



Council of the
European Union

Brussels, 27 May 2016
(OR. en)

9519/16

LIMITE

JAI 494
COPEN 181
USA 33
EUROJUST 68
EJN 35

COVER NOTE

From: EUROJUST
To: Delegations
Subject: Seminar on the application of the Mutual Legal Assistance and extradition agreements between the European Union and the United States of America
- Outcome Report

Delegations will find attached an outcome report of the Seminar on the application of the Mutual Legal Assistance and extradition agreements between the European Union and the United States of America which took place on 8 and 9 October 2015.



ANNEX

**OUTCOME REPORT
SEMINAR
ON THE APPLICATION OF THE MUTUAL LEGAL ASSISTANCE AND
EXTRADITION AGREEMENTS BETWEEN THE EUROPEAN UNION AND THE
UNITED STATES OF AMERICA
EUROJUST, THE HAGUE
8-9 OCTOBER 2015**

The Seminar on the application of the Mutual Legal Assistance and Extradition Agreements between the European Union and the United States of America was held on 8 and 9 October 2015. The Seminar was jointly organised by the U.S., the European Commission and Eurojust, as a follow up to the 2012 Workshop on the application of the Mutual Legal Assistance and Extradition Agreements between the European Union and the United States of America.

This Outcome Report presents the essential information provided by the representatives of EU Member States, the U.S., the European Commission, the private sector and Eurojust during their presentations and plenary discussions. A total of 84 participants attended the Seminar, including the Liaison Prosecutors for Norway and Switzerland posted at Eurojust and representatives from the European Commission (DG Justice and DG Home), the General Secretariat of the Council, the European Union Counter-Terrorism Coordinator, the Council of Europe and Europol. During the open sessions, three representatives of the private sector (Apple, Microsoft and DIGITALEUROPE) were also present.

The Agenda of the Seminar is attached as an Annex (*see Annex 1*), as is a summary of Eurojust's casework with the U.S. (*see Annex 2*) and a preliminary summary of EU Member States' responses to the Commission's questionnaire on the EU-U.S. Mutual Legal Assistance Agreement Review 2015 (*see Annex 3*).

On a general note, the Seminar was conducted in the spirit of good cooperation and clearly showed the will of all participants to work together in improving judicial cooperation between EU Member States and the U.S. in all areas. This was shown by the fact that the emphasis of presentations and discussions was to enhance trust and understanding for each other's legal systems and each other's potential for cooperation while conscious of the limits drawn by the applicable legal framework or the need to make reasonable use of the available resources.

1. Preserving, obtaining and admissibility of electronic evidence

A main focus of the Seminar was to provide participants with an extensive overview of the possibilities, requirements and limitations when it comes to preserving and gathering electronic evidence, and to ensuring its admissibility in criminal proceedings. As the major providers of services on the Internet are based in the U.S.,¹ presentations concentrated on the different ways to obtain evidence from providers under U.S. jurisdiction.

Eurojust presented its role in cases involving judicial cooperation between the EU Member States and the U.S., particularly in cases of cybercrime, which are regularly of a complex nature. The U.S. was identified as the most requested third State in those cases in the past. The possibilities offered by Eurojust, such as coordination meetings, coordination centres and support for joint investigation teams, were highlighted and acknowledged by the participants, as well as the tactical and strategic meetings on cybercrime organised by Eurojust, and Eurojust's support for practitioners in the efforts to establish a Judicial Cybercrime Network.

The U.S. provided a detailed overview of the different types of electronic evidence and methods for obtaining electronic evidence for investigations from U.S.-based electronic service providers (ESPs – see footnote 1) as well as the legal requirements for mutual legal assistance (MLA) requests towards the U.S. Electronic evidence can be requested from the U.S. in relation to data attributed to suspects, victims, or witnesses, with the possibility that any of these persons, if cooperative, may voluntarily disclose his or her information to law enforcement. With regard to data stored in the cloud, the U.S. may execute an MLA request if it determines that it has jurisdiction over the data requested. The U.S. system distinguishes between three subcategories of data with different requirements in relation to the legal standard applicable to obtain the data:

1. The highest threshold is applicable to content data, for which an MLA request is necessary and for which the request needs to meet the requirement of probable cause.
2. A lower threshold is applicable for a type of non-content data referred to as transactional data (this type of non-content data includes information on sender and recipient and their IP addresses; dates and times of communications; and duration or amount of data transmitted during communications), which can also provide valuable information for investigations. While it may still be necessary to issue an MLA request to obtain transactional data, the legal standard is not probable cause but that the evidence requested needs to be relevant and material to the investigation.
3. The lowest threshold is to be met when another category of non-content data is requested, namely subscriber information and access logs (which includes information the user provided upon registering for the account and dates, times and IP addresses for each log-in). It was reiterated that, in principle, no MLA request is necessary to obtain this type of data, and the major ESPs would generally accept direct requests from EU law enforcement authorities.

¹ For the purpose of this Outcome Report, reference will be made to electronic service providers (ESPs), in the sense that this term is meant to comprise not only Internet service providers, which offer services needed to access, use and participate in the Internet, but also all other types of services available on the Internet (such as e-mail services, cloud storage services, social networks, etc.).

The U.S. participants noted that content data often seemed to be requested by default in MLA requests from EU Member States and drew attention to the fact that transactional data, in particular, could often provide sufficient information for the purposes of investigations. Therefore, it would be beneficial to carefully assess whether content data is really necessary, or if non-content data would be sufficient, before issuing MLA requests. If content data is regarded as necessary, careful observation of the probable cause requirement is of essence to the success of an MLA request. A good way to 'build' probable cause would be to first seek subscriber information and access logs and possibly the transactional data (both non-content data). This information, together with other information developed in the investigation, may perhaps then help authorities to formulate an MLA request that meets the probable cause standard.

As mentioned above, subscriber information and access logs can in principle be directly requested from ESPs in the U.S.; however, there is no legal obligation in the U.S. for providers to comply with such requests. It is therefore necessary to check specific policies in the law enforcement guidelines issued by the relevant providers. It is also generally possible to directly request ESPs in the U.S. to preserve data. Since U.S. providers are not legally required to retain data, the preservation of data is recommended and often essential when electronic evidence is needed from them.

Emergency voluntary disclosures of data by U.S. ESPs are possible under certain circumstances, in particular, when there is no time for an MLA request. This applies only to circumstances where there is an imminent danger of death or serious injury to any person (e.g. terrorist threats and kidnapping). The U.S. Department of Justice (DoJ) or the U.S. Computer Crime and Intellectual Property Section (CCIPS) can assist with these matters if the Federal Bureau of Investigation's Legal *Attaché* in the requesting EU Member State is not available.

The U.S. has issued two guides (the *Brief Guide to Obtaining Mutual Legal Assistance and Extradition from the U.S.* and the *Investigative Guide for Obtaining Electronic Evidence from the U.S.*) that, among other things, provide detailed information on MLA requests towards the U.S. in relation to electronic evidence. These guides were distributed to the participants.

The United Kingdom and France have each posted one Liaison Magistrate in the U.S. These Liaison Magistrates facilitate the execution of MLA requests by improving the quality of requests when reviewing the drafts, communicating directly with U.S. counterparts in the DoJ and with the different companies from the private sector. Both Liaison Magistrates have helped in drafting guidelines for their national authorities to support them in obtaining electronic evidence from the U.S.

The representatives of Apple and Microsoft provided insights into their respective companies' policies with regard to cooperation with law enforcement authorities and requests for electronic evidence.

The issues in judicial cooperation regarding electronic evidence addressed by the participants included *i)* establishing the location of data in the virtual world; *ii)* fragmentation of the national data retention regimes of EU Member States and the lack of an obligation for some EU Member States and U.S.-based ESPs to retain data; and *iii)* insufficiency of MLA requests in relation to the probable cause standard.

In relation to the possibility to directly preserve and/or obtain electronic evidence from ESPs, it was observed that *i)* for some EU Member States, this is not a viable option to obtain admissible evidence for their criminal proceedings; *ii)* there is a large and ever growing number of ESPs with different policies on the voluntary disclosure and preservation of data; *iii)* some ESPs notify users if their data is requested by law enforcement authorities or preserved for them (in that case an MLA request should be issued specifying that the subscriber should not be notified); *iv)* some ESPs might not be legitimate

businesses and may even be connected to criminal activities (in that case the DoJ or CCIPS could be contacted for clarification). It was also observed that *i)* directly preserving and obtaining from ESPs such data as is possible to obtain in that manner is much more rapid and efficient than going through the MLA channel to do so; *ii)* directly preserving and obtaining data was the best way to ensure the data is not deleted; *iii)* it is possible to track ESP practices so that these actions can be taken without jeopardizing the confidentiality of the investigation.

Best practice and possible solutions to address the issues identified recommended by participants included *i)* if possible and suitable, avoiding MLA requests by directly requesting non-content data from ESPs; *ii)* providing updated guides and regular training for the judiciary in the EU Member States in order to keep them informed of the possibilities and requirements to obtain electronic evidence from the U.S.; *iii)* if possible, to have MLA requests drafted by a trained jurist who has received special training in U.S. legal requirements, and in particular the probable cause standard, in order to make sure they are tailored to the specific measures requested; *iv)* making use of direct and paperless contacts (*e.g.* phone or e-mail) between the central or competent authorities to swiftly resolve issues or assess the prospects of success for envisaged MLA requests; *v)* to consider posting Liaison Magistrates in the U.S. who have proven to be of great benefit to judicial cooperation and the review of draft MLA requests or direct contact with the private sector; *vi)* setting up a single contact point between national authorities and major ESPs; *vii)* the possibility for the U.S. to provide verification of authenticity for electronic evidence obtained directly from ESPs; *viii)* the possibility to receive a formal letter of refusal from the U.S. if an MLA request cannot be executed for any reason.

The U.S. delegation informed the Seminar participants that the DoJ has increased the resources available for judicial cooperation and has already set up a specific unit to expedite the execution of MLA requests regarding Internet records (*i.e.* electronic evidence).

The development of highly sophisticated encryption programmes and devices as well as anonymizing services by the private sector were highlighted as main practical challenges for investigation with regard to electronic evidence. In addition, the use of newly developed technologies such as the dark web, cloud-storage services, instant messaging and live streaming services were mentioned as challenges at the legal and technical levels and need to be monitored and addressed by law enforcement authorities.

2. Confiscation, asset recovery and sharing of assets

The general approach was outlined on freezing and confiscation of assets for EU Member States in the context of Council Framework Decision 2005/212/JHA on Confiscation of Crime-Related Proceeds, Instrumentalities and Property, Council Framework Decision 2003/577/JHA on the execution in the European Union of orders freezing property or evidence, and Council Framework Decision 2006/783/JHA on the application of the principle of mutual recognition to confiscation orders. The chronological approach in this field was presented, namely identifying, freezing and confiscating assets.

The U.S. presented two main models of MLA available to restrain or confiscate assets. The first method is enforcing a foreign forfeiture order, applying to conviction-based and non-conviction-based (*in rem*) forfeiture. The basic prerequisites for foreign confiscation are that *i)* the foreign offence would also be a forfeitable federal violation if committed in the U.S.; *ii)* a treaty or agreement provides a legal basis; and *iii)* the Attorney General provides a certificate. This method is generally not used for 'smaller' judgements (exceptions possible). Foreign judgements are furthermore only reviewed for compatibility with the basic requirements of due process with the law, not the factual findings which are binding on U.S. courts. The U.S. may also register and enforce a foreign restraining order, or obtain a restraining order during the pendency of foreign confiscation proceedings, both of which require a certification by the Attorney General and a treaty or agreement as legal basis.

The second method would be to request the U.S. to initiate its own confiscation proceedings in the same manner as the domestic *in rem* action (non-conviction-based), which is in principle applicable to narcotic offences and money laundering (the latter including a number of predicate offences, such as bank fraud, extortion, robbery and transnational crimes, *e.g.* terrorism or arms trafficking) for assets inside and outside the U.S. MLA requests aiming for this type of assistance should include *i)* a complete description of the asset (*such as* location and value); *ii)* an affidavit to establish probable cause, describing the illegal activity and the connection to the asset and target; *iii)* a full description of the violation and penalty under the requesting State's law; *iv)* conviction orders, if applicable; and *v)* evidence, such as witness testimony, and any additional information available. It was also noted that in the event of restraint of assets where a foreign restraining or confiscation order will not be forthcoming, the information required to open a U.S. case and establish probable cause had to be transmitted within 30 days.

In relation to requests to the U.S. for evidence in preparation of confiscation and locating assets or tracing their criminal origins, the U.S. requires an MLA request, explaining, among other things, *i)* the purpose for which the evidence is needed; *ii)* a summary of the facts, including an explanation of how the evidence sought is relevant to the investigation; and *iii)* a description of the offence under investigation. It was highlighted that for searches in the U.S., the probable cause requirement had to be met. However, for obtaining *e.g.* the accounts of a company, a production order could be sufficient, for which the legal standard is lower (relevance standard). The U.S. participants indicated that the combination of both measures has proven useful in the past. In relation to requests for bank information according to Article 4 of the EU-U.S. MLA Agreement and the standard form, *see* section 4 of this Outcome Report.

With regard to the sharing of assets, it was noted that this question might already arise in early stages of investigations, but in Sweden, for example, this is not decided by the prosecutors in charge of the case. For the U.S., while in principle possible under certain conditions (*e.g.* a treaty or agreement authorising the sharing, that the other government must have participated at least indirectly in the confiscation, and that no victim assets were to be shared), only the Deputy Attorney General or the Sub-secretary of Treasury can approve such agreements, which have to be agreed to by the Secretary of State and can be objected to by Congress.

The U.S. has issued a guide (*U.S. Asset Recovery Tools and Procedures: A Practical Guide for International Cooperation*) providing detailed information on MLA requests towards the U.S. when seeking assistance in asset recovery and confiscation, which was also distributed to participants.

Issues identified by participants were *i)* the numerous legal frameworks within the EU regulating this area of law; *ii)* problems in the execution of MLA requests from the U.S. in cases of non-conviction-based confiscation within the EU, since this type of confiscation is not applicable in all EU Member States; *iii)* when seeking confiscation from the U.S. to establish a link between the crime and the asset (*e.g.* bank account) to be confiscated; and *iv)* the best methods of identifying assets in the U.S.

Possible solutions and best practice that were mentioned included *i)* the use of Financial Intelligence Units (particularly the Egmont Group), Asset Recovery Offices or the CARIN Network to identify assets subject to confiscation; *ii)* bilateral asset recovery teams (*e.g.* the UK-US Recovery of Assets (RoCAT)) which regularly discuss cases and legal requirements; and *iii)* making contact with the U.S. authorities before obtaining a domestic freezing or confiscation order, so it can be discussed and assessed if an MLA request in this regard has a prospect of success.

3. Cooperation in extradition proceedings

An overview of the applicable legal framework in extradition proceedings between Austria and the U.S. was provided as an example. An Interpol Red Notice is sufficient for Austria for an arrest if the facts are sufficiently complete. Otherwise, the Austrian authorities would use the Interpol channel to obtain additional information. A special feature of incoming extradition requests from the U.S. in Austria is that the Austrian courts apply the probable cause standard in domestic extradition proceedings. This has recently led to legal issues, for example when Austrian courts questioned the evidentiary value of an affidavit from U.S. officials. In one case, an Austrian court requested the U.S. to hear a U.S. official who had provided an affidavit as a witness, and this was denied by the U.S. as being contrary to the treaties and agreements in place. It remains to be seen how the Austrian judiciary will resolve this issue, as no final decision has yet been taken. Also, according to Austrian law, a State requesting extradition is not granted status as a party to the extradition proceedings and has no *locus standi* or right of access to the file in domestic extradition proceedings. Therefore, it is advisable to be in contact with the central authority in Austria to provide additional information from the U.S. in the relevant proceedings, which can be used by the prosecutor in charge before the court. With regard to Article 14 of the EU-U.S. Extradition Agreement and the need to protect sensitive information that is transmitted, the question was raised on how to bring into balance the right of access to the file and ensure that the information in the file remains confidential. There is no experience yet on how to sanction breaches of confidentiality in the requesting or requested State (*e.g.* by the defence council). Legal and practical uncertainties were noted in the event of using deportation as an alternative to extradition, consisting of the (non-)application of guarantees of speciality or in relation to who is responsible for covering the transport costs of the person.

The U.S. emphasized that extradition proceedings are generally considered as written proceedings and that the DoJ put great effort into keeping it that way in the past by successfully averting attempts from defence counsel to, *for example*, hear witnesses in extradition proceedings in order to transform the extradition request into a mini-trial or place a particular emphasis on the credibility of particular witnesses, without the U.S. court being able to review all the evidence and reach a reliable determination on whether the witness testimony has been corroborated by other evidence. Thus, the U.S. judiciary accepts that the extradition court carries out a limited inquiry, should not accept evidence by the defence impugning the credibility of the witnesses referred to in the extradition request, and that the full adjudication of the facts should be carried out at the trial following extradition.

As Interpol Red Notices are considered not sufficiently reliable by the U.S. due to the fact that charges are often dismissed or the case adjudicated without the Red Notice being promptly withdrawn following these actions, foreign authorities need to request a provisional arrest from the U.S. authorities. From a U.S. perspective, the most important issues to bear in mind for practitioners from the EU Member States, besides dual criminality, when issuing extradition requests include *i)* the need to demonstrate probable cause for a successful extradition, in the manner described three paragraphs below; *ii)* transmitting the extradition request through the correct channels so it can be certified according to the treaties in place; and *iii)* the need to enable the U.S. authorities to identify and locate the fugitive within the U.S.

Regarding the issue of identification and location of the fugitive, it was highlighted that an extradition process could not be started without specific information about the location where the fugitive is believed to be located, in view of the size of the U.S.

For identification purposes, the request should include recent photographs and/or fingerprints (however, there are also other means to corroborate a fugitive's identity). It was also emphasized that it is necessary to provide the basis in the evidence for the assertion that the person whose extradition is sought is the same person whose photo and/or fingerprints are provided and for the assertion that this is the person who committed the crime.

The probable cause requirement is not needed for extradition requests that are based on a judgement where the fugitive was convicted in his presence, which under U.S. law means that the fugitive had to be present in a moment of the trial when the evidence against him has been started to be presented. For other extradition requests to which the probable cause standard applies, it is necessary to show that a crime was committed and that the person whose extradition is requested is the person who committed the crime. This can be particularly challenging in extradition requests that rely heavily on electronic interception evidence, since it has to be explained why the evidence in such a case is reliable (*i.e.* the identification of the speakers and interpretation of code).

As to the U.S. authorities involved in the extradition proceedings, the U.S. noted the limited time the Central Authority, the Assistant U.S. Attorney and the competent U.S. judge have to review the extradition cases brought before them in detail, given all of their other responsibilities, and as in many cases these requests include vast amounts of evidence (*e.g.* electronic interception transcripts, witness testimony, documents, etc.). Also, the Assistant U.S. Attorney and the competent U.S. judge are often not familiar with foreign laws and the underlying investigations. Therefore, the requesting authority should anticipate this when drafting the extradition request and make the request as clear, concise and compelling as possible.

Finally, it was noted that once a judicial decision is taken that the fugitive is eligible for extradition, very few of these decisions are challenged by appeal. If they are, however, that process is likely to delay the final decision of the Secretary of State to extradite by months or perhaps years.

From the perspective of EU Member States in extradition requests towards the U.S., it was noted that *i)* special attention needs to be given to the probable cause requirement, which can be a challenge in extradition requests to the U.S. because of the fact that in case of provisional arrest, a sufficient extradition request must be prepared and transmitted within the time limits for detention; *ii)* the U.S. does not execute an arrest on the basis of an Interpol Red Notice and therefore a provisional arrest request is needed, in which case the person can be detained until a complete extradition request is received; however, the person can be released, which leads to a risk of flight, unless a complete extradition request is issued within a certain time limit (often 60 days); *iii)* when using diplomatic channels to transmit extradition requests, there can be delays and a risk of the person being released if the urgency and time limits are not sufficiently observed.

The U.S. participants noted the following issues in extradition requests towards EU Member States: *i)* difficulties in some EU Member States in keeping fugitives in custody during the extradition proceedings (*e.g.* releasing them on bail), which can lead to them fleeing; *ii)* insufficient or delayed communication from EU Member State's authorities to the U.S. where additional information might help to make an extradition request from the U.S. succeed; *iii)* in the event that decisions in extradition proceedings are challenged before the European Court of Human Rights (*e.g.* on length of sentence in the U.S.), fugitives can usually not be kept in custody due to the length of the proceedings before that court; and *iv)* insufficient or delayed coordination with the EU Member State's officials representing the case before the European Court of Human Rights.

As possible solutions for the identified issues and best practice, the participants referred to *i)* if possible, using direct communications with the DoJ Office of International Affairs in seeking provisional arrest and preparing the complete extradition package to ensure sufficiency is accomplished in a timely manner; *ii)* conducting training (possibly via video link) for practitioners in the EU Member States competent for extradition requests to the U.S.; *iii)* disseminating existing guides, checklists and model extradition requests among practitioners of the EU Member States; and *iv)* the readiness of the requesting party to deliver supplementary information or evidence at short notice.

4. Status of the application of the EU-U.S. MLA Agreement

The European Commission is currently conducting a review of the application of the EU-U.S. MLA Agreement and a preliminary analysis has shown that, in general, judicial cooperation between EU Member States and the U.S. functions well.

This assessment by the European Commission was generally confirmed by the U.S. participants who highlighted that, from their experience, judicial cooperation with regard to Articles 6 to 9 of the EU-U.S. MLA Agreement was working well and no substantial difficulties had been reported. Articles 4 and 5 of the EU-U.S. MLA Agreement, however, were - in their view - in need of follow-up and further discussion.

The participants also discussed concerns over the amount of time needed to execute MLA requests, a concern that, on the U.S. side, will be ameliorated by planned staffing increases at the U.S. Central Authority. In particular, the U.S. delegation informed participants that the DoJ is in the process of establishing a unit to expedite the execution of MLA requests regarding third-party records. In addition, the participants agreed that improving the quality of MLA requests in the first instance (including by conducting further training of the type provided in the Seminar) would improve the efficiency of the process. The participants also discussed the need for measures on legislative level in Europe regarding data protection and data retention. Regarding electronic evidence, participants discussed the general assessment by the European Commission, which revealed that ESPs require too much time to deliver requested data (average of two months or longer) and that the aim should be to shorten this period to only several days in urgent cases.

Furthermore, the participants discussed the effect that *de minimis* requests had on the process, including requests among the EU Member States. The U.S. noted in relation to the *de minimis* analysis and minor requests received by the U.S. that the fact that the U.S. receives a large number of MLA requests triggered the need for the U.S. to prioritise requests. This ensures that minor requests do not impede the execution of significant requests. It was underlined, however, in relation to crime phenomena with small damages in single cases that if large-scale activities are referred to in the MLA request, then the chances are higher that the MLA request will be executed.

4.1. Article 4 EU-U.S. MLA Agreement (bank information)

The standard form developed in view of Article 4 of the EU-U.S. MLA Agreement is only used on a reduced basis by the national authorities of the EU Member States to obtain banking information from the U.S. The European Commission established that this is due to the fact that many practitioners are not aware of the existence of this form. It was also noted that neither in the U.S. nor in most EU Member States was there a central registry available to store banking information. However, in the U.S. and some EU Member States, a different and effective mechanism to request bank information is available. In the U.S., a secure platform is available to the Financial Crimes Enforcement Network through which all financial institutions within their jurisdiction (over 22 000) can be queried and are legally obligated to report a match within two weeks. The system has proven useful for domestic proceedings and includes banking and financial services companies such as Western Union. Since banking information is often necessary for tracking measures in investigations, the use of the standard form was recommended if such information is necessary. As in the past, it has been noted that the scope of use of Article 4 of the EU-U.S. MLA Agreement towards the U.S. is limited to terrorism offences or money laundering. It was underlined, however, that the possibilities to conduct financial investigations under the umbrella of money laundering could be considered rather broad, as the main factor in determining the availability of such measures was not the offence investigated by the requesting State but the activity in relation to the financial activities to be reviewed in the U.S.

4.2. Article 5 EU-U.S. MLA Agreement (joint investigation teams)

To date, no joint investigation teams (JITs) have been established between the U.S. and EU Member States² because, in essence, an agreement for intensified cooperation on a particular investigation with the U.S. needs to be prepared in a manner that is significantly different from the format generally applied in JITs between EU Member States. The difference results from particularities of U.S. law that require a different approach in order to avoid potential problems in any resulting U.S. judicial proceedings. To date, it had not been possible to reach an agreement on case-specific cooperation on the terms that would avoid this adverse effect. Nevertheless, the setting up of a JIT was recently considered in a complex cybercrime investigation. However, it was decided to share information by using a broad MLA request. In another case regarding the laundering of drug money, a JIT agreement is currently being developed and has the potential to serve as a first test run in a U.S. criminal proceeding.

5. Conclusions and way forward

As a result of discussions held within the framework of the Seminar, and from a practitioners' perspective, participants in the Seminar made the following suggestions:

1. Based on the mutual desire to improve judicial cooperation between the competent authorities of the EU Member States and the U.S., consideration could be given to the organisation of workshops, that Eurojust could be asked to support, aiming, *inter alia*, to:
 - a) Continue to explore further ways to fostering open communication with a view to speeding cooperation and proposing options, including increasing the use of electronic means, and considering alternatives to MLA where possible under their legal systems;
 - b) Examine differences between U.S. and EU approaches to joint investigation teams with a view to proposing options for future rapid collaboration between national investigations;
 - c) Examine in detail the effectiveness of the system under Article 4 of the EU-U.S. MLA Agreement (identification of bank accounts) and consider using Asset Recovery Offices and Financial Intelligence Units, and preparing recommendations on how to maximise their utility;
 - d) Examine obstacles to the effective freezing, confiscation and recovery of the proceeds of crime and proposing recommendations to overcome them;
 - e) Examine possibilities to improve reciprocal exchange of information included in criminal records systems;
 - f) Examine ways to maximise successful results in extradition cases.
 - g) Examine ways to increase cooperation in consumer fraud matters in which each individual complaint may be of minor importance but which overall represents significant and organized criminal activity.

² However, in the meantime, and after the EU-US Seminar, a JIT has been set up between the U.S. and two EU Member States.

2. In addition, the following actions could be considered:

- a) EU Member States and the U.S. could identify appropriate authorities who can become knowledgeable about both the EU Member States and U.S. legal requirements and who can, in the future, assist their national authorities in preparing requests to the U.S. and the EU Member States; Eurojust could be asked, subject to availability of budget and resources, to facilitate the compiling and updating of this information;
- b) EU Member States could be invited, where possible, to designate a single Contact Point for obtaining such electronic evidence as is available directly from U.S.-based providers under U.S. law;
- c) Both EU Member States and the U.S. could devise programmes to provide regular training to such network of officials on how to improve mutual understanding of the obtaining of electronic evidence from the U.S., and to make use of video link technology to facilitate simultaneous participation in such training in real time by multiple participants;
- d) EU Member States could consider creating a *Guide to Obtaining Communication Service Provider Evidence from the U.S.* and make it available to such officials of EU Member States.

Annex 1: Agenda of the Seminar

SEMINAR ON THE APPLICATION OF THE MUTUAL LEGAL ASSISTANCE AND EXTRADITION AGREEMENTS BETWEEN THE EUROPEAN UNION AND THE UNITED STATES OF AMERICA

EUROJUST, The Hague

8-9 October 2015

AGENDA

THURSDAY, 8 OCTOBER 2015

Chair: Malci Gabrijelčič, National Member for Slovenia, Chair of the External Relations Team at Eurojust and Michael Olmsted, Senior Council for the EU and International Matters, Liaison Prosecutor for Eurojust

08.30 – 09.00

ARRIVAL AND REGISTRATION OF PARTICIPANTS - The Arc Building

OPEN SESSIONS WITH PRIVATE SECTOR

FIRST SESSION: PLENARY – 11th floor meeting room

09.00 – 09.30

OPENING SESSION AND WELCOME SPEECHES

Francisco Jiménez-Villarejo, Vice-President of Eurojust

Jeannot Nies, Luxembourg Presidency of the Council of the EU

Olivier Tell, Head of Unit, Directorate-General Justice B1, European Commission

Mary Rodriguez, Office of International Affairs, Department of Justice

SECOND SESSION: PLENARY – 11th floor meeting room

9:30-11:00

Increasing success in MLAT practice regarding preserving, obtaining and admissibility of electronic evidence

➤ Daniela Buruiană, National Member for Romania, Chair of the Task Force on Cybercrime

➤ Janice Traver, Office of International Affairs, Department of Justice

➤ Cristina Posa, Department of Justice Liaison Prosecutor, U.S. Embassy in Rome

Discussion

11.00 – 11.15

COFFEE BREAK

11.15 – 12.45

CONTINUATION OF SECOND SESSION

➤ Daniel Suter, UK Liaison Prosecutor to the U.S.

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| | <ul style="list-style-type: none"> ➤ Nicolas Guillou, French Liaison Magistrate to the U.S. ➤ Gary Davis, Head of Privacy in Europe, Apple ➤ Amy Hogan-Burney, Senior Attorney, Legal and Corporate Affairs Department, Microsoft <p>Discussion</p> |
| 12.45 – 13.45 | LUNCH – 10 th floor restaurant |
| <u>RESTRICTED SESSIONS</u> | |
| THIRD SESSION: PLENARY – 11 th floor meeting room | |
| 13.45 – 15.00 | <p>Panel discussion on practical aspects relating to the Second Session</p> <p>Moderator: Mr Michael Olmsted, Senior Council for the EU and International Matters, Liaison Prosecutor for Eurojust</p> <ul style="list-style-type: none"> ➤ Daniel Suter, UK Liaison Prosecutor to the U.S. ➤ Nicolas Guillou, French Liaison Magistrate to the U.S. ➤ Lodewijk van Zwieten, National Prosecutor for Cybercrime, The Netherlands Seconded National Expert on Cybercrime at Eurojust ➤ Cristina Posa, Department of Justice Liaison Prosecutor, U.S. Embassy in Rome ➤ Caroline Miller, Department of Justice Liaison Prosecutor, U.S. Embassy in London <p>Discussion</p> |
| FOURTH SESSION: PLENARY – 11 th floor meeting room | |
| 15.00 – 16.00 | <p>Confiscation, asset recovery and sharing of assets</p> <ul style="list-style-type: none"> ➤ Elizabeth Aloï, Asset Forfeiture and Money Laundering Section, Department of Justice ➤ Leif Görts, National Member for Sweden and Chair of the Financial and Economic Crime Team, Eurojust <p>Discussion</p> |
| FIFTH SESSION: PLENARY – 11 th floor meeting room | |
| 16.00 – 16.15 | COFFEE BREAK |
| 16.15 – 17.45 | Major challenges concerning extradition |

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| | <ul style="list-style-type: none"> ➤ Johannes Martetschlaeger, Senior Public Prosecutor, Federal Ministry of Justice, Austria ➤ Kenneth Harris, Office of International Affairs, U.S. Department of Justice ➤ Cristina Posa, Department of Justice Liaison Prosecutor, U.S. Embassy in Rome <p>Discussion</p> |
| 19.30 – 22.00 | DINNER HOSTED BY EUROJUST AT RESTAURANT GUSTO |

FRIDAY, 9 OCTOBER 2015

Chair: Malci Gabrijelčič, National Member for Slovenia, Chair of the External Relations Team at Eurojust and Michael Olmsted, Senior Council for the EU and International Matters, Liaison Prosecutor for Eurojust

SIXTH PLENARY SESSION: 11th floor meeting room

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| 9.00 – 10.30 | <p>Overview of the state of play of application of the MLA and Extradition Agreements between the EU and the USA: miscellaneous topics</p> <ul style="list-style-type: none"> • State of play of the review of the MLA Agreement • Working with Joint Investigation Teams (JITs) • Banking information exchange • Use of video conferencing <ul style="list-style-type: none"> ➤ Olivier Tell, Head of Unit, Directorate-General Justice B1, European Commission ➤ Kenneth Harris, Office of International Affairs, Department of Justice ➤ Beatriz Diz Bayod, Head of the MLA area, Ministry of Justice, Spain ➤ Bram Bronsveld, Ministry of Justice, International Legal Assistance Department, Netherlands <p>Discussion</p> |
| 10.30 – 10.45 | COFFEE BREAK |
| 10.45 – 12.15 | <p>Increasing Success in MLAT Practice - Standards in Mutual Legal Assistance</p> <ul style="list-style-type: none"> ➤ Kenneth Harris, Office of International Affairs, Department of Justice ➤ Caroline Miller, Department of Justice Liaison Prosecutor, U.S. Embassy in London ➤ Michael Olmsted, Senior Council for the EU and International Matters, Liaison Prosecutor for Eurojust ➤ Michael Brady, Office of the Director of Public Prosecutions, Ireland ➤ Francisco Jiménez-Villarejo, National Member for Spain and Vice-President of Eurojust |

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| | <ul style="list-style-type: none"> • Standards for obtaining evidence and probable cause • Requesting and providing banking information • Eurojust's experience in judicial cooperation with the USA <p>Discussion</p> |
| 12.15 - 13.15 | LUNCH – 10 th floor restaurant |
| SEVENTH SESSION: PLENARY – 11 th floor meeting room | |
| 13.15 - 14:45 | <p>Further steps towards effective cooperation between the EU and the USA: Renewed EU-US Working Group Joint Statement</p> <ul style="list-style-type: none"> ➤ Mary Rodriguez, Office of International Affairs, Department of Justice ➤ Michael Olmsted, Senior Council for the EU and International Matters, Liaison Prosecutor for Eurojust ➤ Malči Gabrijelčič, National Member for Slovenia and Chair of the External Relations Team at Eurojust <p>Discussion</p> |
| 14:45 - 15:00 | <p>CLOSING REMARKS</p> <p>Olivier Tell, Head of Unit, Directorate-General Justice B1, European Commission</p> <p>Mary Rodriguez, Office of International Affairs, Department of Justice</p> <p>Francisco Jiménez-Villarejo, Vice-President of Eurojust</p> |
| 15.00 - 15.15 | TRANSPORT TO SCHIPHOL AIRPORT |

Annex 2: Casework of Eurojust

National authorities of EU Member States regularly approach Eurojust when they identify a need to speed up the execution of an MLA or Extradition request towards the U.S., which can occur in different stages of the criminal proceedings, and often before transmitting the requests to assess the chances of success of MLA measures or the Extradition request. Experience also shows that some National Desks at Eurojust are only approached by their national authorities regarding judicial cooperation with the U.S. in multilateral cases involving the U.S. This can be explained by the fact that bilateral contact between national and U.S. authorities for those EU Member States are better facilitated by a national liaison prosecutor/magistrate/officer of those EU Member States posted directly in the U.S.

The figures available at Eurojust show that the U.S. authorities were requested for assistance in a total of 135 cases between 2010 and June 2015. During this period, the number of cases registered towards the U.S. fluctuated between 20 and 26 per year, with 16 cases between January and June 2015. The U.S. was most frequently involved in Eurojust cases of swindling and fraud. Also, money laundering, organised crime and cybercrime were frequently tackled in cases involving the U.S. as a requested country. Since 2010, the National Desks at Eurojust have organised between 5 and 14 coordination meetings per year on cases with the involvement of U.S. authorities. A total of 56 such coordination meetings have been organised since 2010.

The type of assistance Eurojust has provided in cases involving the U.S. includes: *i)* facilitation of the exchange of information on the status of investigations; *ii)* facilitation of the transmission of MLA requests to the U.S., particularly in urgent cases; *iii)* clarification of legal requirements for judicial cooperation, namely in meeting the U.S. probable cause requirement; *iv)* facilitation of the setting up of operational action plans, by dividing the tasks regarding actions towards the U.S. and examining the possibility of issuing joint MLA requests; *v)* identification of a contact point in the U.S. to centralise inquiries; *vi)* identification through the U.S. Liaison Prosecutor at Eurojust of a point of contact in third States; *vii)* identification of certain measures in investigations that could be conducted by U.S. authorities even without a formal MLA request; and *viii)* support in translation issues.

Among the issues dealt with at Eurojust involving the U.S. were MLA requests regarding *i)* the questioning of witnesses (including by videoconference), *ii)* information on U.S.-based companies, *iii)* banking information, *iv)* requests regarding electronic evidence (*e.g.* IP addresses, subscriber information for e-mail addresses, etc.), *v)* conflicts of jurisdiction, and *vi)* execution of provisional arrest warrants and extradition requests.

The main tools available at Eurojust to overcome legal and practical issues in those cases are the possibility to host coordination meetings and coordination centres at Eurojust, where real-time support for joint action days is provided, with participants from the national authorities from EU Member States and the U.S., where issues can be addressed and clarified, and the involvement of the U.S. Liaison Prosecutor for Eurojust, who can be of assistance in identifying the relevant contact points in the U.S. to facilitate direct communication between the competent authorities of both sides.

Overall, the main challenges identified in cases registered at Eurojust included: *i*) coordination of investigations in different jurisdictions of EU Member States and the U.S.; *ii*) delays in the execution of MLA requests towards the U.S. because of duplication of their transmissions towards the U.S. *via* different channels; *iii*) uncertainties for the national authorities in EU Member States about the status of MLA requests to the U.S. and legal prerequisites for the requested measures (*e.g.* hearing of witnesses, gathering of electronic evidence); *iv*) differences in asset-sharing regimes, particularly in the context of non-contested forfeiture proceedings (these are more straightforward in the U.S. than in EU Member States), aggravated in multilateral cases.

Over and above the general type of assistance that Eurojust provides as noted above, Eurojust's experience in the field of electronic evidence shows that national authorities in EU Member States have sought Eurojust's assistance in the preparation of MLA requests seeking information on e-mail accounts (*e.g.* IP addresses, e-mail exchanges), in the U.S. and the possibility of surveillance regarding targeted e-mail accounts in the U.S., as well as the preservation of such data at U.S.-based ISPs. The provision by the U.S. Liaison Prosecutor at Eurojust of *i*) guides in that respect; *ii*) additional advice on to whom such requests should be sent (either directly to the U.S. ISP or *via* the U.S. legal *attaché* posted in the concerned EU Member States); and *iii*) advice regarding the feasibility of opening U.S. investigations, necessary for the U.S. to conduct the surveillance of e-mail accounts, have been identified as good practice.

Possible methods of improving judicial cooperation between EU Member States and the U.S. in relation to the gathering of electronic evidence could be *i*) developing common templates for different types of requests for the different Internet and communication service providers, to facilitate and harmonise those measures for the national authorities in EU Member States; *ii*) further developing and updating guidelines regarding the possibilities and most efficient methods of approaching those service providers, including explanations regarding the different levels of information and requirements of the U.S. authorities for the complete array of MLA measures in the gathering of electronic evidence.

Regarding the field of confiscation, recovery and sharing of assets, Eurojust provided assistance to the national authorities of EU Member States in cases involving the U.S. and other third States by *i*) facilitating the identification of assets subject to possible confiscation; *ii*) clarification of the different possibilities of confiscation in the concerned jurisdictions (*e.g.* the possibility of non-conviction based confiscation in the US); and *iii*) preparation of further discussions on the possible sharing of assets to be confiscated.

With respect to the exchange of banking information and related financial investigations in the U.S., Eurojust's experience has shown difficulties linked with differing levels of banking secrecy among the different states in the U.S., particularly where some states have autonomous jurisdiction and high levels of banking secrecy that have resulted in the requested banking information and the freezing of bank accounts being left unanswered.

Case experience at Eurojust regarding extradition shows that Eurojust's assistance was requested by national authorities in the EU Member States mainly when delays in the execution of extradition requests to the U.S. are experienced or swift action and coordination is needed. Eurojust's assistance included: *i*) coordination of simultaneous arrests in various EU Member States and the U.S.; and *ii*) advice on various possibilities of liaising with the competent U.S. authorities to intensify their efforts and resources in locating and apprehending a wanted person.

With regard to requests for the questioning of witnesses in the U.S., Eurojust's experience shows that the majority of national authorities in EU Member States prefer to resort to classical interviews of the witnesses by the competent U.S. authorities and that, in some cases, the national authorities of EU Member States asked to be granted permission to be present during the interviews of the witnesses.

When the hearing of witnesses is to be conducted via videoconference, Eurojust assisted and advised national authorities in EU Member States regarding *i*) the general possibility of conducting this type of witness hearing; *ii*) the clarification of additional requirements from the U.S. side to conduct a witness hearing *via* videoconference (*i.e.* the need for the requesting authorities to provide a list of questions to be asked of witnesses prior to the hearing); and *iii*) enabling EU Member State authorities and U.S. counterparts to arrange the technicalities of the videoconference (*e.g.* in one case the videoconference was conducted with the support of the U.S. Embassy in the concerned EU Member State). Eurojust's experience in relation to this type of witness hearing shows that in some EU Member States it is possible to deviate from the requirements established by the EU-U.S. MLA Agreement or bilateral agreements, if the competent authorities of all parties agree with this, and conduct a videoconference in a less formal manner, if that is suitable.

To date, no major developments regarding the setting up of JITs between Member States' national authorities and U.S. authorities could be identified by Eurojust. A review of Eurojust's casework registered in the case management system revealed that between 2010 and mid-2015 there have been no JITs with the U.S. set up with the involvement of Eurojust.

Replies to the 2015 Eurojust questionnaire show that the support of Eurojust is appreciated by EU Member States and considered valuable and useful. In particular, assistance provided by virtue of coordination meetings or coordination centres, support in translation issues, and clarification of legal requirements for judicial cooperation, were mentioned in this regard. The importance of Eurojust's strategic and tactical meetings on cybercrime, where representatives from the U.S. are usually present and provide valuable contributions, was highlighted. Eurojust was encouraged to continue organising such seminars, which allow the exchanging of information and best practice among the competent authorities. Moreover, the importance of the organisation by Eurojust of meetings related to the application of legal instruments between the EU and U.S. in the area of extradition and MLA was acknowledged and encouraged, as such meetings contribute to more effective cooperation with the U.S. authorities and a better understanding of the other's legal systems.

Annex 3

EU-US Mutual Legal Assistance Agreement Review 2015

Preliminary summary of Member States' responses to the Commission's questionnaire

(18 responses received by 1st October 2015)

Summary Highlights

Member States' responses show that the EU-US Mutual Legal Assistance ("MLA") Treaty ("MLAT") is being used by Member States and that there is a significant amount of MLA traffic between EU and US. Cooperation is generally considered to be working well, although significant problems of delay on the US side persist. Specific tools such as videoconference are on the whole well used, and there is some interest in Joint Investigation Teams. Electronic means of communication are used by many but not all Member States, and some make use of assistance from Eurojust. Different regimes in relation to data retention/protection are highlighted by some as a problem area. US authorities have refused requests on the basis of dual criminality, *de minimis*, freedom of speech and probable cause. Member States have refused some requests because of concerns in relation to data protection and death penalty, although they have also developed successful mechanisms for assurances in relation to the latter. Some Member States would like to see additional support to practitioners such as seminars and more streamlined procedures. There is also interest at improving electronic channels of communication and financial investigations.

Article 17 of the EU-US MLAT sets out that a common Review will be carried out within five years of its entry into force and that the Review should address in particular practical implementation. To gather evidence for the Review in relation to practical implementation, the Commission circulated a questionnaire to Member States. The content of the questionnaire was agreed by the Member States and US Authorities.

18 Member States responded to the questionnaire. The results reveal that all Member States have experience of using the agreement and there is very significant MLA traffic, both from Member States to the US and vice versa. Statistics vary considerably: Some countries have several hundred outgoing requests per year others have less than a dozen. There are many more outgoing requests to the US than incoming to MS. E.g. in 2013, there were more than 1,400 outgoing MLA requests from the 18 EU Member States who responded to the US (with figures ranging between 5 and 395 per Member States) and around 400 incoming requests from the US (with figure between 0 and 100 per Member State).

MLA is requested in relation to a broad range of offences including fraud, money laundering, terrorism and child pornography. There are also frequent requests to establish beneficial ownership and to freeze assets. The majority of Member States raise concerns in relation to **timescales** for implementation by the US Authorities, although some Member States acknowledge that the US will respect requests for urgency. Timescales for implementation by MS are universally shorter than those of implementation by US authorities. Mechanisms for **expedited transmissions** (article 7) are used by some respondents. In some cases email is the only means of communication. In one case, email transmissions are not permitted. Other respondents would like to make more use of email requests. One uses concurrent email and paper transmission. There is interest by some Member States to explore whether further work on co-operation by means of e-signature would be appropriate.

Some respondents have used the provision in article 4 relation to **banking information**. Member States highlight the fact that rules in relation to banking information are not widely known by practitioners.

Video conferencing is widely used and broadly very satisfactory. One Member State suggested extending it to allow suspects to participate in a trial when detained in the other State.

The use of **Joint Investigation Teams** is not yet wide-spread. However, there has been one JIT with DK and another is under preparation.

Some respondents have sent MLA requests to **administrative authorities**, with no particular difficulties highlighted excepting delay.

Member States do not generally have concerns in relation to **translation**.

The possibility of the **death penalty** being used by the US Authorities can be a concern, but assurances are successfully sought by EU Member States.

A number of Member States raised issues in relation to **data protection or data retention**, particularly in relation to the period of time for which material (in particular intercept material) can be stored. Some MS have refused US requests because of data protection issues, and additional conditions have been required of the US authorities by some Member States.

In relation to **cyber evidence**, there can be problems with the US practice to require a certification of authenticity of business records which Internet Service Providers (ISPs) refuse to sign. One Member State noted that the volume of requests connected to obtaining data held by ISPs is placing significant strain on the system, and that co-operation with ISPs could be improved.

Few difficulties were raised in relation to **confidentiality requests** (art 10), however in one case, lifting of bank secrecy is enforced only where a felony has been committed.

In terms of **refusals**, Member States have refused US requests because of issues relating to data protection, death penalty, "fishing expeditions" or logistical problems. Also some identified issues in relation to US application of extra-territorial jurisdiction. The US has refused requests from many MS in relation to probable cause, dual criminality, freedom of expression and de minimis.

Some Member States have used **Eurojust** in order to facilitate mutual legal assistance. Where this has happened, all are satisfied.

In conclusion, **a clear majority of MS declare themselves broadly content with the current application of the agreement** (excepting the issue of delay). Some would like more seminars to support its application, others see no need. There is some limited interest in further work on e-signature or process, or focus on substantive areas such as improving the circulation of electronic data, and the obtaining of banking information.