

Protocol to the Treaty between the Government of the Republic of Austria and the Government of the United States of America on Mutual Legal Assistance in Criminal Matters signed 23 February 1995, as contemplated by Article 3(2) of the Agreement on Mutual Legal Assistance between the European Union and the United States of America signed 25 June 2003

As contemplated by Article 3(2) of the Agreement on Mutual Legal Assistance between the European Union and the United States of America signed 25 June 2003 (hereafter “the EU-U.S. Mutual Legal Assistance Agreement”), the Governments of the Republic of Austria and the United States of America acknowledge that, in accordance with the provisions of this Protocol, the EU-U.S. Mutual Legal Assistance Agreement is applied in relation to the bilateral Treaty between the Government of the Republic of Austria and the Government of the United States of America on Mutual Legal Assistance in Criminal Matters signed on 23 February 1995 (hereafter “the 1995 Mutual Legal Assistance Treaty”) under the following terms:

Article 1: Channel for assistance to agencies
with jurisdiction to refer matters for criminal prosecution

Pursuant to Article 8(2) of the EU-U.S. Mutual Legal Assistance Agreement, the following shall be applied as the final sentence of Article 2(2) of the 1995 Mutual Legal Assistance Treaty:

“Requests for assistance made on behalf of such agencies shall be transmitted between the Central Authorities, or between such other authorities as may be agreed by the Central Authorities.”

Article 2: Expedited transmission of requests

Pursuant to Article 7 of the EU-U.S. Mutual Legal Assistance Agreement, the following shall be applied in place of Article 4(1) of the 1995 Mutual Legal Assistance Treaty:

“1(a). A request for assistance shall be in writing except that the Central Authority of the Requested State may accept a request in another form in urgent situations. In any such situation, the request shall be confirmed in writing within ten days unless the Central Authority of the Requested State agrees otherwise. For purposes of this paragraph, requests transmitted by fax or e-mail shall be considered to be in writing.

(b) Communications related to requests for assistance 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 by any such expedited means of communication.

(c) The Requesting State shall translate the request and any supporting documents into the language of the Requested State. However, the Central

Authorities may make arrangements for the Requested State to translate the request and any supporting documents at the expense of the Requesting State.”

Article 3:

Limitations on use to protect personal and other data

A. Article 7(2) of the 1995 Mutual Legal Assistance Treaty shall be renumbered to be Article 7(4).

B. Pursuant to Article 9 of the EU-U.S. Mutual Legal Assistance Agreement, the following shall be applied in place of Article 7(1) and (3) of the 1995 Mutual Legal Assistance Treaty:

“1. The Requested State may require that the Requesting State use any evidence or information obtained from the Requested State for the following purposes:

- (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 to agencies with jurisdiction to refer matters for criminal prosecution in accordance with Article 2(2);
- (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 or information can be protected. ”

Article 4: Identification of bank information

Existing Article 18 of the 1995 Mutual Legal Assistance Treaty is renumbered as Article 21 and pursuant to Article 4(1) through (5) of the EU-U.S. Mutual Legal Assistance Agreement, the following shall be applied as Article 18 of the 1995 Mutual Legal Assistance Treaty:

“Article 18: 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 offense 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 offense;
 - (ii) information in the possession of non-bank financial institutions; or
 - (iii) financial transactions unrelated to accounts.

2. In addition to the requirements of Article 4(2) of this Treaty, a request for information described in paragraph 1 of this Article shall include:

- (a) the identity of the natural or legal person relevant to locating such accounts or transactions;
- (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 offense 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; and
- (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. Unless subsequently modified by exchange of diplomatic notes between the European Union and the United States of America, requests for assistance under this Article shall be transmitted between:

- (a) for the Republic of Austria, the Ministry of Justice, and
- (b) for the United States of America, the attaché responsible for Austria of the:
 - (i) U.S. Department of Justice, Drug Enforcement Administration, with respect to matters within its jurisdiction;
 - (ii) U.S. Department of Homeland Security, Bureau of Immigration and Customs Enforcement, with respect to matters within its jurisdiction;
 - (iii) U.S. Department of Justice, Federal Bureau of Investigation, with respect to all other matters.

4. The Republic of Austria and the United States of America shall provide assistance under this Article with respect to money laundering and terrorist activity punishable under the laws of both States, and with respect to such other criminal activity as they may notify each other.

5. 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 other provisions of this Treaty."

Article 5: Joint investigative teams

Existing Article 19 of the 1995 Mutual Legal Assistance Treaty is renumbered as Article 22, and pursuant to Article 5 of the EU-U.S. Mutual Legal Assistance Agreement, the following shall be applied as Article 19 of the 1995 Mutual Legal Assistance Treaty:

"Article 19:

JOINT INVESTIGATIVE TEAMS

1. Joint investigative teams may be established and operated in the respective territories of the Republic of Austria and the United States of America for the purpose of facilitating criminal investigations or prosecutions involving one or more Member States of the European Union and the United States of America where deemed appropriate by the Republic of Austria and the United States of America.

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

Existing Article 20 of the 1995 Mutual Legal Assistance Treaty is renumbered as Article 23 and pursuant to Article 6(1), 6(3) through (6) of the EU-U.S. Mutual Legal Assistance Agreement, the following shall be applied as Article 20 of the 1995 Mutual Legal Assistance Treaty:

"Article 20

VIDEO CONFERENCING

1. The use of video transmission technology shall be available between the Republic of Austria 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 the Requested State. To the extent not specifically set forth in this Article, the modalities governing such procedure shall be as otherwise provided under this Treaty.

2. 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.

3. 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.

4. 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.

5. The Requested State may permit the use of video conferencing technology for purposes other than those described in paragraph 1 of this Article, including for purposes of identification of persons or objects, or taking of investigative statements.”

Article 7: Cost of Video-Conference

Pursuant to Article 6(2) of the EU-U.S. Mutual Legal Assistance Agreement, the following shall be applied as final sentences of Article 6 of the 1995 Mutual Legal Assistance Treaty:

“Unless otherwise agreed by the Requesting and Requested States, the Requesting State shall bear the costs associated with establishing and servicing a video transmission pursuant to Article 20. Other costs arising in the course of providing such assistance (including costs associated with travel of participants in the Requested State) shall be borne in accordance with the other provisions of this Article.”

Article 8: Temporal application

This Protocol shall apply to offenses committed before as well as after it enters into force.

This Protocol shall not apply to requests made prior to its entry into force; except that Articles 2, 6 and 7 of this Protocol shall be applicable to requests made prior to such entry into force.

Article 9: Entry into force and termination

1. This Protocol shall be subject to completion by the Parties of their respective applicable internal procedures for entry into force. The Parties shall thereupon exchange instruments indicating that such measures have been completed. This Protocol shall enter into force on the date of entry into force of the EU-U.S. Mutual Legal Assistance Agreement.

2. In the event of termination of the EU-U.S. Mutual Legal Assistance Agreement, this Protocol shall be terminated and the 1995 Mutual Legal Assistance Treaty shall be applied. The Parties nevertheless may agree to continue to apply some or all of the provisions of this Protocol.

IN WITNESS WHEREOF, the undersigned, being duly authorized by their respective Governments, have signed this Instrument.

DONE at Vienna, in duplicate, this 20th day of July 2005, in the German and English languages, both texts being equally authentic.

FOR THE GOVERNMENT OF THE
REPUBLIC OF AUSTRIA:

Karin MIKLAUTSCH m.p.

FOR THE GOVERNMENT OF THE
UNITED STATES OF AMERICA:

Lyons BROWN m.p.