



EDPS

EUROPEAN DATA PROTECTION SUPERVISOR

The EU's independent data
protection authority

9 August 2022

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

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 the inclusion of provisions on cross-border data flows in the Agreement between the European Union and Japan for an Economic Partnership. 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 Recommendation that are relevant from a data protection perspective.

Executive Summary

On 12 July 2022, the Commission issued a 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.

The Agreement for an Economic Partnership between the European Union and Japan was signed on 17 July 2018. The objective of this Agreement is, in particular, to remove the vast majority of duties paid by EU and Japanese companies and other technical and regulatory trade barriers.

On 23 January 2019, Japan was granted an adequacy finding by the Commission. Consequently, transfers of personal data from a controller or a processor in the European Economic Area (EEA) to organisations in Japan covered by the adequacy decision may take place without the need to obtain any further authorisation.

The EDPS takes note that the negotiations would exclusively concern cross-border data flows. Having regard to the fact that Japan has already been granted an adequacy finding by the Commission in 2019, the EDPS recommends detailing the reasons why, despite this adequacy decision, further negotiations on cross-border data flows are considered necessary.

The EDPS welcomes the specification that the provisions on cross-border data flows should be coherent with the horizontal provisions for cross-border data flows and personal data protection in trade negotiations. The horizontal provisions, published by the Commission in July 2018, represent 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 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.

Contents

1. Introduction.....	4
2. General remarks	5
3. Horizontal provisions on cross-border data flows	5
4. Reference to this Opinion.....	7
5. Conclusions.....	7

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 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 ('EUDPR')¹, and in particular Article 42(1) thereof,

HAS ADOPTED THE FOLLOWING OPINION:

1. Introduction

1. On 12 July 2022, the European Commission ('the Commission') issued a 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 Partnership² ('the Recommendation').
2. By decision of 29 November 2012, the Council approved negotiating directives for the Commission to negotiate a free trade agreement with Japan, on the basis of which the Commission negotiated the Agreement between the European Union and Japan for an Economic Partnership, signed on 17 July 2018³ ('the Agreement'). The Agreement entered into force on 1 February 2019. The objective of the Agreement is, in particular, to remove the vast majority of duties paid by EU and Japanese companies and other technical and regulatory trade barriers.
3. Chapter 8 of the Agreement contains provisions on trade in services, investment liberalisation and electronic commerce. Article 8.81 of the Agreement, which relates to the free flow of data, provides that '[t]he Parties shall reassess within three years of the date of entry into force of this Agreement the need for inclusion of provisions on the free flow of data into this Agreement'. In its meeting of 25 March 2022, the Joint Committee established by Article 22.1 of the Agreement examined whether the economic partnership between the European Union and Japan would benefit from the inclusion of provisions on cross-border data flows in the Agreement. Building on that examination, the representatives of the European Union and Japan, at the 28th EU-Japan summit (in May 2022), committed to consider the launch of the negotiations needed for such inclusion⁴.
4. As made clear by its title, the objective of the Recommendation is to authorise the Commission to open negotiations with Japan with the view to include provisions on data flows into the Agreement.
5. The present Opinion of the EDPS is issued in response to a consultation by the Commission of 22 July 2022, pursuant to Article 42(1) of EUDPR.

¹ OJ L 295, 21.11.2018, p. 39.

² COM(2022) 336 final, <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52022PC0336&from=FR>.

³ Agreement between the European Union and Japan for an Economic Partnership, OJ L 330, 27.12.2018, p. 3.

⁴ Recital 2 to the Recommendation.

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 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 legislation⁵.
7. In this regard, the EDPS positively notes that Japan has already been granted an adequacy finding by the Commission on 23 January 2019 ('the Adequacy Decision')⁶. Consequently, transfers of personal data from a controller or a processor in the European Economic Area (EEA) to organisations in Japan covered by the Adequacy Decision may take place without the need to obtain any further authorisation⁷.
8. In this context, the EDPS takes note that the negotiating directives, included in the annex to the Recommendation, clarify that the provisions, to be negotiated and included in the Agreement, will '**exclusively** concern cross-border data flows between the European Union and Japan' (emphasis added). In view of the Adequacy Decision, the need for having additional rules covering cross-border data flows should be expressed in more detail so that the justification for an amendment of the Agreement is made clearer⁸. In other words, the EDPS recommends to further explain why, despite the Adequacy Decision, further negotiations on cross-border data flows are considered to be necessary.

3. Horizontal provisions on cross-border data flows

9. On 31 January 2018, the European Commission endorsed horizontal provisions for cross-border data flows and personal data protection in trade negotiations ('the Horizontal Provisions'), which were published in July 2018⁹.
10. 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

⁵ [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.

⁶ Commission Implementing Decision (EU) 2019/419 of 23 January 2019 pursuant to Regulation (EU) 2016/679 of the European Parliament and of the Council on the adequate protection of personal data by Japan under the Act on the Protection of Personal Information (Text with EEA relevance), OJ L 76, 19.3.2019, p. 1.

⁷ Article 45(1) GDPR and Recital 5 of the Adequacy Decision.

⁸ Recitals 3 and 4 to the Recommendation offer limited clarification in this regard.

⁹ https://trade.ec.europa.eu/doclib/docs/2018/july/tradoc_157130.pdf.

the high level of protection guaranteed by the Charter of fundamental rights of the EU and the EU legislation on the protection of personal data¹⁰.

11. 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 countries¹¹.
12. Therefore, the EDPS welcomes Recital 4 to the Recommendation, which confirms that the negotiations would be opened '*with a view to include the provisions on data flows into the Agreement, coherent with the horizontal provisions for cross-border data flows and personal data protection in trade negotiations*' (emphasis added).
13. The negotiating directives, included in the annex to the Recommendation, recall that the negotiated rules should not prevent the European Union and its Member States from regulating economic activity in the public interest and to achieve legitimate public policy objectives, including the protection of privacy and data protection. The directives also reiterate that the negotiations should not affect the EU's personal data protection rules and should be in line with the EU legal framework.
14. 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.*'
15. 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 personal electronic health data in compliance with Chapter V GDPR¹². 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.

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 15.

¹¹ [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.

¹² [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.

4. Reference to this Opinion

16. 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.

5. Conclusions

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

- (1) to detail in a recital the reasons why, despite the Adequacy Decision, further negotiations on cross-border data flows are considered to be necessary;
- (2) 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; and
- (3) to refer to the EDPS consultation in a recital.

Brussels, 9 August 2022

P.O.
Leonardo CERVERA NAVAS

[e-signed]
Wojciech Rafał WIEWIÓROWSKI