

Opinion of the European Data Protection Supervisor

on the proposal for a Council Decision on the position to be adopted, on behalf of the European Union, in the EU-China Joint Customs Cooperation Committee regarding mutual recognition of the Authorised Economic Operator Programme in the European Union and the Measures on Classified Management of Enterprises Program in the People's Republic of China

THE EUROPEAN DATA PROTECTION SUPERVISOR,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 16 thereof,

Having regard to the Charter of Fundamental Rights of the European Union, and in particular Articles 7 and 8 thereof,

Having regard to Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data,¹

Having regard to Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 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, and in particular Article 41 thereof,²

HAS ADOPTED THE FOLLOWING OPINION

I. Introduction

1.1. Consultation of the EDPS and aim of the Opinion

1. On 26 February 2014, the Commission published its proposal for a Council Decision on the position to be adopted, on behalf of the European Union, in the EU-China Joint Customs Cooperation Committee regarding mutual recognition of the Authorised Economic Operator Programme (hereinafter: the “programmes”) in the European Union and the Measures on Classified Management of Enterprises Program in the People's Republic of China (hereinafter: "the proposal”). The proposal contains an attached draft Decision of the Joint Customs Cooperation Committee ("JCCC") established under the Agreement between the EU and China

¹ OJ L 281, 23.11.1995, p. 31

² OJ L 8, 12.01.2001, p. 1

on Cooperation and Mutual Administrative Assistance in Customs Matters (hereinafter, “the draft decision”).

2. The EDPS had been previously informally consulted and has had the opportunity to provide comments to the Commission. The aim of this Opinion is to complement these comments in light of the present Proposal and to make the EDPS' views publicly available.
3. In this opinion, the EDPS will analyse the data protection aspects of the draft decision, mainly on the basis of the relevant provisions of Regulation (EC) No 45/2001, taking into account the interpretation that has been given to the main provisions on the transfer of personal data in the Article 29 Data Protection Working Party's Working Document of 25 November 2005 on a common interpretation of Article 26(1) of Directive 95/46/EC³ and in its Working Document of 24 July 1998 on Transfers of personal data to third countries⁴.

1.2 Context of the proposal

4. EU legislation on Authorised Economic Operators was introduced by an amendment to the Community Customs Code (Regulation 648/2005 adopted in April 2005). This amendment came into force in January 2008.
5. Customs relations between the EU and China are based on the EU-China Cooperation and Mutual Administrative Assistance Agreement in Customs Matters (hereinafter: “CCMAAA”) of 8 December 2004. According to the CCMAAA, the parties’ customs authorities undertake to develop customs cooperation covering all matters relating to the application of customs legislation.
6. According to the proposal, mutual recognition should allow the EU and China to provide facilitative benefits to economic operators who have invested in compliance and supply chain security and have been certified under their respective trade partnership programmes.
7. In June 2012 the JCCC agreed to launch formal negotiations on mutual recognition of the programmes. Since then, three rounds of negotiations have taken place; the first in January 2013, the second in March 2013 and the third in October 2013 to finalise the draft decision of the JCCC on AEO mutual recognition.
8. The proposal asks the Council to adopt a Union Position on a draft decision of the JCCC based on Article 207(4) first subparagraph, in conjunction with Article 218(9) of the Treaty on the Functioning of the European Union (‘TFEU’). The legal basis for the draft decision of the JCCC is Article 21 of the CCMAAA.

II. General comments

9. The EDPS welcomes the fact that a number of data protection safeguards are included in the draft decision. However, he is concerned about its actual

³ WP 114, available on http://ec.europa.eu/justice/policies/privacy/docs/wpdocs/2005/wp114_en.pdf.

⁴ "Applying Articles 25 and 26 of the EU data protection directive" (WP 12), available on: http://ec.europa.eu/justice/policies/privacy/docs/wpdocs/1998/wp12_en.pdf

enforceability and about the absence of any independent data protection supervisory authority in the People's Republic of China. In addition, the safeguards should be complemented and reinforced.

III. Specific comments

III.1 Applicability of the EU data protection legal framework

10. The draft decision requires the exchange of data relating to operators which are members of the programmes. The EDPS is aware that the purpose of the draft decision is not the processing of personal data. However, taking into account that data on operators can also relate to natural persons⁵, EU data protection legislation is applicable.
11. Therefore, the EDPS welcomes Article 6 of the draft decision on "Treatment of data", although it should be further improved (see point III.5 below). He also welcomes the reference in Article 5(2) to the applicability of Article 17 of the CCMAAA⁶. In particular, Article 17(2) of the CCMAAA states that "personal data may be exchanged only where the Contracting Party which may receive it undertakes to protect such data in at least an equivalent way to the one applicable to that particular case in the Contracting Party that may supply it". However, this provision has a declarative nature, since no evidence is provided in the CCMAAA of the existence of actual "equivalence"⁷. Moreover, it does not by itself ensure that the CCMAAA provides an adequate level of protection (see point III.5 below).

III.2. Controllability of the processing

12. The draft decision states that the customs authorities shall be responsible for its implementation. Customs Authorities are defined in Article 1(b) of the CCMAAA as the Commission's competent services for customs matters, the Member States' competent authorities and the Chinese General Administration of Customs. Taking into consideration this definition, both the Member States and the Commission are "controllers" on the EU side. Therefore, processing of personal data by national customs authorities would be subject to Directive 95/46/EC and to the national laws implementing Directive 95/46/EC, while the processing by the Commission is subject to Regulation (EC) No 45/2001.
13. However, the EDPS understands from the oral explanations provided by DG TAXUD that, although the implementation "on the field" will be carried out by

⁵ See European Court of Justice, 9 November 2010, *Volker und Markus Schecke*, C-92/09 and C-93/09, para. 53 and Article 29 Working Party Opinion 4/2007 of 20 June 2007 on the concept of personal data (WP 136).

⁶ Agreement between the European Community and the Government of the People's Republic of China on cooperation and mutual administrative assistance in customs matters, OJ L 375, 23.12.2004, p. 20, available on:

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:375:0020:0026:EN:PDF>.

⁷ Article 17(4) of the CCMAAA provides that practical arrangements for the implementation of this Article shall be determined by the JCCC. The draft decision implements Article 17 regarding the exchange of data related to AEO's and MCME's only. It is to be noted that other exchanges (data regarding operators that do not participate in the AEO's or MCME's programmes) may occur in the framework of the CCMAAA (see for ex. Art. 11(d) and 12(d) of the CCMAAA) that are not covered by the draft decision.

national customs authorities, the exchange of data provided by the draft decision (exchange of data related to the operators affiliated to their respective programmes) involves exclusively the European Commission and the Chinese customs authorities and that the Member States determine neither the purposes, nor the means of such exchange.

14. Therefore, the Commission would be the controller of the transfers to Chinese customs authorities, while the subsequent processing operations within the EU borders would be under the control of EU Member States' national customs authorities. If so, this should be specified in the draft decision, as the use of the term "customs authorities" as defined by Article 1(b) of the CCMAAA is not fully clear. The EDPS also recommends adding a reference to the applicability of Regulation (EC) No 45/2001.

III.3. Enforceability of the draft decision

15. The EDPS is concerned about the actual enforceability of the draft decision, since the draft decision might not have the value of an international treaty. The EDPS therefore request the Commission to provide confirmation that the draft decision is binding on both Parties and will prevail over Chinese national laws.
16. The EDPS is also concerned about the absence of an independent data protection authority in the People's Republic of China which could supervise the implementation of the draft decision by Chinese customs authorities and ensure effective redress for citizens of the EU as regards processing of personal data by Chinese customs authorities (see also point *III.7.* below on oversight and review).

III.4. Categories of data to be processed

17. Article 5(a) of the draft decision provides for the exchange of data relating to operators authorised under the Programmes. The EDPS welcomes the fact that most of the categories of data to be exchanged are defined by Article 5(4). However, Article 5(4)(g) contains a very general field named "other details". The EDPS recommends specifying already in the draft decision all the categories of data to be exchanged. At least, it should be specified that sensitive data as defined by Article 10(1) of Regulation (EC) No 45/2001 should not be processed.
18. Article 5(1)(c) states that customs authorities exchange information regarding supply chain security. If this information does not contain data on operators, this should be specified.
19. Article 4(4) requires each customs authority to "report irregularities involving members of the other customs' authority programme to the other customs authority". It should be specified which categories of personal data might be exchanged for this purpose. Furthermore, as stated above, it should be clarified whether only the Commission or also EU national customs authorities fall within the scope of this Article (see point *III.2.* above on controllership of the processing).

20. The EDPS also notes that data exchanged under Articles 4 and 5 may include data on offences or suspected offences, for example, data relating to the suspension and revocation of membership. The processing of these categories of data is subject to prior checking by the EDPS in accordance with Article 27 of Regulation (EC) No 45/2001. In any event, in accordance with Article 25 of Regulation (EC) No 45/2001, the processing operation should be notified to the DPO of the Commission, who must notify the EDPS accordingly.

III.5. Legal basis for international transfers

21. In principle, EU data protection law only allows for transfers of personal data to third countries "if an adequate level of protection is ensured in the country of the recipient"⁸. However, some exceptions apply, e.g., if the transfer is necessary or legally required on important public interest grounds⁹. In any case, these exceptions cannot justify repeated and structured transfers as the ones foreseen in the draft decision¹⁰.

22. Nevertheless, Article 9(7) of Regulation (EC) No 45/2001 allows a transfer or a set of transfers of personal data to a third country or international organisation which does not ensure an adequate level of protection "where the controller adduces adequate safeguards with respect to the protection of the privacy and fundamental rights and freedoms of individuals and as regards the exercise of the corresponding rights", subject to authorisation by the EDPS. It further specifies that such safeguards may in particular result from appropriate contractual clauses.

23. Since China is not considered to grant an adequate level of protection for personal data, the controller should adduce data protection safeguards for the transfers to take place. The EDPS notes that Article 6 on "Treatment of data"¹¹ contains certain safeguards. Nevertheless, these safeguards do not address all the necessary requirements to be considered as an adequate safeguard in the light of Article 9(7). Indeed, some improvements are needed as will be elaborated below. As a point of legal drafting, the EDPS also suggests naming this provision "Processing of data".

24. The Commission should also consult the EDPS with a view to a possible authorisation in accordance with Article 9(7) of Regulation (EC) No 45/2001. Such consultation should include a thorough description and documentation of the analysis conducted in terms of adequate safeguards. Article 9(8) of Regulation (EC) No 45/2001 also requires informing the EDPS where Article 9(7) has been applied.

III.6. Data protection safeguards

25. Article 6 of the draft decision contains a number of data protection safeguards. The EDPS welcomes Article 6(1), which provides for the principle of purpose

⁸ Article 9(1) of Regulation (EC) No 45/2001. See also Article 25 of Directive 95/46/EC.

⁹ See Article 9(2)(d) of Regulation (EC) No 45/2001.

¹⁰ See Article 29 Working Party, Working document on a common interpretation of Article 26(1) of Directive 95/46/EC, cited above.

http://ec.europa.eu/justice/policies/privacy/docs/wpdocs/2005/wp114_en.pdf.

¹¹ The EDPS recommends renaming it "Processing of data", in line with EU data protection legislation.

limitation, required by Article 4(1)(b) of Regulation (EC) No 45/2001. However, Article 17(4) of the CMAAA states that the Parties can use such information for other purposes if they obtain prior written consent of the authority which provided the information.

26. The EDPS notes that Article 17(4) of the CMAAA might cover further processing for incompatible purposes. The EDPS reminds that processing for such purposes should only be allowed on any of the grounds contained in Article 20 of Regulation (EC) No 45/2001¹². Any exception to the principle of purpose limitation should be interpreted in a restrictive way, used only in specific cases and subject to strict conditions¹³. Article 17(4) of the CMAAA should therefore be interpreted in the light of Article 20 of Regulation (EC) No 45/2001.
27. The EDPS also welcomes Article 6(3), which states that the information exchanged is accurate and regularly updated, and that it may not be processed and kept longer than necessary. Moreover, the EDPS welcomes the specification that the data should be kept no longer than necessary “for the purpose for which it is transferred”. However, it should also be specified that the data should be adequate, relevant and not excessive in relation to the purposes for which they are transferred or further processed. A maximum retention period should also be established.
28. Article 6(4) should include a provision similar to the one contained in Article 17(2) of the CCMAAA¹⁴, stating that personal data may only be transferred if the relevant third country, international body or other public authority of the receiving Party guarantees a level of protection that is equivalent to the one required in the draft decision. This provision should in any case specify the purposes of such transfers and the specific situations in which they are allowed. It should also explicitly state that the necessity and the proportionality of onward transfers are to be assessed on a case by case basis and that massive and systematic transfers are not allowed. The obligation to inform data subjects about the possibility of (international) onward transfers should also be included in the text.
29. Data protection principles should be recognised both in substance and in practical implementation¹⁵. The EDPS welcomes Article 6(5) which grants to operators the

¹² Article 20 allows a restriction to the principle of purpose limitation if such a restriction constitutes a necessary measure for the prevention, investigation, detection and prosecution of criminal offences; an important economic or financial interest of the EU or of an EU Member State; the protection of the data subject or the rights and freedoms of others; or to safeguard national security, public security or defence. See also Article 29 Working Party, Working document on Transfers of personal data to third countries: Applying Articles 25 and 26 of the EU data protection directive (WP 12), p. 6, available on: http://ec.europa.eu/justice/policies/privacy/docs/wpdocs/1998/wp12_en.pdf.

¹³ In particular, it should be laid down in the draft decision or by EU or EU Member States’ law, necessary in a democratic society, proportionate and sufficiently clear and precise to be foreseeable (See Article 29 Working Party Opinion 3/2013 on purpose limitation (WP 203), p. 36-37, available on: http://ec.europa.eu/justice/data-protection/article-29/documentation/opinion-recommendation/files/2013/wp203_en.pdf).

¹⁵ See Article 29 Working Party Working Document on transfers of personal data to third countries: Applying Articles 25 and 26 of the Data Protection Directive, dated 24 July 1998, WP 12, available on http://ec.europa.eu/justice/policies/privacy/docs/wpdocs/1998/wp12_en.pdf.

rights of access, rectification, blocking and erasure and requires customs authorities to inform them about the procedures for the exercise of these rights. However, data subjects should also be informed *before* the transfer about the purpose of the processing, the identity of the controller in the third country, the possibility of onward transfers, their rights of access, rectification and opposition, and their right to a remedy and reparation. This information could be provided through letters to the current members of the Programmes or through privacy notices in the documents to be fulfilled by the new members.

30. The EDPS also welcomes Article 6(7-8), which specifies how it will be ensured that the data are accurate and kept up to date and to ensure that the data subjects' rights of rectification, blocking and erasure are exercised also on the receiving authority.
31. If the implementation of the draft decision implies that a decision producing legal effects will be taken on operators on the basis of (solely) automated processing (e.g., through a hit/no hit in the database of recognised programme members), additional safeguards should be foreseen. This should include the right for the individual to know the logic involved in the decision.
32. The EDPS welcomes the fact that Article 6(6) grants economic operators “the right to effective administrative and judicial redress regardless of their nationality or country of residence” and the obligation for customs authorities to inform operators of the options for “seeking administrative and/or judicial redress”.
33. These rights should also include dissuasive sanctions for any failure to comply with the obligations of the draft decision. Practical information on existing remedies should be mentioned in the draft decision or at least in letters exchanged between the parties or in documents accompanying the draft decision. This information should at least be provided to the EDPS in the framework of the consultation referred to above (see point *III.5*).

III.7. Oversight and review

34. The EDPS welcomes Article 6(9) which subjects the whole Article 6 to oversight and review by the respective relevant authorities of the parties. However, this oversight should apply not only to Article 6 but to any personal data processing covered by the draft decision. The EDPS notes however that there is no evidence that the General Administration of China Customs has the duties and powers allowing it to investigate data protection complaints independently.
35. It is also noted that there is no explanation as to the means for ensuring redress for the damages resulting from the acts and omissions of the Chinese authorities. This should be specified in the documentation of the analysis conducted in terms of adequate safeguards, to be provided together with the final decision.
36. Article 7 of the draft decision provides that the JCCC shall settle all issues related to the implementation of the decision and in particular the review of the implementation of Article 6. The JCCC consists of representatives of the EU and

Chinese customs authorities¹⁶. Participation of data protection authorities is not foreseen.

37. The absence of any independent data protection supervisory authority in China reinforces the need for a data protection review of the implementation of the draft decision, including full transparency in case of complaints and blocking of transfers in case of infringement (see below point *III.8.*).
38. Therefore, the EDPS suggests providing that the Parties to the draft decision should jointly review the implementation of the data protection aspects of the draft decision, either in the framework of the JCCC, or as a separate process. On the EU side, the EDPS – and national data protection authorities where relevant (see point *III.2.* above on controllership) – should be involved in the review. The modalities of this involvement could be determined at a later stage.
39. The draft decision mentions the General Administration of China Customs as the authority that shall act as a contact point for data protection issues arising from the draft decision. It should be specified in the draft decision that the Chinese authorities competent for the implementation of the draft decision should provide upon request sufficient evidence of compliance and ensure access by the EU review team to relevant documentation, systems and personnel.
40. The EDPS welcomes the fact that the review shall take place at the request of one of the Parties and in any event after a period of two years, and on a regular basis afterwards.
41. The EDPS also recommends adding to the draft decision a provision stating that after one year of the entry into force of the draft decision, the Commission should present a report to the EDPS (and possibly to the Article 29 Working Party – see point *III.2.* above on controllership) on the implementation of the data protection principles. In the future, such report should be presented on a regular basis, e.g., annually or biannually.

III.8. Suspension and termination

42. The EDPS recommends completing Article 8 of the draft decision with a clause allowing any Party to suspend or terminate the agreement in the event of a breach of the other Party's obligations under the agreement, including as regards compliance with the data protection principles. Such a clause could also include, for example, consultations between the Parties prior to any possible suspension.

IV. Conclusions

43. The EDPS welcomes the fact that a number of data protection safeguards are included in the draft decision. However, such safeguards do not address all the necessary requirements to be considered as "adequate safeguard" in the light of Article 9(7).

¹⁶ Article 21 of CCMAAA.

44. In addition, the EDPS is concerned about the actual enforceability of such safeguards and about the absence of an independent data protection supervisory authority in the People's Republic of China.

45. In particular, he recommends the following:

- providing confirmation that the draft decision is binding on both Parties and will prevail over Chinese national laws;
- specifying in the draft decision the categories of data to be exchanged;
- specifying who will be the controller on the EU side;
- that the Commission notify the EDPS and the DPO in accordance with Articles 25 and 27 of Regulation (EC) No 45/2001 (prior check);
- submitting the adduced adequate safeguards to the EDPS for authorisation in accordance with Articles 9(7) of Regulation (EC) No 45/2001;
- interpreting Article 17(4) of the CMAAA should therefore be interpreted in the light of Article 20 of Regulation (EC) No 45/2001;
- specifying that the data should be adequate, relevant and not excessive in relation to the purposes for which they are transferred or further processed;
- establishing a maximum retention period;
- specifying that personal data may only be further transferred if the recipient guarantees a level of protection that is equivalent to the one required in the draft decision;
- specifying that data subjects should be informed before the transfer about the purpose of the processing, the identity of the controller in the third country, the possibility of onward transfers, their rights of access, rectification and opposition, and their right to a remedy and reparation;
- including additional safeguards, such as the right for the individual to know the logic involved in the decision, in case of automated decisions;
- including dissuasive sanctions for any failure to comply with the obligations of the draft decision;
- including in the draft decision or at least in letters exchanged between the parties or in documents accompanying the draft decision, practical information on existing remedies
- specifying the means for ensuring redress for possible damages resulting from the acts and omissions of the Chinese authorities.
- providing that the Parties to the draft decision should jointly review the implementation of the data protection aspects of the draft decision, either in the framework of the JCCC, or as a separate process and providing for involvement of EU national data protection authorities where relevant;
- specifying in particular that oversight and review by the respective relevant authorities of the parties in accordance to Article 6(9) applies to any personal data processing covered by the draft decision;
- specifying the means for ensuring redress for the damages resulting from the acts and omissions of the Chinese authorities;
- specifying that the Chinese authorities competent for the implementation of the draft decision should provide upon request sufficient evidence of compliance and ensure access by the EU review team to relevant documentation, systems and personnel;

- stating that after one year of the entry into force of the draft decision, the Commission should report on the implementation of the data protection principles.

Done in Brussels, 14 March 2014

(signed)

Peter HUSTINX
European Data Protection Supervisor