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SECOND PROTOCOL, drawn up on the basis of Article K.3 of the treaty on European Union, to the Convention on the protection of the European Communities' financial interests

THE HIGH CONTRACTING PARTIES to this Protocol, Member States of the European Union, REFERRING to the Act of the Council of the European Union of 19 June 1997;

DESIRING to ensure that their criminal laws contribute effectively to the protection of the financial interests of the European Communities;

RECOGNIZING the importance of the Convention on the protection of the European Communities' financial interests of 26 July 1995 in combating fraud affecting Community revenue and expenditure;

RECOGNIZING the importance of the Protocol of 27 September 1996 to the said Convention in the fight against corruption damaging or likely to damage the European Communities' financial interests;

AWARE that the financial interests of the European Communities may be damaged or threatened by acts committed on behalf of legal persons and acts involving money laundering;

CONVINCED of the need for national law to be adapted, where necessary, to provide that legal persons can be held liable in cases of fraud or active corruption and money laundering committed for their benefit that damage or are likely to damage the European Communities' financial interests;

CONVINCED of the need for national law to be adapted, where necessary, to penalize acts of laundering of proceeds of fraud or corruption that damage or are likely to damage the European Communities' financial interests and to make it possible to confiscate proceeds of such fraud and corruption;

CONVINCED of the need for national law to be adapted, where necessary, in order to prevent the refusal of mutual assistance solely because offences covered by this Protocol concern or are considered as tax or customs duty offences;

NOTING that cooperation between Member States is already covered by the Convention on the protection of the European Communities' financial interests of 26 July 1995, but that there is a need, without prejudice to obligations under Community law, for appropriate provision also to be made for cooperation between member States and the Commission to ensure effective action against fraud, active and passive corruption

and related money laundering damaging or likely to damage the European Communities' financial interests, including exchange of information between the Member States and the Commission;

CONSIDERING that, in order to encourage and facilitate the exchange of information, it is necessary to ensure adequate protection of personal data;

CONSIDERING that the exchange of information should not hinder ongoing investigations and that it is therefore necessary to provide for the protection of investigation secrecy;

CONSIDERING that appropriate provisions have to be drawn up on the competence of the Court of Justice of the European Communities;

CONSIDERING finally that the relevant provisions of the Convention on the protection of the European Communities' financial interests of 26 July 1995 should be made applicable to certain acts covered by this Protocol,

HAVE AGREED ON THE FOLLOWING PROVISIONS:

Article 1
Definitions

For the purposes of this Protocol:

- (a) 'Convention' shall mean the Convention drawn up on the basis of Article K.3 of the Treaty on European Union on the protection of the European Communities' financial interests, of 26 July 1995¹⁾;
- (b) 'fraud' shall mean the conduct referred to in Article 1 of the Convention;
- (c) 'passive corruption' shall mean the conduct referred to in Article 2 of the Protocol drawn up on the basis of Article K.3 of the Treaty on European Union to the convention on the protection of the European Communities' financial interests, of 27 September 1996²⁾,
'active corruption' shall mean the conduct referred to in Article 3 of the same Protocol;
- (d) 'legal person' shall mean any entity having such status under the applicable national law, except for States or other public bodies in the exercise of State authority and for public international organizations;

¹⁾ OJ No C 316, 27. 11. 1995, p. 49.

²⁾ OJ No C 313, 23. 10. 1996, p. 2.

(e) 'money laundering' shall mean the conduct as defined in the third indent of Article 1 of Council Directive 91/308/EEC of 10 June 1991 on the prevention of the use of the financial system for the purpose of money laundering³⁾, related to the proceeds of fraud, at least in serious cases, and of active and passive corruption.

Article 2 Money laundering

Each Member State shall take the necessary measures to establish money laundering as a criminal offence.

Article 3 Liability of legal persons

1. Each Member State shall take the necessary measures to ensure that legal persons can be held liable for fraud, active corruption and money laundering committed for their benefit by any person, acting either individually or as part of an organ of the legal person, who has a leading position within the legal person, based on

- a power of representation of the legal person, or
- an authority to take decisions on behalf of the legal person, or
- an authority to exercise control within the legal person, as well as for involvement as accessories or instigators in such fraud, active corruption or money laundering or the attempted commission of such fraud.

2. Apart from the cases already provided for in paragraph 1, each Member State shall take the necessary measures to ensure that a legal person can be held liable where the lack of supervision or control by a person referred to in paragraph 1 has made possible the commission of a fraud or an act of active corruption or money laundering for the benefit of that legal person by a person under its authority.

3. Liability of a legal person under paragraphs 1 and 2 shall not exclude criminal proceedings against natural persons who are perpetrators, instigators or accessories in the fraud, active corruption or money laundering.

Article 4 Sanctions for legal persons

1. Each Member State shall take the necessary measures to ensure that a legal person held liable pursuant to Article 3 (1) is punishable by effective, proportionate and dissuasive sanctions, which shall include criminal or non-criminal fines and may include other sanctions such as:

(a) exclusion from entitlement to public benefits or aid;

- (b) temporary or permanent disqualification from the practice of commercial activities;
- (c) placing under judicial supervision;
- (d) a judicial winding-up order.

2. Each Member State shall take the necessary measures to ensure that a legal person held liable pursuant to Article 3 (2) is punishable by effective, proportionate and dissuasive sanctions or measures.

Article 5 Confiscation

Each Member State shall take the necessary measures to enable the seizure and, without prejudice to the rights of bona fide third parties, the confiscation or removal of the instruments and proceeds of fraud, active and passive corruption and money laundering, or property the value of which corresponds to such proceeds. Any instruments, proceeds or other property seized or confiscated shall be dealt with by the Member State in accordance with its national law.

Article 6 Cooperation with the Commission of the European Communities

A Member State may not refuse to provide mutual assistance in respect of fraud, active and passive corruption and money laundering for the sole reason that it concerns or is considered as a tax or customs duty offence.

Article 7 Cooperation with the Commission of the European Communities

1. The Member States and the Commission shall cooperate with each other in the fight against fraud, active and passive corruption and money laundering. To that end, the Commission shall lend such technical and operational assistance, as the competent national authorities may need to facilitate coordination of their investigations.

2. The competent authorities in the Member States may exchange information with the Commission so as to make it easier to establish the facts and to ensure effective action against fraud, active and passive corruption and money laundering. The Commission and the competent national authorities shall take account, in each specific case, of the requirements of investigation secrecy and data protection. To that end, a Member State, when supplying information to the Commission, may set specific conditions covering the use of information, whether by the Commission or by another Member State to which that information may be passed.

³⁾ OJ No L 166, 28. 6. 1991, p. 77.

Article 8

Data protection responsibility
for the Commission

The Commission shall ensure that, in the context of the exchange of information under Article 7 (2), it shall observe, as regards the processing of personal data, a level of protection equivalent to the level of protection set out in Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data⁴⁾.

Article 9

Publication of data protection rules

The rules adopted concerning the obligations under Article 8 shall be published in the Official Journal of the European Communities.

Article 10

Transfer of data to other Member
States and third countries

1. Subject to any conditions referred to in Article 7 (2), the Commission may transfer personal data obtained from a Member State in the performance of its functions under Article 7 to any other Member State. The Commission shall inform the Member State which supplied the information of its intention to make such as transfer.

2. The Commission may, under the same conditions, transfer personal data obtained from a Member State in the performance of its functions under Article 7 to any third country provided that the Member State which supplied the information has agreed to such transfer.

Article 11

Supervisory authority

Any authority designated or created for the purpose of exercising the function of independent data protection supervision over personal data held by the Commission pursuant to its functions under the Treaty establishing the European Community, shall be competent to exercise the same function with respect to personal data held by the Commission by virtue of this Protocol.

Article 12

Relation to the Convention

1. The provisions of Articles 3, 5 and 6 of the Convention shall also apply to the conduct referred to in Article 2 of this Protocol.

2. The following provisions of the Convention shall also apply to this Protocol:

- Article 4, on the understanding that, unless otherwise indicated at the time of the notification provided for in Article 16 (2) of this Protocol, any declaration within the meaning of Article 4 (2) of the Convention, shall also apply to this Protocol,
- Article 7, on the understanding that the *ne bis in idem* principle also applies to legal persons, and that, unless otherwise indicated at the time the notification provided for in
- Article 16 (2) of this Protocol is being given, any declaration within the meaning of Article 7 (2), of the Convention shall also apply to this Protocol,
- Article 9,
- Article 10.

Article 13

Court of Justice

1. Any dispute between Member States on the interpretation or application of this Protocol must in an initial stage be examined by the Council in accordance with the procedure set out in Title VI of the Treaty on European Union with a view to reaching a solution.

If no solution is found within six months, the matter may be referred to the Court of Justice by a party to the dispute.

2. Any dispute between one or more Member States and the Commission concerning the application of Article 2 in relation to Article 1 (e), and Article 7, 8, 10 and 12 (2), fourth indent of this Protocol which it has proved impossible to settle through negotiation may be submitted to the Court of Justice, after the expiry of a period of six months from the date on which one of the parties has notified the other of the existence of a dispute.

3. The Protocol drawn up on the basis of Article K.3 of the Treaty on European Union, on the interpretation, by way of preliminary rulings, by the Court of Justice of the European Communities of the Convention on the protection of the European Communities' financial interests, of 29 November 1996⁵⁾, shall apply to this Protocol, on the understanding that a declaration made by a Member State pursuant to Article 2 of that Protocol is also valid regarding this Protocol unless the Member State concerned makes a declaration to the contrary when giving the notification provided for in Article 16 (2) of this Protocol.

Article 14

Non-contractual liability

For the purposes of this Protocol, the non-contractual liability of the Community shall be governed by the second paragraph of Article 215 of the Treaty establishing the European Community. Article 178 of the same Treaty shall apply.

⁴⁾ OJ No L 281, 23. 11. 1995, p. 31.

⁵⁾ OJ No C 151, 20. 5. 1997, p. 1.

Article 15
Judicial control

1. The Court of Justice shall have jurisdiction in proceedings instituted by any natural or legal person against a decision of the Commission addressed to that person or which is of direct and individual concern to that person, on ground of infringement of Article 8 or any rule adopted pursuant thereto, or misuse of powers.

2. Articles 168 a (1) and (2), 173, fifth paragraph, 174, first paragraph, 176, first and second paragraphs, 185 and 186 of the Treaty establishing the European Community, as well as the Statute of the Court of Justice of the European Community, shall apply, *mutatis mutandis*.

Article 16
Entry into force

1. This Protocol shall be subject to adoption by the Member States in accordance with their respective constitutional requirements.

2. Member States shall notify the Secretary-General of the Council of the European Union of the completion of the procedures required under their respective constitutional rules for adopting this Protocol.

3. This Protocol shall enter into force ninety days after the notification provided for in paragraph 2, by the State which, being a member of the European Union on the date of the adoption by the Council of the act drawing up this Protocol, is the last to fulfil that formality. If, however, the Convention has not entered into force on that date, this Protocol shall enter into force on the date on which the Convention enters into force.

4. However, the application of Article 7 (2) shall be suspended if, and for so long as, the relevant institution of the European Communities has not complied with its obligation to publish the data protection rules pursuant to Article 9 or the terms of Article 11 concerning the supervisory authority have not been complied with.

Article 17
Accession of new Member States

1. This Protocol shall be open to accession by any State that becomes a member of the European Union.

2. The text of this Protocol in the language of the acceding State, drawn up by the Council of the European Union, shall be authentic.

3. Instruments of accession shall be deposited with the depositary.

4. This Protocol shall enter into force with respect to any State that accedes to it ninety days after the deposit of its instrument of accession or on the date of entry into force of this Protocol if it has not yet entered into force at the time of expiry of the said period of ninety days.

Article 18
Reservations

1. Each Member State may reserve the right to establish the money laundering related to the proceeds of active and passive corruption as a criminal offence only in serious cases of active and passive corruption. Any Member State making such a reservation shall inform the depositary, giving details of the scope of the reservation, when giving the notification provided for in Article 16 (2). Such a reservation shall be valid for a period of five years after the said notification. It may be renewed once for a further period of five years.

2. The Republic of Austria may, when giving its notification referred to in Article 16 (2), declare that it will not be bound by Articles 3 and 4. Such a declaration shall cease to have effect five years after the date of the adoption of the act drawing up this Protocol.

3. No other reservations shall be authorized, with the exception of those provided for in Article 12 (2), first and second indent.

Article 19
Depositary

1. The Secretary-General of the Council of the European Union shall act as depositary of this Protocol.

2. The depositary shall publish in the Official Journal of the European Communities information on the progress of adoptions and accessions, declarations and reservations and any other notification concerning this Protocol.

Done at Brussels, this nineteenth day of June in the year one thousand nine hundred and ninety-seven, in a single original, in the Danish, Dutch, English, Finnish, French, German, Greek, Irish, Italian, Portuguese, Spanish and Swedish languages, each text being equally authentic, such original remaining deposited in the archives of the General Secretariat of the Council of the European Union.

Joint Declaration on Article 13 (2)

The Member States declare that the reference in Article 13 (2) to Article 7 of the Protocol shall apply only to cooperation between the Commission on the one hand and the Member States on the other and is without prejudice to Member States' discretion in supplying information in the course of criminal investigations.

Commission Declaration on Article 7

The Commission accepts the tasks entrusted to it under Article 7 of the Second Additional Protocol to the Convention on the protection of the European Communities' financial interests.

