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America on extradition and on mutual legal assistance

Delegations will find attached the declassified version of the above document.

The text of the document is identical to the previous version.

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**COUNCIL OF
THE EUROPEAN UNION**

Brussels, 9 April 2003

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**CATS 20
USA 29**

NOTE

from :	Presidency
to :	Article 36 Committee/Coreper/Council
No. prev. doc. :	6404/2/03 REV 2 CATS 11 USA 11 CONFIDENTIEL UE
Subject :	Draft Agreements between the European Union and the United States of America on extradition and on mutual legal assistance

Delegations will find attached the texts of the draft agreements and the explanatory notes as they stand after the negotiation session in Washington D.C. of 3-4 April 2003. Any changes as compared to the text set out in doc. 6404/2/03 REV 2 CATS 11 USA 11 CONFIDENTIEL UE are underlined.

Deletions are indicated by [...]

This text is submitted to the Article 36 Committee/Coreper/Council together with a draft Article 24 Decision concerning signature (see doc. 8296/03 CATS 21 USA 30).

**DRAFT AGREEMENT ON EXTRADITION
BETWEEN THE UNITED STATES OF AMERICA
AND THE EUROPEAN UNION**

Contents

Preamble

Article 1 Object and Purpose

Article 2 Definitions

Article 3 Scope of Application of this Agreement in
..... relation to bilateral extradition treaties with Member States

Article 4 Extraditable offences

Article 5..... Transmission and authentication of documents

Article 6..... Transmission of requests for provisional arrest

Article 7 Transmission of documents following provisional arrest

Article 8 Supplemental information

Article 9 Temporary surrender

Article 10 Requests for extradition or surrender made by several States

CONFIDENTIEL UE

Article 11	Simplified extradition procedures
Article 12	Transit
Article 13	Capital punishment
Article 14	Sensitive information in a request
Article 15	Consultations
Article 16	Temporal Application
Article 16a	Non-derogation
Article 17	Future bilateral extradition treaties with Member States
Article 18	Designation and notification
Article 19	Territorial Application
Article 19a	Review
Article 20	Entry into force and termination

Explanatory Note

CONFIDENTIEL UE

The United States of America and the European Union,

Desiring to further facilitate cooperation between the United States of America and European Union Member States,

Desiring to combat crime in a more effective way as a means of protecting our respective democratic societies and our common values;

Having due regard for rights of individuals and the rule of law;

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;

Desiring to conclude an Agreement relating to the extradition of offenders,

Have agreed as follows:

CONFIDENTIEL UE

Article 1: Object and Purpose

The Contracting Parties undertake, in accordance with the provisions of this Agreement, to provide for enhancements to cooperation in the context of applicable extradition relations between the United States of America and Member States governing extradition of offenders.

Article 2: Definitions

1. “Contracting Parties” shall mean the European Union and the United States of America;
2. “Member State” shall mean a Member State of the European Union;
3. “Ministry of Justice” shall, for the United States of America, mean the United States Department of Justice; and for a Member State, its Ministry of Justice, except that with respect to a Member State in which functions described in Articles 3, 5, 6, 8 or 12 are carried out by its Prosecutor General, that body may be designated to carry out such function in lieu of the Ministry of Justice in accordance with Article 18, unless the United States and the Member State concerned agree to designate another body.

Article 3: Scope of application of this Agreement in relation to bilateral extradition treaties with Member States

1. The United States of America, and the European Union pursuant to the Treaty on European Union, shall ensure that this Agreement is applied in relation to bilateral extradition treaties between the United States of America and the Member States, in force at the time of the entry into force of this Agreement, under the following terms:

CONFIDENTIEL UE

- a) Article 4 shall be applied in place of bilateral treaty provisions that authorize extradition exclusively with respect to a list of specified criminal offences;
- b) Article 5 shall be applied in place of bilateral treaty provisions governing transmission, certification, authentication or legalization of an extradition request and supporting documents transmitted by the requesting State;
- c) Article 6 shall be applied in the absence of bilateral treaty provisions authorizing direct transmission of provisional arrest requests between the United States Department of Justice and the Ministry of Justice of the Member State concerned;
- d) Article 7 shall be applied in addition to bilateral treaty provisions governing transmission of extradition requests;
- e) Article 8 shall be applied in the absence of bilateral treaty provisions governing the submission of supplementary information; where bilateral treaty provisions do not specify the channel to be used, paragraph 2 shall also be applied;
- f) Article 9 shall be applied in the absence of bilateral treaty provisions authorizing temporary surrender of persons being proceeded against or serving a sentence in the requested State;
- g) Article 10 shall be applied, except as otherwise specified therein, in place of, or in the absence of, bilateral treaty provisions pertaining to decision on several requests for extradition of the same person;
- h) Article 11 shall be applied in the absence of bilateral treaty provisions authorizing waiver of extradition or simplified extradition procedures;

CONFIDENTIEL UE

- i) Article 12 shall be applied in the absence of bilateral treaty provisions governing transit; where bilateral treaty provisions do not specify the procedure governing unscheduled landing of aircraft, paragraph 3 shall also be applied;
 - j) Article 13 may be applied by the requested State in place of, or in the absence of, bilateral treaty provisions governing capital punishment;
 - k) Article 14 shall be applied in the absence of bilateral treaty provisions governing treatment of sensitive information in a request.
2. a) The European Union pursuant to the Treaty on European Union shall ensure that each Member State acknowledges, in a written instrument between such Member State and the United States of America, the application, in the manner set forth in this Article, of its bilateral extradition treaty in force with the United States of America.
- b) The European Union, pursuant to the Treaty on European Union, shall ensure that new Member States acceding to the European Union after the entry into force of this Agreement and having bilateral extradition treaties with the United States of America, take the measures referred to in subparagraph (a).
- c) The Contracting Parties shall endeavour to complete the process described in paragraph (b) prior to the scheduled accession of a new Member State, or as soon as possible thereafter. The European Union shall notify the United States of America of the date of accession of new Member States.
3. If the process described in paragraph 2(b) is not completed by the date of accession, the provisions of this Agreement shall apply in the relations between the United States of America and that new Member State as from the date that they have notified each other and the European Union of the completion of their internal procedures for that purpose.

CONFIDENTIEL UE

Article 4: Extraditable offences

1. An offence shall be an extraditable offence if it is punishable under the laws of the requested and requesting States by deprivation of liberty for a maximum period of more than one year or by a more severe penalty. An offence shall also be an extraditable offence if it consists of an attempt or conspiracy to commit, or participation in the commission of, an extraditable offence. Where the request is for enforcement of the sentence of a person convicted of an extraditable offence, the deprivation of liberty remaining to be served must be at least four months.
2. If extradition is granted for an extraditable offence, it shall also be granted for any other offence specified in the request if the latter offence is punishable by one year's deprivation of liberty or less, provided that all other requirements for extradition are met.
3. For purposes of this Article, an offence shall be considered an extraditable offence:
 - a) regardless of whether the laws in the requesting and requested States place the offence within the same category of offences or describe the offence by the same terminology;
 - b) regardless of whether the offence is one for which United States federal law requires the showing of such matters as interstate transportation, or use of the mails or of other facilities affecting interstate or foreign commerce, such matters being merely for the purpose of establishing jurisdiction in a United States federal court; and
 - c) in criminal cases relating to taxes, customs duties, currency control and the import or export of commodities, regardless of whether the laws of the requesting and requested States provide for the same kinds of taxes, customs duties, or controls on currency or on the import or export of the same kinds of commodities.

4. If the offence has been committed outside the territory of the requesting State, extradition shall be granted, subject to the other applicable requirements for extradition, if the laws of the requested State provide for the punishment of an offence committed outside its territory in similar circumstances. If the laws of the requested State do not provide for the punishment of an offence committed outside its territory in similar circumstances, the executive authority of the requested State, in its discretion, may grant extradition provided that all other applicable requirements for extradition are met.

Article 5: Transmission and authentication of documents

1. Requests for extradition and supporting documents shall be transmitted through the diplomatic channel, which shall include transmission as provided for in Article 7.
2. Documents which bear the certificate or seal of the Ministry of Justice, or Ministry or Department responsible for foreign affairs, of the requesting State shall be admissible in extradition proceedings in the requested State without further certification, authentication, or other legalization.

Article 6: Transmission of requests for provisional arrest

Requests for provisional arrest may be made directly between the Ministries of Justice of the requesting and requested States, as an alternative to the diplomatic channel. The facilities of the International Criminal Police Organization (Interpol) may be used to transmit such a request.

CONFIDENTIEL UE

Article 7: Transmission of documents following provisional arrest

1. If the person whose extradition is sought is held under provisional arrest by the requested State, the requesting State may satisfy its obligation to transmit its request for extradition and supporting documents through the diplomatic channel pursuant to Article 5, paragraph 1, by submitting the request and documents to the Embassy of the requested State located in the requesting State. In that case, the date of receipt of such request by the Embassy shall be considered to be the date of receipt by the requested State for purposes of applying the time limit that must be met under the applicable extradition treaty to enable the person's continued detention.
2. Where a Member State on the date of signature of this Agreement, due to the established jurisprudence of its domestic legal system applicable at such date, cannot apply the measures referred to in paragraph 1, this Article shall not apply to it, until such time as that State and the United States of America, by exchange of diplomatic note, agree otherwise.¹

Article 8: Supplemental information

1. The requested State may require the requesting State to furnish additional information within such reasonable length of time as it specifies, if it considers that the information furnished in support of the request for extradition is not sufficient to fulfil the requirements of the applicable extradition treaty.
2. Such supplementary information may be requested and furnished directly between the Ministries of Justice of the States concerned.

¹ It is understood that the conditions set forth in this paragraph apply solely to Germany, which has indicated the grave legal problems flowing from its case law. The bilateral instrument exchanged with that Member State shall omit the obligation set forth in Article 7 that will otherwise be contained in the bilateral instrument with each existing and future Member State.

Article 9: Temporary surrender

1. If a request for extradition is granted in the case of a person who is being proceeded against or is serving a sentence in the requested State, the requested State may temporarily surrender the person sought to the requesting State for the purpose of prosecution.
2. The person so surrendered shall be kept in custody in the requesting State and shall be returned to the requested State at the conclusion of the proceedings against that person, in accordance with the conditions to be determined by mutual agreement of the requesting and requested States. The time spent in custody in the territory of the requesting State pending prosecution in that State may be deducted from the time remaining to be served in the requested State.

Article 10: Requests for extradition or surrender made by several States

1. If the requested State receives requests from the requesting State and from any other State or States for the extradition of the same person, either for the same offence or for different offences, the executive authority of the requested State shall determine to which State, if any, it will surrender the person. In making its decision, the requested State shall consider all of the relevant factors, including, but not limited to, factors already set forth in the applicable extradition treaty, and, where not already so set forth, the following:
 - (a) whether the requests were made pursuant to a treaty
 - (b) the places where each of the offences were committed;
 - (c) the respective interests of the requesting States;
 - (d) the gravity of the offences;
 - (e) the nationality of the victim;
 - (f) the possibility of any subsequent extradition between the requesting States; and
 - (g) the chronological order in which the requests were received from the requesting States.

2. A request for arrest and surrender pursuant to the European Arrest Warrant received by a Member State shall be considered a request for extradition for the purpose of applying this Article.

Article 11: Simplified extradition procedures

1. If the person sought consents to be surrendered to the requesting State, the requested State may, in accordance with the principles and procedures provided for under its legal system, surrender the person as expeditiously as possible without further proceedings. The consent of the person sought may include agreement to waiver of protection of the rule of speciality.

Article 12: Transit

1. The United States of America may authorize transportation through its territory of a person surrendered to a Member State by a third State, or by a Member State to a third State. A Member State may authorize transportation through its territory of a person surrendered to the United States by a third State, or by the United States to a third State.
2. A request for transit shall be made through the diplomatic channel or directly between the United States Department of Justice and the Ministry of Justice of the Member State concerned. The facilities of the International Criminal Police Organization (Interpol) may be used to transmit such a request. The request shall contain a description of the person being transported and a brief statement of the facts of the case. A person in transit shall be detained in custody during the period of transit.
3. Authorization is not required when air transportation is used [...] and no landing is scheduled on the territory of the transit State. If an unscheduled landing does occur, the State in which the unscheduled landing occurs may require a request for transit pursuant to paragraph 2. All measures necessary to prevent the person from absconding shall be taken until transit is effected, as long as the request for transit is received within 96 hours of the unscheduled landing.

CONFIDENTIEL UE

Article 13: Capital Punishment

Where the offence for which extradition is sought is punishable by death under the laws in the requesting State and not punishable by death under the laws in the requested State, the requested State may grant extradition 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. If the requesting State accepts extradition subject to conditions pursuant to this paragraph, it shall comply with the conditions. If the requesting State does not accept the conditions, the request for extradition may be denied.

Article 14: Sensitive information in a request

Where the requesting State contemplates the submission of particularly sensitive information in support of its request for extradition, it may consult the requested State to determine the extent to which the information can be protected by the requested State. If the requested State cannot protect the information in the manner sought by the requesting State, the requesting State shall determine whether the information shall nonetheless be submitted.

Article 15: Consultations

The Contracting Parties shall, as appropriate, consult to enable the most effective use to be made of this Agreement, including to facilitate the resolution of any dispute regarding the interpretation or application of this Agreement.

Article 16: Temporal Application

1. This Agreement shall apply to offences committed before as well as after it enters into force.

2. This Agreement shall apply to requests for extradition made after its entry into force. Nevertheless, Articles 4 and 9 of this Agreement shall apply to requests pending in a requested State at the time this Agreement enters into force.

Article 16a: Non-derogation

1. This Agreement is without prejudice to the invocation by the requested State of grounds for refusal relating to a matter not governed by this Agreement that is available pursuant to a bilateral extradition treaty in force between the United States of America and a Member State.
2. Where the constitutional principles of the requested State may pose an impediment to fulfilment of its obligation to extradite, and resolution of the matter is not provided for in this Agreement or the applicable bilateral treaty, consultations shall take place between the requested and requesting States.

Article 17: Future bilateral extradition treaties with Member States

This Agreement shall not preclude the conclusion, after its entry into force, of bilateral Agreements between a Member State and the United States of America consistent with this Agreement.

Article 18: Designation and notification

The European Union shall notify the United States of any designation pursuant to Article 2, paragraph 3, prior to the exchange of written instruments between the United States and the Member States described in Article 3, paragraph 2.

Article 19: Territorial application

This Agreement shall apply:

1. to the United States of America;
2. in relation to the European Union to:
 - a) Member States;
 - b) such overseas territories for whose external relations a Member State has responsibility, or countries that are not Member States for whom a Member State has other duties with respect to external relations, and which are listed in the Annex to this Agreement;
 - c) territories or countries described in subparagraph (b) that are not listed in the Annex, where agreed upon between the Contracting Parties by exchange of diplomatic note duly confirmed between the United States and the relevant Member State.
3. The application of this Agreement to any territory or country in respect of which extension has been made in accordance with paragraph 2 may be terminated by either Party giving six months written notice to the other Party through the diplomatic channel , where duly confirmed between the United States and the relevant Member State.

Article 19a: Review

The Contracting parties agree to carry out a common review of this Agreement no later than five years after its entry into force. The review shall in particular address the practical implementation of the agreement and may also include issues such as the consequences of further development of the European Union relating to the subject matter of this Agreement.

CONFIDENTIEL UE

Article 20: Entry into force and termination

1. This Agreement shall enter into force on the first day following the third month after the date on which the Contracting Parties have exchanged instruments between them indicating that they have completed their internal procedures for this purpose. These instruments shall also indicate that the steps specified in Article 3, paragraph 2 have been completed.
2. Either Contracting Party may terminate this Agreement at any time by giving written notice to the other Party, and such termination shall be effective six months after the date of such notice.

In witness whereof the undersigned Plenipotentiaries have signed this Agreement

Done at [] on [] in duplicate in the [] languages, each text being equally authentic.

Explanatory Note on the Agreement on Extradition between the European Union and the United States of America

This note reflects understandings regarding the application of certain provisions of the Agreement on Extradition between the European Union and the United States of America (hereinafter "the Agreement") agreed between the Contracting Parties.

On Article 17

Articles 17 provides that the Agreement shall not preclude the conclusion, after their entry into force, of bilateral agreements on extradition between a Member State and the United States of America consistent with the Agreement.

In the event that any measures set forth in the Agreement creates an operational difficulty for either the U.S. and/or one or more Member States, such difficulty should in the first place be resolved, if possible, through consultations between the EU Member State or States concerned and the United States of America, or, if appropriate, through the consultation procedures set out in this Agreement. Where it is not possible to address such operational difficulty through consultations alone, it would be consistent with the Agreement for future bilateral agreements between the EU Member State or States and the United States of America to provide an operationally feasible alternative mechanism that would satisfy the objectives of the specific provision with respect to which the difficulty has arisen.

On Article 10

Article 10 is not intended to affect the obligations of States Parties to the Rome Statute of the International Criminal Court, nor to affect the rights of non-States Parties with regard to the International Criminal Court.

CONFIDENTIEL UE

DRAFT AGREEMENT ON MUTUAL LEGAL ASSISTANCE BETWEEN THE UNITED STATES OF AMERICA AND THE EUROPEAN UNION

Contents

Preamble

Article 1 Object and Purpose

Article 2 Definitions

Article 3 Scope of application of this Agreement in relation
..... to bilateral mutual legal assistance treaties with
..... Member States and in the absence thereof

Article 4 Identification of bank information

Article 5 Joint investigative teams

Article 6 Video conferencing

Article 7 Accelerated transmission of requests

Article 8 Mutual legal assistance
..... to administrative authorities

Article 9 Limitations on use to protect personal and other data

Article 10 Requesting State's request for confidentiality

CONFIDENTIEL UE

Article 11	Consultations
Article 12	Temporal Application
Article 13	Non-derogation
Article 14	Future bilateral mutual
.....	legal assistance treaties with Member States
Article 15	Designations and notifications
Article 16	Territorial Application
Article 16a	Review
Article 17	Entry into force and termination

Explanatory Note

CONFIDENTIEL UE

Desiring to further facilitate cooperation between the United States of America and European Union Member States,

Desiring to combat crime in a more effective way as a means of protecting our respective democratic societies and our common values;

Having due regard for rights of individuals and the rule of law;

Mindful of the guarantees under their respective legal systems which provide an accused person with the right to a fair trial, including the right to adjudication by an impartial tribunal pursuant to law;

Desiring to conclude an Agreement relating to mutual legal assistance in criminal matters;

Have agreed as follows:

Article 1: Object and Purpose

The Contracting Parties undertake, in accordance with the provisions of this Agreement, to provide for enhancements to cooperation and mutual legal assistance.

Article 2: Definitions

1. “Contracting Parties” shall mean the European Union and the United States of America;
2. “Member State” shall mean a Member State of the European Union;

Article 3: Scope of application of this Agreement in relation to bilateral mutual legal assistance treaties with Member States and in the absence thereof

1. The United States of America, and the European Union pursuant to the Treaty on European Union, shall ensure that the provisions of this Agreement are applied in relation to bilateral mutual legal assistance treaties between the United States of America and the Member States, in force at the time of the entry into force of this Agreement, under the following terms:
 - a) Article 4 shall be applied to provide for identification of financial accounts and transactions in addition to any authority already provided under bilateral treaty provisions.
 - b) Article 5 shall be applied to authorize the formation and activities of joint investigative teams in addition to any authority already provided under bilateral treaty provisions.
 - c) Article 6 shall be applied to authorize the taking of testimony of a person located in the requested State by use of video transmission technology between the requesting and requested States in addition to any authority already provided under bilateral treaty provisions.
 - d) Article 7 shall be applied to provide for the use of expedited means of communication in addition to any authority already provided under bilateral treaty provisions.
 - e) Article 8 shall be applied to authorize the providing of mutual legal assistance to the administrative authorities concerned, in addition to any authority already provided under bilateral treaty provisions.

- f) Subject to Article 9, paragraphs 4 and 5, Article 9 shall be applied in place of, or in the absence of bilateral treaty provisions governing limitations on use of information or evidence provided to the requesting State, and governing the conditioning or refusal of assistance on data protection grounds.
- g) Article 10 shall be applied in the absence of bilateral treaty provisions pertaining to the circumstances under which a requesting State may seek the confidentiality of its request.
2. a) The European Union pursuant to the Treaty on European Union shall ensure that each Member State acknowledges, in a written instrument between such Member State and the United States of America, the application, in the manner set forth in this Article, of its bilateral mutual legal assistance treaty in force with the United States of America.
- b) The European Union, pursuant to the Treaty on European Union, shall ensure that new Member States acceding to the European Union after the entry into force of this Agreement, and having bilateral mutual legal assistance treaties with the United States of America, take the measures referred to in subparagraph (a).
- c) The Contracting Parties shall endeavour to complete the process described in paragraph (b) prior to the scheduled accession of a new Member State, or as soon as possible thereafter. The European Union shall notify the United States of America of the date of accession of new Member States.
3. a) The United States of America, and the European Union pursuant to the Treaty on European Union, shall also ensure that the provisions of this Agreement are applied in the absence of a bilateral mutual legal assistance treaty in force between the United States of America and a Member State.

b) The European Union pursuant to the Treaty on European Union shall ensure that such Member State acknowledges, in a written instrument between such Member State and the United States of America, the application of the provisions of this Agreement.

c) The European Union, pursuant to the Treaty on European Union, shall ensure that new Member States acceding to the European Union after the entry into force of this Agreement, which do not have bilateral mutual legal assistance treaties with the United States of America, take the measures referred to in subparagraph (b).

4. If the process described in paragraph 2(b) and 3(c) is not completed by the date of accession, the provisions of this Agreement shall apply in the relations between the United States of America and that new Member State as from the date that they have notified each other and the European Union of the completion of their internal procedures for that purpose.

5. The Contracting Parties agree that this Agreement is intended solely for mutual legal assistance between the States concerned. The provisions of this Agreement shall not give rise to a right on the part of any private person to obtain, suppress, or exclude any evidence, or to impede the execution of a request, nor expand or limit rights otherwise available under domestic law.

Article 4: Identification of bank information

1. a) Upon request of the requesting State, the requested State shall, in accordance with the terms of this Article, promptly ascertain if the banks located in its territory possess information on whether an identified natural or legal person suspected of or charged with a criminal offence is the holder of a bank account or accounts. The requested State shall promptly communicate the results of its enquiries to the requesting State.

- b) The actions described in subparagraph (a) may also be taken for the purpose of identifying:
 - i) information regarding natural or legal persons convicted of or otherwise involved in a criminal offence;
 - ii) information in the possession of non-bank financial institutions, or
 - iii) financial transactions unrelated to accounts.

2. A request for information described in paragraph 1 shall include:

- a) the identity of the natural or legal person relevant to locating such accounts or transactions; and
- b) sufficient information to enable the competent authority of the requested State to:
 - i) reasonably suspect that the natural or legal person concerned has engaged in a criminal offence and that banks or non-bank financial institutions in the territory of the requested State may have the information requested; and
 - ii) conclude that the information sought relates to the criminal investigation or proceeding.
- c) to the extent possible, information concerning which bank or non-bank financial institution may be involved, and other information the availability of which may aid in reducing the breadth of the enquiry.

3. Requests for assistance under this Article shall be transmitted between:

- a) central authorities responsible for mutual legal assistance in Member States, or national authorities of Member States responsible for investigation or prosecution of criminal offences as designated pursuant to Article 15(2), and
- b) national authorities of the United States responsible for investigation or prosecution of criminal offences, as designated pursuant to Article 15(2).

The Contracting Parties may, following the entry into force of this Agreement, agree by exchange of diplomatic note to modify the channels through which requests under this Article are made.

- 4. a) Subject to subparagraph (b), a State may, pursuant to Article 15, limit its obligation to provide assistance under this Article to:
 - i) offences punishable under the laws of both the requested and requesting States;
 - ii) offences punishable by a penalty involving deprivation of liberty or a detention order of a maximum period of at least four years in the requesting State and at least two years in the requested State; or
 - iii) designated serious offences punishable under the laws of both the requested and requesting States;
- b) A State which limits its obligation pursuant to subparagraph (a)(ii) or (iii) shall, at a minimum, enable identification of accounts associated with terrorist activity and the laundering of proceeds generated from a comprehensive range of serious criminal activities, punishable under the law of both the requesting and requested States.

5. Assistance may not be refused under this Article on grounds of bank secrecy.
6. The requested State shall respond to a request for production of the records concerning the accounts or transactions identified pursuant to this article, in accordance with the provisions of the applicable mutual legal assistance treaty in force between the States concerned, or in the absence thereof, in accordance with the requirements of its domestic law.
7. The Contracting Parties shall take measures to avoid the imposition of extraordinary burdens on requested States through application of this Article. Where extraordinary burdens on a requested State nonetheless result, including on banks or by operation of the channels of communications foreseen in this Article, the Contracting Parties shall immediately consult with a view to facilitating the application of this Article, including the taking of such measures as may be required to reduce pending and future burdens.

Article 5: Joint investigative teams

1. The Contracting Parties shall, to the extent they have not already done so, take such measures as may be necessary to enable joint investigative teams to be established and operated in the respective territories of the United States and each Member State, for the purpose of facilitating criminal investigations or prosecutions involving the United States and one or more Member States where deemed appropriate by the United States and the Member State concerned.
2. The procedures under which the team is to operate, such as its composition, duration, location, organization, functions, purpose, and terms of participation of team members of a State in investigative activities taking place in another State's territory shall be as agreed between the competent authorities responsible for the investigation or prosecution of criminal offences, as determined by the respective States concerned.

3. The competent authorities determined by the respective States concerned shall communicate directly for the purposes of the establishment and operation of such team except that where the exceptional complexity, broad scope, or other circumstances involved are deemed to require more central coordination as to some or all aspects, the States may agree upon other appropriate channels of communications to that end.
4. Where the joint investigative team needs investigative measures to be taken in one of the States setting up the team, a member of the team of that State may request its own competent authorities to take those measures without the other States having to submit a request for mutual legal assistance. The required legal standard for obtaining the measure in that State shall be the standard applicable to its domestic investigative activities.

Article 6: Video conferencing

1. The Contracting Parties shall take such measures as may be necessary to enable the use of video transmission technology between the United States of America and each Member State for taking testimony in a proceeding for which mutual legal assistance is available of a witness or expert located in a requested State, to the extent such assistance is not currently available. To the extent not specifically set forth in this article, the modalities governing such procedure shall be as provided under the applicable mutual legal assistance treaty in force between the States concerned, or the law of the requested State, as applicable.
2. Unless otherwise agreed by the requesting and requested States, the requesting State shall bear the costs associated with establishing and servicing the video transmission. Other costs arising in the course of providing assistance (including costs associated with travel of participants in the requested State) shall be borne in accordance with the applicable provisions of the mutual legal assistance treaty in force between the States concerned, or, absent such a treaty, as agreed upon by the requesting and requested States.
3. The requesting and requested States may consult in order to facilitate resolution of legal, technical or logistical issues that may arise in the execution of the request.

CONFIDENTIEL UE

4. Without prejudice to any jurisdiction under the law of the requesting State, making an intentionally false statement or other misconduct of the witness or expert during the course of the video conference shall be punishable in the requested State in the same manner as if it had been committed in the course of its domestic proceedings.
5. This Article is without prejudice to the use of other means for obtaining of testimony in the requested State available under applicable treaty or law.
6. This Article is without prejudice to application of provisions of bilateral mutual legal assistance agreements between the United States of America and Member States that require or permit the use of video conferencing technology for purposes other than those described in paragraph 1, including for purposes of identification of persons or objects, or taking of investigative statements. Where not already provided for under applicable treaty or law, a State may permit the use of video conferencing technology in such instances.

Article 7: Expedited transmission of requests

Requests for mutual legal assistance, and communications related thereto, may be made by expedited means of communications, including fax or e-mail, with formal confirmation to follow where required by the requested State. The requested State may respond to the request by any such expedited means of communication.

Article 8: Mutual legal assistance to administrative authorities

1. Mutual legal assistance shall also be afforded to a national administrative authority, investigating conduct with a view to a criminal prosecution of the conduct, or referral of the conduct to criminal investigation or prosecution authorities, pursuant to its specific administrative or regulatory authority to undertake such investigation. Mutual legal assistance may also be afforded to other administrative authorities under such circumstances. Assistance shall not be available for matters in which the administrative authority anticipates that no prosecution or referral, as applicable, will take place.

2. a) Requests for assistance under this article shall be transmitted between the central authorities designated pursuant to the bilateral mutual legal assistance treaty in force between the States concerned, or between such other authorities as may be agreed by the central authorities.
 - b) In the absence of a treaty, requests shall be transmitted between the United States Department of Justice and the Ministry of Justice or, pursuant to Article 15, comparable Ministry of the Member State concerned responsible for transmission of mutual legal assistance requests, or between such other authorities as may be agreed by the Department of Justice and such Ministry.
3. The Contracting Parties shall take measures to avoid the imposition of extraordinary burdens on requested States through application of this Article. Where extraordinary burdens on a requested State nonetheless result, the Contracting Parties shall immediately consult with a view to facilitating the application of this Article, including the taking of such measures as may be required to reduce pending and future burdens.

Article 9: Limitations on use to protect personal and other data

1. The requesting State may use any evidence or information obtained from the requested State:
 - a) for the purpose of its criminal investigations and proceedings;
 - b) for preventing an immediate and serious threat to its public security;
 - c) in its non-criminal judicial or administrative proceedings directly related to investigations or proceedings:
 - i) set forth in subparagraph (a); or
 - ii) for which mutual legal assistance was rendered under Article 8;
 - d) for any other purpose, if the information or evidence has been made public within the framework of proceedings for which they were transmitted, or in any of the situations described in subparagraphs (a), (b) and (c); and
 - e) for any other purpose, only with the prior consent of the requested State.

2. a) This Article shall not prejudice the ability of the requested State to impose additional conditions in a particular case where the particular request for assistance could not be complied with in the absence of such conditions. Where additional conditions have been imposed in accordance with this paragraph, the requested State may require the requesting State to give information on the use made of the evidence or information.
- b) 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 under subparagraph (a) to providing evidence or information.
3. Where, following disclosure to the requesting State, the requested State becomes aware of circumstances that may cause it to seek an additional condition in a particular case, the requested State may consult with the requesting State to determine the extent to which the evidence and information can be protected.
4. A requested State may apply the use limitation provision of the applicable bilateral mutual legal assistance treaty in lieu of the present article, where doing so will result in less restriction on the use of information and evidence than provided for in this article.
5. Where a bilateral mutual legal assistance treaty in force between the United States of America and a Member State on the date of signature of this Agreement, permits limitation of the obligation to provide assistance with respect to certain tax offences, the Member State concerned may indicate, in its exchange of written instruments with the United States described in Article 3, paragraph 2, that, with respect to such offences, it will continue to apply the use limitation provision of that treaty.¹

¹ This paragraph is intended to apply solely to Luxembourg.

Article 10: Requesting State's request for confidentiality

The requested State shall use its best efforts to keep confidential a request and its contents if such confidentiality is requested by the requesting State. If the request cannot be executed without breaching the requested confidentiality, the central authority of the requested State shall so inform the requesting State, which shall then determine whether the request should nevertheless be executed.

Article 11: Consultations

The Contracting Parties shall, as appropriate, consult to enable the most effective use to be made of this Agreement, including to facilitate the resolution of any dispute regarding the interpretation or application of this Agreement.

Article 12: Temporal Application

1. This Agreement shall apply to offences committed before as well as after it enters into force.
2. This Agreement shall apply to requests for mutual legal assistance made after its entry into force. Nevertheless, Articles 6 and 7 of this Agreement shall apply to requests pending in a requested State at the time this Agreement enters into force.

Article 13: Non-derogation

Subject to Article 4, paragraph 5 and Article 9, paragraph 2(b), this Agreement is without prejudice to the invocation by the requested State of grounds for refusal of assistance available pursuant to a bilateral mutual legal assistance treaty, or, in the absence of a treaty, its applicable legal principles, including where execution of the request would prejudice its sovereignty, security, ordre public or other essential interests.

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Article 14: Future mutual legal assistance treaties with Member States

This Agreement shall not preclude the conclusion, after its entry into force, of bilateral Agreements between a Member State and the United States of America consistent with this Agreement.

Article 15: Designations and notifications

1. Where a Ministry other than the Ministry of Justice has been designated under Article 8, paragraph 2(b), the European Union shall notify the United States of such designation prior to the exchange of written instruments between the United States and the Member States described in Article 3, paragraph 3.
2. The Contracting Parties, on the basis of consultations between them on which national authorities responsible for the investigation and prosecution of offences to designate pursuant to Article 4(3), shall notify each other of the national authorities so designated prior to the exchange of written instruments between the United States and the Member States described in Article 3, paragraphs 2 and 3. The European Union shall, for Member States having no mutual legal assistance treaty with the United States, notify the United States prior to such exchange of the identity of the central authorities under Article 4, paragraph 3.
3. The Contracting Parties shall notify each other of any limitations invoked under Article 4, paragraph 4 prior to the exchange of written instruments between the United States and the Member States described in Article 3, paragraphs 2 and 3.

Article 16: Territorial application

This Agreement shall apply:

1. to the United States of America;

2. in relation to the European Union:
 - a) Member States;
 - b) such overseas territories for whose external relations a Member State has responsibility, or countries that are not Member States for whom a Member State has other duties with respect to external relations, and, which are listed in the Annex to this Agreement;
 - c) territories or countries described in subparagraph (b) that are not listed in the Annex, where agreed upon between the Parties by exchange of diplomatic note duly confirmed between the United States and the relevant Member State.
3. The application of this Agreement to any territory or country in respect of which extension has been made in accordance with paragraph 2 may be terminated by either Party giving six months written notice to the other Party through the diplomatic channel, where duly confirmed between the United States and the relevant Member State.

Article 16a: Review

The Contracting parties agree to carry out a common review of this Agreement no later than 5 years after its entry into force. The review shall in particular address the practical implementation of the agreement and may also include issues such as the consequences of further development of the European Union relating to the subject matter of this Agreement.

Article 17: Entry into force and termination

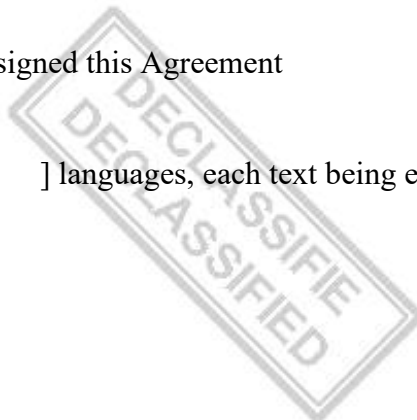
1. This Agreement shall enter into force on the first day following the third month after the date on which the Contracting Parties have exchanged instruments between them indicating that they have completed their internal procedures for this purpose. These instruments shall also indicate that the steps specified in Article 3, paragraphs 2 and 3 have been completed.

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2. Either Contracting Party may terminate this Agreement at any time by giving written notice to the other Party, and such termination shall be effective six months after the date of such notice.

In witness whereof the undersigned Plenipotentiaries have signed this Agreement

Done at [] on [] in duplicate in the [] languages, each text being equally authentic.



Explanatory Note on the Agreement on Mutual Legal Assistance between the European Union and the United States of America

This note reflects understandings regarding the application of certain provisions of the Agreement on Mutual Legal Assistance between the European Union and the United States of America (hereinafter "the Agreement") agreed between the Contracting Parties.

On Article 14

Article 14 provides that the Agreement shall not preclude the conclusion, after their entry into force, of bilateral agreements on mutual legal assistance between a Member State and the United States of America consistent with the Agreement.

In the event that any measures set forth in the Agreement creates an operational difficulty for the U.S. and one or more Member States, such difficulty should in the first place be resolved, if possible, through consultations between the EU Member State concerned and the United States of America, or, if appropriate, through the consultation procedures set out in the Agreement. Where it is not possible to address such operational difficulty through consultations alone, it would be consistent with the Agreement for future bilateral agreements between an EU Member State and the United States of America to provide an operationally feasible alternative mechanism that would satisfy the objectives of the specific provision with respect to which the difficulty has arisen.

On Article 8

With respect to the mutual legal assistance to administrative authorities under Article 8(1), the first sentence of Article 8 (1) imposes an obligation to afford mutual legal assistance to requesting U.S. federal administrative authorities and to requesting national administrative authorities of EU Member States. Under the second sentence of that paragraph mutual legal assistance may also be made available to other - that is non-federal or local - administrative authorities. This provision however, is available at the discretion of the requested State.

The Parties agree that under the first sentence of Article 8 (1) mutual legal assistance will be made available to a requesting administrative authority that is, at the time of making the request, conducting investigations or proceedings in contemplation of criminal prosecution or referral of the investigated conduct to the competent prosecuting authorities, within the terms of its statutory mandate, as further described immediately below. The fact that, at the time of making the request referral for criminal prosecution is being contemplated does not exclude that, other sanctions than criminal ones may be pursued by that authority. Thus, mutual legal assistance obtained under Article 8 (1) may lead the requesting administrative authority to the conclusion that pursuance of criminal proceedings or criminal referral would not be appropriate. These possible consequences do not affect the obligation upon the Contracting Parties to provide assistance under this Article.

However, the requesting administrative authority may not use Article 8 (1) to request assistance where criminal prosecution or referral is not being contemplated, or for matters in which the conduct under investigation is not subject to criminal sanction or referral under the laws of the requesting State.

The EU recalls that the subject matter of the Agreement for its part falls under the provisions on police and judicial cooperation in criminal matters set out in Title VI of the Treaty on European Union and that the Agreement has been concluded within the scope of these provisions.

On Article 9

Article 9(2)(b) is meant to ensure that refusal of assistance on data protection grounds may be invoked only in exceptional cases. Such a situation could arise if, upon balancing the important interests involved in the particular case (on the one hand, public interests, including the sound administration of justice and, on the other hand, privacy interests), furnishing the specific data sought by the requesting State would raise difficulties so fundamental as to be considered by the requested State to fall within the essential interests grounds for refusal. A broad, categorical, or systematic application of data protection principles by the requested State to refuse co-operation is therefore precluded. Thus, the fact 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(2a).
