agreement on temporary surrender reflect those for EU countries in the Extradition Bill currently before Parliament. The Government is currently considering whether primary legislation will be needed to enable UK authorities to request the temporary surrender of fugitives in custody in the USA, in the light of the requirement to keep that fugitive in custody once transferred to the United Kingdom. This would not prevent the UK from meeting its obligations under the agreement, though pending any necessary legislation, it is unlikely that the UK would be able to make the successful request the temporary surrender of a fugitive from the US.

Other provisions in that draft Agreement are either contained in the Extradition Bill, or require administrative changes in relation to, for example Articles 5 and 6.

The provisions of most Articles, except Article 5, of the Mutual Legal Assistance (MLA) Agreement are either already in place or reflect those in the Crime (International Co-operation) Bill. Article 4 provisions would be provided by a combination of measures. The Crime (IC) Bill's provision for secondary legislation, at Section 52(2), would enable the US to be designated. The planned secondary legislation under Part 11 of the Proceeds of Crime Act 2002 will generally enhance international co-operation, including with the US, against money laundering. The provisions of Part 1-3 of the Anti-Terrorism Security and Crime Act 2001 deals with terrorist financing.

Implementation

Unlike normal conventions, there is not a ratification procedure before the conclusion of the Agreement. Member States will be expected to put in place any necessary legislation after the Presidency's signature and before conclusion under Articles 24/38 TEU. It would be possible for the Council to conclude the agreement, at a future date, without all Member States having completed their constitutional procedures. But those Member States would have to declare that they would, in the interim, not be bound by the Agreement. The Agreement, in those circumstances, would be provisionally applied to those Member States that had legislated, pending legislation in those Member States which had made a declaration. We anticipate the majority of Member States, including the UK, will declare when authorising signature of the Agreements, that the Agreements will not be binding on them until they have complied with their internal constitutional procedures. Such a declaration is permitted under Article 24 TEU.

Following signature of the agreement, the Government would seek to introduce the necessary legislation, which would enable it to agree to the conclusion of the agreement by means of a future Council Decision. We understand that a number of Member States are considering the legislative process that would be required to bring the Agreement into force. At present, the indications are that the Presidency hopes that this process could be completed before the end of 2003.

I am writing in similar terms to Jimmy Hood and copying this letter to Dorian Gerhold, Clerk to the European Scrutiny Committee; Les Saunders, Cabinet Office; and to Joanne Harrison; Departmental Scrutiny Co-ordinator.

A handwritten signature in black ink, appearing to read 'Bob Ainsworth', with a stylized flourish at the end.

BOB AINSWORTH