NORM DIFFUSION AS A TOOL TO UPHOLD AND PROMOTE EU VALUES&INTERESTS

A CASE STUDY ON THE EU JAPAN MUTUAL LEGAL ASSISTANCE AGREEMENT

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Abstract

The article takes the EU-Japan Mutual Legal Assistance Agreement as a case study to analyse the EU success in pursuing its Art 3(5) TEU mandate of upholding and promoting its values and interests; and to what extent the EU effectively relied on norm diffusion to this aim.
The EU has arguably been, at least partially, successful, in exporting its legal standards on 'improved judicial cooperation' in the text of the Agreement, especially a legal basis for acquiring testimony via videoconference, whereby to uphold its interest into security; and in including clauses allowing it to uphold its values of respect of fundamental rights. In particular, in having clause allowing the EU to refuse assistance if death penalty is involved, the EU arguably not only acted as a norm exporter, but it arguably set a new international legal standard, through which it also hoped to promote its values by triggering a change in Japan's retentionist policy.
An analysis of 10 years of implementation of the Agreement shows, however, a more nuanced picture, highlighting the importance to look at both the norm emergence and the norm socialisation phase when assessing the success of the EU as a norm exporter.
The institutionalisation of EU-Japan MLA cooperation though the conclusion of the agreement has triggered a stark increase in volume and speed of cases, contributing to higher security. However, legal, practical and cultural factors hinder the implementation in practice of EU legal standards on acquisition of evidence, and the promotion of the EU abolitionist agenda.

Keywords: Norm Diffusion, EU Values, EU security interests, Death Penalty, EU-Japan Mutual Legal Assistance Agreement, Improved Judicial Cooperation

INTRODUCTION

The Treaty on the European Union gives the EU a specific mandate for its external action. Art. 3(5) TEU establishes that "In its relations with the wider world, the Union shall *uphold and promote its values and interests*...". Art. 21(2)a TEU reiterates that the EU shall safeguard its values, fundamental interests, security and integrity in its external action. EU values are listed in Art. 2 TEU, and notably include freedom, democracy, equality, the rule of law and respect for human

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rights. EU interests conversely have been interpreted as 'non-normative [concepts], and concerned rather with power politics...'.[2] They can include objectives such as ensuring internal security on the EU territory to which cooperation with third states can contribute.[3]

Among various tools to pursue its external action mandate, one of the key strategies the EU is known to rely on is 'norm diffusion'. This exercise, also referred to as norm-export, norm-diffusion[4] or rule-transfer,[5] implies attempting to have international legal standards or third states' national legislation modelled on EU legal standards.[6] Diffusion of EU legal standards can serve to create a legal level playing field between the EU and its partners to ensure that cooperation can take place without the EU having to lower its own standards. This allows the EU to *uphold* its values when cooperating.[7] But, according to Art. 3(5) TEU, norm diffusion is also a self-standing foreign policy goal. Classic examples are the long-standing EU campaign towards a world-wide abolition of death penalty;[8] the promotion of fundamental rights more generally in third states through the insertion conditionality clauses in Trade agreements,[9] CFSP agreements and association agreements;[10] or the EU engagement in multilateral fora, like the UN, to promote its criminalisation standards, for instance on money laundering, as global ones.[11]

Upholding and promoting EU values, including through norm diffusion, can take place smoothly when EU values and EU interests coincide.[12] However, combining both can also be challenging. For instance, in the context of EU external action in criminal matters the interest in pursuing security can clash with the EU value of protection of fundamental rights.[13] The EU has so far

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[2] M Cremona, Extending the Reach of EU Law. The EU as an International Legal Actor, in M Cremona and J Scott (Eds.), EU Law Beyond Borders (OUP 2019) 64, 68.

[3] Cremona, n 2, 69. On external action as a tool to pursue internal policy goals, Lavenex S, EU external governance in 'wider Europe', (2004) 11(4) Journal of European Public Policy 680, 694.

[4] M Cremona and J Scott, Introduction in Cremona and Scott, n 2, 1.

[5] E Fahey, The Global Reach of EU Law (2016 Routledge) 4.

[6] The terms norm diffusion, norm promotion, norm export, or rule transfer will be used interchangeably. For a more nuanced understanding of the various terms, across different disciplines, see Fahey, n 5, 4 et ff, and the literature there mentioned. For a mapping of the phenomenon and its relations with extraterritorial application of EU Law see Cremona and Scott, n 2.

[7] See for an extensive treatise on this phenomenon in different policy areas including environment protection, consumer safety, data protection, and competition policy A Bradford, The Brussels Effect. How the European Union rules the world (OUP 2020).

[8] On this see extensively Section III, Subsection B(i)a.

[9] K L Meissner and L McKenzie, The paradox of human rights conditionality in EU Trade Policy: when strategic interests drive policy outcomes (2019) 26(9) Journal of European Public Policy 1273, 1275.

[10] M Cremona, Values in EU Foreign Policy, in M Evans and P Koutrakos (Eds) Beyond the Established Legal Orders: Policy Interconnections between the EU and the Rest of the World (Hart 2011) 275, 303.

[11] Cremona, n 2, 103. For a broader discussion on how the EU influences the creation of international law see R Wessel, Flipping the Question: The Reception of EU Law in the International Legal Order of European Law, (2016) 35(1) Yearbook of European Law 533.

[12] It was also interestingly argued that, conceptually, promoting EU values is also an EU interest Cremona, n 2, 69.

[13] A similar argument can be made for the management of migration. The 2016 Agreement with Turkey for resettlement of refugees was indeed listed as an example of the EU privileging the interest in EU borders management over the EU value of the protection of fundamental rights. Cremona, n 2, 69.

concluded, or is negotiating, judicial cooperation and/or data exchange agreements for the purposes of law enforcement with the US,[14] Canada,[15] the Associate Schengen States,[16] Australia, [17] and Japan.[18] The debate has mainly focussed on the EU capacity to pursue effective crime prevention and repression while upholding EU fundamental rights standards, in its relations with the US and Canada. [19] In particular, the question has been discussed if the EU acted as a 'norm promoter' or a 'norm taker', of privacy and data protection standards, in its transatlantic relations.[20] This article aims to contribute to such discussion on the EU capacity to pursue its external action mandate in criminal matters, including through norm diffusion, focussing on the EU Japan Mutual Legal Assistance Agreement (EU-Japan MLA Agreement, hereinafter).[21] More specifically, it looks at whether the EU succeeded in having the text of the Agreement modelled over EU legal

[14] Agreements between the European Union and the United States of America on extradition, OJ [2003] L181/27 (hereinafter EU-US extradition Agreement), Agreement between the European Union and the United States of America on Mutual Legal Assistance, OJ [2003] L181/34 (hereinafter EU-US MLA Agreement), Agreement between the United States of America and the European Union on the use and transfer of passenger name records to the United States Department of Homeland Security, OJ [2012] L 215/5, Council Decision of 13 December 2011 on the signing, on behalf of the European Union, of the Agreement between the United States of America and the European Union on the processing and transfer of Financial Messaging Data from the European Union to the United States for the purposes of the Terrorist Finance Tracking Program [2010] OJ L8/9.

[15] The EU and Canada had concluded a PNR exchange Agreement in 2015, which however received a veto of the Court of Justice in Opinion of the Court (Grand Chamber) 1/15 of 26 July 2017. Negotiations were then re-opened with Canada in 2018, Council doc. 13672/1/17REV 1, and are still ongoing.

[16] Agreement between the European Union and the Republic of Iceland and the Kingdom of Norway on the application of certain provisions of the Convention of 29 May 2000 on Mutual Assistance in Criminal Matters between the Member States of the European Union and the 2001 Protocol thereto, OJ L26 of 29/01/2004, p.1; Agreement between the European Union and the Republic of Iceland and the Kingdom of Norway on the surrender procedure between the Member States of the European Union and Iceland and Norway, L292, 21/10/2006, p. 2, Protocol between the European Union, the European Community, the Swiss Confederation and the Principality of Liechtenstein on the accession of the Principality of Liechtenstein to the Agreement between the European Union, the European Community and the Swiss Confederation on the Swiss Confederation's association with the implementation, application and development of the Schengen acquis OJ [2011] L 160/21.

[17] Agreement between the European Union and Australia on the processing and transfer of Passenger Name Record (PNR) data by air carriers to the Australian Customs and Border Protection Service, OJ [2012] L 186/4.

[18] Agreement between the European Union and Japan on mutual legal assistance in criminal matters, OJ [2010] L 39/19 (hereinafter EU-Japan MLA Agreement). The Council also authorised the opening of negotiation for an agreement to exchange PNR data. Council Decision authorising the opening of negotiations with Japan for an agreement between the European Union and Japan on the transfer and use of Passenger Name Record (PNR) data to prevent and combat terrorism and serious transnational crime, doc. 5378/20 of 4th February 2020.

[19] E Fahey, The Evolution of Transatlantic Legal Integration: Truly, Madly, Deeply? EU – US Justice and Home Affairs, in F Trauner, and A Ripoll Servent, (Eds.), The Routledge Handbook of Justice and Home Affairs Research (Routledge 2017) 336. V Mitsilegas, The External Dimension of Mutual Trust: The Coming of Age of Transatlantic Counter-Terrorism Cooperation, in C Briere and A Weyembergh, The Needed Balances in EU Criminal Law (Hart 2018) 215, Elaine Fahey and Deirdre Curtin (eds), A Transatlantic Community of Law: Legal Perspectives on the Relationship between the EU and US Legal Orders, (CUP 2014). Kuner C, 'A. Court of Justice International agreements, data protection, and EU fundamental rights on the international stage: Opinion 1/15, EU-Canada PNR' (2018) 55 Common Market Law Review, Issue 3, pp. 857–882

[20] A Ripoll Servent and A MacKenzie, The European Parliament as a 'Norm Taker'? EU-US Relations after the SWIFT Agreement (2012) (17) 2 European Foreign Affairs Review 71. Interestingly, while the EU has not yet concluded a PNR Agreement with Japan, and only an adequacy decision has been adopted, the question of the EU promoting its legal standards has also been raised in that context. E Fahey, I Mancini, The EU as an Intentional or Accidental Convergence Actor? Learning from the EU-Japan Data Adequacy Negotiations, (2020) 2 International Trade Law and Regulation 99.

[21] n 18.

standards on judicial cooperation, which should ensure effective crime prevention and repression, thus upholding the EU interest in security; and in including clauses allowing the EU to safeguard its values, notably respect of its standards in terms of fair trial and right to life. Moreover, the article looks at whether the Agreement has been, or can be, a useful tool to promote EU values in Japan, triggering change in the Japanese legal system on death penalty.

Despite having received so far little attention,[22] the EU-Japan Agreement is an interesting test-ground for analysing the EU success in pursuing its Treaty based external action mandate, and the role that norm diffusion played in it. Firstly, while the EU was keener and pushing for opening negotiations, Japan was less keen in concluding this Agreement, and remained so until late in the negotiations. This thus makes it a challenging context for the EU to have its preferences incorporated in the Agreement. Indeed, international relations literature teaches us that partners less motivated to open negotiations, in our case Japan, are also less inclined to compromise on the text of the negotiated Agreement.[23]

Secondly, upholding EU values with Japan presented the specific challenge of the death penalty. Interestingly, the EU faced a similar challenge when negotiating its MLA Agreement with the US. The EU did not manage to insert a clause in the EU-US MLA Agreement allowing the EU to refuse assistance if death penalty was involved, while it succeeded with Japan. Exploring the reasons for this success, and its (potential) impact in terms of norm diffusion in Japan, is thus particularly insightful.

Thirdly, having the Agreement been into force for more than 10 years, sufficient practice in MLA has been accumulated to allow for an empirical analysis of whether the provisions of the Agreement modelled on EU legal standards have been implemented in practice by Japanese authorities, and if any norm cascade in the Japanese domestic legal system occurred. Looking at both the 'norm emergence' phase for EU legal standards, *and* also at their 'socialisation and internalisation' in practice[24] arguably gives a more complete picture of the EU success as a norm exporter.

The article is structured as following. The first section explains the background to the negotiations, the initial Japanese resistance to negotiate the Agreement, and the success of the EU in concluding

[22] In English language see only J Tsuruta, Agreement between Japan and the European Union on Mutual Legal Assistance in Criminal Matters, (2011) 4 Journal of East Asia and International aw 235, which only summarizes the text of the Agreement, in Japanese see Y Nakauchi, Expansion of the network of mutual legal assistance in criminal matters to 27 European countries - The Japan-EU Mutual Legal Assistance Agreement, (2010) 4(303) Legislation and Examination 18-26, (original in Japanese, read in unofficial translation), available at: https://www.sangiin.go.jp/japanese/annai/chousa/rippou_chousa/backnumber/2010pdf/20100401018.pdf

[23] See infra Section I.

[24] On the various phases of the life cycle of a norm see M Finnemore and K Sikkink, "International Norm Dynamics and Political Change" (1998) 52 International Organisation 887, 893.

it (I). A second section looks at the text of the Agreement, assessing the degree of EU success in exporting its standards on judicial cooperation and on protection of fundamental rights (II). A third section looks at the implementation of the Agreement in practice (III). The conclusion highlights the relevance of the findings of this case study for broader debates on the EU as a global legal actor.

I. THE CHALLENGING CONTEXT AND NEGOTIATIONS OF THE EU-JAPAN MLA AGREEMENT

EU-Japan cooperation kickstarted in 1991 with the Hague Declaration,[25] which inaugurated a tradition of annual EU-Japan summits. Since then, cooperation has been of varying and moderate intensity, not always being a priority for either partner.[26] Since the Second World War, Japan's foreign policy has prioritised relations with the US and with Asian regional partners over those with European democracies[27] while the EU has centred its Asia strategy very much on China and India.[28] In such a context, cooperation in the fight against crime has not been particularly high on the agenda. In 2001, ten years after the Hague Declaration, the EU and Japan adopted an action plan to relaunch future cooperation, which included some references to the fight against terrorism, money laundering and various types of illicit trafficking.[29] A dedicated declaration on combating terrorism jointly was also adopted.[30] However, the action plan was criticised for lacking strategic vision and was qualified as being just a 'shopping list'.[31]

It was in this context that in 2002 the idea of an EU-Japan MLA Agreement was launched by Hans G. Nilsson, Head of Unit at the Council's Secretariat General at the time.[32] At the time no EU Member State had any bilateral judicial cooperation agreement with Japan. However, Japan initally

[25] Joint Declaration on Relations between the European Community and its Members States and Japan, adopted in The Hague on 18 July 1991, available at: http://eeas.europa.eu/archives/docs/japan/docs/joint_pol_decl_en.pdf Last accessed on the 4th April 2020.

[26] For an introduction to EU Japan relations see Keck J, Vanoverbeke D, Waldenberger F, EU-Japan Relations, 1970-2012: From Confrontation to Global Partnership (Routledge 2013).

[27] Nakamura H, Japan as a 'Proactive Civilian Power? Domestic Constraints and Competing Priorities, in Bacon P, Mayer H, Nakamura H (eds.) The European Union and Japan: A New Chapter in Civilian Power Cooperation (Routledge 2016) 17, 22. In some cases, Japan has even used European summits as opportunities to address foreign policy issues other than the relation with the EU (Nakamura, n 26).

[28] Mayer P, EU-Japan Relations in a Fluid Global Order, in Bacon et al, n 27, 1, 3.

[29] An Action Plan for EU – Japan Cooperation European Union – Japan Summit Brussels 2001, Text available at: https://www.mofa.go.jp/region/europe/eu/summit/action0112.html Last accessed on the 4th April 2020.

[30] Declaration on Terrorism, 8 December 2001.
Test available at: http://eeas.europa.eu/archives/docs/japan/docs/2001_terrorism_en.pdf Last accessed on the 4th April 2020.

[31] Berkofsky, A. (n.d.) EU-Japan Relations – Not Much or More than Meets the Eye? [Online]. Available at: http://www.jean-monnet-coe.keio.ac.jp/references/axel_berkofsky_02.pdf Last accessed 3 April 2019.

[32] Interview with Hans G. Nilsson, Head of the Division of Fundamental Rights and Criminal Justice at the Council of the European Union, between 1996 and 2009, while the EU Japan MLA Agreement was being negotiated.

failed to see the need for an agreement with the EU,[33] considering that up until that moment there had been a limited cross-border cases involving Japan and EU Member States, and was reluctant to open the negotiations. Conversely, at least some EU Member States, notably France and Germany, were supportive of the proposal.[34] France was the only Member State which had tried to conclude a MLA agreement with Japan without success, and it saw the EU negotiating an agreement as a chance to obtain what it had failed to achieve bilaterally. [35] The Netherlands, however, shared the Japanese concerns and saw no practical interest in concluding the Agreement.[36] This lack of common position within the Council created difficulties for the EU to obtain a negotiation mandate from his side. Indeed, at the time the third pillar institutional framework applied to cooperation in criminal justice, and it required the Council to decide unanimously on whether to grant a mandate to negotiate.[37]

Admittedly, the argument of lack of pratical interest for an EU-Japan MLA agreement had some value. In the years predating the entry into force of the Agreement cooperation between European States and Japan had not been particularly intense. From 1999 to 2009, Japan only issued 37 requests for mutual legal assistance to all EU MSs taken as a whole.[38] By comparison, Japan issued more than double that number of requests to the US or South Korea during the same period.[39] In the same time span, EU MSs issued 130 requests to Japan. Nearly half of these came from the UK and Poland, which issued 30 requests each, and another quarter came from the Netherlands, Germany and France, which issued 12 requests each; by comparison, the US or South Korea respectively issued 47 and 34 requests to Japan.[40] Thus, prior to the Agreement with the EU, Japan had unsurprisingly concluded MLA Agreements with the US[41] and with South Korea,[42] with which

[33] Interview with Guy Stessens, Administrator at the Council of the European Union, in the area of Criminal Justice, Data Protection and Fundamental Rights, between 2002 and 2015, while the Agreement was being negotiated.
[34] Interview with Hans G. Nilsson, n 32.
[35] Ibidem.
[36] Ibidem.
[37] Art. 24, TEU (Consolidated in Amsterdam) read jointly with Art. 83, TEU (Consolidated in Amsterdam).
[38] Nakauchi, n 22 , 20.
[39] Ibidem.
[40] Ibidem.
[41] Treaty between Japan and the United States on Mutual Legal Assistance in Criminal Matters of June 23th 2006 (Treaty No.9 and Ministry of Foreign Affairs Notification No.358), available at: https://www.mofa.go.jp/policy/treaty/submit/session159/agree-6.html. Last Access, 4th April 2020. (Hereinafter, Japan-US MLA Agreement).
[42] Treaty between Japan and the Republic of Korea on Mutual Legal Assistance in Criminal Matters of January 4th 2007 (Treaty No.1 and Ministry of Foreign Affairs Notification No.3), available at: https://www.mofa.go.jp/policy/treaty/submit/session164/agree-7.html, 4th April 2020.

cooperation had been more intense, as well as with Hong Kong[43] and China,[44] while negotiations were ongoing with Russia.[45] However, the argument put forward by Hans G. Nilsson in favour of the conclusion of an EU Japan MLA agreement was precisely that the low number of cases was (also) due to the lack of a clear legal basis for cooperation. [46] The prediction was that once the legal basis had been introduced, the Agreement would have actually boosted levels of cooperation. As we will see later on, this prediction turned out to be correct. [47]

Finally, in February 2009 the JHA Council authorised the Czech Presidency of the EU to negotiate with the assistance of the Commission. [48] After having appreciated the added value of having MLA Agreements as legal bases for cooperation with the US and South Korea, Japan also agreed to start the negotiations with the EU. In particular, it saw the opportunity to have an agreement with all the EU MSs at once as an significant incentive.[49] Once the mandate had been obtained, negotiations were relatively speedy and the Agreement was signed by the EU on 30 November 2009 under the EU Swedish Presidency.[50] There was a particular interest for the EU to *sign* the Agreement before that date, after which the entry into force of the Lisbon Treaty amended the procedure for negotiating and concluding external Agreements. In particular, after Lisbon, the Commission would have been entrusted with the task of carrying out the negotiations, as opposed to the Council's presidency which was in charge under the third pillar.[51] The opinion at the time was that the Commission could not simply take over a mandate to negotiate which had been given to the Council's presidency. A new mandate would have been necessary, hence the rush to sign the Agreement before the end of November.[52] Of course, even if the Agreement had been signed before Lisbon, the new legal framework would apply to the conclusion phase, requiring the

[43] Agreement between Japan and the Hong Kong Special Administrative Region of the People's Republic of China on Mutual Legal Assistance in Criminal Matters of 28th August 2009, (Treaty No. 11 and Ministry of Foreign Affairs Notification No. 577) available at: https://www.mofa.go.jp/policy/treaty/submit/session171/agree-1.html. Last Access 4th April 2020.

[44] Treaty between Japan and the People's Republic of China on Mutual Legal Assistance in Criminal Matters of 27th October 2008 (Treaty No. 11 and Ministry of Foreign Affairs Notification No. 577) available at: https://www.mofa.go.jp/policy/treaty/submit/session169/agree-13.html. Last Access 4th April 2020.

[45] Now entered into force: "Treaty between Japan and the Russian Federation on Mutual Legal Assistance in Criminal Matters" (Treaty No.12 and Ministry of Foreign Affairs Notification No.483) available at: https://www.mofa.go.jp/policy/treaty/submit/session174/agree-1.html. Last Accessed 1 April 2019. Preliminary consultations are ongoing with Switzerland, the Philippines and Brazil, though these are not at present official negotiations for agreement on mutual legal assistance in criminal matters, Nakauchi, n 22.

[46] Interview with Hans G. Nilsson, n, 32.

[47] See infra Section III.

[48] See the Press Release of the 2927th Council meeting Justice and Home Affairs, of 26 and 27 February 2009, available at: http://europa.eu/rapid/press-release_PRES-09-51_en.htm

[49] Interview with Guy Stessens, 32.

[50] Council Decision on the signing, on behalf of the European Union, of the Agreement between the European Union and Japan on mutual legal assistance in criminal matters, 2010/88/PESC/JHI of 30 November, OJ L 39/19 of 12.02.2010. Interview with Guy Stessens, n 33. See also Nakauchi, n 22.

[51] Art. 217, TFEU.

[52] Interview with Guy Stessens, n 33, and Interview with Hans. G. Nilsson, n 32.

Parliament to give its consent to the text.[53] Japan needed more time to check the Japanese version and thus signed the Agreement on 15 December 2009. Nonetheless, debates within Japan's Public Safety Commission show that concerns about the need for an agreement, given the low number of cases, remained until shortly before its signature.[54] The Agreement was formally concluded on the 7th October 2010,[55] with the UK deciding to opt in, [56] and entered into force in January 2011. Considering the resistances on the Japanese side, and the fact that not all EU Member States were supportive at the beginning, the conclusion of the Agreement itself can be considered a success for the EU. This is all the more so taking into account that the rationale for its conclusion was not a response to an increase of cross-border cases, but based on a prediction of a *future* increase in cooperation. More importantly, this background is meanigful for the broader discussion in this article, namely the EU capacity to succesfully export its legal standards in the text of the Agreement. Literature on 'goal achievement' in international negotiations teaches us that the party less inclined to negotiate is also intuitively the one less inclined to compromise. In particular, Oberthuer and Groen use in this context the concept of interdependence and claim that 'actors losing less in the case of failure to have more leverage – to the extent that others consider their participation crucial/beneficial'.[57] We can assume that being less willing to negotiate, Japan also considered to have less to loose from the failure of the negotiations, and therefore less willing to do concessions in the negotiations. This makes it particularly challenging for the EU, the 'more willing party' not only to bring the negotiations to a good end but also to have its preferences incorporated in the Agreement. The achievements, and the failures, of the EU in exporting its legal standards on judicial cooperation and fundamental rights, discussed in the next sections, must thus be read in this context.

Before turning to the content of the Agreement it is worth noticing that, in the years following the conclusion of the MLA Agreement, the cooperation between EU and Japan, developed further.

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[53] Art. 218(6)a, TFEU.

[54] Minutes of the Committee Meeting of the National Public Safety Commission of Japan, of 5 November 2009, Original in Japanese, read in unofficial translation.

[55] While the text was negotiated under the third pillar framework, the conclusion of the agreement took place under the Treaty of Lisbon Procedure, which also required an approval by the European Parliament, (European Parliament Recommendation on the draft Council decision on the conclusion of the Agreement between the European Union and Japan on mutual legal assistance in criminal matters (05308/2010 – C7-0029/2010 – 2009/0188(NLE)).

[56] See for the UK's and Ireland opt in Council Decision on the conclusion of the Agreement between the European Union and Japan on the mutual legal assistance in criminal matters- Adoption, doc.7670/10 of 27 September 2010, respectively pt. 4 and 5. Curiously, the Agreement also mentions Danish authorities among central authorities, see Annex I. This is because the text of the Agreement was being negotiated under the third pillar regime, which bound Denmark. The Agreement was also signed before the entry into force of the Lisbon Treaty - this signature thus being binding for Denmark. However, it entered into force after Lisbon, under whose regime Denmark is not bound by Area Freedom Security and Justice measures. The Agreement itself is thus not binding for Denmark.

[57] Groen L and Oberthuer S, Explaining goal achievement in international negotiations: the EU and the Paris Agreement on climate change, (2018) 25(5) Journal of European Public Policy 708, see also the literature on power and interdependence there mentioned.

In 2018, the EU-Japan Economic Partnership Agreement[58] and the Strategic Partnership Agreement (SPA)[59] were concluded. The latter, unlike the EU-South Korea SPA, does not include any title on JHA matters; however there are, among other aspects, a number of provisions relating to the fight against crime.[60] Moreover, in the same year, Europol signed a Working Arrangement with the National Police Agency of Japan.[61] Finally, the Council has also authorised the opening of negotiations of a PNR Agreement with Japan.[62]

II. THE CONTENT OF THE EU-JAPAN MLA AGREEMENT AND THE ROLE OF NORM DIFFUSION

The EU-Japan MLA Agreement consists of a core text of 30 articles, and four annexes respectively dealing with designation of central authorities, designation of competent authorities for issuing and receiving MLA requests, the language in which requests can be sent and received and the wider possibility for Portugal, Hungary and Austria to refuse assistance.

Art. 1 clarifies the scope of the Agreement, limiting it to MLA in relation to investigations, prosecutions and other proceedings in criminal matters, excluding extradition, transfer of proceedings in criminal matters and enforcement of sentences, apart from confiscation, which is covered by Art. 25. The remaining 29 articles regulate EU-Japan cooperation in detail.

The next sub-sections discuss the core of the Agreement and assess whether the EU was successful in exporting its legal standards in the text of the Agreement enabling it to uphold its interests in terms of security (A) and its values linked to the protection of fundamental rights (B).

A. The Agreement's provisions ensuring effective judicial cooperation whereby upholding EU interest in security

The EU has been a pioneer in the field of judicial cooperation. More specifically, literature on international cooperation distinguishes between three models for judicial cooperation, namely

[58] Agreement between the European union and japan for an economic partnership, signed in Tokyo on the 17th of July 2018, Text available at: https://www.mofa.go.jp/files/000382106.pdf .

[59] Strategic partnership agreement between the European Union and its member states, of the one part, and japan, of the other part, signed in Tokyo on the 17th of July, text available at: https://www.mofa.go.jp/files/000381942.pdf. Last accessed on 4th of April 2020. For a comment on the history of both Agreements see Ponjaert F, The political and institutional significance of an EU-Japan trade and partnership agreement, *The European Union and Japan: A New Chapter in Civilian Power Cooperation*, in Bacon et al., n 27, 85.

[60] See Art. 7, 8, 34, 35, 36, 37, Strategic Partnership Agreement between the European Union and its Member States, of the one part, and Japan, of the other part ST/8463/2018/INIT, [2018] OJ L 216/4.

[61] Arrangement available at: https://www.europol.europa.eu/partners-agreements/working-arrangements Last accessed 4th April 2020.

[62] Council, doc. 5378/20, n 18.

"traditional cooperation", "improved cooperation", and "mutual recognition". [63] The various models differ in that they strike a different balance between the need to preserve states' sovereignty and the need to ensure effective cooperation against crime, with traditional cooperation being the least effective system. The EU adopted improved cooperation instruments already in the 2000, with the '2000 EU MLA Convention',[64] and mutual recognition ones in 2014, the 'European Investigation Order'.[65] Mutual recognition is admittedly a particularly advanced, EU specific, model for cooperation, [66] which can hardly be exported. Yet, when concluding agreements with third parties the EU aimed for 'improved cooperation' type of agreements, an example being the EU-US MLA Agreement. [67] This sub-section accordingly enquires into what extent the EU has succeeded in having the EU-Japan MLA Agreement modelled over EU 'improved cooperation', whereby to satisfy the EU interest in security. It aims at checking whether the EU managed to insert provisions which Japan did not include in its legal system and which do not feature in other MLA agreements Japan had concluded at the time.

Incidentally, literature on norm-diffusion does acknowledges that norm-diffusion is a complex phenomenon, and that the EU often engages in promotion of EU legal standards whose origin is a mixture of European and international law.[68] This contribution does not pretend that 'improved cooperation' is an exclusively *EU law*-based phenomenon. [69] The focus is not that much on the 'absolute' EU law origin of the relevant provisions, but on the 'relative' EU origin in the EU Japan context. From a methodological perspective, in order to identify the provisions of "EU origin" in the Agreement, the analysis essentially relies on interviews with officials involved in the negotiations, and on a comparison of the EU-Japan MLA Agreement with the 2000 EU MLA

[63] Weyembergh A, « Coopération judiciaire pénale » (2018) 2700 Jurisclasseur Europe Traité. Throughout the article reference is made to examples of instruments belonging to each category, with the understanding of course that this is just an indicative categorization and that single instruments might include elements of different categories.

[64] Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union (2000/C 197/01) (Hereinafter 2000 EU MLA Convention).

[65] Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters, [2014] OJ L 130/1.

[66] A Weyembergh, I Armada, The mutual recognition principle and EU criminal law, in M Fletcher, E Herlin-Karnell, C Matera, The European Union as an Area of Freedom Security and Justice (Routledge 2016).

[67] n 14.

[68] Cremona, n 2. E. Fahey, Joining the dots: External norms, AFSJ Directives and the EU's role in the global legal order, (2016) 41(1) European Law Review 105.

[69] Examples of provision examples of improved cooperation can be found also in non-EU law instruments. See for instance Art. 5(1)f of the UN Model MLA Agreement, which require state parties to set deadlines to comply with requests for assistance, typical of improved cooperation (UN Model Law on Mutual Assistance in Criminal Matters, available at: https://www.un.org/ruleoflaw/files/Model%20Law%20on%20MLA%202007.pdf Law accessed on 4th of April 2020). Another example of non EU Law based improved cooperation is the Second Additional Protocol to the 1959 European Convention on Mutual Assistance in Criminal Matters, of 8 November 2001, ETS 182. This Protocol is however actually the *result* of a quite strong influence of the 2000 EU MLA Convention.

Convention, and with the Japan-US MLA Agreement, which is taken as an example of an alternative agreement concluded by Japan.[70]

The analysis focuses on three salient aspects of improved cooperation which distinguish it from traditional cooperation, namely the channels for the transmissions of requests, if through Ministers of Justice, or faster direct contacts between judicial authorities (i); the broader or narrower amount of discretion left to refuse assistance (ii); and the more or less modern type of assistance which can be asked (iii).

i. Ministerial channels for the transmission of requests

The EU-Japan MLA Agreement provides for the transmission of requests through central authorities.[71] Most State parties designated Ministries of Justice and, only in some cases, also, or exclusively, the office of the prosecutor,[72] especially when the request occurs during the pre-trial phase;[73] or State police when it takes place during the investigation phase.[74] Central authorities collect and re-direct the requests to the competent authorities, mostly judicial authorities.[75] This system is closer to *traditional cooperation* instruments,[76] than it is to *improved cooperation* instruments. The 2000 EU MLA Convention privileged direct contacts between judicial authorities whilst maintaining diplomatic channels - such as via ministers of justice, which could add a political filter slowing down inter-state cooperation - as the exception.[77] The EU-US MLA Agreement similarly includes the option of direct contact between judicial authorities.[78] The EU-Japan MLA Agreement therefore does not seem modelled on EU law on this point. Significantly another agreement concluded by Japan, the Japan-US MLA Agreement also envisages a role only for central authorities.[79]

ii. Wide, yet not unlimited, discretion to refuse cooperation

[70] n 41.
[71] Art. 5(1), EU-Japan MLA Agreement.
[72] Lithuania, Luxemburg, Hungary and Malta, Portuguese, see Annex I to the EU-Japan MLA Agreement.
[73] This is the case for the Czech Republic, Latvia, Poland, Slovak Republic, see Annex I to the EU Japan MLA Agreement.
[74] The Republic of Latvia, see Annex I to the EU-Japan MLA Agreement.
[75] Germany and Denmark see Annex I to the EU-Japan MLA Agreement.
[76] Cfr with Art. 14 of the 1959 Council of Europe, European Convention on Mutual Assistance, 20.IV.1959, ETS n. 30, (Hereinafter 1959 CoE MLA Convention) an example of older traditional cooperation instrument.
[77] Art. 6, 2002 EU MLA Convention.
[78] Art. 4(3)(a), EU-US MLA Agreement.
[79] Art. 2, Japan-US MLA Agreement.

The EU-Japan Agreement imposes an *obligation* for the requested State to provide assistance.[80] In this respect, it goes further than *traditional cooperation* instruments which use milder language when defining the duty to cooperate,[81] and is in line with the more stringent wording on compliance of the 2000 EU MLA Convention.[82] However, it does not include the possibility for State parties to fix deadlines, which one finds in improved cooperation instruments, [83] thus granting the requested party more margin for manoeuvre. The possibility to include deadlines is similarly absent in the US-Japan Agreement, but incidentally also from the EU-US MLA Agreement. However, interestingly, thanks to the conclusion of the Agreement itself, despite the lack of deadlines, the timeframes for dealing with MLA requests from and to Japan have sensitively shortened.[84]

Next to the obligation to cooperate, Art. 11 contains an *exhaustive* list of grounds for refusal, These include provisions one normally finds in both *traditional cooperation* and *improved cooperation* instruments,[85] as well as in the Japan-US Agreement,[86] such as the possibility to deny assistance when the request concerns a political offence; when the concerned person has already been finally convicted or acquitted for the same facts in a MS or in Japan (*ne bis in idem* clause); when the execution of a request is likely to prejudice its sovereignty, security, public order or other essential interests (public order clause)[87]; when the request is for coercive investigative measures, if the facts are not punishable in the requested State (double criminality clause).[88] Nevertheless, the EU-Japan MLA Agreement does not list the fiscal or military nature of the offences as ground for refusal, which one could find in traditional cooperation instruments, but not in improved cooperation ones. [89] Moreover, the EU-Japan MLA Agreement explicitly excludes bank secrecy as grounds for refusal,[90] an innovation we similarly find in EU Law *improved cooperation* instruments, such as the 2001 Protocol to the 2000 EU MLA Convention. [91] The EU-US MLA Agreement[92] similarly rules

[80] Art. 1.1 states that "[t]he requested State shall, upon request by the requesting State, provide mutual legal assistance".
[81] The 1959 CoE Convention wording is "The Contracting Parties undertake to afford each other, in accordance with the provisions of this Convention, the widest measure of mutual assistance", which results milder if compared with "shall" provide assistance in a number of listed cases.
[82] See Art. 3, 2000 EU MLA Convention which similarly uses the term 'shall'.
[83] See Art. 4(2), 2000 EU MLA Convention.
[84] See section III, sub-section A.
[85] See Art. 5, 1959 CoE Convention, Art. 3(2) and Art 4(e) of the UN Model MLA Agreement, which are examples of traditional cooperation. Note that the 2nd Additional Protocol to the 1959 CoE Convention, traditional example of improved cooperation, as well as the 2000 EU MLA Convention did not modify this aspect.
[86] Art. 3(4), Japan-US MLA Agreement.
[87] This public order clause also contains a death penalty ground for refusal that is discussed in detail in the next sub-section.
[88] Art. 11(2), EU-Japan MLA Agreement. Two MSs, Hungary and Austria, have extended the double criminality ground for refusal to all investigative measures.
[89] Art. 2, 1959 Council of Europe Convention on MLA, ETS n 30.
[90] Art. 11(3), the EU-Japan MLA Agreement.
[91] Art. 7 and 8, EU MLA Protocol established by the Council in accordance with Art. 34 of the Treaty on European Union to the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union [2001] OJ C 326/2.
[92] Art. 5, EU-US MLA Agreement.

out the possibility to rely on bank secrecy as a ground for refusal, whereas the Japan-US Treaty includes this ground for refusal. One can thus conclude that, as far as the degree of discretion allowed to refuse cooperation is concerned, the EU-Japan MLA Agreement reproduces, at least partially the EU Law model for improved judicial cooperation.

Interestingly, the EU also managed to include a reference to death penalty in the public order clause which is an important success for the EU. This is relevant to assess the capacity of the EU to uphold its values when cooperating with Japan; it is therefore discussed in the next section.

iii. Evidence acquisition techniques

Art. 3 of the EU-Japan MLA Agreement includes a number of standard investigative measures that can be found both in *traditional cooperation* and *improved cooperation* instruments, such as taking testimony or statements,[93] obtaining items including through the execution of search and seizure[94] or obtaining records, documents or reports of bank accounts.[95]

Next to this, Art. 16 allows hearing by videoconference, which cannot be found in older *traditional cooperation* instruments and was introduced in *improved cooperation* such as the 2000 EU MLA Convention.[96] This provision was inserted in the Agreement at the EU's request,[97] and it is also included in the EU-US MLA Agreement,[98] but, significantly, it is not present in the Japan-US MLA Agreement. The inclusion of this provision was undoubtedly a negotiation success for the EU. Section III illustrates however the challenges in implementating this provision in practice.

Other modern kinds of assistance included in the 2000 EU MLA Convention, such as interception of communications or controlled deliveries[99] or, most importantly, a legal basis to create Joint Investigation Teams (JITs),[100] are nonetheless missing. A JIT allows prosecutors or police officers from country X to directly collect evidence in country Y without having to issue MLA requests. JITs prove particularly effective in dealing with complex cases swiftly.[101] They are however sensitive in terms of national sovereignty, since they imply foreign investigators operating on

[93] See Art. 10, 1959 CoE Convention, on personal appearance of witnesses.
[94] Search and seizures are not mentioned per se in the 1959 Convention, but Art. 5 of the Convention allow States Party to introduce the possibility to submit request for Search and Seizures to the double criminality requirement.
[95] See Art. 21, and 22, 1959 CoE MLA Convention.
[96] Art. 10, 2000 EU MLA Convention.
[97] Nakauchi, n 22.
[98] Art. 6, EU-US MLA Agreement.
[99] See by comparison Title III of the 2000 EU MLA Convention.
[100] Art. 13, 2000 EU MLA Convention, and Art. 5 of the EU-US MLA Agreement.
[101] Among many examples, we can mention the JIT created to investigate the disappearance of the Malaysian Plane: https://www.government.nl/topics/mh17-incident/achieving-justice/the-criminal-investigation.
Last Accessed 2 April 2019.

national territory, though under the authority of the JIT leader who is from the country where the investigative acts are executed.

While JIT are commonly used in Europe, and in cooperation with the US,[102] Japan was reluctant to include a relevant legal basis in the Agreement with the EU, and unsurprisingly JITs are not mentioned in the Japan-US MLA Agreement. Japan's resistance was due to an interpretation of the principle of sovereignty as precluding foreign investigators from operating and collecting evidence on Japanese soil.[103] While there are voices calling for the abandonment of this 'old fashioned' understanding of sovereignty,[104] this approach is still considered the predominant one. Admittedly, in 1992, Japan ratified the UN Drug Trafficking Convention[105], which includes a legal basis to form JITs. Nonetheless, the convention specifies that JITs can be formed to the extent that it is not contrary to domestic law, [106] which is probably the exception that Japan would rely on to decline participation. Moreover, during the negotiation of the Agreement with the EU, when the subject of JIT was brought up, the Japanese delegation also raised practical concerns stemming from a linguistic barrier that would affect the functioning of the JITs, and the impracticality of using English as a common language.[107] The imminent entry into force of the Treaty of Lisbon,[108] and the desire of EU Member States to sign the Agreement before that date for the reason explained above, prevented a thorough discussion on this sensitive point, and the issue was eventually dropped.[109] For the purposes of this article, we can conclude that the EU only partially succeded in having its judicial cooperation acquis integrated in the text of the EU-Japan Agreement, since videoconference was included and JITs were not.

Interestingly, in 2011 a JIT was necessary to deal with a case of drug trafficking, which involved Japan and three EU Member States. Couriers were recruted by a criminal organisation in Belgium in order to transport amphetamines to different countries, including Japan. Their travels, through France, were organized in the United-Kingdom. EU Member States formed a JIT but Japan declined participation on the basis that national law prevented it from doing so. Cooperation with Japan had to be established through *ad hoc* letters of request. Cooperation was facilitated and accellerated through active participation of Japanese judicial and law enforcement authorities to a

[102] Art. 5, EU-US MLA Agreement.
[103] Interview with Go Naruse, Associated Professor in Criminal Procedure, University of Tokyo.
[104] Interview with Go Naruse, n 103, see also: Yamauchi Y, Investigation Abroad, in Matsuo K and Iwase T (eds.) Practical Criminal Procedure Ⅰ: Investigation (Seirin Syoin 2012) 5, 18-21.
[105] Status of ratifications: https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=VI-19&chapter=6&clang=_en
[106] Art. 9(c), United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic substances of 1988.
[107] Interview with Guy Stessens, n 33.
[108] Ibidem.
[109] Ibidem.

coordination meeting at Eurojust in The Hague.[110] This case nonetheless highlights the limits of the EU-Japan MLA Agreement.

B. The Agreement's provisions ensuring protection of fundamental rights whereby upholding EU values

As mentioned, a first fundamental rights challenge for the EU was the presence, in Japan, of death penalty to which the EU is radically opposed, and the abolition of which has been a key objective of EU foreign policy. To be able to *uphold* and *promote* its values on this point, the EU insisted, and succeeded, in having a clause in the Agreement allowing it to refuse assistance to Japan if the relevant cases involved capital punishment. This clause was partially modelled over the one the EU included in the extradition Agreement with the US, but went further than that, being an example not only of norm diffusion but of the EU setting a new international legal standard (i). A second challenge was the difference in standards on the right to access to a lawyer between the EU and Japan, with Japanese criminal procedure providing less protection than EU Law. The challenge in this context was for the EU to be able to simultaneously uphold its values and its interests. The EU MLA Agreement includes specific provisions on the norms applicable to the collection of evidence which can be relied upon to address this challenge, similar to those present in other agreements concluded both by the EU and by Japan (ii).

i. The Agreement's innovative death penalty-based ground for refusal

Art. 11(b) of the Agreement allows to refuse a request for assistance 'if it is likely to prejudice its sovereignty, security, ordre public or other essential interests'. It further clarifies that for the purposes of this paragraph the 'requested State may consider that the execution of a request concerning an offence punishable by death under the laws of the requesting State'.[111] This clause has naturally been inserted at the request of the EU, considering that only Japanese law includes capital punishment. It is argued here that this was a particularly important success for the EU, in light of the importance of opposing capital punishment for the EU identity as international actor (a); but also considering that a similar success could not be achieved in the EU-US MLA Agreement (b).

[110] Interview with Daniel Bernard, former Belgian Federal Prosecutor. Notably, also the presence of an attached prosecutor to the Japan Mission to the EU in Brussels can play an important role in facilitating cooperation in practice between Japan and EU MS.

[111] Portugal can also refuse assistance if the offence is punished with Life Imprisonment, see Annex IV to the EU-Japan MLA Agreement.

a. The importance of the death penalty ground for refusal: the EU abolitionist agenda

The EU has since longtime embarked in a mission to abolish the death penalty, first internally and secondly in third countries.[112] To this aim, it has resorted to a wide range of tools. It unilaterally enforces bans on export of products which can be used in capital executions,[113]submits amicus curiae briefs in foreign cases involving death penalty,[114] or it finances local abolitionist campaign or initiatives in third states.[115] Moreover, it routinely inserts human rights' clauses including the question of death penalty in political dialogues, in CFSP agreements, or association agreements, [116] with the long-run prospect of EU membership often providing the last push towards abolition.[117] The inclusion of death penalty based grounds for refusal in judicial cooperation agreements signed by the EU - both MLA or extradition agreements - should thus be read in this context.[118]

Admittedly, States Parties to the European Convention on Human Rights have a specific obligation not to *extradite* suspects if they risk being subject to death penalty. Indeed, ECHR law prevents state from facilitating the violation of fundamental rights of an individual who, at the time of the extradition request, is within the jurisdiction of that state.[119] The inclusion of death penalty based grounds for refusal in extradition agreements, like the EU-US extradition Agreement,[120] thus has (also) legal reasons.[121] The law is not equally clear on whether European States are legally bound to refuse providing legal assistance, if that could lead to capital punishment.

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[112] I Manniers, Normative Power Europe: A Contradiction in Terms? (2002) 40(2) Journal of Common Market Studies 235.

[113] This is the case for the export of electric chairs or automatic drug-injection apparatus to the US. Cremona, n 10, n 84.

[114] Cremona, 10, 311.

[115] Bacon P, Reiterer M, Vanoverbeke D, Recent Developments on the Death Penalty in Japan: Public Opinion and the Lay Judge System, (2017) European Yearbook of Human Rights 103, 104, ff.

[116] Cremona, n 29, 309.

[117] This was especially the case with Ukraine, Vandebroek E and Verbruggen F, The EU and Death penalty Abolition: The Limited Prospects of Judicial Cooperation in Criminal Matters as an External Policy Tool, (2013) 4(4) New Journal of European Criminal Law 481, 484. Wohlwend R, 'The role of the Council of Europe's Parliamentary Assembly' in Council of Europe, The death penalty beyond abolition, (Council of Europe Publishing 2004) 65-85.

[118] Vandebroek and Verbruggen, n 115.

[119] Soering v. The United Kingdom, of 7 July 1989, n. 14038/88.

[120] Art. 13, EU-US Extradition Agreement.

[121] Still, interestingly, prior to the finalisation of both agreements, some extradition cases involving the death penalty had occurred with the US and specific *ad hoc* solutions were found to allow EU MSs extraditing individuals without these being subject to death penalty. Chambon F. « La France accepte de cooperer avec la justice americaine sur le cas de Zacaraias Moussaoui » Le Monde 29, Novembre 2002. However, the EU insisted on including a general clause in the EU US Agreement. Stessens G, The EU-US Agreement on Extradition and on Mutual Legal Assistance: how to Bridge Different Approaches, in De Kerchove G and Weyembergh A, Sécurité et justice: enjeu de la politique exteriéure de l'Union européenne (Editions de l'ULB 2003) 263, 267. Moreover, exceptionally, some States, such as Germany, already included grounds for refusal related to the death penalty in bilateral extradition treaties with the US before the Soering case (n 117). Such clauses have thus not only been argued for by the EU due to the need to avoid responsibility in connection with international human rights.

In this case, the individual who might be subject to capital punishment would not be within European States jurisdiction, which means there is no trigger for the application of ECHR law.[122] Moreover, it was argued, it would not be possible to hold European States responsible for providing assistance to Japanese cases which involve death penalty under international law State Responsibilities rule.[123] The EU decision to eventually agree on an MLA agreement with the US without a ground for refusal related to the death penalty seems to confirm that providing MLA in cases involving death penalty is in principle legal.

The EU insistence of having a death penalty-based ground for refusal in the MLA Agreement with Japan despite lack of a clear international law obligation thus attests to the importance for the EU to *uphold* its values on this point. The EU does not want to cooperate to third states' fundamental rights violations, and it ideally wants to obstruct capital executions in the specific case.[124] Beyond that, given the broader abolitionist mission of the EU, the rationale for inserting this clause was arguably also to put pressure on Japan to change its policy on capital punishment, that is for the EU to also *promote* its values. The EU thus aimed first at exporting its legal standards in the text of the Agreement, ideally modelling the EU-Japan MLA Agreement over the pre-existing EU-US extradition Agreement which includes a death penalty ground for refusal. Though, the next paragraph interestingly shows that the EU-US MLA does not include such a clause. Secondly, the EU arguably aimed to also export its legal standard in Japanese domestic law through this clause.

Japan, among other countries, has been strongly targeted by international pressure from NGOs and international organisations for its decision to maintain the death penalty and for having a low level of procedural rights granted to individuals who are on death row.[125] The EU has routinely inserted fundamental rights' clauses in its political dialogues with Japan and has also financed local initiatives campaigning for abolition.[126] Ideally, by refusing mutual legal assistance in death penalty cases, thus deliberately creating hurdles to judicial cooperation, the EU could 'raise the price' for Japan to keep death penalty in force. The presence of capital punishment would then represent an

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[122] M Ochi, Supplementing the Pitfalls of Japan-EU MLA Agreement on Death Penalty, paper presented at internal workshop, Waseda University, Tokyo, 31 October 2019 (in file with the authors). See also Malkami, who argues in favour of a European States having a legal obligation to refrain from providing MLA assistance to retentionist states, but also admits that the lack of jurisdictional limits could be a valid counter-argument. Malkani B, 'The obligation to refrain from assisting the use of the death penalty', (2003) 62(3) *International and Comparative Law Quarterly* 523, 554.

[123] Ochi n 120.

[124] While less evidently than in the case of extradition, also providing mutual legal assistance can actually lead to executions, and thus withdrawing it can prevent likely execution scenarios. See the examples involving UK and Antigua, and Thailand, Malkani, n 120.

[125] See by way of examples the different position of the United Nations, the Council of Europe, the European Union, and the International Criminal Court with respect to death penalty of Japan and some of the initiative summarized in the 2008 Report of the International Federation for Human Rights, The Death penalty in Japan: the Law of Silence, available at: https://www.fidh.org/IMG/pdf/japon505a2008.pdf Last Accessed on the 4th April 2020.

[126] For a discussion on EU initiative for the promotion of Human Rights in Japan see Bacon et al., n 115.

obstacle for them to lead an effective fight against cross-border crime.[127] More generally, raising the question of death penalty during the negotiations would reassert the EU's opposition to capital punishment.

It can already be mentioned that the presence of the clause naturally allows the EU to uphold its values, in that EU Member States can actually refuse cooperation if requests on cases punishable with death penalty arise. However, the insistence and the presence of this provision has not triggered, nor, due to the specificities of the Japanese debate on capital punishment, is likely to trigger any internal debate on abolition. This is further discussed in Section III.

b. Assessing the EU success with Japan: comparing the EU-Japan and the EU-US MLA and extradition Agreements

The EU's success in persuading Japan to accept the inclusion of a death penalty-based ground for refusal in the Agreement aquires even more significance if compared with the negotiations on the EU US Agreements. Being the US a retentionist state, the EU faced similar problems on how to uphold its values when cooperating in criminal justice matters. During negotiations the EU insisted on having a death penalty gound for refusal in boh the extradition and the MLA Agreements. The question was however a sensitive one, and in the end this ground for refusal was only included in the EU-US extradition Agreement.[128] The EU-US MLA Agreement only includes a general 'public order' clause, which contrary to the one in the EU-Japan MLA Agreement does not make any reference to capital punishment.[129] Moreover, the death penalty clause in the EU-US extradition Agreement is slightly more restrictive in comparison to the Japanese one. As per the EU-US extradition Agreement, EU Member States can only refuse extradition to the US when they cannot be reassured that capital punishment, if imposed, will not be executed in practice. In the EU-Japan MLA Agreement, assistance can be refused if the relevant offence is simply *punishable* with the death penalty. Briefly, the EU-Japan Agreement adopts a broader *in abstracto* perspective, i.e. taking into account the theoretical possibility that EU assistance would contribute to the imposition of capital punishment. The EU-US extradition Agreement adopts a narrower *in concreto* perspective, looking at whether cooperation would in practice lead to an execution. Basically, the EU obtained more with Japan on MLA - where it is even unclear if ECHR law binds Member States to refuse assistance in cases involving death penalty - than it did with the US on extradition - where a clear obligation to refuse surrender in capital punishment cases exist.

[127] Vandebroek E and Verbruggen F, n 115, 485.
[128] Art. 13, EU-US Extradition Agreement.
[129] Ibidem.

There are various reasons for the different degrees of success with Japan and with the US in designing an Agreement allowing it to uphold its values. Negotiations with the US were taking place in the very first years of the 'war on terror' and in the context of the contested Iraq war. This context created tensions between the US and some of the EU Member States' delegations.[130] The internal political context in the US was likely to be particularly tense; the US delegation might have been less inclined to compromise. Moreover, concerning the MLA Agreement specifically, it is worth recalling that the law of evidence is a *States*' competence in the US.[131] Therefore, the US Federal government, which was negotiating the Agreement, could not guarantee that US courts would exclude 'European evidence' in death penalty cases or not carry out executions in cases for which they received assistance from EU Member States.[132] Lastly, one has to consider that a number of EU Member States had concluded bilateral MLA Treaties with the US beforehand, and none of these include grounds for refusal related to the death penalty.[133] It would have thus been hard to convince the US to accept the inclusion of similar clauses in an EU-wide agreement.

The context of the negotiation with Japan was radically different. The political climate was not tense and the discussions were rather technical ones.[134] Moreover, negotiations took place in the relatively short period of time in which the progressive Democratic Party of Japan - traditionally more favourable to the abolition of the death penalty [135] - was in power, in an otherwise uninterrupted series of governments led by the conservative, retentionist Liberal Democratic Party. Moreover, as mentioned Japan had no previous bilateral agreements with any EU Member States. We can assume the EU thus had more bargaining power to propose the Agreement as the only available 'whole package', with the death penalty clause included.

Lastly, an important factor that played a role in the negotiations with Japan was the upcoming change of procedure due to the entry into force of the Lisbon Treaty, which required parliamentary approval after the conclusion of the Agreement. An argument that the EU delegation could raise with Japan was therefore that the Parliament, traditionally attentive to protecting human rights, would not have approved a MLA Agreement which did not include a ground for refusal relating to the death penalty.[136] Indeed, the European Parliament had already insisted on a death penalty clause being inserted in the text of the EU-US MLA Agreement.[137] However, when the EU-US

[130] Interview with Guy Stessens, n 32.
[131] Stessens G, n 119, 267.
[132] Ibidem.
[133] See *infra*.
[134] Interview with Guy Stessens, 32.
[135] Bacon P et al., n 115, 105.
[136] Interview with Guy Stessens, n 32.
[137] European Parliament resolution on EU judicial co-operation with the United States in combating terrorism, B5-0813/2001.

Agreement was being negotiated the pre-Lisbon procedure applied, and the Parliament had no formal role in the the conclusion of external agreements. The EU therefore could not rely with the US on the same argument it used with Japan, namely that Parliament opposition would have likely stopped the adoption of the Agreement. This allowed the EU to have the text of the EU-Japan Agreement modelled on the previsously concluded extradition Agreement with the US, and to go even further than that.

ii. Provisions on the applicable rules to the collection of evidence

The presence of different standards in Japan and in the EU in terms of the right to access to a lawyer can be problematic, in particular when assistance by Japan is provided in taking witnesses' or suspects' testimony. Indeed, in such case, to ensure respect of fundamental rights, judicial authorities in EU Member States would have to exclude foreign evidence if this was collected in a way that does not meet EU law procedural standards. But this could mean jeopardising the EU interest in security. The collected evidence might be possibly useful for convictions. Hence the challenge for the EU, in such cases, of simultaneously upholding its interest and its values.
The EU-Japan MLA Agreement includes a clause allowing the requesting state to indicate the manner in which evidence is to be collected, similar to a clause present in the 2000 EU MLA Convention, but also, interestingly in the Japan-US MLA Treaty. Reliance on this clause can allow the EU to uphold its fundamental right standards, while also pursuing its interest in security. The next paragraphs develop this argument further. The first details the differences between EU Law and Japanese standards on access to a lawyer (a). The following one discusses the EU-Japan MLA Agreement clause (b).

a. A comparison between Japanese and EU Law regulation of the right to access to a lawyer

EU Directive 2013/48 grants a right to access a lawyer from the point at which the suspect is involved in the investigation.[138] This includes the possibility not only to consult with the lawyer but also to have him/her physically present and participate effectively during questioning both at the pre-trial and trial stages.[139] Moreover, the suspect has a right to have his/her lawyer present for investigative measures, especially including identity parades (to which the suspect or accused person figures among other persons in order to be identified by a victim or witness),

[138] Art. 2, Directive 2013/48/EU of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty. [2013] OJ L 294/1.
[139] Art. 3(2) b, Directive 2013/48/EU.

confrontations (when a suspect is brought together with a witness or a victim where there is disagreement about important facts) and reconstructions of the scene of a crime. [140] This is obviously a *minimum standard*, and EU Member States might also have higher standards in their national legislations. Japanese law, however, fails short of this minimum threshold.

A first difference concerns regulating the questioning of suspects. During the investigative phase, suspects can be interrogated by policemen and prosecutors. Japanese law give them a right to consult with a lawyer but they do not have a right to have their lawyer present in the interrogation room.[141] In practice, the two phases of questioning by the police or prosecutors and consultation with a lawyer are separate in the course of the procedure and many suspects have access to a lawyer only after the first interrogation by policemen has taken place.[142] Conversely, during the trial phase, defendants are questioned in court and they have a right to have their lawyer present in the case where the acts are punishable with the death penalty, life imprisonment or imprisonment with or without work for more than three years.[143]

A second difference concerns the right to have the suspects' lawyer present during the questioning of witnesses. Japanese criminal procedure distinguishes between *interviewing a witness*, which occurs during the investigation phase and is conducted by a police officer or a prosecutor[144] and *a witness examination,* which normally takes place during the trial phase but can be used under some requirements during the pre-trial phase and is conducted by a judge.[145] In both cases, the presence of the suspect's lawyer during the questioning is a discretionary decision for the police/prosecutor or the judge.[146] However, it is much more commonly authorised, and easier to arrange, during the examination of witnesses in courts than when interviewing a witness in the interrogation room.[147] When Japanese prosecutors receive a request to interview a witness from an EU MS, they might assume that a police interrogation is sufficient.[148] However, in those cases in which the suspect would have a right to have his/her lawyer present as per EU law, a Japanese witness interview procedure would not live up to EU standards, which would handicap the use, in the EU, of evidence collected in Japan. The Commission suggested in its evaluation report that Member States

[140] Art. 3(2) c, Directive 2013/48/EU.
[141] Art. 39, Japanese Code of criminal procedure.
[142] Interview with Go Naruse, n 103.
[143] Art. 37-3, Constitution of Japan and Art. 36, Japanese Code of Criminal Procedure (see also Art. 289, Japanese Code of Criminal Procedure).
[144] Art. 223, Japanese Code of Criminal Procedure.
[145] Art. 226-228, Japanese Code of Criminal Procedure.
[146] See Art. 228-2, Japanese Code of Criminal procedure (see also Art. 37-3 of the Constitution of Japan and Art. 36 Japanese Code of Criminal Procedure).
[147] For a detailed explanation see summaries of the replies to the questionnaire on the implementation of EU-Japan MLA Agreement, Council doc. 10783/1/16.
[148] EU-Japan Day on 14 July 2016 - Final report, Council doc. 9003/17 of 11 May 2017, 9.

specify in their request they are explicitly asking for the 'examination of witness' procedure.[149] However, considering that this procedure is normally only available during the trial phase and only exceptionally during the investigative phase,[150] if the request occurs during the pre-trial phase, the problem remains.

Lastly, and to complicate matters further, in Japanese criminal procedure there is not a clear moment which indicates when a witness becomes a suspect.[151] It might well happen that a witness is being questioned without his/her lawyer being present but during the investigation becomes a suspect. Japanese procedural law does not introduce an obligation to interrupt questioning and arrange for the lawyer to be present before continuing, as EU law does. [152]

Given these differences, it is paramount to look more closely at the provision of the EU-Japan MLA Agreement regulating which rules should apply to the collection of evidence following MLA requests.

b. The compromise in the Agreement between forum and locus regit actum

Traditionally, there exist two principles regulating the choice of rules applicable to the collection of evidence in judicial cooperation Agreements. A first, *locus regit actum*, requires the rules of the State where the evidence is collected to apply. This approach is typical of a traditional MLA[153] and it protects the requested State's sovereignty. The second principle, *forum regit actum*, requires that the law of the requesting State applies. This ensures that evidence can be used in court since it was collected following the requesting State's law, enabling the latter to respect its fundamental rights standards on this point. However, it implies a considerable reduction of the sovereignty of the requested State, which has to apply foreign law on its soil.

The EU-Japan MLA Agreement relies on a combination of the two principles. Art. 8(4)g and Art. 8(5)(a) allow the requesting State to indicate the manner in which evidence should be collected (forum regit actum).[154] Art. 10(2) establishes that such indications are to be followed to the extent that these are not contrary to the laws of the requested State (back to locus regit actum) and where it is practically possible.[155] This compromise between protecting sovereignty, effective cooperation, as well as the requesting state's fundamental rights standards, is very similar to the one in the 2000

[149] Final report, n 148, 10.
[150] Art. 226 and 227, Japanese Code of Criminal Procedure.
[151] Interview with Go Naruse, n 103.
[152] Art. 2(3) and Recital 21, Directive 2013/48/EU.
[153] Art. 3, 1959 CoE MLA Convention.
[154] Art. 8 (4) (g), (5) (a), EU-Japan MLA Agreement.
[155] Art. 10 (2), EU-Japan MLA Agreement.

EU MLA Convention - though the EU convention provides for a narrower derogation to the *forum regit actum rule*, allowing derogation only if contrary to the fundamental principles of law in the requested Member State - [156] and interestingly in the US Japan MLA Treaty.[157]
In order to ensure that EU procedural rights standards are safeguarded, EU Member States' authorities could rely on Art. 8 of the Agreement to ask that a lawyer be present when EU law would require to. The Commission in its evaluation report highlighted the difficulties that differences in procedural rights standards might trigger, and actually suggested Member States rely on Art. 8 guarantees.[158] The question would thus be whether, admitted that Japanese law does not live up to the EU relevant standards, complying with them could be considered actually *contrary* to Japanese legislation. Could Japanese authorities rely on Art. 10 of the Agreement to refuse the presence of a lawyer? To our knowledge there have not been so far, any cases in which this represented a problem in practice. And actually, as further explained below Japanese authorities particularly welcome indications from EU Member States on how to carry out MLA requests.[159]

III. THE IMPACT OF THE EU-JAPAN MLA AGREEMENT: EU INTERESTS & VALUES IN PRACTICE

Having discussed the text of the Agreement, this concluding section looks at its implementation in the following 10 years, assessing whether the EU has managed to uphold and promote its interests and values in practice. The first paragraph discusses whether the EU managed to secure effective cooperation with Japan by, among other, implementing the Agreement's videoconference provisions modelled over EU law "improved cooperation" provisions (A). The second paragraph assesses whether the relevant clauses in the Agreement have allowed the EU to uphold its EU fundamental rights standards in practice, and to promote its abolitionist agenda in Japan (B).

A. Upholding the EU interest in security: how effective is EU Japan MLA cooperation?

When looking at the implementation of the Agreement the first and most striking figures are the stark increase in the number and the speed of EU Japan MLA cases.
Already in the first six years the Agreement has been in force (2010-2016), there have been 121 incoming requests (from the EU to Japan) and 101 outgoing cases (from Japan to EU MSs). The

[156] Compare with Art. 4.1 of the 2000 EU MLA Convention, Art. 8 of the 2nd Protocol to the European Convention on MLA in criminal matters.
[157] Art. 3(2), Art. 3(6) and Art. 5(3), Japan-US MLA Treaty.
[158] Final report, n 148, 18.
[159] See *infra* sub-section B.

number of incoming cases almost doubled compared to the period from 2006 until 2010 (before the MLA Agreement came into force), whereas the number of outgoing cases increased by almost five times.[160] Japanese requests were mainly directed to Luxembourg,[161] France[162] and Germany.[163] In terms of requests to Japan, Spain comes first with 19 requests followed by France and Poland with 15 requests each and then the Netherlands and Bulgaria with 11 requests each.[164]

Furthermore, the adoption of the Agreement also accelerated the procedures. On average, after the entry into force of the Agreement, the time for complying with a request has been eight months on the Japanese side and slightly shorter on the EU MSs' side, namely roughly five or six months.[165] This has meant for instance for Belgium, for which there were seven cases in total before the Agreement and eight cases after,[166] the cases were dealt with twice as fast as before. [167] A similar acceleration in the procedure has been witnessed in Germany.[168] Finally, the number of refusals is very limited on both sides, which especially shows that requests are normally drafted following the relevant provisions of the Agreement,[169] even though both parties highlighted there is room for improvement on this point.[170]

Such rapid increase in the numbers and the speed of cases is particularly noteworthy if one considers that, on average, criminal justice actors take a much longer time to get accustomed and actually make an efficient use of new legal instruments/international fora.[171] The assumption on which the conclusion of the Agreement was justified - namely that little cooperation was due to the lack of a legal basis and that formalising cooperation would have increased the number of cases

[160] Final report, n 148, 4.

[161] 37 requests, Final report n 148, 6. The national statistics for Luxembourg show an increase from three cases before 2011 to 64 cases after the adoption of the Agreement, a number comparable with the 74 cases with the US after the entry into force of the EU-US Agreement. (Interview with John Petry, and Jeannot Nies, Adjoint Prosecutor General, Duchy of Luxemburg). Luxembourg had, however, already had a considerable number of cases before the finalisation of the EU-Japan MLA Agreement (47 cases from 2001 to 2010). The high number of Japanese MLA requests to Luxembourg might be due to the physical presence of a number of players in the digital economy, from which Japanese authorities seek to obtain telecomunication data, (Interviews with Kitamura Yusuke, Former First Secretary, Mission of Japan to the EU, and with Jeannot Nies, supra) and a broad banking sector. (This was mentioned as one of the arguments in favor of concluding the Agreement, see Minutes of the Public Safety Commission, n 54).

[162] 13 requests, Final report n 148, 6.

[163] 10 requests, Ibidem.

[164] Ibidem.

[165] Ibidem.

[166] For comparison Belgium had around 60 cases with the US before the entry into force of the EU US MLA Treaty, and about a100 cases after. Interview with Nereda Thouet, Legal Advisor at the Belgian Federal Public Service of Justice.

[167] Beforehand, they could take around one year whereas, after 2011, the average has been six months, with two exceptions. Interview with Nereda Thouet, n 164.

[168] Interview with Riegel Ralf, Head of Division, International Criminal Law, European and Multilateral Cooperation in Criminal Matters, German, Federal Ministry of Justice and for Consumer Protection.

[169] Final report, n 148, 6.

[170] See infra sub-section i.

[171] See for a discussion on how practitioners took some time to make effective use of Europol and Eurojust Hufnagel S., EU Integrated and Reintegrated Security, (2016) 4(1) European Journal of Policing Studies 64.

- turned out to be correct. These data already attest to the positive impact of the Agreement on the effectiveness of cooperation, and therefore the EU capacity to uphold its interest in security.
However, Japanese authorities struggle with implementing the provision on videoconference. These provisions had been listed as one of the EU success in exporting its legal standard in the text of the Agreement. However, drawing from Finnemore and K. Sikkink's cycle of a norm's life,[172] one could say that norm-diffusion in this context has stopped at the norm-emergence phase - inclusion in the Agreement - and the norms have not been socialised - that is relied upon in practice. The failure to secure a full norm-transfer on this point risk affecting the swiftness of cooperation, and therefore the EU capacity to uphold its security interest (i).

i. Legal and practical problems in applying the videoconference provisions in Japan

The 2016 Commission evaluation report[173] and Japanese commentaries on the Agreement[174] noted that difficulties with videoconferencing could arise. In fact, this has already been the case in one Dutch case. The Agreement allows for videoconferencing if the hearing is "necessary" for the proceedings in the requested Member States.[175] Following a Dutch request for the use of video link, Japanese authorities interpreted this requirement as a very high threshold[176] and were very reluctant to comply with the request. The request was eventually dropped by the Netherlands.[177]
The reasons for Japanese reluctance for the use of videoconference are both of a legal and practical nature, and this shows the complexity of factors which can contribute to the success and the failure of a norm-diffusion process.
Videoconferencing is very rarely used in domestic cases in Japan. No specific provision regulates its use during the investigative phase. It is not explicitly prohibited but, in practice, investigators would rarely resort to it because they attach particular importance to face to face interviews, which are seen as a better way to allow them to assess the credibility of witnesses. It is generally believed that the video link would significantly jeopardise this objective.[178] When a face to face interview is not possible with the police officer/prosecutor conducting the interview, the testimony would be taken most likely by a police officer/prosecutor competent for the district where the person is present and the transcripts would then be forwarded to the competent authorities. The Japanese

[172] n 24.
[173] Final report, n 148, 17.
[174] Nakauchi, n 22.
[175] Art. 16 EU-Japan MLA Agreement.
[176] Interview with a Senior legal officer at the Ministry of Justice and Security of the Netherlands.
[177] Ibidem. See also, EU-Japan Mutual Legal Assistance Agreement - Summary of replies to the questionnaire on the application of the 2009 EU-Japan Agreement on Mutual Legal Assistance Council doc. 10783/1/16, of 13 July 2016.
[178] Interview with Go Naruse, 103.

public prosecutor's office and police agency are both centralised organizations with a branch in each district of the country and cooperation between the various branches works particularly well.[179]

Japanese criminal procedure law explicitly envisages the possibility of using videoconferencing during the trial phase but imposes very strict requirements. In 2009, when the EU-Japan MLA Agreement was concluded, only vulnerable witnesses (especially victims of sex crimes) could use videoconferencing to give testimony if this was necessary to avoid pressure and harassment from defendants and the public.[180] Witnesses had, in any case, to be present in the same courthouse where the defendants' trial was being held. They would sit in a different room connected to the courtroom via a video link. In 2018, Japanese criminal procedure law was amended to allow for videoconferencing also in cases in which witnesses were living particularly far away from the courthouse where the defendant's trial was being held. The threshold is, however, very high: witnesses must have *great* difficulty to travel to the courthouse due to their age, occupation and health conditions.[181] The use of videoconferencing is discouraged at the trial stage, firstly because of the witnesses' credibility issue mentioned above but also because defence lawyers strongly argued that using a video link would restrict the defendant's constitutional right to examine the witness in person.[182] The Japanese Supreme Court was called on to rule on the constitutionality of the pre-2018 regime on videoconferencing,[183] and notably on Art. 157-5 (the presence of a wall between the witness and the defendant) and Art. 157-6 (videoconference where the witness and the defendant sit in different rooms). Regarding Art. 157-5, the supreme court held that the presence of a wall between the witness and the defendant would restrict the defendant's right to examine witnesses in person, but the justification for it (protection of vulnerable witnesses) was an acceptable one. Regarding Art. 157-6 the supreme court implied (though did not hold explicitly) that the videoconference where the witness and the defendant sit in different rooms would not restrict the defendant's right to examine witnesses in person in the first place. It remains to be seen whether the new regime, which allows for the witness and the suspect not to be in the same room, due to the geographical distance between them, will also be upheld by the Court.

Admittedly, the use of videoconferencing in international cases is not explicitly regulated by Japanese law.[184] However, given this very strict regime surrounding its use in domestic cases, it is

[179] Ibidem.
[180] Art. 157-6 part. 1, Japanese code of criminal procedure.
[181] Art. 157 - 6 part 2, Japanese code of criminal procedure.
[182] Art. 37 Part 2, The Constitution of Japan.
[183] Japanese Supreme Court, Case of 14 April 2005, Official Journal 59/3 p. 259.
[184] Nakauchi, n 22.

uncertain whether evidence collected via videoconferencing could be used in Japanese trials.[185] For the same reason, Japanese prosecutors are reluctant to respond positively to EU requests in this sense.

Complying with such a request from EU States might also be difficult on a practical level.[186] Considering it is rarely used in domestic cases, Court rooms might not have the equipment for videoconference. The Commission evaluation report suggests the possibility of having a videoconference carried out in lawyer's offices, which might be better equipped.[187] Interestingly, however, one Japanese commentator, a member of the Diplomacy and Defence Committee Inquiry Office, argues that "in cases where video conferencing is considered to be inadequate for legal purposes, it is permitted not to implement such assistance, although not specified under the "Grounds for refusal of assistance" in Art. 11".[188] Nevertheless he suggests that the Japanese government would need to prepare appropriate policies to address these issues, most likely through legislative proceedings.

B. The ease in upholding EU values and the challenge in promoting them

Upholding EU values, namely respect of the right to access to a lawyer and refusing cooperation in cases with capital punishment, has conversely proved, so far, unproblematic. As mentioned, the problem of complying with EU standards on the right to access to a lawyer has not arised yet in practice, and there are good reasons to believe should these arise in the future there are ways to accomodate them.

Admittedly, EU MSs have reported some difficulties in the quality of Japanese assistance. The kinds of assistance requested mainly covers taking statements from witnesses and suspects, obtaining criminal records, bank or credit card data,[189] and MSs have highlighted they would welcome acknowledgment of the receipt of requests, increased use of electronic means of communication, more use of the English language in informal communication, and quicker responses.[190] Japan in return has however rather insisted on the need for more structured and detailed requests as well as better translations. Briefly, EU MSs ask for 'better responses' from Japan and Japan asks in return for 'better questions' in order to deliver such 'better responses'. In this respect, Belgian and German good practice to have prior and informal consultation with

[185] Ibidem.
[186] Final report, n 148, 10, Nakauchi, n. 22.
[187] Final report, n 148, 10.
[188] Nakauchi, n 22.
[189] Final report, n 148, 5, 6.
[190] Final report, n 148, 13-14.

Japanese representatives/attachés, who can help in drafting and translating the requests, are welcomed.[191] Japanese' authorities availability to accomodate Member States' requests as to the procedures through which assistance should be given seems a favourable context to accomodate demands as to the presence of a lawyer, should these arise in the future.

The question of Japanese requests for assistance in death penalty cases has similarly not arose in practice, so far. The main crimes for which assistance is requested by Japan, and also by EU Member States, are fraud, drug trafficking, money laundering, corruption and cybercrime.[192] None of these crimes is punishable with death penalty in Japan. The EU has therefore so far not seen its values challenged. One might wonder whether this is because there were factually no cases or because, in cases involving the death penalty, Japanese prosecutors refrain from asking for assistance as they know that it might be refused. It was suggested that, in national cases, prosecutors only ask for the death penalty when they are very confident of securing the jury's approval. Given the sensitivity of the issue and the corporate culture within the office of prosecutors, their reputation is on the line in these cases and 'there is no room to 'fail".[193] One could speculate about whether similar caution is being exercised in international cases to avoid prosecutorial failure. Still, one should note, contrary to financial crimes, or trafficking crimes for which assistance has been requested so far, offences for which capital punishment is envisaged, like homicide[194], robbery causing death,[195] and rape at the scene of a robbery, causing death thereby,[196] do not have an inherent cross-border element,[197] except maybe crimes related to foreign aggression.[198] Prosecution of these offences is therefore intuitively less likely to require assistance from foreign authorities. In any case, whether the reasons for the lack of cases involving capital punishment are factual or strategic, it is likely that no request on cases concerning death penalty will be forwarded by Japan in the future either. Upholding EU values on this point is therefore unlikely to be a problem also in the future. Lack of death penalty cases, is however one of the reasons why the conclusion of the Agreement is unlikely to influence Japanese domestic debates on this point, thus preventing the EU from *promoting* its values (i).

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[191] Interview with Yusuke Kitamura, n 161.
[192] Final report, n 148, 4.
[193] Bacon et al., n 115, 114.
[194] Art. 199, Japanese Code of Criminal law.
[195] Art. 240, Japanese Code of Criminal law.
[196] Art. 241-3, Japanese Code of Criminal law.
[197] The Japanese criminal code includes a number of other cases for which death penalty is envisaged: Art. 77 Crimes of Insurrection, 108 Arson of inhabited buildings, 117 Detonating of explosives, 119 Damage to inhabited buildings by flood, 126 Overturning of trains and causing death of a person thereby, 127 Endangering traffic by overturning of a train, 146 Pollution of water supplies with poisonous materials and causing death thereby. However, the ones mentioned are the ones for which death penalty is imposed in practice.
[198] Japanese criminal code, Art. 82 Assistance to the enemy, Art. 81 Instigation of foreign aggression. As said already, however, these crimes are not common ones, and death penalty is not imposed in practice.

ii. Japanese reistance the EU abolitionist agenda

It was said that the inclusion of the death penalty in the Agreement was also intended to influence Japanese position on the matter, triggering EU norm diffusion in Japan, thus promoting EU values. The clause was firstly meant to work by 'rising the price' for retaining death penalty for Japan in terms of effective judicial cooperation. This strategy is unlikely to work for the reasons explained above, namely MLA requests in cases involving death penalty are unlikely to arise. Secondly, the inclusion of the clause was also meant to more generally highlight EU's opposition to capital punishment, ideally also putting pressure on Japan. This also unlikely to succeed. Japanese governments are not particularly responsive to external pressure on death penalty issues. The traditional argument in favour of keeping it is that the great majority of Japanese public opinion supports capital punishment,[199] and this domestic perspective is underlined when discussing the death penalty in international fora. For instance, Japan's Sixth Periodic Report to the UN Human Rights Committee recalls that "…whether to continue or abolish the death penalty should be determined by each country *at its discretion* based on *public sentiment*, […] it is a critical issue constituting the backbone of Japan's criminal justice system, and therefore needs to be carefully examined in all respects; among others, in terms of social justice, with the fullest attention given to the *people's opinion*".[200] In a similar vein, while acknowledging an international trend towards abolition in 2013, Justice Minister Tanigaki insisted that any debate about capital punishment should be based on Japan's 'domestic situation' rather than 'movements beyond Japan's borders'.[201] Moreover, Japanese authorities have shown indifference towards international standards in a more indirect manner too. For instance, executions were authorised and carried out two days after the UN Resolution of 18 December 2007 calling for a universal moratorium on the abolition of capital punishment[202] and on the same days as meetings relating to negotiations about the MLA Agreement with the EU were taking place.[203]

One of the few external factors that might influence Japan's position on the death penalty could be if the US - an important point of reference for Japanese foreign policy - makes a significant step towards abolition. [204] Conversely, the conclusion of this Agreement with the EU is unlikely to

[199] Bacon et al., n 115, 107.
[200] Government of Japan Sixth Periodic Report to the UN Human Rights Committee, 2012, 20.
[201] Ibidem.
[202] See, 2008 Report of the International Federation for Human Rights, The Death Penalty in Japan: the Law of Silence, available at: https://www.fidh.org/IMG/pdf/japon505a2008.pdf, last accessed 4th of April 2020, 7.
[203] Interview with Hans G. Nilsson, 32.
[204] Interview with Maiko Tagusari, president of "CrimeInfo", NGO working on criminal justice issues in Japan.

have an impact on this political environment, which is already hostile to international pressure. The EU demand to insert the death penalty clause was met with some negative reactions during parliamentary debates and discussions within the National Safety Commission, being perceived as an alleged EU double standard, asking Japan for higher guarantees than were being asked by the US or China.[205] Similar concerns were raised during Japanese parliamentary debates that respecting this clause would imply an inequality of arms between the EU and Japan since, as requested parties, the EU Member States have, *de facto*, an additional ground for refusal.[206] Lastly, Japan's Minister of Foreign Affairs also felt the need to explicitly specify that the conclusion of the Agreement was not to have any impact on Japan's domestic system and in particular on the legal regime of the death penalty but only to create more efficient cooperation.[207] These reactions seem consistent with the traditional 'domestic perspective' on the desirability of the death penalty referred to above. Finally, to our knowledge, the discussion on capital punishment included in the negotiations was not picked up by the main Japanese associations or political parties campaigning against the death penalty.[208] Briefly, due to the specificities of the debate on capital punishment within Japan, the conclusion of the Agreement and its implementation has not worked, and is unlikely to work in the future, as an instrument for diffusion of EU norms and values.

CONCLUSIONS

This article took the EU-Japan MLA Agreement as a case study to investigate the EU capacity to fulfil its external action mandate to uphold and promote its interest and values, by means of norm diffusion. The interest pursued by the EU in this context was arguably ensuring effective cooperation against crime, or broadly, 'security'; and the values to uphold and promote, were respect of fundamental rights, notably the right of access to a lawyer, and the right to life endangered by death penalty. By norm diffusion, the article intended the process through which the EU managed, or did not manage, to export its legal standards both in the text of the Agreement and influence Japanese policy on capital punishment.

Two important conclusions can be drawn from the analysis of the EU Japan MLA Agreement, which incidentally also provides interesting elements for broader debates transcending this case

[205] Minutes of the Public Safety Commission, n 54.
[206] Minutes of the 174th Foreign Affairs Committee of the House of Representative, No. 8 of Friday, 26th March 2010). Original in Japanese, read in unofficial translation.
[207] Nakauchi, n 22.
[208] Interview with Maiko Tagusari, and Karou Yamagughi, Office of Mizuho Fukushima, House of Councillors, National Diet of Japan, former Political Officer at Amnesty International Japan with responsibility for covering the death penalty.

study. On the one hand, the implementation of the EU-Japan MLA Agreement has led to a significant boost in volume and speed of MLA requests between EU Member States and Japan. The introduction of a legal basis for cooperation has therefore undoubtedly contributed to the EU pursuit of the interest in security. On a broader level, this result is an interesting insight for the debate on the impact of legalisation and institutionalisation of international relations.[209] Against this background, it is however surprising that the EU has not negotiated any other MLA Agreement with third parties since the entry into force of the Lisbon Treaty.[210]

On the other hand, the EU has been only partially successful in exporting its legal standards on judicial cooperation which could guarantee a more effective cooperation. The EU managed to have a provision on videoconference in the Agreement modelled over EU standards, which Japanese authorities however struggle to implement in practice, and it failed to have a provision on JITs. Upholding EU values when cooperating with Japan proves less challenging. The EU managed to incorporate a death penalty ground for refusal, and the Agreement includes provisions arguably enabling the EU to uphold its higher procedural rights standards. So far there has been no problem implementing these provisions in practice. However, the conclusion of the Agreement has not contributed and will unlikely contribute to the EU promotion of its values in Japan, notably influencing Japanese position on capital punishment.

Looking closer at the rationales for the EU successes and failures as a norm exporter, this case study illustrates firstly the importance of the institutional framework in which negotiations are pursued in this respect. For instance, one key factor for the EU success in including the provision on death penalty was the involvement of the European Parliament in the procedure. This is an interesting element to be read in the framework of literature on the impact of the supranationalisation of Justice and Home Affairs matters on the content of internal and external EU JHA instruments, [211] and more specifically the role of the European Parliament as a fundamental rights champion in EU negotiations with external partners.[212] Interestingly, also the decision of the EU delegation not to further insist on the insertion of a legal basis for JITs can be

[209] On the concept of legalisation and institutionalisation K Abbott, R Keohane, A Moravcsik, A Slaughter, & D Snidal, (2000). The Concept of Legalization. International Organization, 54(3), 401-419 and E Fahey (Ed), Institutionalisation beyond the Nation State Transatlantic Relations: Data, Privacy and Trade Law (Springer 2018).

[210] On the broader trend of the EU progressively preferring soft law agreements, as opposed to hard law ones, even beyond the field of criminal justice, see R.A. Wessel, Normative Transformations in EU External Relations: The Phenomenon of 'Soft' International Agreements, West European Politics, 2020, available at: https://www.tandfonline.com/doi/pdf/10.1080/01402382.2020.1738094?needAccess=true Last Accessed 8 April 2020.

[211] F Trauner, Florian & A Ripoll Servent, (eds.) Policy Change in the Area of Freedom, Security and Justice: how EU institutions matter. (London, Routledge, 2015), C Eckes, How the European Parliament's participation in international relations affects the deep tissue of the EU's power structures, (2014) 12(4) *International Journal of Constitutional Law* 904.

[212] Meissner and McKenzie, n 9,

indirectly traced back, among other factors, to institutional reasons. In particular, what influenced the EU decision not to further insist on this point was the upcoming Lisbon institutional framework, before which the parties insisted to have the Agreement concluded.

Finally, this case study illustrates quite clearly, that the challenges to norm-diffusion faces can range from legal to practical and cultural and political factors in the 'legal order of destination'. For instance, the main issue that discouraged the Japanese from agreeing on including JITs in the Agreement was Japanese attachment to the principle of sovereignty and specifically its legal implications. Whereas the problems with implementing the videoconference provisions included also practical factors, like the lack of infrastructure. Lastly, it is the specificity of the Japanese political discourse on capital punishment which makes external pressure coming from the EU less likely to work. These findings attest to the importance to look both at norm emergence and norms socialisation and internalisation, in order to fully appreciate the success of the EU as a norm exporter. They also show the importance of considering the role of both legal and non-legal factors when investigating the 'success' of the EU in its external relations.[213]

[213] E Fahey, On the Use of Law in Transatlantic Relations: Legal Dialogues between the EU and US (2014) 20(3) European Law Journal 368–384.