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Delegations will find attached the declassified version of the above document.

The text of this document is identical to the previous version.

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NOTE

From :	General Secretariat of the Council
To	Delegations
Subject :	Information concerning informal, exploratory consultations on a possible agreement between the European Union and Japan on mutual legal assistance

1. Introduction

An EU-Japan informal meeting was held on 27 February 2007 with a view to discussing the possibility to conclude a Mutual Legal Assistance Agreement (MLAT) between Japan and the European Union. The Japanese delegation was composed of representatives of the Ministry of Foreign Affairs, the Ministry of Justice and the National Police Agency as well as officials from the Mission of Japan to the EU. The EU delegation was chaired by the German Presidency accompanied by Portuguese and Slovenian representatives together with representatives from the Commission and the General Secretariat of the Council.

At present, mutual legal assistance between Japan and the Member States of the EU is not covered by any bilateral treaties. The Japanese delegation indicated Japan's interest in strengthening the cooperation in criminal matters with EU Member States.

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The Japanese delegation underlined that Japan is not yet in a position to open formal negotiations. The EU delegation explained the EU procedures for a possible agreement between the European Union and Japan on mutual legal assistance.

2. Issues raised during discussions

Several procedural issues as well as a few possible substantive issues were discussed:

- **Legal capacity of the EU**

The Japanese delegation raised the issue of the legal capacity of the EU to conclude a MLAT. It was clarified that despite some controversy within the doctrine, it is clearly established practice that the EU may enter into such agreements; third States have accepted and recognized the European Union by signing treaties with the EU and the capacity of the EU of concluding agreements has never been contested. As regards police and judicial cooperation covered by Title VI, Articles 24, 31 and 38 TEU provide the legal basis for treaties in these matters, and has been used several times before, for instance the EU-US agreements on extradition and MLA of 25 June 2003 and agreement on MLA with Norway and Island. By September 2006, the EU has concluded altogether 71 treaties with third states and international organizations.

- **Legal consequences of an EU-Japan Agreement on the Member States**

The Japanese delegation asked how an EU-Japan Agreement would be binding upon the EU Member States. It was clarified that Member States had, by concluding the EU Agreement, agreed on provisions that confer competences and power to the EU in certain fields, including the capacity to adopt legal acts pursuant to Title VI TEU. It was furthermore explained that in accordance with Article 24 (5) and Article 38 Member States may determine that an Agreement with Japan shall be binding upon that Member State only after certain constitutional procedures have been complied with.

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▪ **Implementation of MLAT in the Member State**

The Japanese delegation asked how the possible EU-Japan MLAT would be implemented in each EU Member State and whether any subsequent legislative acts of the EU or the Member States would be required. The procedure in the European Union to conclude an Agreement was explained in more detail. It was clarified that following the formal decision by the Council to conclude the agreement on behalf of the European Union there would be no need for any additional EU legislative acts in order to “implement” the EU-Japan MLAT. Each individual EU Member State will need to ensure that its legislation is in conformity with the provisions of the Agreement. In case there are no bilateral MLATs between any EU Member States and Japan, an EU-Japan MLAT could presumably become applicable between the EU Member States and Japan, without the need for further bilateral, implementation agreements, but that may depend on each Member States' constitutional requirements.

▪ **Central authority**

The Japanese delegation explained the roles of the central authorities in Japan. Currently, two different situations involve different central authorities in Japan;

- if the Japanese side receives a request, the identification of the competent central authority depends on the status of the country which submitted a request: if the request comes from a foreign country with which Japan has no MLAT, the Ministry of Foreign Affairs is the central authority according to the domestic law on MLA, whereas if the request comes from a country with which Japan has signed an MLAT, that an Agreement may designate the Ministry of Justice as central authority.
- in case Japan is the requesting country also the National Public Safety Commission may act as central authority.

As regards the EU, the choice of the central authority depends on each Member State. Furthermore it was clarified that the issue of one Member State indicating several central authorities should not constitute a problem within future negotiations.

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The Japanese delegation asked if Eurojust and/or Europol would have a role in a possible EU-Japan MLAT. It was clarified that that would not be the case.

- **Death penalty and life imprisonment**

The Japanese delegation pointed out that the Japanese courts are independent and sovereign in pronouncing the sentence. The Ministry of Justice was required to execute a sentence as pronounced by the courts. Therefore it would not be possible for the Japanese Government to guarantee that no death penalty sentence would be pronounced if according to the law death penalty may be at stake in a particular case where Japan requests mutual legal assistance from an EU Member State.

The EU delegation pointed out that this would be an important issue for the negotiations of a possible EU-Japan MLAT. An MLAT would need to allow the Member States to refuse mutual legal assistance if there is a risk that the evidence may be used to impose the death penalty. The EU delegation explained that the issue of death penalty was also crucial in the EU-US MLAT. There is no formal provision on the death penalty in the EU-US MLA Agreement, but Article 13 of that agreement contains a non derogation clause, which refers to the grounds of refusal available pursuant to bilateral treaties and, in the absence of a bilateral treaty, to the applicable legal principles of the requested Member State, including where the execution of the request would prejudice the sovereignty, security, public order or other essential interests.

The Japanese delegation proposed to provide for criteria based on an analysis of case law and statistics, but the Presidency affirmed that a provision allowing Member States to refuse assistance in case of possible death penalty was crucial. The Japanese delegation underlined that there was no way to ensure that evidence could not be used in a death penalty case. Both delegations agreed that it was an issue to be further addressed and as having a common interest in fighting against international crime, a solution could be found in this issue with respect to both legal orders and principles of all parties.

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- **Dual criminality**

Based on discussions it is clear that an Agreement will need to include a dual criminality requirement, which may, however, be restricted to coercive measures.

- **Banking information**

The Presidency pointed out that access to banking information would create an added value to the MLAT and would be an issue to consider further by both parties. The Presidency reminded that the Article 4 of the EU-US Agreement "identification of bank information" concerned information related to criminal proceedings specified in the MLA, and that a simplified procedure had been set up to establish the existence of information but not to obtain the details (bank records etc.). To obtain bank records etc. the classic MLA procedure was to follow an initial identification. It was also stressed by the EU delegation that a request related to the banking information would also need an essential link to ongoing criminal investigations/prosecutions of a serious crime.

- **Video conference**

The Japanese delegation made a clear distinction between the possibility to take testimony at the request of a Member State (which was to be considered as possible in a MLAT) and the possibility for a requesting Member State's officer to interrogate a witness in Japan (which was suggested to be excluded). The EU delegation pointed out that due to the geographical distance between the EU Member States and Japan, a possibility to use the video conference would give an added value to both parties.

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▪ Joint Investigation Teams

The Presidency explained that the possibility of setting up a joint investigation team has been allowed in the 2000 EU MLAT and the 2003 EU-US MLAT. Japan had no experience in that matter and asked for examples and best practices in order to be able to consider the issue further. However, the Japan delegation stated that it can not allow a foreign officer to make search or seizure on the Japanese soil. The EU side explained that a main added value of a JIT would be to save time in the information sharing by avoiding formal MLA procedures for each piece of information.

▪ Seizure of assets

The Japanese delegation explained that Article 1(2) of the Japan-Korea MLAT allows for cooperation in the area of asset freezing proceedings by providing evidence and information, but does not cover the seizure or freezing itself. Japan has provisions allowing that in its own domestic legislation but so far no experience in that matter.

3. Conclusion of the meeting

Both delegations agreed that in case further negotiations were envisaged, another informal meeting would be needed. The Presidency stated that relevant Council working parties will be informed on the outcome of this meeting.