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Explanatory Note

THE EUROPEAN UNION AND THE UNITED STATES OF AMERICA,

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

DESIRING to combat crime in a more effective way as a means of protecting their respective democratic societies and common values,

HAVING DUE REGARD for rights of individuals and the rule of law,

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

DESIRING to conclude an Agreement relating to mutual legal assistance in criminal matters,

HAVE AGREED AS FOLLOWS:

*Article 1***Object and purpose**

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

*Article 2***Definitions**

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

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

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

- (a) Article 4 shall be applied to provide for identification of financial accounts and transactions in addition to any authority already provided under bilateral treaty provisions;
- (b) Article 5 shall be applied to authorise the formation and activities of joint investigative teams in addition to any authority already provided under bilateral treaty provisions;
- (c) Article 6 shall be applied to authorise the taking of testimony of a person located in the requested State by use of video transmission technology between the requesting and requested States in addition to any authority already provided under bilateral treaty provisions;

(d) Article 7 shall be applied to provide for the use of expedited means of communication in addition to any authority already provided under bilateral treaty provisions;

(e) Article 8 shall be applied to authorise the providing of mutual legal assistance to the administrative authorities concerned, in addition to any authority already provided under bilateral treaty provisions;

(f) subject to Article 9(4) and (5), Article 9 shall be applied in place of, or in the absence of bilateral treaty provisions governing limitations on use of information or evidence provided to the requesting State, and governing the conditioning or refusal of assistance on data protection grounds;

(g) Article 10 shall be applied in the absence of bilateral treaty provisions pertaining to the circumstances under which a requesting State may seek the confidentiality of its request.

2. (a) The European Union, pursuant to the Treaty on European Union, shall ensure that each Member State acknowledges, in a written instrument between such Member State and the United States of America, the application, in the manner set forth in this Article, of its bilateral mutual legal assistance treaty in force with the United States of America.

(b) The European Union, pursuant to the Treaty on European Union, shall ensure that new Member States acceding to the European Union after the entry into force of this Agreement, and having bilateral mutual legal assistance treaties with the United States of America, take the measures referred to in subparagraph (a).

(c) The Contracting Parties shall endeavour to complete the process described in subparagraph (b) prior to the scheduled accession of a new Member State, or as soon as possible thereafter. The European Union shall notify the United States of America of the date of accession of new Member States.

3. (a) The European Union, pursuant to the Treaty on European Union, and the United States of America shall also ensure that the provisions of this Agreement are applied in the absence of a bilateral mutual legal assistance treaty in force between a Member State and the United States of America.

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

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

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

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

Article 4

Identification of bank information

1. (a) Upon request of the requesting State, the requested State shall, in accordance with the terms of this Article, promptly ascertain if the banks located in its territory possess information on whether an identified natural or legal person suspected of or charged with a criminal offence is the holder of a bank account or accounts. The requested State shall promptly communicate the results of its enquiries to the requesting State.
 - (b) The actions described in subparagraph (a) may also be taken for the purpose of identifying:
 - (i) information regarding natural or legal persons convicted of or otherwise involved in a criminal offence;
 - (ii) information in the possession of non-bank financial institutions; or
 - (iii) financial transactions unrelated to accounts.
 2. A request for information described in paragraph 1 shall include:
 - (a) the identity of the natural or legal person relevant to locating such accounts or transactions; and
 - (b) sufficient information to enable the competent authority of the requested State to:
 - (i) reasonably suspect that the natural or legal person concerned has engaged in a criminal offence and that banks or non-bank financial institutions in the territory of the requested State may have the information requested; and
 - (ii) conclude that the information sought relates to the criminal investigation or proceeding;
 - (c) to the extent possible, information concerning which bank or non-bank financial institution may be involved, and other information the availability of which may aid in reducing the breadth of the enquiry.
 3. Requests for assistance under this Article shall be transmitted between:
 - (a) central authorities responsible for mutual legal assistance in Member States, or national authorities of Member States responsible for investigation or prosecution of criminal offences as designated pursuant to Article 15(2); and
 - (b) national authorities of the United States responsible for investigation or prosecution of criminal offences, as designated pursuant to Article 15(2).
- The Contracting Parties may, following the entry into force of this Agreement, agree by Exchange of Diplomatic Note to modify the channels through which requests under this Article are made.
4. (a) Subject to subparagraph (b), a State may, pursuant to Article 15, limit its obligation to provide assistance under this Article to:
 - (i) offences punishable under the laws of both the requested and requesting States;
 - (ii) offences punishable by a penalty involving deprivation of liberty or a detention order of a maximum period of at least four years in the requesting State and at least two years in the requested State; or
 - (iii) designated serious offences punishable under the laws of both the requested and requesting States.
 - (b) A State which limits its obligation pursuant to subparagraph (a)(ii) or (iii) shall, at a minimum, enable identification of accounts associated with terrorist activity and the laundering of proceeds generated from a comprehensive range of serious criminal activities, punishable under the laws of both the requesting and requested States.
 5. Assistance may not be refused under this Article on grounds of bank secrecy.
 6. The requested State shall respond to a request for production of the records concerning the accounts or transactions identified pursuant to this Article, in accordance with the provisions of the applicable mutual legal assistance treaty in force between the States concerned, or in the absence thereof, in accordance with the requirements of its domestic law.
 7. The Contracting Parties shall take measures to avoid the imposition of extraordinary burdens on requested States through application of this Article. Where extraordinary burdens on a requested State nonetheless result, including on banks or by operation of the channels of communications foreseen in this Article, the Contracting Parties shall immediately consult with a view to facilitating the application of this Article, including the taking of such measures as may be required to reduce pending and future burdens.

*Article 5***Joint investigative teams**

1. The Contracting Parties shall, to the extent they have not already done so, take such measures as may be necessary to enable joint investigative teams to be established and operated in the respective territories of each Member State and the United States of America for the purpose of facilitating criminal investigations or prosecutions involving one or more Member States and the United States of America where deemed appropriate by the Member State concerned and the United States of America.

2. The procedures under which the team is to operate, such as its composition, duration, location, organisation, functions, purpose, and terms of participation of team members of a State in investigative activities taking place in another State's territory shall be as agreed between the competent authorities responsible for the investigation or prosecution of criminal offences, as determined by the respective States concerned.

3. The competent authorities determined by the respective States concerned shall communicate directly for the purposes of the establishment and operation of such team except that where the exceptional complexity, broad scope, or other circumstances involved are deemed to require more central coordination as to some or all aspects, the States may agree upon other appropriate channels of communications to that end.

4. Where the joint investigative team needs investigative measures to be taken in one of the States setting up the team, a member of the team of that State may request its own competent authorities to take those measures without the other States having to submit a request for mutual legal assistance. The required legal standard for obtaining the measure in that State shall be the standard applicable to its domestic investigative activities.

*Article 6***Video conferencing**

1. The Contracting Parties shall take such measures as may be necessary to enable the use of video transmission technology between each Member State and the United States of America for taking testimony in a proceeding for which mutual legal assistance is available of a witness or expert located in a requested State, to the extent such assistance is not currently available. To the extent not specifically set forth in this Article, the modalities governing such procedure shall be as provided under the applicable mutual legal assistance treaty in force between the States concerned, or the law of the requested State, as applicable.

2. Unless otherwise agreed by the requesting and requested States, the requesting State shall bear the costs associated with establishing and servicing the video transmission. Other costs

arising in the course of providing assistance (including costs associated with travel of participants in the requested State) shall be borne in accordance with the applicable provisions of the mutual legal assistance treaty in force between the States concerned, or where there is no such treaty, as agreed upon by the requesting and requested States.

3. The requesting and requested States may consult in order to facilitate resolution of legal, technical or logistical issues that may arise in the execution of the request.

4. Without prejudice to any jurisdiction under the law of the requesting State, making an intentionally false statement or other misconduct of the witness or expert during the course of the video conference shall be punishable in the requested State in the same manner as if it had been committed in the course of its domestic proceedings.

5. This Article is without prejudice to the use of other means for obtaining of testimony in the requested State available under applicable treaty or law.

6. This Article is without prejudice to application of provisions of bilateral mutual legal assistance agreements between Member States and the United States of America that require or permit the use of video conferencing technology for purposes other than those described in paragraph 1, including for purposes of identification of persons or objects, or taking of investigative statements. Where not already provided for under applicable treaty or law, a State may permit the use of video conferencing technology in such instances.

*Article 7***Expedited transmission of requests**

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

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

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

2. (a) Requests for assistance under this Article shall be transmitted between the central authorities designated pursuant to the bilateral mutual legal assistance treaty in force between the States concerned, or between such other authorities as may be agreed by the central authorities.
 - (b) In the absence of a treaty, requests shall be transmitted between the United States Department of Justice and the Ministry of Justice or, pursuant to Article 15(1), comparable Ministry of the Member State concerned responsible for transmission of mutual legal assistance requests, or between such other authorities as may be agreed by the Department of Justice and such Ministry.
3. The Contracting Parties shall take measures to avoid the imposition of extraordinary burdens on requested States through application of this Article. Where extraordinary burdens on a requested State nonetheless result, the Contracting Parties shall immediately consult with a view to facilitating the application of this Article, including the taking of such measures as may be required to reduce pending and future burdens.

Article 9

Limitations on use to protect personal and other data

1. The requesting State may use any evidence or information obtained from the requested State:
 - (a) for the purpose of its criminal investigations and proceedings;
 - (b) for preventing an immediate and serious threat to its public security;
 - (c) in its non-criminal judicial or administrative proceedings directly related to investigations or proceedings:
 - (i) set forth in subparagraph (a); or
 - (ii) for which mutual legal assistance was rendered under Article 8;
 - (d) for any other purpose, if the information or evidence has been made public within the framework of proceedings for which they were transmitted, or in any of the situations described in subparagraphs (a), (b) and (c); and
 - (e) for any other purpose, only with the prior consent of the requested State.
2. (a) This Article shall not prejudice the ability of the requested State to impose additional conditions in a particular case where the particular request for assistance could not be complied with in the absence of such conditions. Where additional conditions have been imposed in accordance with this subparagraph, the requested State may require the requesting State to give information on the use made of the evidence or information.

- (b) Generic restrictions with respect to the legal standards of the requesting State for processing personal data may not be imposed by the requested State as a condition under subparagraph (a) to providing evidence or information.

3. Where, following disclosure to the requesting State, the requested State becomes aware of circumstances that may cause it to seek an additional condition in a particular case, the requested State may consult with the requesting State to determine the extent to which the evidence and information can be protected.

4. A requested State may apply the use limitation provision of the applicable bilateral mutual legal assistance treaty in lieu of this Article, where doing so will result in less restriction on the use of information and evidence than provided for in this Article.

5. Where a bilateral mutual legal assistance treaty in force between a Member State and the United States of America on the date of signature of this Agreement, permits limitation of the obligation to provide assistance with respect to certain tax offences, the Member State concerned may indicate, in its exchange of written instruments with the United States of America described in Article 3(2), that, with respect to such offences, it will continue to apply the use limitation provision of that treaty.

Article 10

Requesting State's request for confidentiality

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

Article 11

Consultations

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

Article 12

Temporal application

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

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

Article 13

Non-derogation

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

Article 14

Future bilateral mutual legal assistance treaties with Member States

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

Article 15

Designations and notifications

1. Where a Ministry other than the Ministry of Justice has been designated under Article 8(2)(b), the European Union shall notify the United States of America of such designation prior to the exchange of written instruments described in Article 3(3) between the Member States and the United States of America.

2. The Contracting Parties, on the basis of consultations between them on which national authorities responsible for the investigation and prosecution of offences to designate pursuant to Article 4(3), shall notify each other of the national authorities so designated prior to the exchange of written instruments described in Article 3(2) and (3) between the Member States and the United States of America. The European Union shall, for Member States having no mutual legal assistance treaty with the United States of America, notify the United States of America prior to such exchange of the identity of the central authorities under Article 4(3).

3. The Contracting Parties shall notify each other of any limitations invoked under Article 4(4) prior to the exchange of written instruments described in Article 3(2) and (3) between the Member States and the United States of America.

Article 16

Territorial application

1. This Agreement shall apply:

(a) to the United States of America;

(b) in relation to the European Union, to:

- Member States,
- territories for whose external relations a Member State has responsibility, or countries that are not Member States for whom a Member State has other duties with respect to external relations, where agreed upon by exchange of diplomatic note between the Contracting Parties, duly confirmed by the relevant Member State.

2. The application of this Agreement to any territory or country in respect of which extension has been made in accordance with subparagraph (b) of paragraph 1 may be terminated by either Contracting Party giving six months' written notice to the other Contracting Party through the diplomatic channel, where duly confirmed between the relevant Member State and the United States of America.

Article 17

Review

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

Article 18

Entry into force and termination

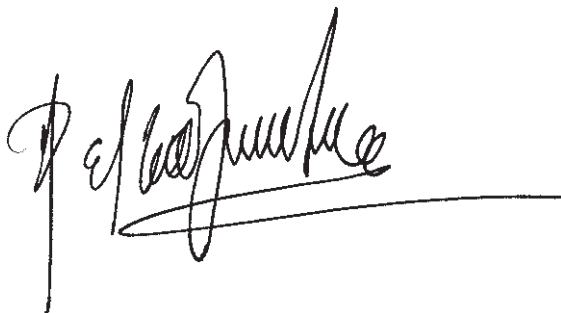
1. This Agreement shall enter into force on the first day following the third month after the date on which the Contracting Parties have exchanged instruments indicating that they have completed their internal procedures for this purpose. These instruments shall also indicate that the steps specified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

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

In witness whereof the undersigned Plenipotentiaries have signed this Agreement

Done at Washington D.C. on the twenty-fifth day of June in the year two thousand and three in duplicate in the Danish, Dutch, English, Finnish, French, German, Greek, Italian, Portuguese, Spanish and Swedish languages, each text being equally authentic.

Por la Unión Europea
For Den Europæiske Union
Für die Europäische Union
Για την Ευρωπαϊκή Ένωση
For the European Union
Pour l'Union européenne
Per l'Unione europea
Voor de Europese Unie
Pela União Europeia
Euroopan unionin puolesta
På Europeiska unionens vägnar



Por los Estados Unidos de América
For Amerikas Forenede Stater
Für die Vereinigten Staaten von Amerika
Για τις Ηνωμένες Πολιτείες της Αμερικής
For the United States of America
Pour les États-Unis d'Amérique
Per gli Stati Uniti d'America
Voor de Verenigde Staten van Amerika
Pelos Estados Unidos da América
Amerikan yhdysvaltojen puolesta
På Amerikas förenta staters vägnar



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

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

On Article 8

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

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

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

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

On Article 9

Article 9(2)(b) is meant to ensure that refusal of assistance on data protection grounds may be invoked only in exceptional cases. Such a situation could arise if, upon balancing the important interests involved in the particular case (on the one hand, public interests, including the sound administration of justice and, on the other hand, privacy interests), furnishing the specific data sought by the requesting State would raise difficulties so fundamental as to be considered by the requested State to fall within the essential interests grounds for refusal. A broad, categorical, or systematic application of data protection principles by the requested State to refuse cooperation is therefore precluded. Thus, the fact the requesting and requested States have different systems of protecting the privacy of data (such as that the requesting State does not have the equivalent of a specialised data protection authority) or have different means of protecting personal data (such as that the requesting State uses means other than the process of deletion to protect the privacy or the accuracy of the personal data received by law enforcement authorities), may as such not be imposed as additional conditions under Article 9(2a).

On Article 14

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

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