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NOTE

from:	Presidency
to:	Working Party on Co-operation in Criminal Matters
Subject:	Handbook on the practical application of the EU-U.S. Mutual Legal Assistance and Extradition Agreements

Delegations find attached a draft Handbook, which has been jointly prepared by the Presidency and the US delegation.

Whilst such Handbook does not have authoritative force, the Presidency is of the opinion that it might nevertheless be a useful tool for practitioners in understanding the EU-U.S. Agreements. Once the forms under Article 4 of the EU-U.S. MLA agreement (7139/11 COPEN 32 EJN 16 EUROJUST 24 USA 19) are finalised, these can be attached to the Handbook.

The Presidency invites delegations to inform it of any comments they might have on this draft Handbook.

ANNEX

INTRODUCTION TO THE AGREEMENTS ON EXTRADITION AND MUTUAL LEGAL ASSISTANCE BETWEEN THE UNITED STATES AND THE EUROPEAN UNION

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Part I: HISTORICAL CONTEXT

Following the attacks of September 11, 2001, the United States and the European Union (EU) initiated a series of consultations to identify ways to improve security and law enforcement cooperation. Articles 24 and 38 of the Treaty on European Union (TEU) permitted the Presidency of the Council to negotiate international agreements in justice and home affairs matters on behalf of the Member States. Early in the discussion process, extradition and mutual legal assistance were identified as two areas of international cooperation that should be modernized and streamlined in order to expand and facilitate cooperation.

Formal negotiations between the United States of America and the European Union began in the spring of 2002 and the two agreements were signed by the United States and the European Union on June 25, 2003.

The extradition agreement incorporated facets of modern practice that were absent from older extradition treaties between the United States and Member States (*e.g.,* conversion of list treaties to a dual criminality approach; streamlining of process for authentication and transmission of documents); while the mutual legal assistance agreement (MLA) provided a number of provisions absent even from newer mutual legal assistance treaties (MLATs) (*e.g.*, tools to identify bank accounts and transactions, and to facilitate the establishment of joint investigative teams). The EU-U.S. Agreements were historic in that they were both the first law enforcement agreements concluded between the United States and the European Union, and the first international agreements in cooperation in criminal matters to be negotiated by the European Union under Articles 24 and 38 TEU.

The EU - U.S. agreements do not replace the existing bilateral Treaties but supplement them. Thereafter, the United States and the individual Member States began the process of drafting bilateral instruments to reflect the EU-U.S. Agreements based obligations in the bilateral extradition and mutual legal assistance relationships of the United States and the Member States. The negotiation of the bilateral instruments with the 15 EU Member States came next, closely followed by negotiation with the 10 Member States that acceded to the European Union on May 1, 2004.

Following the accession of Bulgaria and Romania to the European Union on January 1, 2007, two full extradition treaties and two bilateral mutual legal assistance instruments were concluded with these countries during 2007.

The exchange of instruments between the European Union and the United States of America accordingly took place on October 28, 2009, and operated to fix the entry in force date for both EU-U.S. Agreements and all the corresponding bilateral instruments as February 1, 2010.

Part II: ISSUES COMMON TO THE AGREEMENTS AND BILATERAL INSTRUMENTS

(a) Effect of EU - U.S. Agreements on Existing Extradition Treaties and MLATs

The EU-U.S. Agreements selectively amend and supplement existing bilateral extradition treaties and MLATs between the United States and Member States. The United States has extradition treaties with all EU Member States, and MLATs with 20 of the 27. The MLA Agreement serves to create for the first time a treaty-based, albeit partial, mutual legal assistance relationship between the Unites States and the other seven Member States (Bulgaria, Denmark, Finland, Malta, Portugal, Slovakia, and Slovenia).

The European Union, as a Contracting Party, is responsible for implementation of the obligations contained in each Agreement, even though practical application of those obligations would occur at the Member State level. EU Member States, although not formally Contracting Parties, are bound to the provisions of each EU-U.S. Agreement as a matter of EU law, and they also have separate but parallel international obligations to the United States pursuant to the bilateral instruments.

(b) Title and Form of Bilateral Instruments

The EU-U.S. Agreements themselves, in Article 3(2), refer to the United States and each Member State entering into a "written instrument" to "acknowledge" their effect on existing bilateral extradition treaties or/and MLATs.

The obligation to negotiate bilateral instruments between the United States and each Member State flows from the text of the EU-U.S. Agreements itself (Article 3 (2)). The American negotiators had several concerns that led them to insist on this requirement. The paramount concern of the U.S. negotiators was one of clarity: it had to be absolutely clear to US prosecutors and U.S. courts how the provisions of the EU-U.S. Agreements would relate to those of the bilateral extradition and mutual legal assistance treaties. As a matter of EU law, the Member States were obliged to comply, in their bilateral relationships with the United States, with the requirements flowing from the EU-U.S. Agreements.

The compromise term left it to each Member State to determine, together with the United States, the nature of these 'written instrument'. Most of the Member States chose to use the term "instrument," but others chose different titles used under their national treaty laws , such as supplementary treaty (Germany and Czech Republic), protocol (Austria and Greece) or agreement (Netherlands and Poland). From the point of view of international law, the result is the same as all Member States became bound by the EU-U.S. Agreements upon their conclusion and all bilateral instruments, whatever their denomination, are binding on the (Member) States that have entered into these instruments. A possible difference lies at the domestic, constitutional level of Member States, as the constitutional requirements (e.g. ratification) may differ according to whether these instruments are termed instruments or Protocols. For the United States, all of the instruments (as well as the Agreements with the Union) were subject to the full U.S. ratification procedure.

There also is some variation in the form of the bilateral instruments. A majority of EU Member States opted for an instrument containing an annex in which the changes made by the EU-U.S. Agreements are consolidated with the provisions from the pre-existing bilateral treaties, so that the entirety is readily accessible to judges and practitioners.

Other Member States advised that their domestic treaty law did not permit the integrated text approach, so instead only the newly-operative supplemental or replacement language is set forth, and is placed in the instrument itself rather than in a separate annex. Still other Member States (*i.e.*, France and Luxembourg) chose a descriptive approach in which the EU-U.S. Agreements- based obligations are reproduced in the bilateral instruments and the manner of their application to the existing treaties is specified. The consequence of this non-integrated approach is that reference to both the instruments and the pre-existing treaties is necessary in order to apply the entire set of obligations between the United States and the Member State.

(c) Temporal Application

The EU-U.S. Agreements and bilateral instruments entered into force on the same date (*i.e.*,1 February 2010).

Both EU - U.S. Agreements (Article 16(1) of Extradition and Article 12(1) of MLA) provide that they apply to offences committed both before and after their entry into force. In general, the EU-U.S. Agreements (Article 16(2) of Extradition and Article 12(2) of MLA) apply only to requests made after their entry into force, with requests made prior to entry into force being treated under the preexisting bilateral extradition treaties or MLATs (or, in the absence of an MLAT, by the domestic law of the Requested State). However, in the case of extradition, Articles 4 (dual criminality) and 9 (temporary extradition) apply even to requests already pending at the time of entry into force of the agreement.

These temporal application provisions have also been carried over into the bilateral instruments.

(d) Territorial Scope

Both EU-U.S. Agreements (Article 20 of Extradition and Article 16 of MLA) provide that the jurisdiction of a Member State shall extend to territories for whose external relations it is responsible, and to countries for which the Member State has other duties pertaining to its external relations. If the Member State wishes the EU-U.S. Agreement to apply to such territories or countries, this is to be confirmed by exchanges of diplomatic notes between the United States and the European Union and between the Member State and the European Union. So far only the Netherlands, availed itself of this possibility. For the Netherlands the scope of the Extradition Agreement was extended to the Netherlands Antilles and Aruba. This was done by way of exchange of diplomatic notes from the General Secretariat of the Council with the Mission of the United States of America to the European Union on 9 June 2009, acknowledged in the diplomatic note of the United States Mission to the European Union of 16 June 2009 and confirmed through Council Decision 2009/933/CFSP of 30 November 2009 on the extension, on behalf of the European Union, of the territorial scope of the Agreement on extradition between the European Union and the United States of America.[1]

[1] OJ, L 325, 11.12.2009, p. 4.

(e) Periodic Review of Agreements/Institutional Role of European Union

Both EU-U.S. Agreements (Article 21 of Extradition and Article 17 of MLA) stipulate that the Contracting Parties will review their application no later than five years after entry into force, looking not only at practical aspects but also at the evolving role of the European Union in relation to law enforcement. The Agreements will be carried out, on a day-to-day basis, by the Member States, through the bilateral extradition treaty and MLAT in practice. However, the Agreements may also form the basis for an institutional relationship between the European Union and the United States on law enforcement and broader public security topics.

(f) Consultations

The EU-U.S. Agreements (Article 15 of Extradition and Article 11 of MLA) provide for consultations between the United States and the European Union, rather than between the United States and a Member State with which a dispute may arise. Bearing in mind that the European Union negotiated the EU-U.S. Agreements on behalf of the Member States, and that EU law gives it authority over Member States with respect to the subject matter of the EU-U.S. Agreements, the European Union is in a unique position to assist Member States in understanding the intended meaning, and appropriate application, of particular provisions. In addition, there are a number of consultation provisions contemplated by the EU-U.S. Agreements that apply between the United States and the Member States in their roles as Requesting and Requested States, and, of course, the bilateral extradition and MLA treaties modified by the EU-U.S. Agreements also frequently contemplate periodic consultations. Only the consultation provisions of the EU-U.S. Agreements that foresee a role for Member States are carried over into the bilateral instruments.

(g) Effect of Further EU Accession

If and when new Member States join the European Union, they will assume the same rights and obligations as all other EU Member States pursuant to Article 3 of the EU-U.S. Agreements. Such states will also be expected to reflect the new bilateral obligations in bilateral instruments with the United States.

(h) Termination of U.S.-EU Agreements and Bilateral Instruments

The EU-U.S. Agreements have standard termination clauses, entailing written notice effective six months thereafter. Each bilateral instrument also would terminate if the EU-U.S. Agreements were to terminate. Thereupon, application of the pre-existing bilateral extradition treaties and MLATs in their unamended form, which are regarded as suspended while the bilateral instruments are in force, would resume. However, the United States and the individual Member States could agree bilaterally to continue to apply some or all of the provisions in the bilateral instrument that are derived from the EU-U.S. Agreements. Most of the bilateral instruments contain an express statement to this effect.

(i) Future bilateral treaties

Article 18 of the EU - U.S. Extradition Agreement and Article 14 of the EU - US MLA Agreement permit the negotiation of new bilateral treaties between the United States and Member States that are consistent with the respective EU - U.S. Agreements. The explanatory note annexed to the EU - U.S.
Agreements provides further clarification regarding the types of provisions that would be "consistent" with the Agreements.

Part III: THE EXTRADITION AGREEMENT

(a) Structure

The EU-U.S. Extradition Agreement is designed to modernize older treaty texts, thereby expanding and facilitating cooperation. However, its provisions do not apply equally to all U.S. bilateral treaties with Member States.

This variable geometry approach manifests itself in two ways. First, so as not to weaken stronger existing treaties, Article 3(1) carefully sets forth the circumstances under which the provisions of the EU-U.S. Agreement apply to a particular Member State. Second, some treaties, especially those most recently negotiated, already contain provisions similar to those covered by the EU - U.S. Extradition Agreement, and it was not worthwhile making slight changes to provisions that were already well-understood and functioning properly at the bilateral level.

(b) Extraditable Offenses (Article 4)

The dual criminality provision of the EU-U.S. Extradition Agreement has modernized the definition of an extraditable offense by applying a dual criminality analysis in older treaties that do not already apply such a standard. Previously, extradition had sometimes been impossible between the United States and Member States when, despite the existence of dual criminality between the United States and the Member State, the offence was a modern one that was not listed among offences for which the treaty authorized extradition. For example, more modern offences such as material support for terrorism, cybercrime, intellectual property offences and even money laundering are often not specified as extraditable offences under the older list treaties. By replacing the list approach with a straight dual criminality standard, the scope of extraditable offences between all Member States and the United States becomes essentially the same.

This provision has modernized list treaties currently in use with seven Member States: the Czech Republic, Denmark, Finland, Greece, Portugal, the Slovak Republic and Slovenia. In addition, the new extradition treaties with Bulgaria, Estonia, Latvia, Malta and Romania also apply the dual criminality standard.

Where there is already a dual-criminality approach in the existing bilateral extradition treaty with a Member State the EU-U.S. Agreement's provision does not apply, as it was preferable to continue to apply the existing and well-functioning provisions and any improvements bestowed by the EU-U.S. Agreement's text over the existing bilateral dual criminality language would not be significant.

(c) Authentication of Extradition Documents (Article 5(2))

Article 5(2) of the EU-U.S. Extradition Agreement has harmonized the authentication requirement for all 27 bilateral extradition treaties, which previously addressed the issue of authentication in several different ways. The provision eliminates burdensome and time-consuming authentication requirements sometimes found in older treaties. It is expected that this provision simplifies and expedites the presentation of extradition requests. By specifying that documents transmitted through the diplomatic channel bearing the official seal of the Ministry of Justice or Ministry of Foreign Affairs of the Requesting State shall be admitted in extradition proceedings in the Requested State without further certification, authentication or other legalization, the provision reflects the

prevailing view that such documents bear sufficient indicia of reliability. This provision replaces existing provisions in all the bilateral extradition treaties between the United States and the Member States, and appears in the new extradition treaties with Bulgaria, Estonia, Latvia, Malta and Romania, thereby establishing a uniform authentication standard.

(d) Transmission of Provisional Arrest Requests (Article 6)

The authorization to transmit provisional arrest requests directly between the ministries of justice or through the Interpol channel appears in many modern extradition treaties and ensures that urgent requests for a fugitive's arrest are received and acted upon quickly, as such channels of transmission are often faster, particularly outside of normal business hours. Accordingly, where the existing bilateral treaty does not have this kind of provision, the EU-U.S. Extradition Agreement requires that it be inserted.

This provision supplements eight treaties (the Czech Republic, Finland, Germany, Greece, Portugal, the Slovak Republic, Slovenia and Sweden) that currently lack a similar provision and it is also incorporated into the comprehensive extradition treaties with Bulgaria, Estonia, Latvia, Malta and Romania.

(e) Transmission of Extradition Documents Following Provisional Arrest (Article 7)

Articles 5(1) and 7 of the EU-U.S. Extradition Agreement, when read together, provide for the transmission of formal extradition requests following provisional arrest to the Requested State's Embassy in the Requesting State. When presented to the Embassy of the Requested State in the Requesting State following a provisional arrest, such documentation is deemed to be timely submitted by the Requesting State for purposes of the deadline for submission of the formal request in order to avoid the fugitive’s release.

This provision may give rise to new ways of transmitting requests. Although embassies are accustomed to transmitting diplomatic correspondence and are usually attuned to the urgency of presenting the documents from their own country following provisional arrest for the purpose of extradition, embassies of the Requested State have not, as a rule, previously transmitted requests from the Requesting State to judicial authorities of the Requested State. Accordingly, care should be taken to ensure that cases proceeding under Article 7 are closely monitored, particularly immediately following entry into force of the EU-U.S. Extradition Agreement, and that this channel does not become overburdened.

This new method of transmitting extradition documents following provisional arrest is applied between the United States and all Member States. It should be noted that the 2001 extradition treaty between the United States and Lithuania and the 2004 extradition treaty between the United States and the United Kingdom already contain a similar provision and the language in those bilateral treaties has not been changed.

(f) Supplementary Information (Article 8)

Article 8 of the EU-U.S. Extradition Agreement provides for the submission of supplementary information in support of an extradition request. In the event that an initial request for extradition is found to be deficient, this provision gives the Requesting State an opportunity to supplement the record through the submission of additional information. Without the opportunity to supplement the record, an extradition may be denied outright when, in fact, additional supporting evidence may be available. The supplementary information provision avoids this result. Also, because the provision authorizes a direct channel for transmission of the supplementary information (*i.e.*, transmission between ministries of justice) it creates an expedited and more efficient process for presentation of the additional information.

This provision, in its entirety, supplements eight existing treaties between the United States and Member States that did not already have such a provision (Belgium, the Czech Republic, Greece, Lithuania, Portugal, the Slovak Republic, Slovenia, and Sweden) and is incorporated as well in the five new comprehensive treaties (Bulgaria, Estonia, Latvia, Malta and Romania).

Eleven treaties already contained a supplemental information provision (Austria, Cyprus, Denmark, Finland, Hungary, Ireland, Italy, Luxembourg, the Netherlands, Spain and the United Kingdom) but did not authorize transmittal of the information directly between the ministries of justice. These were amended to add such a clause. The U.S. extradition treaties with France, Germany and Poland, which already contained a provision consistent with Article 8 of the EU-U.S. Extradition Agreement, were not amended.

(g) Temporary Surrender (Article 9)

This provision, which is common in modern extradition treaties, facilitates the orderly and efficient prosecution of a person sought in two jurisdictions by allowing the temporary transfer of the person to the Requesting State for prosecution, when that person is subject to proceedings (either prosecution or service of a sentence) in the Requested State. The transfer is subject to conditions agreed to in advance of the transfer. The provision also permits the defendant to receive credit in the Requested State for time served in custody while under prosecution in the Requesting State.

By the terms of Article 3 of the EU-U.S. Extradition Agreement, this provision is to be applied in bilateral treaties not already containing a temporary surrender provision. All five of the new comprehensive extradition treaties (Bulgaria, Estonia, Latvia, Malta, and Romania) include such a provision. In addition, eight older treaties (the Czech Republic, Denmark, Finland, Greece, Ireland, Portugal, the Slovak Republic and Slovenia) were supplemented to include it.

(h) Requests Made by Several States (Article 10)

Initially, Article 10(1) and (3) of the EU-U.S. Extradition Agreement update antiquated competing requests provisions in a number of older treaties with Member States. Henceforth, when an extradition request from the U.S. or from a Member State competes with an extradition request from a third State, a modern formulation of this provision will be applied, in which the decision on giving priority is made based on the balance of applicable factors, many of which are specified in the text.

Article 10 (2) addresses competing requests when the United States seeks the extradition of a person whose surrender is also requested by another Member State pursuant to an European Arrest Warrant (EAW). This provision creates a treaty obligation whereby the United States competes on equal footing with another Member State for the same person. Under the terms of Article 10(2) and (3), henceforth, when there is a U.S. extradition request competing with a request from another Member State made pursuant to an EAW, the priority of the requests is decided based on their respective merits (including the factors set forth in paragraph 3, such as whether subsequent extradition is possible between the Requesting States). Specifically, in reaching a decision regarding the sequence or priority of countries for surrender of the fugitive, the Requested State shall consider the factors set forth in the existing bilateral extradition treaty, as supplemented by the factors specified in the EU-U.S. Extradition Agreement. For example, in the case of a fugitive who is a national of the competing Member State that does not extradite its nationals, if the fugitive were surrendered to the competing Member State, the United States would not be able subsequently to extradite him. A potential future bar to extradition based on nationality is therefore an important factor to be taken into account when deciding to which country the person must be surrendered first. Similar provisions are found in the Framework Decision on the European arrest warrant.

Article 10 (2) also recognizes that different authorities can be designated to decide the question of competing requests, depending on whether the competing request is an EAW from another Member State or another extradition request pursuant to an extradition treaty with a third State. Under Article 10 (1) of the EU-U.S. Extradition Agreement, the executive authority of the Requested State shall make the surrender decision in cases in which a extradition request from the U.S. or a Member State competes with an extradition request from a third State. Use of the executive authority as the decision-making body was decided upon as the best choice for purposes of assessing all of the applicable factors, including the potential impact of a particular outcome on future cases, and the effect of the decision on the overall relationship. In Article 10(2), governing a US request competing with an EAW issued by a Member State, it was agreed that if the bilateral extradition treaty between the United States and the Member State concerned specified that the executive authority was to decide between competing extradition requests, the executive authority of the Member State would also decide between a competing U.S. extradition request and the EAW.

However, if the existing bilateral treaty did not specify that the executive authority of the Requested State was to make the decision, the Member State could specify a different authority. Member States that specified another authority generally chose the same authority (frequently the judiciary) designated to make decisions for surrender under internal legislation on the EAW (*i.e*, Bulgaria, France, Ireland, Portugal, Romania, and Slovenia).

(i) Simplified Extradition (Article 11)

This article is intended to streamline and expedite extradition surrenders. It supplements those older treaties that lacked a provision permitting fugitives to consent to extradition without the need for conducting a full extradition hearing. The provision also permits the fugitive to waive the protections of the rule of specialty.

This provision is incorporated into all the bilateral treaties that currently lack a similar provision (specifically, those with the Czech Republic, Denmark, Finland, France, Greece, Ireland, Portugal, the Slovak Republic, Slovenia and Sweden) as well as the five comprehensive extradition treaties (Bulgaria, Estonia, Latvia, Malta, and Romania).

(j) Transit (Article 12)

This provision, common in modern extradition treaties, authorizes the transit of surrendered persons through the national territory of the United States and Member States. The provision covers transit both when the surrender occurs between the United States and a Member State, or between the United State or a Member State and a third state. The article also specifies the requirements for making transit requests and the procedures to be followed in instances of unscheduled landing.

Article 12 supplements some older extradition treaties that lacked similar transit arrangements, specifically, the Czech Republic, Greece, Portugal, the Slovak Republic, Slovenia and Spain. It also appears in the comprehensive treaties with Bulgaria, Estonia, Latvia, Malta and Romania. Four existing extradition treaties (those with Denmark, Finland, Ireland and Sweden) lacked a provision addressing transit requests in the event of unscheduled landings. Consequently, pursuant to the terms of Article 3 of EU-U.S. Agreement, those treaties were supplemented by adding only the unscheduled landing provision to the pre-existing transit article.

(k) Capital Punishment (Article 13)

The federal U.S. system and a majority of states in the United States provide for the death penalty for some offences (capital offences). Article 2 of the Charter of Fundamental Rights of the European Union prohibits the death penalty in any circumstance, as does Protocol No 13 to the European Convention on Human Rights. Therefore extradition by a Member State to the United States is possible only with the assurance that the person will not be subjected to the death penalty. As a result, in extradition relationships between the United States and Member States, the United States has routinely obligated itself not to subject the extradited person to the death penalty.

The new language reflects the existing practice more precisely. In almost all states in the U.S. and in the federal U.S. system, when extradition to the United States is granted subject to a condition of non-imposition/carrying out of the death penalty, and the United States agrees to this limitation, it is generally effected by the prosecutor declining to take a step within his or her power that would trigger application of the death penalty, such as by not filing a notice of intent to seek the death penalty, without which imposition of the death penalty is not authorized. In a small number of states, however, once the highest provable offence has been charged, it is for the jury to decide whether the death penalty is imposed; in such jurisdictions executive branch officials like the prosecutor cannot ensure that the death penalty will not be imposed by the jury. Nonetheless, because the executive retains the power to commute a sentence it can always be ensured that the death penalty will not be carried out.

Accordingly, under the text of the new provision, the United States, as a general rule, agrees to the condition that the death penalty not be imposed. If the case emanates from one of the few states described above in which it is not technically possible to assure that the death penalty will not be imposed, the United States agrees to the condition that, if imposed, the death penalty will not be carried out.

If the requesting State accepts extradition subject to the condition that the death penalty will not be imposed or carried out, the Requesting State is required, pursuant to the language in Article 13, to comply with the condition. In such case that condition is binding on the United States by virtue of treaty law.

Under the EU-U.S. Extradition Agreement, each Member State has the option to retain the death penalty provision already in place in the bilateral extradition treaty with the United States. A few countries (Austria, Finland, Hungary, Portugal and the United Kingdom) expressed their satisfaction with the existing capital punishment provision in the bilateral treaty and concluded that there was no need to change the existing arrangement.

(l) Sensitive Information in the Request (Article 14)

This is a new provision not previously found in existing U.S. extradition treaties. Consequently, this provision supplements all existing treaties and is incorporated into the five comprehensive treaties (Bulgaria, Estonia, Latvia, Malta and Romania). The intent of the provision is to create a consultation mechanism to ensure that any sensitive information presented in support of an extradition request will be properly protected from unauthorized disclosure and that the Requesting State will be permitted the opportunity to decide whether or not to submit such information in the event that non-disclosure cannot be assured.

(m) Non-derogation Clause (Article 17)

The non-derogation provision of the EU-U.S. Extradition Agreement has two parts. Article 17(1) specifies that nothing in the EU-U.S. Extradition Agreement precludes a State from invoking a ground for refusal of extradition if that ground is based on the bilateral treaty and is not otherwise governed by the EU-U.S. Agreement. Aside from the provision on capital punishment, the EU - U.S. Extradition Agreement does not address the grounds for refusal of extradition, such grounds being governed by the existing bilateral extradition treaties in force. This provision was inserted in order to leave no doubt on this issue.

Article 17(2) provides a mechanism for resolving cases in the event that a constitutional impediment to extradition arises that is not covered by a treaty provision and that might amount to a breach of the obligation to extradite. It was agreed that the Requesting and Requested States would consult in such circumstances, in an effort to resolve the difficulty.

Part IV: THE AGREEMENT ON MUTUAL LEGAL ASSISTANCE

(a) Defense Requests Not Authorized (Article 3(5))

The EU-U.S. MLA Agreement and the corresponding bilateral instruments are intended for assistance between law enforcement authorities of governments, not for private parties. The formulation in Article 3(5) of the EU-U.S. MLA Agreement - similar to that of many other MLATs entered into by the United States-states that, "[t]he 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." Accordingly, unless otherwise provided by the law of an EU Member State or the United States, defendants and other private parties cannot use the EU-U.S. MLA Agreement to make mutual legal assistance requests or to impede them. Restricting third party access to the Agreement and bilateral instruments does not foreclose the availability of assistance to them via other channels. Particularly, in the United States and some Member States, private parties retain the use of letters rogatory, a time-tested channel, to pursue foreign evidence for use in criminal proceedings. In a number of Member States, private parties may have the possibility to ask the prosecutor, the investigating magistrate or even the trial court to order additional investigative measures, which in some cases may necessitate mutual legal assistance requests. In such cases the mutual legal assistance request, even if prompted by a motion from the defense, will always be made by and at the discretion of a prosecutor or judge.

Application of mutual legal assistance treaties to defense requests would create intractable practical problems within the adversarial criminal justice system of the United States. The U.S. central authority is a component of the Department of Justice, which is a part of the prosecution system. Granting defendants access to mutual legal assistance treaties creates potential conflicts of interest in that a U.S. prosecution system component would be required to make representations on behalf of defendants that are contrary to the theory of the Government's case and objective, or handle information to which the defense would not wish the government to have access until trial.

Were the response to the request to be delayed or viewed as inadequate (which can happen even with respect to requests made on behalf of law enforcement authorities), or information revealed in a manner the defense had not desired, the government could be accused of negligence or misconduct in handling the matter. Under the US adversarial system of justice, evidence is generally gathered by each party acting independently of the other; hence, use of letters rogatory by the defense is the most workable system. The EU-U.S. MLA Agreement will therefore not be used on behalf of defendants in U.S. proceedings.

(b) Identification of Bank Information (Article 4)

This is the first time a provision such as that found in Article 4 of the EU - U.S. MLA Agreement has been included in an MLAT between the U.S. and other countries. It will apply between the United States and each EU Member State. The provision was inspired by Article 2 of the 2001 Protocol to the EU MLA Convention of 2000.

Investigators tracing the financing of terrorism or money laundering activities may be aware that criminals are using banking channels, but don't know which ones. To prove the charge, or to forfeit proceeds, it is necessary to prove the link between the underlying offence and the movement of the funds intended to commit it, or which are derived from it. Previously, without account numbers or the names of branches holding accounts through which money flowed, it was difficult and time consuming to trace these financial flows.

This provision obligates Requested States to query either a central database containing a list of all bank accounts or all financial institutions operating in their territory if the Requesting State reasonably suspects that illicit funds are flowing through such institutions, and provides the name and date of birth or other identifying information regarding a potential account holder or transaction. If a search of the databases of these institutions reveals that such accounts do exist or that particular transactions have taken place, a subsequent request can be made for bank or financial records in order to trace the particular monetary movements.

Pursuant to Article 4 (1), the Parties are required to search for the existence of bank accounts, and financial transactions unrelated to specific bank accounts. Pursuant to paragraph 2, a Requested State may also provide information on accounts or transactions pertaining to non-bank financial institutions.

For purposes of implementing these obligations, Article 4 (3) a) further allows other authorities than central authorities to be designated pursuant to Article 15 (2), but no Member State has availed itself of this possibility. Instead, Member States have thus far designated their central authorities to process these requests. The United States has designated three federal law enforcement agencies (FBI, DEA, and ICE) to process these requests. Given that this information is needed to trace funds intended to finance terrorism, or the proceeds of money laundering with the potential goal of restraint of assets, speed is of the essence, and it was felt that this would provide the fastest channel. For example, in cases in which the United States is the originator of the request, it is more efficient and expedient to have the investigative agencies that are conducting the investigation (or coordinating with those that are) submit requests directly to the designated authorities in the EU Member States than to route them via the U.S. Central Authority..

Where a Member State is the originator of the request, the U.S. investigative agencies must analyze the request to ensure that it meets the treaty requirements. In particular, they have to certify to the U.S. Department of Treasury's Financial Crimes Enforcement Network (FinCEN), which operates the existing U.S. system for this type of query, that the foreign requests contain sufficient information to reasonably conclude that the natural or legal person to whom the request relates has committed a criminal offence and that those banks or financial institutions in the United States have information that relates to the offence. They must also determine that the information sought relates to the criminal investigation or proceeding for which it is requested in order to provide assistance. Requests originating from EU Member States will therefore need to be drafted with precision in order to be executed, and the competent authorities of Member States can expect to receive follow-up queries for additional information from U.S. authorities who must certify that this standard of proof has been met.

Obviously the reverse is equally true. As Article 4 of the EU-U.S. MLA Agreement is modeled after Article 2 of the 2001 EU Protocol, the requirements for obtaining the requested information will in many cases be identical to that used for requests within the European Union.

However, Article 4 (4) recognizes that different countries may provide differing degrees of cooperation under the banking information provision and allows them to limit the scope of their assistance to certain types of offences. For example, under current implementing legislation, the United States currently provides assistance with regard to terrorism and money laundering conduct. Some Member States wished to reciprocate at the same level of cooperation that the United States would provide to it, and, consequently, limited their cooperation to the same offences as designated by the United States, namely terrorist and money laundering activity. These countries were Austria, Belgium, Bulgaria, the Czech Republic, Finland, Germany, Greece, Italy, Lithuania, Luxembourg, Malta, Poland, Romania, the Slovak Republic, Slovenia, Spain, and the United Kingdom. Other Member States agreed to provide to the United States an even broader scope of cooperation possible under their national law. Specifically, Portugal agreed to provide cooperation under this provision for organized crime and drug trafficking in addition to terrorist activity and money laundering. Cyprus, Denmark, Estonia, Hungary, Ireland, the Netherlands, and Sweden agreed to provide cooperation for a wider range of offences for which dual criminality could be established. France and Latvia chose not to limit cooperation under this provision in any way; consequently, the United States can receive cooperation from these States even in the absence of dual criminality.

Should U.S. domestic legal authority expand in future, the United States would consider expanding the scope of assistance it provides under this section. Member States that limited the scope of their assistance generally undertook to do likewise. Pursuant to the bilateral instruments, this would be accomplished by an exchange of diplomatic notes.

Article 4 (5) was included to ensure that assistance not be denied on bank secrecy grounds in countries with which the United States does not already have an underlying MLAT. Under Article 13 of the EU-U.S. MLA Agreement, the grounds for refusal of assistance set forth in current MLATs in force between the United States and Member States are applicable to the forms of assistance set forth in the Agreement (where there is no MLAT in force, the grounds provided for in the domestic law of the Requested State apply). Under the MLATs already in force between the United States and Member States, the authorized grounds for refusal never include bank secrecy, and, as a result, the instruments between the United States and Member States that have a bilateral MLAT do not include this paragraph. However, it was important to include this paragraph in the

EU-U.S. MLA Agreement and in the bilateral instruments with Member States that lack a bilateral MLAT with the United States to ensure that bank secrecy cannot be invoked as an impediment to assistance under this article.

Article 4 does not regulate the actual production of bank records through law enforcement channels once the account is located. Under paragraph 6, the Requesting State must make a request for record production through the usual legal assistance channels (*i.e.,* via the provisions of the already existing MLAT pertaining to the production of records, or via letters rogatory if no MLAT is in force).

Finally, Article 4 (7) provides that in the event extraordinary burdens result for either the U.S. government or the banking sector, or that of Member States, consultations shall take place with a view to reducing such burdens. While it is hoped these kinds of burdens will not arise, it should be emphasized that the system should not be overused; to the contrary, this mechanism should be reserved for cases of serious criminality, and considerable discretion should be exercised in invoking it.

Article 4 supplements the provisions of all MLATs between the United States and Member States and also applies between the United States and Member States with which there is no bilateral MLAT.

(c) Joint Investigative Teams (Article 5)

Article 5 of the EU-U.S. MLA Agreement enables the United States and Member States to integrate U.S. and Member State prosecutors and/or investigators into a single investigation so that greater cooperation may be made possible. The creation of joint investigative teams can allow for faster, more efficient and timely exchange of sensitive law enforcement information for purposes of averting and investigating serious criminal conduct.

While the EU-U.S. MLA Agreement and the 2004 US - German MLAT are the first MLATs to which the United States is party to incorporate a detailed provision to this effect, this sort of cooperation is not new. In the past, there have been frequent international collaborative efforts carried out between US and European law enforcement partners on an ad hoc basis, for example in complex fraud, corruption, narcotics, and organized crime cases. At times, integrated teams of prosecutors and investigators collaborated with foreign counterparts in a particular investigation.

Given that ad hoc operational cooperation as to common targets is currently possible between U.S. law enforcement agencies and police /law enforcement agencies of many Member States, even absent any written joint investigative teams agreement, and given that such working arrangements have the benefit of being able to be rapidly implemented and highly flexible in nature, in most cases a written agreement should not be necessary and cooperation should proceed on the basis of existing working arrangements. Even if an agreement is deemed advisable, consideration should be given to the extent of detail required. In many cases, an all-encompassing agreement will not be needed; rather, a more streamlined text may provide the necessary degree of precision for foreseeable circumstances, and supplementary provisions can be agreed upon should changed circumstances make further precision necessary.

For the United States, the competent authorities contemplated by Article 5 to determine the composition, duration, location, organization, function, etc., of the joint investigative team would normally be U.S. prosecutors working together in the investigation with senior law enforcement officials representing the U.S. investigative agency concerned. For the Member States, the competent authorities may vary from one Member State to the next, but likely would be found among the ranks of prosecutors, investigating magistrates (also known as judges of instruction), or senior law enforcement investigators charged with directing criminal investigations. All these officials would have the authority to determine the need for and utility of the participation of foreign authorities in their investigations.

Paragraph 3 permits more central coordination where needed. While the negotiators foresaw that the operation of joint investigative teams will work smoothly when coordinated by competent prosecutorial or police authorities, they also felt that the international ramifications of investigations carried out by such teams might sometimes present coordination issues beyond those with which the competent authorities may have practical expertise. In such instances, they wanted to ensure that centralized authorities, such as the Central Authorities designated pursuant to MLATs, were available to assist in coordinating such matters. By authorizing, though not requiring, the participation of these central coordinating authorities, when necessary, the provision has built in a mechanism to facilitate cooperation and coordination to an even greater extent. The provisions have been inspired by Article 13 of the EU MLA Convention of 2000, but are much less detailed than the latter provision.

Pursuant to paragraph 4, it is foreseen that actions taken on the territory of one of the states participating in the team shall be carried out as part of that state's investigation, pursuant to the domestic authority of that state. Consequently, no mutual legal assistance request is required in such circumstances, and the resulting evidence can be shared with the other participating states (subject to any contrary terms of the agreement by which the team has been formed) even absent a formal mutual legal assistance request. A request for mutual legal assistance may nonetheless be necessary, if an action were required in a state and that state has no investigation open or otherwise cannot carry out the measure under its domestic law unless a mutual legal assistance treaty or legislation bestows the power to do so.

Article 5 supplements the provisions of all MLATs in force between the U.S. and EU Member States, and also applies between the U.S. and EU Member States with which there is no bilateral MLAT.

(d) Videoconferencing (Article 6)

While traditionally the use of video conferencing technology to take testimony was not explicitly provided for in MLATs between the United States and Member States, in the past, this type of assistance has been available pursuant to the catch-all provisions generally found in Article 1 of such MLATs, whereby the parties undertake to provide forms of assistance not explicitly regulated within the treaty to the extent these are not prohibited by the domestic law of the Requested State. Thus, even prior to the express provision found in the EU-U.S. MLA Agreement, such catch-all provisions formed the basis for this type of assistance with a number of Member States in which the technology was available, and in which this form of assistance was compatible with the law of the treaty partner. However, where there was no treaty in force, or where the EU treaty partner did not view the existing treaty as providing for such assistance, testimony by video conference was not possible, and this provision henceforth enables cooperation. This provision supplements all the bilateral treaties and enables such assistance with those Member States with which the United States lacks an MLAT.

In *United States* v. *Yates*, 438 F.3d 1307 (11th Cir. 2006), a U.S. federal appellate court ruled that the taking of testimony via video conferencing during a federal criminal trial was contrary to the United States Constitution (Amendment Six), where, over the objections of the defense, rather than coming to the United States to testify in person at the trial, a witness located in Australia was examined via video conference by the parties located in the United States before judge and jury. This decision is binding only on the geographical area within the 11th Federal Circuit, and it remains to be seen whether this decision leads to a general inability in the United States to conduct such proceedings. In such event, the use of video conferencing technology would nonetheless still constitutionally be available to take testimony via video-conferencing where (1) the defense has no objection; or (2) in some cases in which the witness is examined in a foreign state prior to trial with the prosecutor and the defense attorney present with the witness, while an in-custody defendant in the United States participates through the video connection.

The purpose of paragraph 4, concerning penalty for false statement and other misconduct is to protect the integrity of the process of providing testimony when the witness is physically in a different country than that in which the criminal proceeding is taking place. The witness will be subject to serious consequences for false statements in the jurisdiction where the witness is located, separate and apart from any other consequence that may attach under the law of the Requesting State, where the testimony will be used. This provision will be particularly useful to ensure the prosecution of a witness who testifies falsely but cannot be extradited to face prosecution in the Requesting State because of a Requested State's prohibition on extradition of nationals.

While Article 6(1) of the EU-U.S. MLA Agreement expressly authorizes the use of videoconferencing technology to take testimony, paragraph 5 also specifies that – if an existing treaty or law does not already permit use of the technology for other purposes, such as identification of persons or objects, or taking of investigative statements – the United States and Member States have the legal authority to also permit the use of the technology in such instances.

(e) Expedited Transmission of Requests (Article 7)

Article 7 improves the assistance process by permitting the Requested State to accept a request transmitted through channels that are much faster than the traditional mail system, through which requests are generally sent. Moreover, the provision authorizes communications on assistance matters to be sent through expedited channels. It has been the case with some countries that action in furtherance of requests could be taken only upon receipt of the original, signed request for assistance. Originals of subsequent communications also had to be received through the mail before the subject of the communication could be addressed. This new provision recognizes faster, alternative channels of transmission as valid. Consequently, the Requested State may now act upon the receipt of a request transmitted by fax, e-mail or, as technology develops further, some other expeditious method of transmission. Even if the Requested State insists upon receiving original versions of documents through the mail following receipt of the faxed, e-mailed, or other copy, this provision will expedite the overall execution of requests significantly.

If the Requested State agrees, it would even be possible to dispense with sending the original paper request. This provision leaves to the discretion of the Requested State whether to require the Requesting State to transmit the original request through traditional channels (mail or express mail) following the electronic transmission. Unless there is some question about the integrity of a particular request, or its transmission, and receipt of the original document would dispel the uncertainty, it would be possible to dispense with the requirement of producing the original document.

Article 7 supplements the provisions of all MLATs in force between the United States and Member States, and also applies between the United States and Member States with which there is no bilateral MLAT.

(f) Mutual Legal Assistance to Administrative Authorities (Article 8)

Some bilateral MLATs between the United States and Member States (for example, Austria, the Czech Republic, France, Lithuania, Luxembourg, and Sweden) already foresee the grant of assistance in furtherance of investigations conducted by administrative or regulatory agencies with statutory authority to refer matters for criminal prosecution. For the United States, agencies such as the Securities and Exchange Commission, the Commodities Futures Trading Commission, the Federal Trade Commission, and the Internal Revenue Service, are examples of agencies authorized by statute to receive assistance pursuant to this provision.

It should be emphasized first that this provision is not available to all administrative agencies; only to those with authority either to conduct a criminal investigation or to refer matters for criminal prosecution, that is, the power to refer the matter to the prosecutorial authorities in order to launch a criminal proceeding. Within the European Union, this will typically be the case for many of the banking supervision (prudential) authorities. Second, even with regard to those agencies that possess such authority, a determination must be made at the time the request is made that referral for criminal prosecution is being contemplated. If, at the time the request is made, referral for criminal prosecution is not being contemplated, *i.e.*, the matter is purely regulatory in nature, then, assistance would not be available. See explanatory note attached as Annex to the Agreement.

Third, the Article also strikes a delicate balance between assisting investigations into serious criminal conduct such as those investigated by U.S. federal agencies and their European counterparts at the national level and those matters that are pursued by other administrative authorities that do not rise to national importance. In this latter category are matters that, in the United States, would be pursued by state regulators, which, like their federal counterparts may have referral authority for criminal prosecution. One example is a state's insurance regulator that may have an investigative branch with criminal referral authority. With respect to such non-federal agencies, the EU Member State from which cooperation is sought has the authority to provide assistance under this provision, but it is discretionary.

If, in the end, an investigation by the regulatory agency does not recover sufficient evidence to justify bringing of criminal charges, civil or regulatory/administrative action may still be available. In this case, it would be duplicative and time consuming to require such agencies to seek authorization to use the evidence in the civil or regulatory action. Accordingly, after it receives assistance pursuant to a request in which the requesting administrative agency was, in good faith, contemplating criminal referral, it may still use the evidence provided for the agency's civil or regulatory administrative purposes even if referral for criminal prosecution was ultimately determined to be inappropriate. See Explanatory Note to the EU-U.S. MLA Agreement.

Under this article, requests for assistance will be made via the Central Authority. However, the negotiators believed it possible that, in time, agencies that use the provision most frequently – such as the SEC – might reach a sufficiently developed practice with its counterpart in a particular EU Member State that it may be most efficient to permit requests to be submitted directly between such authorities. In that case, paragraph 2 provides the Central Authorities with the ability to authorize use of such a direct channel.

Finally, as in Article 4, Article 8(3) has been inserted to ensure that the flow of requests from regulatory agencies remains manageable and that no extraordinary burdens result from application of the article.

Article 8 supplements the provisions of all MLATs in force between the United States and Member States, and also applies between the United States and Member States with which there is no bilateral MLAT.

(g) Limitations on Use to Protect Personal Data (Article 9)

The use limitations provision of the EU-U.S. MLA Agreement reflects the reality that, at the time a request is made, the investigation may not be sufficiently advanced to enable all possible charges to be identified. Article 9 of the EU-U.S. MLA Agreement, which is very similar to and inspired by Article 23 of the EU MLA Convention 2000 provision permits use of the evidence received *ab initio* for proceedings relating to any criminal offense, to prevent the commission of offenses (this is particularly useful in the counter-terrorism context), and for non-criminal proceedings related to criminal proceedings, such as civil confiscation proceedings. If use for other purposes is desired, the permission of the Requested State is required.

In essence, the EU-U.S. MLA Agreement allows that evidence obtained for use in one investigation be available (1) to investigators of the Requesting State who find a link between their original investigation and other criminal conduct; (2) for use in taking rapid action where it is discovered that the evidence helps establish that a terrorist attack or other national security threat is about to take place; and (3) for use in forfeiture and regulatory/ administrative enforcement actions that are not themselves criminal in nature but which are government efforts intended to suppress criminal conduct.

Article 9(1)d) of the EU-U.S. MLA Agreement introduces a rule that cannot be found in Article 23 of the EU MLA Convention 2000, but reflects the fact that it is impossible under U.S. law, once information or evidence has been made public in court proceedings, to preclude its use for other purposes. Article 9(1)d) therefore allows the use of information or evidence for any other purpose once it has been made public within the framework of proceedings for which it was transmitted, or in any other situations allowed under Article 9.

The MLATs that henceforth incorporate a provision virtually identical to Article 9 are Ireland, Italy, Germany, the Netherlands, and the United Kingdom. The Member States with which this provision operates in the absence of an MLAT are Bulgaria, Denmark, Finland, Malta, Portugal, the Slovak Republic, and Slovenia.

In more modern preexisting MLATs with Austria, Belgium, Cyprus, the Czech Republic, Estonia, France, Greece, Hungary, Latvia, Lithuania, Luxembourg, Poland, Romania, Spain, and Sweden, the need to go back for permission a second time if additional charges were brought was obviated by a formulation in which no limitation on use applied unless expressly invoked by the Requested State at the time the evidence was provided. Under Article 9 (4), of the EU-U.S. MLA Agreement and the bilateral instruments with these EU Member States, this rule continues to apply, to wit: the use limitation provision in the bilateral instruments is drafted so there is no limitation unless expressly invoked, and even if so invoked, the evidence can still be used for the purposes set forth in Article 9 (1) (i.e., for the purpose of criminal investigations, preventing immediate and serious threat, etc.) unless more restrictive conditions were imposed as an alternative to denying assistance.

Under Article 9(2)(a), it is contemplated that additional conditions on use may be imposed in certain circumstances. It happens, on occasion, that information in the Requested State is subject to particular conditions of non-disclosure (e.g., of the identity of a witness or informant). In such cases, the Requested State may want to cooperate with the Requesting State by sharing the information; however, disclosure to the public is not authorized. In such cases, the Requested State may seek to share the information on the condition that such information not be disclosed publicly, or that it not be disclosed until such time as the Requested State authorizes disclosure. Under these conditions, the Requesting State must determine whether it still wishes to receive the information.

Article 9(2)(b) deals with the issue of data protection, the requirements of which are spelled out in various European and U.S. legal instruments/legislation. The European system contains requirements that differ from U.S. laws protecting privacy; for example, it requires the establishment of independent government agencies devoted to data protection, and has different time limits for government retention of personal data than those which exist under the U.S. Federal Records Act and state laws. The Contracting Parties agreed that these generic differences in the privacy protection legal frameworks of the United States and European Union should not be the cause for a denial of mutual legal assistance in a criminal case, and this provision accomplishes that objective. Only in very unusual circumstances might the magnitude of an intrusion into an individual's personal privacy outweigh the public interest in prosecution such as to give rise to a right to deny assistance on privacy grounds. The Explanatory Note attached to the EU-U.S. MLA Agreement clearly precludes this and clarifies that refusal of assistance on data protection grounds may be invoked only in exceptional circumstances relating to a specific case.

Article 9(5) applies only to Luxembourg, which has a similar use limitation restriction in the existing bilateral MLAT. [While the European Union, felt it was appropriate not to preclude the use of information or evidence in investigations relating to fiscal matters, the U.S.-Luxembourg MLAT permits only limited assistance in fiscal matters in the first instance. Consequently, U.S. and EU negotiators drafted a limited exception to the EU-U.S. MLA Agreement use limitations provision that could only apply to Luxembourg, the only EU Member State that, at the time of the signing of the EU-U.S. MLA Agreement, was party to an MLAT with the United States that contained a use limitation in relation to fiscal matters.

(h) Requesting State's Request for Confidentiality (Article 10)

Confidentiality provisions are common in modern MLATs. This provision is formulated in similar terms to the provisions in other treaties and establishes a consultation channel to ensure that the confidentiality concerns are properly addressed. Article 10 also provides the Requesting State the opportunity to decide whether or not to have the request executed when disclosures must be made in the course of execution. The provision applies to those Member States that do not already have an MLAT with the United States (Bulgaria, Denmark, Finland, Malta, Portugal, the Slovak Republic and Slovenia) and it supplements the treaties with Hungary and the Netherlands, which lacked a similar provision.

(i) Non-derogation Clause (Refusal) (Article 13)

Article 13 of the EU-U.S. MLA Agreement specifies that nothing in the EU-U.S. MLA Agreement precludes a Requested State from invoking a ground for refusal of assistance if that ground is based on a bilateral MLAT, or, in the absence of an MLAT, on that State's legal principles—including where execution of a request would prejudice that State's sovereignty, security, public order or other essential interests. The provision also makes clear that bank secrecy and generic restrictions based on data protection grounds are not bases to restrict or refuse assistance. (See Articles 4(5) and 9(2)(b) of the EU-U.S. MLA Agreement.) Inclusion of this provision was necessary in order to apply the same standards for refusal between the United States and its treaty as well as its non-treaty partners. This non-derogation provision is consistent with provisions addressing limitations on assistance typically found in bilateral MLATs. It preserves the traditional bases for limitations on the obligation to provide assistance. Consequently, the non-derogation clause presents neither a departure from nor a novel concept in mutual legal assistance practice.

Part V: RATIFICATION AND ENTRY IN FORCE

In the fall of 2006, the United States submitted the EU-U.S. Extradition and Mutual Legal Assistance Agreements and the corresponding bilateral instruments with 25 Member States to the US Senate for advice and consent. Similarly, some Member States submitted the bilateral instruments with the United States to their parliaments when their domestic law required parliamentary review and approval. Other Member States indicated that parliamentary approval was not required inasmuch as they were bound to apply the EU-U.S.–Agreements based obligations by application of EU law.

While the parliamentary review process was ongoing, the European Union underwent another enlargement with the admission of Bulgaria and Romania in January 2007. This expansion resulted in the need for the United States to complete bilateral instruments with these two countries and further delayed Senate consideration of the EU-U.S. Agreements and corresponding bilateral instruments.

The U.S. Senate provided advice and consent to ratification of the Agreements on September 24, 2008. Thereafter, the United States began the process of exchanging instruments of ratification with the EU Member States, reserving for last the exchange of instruments of ratification with the European Union. On 23 October 2009 the Council of the European Union adopted the Decision on the conclusion on behalf of the European Union of the Agreement on extradition between the European Union and the United States of America and the Agreement on mutual legal assistance between the European Union and the United States of America.

The exchange of instruments between the European Union and the United States of America accordingly took place on October 28, 2009, and operated to fix the entry in force date for both EU-U.S. Agreements and all the corresponding bilateral instruments as February 1, 2010.