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

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NOTE

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

1. Introduction

A second EU-Japan informal meeting was held in Tokyo 21 and 22 June 2007 with a view to further discussing the possibility of concluding 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 Public Safety Commission. 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.

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The head of the Japanese host delegation opened the meeting by welcoming the EU delegation and expressing his gratitude at the continuation of the exploratory talks between the European Union and Japan, which had been welcomed in the statement of the recent European Union-Japan summit. Whilst Japan had not yet decided whether to proceed to the stage of formal negotiations, it emphasised that it regarded this positively and that Japan would consider very thoroughly a possible MLAT. The EU side emphasised that no formal negotiations could start before the Council approved a mandate by unanimity.

In the course of the two-day meeting, the EU and Japanese sides addressed a wide range of issues which could/should be covered by a possible EU-JP Mutual Legal Assistance Agreement with a view to obtaining a better understanding of each other's system. These issues are outlined below. Apart from the substantive issues, some questions of treaty law were also discussed.

2. The European Union's legal authority to enter into agreements with third States

At the request of Japan, the EU side provided some further clarification of this issue. The EU delegation cited the high and increasing number of agreements (more than 70) concluded by the European Union on the basis of Article 24 TEU, also in the third pillar (Article 38 TEU). Reference was also made to the debate held in the context of the Reform Treaty regarding the explicit acknowledgement of the European Union's legal personality. The relationship between the European Union's and the Member States' competence to enter into international agreements on law enforcement matters was discussed. With reference to the EU-US MLA Agreement of 25 June 2003, the question as to whether Member States would retain their competence to enter into an MLAT with Japan, after Japan and the European Union had concluded a Mutual Legal Assistance Agreement, was answered in the affirmative, with the caveat that Member States should in such a situation obviously respect the *acquis* of an EU-JP Mutual Legal Assistance Agreement. The EU delegation also clarified the issue of the allocation of the provisions of the Schengen Implementation Convention to the first and third pillars.

3. The condition of double criminality

Japan stated that its Act on Mutual Legal Assistance in Criminal Matters required double criminality as a condition for the granting of assistance, but allowed for exceptions to that condition through treaties.

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The EU side started by setting out how the condition of double criminality operated under the 1959 CoE Convention on Mutual Assistance in Criminal Matters and further explained how that condition had been eroded by the development of EU third pillar law. A discussion ensued as to the possibility of restricting the condition of double criminality to coercive measures (as Japan had already done in its MLAT with the USA) and more specifically what type of investigative measures would be covered by the concept of coercive measures. Understanding the scope of coercive measures was of particular importance to Japan, given the variety of legal systems among the 27 EU Member States. In that context, the possibility of drawing up a positive and/or negative list of coercive measures was briefly touched upon.

4. The role of central authorities

Japan emphasised, as it had done during the first round of exploratory talks, that it was of paramount importance that a possible EU-JP MLA Agreement acknowledged 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). Given the fact that the Japanese police acts as an independent investigating body for any offence and can *proprio motu* initiate criminal investigations¹ and send letters rogatory, it was deemed important that the National Public Safety Commission could itself initiate a mutual legal assistance request without having to go through the Ministry of Justice or court. The EU side indicated that there might be some sensitivity regarding the possibility for a foreign police authority to ask a Member State authority directly for mutual legal assistance. The Japanese police, in a purely domestic context, is obliged to obtain a court warrant in order to be able to execute coercive measures, but for the purpose of obtaining mutual legal assistance, for example under the JP-US MLAT, can directly make a request to that effect. In that sense, the position of the Japanese police is similar to that of a prosecutor, who in a domestic case would typically need to obtain a court authorisation for coercive measures, but may directly ask a foreign authority for those measures through a mutual legal assistance request. Of course the legal system of the requested State will determine whether the execution of the mutual legal assistance request from the National Public Safety Commission requires a court intervention.

¹ Article 5(2)(10) Japanese Police Act.

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Conversely, the Japanese delegation indicated that the due process requirement under the Japanese constitutional system implied that the execution of a mutual legal assistance request for coercive measures would need to be subject to a test of necessity. This is currently already the case under Article 9(3) of the JP-US MLAT, which stipulates that the 'requested Party shall execute a request for the search and seizure of any item for the requesting Party, if such measures are necessary and the request includes information justifying those measures under the law of the requested Party' (see a similar provision in the JP-KO MLAT (Article 9(1))). It follows from this wording that the Central Authority of the requested State would always have the possibility of requesting additional information, should it find the information provided in the mutual legal assistance request insufficient to demonstrate the need for the requested coercive measures.

5. Administrative Cooperation

The provisions of the EU-US Mutual Legal Assistance Agreement and of the JP-US MLAT on this matter were briefly discussed. The Japanese delegation stated that, like the SEC in the United States, there is a Japanese supervisory financial authority which has administrative investigation powers as well as the power to refer cases to a prosecutor for criminal prosecution.

Given the fact that the provisions referred to above had been inserted in the relevant treaties as the result of a clear demand from the US side, this matter was not further discussed and it was concluded that it was unlikely that there would be a need for a similar provision in any EU-JP Mutual Legal Assistance Agreement.

6. Joint investigation teams

At the request of the Japanese delegation, members of the EU delegation provided some concrete examples of joint investigation teams and how they operated. It was emphasised that the setting up of a JIT obviated the need to go through letters rogatory for all information and evidence gathered through the JIT. Some aspects of the practical operation of JITs were explained in more detail, like the powers of seconded members of a JIT, costs, and the question of where a suspect would eventually be charged.

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The existence and function of the JIT Network was explained. Whilst all JITs so far had operated on a bilateral basis, the potential of JITs involving more than two States was also underscored.

The Japanese authorities indicated that they would study the possible inclusion of JITs in a EU-JP Mutual Legal Assistance Agreement with an open mind.

7. Bank information

The Japanese side asked for clarification on the exact scope and functioning of the relevant provisions in the 2001 Protocol to the 2000 EU Mutual Legal Assistance Convention. The EU side provided information on the relevant articles, which also served as a model for Article 4 of the EU-US Mutual Legal Assistance Agreement.

Following this explanation, the Japanese authorities stated that it was very difficult for them to ascertain whether a given person had a bank account in Japan. At least the name of the branch office needed to be known. This difficulty resulted, *inter alia*, from the existence of several, non-integrated sectoral banking associations, each with their own record-keeping system and the lack of a central database holding all Japanese bank accounts. However, the Japanese authorities indicated that they would further study the matter. The EU side was also informed that there was currently no authority under Japanese law for monitoring future transactions on a bank account.

The Japanese side reassured the EU delegation that information regarding a specific bank account could be seized pursuant to a 'normal' mutual legal assistance request under the heading of seizing 'items'. The Japanese side further informed the EU delegation that the Japanese money laundering legislation was FATF-proof.

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8. Hearing by videoconference and by telephone

The EU delegation set out the basic elements and advantages of hearing by videoconference and gave some concrete examples. The EU side could provide a study visit if Japan so wished. The Japanese side asked a number of questions relating to the use of hearing by videoconference. As to whether this was used in the pre-trial phase and or at the trial hearing itself, the Presidency indicated that it was not aware of any practical examples in the pre-trial phase. It was however pointed out that Article 6(6) of the EU-US Agreement allowed for the use of hearing by videoconference in the pre-trial phase.

Another question centred on the use of video-recorded images. The EU delegation replied that these images are often not recorded, but that in those cases where they are, their use is governed by the general data protection regime/specialty principle of the applicable Mutual Legal Assistance Agreement.

The Japanese delegation expressed two concerns regarding the possibility of hearing by videoconference. As a matter of principle, some concerns were raised regarding the possible violation of Japanese sovereignty by conducting a hearing by videoconference of a person on Japanese territory. At a practical level, the question was raised whether the use of a videoconference installation might have a negative psychological influence on a witness. The EU delegation tried to allay these concerns.

Whilst the Japanese delegation was as yet not in a position to support whole-heartedly the use of hearing by videoconference, it did indicate its willingness to look at this issue further.

The issue of hearing by telephone was also briefly touched upon. The EU delegation explained that this could be used for the hearing of less important witnesses and indicated that, at least under the domestic law of some Member States, statements obtained in this way could not be used as the main evidence in support of a conviction. The position of the Japanese delegation was the same as on hearing by videoconference.

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9. Asset seizure, confiscation and asset-sharing

The Japanese delegation referred to Articles 59 and 64(2) of the Japanese Mutual Legal Assistance Act, which allowed the Japanese authorities to execute a foreign confiscation order and share assets with the requesting State, even without a treaty with the requesting State.

The EU delegation referred to the rules contained in the Framework Decision of 6 October 2006 on the execution in the European Union of confiscation orders. Reference was also made to the Council of Europe Convention on Money Laundering, but it seemed that accession by Japan to that Convention had so far never been considered. However, the Japanese side would further reflect on the issue in the future.

10. Death penalty

Japanese law provides for 18 capital offences. In 2006 21 death sentences were imposed (the highest number per year over the past ten years). None of these was executed in 2006, but 4 death sentences pronounced prior to 2006 were executed.

The Japanese legal system does not allow for life imprisonment, but does provide for indefinite detention as a sanction for some criminal offences. Where indefinite detention has been imposed, however, early release is possible in the event of good behaviour and remorse. The decision on such early release is taken by an independent committee. No automatic, periodic review of indefinite sentences was foreseen. Japan would examine what would happen if the person concerned asked for an early release.

The European Union underscored the need to find a solution to bridge fundamental differences between the European Union and Japan. The Japanese delegation indicated that a provision which would exclude mutual legal assistance in any case where the death penalty could be imposed in theory would not be acceptable to Japan. A general treaty provision excluding the imposition of the death penalty was said to be not compatible with the Japanese constitutional concept of judicial independence.

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The EU delegation explained that it was of paramount importance that a solution be devised which would allow for effective mutual legal assistance but at the same time assure the Member States' authorities that any evidence they provided to Japan would in no circumstance be used to obtain a death penalty sentence.

The Japanese delegation stated in reply that its legal system made it difficult to devise such a solution. Whilst it was in practice highly unlikely, it was in theory not excluded that a Japanese judge would impose the death penalty even if the prosecutor had not requested it. Possible solutions with respect to Japanese constitutional law (see below under 13) were discussed.

The EU delegation gave some further explanations on the solutions that had been found in the context of the EU-US Agreements. However, it was also stressed that the solution of an "ordre public" clause should be seen in the specific EU-US context with many pre-existing bilateral MLATs between the Member States and the US, which obviously needed to be honoured, and might therefore not be readily transposable to the EU-JP context, where there were no pre-existing MLATs.

With reference to the practice of the US authorities of providing assurances that the evidence would not be used to obtain the death penalty, the EU delegation asked whether an agreement between a Japanese prosecutor and a Member State authority excluding the use of evidence for the purpose of obtaining a death penalty sentence would be binding on a Japanese court. The Japanese delegation confirmed that if a Japanese prosecutor were to inform the court of such an agreement, the court would in principle have to honour the agreement, either by discarding the evidence or by not imposing the death penalty, in particular taken into account the provisions of the Japanese constitution (see below).

It was agreed to reflect further on avenues for dealing with this fundamental difference between the EU and Japanese legal systems.

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11. Exchange of criminal records

This item was briefly touched upon by the EU delegation. The developing EU legislation in this area was sketched. It was agreed that the possibility of cooperation in this area would be further explored in the future. A possibility of exchanging of criminal records could be a possible added value of a future treaty, in particular since the future EU system for non-nationals would be a centralised one.

12. Data protection

It was noted that the JP-US and JP-KO MLATs had a very strict specialty principle, subjecting the use of evidence for other purposes to the prior consent of the requested party, whereas the EU-US Agreement incorporated a data protection provision similar to that of Article 23 of the EU Mutual Assistance Convention.

It was agreed to return to this matter in the future.

13. Japanese Constitution

The EU delegation was informed that Article 98(2) of the Japanese Constitution had a provision providing that Japan has to faithfully comply with treaties ratified by Japan. Treaties also supersede national law and could be applied directly if they are sufficiently clear. In practice, treaties are most often implemented by law.
