



EDPS formal comments on the Proposal for a Council Decision on the position to be taken on behalf of the European Union in the EU-Canada Joint Customs Cooperation Committee as regards the adoption of the decision concerning the mutual recognition of the Partners in Protection Programme of Canada and the Authorised Economic Operators Programme of the European Union

1. Introduction and background

- These formal comments on the Proposal for a Council Decision on the position to be taken on behalf of the European Union in the EU-Canada Joint Customs Cooperation Committee as regards the adoption of the decision concerning the mutual recognition of the Partners in Protection Programme of Canada and the Authorised Economic Operators Programme of the European Union ('the Proposal for a Council Decision') are issued by the EDPS pursuant to Article 42(1) of Regulation (EU) 2018/1725¹, following a request for consultation from the European Commission, Directorate-General for Taxation and Customs Union (DG TAXUD) of 20 October 2020.
- The Proposal for a Council Decision establishes the position to be taken on the Union's behalf in the meeting of the Joint Customs Cooperation Committee (JCCC) established by the Agreement between the European Community and Canada on Customs Cooperation and Mutual Assistance in Customs Matters with regard to the mutual recognition of the Partners in Protection Programme of Canada and the Authorised Economic Operators Programme of the European Union. Such position, pursuant to Article 1 of the Proposal for a Council Decision, is detailed in its Annex.
- The EDPS welcomes that he had already been consulted informally by the Commission on the draft the Proposal for a Council Decision and was given the opportunity to provide input on data protection aspects.

2. The EDPS Comments

2.1. General comments

- The EDPS notes that the Annex to the Proposal for a Council Decision does not refer to the applicability of the Regulation (EU) 2016/679 ('GDPR')² and of Regulation (EU) 2018/1725. Hence, we recommend including such reference adding a recital in the Proposal for a Council Decision, for which we recommend the following wording: *"The processing of personal data envisaged under this Annex should comply with Regulation (EU) 2016/679 and, where applicable, Regulation (EU) 2018/1725."*

¹ Regulation (EU) 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC, L295, 21.11.2018.

² Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), OJ L 119, 4.5.2016.

2.2. International transfers of personal data

- The EDPS notes that under Article 2 of the Annex, the European Union and Canada, as Contracting Party, shall recognize the customs programme of the other Party (the Partners in Protection Programme of Canada by the EU; the Authorised Economic Operator Programme by Canada) as compatible and equivalent to its Programme. Such **mutual recognition** of trade partnership programmes aims at facilitating trade allowing in particular harmonized border control by customs authorities.
- The EPDS recalls his already issued opinions on mutual recognition of customs programmes concluded by the EU through JCCC decisions.³
- The EDPS also recalls that the Council Decision concerns transfers of personal data from the customs authorities of the EU Member States to the custom authorities of a third country (Canada). Such transfers encompass an **international transfer of personal data** in the meaning of Chapter V of the GDPR, and therefore needs to rely on one of the legal basis for transfers provided by the GDPR under this Chapter (namely, Article 45, transfers on the basis of an adequacy decision; Article 46, transfers on the basis of appropriate safeguards; Article 49, derogations for specific situations).
- The EDPS notes that the JCCC decision on mutual recognition of customs programmes would be a **legally binding decision** between customs authorities⁴. The latter would therefore constitute **the legal basis for the international transfer of data** pursuant to Article 46(2)(a) of the GDPR. The list of safeguards required to be put in place by a legally binding and enforceable instrument between public bodies pursuant to Article 46(2)(a) GDPR is detailed in the EDPB “*Guidelines on articles 46(2)(a) and 46 (3)(b) of Regulation 2016/679 for transfers of personal data between EEA and non-EEA public authorities and bodies*”.
- The EDPS also notes that the Annex refers to “*communications between the competent services of the Commission and the customs administration of Canada*”

³ Opinion of the European Data Protection Supervisor on the proposal for a Council Decision on a Union position within the EU-Japan Joint Customs Cooperation Committee concerning the mutual recognition of Authorised Economic Operator programmes in the European Union and in Japan, available at:

https://edps.europa.eu/sites/edp/files/publication/10-03-12_eu-japan_en.pdf

See 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, available at:

https://edps.europa.eu/data-protection/our-work/publications/opinions/eu-china-joint-customs-cooperation-committee_en

Opinion of the European Data Protection Supervisor on the Proposal for a Council decision on a Union position within the EU-US Joint Customs Cooperation Committee regarding mutual recognition of the Authorised Economic Operator Programme of the European Union and the Customs-Trade Partnership Against Terrorism Program of the United States, available at:

https://edps.europa.eu/data-protection/our-work/publications/opinions/eu-us-joint-customs-cooperation_en

⁴ See also the recently adopted Guidelines by the EDPB “*Guidelines 02/2020 on articles 46(2)(a) and 46 (3)(b) of Regulation 2016/679 for transfers of personal data between EEA and non-EEA public authorities and bodies*”. These Guidelines are available at:

https://edpb.europa.eu/sites/edpb/files/consultation/edpb_guidelines_202002_art46guidelines_internationaltransferspublicbodies_v1.pdf

under Article 5(1), letter (d), and to “*exchange of information and communication*” under Article 5(2). Having regard to the possible transfers envisaged under these Articles, the **EDPS considers that the appropriate legal basis**, pursuant in this case to Article 48(2)(a) of Regulation (EU) 2018/1725, **would also be provided in the JCCC decision.**

2.3. Data subjects’ rights

- Having regard to Article 6(8)⁵, referring to the rights to administrative redress and judicial review, the **EDPS recommends including in this Article a reference to data subjects’ rights**, e.g. as follows: “*Each Custom Authority shall ensure the exercise of the rights of the data subject, such as the right to information and access to personal data and to rectification, and to administrative redress or judicial review regardless of their nationality or country of residence.*”

2.4. Oversight of compliance with the data protection rules

- Concerning Article 6(10)(b)⁶, **the EDPS considers that the reference to the EDPS and to “the EU Member States’ data protection authorities” should be redrafted since it is incomplete.** It refers to the **oversight** by these authorities of compliance with the provisions in Article 6, which refers only to **some** data protection aspects (for instance, not including the data minimization principle). Moreover, as for Canada, reference is made to the Recourse Directorate or its successor within the customs administration of Canada, instead of to the Canadian competent data protection authority.
- The EDPS thus recommends the following drafting: “*Any personal data processing covered by the Articles of this Annex is subject to the oversight of compliance with the data protection rules and principles by the competent independent supervisory authorities. These authorities are:*
(a) *in the EU: the European Data Protection Supervisor or its successor, and the EU Member States’ supervisory authorities, for the processing of personal data falling under the respective competence;*
(b) *in Canada: the competent independent data protection authority of Canada.*”

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⁵ Article 6(8): “*Each Customs Authority shall provide that Programme Members have access, as it relates to their personal data, to administrative redress or judicial review regardless of their nationality or country of residence.*”

⁶ Article 6(10)(b): “*Compliance with the provisions in Article 6 by each Customs Authority is subject to review by their respective relevant authority, which ensures that complaints relating to non-compliance in the treatment of information are received, investigated, responded to, and appropriately redressed. These authorities are:*

(a) *in the EU: the European Data Protection Supervisor or its successor, and the EU Member States’ data protection authorities;*

(b) *in Canada: the Recourse Directorate or its successor within the customs administration of Canada.*”