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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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COUNCIL OF
THE EUROPEAN UNION

Brussels, 15 September2009

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**OUTCOME OF PROCEEDINGS**

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| from : | General Secretariat of the Council |
| to : | Working Party on Cooperation in Criminal Matters |
| Subject : | Draft Mutual Legal Assistance Agreement between the European Union and Japan - Third round of negotiations, Tokyo, 26-28 July 2009 |

**Preliminary matters**

Following the adoption by the Council on 27 February 2009 of a mandate for the Presidency to negotiate a Mutual Legal Assistance Agreement between the European Union and Japan, the Presidency held a first round of negotiations with the Japanese delegation in Tokyo on 8, 9 and 10 April 2009[1]. The second round of negotiations took place in Brussels on 15, 16 and 17 June 2009[2]. The third round of negotiations took place in Tokyo on 27, 28 and 29 July 2009.

The EU draft was discussed article by article, comparing it with the Japanese draft Agreement. As indicated below, the Presidency agreed on a number of changes to the EU draft[3]. Obviously, such agreement is *ad referendum*, subject to eventual agreement on the whole text and approval by all Member States.

[1] For the outcome of proceedings of that meeting, see 8804/09 COPEN 73 COASI 61 RESTREINT UE.

[2] For the outcome of proceedings of that meeting, see 11711/09 COPEN 130 COASI 115 RESTREINT UE.

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


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**Article 1 (Object and purpose)**

The drafting of this provision was discussed. It was agreed that the terms "requested state" and "upon request" would be used in paragraph 1 of this article. As a consequence Japan agreed that the latter term should not be used throughout the Agreement, contrary to what it had previously demanded. Japan agreed that this wording was without prejudice to the possibility of spontaneous assistance.

Japan continued to oppose paragraph 2, stating that it thought it was not expedient to define the scope of an Agreement "in the negative". As to the argument that Article 3(k) allowed for other forms of assistance, Japan was not convinced that this was a necessary reason for Article 1(2), as Article 3(k) would not oblige states to have certain types of mutual legal assistance, but was purely optional. The EU indicated it would consider deleting paragraph 2 of this article, as its content was self-evident anyway.

On a more general note, the Japanese delegation confirmed the understanding that the Agreement should also cover assistance to be afforded by Japanese courts. Japan committed itself to afford assistance in all cases where the assistance sought from Japan would be the exclusive competence of Japanese courts. As to the quality of the requesting authority, Japan indicated that, upon consideration, it had come to the conclusion that its domestic law could be interpreted in such a way that it covered requests by various kinds of investigatory authority. Whilst pointing to precedents where Japan had afforded assistance further to requests made by investigating judges, Japan nevertheless continued to express its preference for requests communicated by prosecutors. In that context, it asked to be informed which Member States' laws made it impossible in certain circumstances to channel requests for assistance through prosecutors.

The Japanese side confirmed that it would be able to grant mutual legal assistance to EU Member States' courts during the trial stage. Where the request related to types of assistance other than those normally dealt with by Japanese courts (i.e. taking witness statements), the request would have to be interpreted as being made for investigative purposes.

Whilst Japan had previously insisted on a reference in this provision so as to guarantee that judicial independence would be fully safeguarded, it now indicated it was no longer insisting on a reference to judicial independence, as long as there was a clear reference in Article 8.

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**Article 2 (Definitions)**

Japan reiterated its concern that the indiscriminate use of such terms (“judicial/competent authorities”) could lead to misunderstandings, as in Article 2 the term was used exclusively in the sense of authorities of the requesting State, whereas the draft Agreement also referred in many instances to the judicial authority of the requested State. Japan therefore proposed to use the more general term 'appropriate' authorities in those cases where the text related to the judicial authority in the requested State. Japan explained that in the Japanese draft, the term "appropriate authority" means requesting authority and "competent authority" means authority of the requested State that executes the request.

Some further discussion took place as to the exact terms to be used regarding cooperation in the tracing, seizing and confiscation of assets (paragraphs 7-11).

**Article 3 (Scope of assistance)**

There was consensus on subparagraphs (a) to (i). The drafting of subparagraph (k) of the Japanese draft was criticised by the EU. The Presidency explained that the EU could not agree to make the provision of any other type of assistance subject to the mutual agreement of the Central Authorities or to mutual agreement between the Contracting Parties as the European Union does not have competence to agree on enlarging the scope of the Agreement on an *ad hoc* basis. The Presidency moreover pointed out that the Japanese proposal seemed to refer to a more permanent type of solution between a Member State and Japan, whereas Article 28 already provided for a possibility to have bilateral agreements to supplement this EU-JP Agreement.

Japan indicated that it understood the EU concerns and that it would consider this matter further.

**Article 4 (Sending requests and replying to them)**

Regarding the proposed paragraphs 1 and 2, the Presidency indicated that the EU could consider the Japanese proposal for a description of the role of Central Authorities and the designation thereof in the Annex to the Agreement.

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The EU continued to argue in favour of the designation of judicial authorities, emphasising that it was also in Japan's interest to be aware of which competent authorities could initiate a request in each (Member) State. Japan argued that the States did not need to know these authorities as all communication would take place between the Central Authorities. The latter would know from which competent authorities to forward requests, as it was exclusively for the domestic law of the requesting state to determine which authority was competent to make a request for assistance. The EU side, however, warned the Japanese delegation that Member State authorities competent to execute a request might be reluctant to execute requests emanating from some Japanese authorities if it could not be demonstrated that under the EU-Japan Agreement those Japanese authorities were competent to initiate such requests. Contrary to what Japan thought, the fact that the request had been sent by a Japanese central authority might not always be sufficient to allay the concerns of Member State authorities in charge of the execution of the request.

Japan expressed some understanding for the EU position and further inquired as to which central and competent authorities would be designated under the EU-JP Agreement. The Presidency replied that this was for each Member State to decide. As far as competent authorities were concerned, the Presidency referred to the declarations made under Article 24 of the 1959 Council of Europe Convention.

There was consensus on the text of paragraph 3.

**Article 5 (Authentication)**

Japan repeated that it agreed with the EU position that a signature or an official stamp from the Central Authority should suffice, without any need for further forms of authentication. Its only concern was that the proposed wording should not lead to confusion with the term "certification of documents". EU indicated it would consider Japan’s wording, which is more in line with the 1959 Convention.

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**Article 6 (Requests for assistance)**

The delegations reached consensus on the wording of this Article, except for one issue. Japan repeated that, in urgent cases, it would like some prior notice of the fact that an urgent request was imminent in order to prevent the fax being mislaid. To that extent, it had proposed the insertion of the words "after consultations with the requested State". When the EU repeated that, in its view, the use of expedited means of communications could not be made dependent upon prior approval by Japan, Japan emphasised that this was not its intention, but that, for purely practical reasons, it wanted to have prior notice. It pointed out that it would not take a lot of time to make, for example, a phone call to the Japanese authorities.

Regarding paragraph 2(d) it was discussed whether a "statement" of applicable laws could suffice. The Presidency indicated that this was in accordance with the UN Model Treaty on Mutual Legal Assistance. It also pointed to the fact that in some Member States there could be situations where no written law exists. Japan indicated that, in its practice, the requirement to obtain the "text" of the relevant laws had so far never posed a problem.

**Article 7 (Language)**

Japan again insisted that a solution be found to allow English to be used in urgent cases, pointing out that this would facilitate the preparation of urgent requests by the requesting state. The EU side reiterated that this was an extremely sensitive issue and therefore difficult to accept in such a general manner. To this Japan replied that its proposal allowed both for the use of English on a case-by-case basis and on a permanent basis and that it was difficult to see why this was not acceptable to the EU side.

**Article 8 (Execution of the request)**

Paragraph 1: Japan demanded that a reference to judicial independence be inserted here. It could agree to the deletion of such references in all other instances in the text. The EU side suggested that this reference would be placed in the preamble instead. Japan agreed to consider this suggestion.

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Paragraph 2: both sides endeavoured to find a solution which could allay the Japanese concerns regarding practical problems that could arise in the execution of a request in accordance with the procedure specified. Japan indicated its willingness to consider wording consisting of a combination of "and where it is practically possible" with a consultation duty. On the other previous points of divergence between the EU text and the Japanese text, Japan accepted the EU text.

Paragraph 3: Japan would consider whether it could accept the EU text.

Paragraph 6: the European Union and Japan reached consensus on a general rule, according to which the requested State would send the originals of the documents sought by the request or, where there were reasonable grounds, certified copies.

**Article 9 (Grounds for refusal of assistance)**

Paragraph 1(a): Japan repeated that any reference to the Self-Defence Act was unacceptable and that any offences committed by soldiers under the Self-Defence Act were offences under 'ordinary' Japanese criminal law. It also clarified that it would grant assistance further to any request pertaining to a military offence.

Paragraph 1(c): Japan restated its objections to this broadly drafted ground for refusal, which was in danger of creating a *passe-partout* ground for refusal which could be used in all cases. Japan argued that Article 8(2), which contains an obligation to follow the procedures specified in the request, should suffice. For its part, Japan would always endeavour to execute a request. In the rare case of an impossibility to execute a request, this should not be considered as a refusal to execute a request, but as an impossibility to grant the assistance requested.

Paragraph 1(e): As the international *ne bis in idem* was not a generally accepted principle of international law as a ground for refusal of assistance, and not a mandatory ground for refusal under the mutual legal assistance legislation of most Member States, Japan repeated its reluctance to accept this ground for refusal here. However, it also indicated its willingness to reconsider the matter.

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Paragraph 2:

The Presidency again emphasised the legal and political importance of having adequate safeguards to prevent any use of evidence transmitted by EU Member States for the purposes of imposing the death penalty, and, in the case of one Member State, life imprisonment.

Japan again indicated the difficulties it had in ensuring that the death penalty would not be imposed and/or executed. As far as the imposition of such sentences was concerned, there was no possibility for Japan to bind courts of law. Japan also emphasised that it was in principle for each prosecutor to decide which items should be introduced as evidence in the trial proceedings in order to obtain a conviction. At any rate, a defence lawyer always had the possibility of demanding the disclosure of any evidence held by the prosecutor.

As far as the execution of the death penalty is concerned, Japan clarified that in the case of the execution of the death penalty, it was the Minister of Justice who signed the death warrant. As the Minister is merely fulfilling the obligation imposed on him by Japanese law, there is no possibility for him to opt out of it.

Japan also indicated that, from its point of view, any solution would obviously have to be based on reciprocity. A refusal by the European Union to cooperate for capital offences might lead to a similar refusal by Japan to cooperate for similar offences and might therefore be to the disadvantage of the European Union. The EU delegation made it clear that such an application of the reciprocity principle was entirely unacceptable.

Paragraph 3:

The EU side explained why two Member States needed a broader application of the rule on double criminality. Japan repeated that the fact that two Member States sought a broader application of the rule on double criminality was unacceptable.

Regarding the possible restriction of double criminality to compulsory measures, Japan indicated that at any rate it would need to have a clear understanding of which types of measure constituted compulsory measures under the national law of the Member States.

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Paragraph 4:

Japan again asked for the deletion of this proposed paragraph. Japan repeated that, under Japanese law, there was no such offence as membership of a criminal organisation and that, on the basis of UNTOC, no Contracting Party was obliged to introduce an offence of membership of a criminal organisation. Japan could not accept such a one-sided ground for refusal.

**Article 10 (Costs)**

Both delegations reached agreement on the substance of this Article, subject to some further drafting refinements.

**Article 11 (Limitations on the use of testimony, statements or items and other personal data)**

The Presidency again emphasised the importance of having an adequate data protection provision in this Agreement and stressed the political sensitivity of this topic.

Japan would further consider the proposed EU wording.

**Article 12 (Transport, maintenance and return of items)**

There was consensus between the two sides on the text.

**Article 13 (Taking of testimony or statements)**

Regarding paragraph 3, Japan voiced concerns that the text proposed by the EU could lead to the disappearance of evidence pending resolution of the claim of immunity. These concerns were also motivated by the fact that it was impossible for Japan to be aware of all the different types of immunity that could be invoked under 27 different legal systems. Japan stated that it was in the first place the responsibility of the requesting State to ensure that no requests for assistance were made that would impinge upon an immunity or privilege under the laws of the requesting state. Should such an infringement take place nevertheless, the evidence obtained in such a manner could be excluded by the trial court in the requesting State.

The Presidency indicated that it would also be possible to envisage a solution along the lines of Article 12 of the UN Model Treaty on Mutual Assistance, according to which the requested State would rely on a certificate or statement of the requesting State as evidence of the existence or non existence of that immunity, incapacity or privilege.

Both sides indicated they would consider this matter further.

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Regarding paragraph 4, the Presidency indicated that this might be deleted if a satisfactory solution could be found for the general rule on executing a request in accordance with the procedures indicated by the requesting authority (Article 8(2)).

**Article 14 (Obtaining of items)**

The Presidency indicated that, in its view, paragraph 3 could be deleted as this was a matter to be resolved entirely according to the law of the requested State. In general, it could not see how immunities or privileges under the law of the requesting state could have any extraterritorial effect on the territory of the requested State. Japan stated that this was possible in some cases, but that it would study the matter further.

**Article 15 (Hearing by videoconference)**

Japan reiterated that its national law imposed a number of limitations on the type of assistance it could provide in this regard. Whilst a witness is administered an oath when giving testimony to a trial court, this never happens in the context of testimony taken in the pre-trial phase. There was only one exception to this, namely when it would be materially impossible for a witness to attend the trial, in which case the Japanese Procedural Code allowed for a pre-trial taking of testimony from a witness by a court.

Following this, delegations discussed drafting suggestions by the EU, under which it would be possible for Japan, at the request of a Member State, to issue the "invitation to appear" to a person and to enable logistical hearing by videoconference. In such cases the Ministry of Justice would organise the hearing by videoconference. Japan indicated it would study these proposals further and consult the Supreme Court on them.

**Article 16 (Examination of persons, items or places)**

There was consensus between the two sides on the text.

**Article 17 (Locating or identifying persons, items or places)**

There was consensus between the two sides on the text.

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**Article 18 (Providing items in possession of the legislative, administrative, judicial or local authorities)**

There was consensus between the two sides on the text, except for the issue of criminal records. Japan queried why the EU thought it necessary to specify that criminal records would also be covered by this provision. Japan thought the term 'items' was general enough to cover criminal records too. The European Union referred to its very detailed internal legislation on this issue. Japan agreed to consider this matter further.

**Article 19 (Exchange of information from judicial records)**

The EU had deleted this provision.

**Article 20 (Service of documents) and Article 21 (Service of summons or invitations to appear)**

Both delegations discussed the wording of this article. At the request of Japan, the wording was further simplified by inserting a reference to other provisions regarding service of documents. Japan clarified that, under Japanese law, the service of a document would not necessarily take place by service to the addressee, but could also validly take place by other means (e.g. service on the head of the penitentiary institution where the addressee is residing). At any rate, if Japan were asked to execute service of a document in specific manner, the Japanese court would always decide whether such manner of service was contrary to the laws of Japan (cf. Article 8(2)).

Regarding Article 20, paragraph 3, Japan repeated that it related to the relationship between the requesting state and the addressee of the document and should not therefore be regulated in this Agreement, which was on mutual legal assistance between two States. The EU, however, pointed out that it had an interest in safeguarding its citizens' and residents' rights when it authorised, through an international Agreement, the service of documents upon them emanating from a third country.

**Article 22 (Safe conduct)**

The text of this Article was merged into Article 21.

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**Article 23 (Service by post)**

Japan referred to Article 108 of the Japanese Code of Criminal Procedure, which imposed the use of the government channel for the service of documents from a foreign authority. It was therefore not in a position to agree to service by post, which might be considered as an infringement of Japanese sovereignty. Japan would however study the matter further.

**Article 24 (Temporary transfer)**

Regarding paragraph 1, Japan stated it required a mandatory provision in order to be able to effect temporary transfer under its national law, as this made such transfer possible only for evidentiary purposes if a an international convention contained an obligation to that effect.
Regarding paragraphs 2, 3 and 5, the texts of both sides were identical.
Regarding paragraph 4, Japan indicated that it would consider the EU wording positively.

**Article 25 (Information on bank accounts)**

Japan made some concessions from its earlier negotiating position, by accepting a specific provision on banking information (which it had previously considered as superfluous as this was considered to be covered by the general provisions on the taking of 'items'). It repeated that it was in a position to provide information on bank accounts and bank transactions, but not to ascertain whether any given person had a bank account in Japan or to monitor bank accounts (i.e. future bank transactions) continuously.

Regarding the proposed Article 25, Japan remarked that some of the detail in this article was superfluous as it was already covered by Article 6. The Presidency indicated that it would consider to what extent its proposed text for banking information could be further simplified.

**Article 26 (Seizure and confiscation of assets)**

Both sides discussed the wording of paragraph 1. There was consensus between the two sides on the text of paragraphs 2, 3 and 4.

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**Article 27 (Spontaneous exchange of information)**

There was agreement on the wording of paragraph 1.

Regarding paragraph 2, the discussion centred on the question of whether the conditions to be imposed should flow from the national law of the providing State. The opinion of Japan was that there might be cases where it would want information not to be used for specific purposes, but that such conditions could not be linked to a specific provision under its national law.

**Article 28 (Relation to other instruments)**

Regarding paragraph 1, there was consensus.

Regarding paragraph 2, Japan would consider the EU proposal positively.

**Article 29 (Consultations)**

Japan continued to argue in favour of a clearer distinction between practical consultations between central authorities in order to settle practical issues and general consultations on the interpretation of the future Agreement. Following the exchange of some drafting suggestions, Japan indicated that it would come forward with a new proposal.

**Article 30 (Notifications and designations)**

See the discussion under Articles 2 and 4.

**Article 31 (Territorial application)**

The EU provided further clarification regarding which territories and countries would be covered by the future EU-JP Agreement.

**Article 32 (Entry into force and termination)**

Consensus was reached on this Article.

**Final clauses**

Japan insisted that only the English and Japanese text should prevail in case of any divergence of interpretation. The EU side reiterated that this was an extremely sensitive issue and therefore difficult to accept. Japan pointed out that such a solution had previously been adopted in some agreements between Japan and the European Community.

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As an additional argument, Japan stated that it would be impossible to verify all the language versions before the end of the year (target date for signing the Agreement). Under the Japanese domestic legal system, it was impossible subsequently to give the same force to other language versions that had not been submitted to the Cabinet before signing.

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