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FPC Briefing: Where next for EU-US judicial co-operation?

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EU-US judicial co-operation can celebrate a landmark of success through two recently enacted agreements in Extradition and Mutual Legal Aid (MLA) which standardize EU arrangements with the US and allow for improved co-operation and information sharing. These agreements however also expose the wider and underlying problems in transatlantic judicial co-operation in the fields of human rights and data protection/ privacy. This paper examines the main features of the Extradition and MLA Agreements and sets out ways forward for their improvement and for improvement in the wider EU-US judicial co-operation relationship.

The EU-US Agreements on Extradition and MLA negotiated in 2003 in response to the terrorist attacks in New York in September 2001 were signed by the last EU member state, Greece, in June 2009 allowing for their entry into force in the European Union in February 2010.[1] (The US provided consent in October 2008 and an exchange of instruments with the EU took place October 2009).

These two Agreements address all aspects of serious criminality whether terrorism, fraud, human trafficking, or other organized crime in judicial co-operation between the US and the EU. They do not replace individual member states' bilateral extradition or bilateral mutual legal aid relations with the US (for example the UK-US 2003 Extradition Treaty) nor do they preclude further bilateral treaties being agreed. Existing country procedures are however to be amended to remove any inconsistencies between existing domestic legislation and/or bilateral treaties and these new multi-lateral agreements. A number of new bilateral extradition treaties between the US and the newer members of the EU have resulted, as in the cases of Estonia (2006), Latvia (2005), Bulgaria (2007), Malta (2006) and Rumania (2007). For the other EU countries, the applicable EU Extradition and MLA provisions were incorporated into existing arrangements.

Whilst the Agreements are not ground- breaking as in many cases their provisions are reflected in bilateral provisions already in place between individual member states and the US, they are a dramatic step in achieving *standardization* between the group of 27 European countries and the US in judicial co-operation. The only other US precedent is the 1933 Montevideo Convention for extradition among American States which, whilst still believed to be in force, has never been used.

Although the terms of the 2003 Extradition and MLA Agreements are mutually applicable for EU countries and the US to benefit from, they represent presentational and standardizing successes for both sides during negotiations. In respect of the Extradition Agreement, there is firstly under Article 4 (Extraditable Offences) the application of the simple and effective dual criminality test, under which a crime must be an offence in both countries with a punishment of 12 months' imprisonment or more (or

[1] Agreement on extradition between the European Union and the United States of America (L 181/27 19.7.2003) and Agreement on mutual legal assistance between the European Union and the United States of America (L 181/34 19.7.2003).

if the return of a prisoner is sought, the remaining sentence must be a minimum of 4 months), to determine whether there is an extradition offence. This replaces a range of alternative approaches in previous treaties, principally a list system where crimes had to match offences in a pre-defined list otherwise they could not be used to form an extradition request. This was a headache for both sides.

Secondly, this same Article 4 allows for the consideration of extra-territorially committed crimes so that if the US (or an EU country) seeks to prosecute for a crime committed outside of its territory but where its laws are broken, in cyber crime for instance where the perpetrator commits an offence over the internet outside of the US or EU, then extradition can be granted if the requested country's law would allow it to prosecute in similar circumstances. And if the requested country's laws do not allow for prosecution in these circumstances, the requested country may still grant extradition at its 'discretion' provided that the other extradition criteria are met. Secondary extradition is also permitted so that extradition can be approved for a related offence in the extradition request even if this offence is punishable by less than 12 months' imprisonment provided that (i) the main offence is an extradition offence and (ii) 'that all other requirements for extradition are met'.

Thirdly, a significant advance was made on the question of how to handle competing extradition requests when a person is sought at the same time by a member state(s) and the US and/or any other third country. Under Article 10 (Requests for extradition or surrender made by several States), the requested EU country has *discretion* based on the circumstances of the case to decide which extradition request should prevail. The factors to take into account, which include the 'respective interests of the requesting states', the 'seriousness' of the offences, and the nationality of the victim, are more detailed than a similar provision governing arrangements between EU member states (in the European Arrest Warrant introduced by the Council Framework Decision of 13th June 2002). This Article 10 addresses any concern that EU member states' extradition requests would by default prevail in the EU over American ones.

Fourthly, there are provisions for temporary surrender (Article 9), when a requested country which is either proceeding against a suspect or has imprisoned them can decide to suspend those proceedings and temporarily return the affected person to be tried in the requesting country for other crimes. This replaces previous practice in some treaties where existing proceedings had to conclude and the sought person first had to finish his/her sentence before extradition proceedings commenced. (Although the treaty is silent on the application of Non Bis in Idem, trying a person the same offence in different jurisdictions, this is a standard bar that exists in most of the bilateral treaties).

For the European side, a presentational success was achieved over the non-implementation of capital punishment for an extradition crime. The US authorities are under Article 13 (Capital Punishment) of the Extradition Agreement required to provide an assurance that where an offence forming an extradition request is punishable by death, this sentence will not be sought at trial, or, should this not be procedurally possible, that if a death sentence is imposed, it will not be carried out.

Approaches to the death penalty and certain other Human Rights issues are together one of the defining features of the differences in EU-US judicial relations. Capital punishment has ceased to be used in EU countries by practice (it was available in French law until 1981 and English law until 1969) and is now forbidden by EU law. Article 2 of the Charter of Fundamental Rights of the European Union enacted in the EU through the Lisbon Treaty of 1st December 2009 excludes the death penalty. [2] This difference of approach can affect the EU's external relations with the US (and other countries practicing capital punishment): the death penalty is frequently raised by MEPs as a 'crime' and the European Parliament recently urged the EU's High Representative for Foreign Affairs and Security Policy to raise the matter with the US.[3] Moreover, tackling the death penalty appears in the EU's future programme in Justice and Home Affairs (JHA), the Stockholm Programme. Section 7.2 of Stockholm requires that "the values of the Union should be promoted and strict compliance with and development of international law should be respected. The European Council calls for the establishment of a Human Rights Action Plan to promote its values in the external dimension of the policies in the area of freedom, security and justice. This Plan should be examined by the European Council and should take into account that internal and external aspects of Human Rights are interlinked, for instance as regards the principle of non- refoulement or the use of death penalty by partners that the Union cooperates with".[4]

However, Article 13 of the Extradition Agreement is to some extent presentational as the safeguard of refusing to extradite without assurances is present in most EU-US bilateral treaties. And America has long since accepted the 'European position' on the death penalty and, where required to do so under bilateral treaties, complies by providing as a standard procedure the relevant acceptable assurances of not imposing a death penalty in extradition requests. Article 13 therefore appears as much for emphasis as practice to set out Europe's standing on the matter. In conceding this position, the US is arguably allowing the EU to interfere in America's domestic justice system raising issues about sovereignty (though this US concession is long standing in bilateral arrangements).

A second important concession by the US negotiators in the Extradition Agreement was to allow the omission of any provision preventing a country from refusing to extradite its own nationals. This bar exists in varying forms in many of the current bilateral extradition treaties, for example with France (1996), Poland (1996), Austria (1998) and Germany (1978), and arises principally because the constitutions or other domestic laws of certain EU countries forbid the surrender of their nationals. There is, by contrast, in the US extradition treaties with the UK (2003), Italy (1983) and Bulgaria (2007) an express provision that extradition shall *not* be refused on grounds of nationality. And the US, like the UK, does by practice extradite its nationals to Europe and other countries with which there are established extradition arrangements in the wider cause of justice.

[2] Charter of Fundamental Rights of the European Union (2000/C 364/01), 18.12.2000
[3] http://www.theparliament.com/latest-news/article/newsarticle/eu-foreign-affairs-chief-urged-to-raise-death-penalty-case-with-obama/
[4] Article 7.2 (Human Rights) The Stockholm Programme - An Open and Secure Europe Serving and Protecting Citizens (2010/C 115/01) 4.5.2010

The 2003 MLA Agreement like the Extradition Agreement also provides for mutual cooperation and information sharing in the investigation of crimes, while reflecting particular negotiating positions. There is under Article 4 (Identification of Bank Information) of the MLA improved access to a suspect's financial transactions and accounts from banks in EU member state(s) when the US (or vice versa) provides information showing reasonable suspicion that the concerned person is engaging in criminal conduct. Importantly, under this provision no MLA request for banking information can be refused on the grounds of banking secrecy.

Secondly, under Article 8 (Mutual Legal Assistance to Administrative Authorities), this financial information can be provided both to law enforcement agencies *and* to banking authorities, 'administrative authorities', which are empowered to launch investigations.

Thirdly, the giving of evidence is improved by allowing under Article 6 (Video Conferencing) witness or expert testimonies to be made in a requested country by video-conference - and making the delivered testimonies subject to the requested state's legal system to protect against a witness deliberately giving a false testimony. Next, joint investigation teams can under Article 5 be established and can operate in the concerned country to gather information and evidence. Finally, the MLA provides for expedited communication under Article 7 (Expedited Transmission of Requests) with the ability to send aid requests via email or fax rather than having to proceed through the diplomatic channel. Not all these measures are new to bilateral MLA treaties but they do provide for standardization with the US across the EU.

For its part, the EU secured particular provisions on the protection of data under Article 9 (Limitations on use to protect personal and other data) passed to or obtained by the US under an MLA request which describe the purposes for which the data may be used. This provision furthermore allows the requested state to impose "additional conditions" on how the data is to be managed.

Data protection is the other defining character of US-EU relations in judicial co-operation which has led to friction. Historical concerns about governmental access to personal data has produced a heavy regulatory regime in the EU which grates against the US litigation based approach. Section 7.3 of the Stockholm Programme places an emphasis on data protection, "Protection of personal data is a core activity of the Union. There is a need for a coherent legislative framework for the Union for personal data transfers to third countries for law enforcement. A framework model agreement consisting of commonly applicable core elements of data protection could be created." (Privacy is another area where there is a contrast between strong EU libel laws or rules (UK and France) and a liberal regime in the US.)

To the anger of the US authorities, the EU Parliament rejected in February last year, 2010, a renewed EU-US 2009 SWIFT Agreement (originally agreed in 2001 and renewed in 2007) for the transfer of financial data by a Brussels based consortium of banks known as the Society for Worldwide Interbank Financial Telecommunication. This data is used by the US for its Terrorist Finance Tracking Programme (TFTP) to investigate and track terrorist groups and operations, data which has been to mutual EU-US

benefit. However, the EU Parliament rejected the agreement over concerns that civil liberties and fundamental rights were being infringed. This rejection was an own goal since the data provided by SWIFT was passed back to the EU and member states' authorities to assist in localized terrorist investigations. The manner of the unseemly congratulatory rejection by MEPs of an existing measure affecting national security on both sides of the Atlantic was carefully noted by US public opinion. US authorities described the rejection as a 'disappointment' and a 'setback' for EU-US counter terror cooperation.[5] Even in Europe, there was dismay at the actions of the European Parliament: Angela Merkel was reported as being at her angriest with the decision.[6]

Only after three additional safeguards were brokered following further US concessions was a new SWIFT agreement accepted by the MEPs and entered into force on 1st August 2010. These were for the appointment of an EU ombudsman in Washington to oversee data extraction, a method for filtering data 'bulk transfers' and agreement about the creation of a European TFTP which, in theory, could result in the data being maintained in Europe with US targeted access in place of bulk transfers.

A similar row is brewing over the sharing of passenger airline data under the 2007 US- EU Passenger Name Record (PNR) Agreement. Rather than allow the European Parliament to reject this deal as happened with SWIFT, the US authorities and EU Commission have offered to present an amended proposal to the European Parliament. Discussions on these amendments are continuing and were last reviewed at the last biannual meeting in December between JHA Ministers and their US counter parts, US Attorney General Eric Holder and Homeland Security Secretary Janet Napolitano.

On the wider question of data protection across the JHA arena, the US authorities and the EU Commission opened up discussions in April 2011 on a broad data protection agreement. However, there's no telling how the MEPs will respond to such a concept and whether they may demand separate agreements in addition to any blanket privacy coverage.

For the purposes of the MLA, the effect of the Article 9 data protection provision was lessened by an explanatory note to this Article which limits refusal of any MLA request on data protection grounds to "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 the requested State to fall within the essential interests grounds for refusal." The existence of different data protection regimes is not to be a ground for imposing an additional condition on the requesting State

What next?

[5] http://useu.usmission.gov/tftp_ep_feb1110/
[6] http://www.nytimes.com/interactive/2010/11/28/world/20101128-cables-viewer.html#report/financing-10BERLIN180

The next step is to build on these nearly ten year old Agreements with further measures of standardization that reflect modern practice since they were negotiated and to remove or mitigate obstacles to improving further judicial co-operation. There are three areas to concentrate on.

Firstly, permit the extradition of all EU nationals to US. There are no compelling reasons why all European Union countries should not now drop the refusal to extradite on nationality grounds. As a result of the 2002 Framework Decision, all EU member states have now amended their constitutions or other domestic law to allow for the extradition of nationals within the European Union. As the EU-US Extradition Agreement was signed before the Framework Decision entered into force (2004) it was understandable that there was then no appetite for the surrender of nationals outside of the EU. However, now that the surrendering of nationals under the EAW has settled down and is working well, with many European countries over the apprehension of what was a significant psychological and constitutional milestone, it is proper to consider extending this provision to another trusted justice area, the US, which Italy and the UK already have.

Any concerns about a death penalty are already dealt with by Article 15(Capital Punishment) of the 2003 Extradition Agreement, in addition to bilateral safeguards alongside the transposition of the Charter of Fundamental Rights into member states' domestic law. Otherwise, the US with its transparent, free and fair domestic legal system meets, if not exceeds, the justice standards required of EU countries (and, within the EU, there are ongoing concerns about some member states' treatment of persons extradited under the EAW which the EU Commission is trying to correct). There is no issue of reciprocity to worry about as the US is not required to prohibit the return of its nationals and does surrender them as a matter of practice. If necessary, the EU could on behalf of member states negotiate relevant similar conditions as exist in the EAW. For example, a requested state could insist that any sentence passed on its national in the requesting state is served locally in accordance with the requested state's law. This would not be a new practice, for the US is a party to the Council of Europe Convention on the Transfer of Sentenced Prisoner 1983 under which it does repatriate convicted persons to foreign states in extradition cases (there may have to be some haggling about the disparity in sentencing regimes).

Agreeing to extradite nationals will provide mutual benefits to the US and EU in the fight against terrorism and serious and organized crime. This is the next logical step in enhancing EU-US co-operation and in the wider cause of justice by not allowing alleged perpetrators of crime to escape prosecution by fleeing borders.

Second, speed up the appeals system to the Council of Europe European Court of Human Rights (ECHR). Any person, whether an EU national or not, subject to an extradition claim whether by an EAW or a third party country extradition request can, once they have exhausted the national appellate system, make an appeal to the European Court of Human Rights. This is a sure way of adding months if not a year or more to the extradition process and can be another cause of friction with US prosecutors and other third country extradition partners. This problem clearly exists within the EU but member states have become grudgingly accustomed to such lengthy delays. This is a position that needs to be examined and improved by the European Commission and national governments (the ECHR not being an

EU body). Delays as a result of appeals benefit no-one; not the accused person whose anxiety is worsened by the position of uncertainty not to mention their legal costs (convicted persons may of course have a preference for delay); not the tax payers; and not extradition relations between the concerned countries (delays arising from judicial process typically lead to allegations in the popular media that delays are a result of political interference).

The solution might simply be to apply more resources to a court heavily burdened with a European workload. Alternatively, perhaps an early filtering process can be devised in the ECHR to quickly rule out appeals with little merit made as a delaying tactic. If either an EU or a trusted third party (the US or Australia for example) extradition request has exhausted the requested country's national system of appeals all of which decisions are in favour of extradition, what is the realistic prospect of an ECHR contrary decision? Perhaps the national supreme or final court could signal to the ECHR whether there is a genuine point of law to be answered at the European level. The absence of a signal or a question would indicate to the ECHR the reasonability of the grounds of the appeal.

Finally, one general area to focus on is for **the European Parliament to exercise its powers carefully** and not allow undue concerns about capital punishment when there are established satisfactory safeguards prohibiting a death penalty for persons extradited to the US or unbalanced concerns about data protection which do not take account of the weight of security issues to hamper future reasonable developments in EC-US judicial co-operation (extradition, MLA, PNR and other counter-terrorism co-operation).

The Treaty on the Functioning of the European Union (TFEU or Lisbon) which entered into force in 2009 enhances the powers of the EU Parliament by providing it and the Council of Ministers with co-decision powers in JHA matters from 2014. Formerly it had only consultation rights in JHA. Lisbon has already given the European Parliament the right to review and reject international agreements. MEPs were quick to use this latter power in rejecting the SWIFT Agreement in 2010, a demonstration of an institution wielding new found powers for political purposes.

American anger over SWIFT and PNR developments is considerable - but regrettably is insufficiently understood or even reported in Europe. US politicians could not see why an agreement already in place with the EU and functioning for eight years to the benefit of both communities was rejected with such enthusiasm: and they have not taken well to have to amend PNR data, another anti-terrorist measure. The perception in America is that the US Government makes continuous and disproportionate concessions in judicial cooperation (extradition, MLA, PNR, SWIFT, counter-terrorism affirmations) without due recognition or reciprocity by European institutions, even when the matters have equal impact for both US and EU communities. The US Senate passed in May a resolution to re-affirm the importance of airline passenger data, a resolution intended as a "message of disapproval" to the "EU" over PNR. [7]

[7] http://hsgac.senate.gov/public/index.cfm?FuseAction=Press.MajorityNews&ContentRecord_id=08dbfb7f-5056-8059-76a4-ea9eba4f4a56

There is a genuine debate to be had on human rights and data protection but this should be balanced and based on a recognition that different traditions, practices and policies have equal legitimacy. The US approach to data protection and privacy will have benefits and disadvantages just as will the European approach: not forgetting that the US constitution and its Amendments act as an international torch bearer on 'rights' generally. American criminal sentencing policy is a matter for the US Government and US society. It is no more for external bodies to comment on American democratic judicial processes than it is for US Senators or Representatives to comment on Italian and French penal codes).

There are limits to American tolerance. Any concept in the European Parliament that America has no alternative but to compromise with EU institutions in the justice field has an inherent flaw. The danger for the European Parliament is bilateralism. While the EU-US Agreements on Extradition and MLA provide for helpful standardization across Europe, bilateral agreements and relations between member states and the US remain the driving force in these and other judicial co-operation areas. Established and, mostly, successful bilateral links exist between US Federal security and police bodies and their counterparts in EU countries. If the EU body becomes a problematic area, the US Government could reverse the policy of cooperation started under President Bush and continued by President Obama in favour of these country links. Individual member states are in most cases unlikely to spurn bilateral-co-operation with the US in key justice matters.

Both the EU and the US are aware of the need to enhance parliamentary co-operation and much work has been done to extend the role of the Transatlantic Legislators' Dialogue (TLD), a formal communication process between the Houses of Congress and MEPs started in 1999. But more needs to be done to invigorate this process. Also European Parliament Committees in justice and home affairs should regularly invite expert views from US justice officials to examine and understand US thinking behind policy and ensure wide dissemination of Committee findings. The Commission should improve the management of its communication and its advocacy methods when submitting proposals to the European Parliament. Above all, European Parliament political parties need to develop deep and wide contacts within the US political system to improve their understanding of American policy and decision making processes.

Development in these three areas will assist wider EU-US relations in judicial co-operation for the benefit and safety of US and European citizens.

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