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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.

# RESTREINT UE



**COUNCIL OF  
THE EUROPEAN UNION**

**Brussels, 17 June 2008**

**10070/08**

**RESTREINT UE**

**COPEN 108  
COASI 106**

## **NOTE**

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|-----------|--|
| From :    | Slovenian Presidency and incoming French Presidency  |
| To        | Delegations  |
| Prev doc  | 7019/07 RESTREINT UE COPEN 27 COASI 32, 11941/07 RESTREINT UE COPEN 112 COASI 97, 10039/08 RESTREINT UE COPEN 106 COASI 104  |
| Subject : | Request for a negotiation mandate for the Presidency on judicial co-operation in criminal matters on the basis of Articles 38 and 24 TEU - possible Mutual Legal Assistance Agreement between the European Union and Japan |

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## **A. Introduction**

In December 2005, the Council adopted the Strategy for External Dimension of Justice, Freedom, Security. The strategy underlines the need for the EU to engage in the work of both regional and international organisations and promote the respect for human rights, the rule of law and international obligations and the strengthening of judicial and law enforcement capacities in third countries. Moreover, in the strategy the following guidelines were taken into account: the existence of internal policies as the major parameter justifying external action; the need for added value in relation to projects carried out by the Member States and the contribution to the general political objectives of the foreign policies of the Union. The link between justice, freedom and security issues, Common Foreign and Security Policy, European Security and Defence Policy and development policies of the EU was underlined.

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Discussions with Japan about a possible mutual legal assistance agreement should be seen in the context of the strategic partnership with Japan and in light of the fact that no member state has a bilateral treaty with Japan on mutual legal assistance. The Japanese side is construing new strategic partnerships on mutual legal assistance, by *inter alia* concluding agreements with USA, China, Australia, Korea and the Russian Federation.

The political dimension of the conclusion of an agreement on mutual legal assistance should be underlined. It would strengthen the ties that already exist between the EU and Japan, send a political signal to terrorists and organised criminals that the international community is prepared to take this fight seriously and that countries are prepared to increase their law enforcement co-operation in order to achieve those goals. Japan is seen by the EU as an important partner in foreign policy, not least in the context of the ASEM dialogue, in the UN and in the G8, and the conclusion of a binding important agreement on judicial co-operation would further strengthen that dimension.

In the Action Plan for EU-Japan co-operation of the EU-Japan Summit of 8 December 2001 (15175/01 ASIE 82), the EU and Japan affirmed to increase support for multilateral efforts to combat crime and strengthen judicial co-operation, notably through improving international mechanisms and procedures, such as those dealing with extradition and legal assistance.

At the 16th EU - Japan Summit, Summit leaders welcomed the launch of preliminary, informal discussions on cooperation between the EU and Japan in the area of mutual legal assistance in criminal matters (see 10470/07 PESC 701).

*Such discussions have taken place three times. The Presidency and the incoming French Presidency submit the following draft mandate for consideration of the Article 36 Committee, Coreper and Council.*

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## B. Background

Crime and in particular organised crime is increasingly developing a cross-border dimension. In view of the permanently growing number of all types of crime with transnational implications, international judicial co-operation, even across continents, needs to be reinforced. A close co-operation of judicial and law enforcement authorities is necessary to overcome difficulties and obstacles in preventing, investigating and prosecuting crime and to avoid impunity of criminals. Measures to improve international co-operation need to take account of legal and practical needs to ensure an effective fight against international crime.

At present, mutual legal assistance between Japan on the one hand and the Member States of the EU on the other hand is not covered by bilateral treaties. Some multilateral agreements (e.g. the UN 1961 Single Drug Convention or the 1988 UN Convention on Drug Trafficking) provide, in a piecemeal fashion, some international legal basis for co-operation, but there is at present no general comprehensive international legal framework for law enforcement co-operation between the EU and Japan. Japan has a domestic law on mutual legal assistance and is able to provide, under certain circumstances, some assistance on the basis of international comity. However, as its mutual legal assistance treaties/negotiations with other countries demonstrate, Japan has come to realise that there is a need for a solid treaty legal basis to foster effective mutual legal assistance relationships with its most important partners.

For the time being, mutual legal assistance is afforded on the basis of reciprocity. The requirements for legal assistance to Japan are subject to 27 different regimes. Moreover, the absence of any bilateral agreement entails cumbersome and time-consuming procedures to transmit the requests (most often through the diplomatic channels), which are not suited to effective modern law enforcement action.

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The aim of a possible agreement between the European Union and Japan on mutual legal assistance would be to enhance and facilitate mutual legal assistance between Japan on the one hand and the 27 Member States of the EU on the other hand based, while safeguarding fundamental rights and guaranteeing that the death penalty could not be imposed on the basis of evidence submitted by the EU Member States. It would be based on Articles 24 and 38 TEU and would have to be concluded by the Council on behalf of the European Union. The negotiations would be conducted by the Presidency of the Council, assisted by the Council General Secretariat and the Commission. The incoming Czech Presidency would also be invited to assist in the discussions.

There is no doubt that an agreement between Japan and the EU will lead to an enhancement and a facilitation of mutual legal assistance between all current and future Member States of the EU on the one hand and Japan on the other hand. For the EU side, it has been made clear to Japan that the issue of death penalty/life imprisonment is of crucial importance to the EU. It appears that a satisfactory solution to this issue could be found in the negotiations.

The strengthening of mutual legal assistance would be carried out in many ways. First, the requirements for mutual legal assistance between all 27 Member States and Japan would be covered by one single legal regime. Second, these requirements, both in formal and substantive respect, would be clearly and explicitly stated. The certainty of the law applicable to mutual legal assistance would significantly increase and the practical dealing with requests for mutual legal assistance would be facilitated. Japan has also noted that it believes that MLA would increase significantly with a clear legal basis. Third, for Japan the agreement would have to be with only one Contracting Party, namely the European Union whereas the result would have an effect on all 27 Member States. Japan has informally indicated that it does not intend to enter into any bilateral discussions with individual member states. Any agreement would, under the future legal regime, if signed before the end of the year, have to be accepted by the European Parliament.

Moreover, although the number of cases of co-operation between Japan and the EU has been relatively small as compared to intra-EU co-operation, the number of cases has been increasing in recent years and is likely to continue to increase. Japan has had in the past 3 years cases of MLA with some 15 member states (see for details item 14 of xxxxx/08). Their most important partners are FR, UK, NL and ES, but there have been significant cases with a number of other Member States.

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## C. Results of the informal discussions with Japan

A first EU-Japan informal meeting was held in Brussels on 27 February 2007<sup>1</sup> with a view to discussing the possibility to conclude a Mutual Legal Assistance Agreement (MLAT) between Japan and the European Union. At that time, the Japanese delegation indicated Japan's interest in strengthening the cooperation in criminal matters with EU Member States.

A second EU-Japan informal meeting took place in Tokyo on 21 and 22 June 2007<sup>2</sup> at which several items related to the conclusion of a possible MLAT between Japan and the European Union were discussed.

A third informal meeting was held in Brussels on 20 - 21 May 2008<sup>3</sup>. In this meeting the Japanese delegation expressed its strong political willingness to formally open negotiations with the EU and to conclude these negotiations before the entry into force of the Lisbon Treaty. It submitted to that effect a model legal Treaty (see doc. 10058/08 RESTREINT UE COPEN 107 COASI 105), and asked for that to be taken as basis, while recognising that the draft model needed to be amended and supplemented by other issues that had been discussed between the EU and Japan.

## D. Legal basis

**Article 38 TEU** makes it possible to conclude agreements as referred to in Article 24 TEU on matters which come under Title VI "Police and judicial cooperation in criminal matters".

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<sup>1</sup> 7019/07 COPEN 27 COASI 32 RESTREINT UE.

<sup>2</sup> 11941/07 COPEN 112 COASI 97 RESTREINT UE.

<sup>3</sup> 10039/08 COPEN 106 COASI 104 RESTREINT UE.

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**Article 24 TEU** states that "when it is necessary to conclude an agreement with one or more States or international organisations in implementation of this Title, the Council, acting unanimously, may authorise the Presidency, assisted by the Commission as appropriate, to open negotiations to that effect. Such agreements shall be concluded by the Council acting unanimously on a recommendation from the Presidency. No agreement shall be binding on a Member State whose representative in the Council states that it has to comply with the requirements of its own constitutional procedure; the other members of the Council may agree that the agreement shall apply provisionally to them. The provisions of this Article shall also apply to matters falling under Title VI".

The EU-US Agreements on extradition and on mutual legal assistance of 26 June 2003<sup>1</sup> were the first agreements that have been signed on behalf of the European Union on the basis of Articles 24 and 38 TEU.

Since 25 June 2003, on several other occasions have similar agreements been entered into by the European Union, namely the Agreement of 19 December 2003 between the European Union and the Republic of Iceland and the Kingdom of Norway on Mutual Assistance in Criminal Matters between Member States of the European Union and the 2001 Protocol thereto, the Agreement of 28 June 2006 between the European Union and the Republic of Iceland and the Kingdom of Norway on the surrender procedure between the Member States of the European Union and Iceland and Norway<sup>2</sup>, and the Agreement of 26 October 2004 between the European Union, the European Community and the Swiss Confederation concerning the latter's association to the implementation, the application and the development of the Schengen Acquis<sup>3</sup>. Also the Protocol on the accession of the Principality of Liechtenstein to this Agreement was signed on this legal basis<sup>4</sup>. This legal basis was also used for the 2007 PNR Agreement with the United States<sup>5</sup>, as well as the future PNR Agreement with Australia.

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<sup>1</sup> *OJ*, 19.07.2003, L 181, p. 1.

<sup>2</sup> Both agreements have been published, together with the Council Decisions: *OJ* L 26 of 29.01.2004, p. 1 and L 292 of 21.10.2006, p. 1.

<sup>3</sup> *OJ*, 15.12.2004, L 368/26 van (on the signing on behalf of the EU) and 17.12.2004, L 370/78 (on the signing on behalf of the EC).

<sup>4</sup> *OJ*, 26.3.2008, L 83.

<sup>5</sup> *OJ*, 04.08.2007, L 204, p. 18.



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*The Presidency proposes that the Council take the following decisions on the basis of Articles 24 and 38 TEU.*

## **E. Draft Council authorisation**

### **a) General matters**

1. The Council authorises the Presidency, assisted by the Commission, to open negotiations with Japan for the purpose of concluding an agreement on mutual legal assistance between the European Union and Japan. The negotiations shall be based on concept of reciprocity and be concluded in a spirit of co-operation between equal partners striving for a common goal.
2. The negotiation will build on existing agreements, conventions, treaties, arrangements and any other legal framework on co-operation in criminal matters, with a view to facilitating mutual legal assistance between Member States and Japan, while safeguarding fundamental rights and freedoms.
3. The agreement must contain the necessary guarantees for the protection of human rights and fundamental freedoms and must respect the constitutional principles of the Member States. Further instructions of the Council in this respect are found below under b).
4. Future bilateral agreements, conventions or treaties between a Member State and Japan aimed at further improving cooperation in criminal matters are not precluded by the conclusion of the future agreement between the EU and Japan.
5. Negotiations should focus on the issues referred to below under b) with the aim of achieving an added value to existing cooperation. The issues raised should be considered to be a package. The negotiations should be conducted as speedily as possible.
6. The agreement should contain a provision under which it shall not create obligations in respect of a Member State whose representative in the Council has stated that it has to comply with the requirements under its own constitutional procedure before being bound by the agreement or agreements, until that Member State has concluded these procedures. The agreement should take account of the procedures contemplated in Article 24 TEU.



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## b) EU priorities and response to Japan

7. Within the framework of the general matters indicated under a) and following the procedure specified in c), the Council authorises the Presidency, assisted by the Commission, to negotiate with Japan the following issues in accordance with the negotiating instructions set out hereafter:

| Issues to be raised by the EU   | Line to take   |
|---|--|
| Measures involved in mutual legal assistance  | <p>- The agreement should be applicable to mutual legal assistance proceedings in respect of all offences falling under the jurisdiction of the judicial authorities of the requested State.</p> <p>Within this scope, mutual legal assistance should be afforded to the widest extent possible, subject to a limited number of grounds for refusal.</p> <p>- Potentially all subject matters covered in the EU Convention on Mutual Legal Assistance in Criminal Matters of 29 May 2000 could be dealt with on MLA Agreement with Japan. General provisions relating to concrete rules on cooperation should be based on the CoE Convention 1959 on Mutual Assistance in Criminal Matters and the Japanese model agreement.</p> |
| Formalities and procedures in the execution of requests for mutual legal assistance | <p>- create general provisions based on CoE 1959 MLA and complemented by 2000 EU MLA.</p> <p>Direct contact between judicial authorities should not be permitted</p>   |
| Sending and service of procedural documents   | <p>- create a treaty basis for efficient sending and service of procedural documents</p>   |

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| Channels of communication  | - create a treaty basis for communication channels between the central authorities of the Member States and Japan  |
| Spontaneous exchange of information  | - create, if possible, a treaty basis for spontaneous exchange of information  |
| Hearing by videoconference <sup>1</sup>  | - create, if possible, a treaty basis for the use of video conferences in case of hearings of witnesses, experts or defendant/accused  |
| Hearing of witnesses and experts by telephone conference   | - explore the necessity of creating a treaty basis for the use of hearing of witnesses and experts by telephone conference   |
| Requests for information on bank accounts, banking transactions and requests for the monitoring of banking transactions <sup>2</sup> | - create, if possible, a treaty basis to obtain in an efficient and speedy way information on bank accounts and financial transactions   |
| Co-operation in seizure and confiscation of assets   | - create, if possible, a legal basis for cooperation in seizure and confiscation of assets or ensure that Japan considers the possibility of joining the Council of Europe Convention on the subject |
| Joint investigative teams <sup>3</sup>   | - create, if possible, a treaty basis for the setting up of joint investigative teams and for a practical cooperation of such teams  |
| Exchange of criminal records   | - explore the possibility to create a legal basis for exchanging criminal records  |

<sup>1</sup> See 10039/08 COPEN 106 COASI 104 RESTREINT UE.

<sup>2</sup> See 11941/07 COPEN 112 COASI 97 RESTREINT UE and doc. 10039/08 COPEN 106 COASI 104 RESTREINT UE.

<sup>3</sup> See 10039/08 COPEN 106 COASI 104 RESTREINT UE.

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## Conditions, exceptions and safeguards

## Line to take

|  |   |
|--|---|
| The condition of double criminality <sup>1</sup> | - explore the possibility to limit as far as possible the requirement of double criminality as precondition for mutual legal assistance, at least to coercive measures.   |
| Grounds for refusal                              | - same conditions and grounds for refusal as in 1959 CoE MLA Convention   |
| Data protection                                  | - lay down adequate standards of data protection for evidence and international transmitted data as a consequence of mutual legal assistance  |
| Death penalty and life imprisonment <sup>2</sup> | - to find a solution to bridge fundamental differences between the European Union and Japan which would allow for effective mutual legal assistance but at the same time ensure that evidence transmitted by a Member State, could in no circumstances be used to obtain a death penalty sentence or, in relation to one Member State, life imprisonment. |

## Issues raised by Japan

## Line to take

|                                     |  |
|-------------------------------------|--|
| The condition of double criminality | - Possibility of restricting the condition of double criminality to coercive measures  |
| The role of central authorities     | - a possible EU-JP MLA Agreement should acknowledge two Japanese requesting authorities, the Ministry of Justice and the National Public Safety Commission (i.e. the police), as opposed to just one receiving authority (as regards requests from the EU it would be the Japanese Ministry of Justice). |

<sup>1</sup> See 10039/08 COPEN 106 COASI 104 RESTREINT UE.

<sup>2</sup> See 11941/07 COPEN 112 COASI 97 RESTREINT UE and 10039/08 COPEN 106 COASI 104 RESTREINT UE.

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## c) Procedure

The Presidency will keep the Council fully and regularly informed of the progress of discussions with Japan, and of any problems concerning the negotiations, by means of regular reports to the Article 36 Committee and Coreper.

Coreper will be requested to mandate the Working Party on Cooperation in Criminal Matters to follow the negotiations at expert level. After each meeting with Japan side, a detailed report shall be made by the Presidency, in cooperation with the General Secretariat, on the outcome of the discussions. The Presidency shall take account of the wishes of the delegations expressed in the Council.

At the end of the negotiations, the draft agreement will be submitted to the Council, in accordance with the procedure laid down in Article 24 TEU, for signing and conclusion.

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