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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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**10070/3/08
REV 3**

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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 French 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. At the CATS meeting of 18 December 2008 and the Friends of the Presidency meeting of 20 January 2009, a number of comments were made. The Presidency has endeavoured to take into accounts these comments as much as possible in order to revise the draft negotiations instructions set out in the annex.

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, the 1988 UN Convention on Drug Trafficking) provide (or, if ratified by Japan, could provide: the 2000 Convention on Transnational Organised Crime), 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), hardly suited to effective 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, 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 be invited to assist in the discussions. (...)

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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, the Protocols thereto 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 with the said aim of achieving added value and without delay, taking into account timely consultations of Member States.

b) EU priorities and response to Japan

6. 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>- subject matters covered in the 1959 Council of Europe Convention on Mutual Assistance in Criminal Matters and the Protocols thereto¹ could be dealt with in an MLA Agreement with Japan. General provisions relating to concrete rules on cooperation should be based on the 1959 Convention on Mutual Assistance in Criminal Matters, the Protocols thereto and the Japanese model agreement.</p> <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 number of grounds for refusal.</p>
Formalities and procedures in the execution of requests for mutual legal assistance	<p>- create general provisions based on the 1959 CoE Convention. (...) In addition, the requested state should apply the <u>formalities and procedures</u> of the requesting state indicated in the request², unless these are contrary to the fundamental principles of its legal system.</p>

¹ Thereby including, for example, the temporary transfer of detained persons.

² This should allow, *inter alia*, for the necessary defence safeguards, for example by allowing for the presence of the defence counsel when the law of the requesting state so provides.

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Sending and service of procedural documents	- create a treaty basis for efficient sending and service of procedural documents, including the <u>optional possibility of direct sending of procedural documents to a person located in the territory of the other Contracting Party</u> . Clear rules must be stipulated regarding the language regime as well as the <u>mandatory information on the procedural rights to be provided to the persons concerned by the requesting authority</u> .
Channels of communication	- create a treaty basis for communication channels of the Member States and Japan. <u>The optional possibility of the judicial authorities addressing letters rogatory directly to the central authority of the requested state should be further explored</u> . Stipulate a clear and workable language regime.
Spontaneous exchange of information	- create a treaty basis for spontaneous exchange of information <u>between the central authorities</u> , while taking into account the requirements on protection of personal data in criminal matters.
Hearing by videoconference ¹	- create a treaty basis for the use of video conferences in case of hearings of witnesses, experts or defendant/accused.

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

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Improving cooperation in the area of investigations into financial elements of serious crime, including organised crime, terrorism and financial crime through requests for information on bank accounts, banking transactions and requests for the monitoring of banking transactions ¹	- create a treaty basis to obtain in an efficient and speedy way information on bank accounts and financial transactions, <u>along the model of the 2001 Protocol to the EU Mutual Assistance Convention and Article 4 of the EU- US MLA agreement.</u>
Co-operation in seizure and confiscation of assets	- ensure that Japan commits itself to joining the Convention on laundering, search, seizure and confiscation of the proceeds from crime (ETS No. 141) of 8 november 1990, or, if this proves to be impossible, create a legal basis for cooperation in seizure and confiscation of assets along the standards of that Convention.
Exchange of criminal records	- explore the possibility to create a legal basis for exchanging criminal records, <u>while taking into account the requirements of protection of personal data in criminal matters.</u>

¹ 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	- maintain the requirement of double criminality as precondition for mutual legal assistance in case of coercive measures.
Grounds for refusal	- same conditions and grounds for refusal as in 1959 CoE MLA Convention <u>and the Protocols thereto</u> .
<u>Participation in a criminal organisation and liability of legal persons</u>	- assistance cannot be refused <u>solely because</u> the underlying offence is one of participation in a criminal organisation <u>or because of</u> lack of liability of legal persons (...-). <u>including where coercive measures could be foreseen</u> .
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 <u>information</u> transmitted by a Member State, could in no circumstances be used <u>in evidence in a proceeding leading to the imposition of</u> a death penalty sentence or, in relation to one Member State, life <u>imprisonment</u>

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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Issues raised by Japan	Line to take
The condition of double criminality	- restrict the condition of double criminality to coercive measures
The role of central authorities	- the 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 (for requests from the EU it would be the Japanese Ministry of Justice) ¹ .

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.

The Working Party on Cooperation in Criminal Matters will 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 seek to obtain the views of delegations prior to each negotiation round and take account of the wishes of the delegations (...). The Presidency will also endeavour to obtain and distribute in parallel to the negotiations - the necessary information on the practical functioning of the relevant aspects of the Japanese criminal justice system.

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.

¹ The negotiations will take account of the wish of some Member States to designate more than one requesting and receiving central authority.