



EUROPEAN DATA PROTECTION SUPERVISOR

The EU's independent data
protection authority

15 May 2023

Opinion 18/2023

on the Recommendation for a Council
Decision authorising the opening of
negotiations for digital trade
disciplines with the Republic of Korea
and with Singapore

The European Data Protection Supervisor (EDPS) is an independent institution of the EU, responsible under Article 52(2) of Regulation 2018/1725 ‘With respect to the processing of personal data... for ensuring that the fundamental rights and freedoms of natural persons, and in particular their right to data protection, are respected by Union institutions and bodies’, and under Article 52(3) ‘...for advising Union institutions and bodies and data subjects on all matters concerning the processing of personal data’.

Wojciech Rafał Wiewiórowski was appointed as Supervisor on 5 December 2019 for a term of five years.

*Under **Article 42(1)** of Regulation 2018/1725, the Commission shall ‘following the adoption of proposals for a legislative act, of recommendations or of proposals to the Council pursuant to Article 218 TFEU or when preparing delegated acts or implementing acts, consult the EDPS where there is an impact on the protection of individuals’ rights and freedoms with regard to the processing of personal data’.*

This Opinion relates to the Commission Recommendation for a Council Decision authorising the opening of negotiations for digital trade disciplines with the Republic of Korea and with Singapore¹. This Opinion does not preclude any future additional comments or recommendations by the EDPS, in particular if further issues are identified or new information becomes available. Furthermore, this Opinion is without prejudice to any future action that may be taken by the EDPS in the exercise of his powers pursuant to Regulation (EU) 2018/1725. This Opinion is limited to the provisions of the Proposal that are relevant from a data protection perspective.

¹ COM(2022) 336 final, <https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1681472401391&uri=COM%3A2023%3A230%3AFIN>

Executive Summary

On 14 April 2023, the European Commission issued a Recommendation for a Council Decision authorising the opening of negotiations for digital trade disciplines with the Republic of Korea and with Singapore

The objective of this recommendation is to authorise the Commission to open negotiations with the Republic of Korea and with Singapore to establish binding disciplines on trade in goods and services enabled by electronic means. These negotiations may cover cross-border data flows with trust, data localisation requirements and personal data protection.

The EDPS recalls that, as the protection of personal data is a fundamental right in the Union, it cannot be subject to negotiations in the context of EU trade agreements. Dialogues on data protection and trade negotiations with third countries can complement each other but must follow separate tracks. Personal data flows between the EU and third countries should be enabled by using the mechanisms provided under the EU data protection legislation. The EDPS recalls that in 2018, the Commission endorsed horizontal provisions for cross-border data flows and personal data protection in trade negotiations. The EDPS considers that these provisions reach a balanced compromise between public and private interests as they allow the EU to tackle protectionist practices in third countries in relation to digital trade, while ensuring that trade agreements cannot be used to challenge the high level of protection guaranteed by the Charter of fundamental rights of the EU and the EU legislation on the protection of personal data. The EDPS understands from the recommendation that the negotiations on data flows and data protection should be opened with a view to agree on provisions that are coherent with these horizontal provisions. For the sake of clarity, the EDPS recommends to make an express reference to these horizontal provisions.

In addition, as regards more specifically the Republic of Korea, the EDPS notes that this country has already been granted an adequacy finding by the Commission in 2021. Consequently, transfers of personal data from a controller or a processor in the European Economic Area (EEA) to organisations in the Republic of Korea covered by the adequacy decision may take place without the need to obtain any further authorisation. Therefore, the EDPS recommends to further explain why, despite the adequacy decision, further negotiations on cross-border data flows and data protection are considered to be necessary in the case of the Republic of Korea.

Furthermore, the EDPS understands the negotiating directives and the horizontal provisions as allowing, in duly justified cases, measures that would require controllers or processors to store personal data in the EU/EEA. The EDPS recalls that, together with the EDPB, he recently recommended that controllers and processors, established in the EU/EEA and processing personal electronic health data within the scope of the Commission's proposal for a Regulation on the European Health Data Space, should be required to store this data in the EU/EEA, without prejudice to the possibility to transfer personal electronic health data in compliance with Chapter V GDPR. For the avoidance of doubt, the EDPS recommends to expressly clarify in the negotiating directives that the negotiated rules should not prevent the EU or the Member States from adopting, in duly justified cases, measures that would require controllers or processors to store personal data in the EU/EEA.

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THE EUROPEAN DATA PROTECTION SUPERVISOR,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Regulation (EU) No 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data ('EUDPR')², and in particular Article 42(1) thereof,

HAS ADOPTED THE FOLLOWING OPINION:

1. Introduction

1. On 14 April 2023, the European Commission ('the Commission') issued a Recommendation for a Council Decision authorising the opening of negotiations for digital trade disciplines with the Republic of Korea and with Singapore³ ('the Recommendation'). An annex to the Recommendation details the directives for the negotiation of digital trade disciplines with the Republic of Korea and with Singapore and the proposed content of the rules and commitments ('the Annex').
2. The European Union ('the EU') has had a free trade agreement with the Republic of Korea since 2011 and a free trade agreement with Singapore since 2019. These free trade agreements provide for substantial commitments for trade in goods and services between the parties, but they do not include comprehensive rules on digital trade⁴.
3. The EU and the Republic of Korea entered into a Digital Partnership on 28 November 2022 and in that context agreed non-binding Digital Trade Principles on 30 November 2022. The EU and Singapore entered into a Digital Partnership on 1 February 2023, and agreed non-binding Digital Trade Principles on 31 January 2023⁵.
4. The objective of the Recommendation is to authorise the Commission to open negotiations with the Republic of Korea and with Singapore to establish binding disciplines on trade in goods and services enabled by electronic means, in accordance with Article 218(3) and (4) TFEU.
5. The present Opinion of the EDPS is issued in response to a consultation by the Commission of 14 April 2023, pursuant to Article 42(1) of EUDPR.

2. General remarks

6. The EDPS has long taken the view that, as the protection of personal data is a fundamental right in the Union, it cannot be subject to negotiations in the context of EU trade agreements. It is for the EU alone to decide how to implement fundamental rights

² OJ L 295, 21.11.2018, p. 39.

³ COM(2022) 336 final, <https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1681472401391&uri=COM%3A2023%3A230%3AFIN>

⁴ Recital 1 of the Recommendation.

⁵ Recital 2 of the Recommendation.

protections in Union law. The Union cannot and should not embark on any international trade commitments that are incompatible with its domestic data protection legislation. Dialogues on data protection and trade negotiations with third countries can complement each other but must follow separate tracks. Personal data flows between the EU and third countries should be enabled by using the mechanisms provided under the EU data protection legislation⁶.

7. In this context, the EDPS notes that the negotiating directives, included in the Annex, provide that ‘the negotiations may cover cross-border data flows with trust, data localisation requirements and personal data protection’⁷.
8. The EDPS recalls that in 2018, the Commission endorsed horizontal provisions for cross-border data flows and personal data protection in trade negotiations (‘the Horizontal Provisions’)⁸.
9. The EDPS recalls that he supports the legal wording of the Horizontal Provisions as the best outcome achievable to preserve individual’s fundamental rights to data protection and privacy. The Horizontal Provisions reach a balanced compromise between public and private interests as they allow the EU to tackle protectionist practices in third countries in relation to digital trade, while ensuring that trade agreements cannot be used to challenge the high level of protection guaranteed by the Charter of fundamental rights of the EU and the EU legislation on the protection of personal data⁹.
10. In his Opinion 3/2021 on the conclusion of the EU and UK trade agreement and the EU and UK exchange of classified information agreement, the EDPS recommended that the wording agreed with the UK on data protection and privacy (which modified the Horizontal Provisions) remained an exception and would not be the basis for future trade agreements with other third countries¹⁰.
11. The EDPS understands from the Recommendation that the negotiations on data flows and data protection should be opened with a view to agree on provisions that are coherent with the Horizontal Provisions¹¹. For the sake of clarity, the EDPS recommends to make an express reference to the Horizontal Provisions, as was done for instance in the Commission’s Recommendation for a Council Decision authorising the opening of negotiations for the inclusion of provisions on cross-border data flows in the Agreement between the European Union and Japan for an Economic Partnership¹².
12. In addition, as regards more specifically the Republic of Korea, the EDPS notes that this country has already been granted an adequacy finding by the Commission on 17 December 2021 (‘the Adequacy Decision’)¹³. Consequently, transfers of personal data from a controller

⁶ [EDPS Opinion 03/2021 on the conclusion of the EU and UK trade agreement and the EU and UK exchange of classified information agreement](#), issued on 22 February 2021, paragraph 14.

⁷ Section 2(3)(d) of the Annex.

⁸ <https://ec.europa.eu/newsroom/just/items/627665/en>.

⁹ [EDPS Opinion 03/2021 on the conclusion of the EU and UK trade agreement and the EU and UK exchange of classified information agreement](#), issued on 22 February 2021, paragraph 15.

¹⁰ [EDPS Opinion 03/2021 on the conclusion of the EU and UK trade agreement and the EU and UK exchange of classified information agreement](#), issued on 22 February 2021, paragraphs 16-22 and 38.

¹¹ Section (2)(6) of the Annex.

¹² COM(2022) 336 final, Recital 4, <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52022PC0336&from=FR>.

¹³ Commission Implementing Decision (EU) 2022/254 of 17 December 2021 pursuant to Regulation (EU) 2016/679 of the European Parliament and of the Council on the adequate protection of personal data by the Republic of Korea under the Personal Information Protection Act (notified under document C(2021) 9316) (Text with EEA relevance), OJ L 44, 21.2.2022, p. 1.

or a processor in the European Economic Area (EEA) to entities in the Republic of Korea covered by the Adequacy Decision may take place without the need to obtain any further authorisation¹⁴.

13. In view of the Adequacy Decision, the need for having additional rules covering cross-border data flows and data protection as regards the Republic of Korea is unclear. In other words, the EDPS recommends to explain why, despite the Adequacy Decision, further negotiations on cross-border data flows and data protection are considered to be necessary in the case of the Republic of Korea.

3. Negotiations on cross-border data flows and data protection

14. The negotiating directives, included in the Annex, provide that:

- The negotiated rules and commitments 'should be in line with the EU legal framework and should preserve the regulatory autonomy required to implement and develop the EU data and digital policies'¹⁵.
- The 'negotiations should result in rules covering cross-border data flows addressing unjustified data localisation requirements, while neither negotiating nor affecting the EU's personal data protection rules and should, notably be in line with the EU legal framework on the protection of personal and non-personal data'¹⁶.
- The 'rules and commitments should not prevent the European Union, its Member States and their national, regional and local authorities from regulating economic activity in the public interest, to achieve legitimate public policy objectives such as [...] privacy and personal data protection'¹⁷.

15. The EDPS welcomes the directives, which are in line with Article 2(2) of the Horizontal Provisions, according to which '*[e]ach Party may adopt and maintain the safeguards it deems appropriate to ensure the protection of personal data and privacy, including through the adoption and application of rules for the cross-border transfer of personal data. Nothing in this agreement shall affect the protection of personal data and privacy afforded by the Parties' respective safeguards.*

16. The EDPS understands the negotiating directives and the Horizontal Provisions as allowing, in duly justified cases, measures that would require controllers or processors to store personal data in the EU/EEA. The EDPS recalls that, together with the EDPB, he recently recommended the co-legislators to require that controllers and processors, established in the EU/EEA and processing personal electronic health data within the scope of the Commission's proposal for a Regulation on the European Health Data Space, should be required to store this data in the EU/EEA, without prejudice to the possibility to transfer

¹⁴ Article 45(1) GDPR and Recital 5 of the Adequacy Decision.

¹⁵ Section 2(4) of the Annex.

¹⁶ Section 2(6) of the Annex.

¹⁷ Section 2(9) of the Annex.

personal electronic health data in compliance with Chapter V GDPR¹⁸. For the avoidance of doubt, the EDPS recommends to expressly clarify in the negotiating directives that the negotiated rules should not prevent the EU or the Member States from adopting, in duly justified cases, measures that would require controllers or processors to store personal data in the EU/EEA¹⁹.

4. Reference to this Opinion

17. The EDPS notes that the Recommendation does not refer to the EDPS consultation. Therefore, the EDPS recommends inserting a reference to the EDPS consultation in a recital of the Council decision.

5. Conclusions

18. In light of the above, the EDPS makes the following recommendations:

- (1) to make an express reference to the fact that the negotiations on data flows and data protection should be opened with a view to agree on provisions that are coherent with the horizontal provisions for cross-border data flows and personal data protection in trade negotiations endorsed by the Commission in 2018.
- (2) to explain in a recital why, despite the adequacy decision granted to the Republic of Korea, further negotiations on cross-border data flows and data protection are considered to be necessary with this country.
- (3) to clarify, in the negotiating directives included in the annex to the Recommendation, that the negotiated rules should not prevent the EU or the Member States from imposing on controllers and processors, in duly justified cases, to store personal data in the EU/EEA.
- (4) to insert a reference to the EDPS consultation in a recital of the Council decision.

Brussels, 15 May 2023

(e-signed)

Wojciech Rafał WIEWIÓROWSKI

p.o. Leonardo CERVERA NAVAS

Acting Head of EDPS Secretariat

¹⁸ [EDPB-EDPS Joint Opinion 03/2022 on the Recommendation for a Regulation on the European Health Data Space](#), issued on 12 July 2022, paragraph 111.

¹⁹ [EDPS Opinion 17/2022 on the Recommendation for a Council Decision authorising the opening of negotiations for the inclusion of provisions on cross-border data flows in the Agreement between the European Union and Japan for an Economic Partnership](#), issued on 9 August 2022, paragraph 15.