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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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NOTE

from :	Presidency
to :	Working Party on Cooperation in Criminal Matters
No prev. doc :	7288/3/09 REV 3 COPEN 47 COASI 31 RESTREINT UE
Subject :	Draft Mutual Legal Assistance Agreement between the European Union and Japan

Following the third round of negotiations (Tokyo, 27-29 July 2009)¹, the Presidency would like to consult delegations on the questions set out hereafter.

1. Death penalty and life imprisonment

During the negotiations with Japan, the present and former Presidency have emphasized the importance of having specific provisions with regard to the death penalty or, in relation to one Member State, life imprisonment. This is also clearly stated in the mandate. During the negotiations the EU has proposed a case-by-case assurance, provided at the moment a request for assistance is granted, that the capital punishment or life imprisonment should not be sought, imposed or enforced (Article 9(2) combined with a strict speciality principle (Article 11(1)) and a general condition that the evidence provided shall not be used for the purpose of imposing the death penalty or life

¹ See Annex I to 7288/3/09 REV 3 COPEN 47 COASI 31 RESTREINT UE.

imprisonment (Article 11(2)). So far, Japan has strongly rejected these proposals. It has explained that it has no legal possibility to bind courts of law when sentencing or to oblige the Minister of Justice not to enforce the capital punishment by signing the death warrant. The Presidency's view is that the current proposal would not be accepted by Japan and another solution has to be found. A new proposal will naturally have to be fully in line with the mandate according to which the EU shall insist on specific rules to guarantee that information transmitted by a Member State could in no circumstances be used in a proceeding leading to the imposition of a death penalty sentence or, in relation to one Member State, life imprisonment. The Presidency wishes to be informed of the delegations' views on this. The Presidency would also like to be informed if Member States have any experiences with Japan on extradition or MLA cases in which assurances or guarantees have been used with regard to the death penalty or life imprisonment.

2. Grounds for refusal

The views of the EU and Japan on Article 9 (in addition to paragraph 2) differ a great deal. Japan strongly opposes any ground for refusal which, directly or indirectly, makes a reference to military law (paragraph 1 (a)). Furthermore, Japan can not accept the general ground for refusal in paragraph 1 (c). The main reason is that this ground for refusal is too broad and could be used in all cases. Japan has also pointed out that this provision can not be found in the bilateral MLATs between the Member States and the U.S. Japan does not see any reason why it should be treated any differently than the U.S. Besides that, Japan resents the fact that there would be no universal application of the rule of double criminality (Article 9(3)) because two Member States are insisting on a broader application of that rule. Finally, Japan is also strongly opposed to the proposed paragraph 4 of Article 9, which it considers to be a one-sided ground for refusal.

The Presidency is of the opinion that Article 9 should be seen as a whole and in the view of the Presidency this provision can only be solved through a compromise, in which paragraph 2 of Article 9 on the capital punishment and, in relation to one Member State, life imprisonment will be included. The point of departure for the Presidency will be to keep a specific provision on the death penalty and life imprisonment. The room for manoeuvre lies in paragraphs 1 (a), 1 (c), 3 and 4. The Presidency would like to be informed of delegations' views on this.

3. Taking of testimony by videoconference

During the negotiations it has become clear that there are a number of limitations in Japanese law with regard to hearings by videoconference. However, Japan may administrate such a conference through the Ministry of Justice in Japan. Therefore, the Presidency is considering a general, "enabling" provision, by which all States would commit themselves to organise hearings by videoconference, but under which the details would be left to the domestic law of all States. The Presidency would like to be informed of delegations' view on this.

4. Bank information

It is clear that Japanese law does not allow for accessing the same detail of information, as should be possible under the 2001 Protocol. At the same time the Presidency is, on the basis of the information received from Member States, not in a position to ensure Japan that all Member States' transposition law allows to take all the measures provided for in the 2001 Protocol.

Therefore the Presidency is considering a provision which would oblige all States to take the measures necessary to determine, whether a natural or legal person that is the subject of a criminal investigation holds or controls one or more accounts, of whatever nature, in *one or a limited number of specified bank(s)* located in its territory (rather than any bank in its territory). The Presidency would like to be informed of delegations' views on this.

5. Immunity

The Presidency has continued to argue for the text proposed by the EU in Article 13(3) which has been supported by the Member States. However, Japan is still of the opinion that its text (Article 11(3) in the Japanese draft) is more favourable. One of the reasons put forward by Japan is that most of the bilateral MLATs between Member States and the U.S. include provisions which are almost identical to the text proposed by Japan.¹ The Presidency would like to be informed if this is correct. In Article 14(3) there is a similar provision on immunity when obtaining items in the requested State.

¹ As far as the MLAT between Sweden and the U.S. is concerned this is not correct, since that provision is more in line with the one proposed by the EU.

This kind of provision can not be found in any other international agreement and could probably be deleted. The Presidency would like to be informed of delegations' views on this.

6. *Competent authorities*

In the Agreement the Japan and Member States should use a notification system whereby the States clarify which authorities are competent to request assistance. Japan has been very reluctant to such a provision. Japan cannot see any need of this provision, because all requests will go through the Central Authorities. In the case of Japan requests will sometimes originate from police authorities. The Presidency has argued that it should be clear from which authorities a request can originate to avoid a request being questioned because it doesn't emanate from a judicial authority.

Japan asked which Member States have laws or regulations stipulating that a request for assistance can be refused on the ground that the request does not originate from a judicial authority. The Presidency would like to be informed of delegations' views on this.

7. *Service by post*

The Presidency has proposed an optional provision allowing service of documents by post. Japan has clearly indicated that it does not wish to avail itself of this possibility. It has requested to be informed which Member States would be interested in using such a provision.