



Brussels, 12.7.2022
COM(2022) 336 final

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

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE PROPOSAL

- **Reasons for and objectives of the proposal**

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 (the Agreement). Chapter 8 of the Agreement contains comprehensive provisions on trade in services, investment liberalisation and electronic commerce.

However, at the time of the conclusion of the negotiations, the European Union had not yet consolidated an internal position on horizontal provisions for cross-border data flows and for personal data protection in trade agreements. As a result, the Agreement does not contain substantive rules on cross-border data flows between the European Union and Japan, but a review clause, in Article 8.81 of the Agreement, according to which “[t]he Parties shall reassess within three years of the date of entry into force of [the] Agreement the need for inclusion of provisions on the free flow of data into [the] Agreement.”

On 31 January 2018, the European Commission endorsed horizontal provisions for cross-border data flows and personal data protection in trade negotiations¹, which were published in July 2018. These provisions have been successfully negotiated in several bilateral negotiations² and proposed in the context of the ongoing negotiations on electronic commerce in the WTO. The European Union is thus now in a position to include the July 2018 provisions on cross-border data flows in the Agreement’s existing rules on e-commerce.

Following a series of exploratory discussions held at technical level between representatives of the European Union and Japan during 2021, the Joint Committee established by Article 22.1 of the Agreement, in its meeting of 25 March 2022, 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, committed to consider the launch of the negotiations needed for such inclusion.

The European Union and Japan have a deep and dynamic economic relationship and, through their mutual adequacy arrangement, have created the world’s largest area of safe transfers of personal data. Japan is the closest strategic partner of the European Union in the Indo-Pacific region and the European Union’s second-biggest trading partner in Asia. It is therefore appropriate to initiate, for the first time, single-issue trade negotiations to include provisions on cross-border data flows, data protection and privacy into the Agreement.

- **Consistency with existing policy provisions in the policy area**

By aiming for rules addressing unjustified obstacles to data flows while preserving the European Union regulatory autonomy, in particular in the area of data protection and privacy, the proposal contributes to the objectives laid down in the Communication of 18 February

¹ https://trade.ec.europa.eu/doclib/docs/2018/july/tradoc_157130.pdf

² See Article 201 of the Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part. The provisions have been also accepted by Chile in the negotiations concluded for the modernisation of the Association Agreement between the European Union and Chile. Finally, the provisions have been submitted by the EU in its ongoing negotiations with Australia, New Zealand, Indonesia and India.

2021 from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions.³

- **Consistency with other Union policies**

By negotiating rules on cross-border data flows with Japan in line with the consolidated proposal for provisions on cross-border data flows and protection of personal data and privacy in trade agreements, the proposal pursues the Commission’s strategy laid down in the Trade Policy Review, the EU Data Strategy and in the Commission’s Joint Communication on the EU Strategy for Cooperation in the Indo-Pacific.

In the Trade Policy review the Commission committed to “*continue to address unjustified obstacles to data flows while preserving its regulatory autonomy in the area of data protection and privacy*”. The EU Data Strategy⁴ states: “*The EU will continue to address these unjustified obstacles to data flows in bilateral discussions and international fora – including the World Trade Organisation – while promoting and protecting European data processing rules and standards, in full compliance with EU legislation*”. Data flows is also identified as an important element of the Commission’s Joint Communication on the EU Strategy for Cooperation in the Indo-Pacific⁵.

2. LEGAL BASIS, SUBSIDIARITY AND PROPORTIONALITY

- **Legal basis**

Article 207(4) first subparagraph in conjunction with Article 218(3) and (4) of the Treaty on the Functioning of the European Union (TFEU) shall be indicated as legal basis for this proposal.

- **Subsidiarity (for non-exclusive competence)**

According to Article 5(3) of the Treaty on the European Union (TEU), the subsidiarity principle does not apply in areas of exclusive EU competence.

- **Proportionality**

The Commission recommendation is in line with the principle of proportionality.

- **Choice of the instrument**

The only available instrument to achieve the objective is an international agreement. An authorisation to open negotiations for an international agreement is therefore required.

3. RESULTS OF EX-POST EVALUATIONS, STAKEHOLDER CONSULTATIONS AND IMPACT ASSESSMENTS

- **Ex-post evaluations/fitness checks of existing legislation**

Not applicable

- **Stakeholder consultations**

Not applicable

³ Trade Policy Review – An Open, Sustainable and Assertive Trade Policy, COM(2021) 66 final

⁴ <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020DC0066&from=EN>

⁵ https://ec.europa.eu/info/sites/default/files/jointcommunication_indo_pacific_en.pdf

- **Collection and use of expertise**

Not relevant

- **Impact assessment**

Not relevant

- **Regulatory fitness and simplification**

Not applicable

- **Fundamental rights**

The recommendation is consistent with the EU Treaties and the Charter of Fundamental Rights of the European Union. In particular, by tabling the consolidated proposal for provisions on cross-border data flows and protection of personal data and privacy in trade agreements the Commission seeks to preserve the Union's regulatory autonomy in the area of data protection and privacy.

4. BUDGETARY IMPLICATIONS

Not relevant

5. OTHER ELEMENTS

- **Implementation plans and monitoring, evaluation and reporting arrangements**

Not applicable

- **Explanatory documents (for directives)**

Not applicable

- **Detailed explanation of the specific provisions of the proposal**

This proposal authorises the Commission to negotiate, on behalf of the Union, the inclusion of provisions on cross-border data flows into the Economic Partnership Agreement between the European Union and Japan.

The proposal establishes in its annex the negotiating directives to be followed by the Commission.

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THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 218(3) and (4) thereof,

Having regard to the recommendation from the European Commission,

Whereas:

- (1) Article 8.81 of the Agreement between the European Union and Japan for an Economic Partnership (the Agreement) instructs the Parties to reassess the need for the inclusion of provisions on the free flow of data into the Agreement.
- (2) The Joint Committee established by Article 22.1 of the Agreement, in its meeting of 25 March, 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, committed to consider the launch of the negotiations needed for such inclusion.
- (3) The European Union and Japan have a deep and dynamic economic relationship and, through their mutual adequacy arrangement, have created the world's largest area of safe transfers of personal data. Japan is the closest strategic partner of the European Union in the Indo-Pacific region and the European Union's second-biggest trading partner in Asia.
- (4) The European Union is engaged in negotiations on rules covering cross-border data flows in several bilateral negotiations with third countries, as well as in the context of the ongoing negotiations on electronic commerce within the WTO. Therefore, it is appropriate to authorise the Commission to open negotiations 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 negotiations⁶.

HAS ADOPTED THIS DECISION:

Article 1

The Commission is hereby authorised to negotiate, on behalf of the Union, the provisions on cross-border data flows in the framework of the Agreement between the European Union and Japan for an Economic Partnership.

⁶ https://trade.ec.europa.eu/doclib/docs/2018/july/tradoc_157130.pdf

Article 2

The negotiating directives addressed to the Commission for the negotiation of the provisions on cross-border data flows with Japan are set out in the addendum to the decision.

Article 3

The negotiations shall be conducted in consultation with the [name of the special committee to be inserted by the Council].

Article 4

This Decision is addressed to the Commission.

Done at Brussels,

*For the Council
The President*