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PROPOSAL

From:	Secretary-General of the European Commission, signed by Ms Martine DEPREZ, Director
date of receipt:	1 December 2023
To:	Ms Thérèse BLANCHET, Secretary-General of the Council of the European Union
No. Cion doc.:	COM(2023) 773 final
Subject:	Proposal for a COUNCIL DECISION on the signing, on behalf of the European Union, of the Protocol amending the Agreement between the European Union and Japan for an Economic Partnership regarding free flow of data

Delegations will find attached document COM(2023) 773 final.

Encl.: COM(2023) 773 final



EUROPEAN
COMMISSION

Brussels, 1.12.2023
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Proposal for a

COUNCIL DECISION

on the signing, on behalf of the European Union, of the Protocol amending the Agreement between the European Union and Japan for an Economic Partnership regarding free flow of data

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE PROPOSAL

• Reasons for and objectives of the proposal

By decision of 12 July 2023 the Council approved negotiating directives for the Commission to negotiate the inclusion of provisions on cross-border data flows in the Agreement between the European Union and Japan for an Economic Partnership¹.

On the 24 October 2022, the EU and Japan launched the negotiations on cross-border data flows. The negotiations were concluded in principle on 28 October 2023.

The EU and Japan are among the largest digital economies in the world. The EU seeks to accelerate and harness the benefits of the further digitalisation of the global economy and society. Data governance and cross-border data flows are crucial to this development.

Data is the lifeline of many businesses and a critical component of business models and supply chains across many economic sectors. This agreement brings much needed legal certainty that data flows between the EU and Japan will not be hampered by unjustified data localisation measures, and ensures the benefit from the free flow of data with trust in full compliance with our respective rules on data protection and the digital economy.

The outcome of the negotiations confirms EU and Japan continued commitment to the rules-based international trading system and joint determination to shape global data flow rules that respect shared values and respective regulatory approaches.

• Consistency with existing policy provisions in the policy area

By agreeing on rules addressing unjustified obstacles to data flows while preserving regulatory autonomy in the area of data protection and privacy the proposal contributes to the objectives as laid down in the Communication of 18 February 2021 from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions².

• Consistency with other Union policies

Negotiated rules on cross-border data flows with Japan complement the existing mutual adequacy arrangement between the EU and Japan for personal data³, and are in line with the consolidated proposal for provisions on cross-border data flows and protection of personal data and privacy in trade agreements⁴ the proposal pursues the Commission's strategy laid down in the Trade Policy Review, the EU Data Strategy, the Joint Communication on the EU Strategy for Cooperation in the Indo-Pacific⁵ and in the Joint Declaration on privacy and the protection of personal data co-signed by the EU and Japan⁶.

¹ Agreement between the European Union and Japan for an Economic Partnership (OJ L 330, 27.12.2018, p. 3).

² Trade Policy Review – An Open, Sustainable and Assertive Trade Policy, COM(2021) 66 final.

³ [European Commission adopts adequacy decision on Japan, creating the world's largest area of safe data flows \(europa.eu\)](#) ; [EUR-Lex - 32019D0419 - EN - EUR-Lex \(europa.eu\)](#)

⁴ <https://ec.europa.eu/newsroom/just/items/627665>

⁵ Joint Communication on the EU Strategy for Cooperation in the Indo-Pacific JOIN(2021) 24 final

⁶ [Joint Declaration on privacy and the protection of personal data | EEAS \(europa.eu\)](#)

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 Strategy⁷ 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 Joint Communication on the EU Strategy for Cooperation in the Indo-Pacific⁸.

2. LEGAL BASIS, SUBSIDIARITY AND PROPORTIONALITY

- **Legal basis**

The substantive legal basis is Article 207 TFEU.

The Protocol for Amendment is to be signed by the Union pursuant to a decision of the Council based on Article 218(5) TFEU and concluded by the Union pursuant to a decision of the Council based on Article 218(6) TFEU, following the European Parliament’s consent.

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

The Protocol for Amendment as presented to the Council does not cover any matters that fall outside the EU’s exclusive competence.

- **Proportionality**

Trade agreements are the appropriate means to govern market access and the related areas of comprehensive economic relations with a third country outside the EU. No alternative exists to render such commitments and liberalisation efforts legally binding.

This initiative pursues directly the Union's objective in external action and contributes to the political priority of 'EU as a stronger global actor'. It is in line with the EU Global Strategy’s orientations to engage with others and revamp its external partnerships in a responsible way, in order to attain the EU's external priorities. It contributes to the EU’s trade and development objectives.

- **Choice of the instrument**

This proposal is in accordance with Article 218(5) TFEU, which envisages the adoption by the Council of decisions on the signature of international agreements. No other legal instrument exists that could be used in order to achieve the objective expressed in this proposal.

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

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

Not applicable

⁷ COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS A European strategy for data, COM(2020) 66 final

⁸ Joint Communication on the EU Strategy for Cooperation in the Indo-Pacific JOIN(2021) 24 final

- **Stakeholder consultations**

Not applicable

- **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**

The proposal consists of 7 articles.

Article 1 concerns the amendment of the table of contents.

Article 2 principally concerns the addition of definition of “covered person” defining the scope of the provisions concerned.

Article 3 concerns the rules for cross-border transfer of information by electronic means based on a closed list of prohibited measures restricting cross-border flow of information and relevant exceptions.

Article 4 concerns personal data protection. In line with EU practice and with the consolidated proposal for provisions on cross-border data flows and protection of personal data and privacy in trade agreements it recognises each Party's right to determine the appropriate level of privacy and personal data protection.

Article 5 provides for the deletion of the provision concerning financial data.

Article 6 concerns the entry into force.

Article 7 concerns the authentic languages in which the Protocol is drawn up.

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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 207(4), first subparagraph, in conjunction with Article 218(5) thereof,

Having regard to the proposal from the European Commission,

The European Data Protection Supervisor was consulted in accordance with Article 42(1) of Regulation (EU) 2018/1725 and delivered an opinion on [date of the opinion],

Whereas:

- (1) On 12 July 2023, the Council authorised the Commission to negotiate the inclusion of provisions on cross-border data flows in the Agreement between the European Union and Japan for an Economic Partnership ('the Agreement').
- (2) On 28 October 2023, the negotiations of the provisions on cross-border data flows to be included in the Agreement were concluded.
- (3) Therefore, the Protocol amending the Agreement should be signed on behalf of the Union, subject to its conclusion at a later date,

HAS ADOPTED THIS DECISION:

Article 1

The signing of the Protocol amending the Agreement between the European Union and Japan for an Economic Partnership regarding free flow of data ('the Protocol') is hereby approved on behalf of the Union, subject to the conclusion of the Protocol.

The text of the Protocol is attached to this Decision.

Article 2

The Council Secretariat General shall establish the instrument of full powers to sign the Protocol on behalf of the Union, subject to its conclusion, for the person(s) indicated by the negotiator of the Protocol.

Article 3

This Decision shall enter into force on the day of its adoption.

Done at Brussels,

*For the Council
The President*