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SELECT COMMITTEE ON
THE EUROPEAN UNION

EU/US AGREEMENTS ON
EXTRADITION AND MUTUAL LEGAL
ASSISTANCE

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THIRTY-EIGHTH REPORT

15 JULY 2003

By the Select Committee appointed to consider European Union documents and other matters relating to the European Union.

ORDERED TO REPORT

EU/US AGREEMENTS ON EXTRADITION AND MUTUAL LEGAL ASSISTANCE

8296/03 CATS 21 USA 30 and

Draft Agreements between the EU and the USA on extradition and on mutual legal assistance, under Articles 24 and 38 of the TEU

8295/1/03 CATS 20 USA 29 Rev 1

ABSTRACT

Scrutiny

We regret the limited time available to us to examine the major constitutional, legal and political issues arising from the two Agreements. These were declassified only in May and the decision authorising their signature was taken at the Justice and Home Affairs Council on 6 June.

The Committee pressed hard for the text of the Agreements to be made public. We refused to scrutinise them in secret and (jointly with the House of Commons European Scrutiny Committee) we invited the Presidency to supply the text to all the parliaments in the Union.

The 'confidential' classification on the Agreements after the negotiations between the EU and the US had been concluded was unnecessary. It was also contrary to the democratic accountability that ought to inform decisions by the EU institutions regarding access to documents. We hope that in future a clearer understanding of the requirements and importance of open government will prevail.

Extradition

The Agreement does not provide explicitly for the possibility of extradition being refused on ECHR grounds. This is regrettable.

The Agreement does not preclude the prospect of the EU deciding to give primacy to European Arrest Warrants over extradition requests by the US.

Mutual Legal Assistance

The wording of Article 4(1)(b) (on the identification of bank information) is broad and could cover a wide range of information about legitimate every day transactions of innocent third parties.

It is unclear whether the establishment and operation of joint investigation teams will be subject to parliamentary scrutiny.

There appear to be major differences in the data protection systems of the EU and the US. We urge the Government to ensure that a high level of data protection is required as a condition for the provision of information to the US authorities.

The Government's Assurances

We welcome the Government's assurances that extradition can be refused by our courts in the event of a successful ECHR challenge to extradition, including breach of fair trial rights.

We also welcome the Government's clarification that it will always seek assurances when responding to extradition requests from the US that the death penalty is not imposed, or if imposed, not executed.

There is no specific treatment of the capital punishment issue in the Mutual Legal Assistance Agreement. We welcome the Government's assurance that the UK could—should it ever so wish—properly decline to assist in such cases or could properly subject any cooperation to conditions.

CHAPTER 1: BACKGROUND

1. The events of 11 September 2001 elevated EU-US co-operation in combating terrorism to the top of the EU political agenda. Only nine days after the attack on the Twin Towers, the Justice and Home Affairs Council of 20 September called for the adoption of a series of measures aimed at enhancing co-operation in criminal matters. These included proposing to the United States that an agreement be negotiated between the EU and the US, on the basis of Article 38 TEU,¹ in the field of penal co-operation on terrorism (p 12, para. 7). The US expressed an interest in the proposal, and letters were exchanged between President Bush and Mr Verhofstadt, then President of the European Council.² The willingness of the Union to conclude such agreements was confirmed at the European Council of 19 October in Ghent. The Declaration by the Heads of State of the EU and the President of the Commission which followed stated that the Union is prepared to engage with the United States in reciprocal initiatives such as “facilitation of mutual judicial assistance between the competent authorities of the US and of the Member States, as well as extradition in connection with terrorism in accordance with the constitutional rules of the Member States”.³

2. Following the conclusions of its informal meeting at Santiago de Compostella on 28 February 2002, the Justice and Home Affairs Council adopted on 26 April 2002 a negotiating mandate for an agreement on judicial co-operation in criminal matters on the basis of Articles 38 and 24 TEU. The mandate extended beyond terrorism to cover in particular “extradition, including the temporary surrender for trials and mutual legal assistance including the exchange of data, the setting up of joint investigation teams, the giving of evidence (via video conference) and the establishment of single contact points”. Reflecting calls for not allowing extradition to take place if the defendant could be sentenced to death,⁴ the Council conclusions expressly stated that “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”.⁵

3. Negotiations began in the summer of 2002. Despite calls for information on their themes and progress to be made public,⁶ they were conducted in secrecy. The conclusions of the Justice and Home Affairs Council of 28 November 2002 indicate that the Council took note of the state of play and agreed on the strategy that the Presidency would have to follow for the further conduct of negotiations.⁷ Negotiations continued until the end of February 2003, when the Justice and Home Affairs Council⁸ decided to suspend them in order to allow time for delegations to examine all relevant aspects of the texts in view of concerns on specific points. The Council conclusions noted that if possible the Agreements should be concluded in May or June after having involved the parliaments in an appropriate manner.⁹

¹ Article 38—in conjunction with Article 24 TEU—enables the conclusion of international agreements in third pillar matters by the Council on a recommendation by the Presidency, which may be authorised to open negotiations to that effect.

² European Parliament, Committee on Citizens’ Freedoms and Rights, *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*, A5-0172/2003, 22.5.03, p 8; see also W. Gilmore, *The Twin Towers and the Third Pillar: Some Security Agenda Developments*, European University Institute Working Paper Law 2003/7, p 10.

³ Point 4.

⁴ European Parliament Resolution of 13.12.2001 on EU judicial co-operation with the United States in combating terrorism (B5- 0813/2001). The Parliament also highlighted the need for any agreements to fully respect the ECHR with regard to fair trial rights and declared that no extradition could be allowed to the US for people who are to be tried before military tribunals.

⁵ p 13.

⁶ In its Recommendation B5-0540/2002 the European Parliament asked the Council to inform the European Parliament as well as national parliaments about the progress of negotiations. In a letter of 28 May 2002 to Romano Prodi, JUSTICE noted that a more informed contribution on specific areas under negotiation could be made “if the basic themes were in public”. Statewatch, on the other hand, published on its website, in the summer of 2002, a (classified) version in the form of an early draft of the negotiating mandate.

⁷ p 15.

⁸ 28 February 2003.

⁹ p 14.

CHAPTER 2: SCRUTINY HISTORY

4. The Committee was first informed about the negotiations by a letter from Bob Ainsworth MP, then Parliamentary Under Secretary of State, Home Office, on 29 May 2002.¹⁰ Mr Ainsworth provided some information on the content of the negotiating mandate, but noted that the latter was a confidential document not falling within the normal criteria for scrutiny. He confirmed that the Agreements resulting from those negotiations would be submitted for parliamentary scrutiny when presented to the Council for approval.

5. Mr Ainsworth next wrote to the Committee on 30 January 2003. He noted that at the meeting of 28 November 2002 the JHA Council agreed to changes in the negotiating mandate, with provisions relating to the extradition of own nationals and the narrowing of the political offence exception being withdrawn. The Minister reiterated that the documents in question were confidential and could not be deposited for scrutiny. He reassured the Committee that he would provide the draft Council Decision authorising the Presidency to conclude the agreement when it became available and added: “at that time you will of course have an opportunity to scrutinise the text in full”. Mr Ainsworth further noted that the Greek Government did not anticipate conclusion of the Agreement during its Presidency.

6. The conclusions of the February JHA Council however indicated that the Council contemplated that the Agreement would be concluded during the Greek Presidency (in May or June) after having undergone scrutiny by national parliaments. In the light of these conclusions, the Committee wrote to the Home Office on 24 March 2003. We made clear our expectation that the draft Agreements would be deposited in Parliament for scrutiny and that both this Committee and the House of Commons European Scrutiny Committee would be given sufficient time to examine the texts. We asked for the texts to be deposited as soon as possible.

7. Mr Ainsworth replied on 27 March. He provided the Committee with a copy of the draft Agreements but asked for these documents to be treated as confidential since they had been given an EU confidential classification. The Minister said that he would deposit for scrutiny the unclassified Decision authorising the Presidency to sign the Agreements, but that this deposit would not be accompanied by the texts of the Agreements. He further noted that the Council Secretariat had advised that it might not be possible to declassify the texts of the Agreements until after they had been signed.

8. The Committee refused to examine the Agreements on this ‘confidential’ basis. In our response of 3 April, we told the Minister that such an approach “would be inconsistent with the principles of parliamentary scrutiny and how they have been practised in this Parliament for many years”. No explanation had been given as to why the documents had to remain classified as confidential (Lord Filkin claimed that this was necessary in order to protect the negotiating position of the parties—letter of 17 April). We accordingly insisted that the documents be deposited in Parliament for scrutiny in the usual way and noted that the manner in which the Council, the Greek Presidency and the Government were dealing with the matter raised “issues of substantial constitutional significance both for the Union and the UK”.

9. In addition to our correspondence with the Government, we took the unprecedented step of also writing, jointly with the Commons European Scrutiny Committee, a letter to the EU Presidency. The letter (dated 10 April) invited the Presidency “to supply to this Parliament and to all the parliaments in the Union copies of the draft Agreements so that they can undertake scrutiny of them in an appropriate manner, namely publicly and meaningfully and with sufficient time to consider the constitutional, legal and political issues raised by the Agreements”. The letter also proposed that, consistently with the spirit of the Protocol on the Role of National Parliaments annexed to the Treaty of Amsterdam, national parliaments be allowed six weeks to consider the draft Agreements.

10. The Agreements were finally declassified in early May and deposited for scrutiny on 13 May.¹¹ **We welcome the de-classification of the documents but regret the tight deadlines imposed on the Committee, which left limited time to examine the complex issues arising from them.** Time was limited because the Decision authorising the Presidency to conclude the Agreements (also held under scrutiny by our Committee) was on the agenda for adoption at the JHA Council of 5-6 June. The Committee decided that the best way forward in these circumstances would be to invite the Minister to give oral evidence on June 4. In his appearance before the Committee, Mr Ainsworth confirmed that the Government “will potentially be overriding scrutiny” on June 6 (Q 1).¹² This was the day on which

¹⁰ All letters referred to in this section are reproduced in Appendix 2.

¹¹ Document 8295/1/03 CATS 20 USA 29 Rev 1. The Government has also deposited for scrutiny the draft Decision authorising the signature of the Agreements by the Presidency on behalf of the Council (document 8296/03 CATS 21 USA 30, submitted by the Home Office on 28 April 2003). The Government’s Explanatory Memoranda accompanying these documents are reproduced in Appendix 2.

¹² The transcript of Mr Ainsworth’s evidence is printed in Appendix 2 to this Report.

the Justice and Home Affairs Council proposed to authorise the Presidency to designate the person to sign the Agreements at the EU-US Summit on 25 June.

11. On the basis of the evidence given by the Minister and his team, and in particular the assurances he provided on human rights aspects, the Committee decided to clear the documents from scrutiny. We have recorded these assurances in our letter to Mr Ainsworth of 12 June. We nevertheless considered that it was important to examine some of the issues arising from the Agreements in greater detail. That is the purpose of this Report. We are grateful to our Specialist Adviser, Professor William Gilmore, for his assistance in this task.

12. Before turning to these issues, however, we must record our opinion that **the decision of the Presidency to retain the ‘confidential’ classification on these Agreements after the negotiations between the EU and the US had been concluded and their content had been agreed both by the EU Member States and by the US was unnecessary and contrary to the democratic accountability that ought to inform decisions by EU institutions regarding access to documents.** The decision was also, of course, inimical to the proper conduct of scrutiny procedures by national Parliaments and was responsible for the time constraints within which the Committee had to carry out its scrutiny. The decision is especially regrettable in the context of the effective parliamentary scrutiny of multilateral Treaties. It is in marked contrast to the position in the United States where the Senate advises on and consents to the ratification of Treaties that are not self-executing. **We express the hope that in future a clearer understanding of the requirements and importance of open government will prevail.**

CHAPTER 3: THE AGREEMENTS—GENERAL

Added value

13. It is important to bear in mind that the EU-US Agreements here in question are not intended to substitute existing bilateral arrangements between the US and Member States but to supplement them. All 15 Member States have bilateral extradition treaties in place with the US while 11 had, at the time when negotiations began, concluded mutual legal assistance treaties with the US. Nor, as the Home Office pointed out in its Explanatory Memorandum dated 13 May 2003, do the Agreements preclude the conclusion of more favourable bilateral arrangements in the future (para. 15). It follows that the EU-US Agreements will have a different impact on each Member State. In other words the “added value” which they provide will vary from jurisdiction to jurisdiction: the more recent the bilateral arrangements and the more comprehensive their scope, the less the significance of these Agreements.

14. In his evidence to the Committee, Mr Ainsworth stated that the Agreements “do add value, probably not nearly as great to the United Kingdom as most other European jurisdictions” (Q 5). He further noted that the Extradition Agreement is of procedural, rather than substantive value for the UK but of greater value for other Member States as it extends extradition arrangements to a broader range of offences based on a penalty threshold and not on a list of offences (QQ 7, 10).

15. UK/US extradition arrangements will be covered primarily by the new bilateral extradition treaty signed on 31 March 2003 and laid before Parliament as a Command Paper in May.¹³ The Minister confirmed that the Government’s intention to enter into a new bilateral UK-US extradition treaty preceded the EU initiative and that it was always intended that the bilateral treaty would go further than the EU/US agreement. Bilateral negotiations were said not to have been influenced by the discussions at the EU level (QQ 18, 19).

16. The conclusions of the JHA Council of 5-6 June also refer to the added value brought by the Agreements. By way of illustration, the Extradition Agreement leaves to the exclusive competence of the Member States the question of how to deal with competing requests for surrender from the International Criminal Court and extradition requests from the US; it also makes provision for consultations regarding the protection to be given to sensitive information to be supplied by the requested State. The Mutual Legal Assistance Agreement on the other hand would add value by improving co-operation in the area of investigations into financial elements of serious crime. It also includes provisions allowing the use of modern telecommunication techniques for the exchange of mutual legal assistance requests and replies.¹⁴

Scope

17. As mentioned above, the political impetus for the conclusion of the agreements was generated by the events of 11 September 2001. The link of the Agreements with the war on terror was regarded as justifying the need to agree the authorising Decision on 6 June and the potential overriding of the scrutiny reserve by the Government. Mr Ainsworth told us:

“We do not feel that it is appropriate on measures like this, which are part of the counter-terrorism package that was agreed at the Extraordinary Council in September 2001, that we, the British Government, should be seen to be dragging our feet, or failing in our commitment to introduce measures to fight organised crime and terrorism” (Q 1).

18. We note, however, that the scope of the Agreements is much broader than terrorism and organised crime. The penalty threshold is set so as to permit extradition in cases of any offence punishable by deprivation of liberty of one year or more (Article 4(1) of the Extradition Agreement). Mutual legal assistance in identifying bank information will apply when a natural or legal person is “suspected of or charged with a criminal offence” (Article 4(1)(a) of the Mutual Legal Assistance Agreement). The Agreement enables the establishment of joint investigation teams “for the purpose of facilitating criminal investigations or prosecutions involving the US and one or more Member States” (Article 5(1)). Generally speaking, mutual legal assistance arrangements may thus apply without any penalty threshold to any offence. **In short, while the Agreements may have been prompted by terrorist activity they are not confined to or focused on offences in that category.**

¹³ Cm 5821. The bilateral Treaty has given rise to ECHR concerns which have been exposed in debate in this House—see HL Deb. 13 May 2003 col. 127-129.

¹⁴ pp 22 & 23.

Influences

19. Viewed from a European perspective it is clear that measures concerning judicial cooperation previously agreed within the Union constituted a major source of inspiration in the formulation of the EU-US Agreements. In this regard it will be recalled that the 2000 EU Convention on mutual assistance and its Protocol focused on expanding the scope of judicial cooperation to new areas (such as the creation of joint investigation teams and facilitating the identification of bank accounts and the exchange of information on the operation of such accounts) as well as modernising procedures to render co-operation more effective and timely. Somewhat similar concerns have informed internal Union initiatives in the field of extradition culminating in the Framework Decision on the European Arrest Warrant.

20. It was equally apparent, however, that these precedents could not be applied without modification to the somewhat different circumstances and challenges posed in regulating mutual assistance and extradition relationships with a third state. As the Explanatory Memorandum of 13 May noted, for example, none of the “mutual recognition” provisions (such as the abolition of dual criminality or the recognition of judicial decisions) contained in the European Arrest Warrant find reflection in the EU-US Extradition Agreement (para. 17). Similarly, while under the Arrest Warrant there is to be surrender of “own nationals” and the elimination of the political offence exception these two important features are not repeated in the text here in question.¹⁵

¹⁵ However, we note that the European Convention on the Suppression of Terrorism of 1977 has been re-examined of late within a Council of Europe context and that an amending Protocol has been concluded. It is relevant that this has been formulated in such a way as to permit the United States to become a party. Should it elect to do so this would, in part, address the “gap” in the EU-US text in relation to the operation of the political offence exception in terrorism cases.

CHAPTER 4: EXTRADITION

Human rights safeguards

21. There is no substantive provision in the Agreement explicitly regulating instances in which there may be a ECHR bar to extradition. The Preamble to the Agreement refers to the Parties having “due regard for rights of individuals and the rule of law” (third recital). Article 17(2) on the other hand enables “consultations” to take place between the requested and requesting States “where the constitutional principles of, or final judicial decisions binding upon, the requested State may pose an impediment to fulfilment of its obligation to extradite”.¹⁶ The reference to “final binding judicial decisions” was added in the very last stages of the negotiations and may be read as covering decisions by the European Court of Justice and the European Court of Human Rights. The Greek Minister of Justice Mr Petsalnikos (who chaired the JHA Council during the Greek Presidency) emphasised to the European Parliament’s Citizens’ Rights Committee that this provision “has no precedent and it certainly constitutes the common point between these agreements and the European Convention on Human Rights”.¹⁷

22. In his evidence to the Committee, Mr Ainsworth repeatedly emphasised that nothing in the Agreement was intended to disturb the current domestic law position in the UK that extradition would be refused by our courts in the event of a successful ECHR challenge to extradition (QQ 47, 56, 58, 59). The Minister further confirmed that Article 17(2) constituted an implied ground for refusal of extradition on ECHR grounds (Q 67) and that that interpretation was shared by other Member States (QQ 64, 65). **We welcome the Minister’s assurances. It would be preferable, however, if the Agreement explicitly provided for the possibility of extradition being refused on ECHR grounds, as the Convention forms an integral part of Union law.¹⁸ Such express reference would constitute considerable “added value” in an agreement concluded between the EU (and not each Member State individually) and the US. It might also enhance human rights safeguards in future bilateral agreements between Member States and the US, which must, according to Article 18, be consistent with this Agreement.**

Capital punishment

23. Article 13 enables extradition to be granted “on the condition that the death penalty shall not be imposed on the person sought, or if for procedural reasons such condition cannot be complied with by the requesting State, on condition that the death penalty if imposed shall not be carried out”. The wording is a departure from the initial negotiating mandate, which envisaged guarantees on the non-imposition (and not the non-execution) of capital punishment sentences (see para. 2 above). By way of explanation Government officials indicated that the wording used reflected the fact that in some states courts were obliged to impose the death penalty for certain offences but “it is then discretionary whether or not it is carried out” (Q 80).

24. Article 13 has been criticised by Amnesty International, on various grounds including the leaving of what it considers “an unacceptable margin of discretion with regard to conditioning and refusing extradition in the face of the death penalty”.¹⁹ The Citizens’ Rights Committee of the European Parliament was, however, more positive in its assessment. Its Report pointed out that “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”.²⁰ This is a welcome step.

25. It should be noted that, pursuant to Article 3(i)(j), Article 13 “may be applied by the requested State in place of, or in the absence of, bilateral treaty provisions governing capital punishment”. Consistent with UK practice the new bilateral treaty with the US contains (in Article 7) such a provision. Under it extradition may be refused “unless the Requesting State provides an assurance that

¹⁶ This was Article 16(a)(2) in the version that was formally submitted for scrutiny (document 8295/1/03). It was amended and renumbered in a subsequent version of the Agreement (document 9153/03 CATS 28 USA 41) dated 3 June.

¹⁷ Address by Mr Petsalnikos to the LIBE Committee of the European Parliament, 11 June 2003, www.eu2003.gr/en/articles/2003/6/11/3037/

¹⁸ See Article 6(2) TEU.

¹⁹ Amnesty International, *EU-US extradition agreement still flawed on human rights*, 4.6.03, www.amnesty-eu.org. The same report also draws attention to various other ECHR issues including fair trial rights and those in issue in the European Court of Human Rights judgment in *Soering v UK*, 7.7.1989, 1/1989/161/217.

²⁰ *Op. cit.*, p 12. Emphasis added.

the death penalty will not be imposed or, if imposed, will not be carried out". **In evidence to us the Government emphasised that they will always seek appropriate assurances in death penalty cases.** This has been the practice for many years and it was stressed that there has never been an instance in which such assurances have not been fully honoured (QQ 16, 80, 81). **We welcome this clarification.**

26. Death penalty concerns can also arise in the context of the relaxation of the protections afforded by the doctrine of speciality (specialty). In contrast to Article 27 of the Framework Decision on the European Arrest Warrant the EU-US Extradition Agreement does not contain detailed treatment of this important topic.²¹ We note, however, that Article 18 of the new UK-US bilateral treaty does. In this regard we welcome the indication that the relaxation of the rule of speciality contained in Article 18(1)(a)²² is not intended to lessen protection for the individual in a capital punishment context. **It is our understanding from the Government's oral evidence to us that if, post extradition, a charge for a capital offence were to be substituted for, or added to, the extradition offence not carrying such a penalty, even though based on the same facts, the Government would regard it as an act of bad faith for the capital offence to be prosecuted otherwise than on the footing that the death penalty would not be imposed or, if imposed, would not be executed (QQ 99, 100).**

Military tribunals

27. There has been great concern over whether the extradition agreement would allow extradition to the US of suspects who could face trial in a military tribunal. One of the Recommendations of the European Parliament's Citizens' Rights Committee, which was endorsed by the plenary, has been 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".²³

28. Along with the general human rights safeguards mentioned above (which would include fair trial rights), the Preamble of the Extradition Agreement states that the Parties are "mindful of the guarantees under their respective legal systems which provide for the right to a fair trial to an extradited person, including the right to adjudication by an impartial tribunal established pursuant to law". This is a welcome (even if indirect) acknowledgement of this important matter, though its legal force is debatable. This also departs from the wording of the ECHR which requires an "independent" and impartial tribunal (Q 62). Once more **we note the Minister's assurances that extradition will be refused by our courts in the event of a successful ECHR challenge to extradition including breach of fair trial rights (QQ 47, 56, 58, 59). We recommend that the Government adopt a practice of requiring, as a condition of extradition in cases where trial before a military tribunal or other similar exceptional court is an option under US or State law (as the case may be), an assurance that the extradited person will be tried before a normal federal or State court.**

Concurrent requests—relationship with the European Arrest Warrant

29. A controversial issue during the negotiation of the Agreement was whether requests pursuant to the European Arrest Warrant should take precedence over extradition requests by the US. The French Government has sought to delete Article 10(2) which treated European Arrest Warrants as normal extradition requests received by Member States for the purposes of the agreement.²⁴ The Article went through a last minute amendment to address these concerns. According to the Government, the amendment is designed to ensure that should the EU decide in the future that European Arrest Warrants should be afforded primacy, the EU would not be bound by this Agreement to set aside that primacy in the case of a request by the US (Q 104). This has been reinforced by Article 21,²⁵ which provides for the agreement to be reviewed no later than five years after its entry into force and that the review may include issues "such as the consequences of further development of the European Union relating to the subject matter of this Agreement, including Article 10".

²¹ However, Article 11 envisages simplified extradition with the consent of the individual concerned and stipulates that such consent may include waiver of protection of the rule of speciality.

²² "A person extradited under this Treaty may not be detained, tried, or punished in the Requesting State except for: (a) any offence for which extradition was granted, or a differently denominated offence based on the same facts as the offence on which extradition was granted, provided such offence is extraditable, or is a lesser included offence".

²³ *Op. cit.*, p.6.

²⁴ See the Report by the French Parliament: Assemblée nationale, *Rapport d'information sur la coopération judiciaire entre l'Union européenne et les Etats Unis d'Amerique*, no 716, p 45. It should be noted that European Arrest Warrants do not at present have priority under Article 16(3) of the Framework Decision.

²⁵ Article 19a in the draft formally submitted for scrutiny.

CHAPTER 5: MUTUAL LEGAL ASSISTANCE

Capital punishment

30. The Mutual Legal Assistance Agreement does not contain any provision equivalent to Article 13 of the extradition instrument providing safeguards in death penalty cases. There is only a reference in the Preamble to “due regard for rights of individuals and the rule of law”. Mr Ainsworth noted that “this is a difficult area”, as it is not at all clear that assistance should be *a priori* refused in all cases that may involve the imposition of the death penalty (which could include serious terrorist offences). The Minister noted that decisions will be taken on a case-by-case basis (QQ 108, 110). **We welcome the Minister’s assurance that, notwithstanding the absence of specific treatment of the capital punishment issue in the Agreement, the UK could—should it ever so wish—properly decline to assist in such cases or could properly subject any cooperation to conditions.**

Identification of bank information and beyond

31. The 2001 Protocol to the EU Convention on Mutual Legal Assistance contains several provisions on access to bank information. As the Explanatory Memorandum of 13 May 2003 points out, Article 4 of the EU-US Agreement on Mutual Legal Assistance is designed, in effect, to extend to the US certain of those Protocol provisions (para. 24). These are of particular relevance to international efforts to combat money laundering. However, Article 4(1)(b), which is not drafted with elegance or clarity, has no direct parallel in the 2001 Protocol.

32. Article 4(1)(b) provides for mutual legal assistance for the purpose of identifying information regarding natural or legal persons convicted “or otherwise involved in a criminal offence”, information in the possession of “non-bank financial institutions” or “financial transactions unrelated to accounts”. Mr Ainsworth was asked to clarify the meaning of these rather vague terms. He understood the term “otherwise involved” to mean someone who is under investigation and confirmed that the Government would require “some assurance that there was an actual investigation going on” (QQ 112, 113). Identification might also involve innocent third parties whose accounts might be used for money laundering without their knowledge (Q 114). “Non-bank financial institutions” would include organisations such as *bureaux de change* (QQ 116, 117) and “financial transactions unrelated to accounts” would also involve *bureaux de change* (Q 118). **We welcome the Minister’s partial clarification of the terms included in Article 4(1)(b) and his assurance that assistance would be provided only if an actual investigation was going on and the assistance requested was proportionate. The terms, however, remain broad and the provision as drafted could extend to a wide range of information about legitimate everyday transactions of, as the Government admitted, “innocent third parties”.**

Joint investigation teams

33. Article 5 enables the establishment of joint investigation teams to operate in the respective territories of the US and the Member States involved. The procedures under which these teams will operate will be “as agreed between the competent authorities responsible for the investigation or prosecution of criminal offences as determined by the respective States concerned” (Article 5(2)). **It is therefore not clear whether the operation of these teams, including aspects such as the liability of participating members, would be determined by legislation—and would therefore be subject to parliamentary scrutiny—or would merely take the form of an executive agreement between prosecutors or law enforcement authorities.** The approach here is in sharp contrast with the regulation of joint investigation teams in the EU, where specific rules on their powers, criminal and civil liability and data protection issues have been established by Third Pillar legislation.²⁶ The Minister’s response was not entirely clear-cut. He noted that the UK/US mutual legal assistance treaty “does not prevent joint investigations from being established” and his officials noted that it is “quite likely perhaps for the Chief Constable of the force here to be legally answerable for torts” (Q 121). It was then noted that there was provision in the Police Act 1996 (as amended) to deal with such teams in relation to co-operation with EU members and that “similar arrangements no doubt would be applied” (Q 125).

Assistance to administrative authorities

34. Article 8 allows for mutual legal assistance to be provided to national and “other” administrative authorities investigating a case with a view to a criminal prosecution, or to referral of

²⁶ Council Framework Decision of 13.6.02 on joint investigation teams, OJ L 162, 20.6.2002, p 1.

the case to criminal investigators or prosecution authorities. It is to be read in conjunction with the detailed Explanatory Note appended to the Agreement. **The Government confirmed that assistance will not be provided if the requesting authority does not have proper competence in criminal matters (Q 126). We welcome this assurance.**

Data protection

35. Article 9 contains a series of data protection safeguards, but no reference is made to specific data protection instruments such as the 1981 Council of Europe Data Protection Convention, the EC data protection Directive and the EU Charter of Fundamental Rights.²⁷ This may be a cause of concern in view of the different systems of protecting data in the EU and the US. The issue was highlighted during the scrutiny of the Agreement between Europol and the US on the exchange of personal data which the Committee carried out last year²⁸ and also by the European Parliament Citizens' Rights Committee, which said, in relation to the EU-US Mutual Legal Assistance Agreement, that there were "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".²⁹ Article 9(2)(b) further states that "generic restrictions with respect to the legal standards of the requesting State for processing personal data may not be imposed by the requested State as a condition ... to providing evidence or information".³⁰ **We urge the Government to ensure that a high level of data protection, consistent with EU legislation and the 1981 Council of Europe Data Protection Convention, is required as a condition for the provision of information to the US.**

Recommendation

36. The Agreements raise important questions to which the attention of the House should be drawn. **We make this Report to the House for information.**

²⁷ See also the concerns of Statewatch, noting that no rights of access to data held or rights of correction and deletion are included in the agreement and no conditions are set out prohibiting passing information to third parties. See www.statewatch.org/news/2003/may/06useu.htm

²⁸ See in particular the letters of Lord Grenfell to Bob Ainsworth dated 20 November and 4 December 2002, www.parliament.uk/parliamentary-committees/lords-s-comm-f/cwm-f.cfm

²⁹ *Op. cit.*, p 6.

³⁰ The Explanatory Note on the Agreement further states that: "A broad, categorical, or systematic application of data protection principles by the requested State to refuse co-operation is therefore precluded. Thus, the fact [that] the requesting and requested States have different systems of protecting the privacy of data (such as that the requesting State does not have the equivalent of a specialised data protection authority) or have different means of protecting personal data (such as that the requesting State uses means other than the process of deletion to protect the privacy or the accuracy of the personal data received by law enforcement authorities), may as such not be imposed as additional conditions under Article 9(2)(a)." It is also to be noted that under Article 9(4) a requested State may apply the relevant provision of its bilateral treaty in substitution where doing so will result in less restriction on the use of information or evidence.

APPENDIX 1

Sub-Committee E (Law and Institutions)

The members of Sub-Committee E are:

Lord Brennan
Lord Fraser of Carmyllie
Lord Grabiner
Lord Henley
Lord Lester of Herne Hill
Lord Mayhew of Twysden
Lord Neill of Bladen
Lord Plant of Highfield
Lord Scott of Foscote (Chairman)
Baroness Thomas of Walliswood
Lord Thomson of Monifieth

The Specialist Adviser was Professor William Gilmore.

Declared interests:

Lord Lester of Herne Hill Council Member of JUSTICE