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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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THE EUROPEAN UNION

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10070/1/08
REV 1

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COPEN 108
COASI 106

NOTE

From :	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; 16398/08 COPEN 243 COASI 219
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

A. Introduction

In 2007 and 2008 three informal meetings were held between the European Union and Japan for the purpose of assessing the feasibility of concluding a mutual legal assistance agreement in criminal matters. At the 16th EU-Japan Summit, the EU and Japan welcomed the launch of those preliminary informal discussions¹. At the last meeting the Japanese delegation expressed Japan's strong political will to engage open negotiations officially with the EU and to conclude them before the entry into force of the Lisbon Treaty. To that end it submitted the text of a model treaty² which, in its view, can serve as a starting point for the discussions.

¹ See 10470/07 PESC 701.

² See 10058/08 RESTREINT UE COPEN 107 COASI 105.

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In June 2008 the Slovenian and French Presidencies presented draft directives for opening negotiations. During discussions in the Article 36 Committee (CATS) on 23 June 2008, a majority of Member States called for a more specific mandate based mainly on the standards set by the European Convention on Mutual Assistance in Criminal Matters of 20 April 1959 and containing specific guarantees regarding the death penalty, life imprisonment and respect for human rights and fundamental freedoms as well as for Member States' constitutional principles and personal data protection requirements.

In November the Japanese Ambassador to the European Union sent the Presidency a letter proposing that formal negotiations be opened between Japan and the European Union¹. This letter was discussed at the Coreper meeting of 3 December 2008. Most delegations favoured a positive response to this proposal, while some delegations stressed the need for agreeing on negotiation instructions before entering into formal negotiations with Japan. Coreper has charged Article 36 Committee to examine a modified draft Council authorisation, to be presented promptly by the Presidency and which would take account of the concerns raised at the CATS meeting of 23 June and, in particular, those mentioned in the above paragraph.

B. Background

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.

¹ See the Japanese Ambassador's letter attached as Annex I to 16398/08 COPEN 243 COASI 219.

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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. For the time being, mutual legal assistance is therefore 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.

The aim of an agreement between the European Union and Japan on mutual legal assistance is 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 has been made clear to the Japanese side that the issue of death penalty/life imprisonment is of crucial importance to the EU, but obviously a mutually acceptable solution to such a crucial and politically sensitive issue can be found only in the course of 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. . Third, for Japan the agreement will be with only one Contracting Party, namely the European Union whereas the result would have an effect on all 27 Member States.

C. Legal basis

The Agreement will be negotiated on the basis of Articles 24 and 38 TEU and will have to be concluded by the Council on behalf of the European Union. The negotiations will be conducted by the Presidency of the Council, assisted by the Commission. The incoming Presidency will also be invited to assist in the discussions. The agreement would, under the future legal regime, have to be accepted by the European Parliament.

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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".

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

D. 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, in particular the European convention on mutual assistance in criminal matters, adopted in 1959, 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.

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3. The agreement must contain the necessary guarantees for the protection of human rights and fundamental freedoms and the protection of personal data, 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.

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:

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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 requesting State. 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 <u>Council of Europe (CoE) Convention 1959 on Mutual Assistance in Criminal Matters</u> could be dealt with <u>in an</u> MLA Agreement with Japan. General provisions relating to concrete rules on cooperation should be based on the 1959 CoE Convention 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. 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. <u>Stipulate a clear and workable language regime.</u>
Spontaneous exchange of information	- create, if possible, a treaty basis for spontaneous exchange of information, while taking into account the requirements on protection of personal data in criminal matters.
Hearing by videoconference ¹	- create, if possible, a treaty basis for the use of video conferences in case of hearings of witnesses, experts or defendant/accused
Requests for information on bank accounts, banking transactions and requests for the monitoring of banking transactions ²	- 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	Ensure that Japan considers the possibility of joining the Convention on laundering, search, seizure and confiscation of the proceeds from crime (ETS n° 141) of 8 november 1990, or create, if possible, a legal basis for cooperation in seizure and confiscation of assets.
Exchange of criminal records	- explore the possibility to create a legal basis for exchanging criminal records, while taking into account the requirements on protection of personal data in criminal matters.

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

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

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Conditions, exceptions and safeguards	Line to take
The condition of double criminality ¹	- <u>maintain</u> 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 ²	- 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 <u>impose</u> 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).

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

² 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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