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NEWSLETTERS

# Business Crimes

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## New Agreements with Europe

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Conscientious corporate counsel and other careful practitioners soon should familiarize themselves with yet another prosecutorial and investigative weapon devised and implemented as a result of the terrorist attacks of 9/11. Prompted by an idea to promote cooperation between the European Union (EU) and the United States in fighting terrorism, the EU-U.S. Agreements on Extradition and Mutual Legal Assistance ("the Agreements"), once in effect, will provide new and powerful weapons for police and prosecutors on both sides of the pond. While the Agreements were created for a noble cause, their reach and grasp beyond terrorist activity is potentially troubling.

Of particular note, the Agreements provide for the formation of joint EU-U.S. investigative teams, the use of video technology for taking testimony abroad, and, importantly, the exchange of information regarding suspect bank accounts in investigations of any alleged serious crime, including not only terrorism and organized crime but also financial fraud. Further, the Agreements broaden the range of extraditable offenses by allowing extradition for any offense punishable by more than 1 year of imprisonment.

Signed by the United States and the EU on June 25, 2003, these agreements must undergo bilateral implementing protocols prior to submission to the Senate for ratification, which reportedly will not occur before sometime in 2006. The Agreements supplement rather than supplant the bilateral treaties currently in effect between the United States and EU member states, with the stated intent of streamlining the procedures for extradition and mutual legal assistance by easing formal requirements, simplifying pertinent documentation, and providing for the designation of administrative authorities for making and executing requests. Grounds for refusal to extradite or provide mutual assistance may still be based upon bilateral treaties or principles of domestic law.

### The EU and the Agreements

The European Union has described the Agreements as "a watershed in the international fight against crime by the EU, as they will shape an efficient legal regime for extradition and mutual legal assistance between the EU and the U.S." At present, there are 25 member states comprising the EU: Austria, Belgium, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Poland, Portugal, Slovakia, Slovenia, Spain, Sweden, The Netherlands, and the United Kingdom. Four countries have applied for EU membership: Bulgaria, Croatia, Romania, and Turkey.

As further noted by the EU, the "Agreements will not do away with the bilateral treaties between EU Members States, but will build upon, supplement and, in a few cases, replace provisions from the bilateral treaties."

## **Mutual Legal Assistance Treaties**

### ***Those Currently in Effect and Their General Provisions***

With the ever-increasing international nature of crime, the United States during the late 1970s began negotiating treaties with other countries to facilitate the exchange of evidence in criminal cases. Currently, the United States has Mutual Legal Assistance Treaties (MLATs) with approximately 55 countries, 15 of which are members of the EU (ie, Austria, Cyprus, Czech Republic, Estonia, France, Greece, Hungary, Italy, Latvia, Lithuania, Luxembourg, The Netherlands, Poland, Spain, and the United Kingdom) and two of which have applied for EU membership (ie, Romania and Turkey). Several other MLATs have been negotiated and are awaiting ratification. It should be noted that MLATs are not available for use by private parties.

MLATs expand the abilities of the contracting countries to obtain or provide information from abroad for investigative purposes even if no proceeding is pending. Each MLAT designates a Central Authority in the contracting country responsible for the administration of the treaty. In the United States, the Office of International Affairs (OIA) in the Criminal Division of the Department of Justice acts as the Central Authority. OIA reportedly receives twice as many MLAT requests as it makes to other countries.

All MLATs contain provisions requiring the requested country to use its best efforts to locate persons believed to be in its territory, as well as to compel the appearance of a witness in its territory and require the witness to testify and produce documents and records. Generally, the witnesses will testify in accordance with the procedure of the requested country. Witnesses are permitted to assert any privilege that may be available in the requested country. All MLATs also contain provisions requiring the requested country to conduct a search and seizure on behalf of the requesting country if the domestic laws of the requested country permit such a search and seizure. Further, MLATs provide that evidence furnished to the requesting country is obtained in a manner that will comply with the procedural and evidentiary requirements of the requesting country. Many MLATs also contain provisions relating to the immobilization and seizure of property subject to forfeiture. Because of the wide variety of forfeiture laws, these provisions differ significantly among the treaties.

Grounds for refusing assistance under an MLAT generally include that the request is prejudicial to the security or public interest of the requested country, the request does not comply with the provisions of the treaty, reasonable grounds or suspicion does not support the request, or the subject of the request has been tried in the requested country for the same offense.

## **EU/U.S. Agreement on Mutual Legal Assistance**

The EU/U.S. Agreement on Mutual Legal Assistance has 18 articles. Here are the key provisions:

### ***Identification of Bank Information***

Article 4 provides that the requested state shall "promptly ascertain if the banks located in its territory possess information on whether an identified natural or legal person suspected of or charged with a criminal offence is the holder of a bank account or accounts." The exchange of information from "non-bank financial institutions" and "financial transactions unrelated to accounts" also is permissible. Further, assistance "may not be refused under this Article on grounds of bank secrecy." Indisputably, the Agreements will give law enforcement authorities extensive access to information from banks and other financial institutions throughout the EU, with reciprocal access by its EU counterparts to such financial information within the United States. The potential for international fishing expeditions conducted on both sides of the Atlantic arguably is vast.

### ***Joint Investigative Teams***

Article 5 provides for the establishment and operation of joint investigative teams in the respective territories of each EU Member State and the United States for the purpose of facilitating criminal investigations or prosecutions. The procedures under which the team is to operate "shall be as agreed between the competent authorities responsible for the investigation or prosecution of criminal offences, as determined by the respective States concerned." Of particular note, joint investigative teams reportedly will enjoy full powers of search, surveillance, and arrest.

### ***Video Conferencing***

Article 6 provides for the use of video transmission technology between each EU Member State and the United States for taking testimony in a proceeding for which mutual legal assistance is available of a witness or expert located in a requested state. Making an intentional false statement or other misconduct of the witness or expert during the course of the video-conference is punishable in the requested state in the same manner as if it had been committed in the course of its domestic proceedings. Note, however, that recent U.S. case law may prohibit such video conferencing in a criminal trial based upon a violation of the defendant's Sixth Amendment right of confrontation. See *United States v. Yates*, 391 F.3d 1182 (11th Cir. 2005). Video-conference testimony at a criminal trial in the United States is restricted to exceptional situations, such as in the case of a child abuse victim or a terminally ill participant in the Federal Witness Protection Program. See *Maryland v. Craig*, 497 836 (1990); *United States v. Gigante*, 166 F.3d 75 (2d Cir. 1999).

### ***Other Provisions of Interest***

The requested state shall use its best efforts to keep confidential a request and its contents if so requested by the requesting state. Requests for mutual legal assistance may be made by fax or e-mail with formal confirmation to follow where required by the requested state. Responses also may be made by any such expedited means of communication. The Agreement applies to offenses committed before as well as after it enters into force.

### ***EU/U.S. Agreement on Extradition***

Most notably, the EU/U.S. Agreement on Extradition, consisting of 22 Articles, will expand the range of extraditable offenses by allowing extradition for every offense punishable by more than one year imprisonment (*ie*, any felony, by definition under U.S. federal criminal law), including conspiracies and attempts to commit any extraditable offense. Also by definition

under Article 4, an extraditable offense includes criminal cases relating to taxes, customs duties, currency control, and the import or export of commodities, "regardless of whether the laws of the requesting and requested States provide for the same kinds of taxes, customs duties, or controls on currency or on the import or export of the same kinds of commodities."

## **Conclusion**

We have seen the government use the PATRIOT Act, as well as the RICO and money laundering statutes, far beyond their ostensible targets of terrorism and organized crime. Corporate counsel and private practitioners alike should be concerned that the application of the EU/U.S. Agreements will transcend the problems they were enacted to address. Absent a reasonable application of the Agreements, their reach and grasp may prove to be simply too extensive, intrusive, and abusive.

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