



Formal comments of the EDPS on the Recommendation for a Council decision authorising the opening of negotiations to amend the Agreement between the European Union and Japan on mutual legal assistance in criminal matters and its Annex

1. Introduction and background

The Agreement between the European Union and Japan on mutual legal assistance in criminal matters¹ (the Agreement) entered into force on 2 January 2011 and aims to establish a more effective cooperation between the European Union and Japan in that area.

The Law Enforcement Directive (LED)² entered into force on 6 May 2016 and Member States were to transpose it into national law by 6 May 2018 (Article 63(1) LED).

Article 62(6) LED requires the Commission, by 6 May 2019, to review other EU legal acts that regulate the processing of personal data for law enforcement purposes, in order to assess the need for alignment with the LED and, where appropriate, propose amendments so as to ensure a consistent approach to the protection of personal data.

On 24 June 2020, the Commission fulfilled that obligation by adopting a Communication, *Way forward on aligning the former third pillar acquis with data protection rules*³. It listed 10 legal acts that should be aligned with the LED and set out a timetable for doing so. It identified the Agreement with Japan as one of the acts that require targeted amendment to ensure full alignment with the LED.

The present formal comments of the EDPS are issued in response to a consultation by the European Commission of 1 June 2021, pursuant to Article 42(1) of Regulation 2018/1725⁴. In this regard, the EDPS welcomes the reference to this consultation in Recital 3 of the Recommendation.

These formal comments do not exclude the possibility for additional comments by the EDPS in the future, if further issues are identified or new information becomes available. Furthermore, these formal comments are without prejudice to any future measures that may be taken by the EDPS in the exercise of his supervisory powers pursuant to Article 58 of Regulation (EU) 2018/1725.

¹ OJ L 39, 12.2.2010, p. 20

² Directive (EU) 2016/680 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 by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA (OJ L 119, 4.5.2016, p. 89).

³ COM(2020) 262 final.

⁴ 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, OJ, 21.11.2018, L.295, p.39 (Regulation 2018/1725).

2. Comments

The EDPS welcomes the aim of the **Recommendation** to align the data protection rules in the Agreement with the principles and rules laid down in the LED, in order to provide a strong and coherent data protection framework for the purposes of the Agreement. However, the EDPS would like to highlight a couple of elements, which should be added in the mandate given to the Commission in Annex to the Recommendation:

- Article 11 of the Agreement provides that assistance may be refused if a requested EU Member State considers that the execution of a request is likely to prejudice its sovereignty, security, *ordre public* or other essential interests. For this purpose the requested EU Member State may consider that the execution of a request concerning an offence punishable by death under the laws of the requesting State, could prejudice essential interests of the requested State, unless the requested State and the requesting State agree on the conditions under which the request can be executed. However, in line with Recital 71 of the LED, the EDPS considers that it should be explicitly laid down that personal data transferred by an EU Member State to Japan will not be used to request or hand down or execute a death penalty or any form of cruel and inhuman treatment.
- The explanatory memorandum of the Recommendation mentions that the review identified several areas in which provisions are needed, *inter alia* restrictions on onward transfers⁵. However, onward transfers are not mentioned in the directives of the Annex. The EDPS would like to remind that onward transfers of personal data must not undermine the level of protection, provided for in the Union, of natural persons whose data is transferred. Therefore, such onward data transfers should be permitted only where the continuity of the level of protection afforded under EU law is ensured. In particular, the further recipient (i.e. the recipient of the onward transfer) should be a competent authority for law enforcement purposes and such onward transfers of data may only take place for limited and specified purposes and as long as there is a legal ground for that processing. The existence of a mechanism for the **relevant Member State's competent authorities to be informed and authorise such** onward transfer of data has to also be provided for. The initial recipient of the data transferred from the EU should be liable and be able to prove that the relevant competent authority of the Member State has authorised the onward transfer and that appropriate safeguards are provided for onward transfers of data in the absence of an adequacy decision concerning the third country to which the data would be transferred.
- In addition, it should also be clarified that the transfer and onward transfer do not concern only the requested data that are transferred by the requested State but also the data included in the request sent by the requesting State. Given that the Annex only speaks of the consent of the requested State (see for instance point i) of the Annex), while the cooperation will imply exchange of information in both directions, the data included in the request should also be protected. In other words, the consent

⁵ see third bullet point at the beginning of page 3

of the requesting State should also be sought for the data it transfers in the request if the requested State would want to further transfer or disclose them.

- The Agreement should also lay down the rules on storage, review, correction and deletion of personal data as well as on keeping records for the purposes of logging and documentation as well as on information to be made available to individuals.
- In view of the ongoing global process of digitalization of various aspects of our life, including criminal justice systems, the EDPS considers that the amended Agreement should lay down the appropriate safeguards in cases when the personal data are used for automated decision-making, including profiling, in line with Article 11 of the LED.
- The EDPS also notes that the Agreement provides for the possibility to terminate the Agreement at any time by giving written notice to the other Contracting Party, and such termination shall be effective six months after the date of such notice⁶. The EDPS recommends specifying in the mandate that the agreement should provide for such possibility in cases of breaches of its provisions on personal data by one of the parties and that personal data falling within the scope of the agreement transferred prior to its suspension or termination may continue to be processed in accordance with the agreement.

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(e-signed)

⁶ Art 31/3 of the Agreement