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DOI
10.2139/ssrn.3099390

Publication date
2017

Document Version
Final published version

UNIVERSITY OF AMSTERDAM

The Japan EU Economic Partnership Agreement: Flows of Personal Data to the Land of the Rising Sun

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Content

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This research was commissioned and received funding by the European Parliamentary Group GUE/NGL. The opinions expressed in this work reflect the authors' own views and do not necessarily reflect those of the commissioning organization/s. The project has been carried out in full compliance with the European Code of Conduct for Research Integrity.

Amsterdam, 25 October 2017

Introduction

At the EU-Japan Summit in July this year the European Union (EU) and Japan have achieved a political agreement in principle on the content of the Japan EU Economic Partnership Agreement.[1] Both, Japan and the EU intend to build their partnership on the many shared values and structural similarities in some key areas underpinning the digital economy.

In a joint declaration, Mr. Shinzo Abe, Prime Minister of Japan, and Mr. Jean-Claude Juncker, President of the European Commission, "stress the importance of ensuring a high level of privacy and security of personal data as a fundamental right and as a central factor of consumer trust in the digital economy, which also further facilitate mutual data flows, leading to the development of digital economy."[2]

> "Japan would like to work together [with the EU] to establish a state of the art digital economy which can be a model for the rest of the world."
>
> - *Japanese government spokesperson*

Converging rules on the protection of data privacy could become the basis for a future 'regulatory handshake' between the EU and Japan that allows personal data to flow either way. For Japan, however, including data flows in the trade deal with the EU has been an important political goal besides mutual recognition of their privacy laws.[3] The EU is currently not favorably disposed to allow data flows provisions into trade deals.

The issue of global data flows is certainly a trending topic in trade diplomacy. The reason why Japan pushes for the inclusion of data flows into its trade deal with the EU is, however, far from evident. Building a 'state of the art' digital economy between Japan and the EU is certainly possible in conformity with their data privacy laws and the classical trade law disciplines.

Our brief unpacks how flows of personal data will governed in the relationship between Japan and the EU. As a point of departure we look at the extent to which the prospective trade deal between the two economies would already cover data flows, including personal data. Next, we will take a look at the prospects for a regulatory handshake between Japan and EU providing for mutual recognition of data privacy and flows of personal data. The brief concludes with findings and recommendations on the future directions of Japan EU Economic Partnership Agreement.

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[1] Council of the European Union, "Statement following the 24th EU-Japan Summit, Brussels", 6 July 2017, press information 446/17 <http://www.consilium.europa.eu/press-releases-pdf/2017/7/47244662259_en.pdf>.
[2] European Commission, "Joint Declaration by Mr. Shinzo Abe, Prime Minister of Japan, and Mr. Jean-Claude Juncker, President of the European Commission", Brussels, 6 July 2017 <http://europa.eu/rapid/press-release_STATEMENT-17-1917_en.htm>.
[3] Alberto Mucci, Laurens Cerulus and Hans von der Burchard, "Data fight emerges as last big hurdle to EU-Japan trade deal", Politico 12 September 2016 <http://www.politico.eu/article/eu-japan-trade-deal-caught-up-in-data-flow-row-cecilia-malmstrom/>.

The European Union

The EU has the exclusive competence over the common commercial policy including all aspects of trade in services and goods.[4] The EU holds also the exclusive competence to lay down rules relating to the protection of personal data and the free movement thereof, which is the legal basis for the new General Data Protection Regulation.[5] The contemporary ubiquity of personal data in cross-border transactions, complemented with the regulation of the transfer of personal data under EU data protection law, brings trade and data protection ever closer to each other.

> "In line with our commitment to transparency, we have published the bulk of the text, where agreed. I hope the rest can follow soon."
>
> - *Cecilia Malmström, EU Trade Commissioner*

In its 2015 Trade for All Strategy the European Commission resolved that it will seek to use free trade agreements to "set rules for e-commerce and cross-border data flows and tackle new forms of digital protectionism, in full compliance with and without prejudice to the EU's data protection and data privacy rules."[6] So far it has not been clarified how this can be achieved and if the EU will pull its weight for additional safeguards of its autonomy to regulate in trade deals.

The Japan-EU Economic Partnership Agreement

Pursuant to the negotiation mandate from the Council,[7] the European Commission has been negotiating an ambitious free trade agreements with Japan. As a "new generation" agreement it does not only cater for the classical provisions to liberalize trade in goods and services but would cover also rules on trade-related aspects, such as regulatory cooperation, mutual recognition, investment and competition. Back in 2012 there was no mentioning of the protection of privacy or personal data or the free movement thereof.

When five years later the Agreement in Principle between Japan and the EU was reached, the first mega-regional free trade agreement has been concluded with the participation of Japan. The so-called Trans-Pacific Partnership (TPP) Agreement[8] includes new provisions on free data flows which could explain Japan's motivation to seek similar commitments with the EU even though the US withdrew from ratifying the TPP altogether.[9]

[4] See Articles 3(1)(e) and 207 of the Treaty on the Functioning of the European Union.
[5] See Article 16(2) of the Treaty on the Functioning of the European Union.
[6] European Commission, "Trade for All. Towards a more responsible trade and investment policy" (European Union, 2015), p. 12 <http://trade.ec.europa.eu/doclib/docs/2015/october/tradoc_153846.pdf>.
[7] Council of the European Union, Directives for the negotiation of a Free Trade Agreement with Japan (15864/12 ADD 1 REV2), 29 November 2012, publically released on 14 September 2017 <http://www.consilium.europa.eu/en/meetings/jha/2017/09/st15864-ad01re02dc01_en12_pdf/>.
[8] The Trans-Pacific Partnership Agreement, Full text, 4 February 2016, <https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-full-text>.
[9] Motoko Rich, "TPP, the Trade Deal Trump Killed, Is Back in Talks Without U.S.", The New York Times, 14 July 2017 <https://www.nytimes.com/2017/07/14/business/trans-pacific-partnership-trade-japan-china-globalization.html>.

Cross-border data flow and data privacy

The following assessment is based on the textual proposals released together with the Agreement in Principle in July 2017. The Japan-EU Economic Partnership Agreement is not yet finalized and negotiations for the precise free trade agreement have yet to be concluded.[10] The Agreement in Principle which summarizes the negotiating results so far claims:

> The agreement in principle does not include any substantive provisions on flows of personal data.[11]

That this is a placeholder is clear from the subsequent "*rendez-vous* clause" according to which "both sides undertook to look again at the issue after three years". This is confirmed by the consolidated text of the Electronic Commerce Chapter providing that "parties shall reassess the need for inclusion of an article on the three flow of data within three years".[12]

> "Human Rights are not to be negotiated in trade agreements; that doesn't mean they don't need protection in trade agreements""
> - *Jan Philip Albrecht, Member of the European Parliament*

The statement that the agreement in principle has no substantive provisions on flow of data is, however, not fully accurate. The Sections on Financial Services and Telecommunications Services carry substantive language on the transfer of information (in other words data flows), amongst which also personal data. These provisions mainly replicate existing language in WTO law, however, the relevance of personal data inside digital trade and data-driven business models has changed and the robustness of existing safeguards would need to be newly evaluated.

Financial Services

The draft Section on Financial Services holds a provision on Transfers of Information, which in substance would also cover the flow of personal data in the context of banking and insurances, including for example also new and innovative FinTech services.

(draft) Article 6
Transfers of Information and Processing of Information

> 1. Each Party shall allow a financial service supplier of the other Party to transfer information in electronic or other form, into and out of its territory, for data processing where such processing is required in the financial service supplier's ordinary course of business. Nothing in this paragraph restricts the right of a Party to adopt or maintain measures to protect personal data, personal privacy and the confidentiality of individual records and accounts, so long as such measures are not used to circumvent the provisions of this Article.[13]

[10] European Commission, The EU Japan EPA - Agreement in Principle, 6 July 2017 <http://trade.ec.europa.eu/doclib/docs/2017/july/tradoc_155693.doc.pdf>.
[11] European Commission, The EU Japan EPA - Agreement in Principle (fn. 2), p. 9.
[12] European Commission, Japan – EU EPA/FTA. Consolidated Text. Status 5 July 2017. Title [X] Trade in Services, Investment and e-Commerce. Chapter XI Electronic Commerce, Article 12 <http://trade.ec.europa.eu/doclib/docs/2017/july/tradoc_155727.pdf>.
[13] Japan - EU Economic Partnership Agreement Consolidated Text (Status 5 July 2017), Title [X] – Trade in Services, Investment and e-Commerce, Chapter V Regulatory Framework, Section V Financial Services, Article 6(1) and (2) <http://trade.ec.europa.eu/doclib/docs/2017/july/tradoc_155708.pdf>.

That this provision also reserves the right of the members to protect personal data and personal privacy points to the fact that "information in electronic or other form" mentioned therein can include "personal data" in the meaning of EU law. The second sentence formulates a counter-balancing provision that is modeled after the formulation used in the 1997 Understanding on Commitments in Financial Services.[14] This Understanding is one of the first recognitions of a potential conflict between trade law commitments on information transfers (or flows of data) and contemporary rules protecting privacy and personal data.

By contrast, in the preceding EU-Canada Comprehensive Economic and Trade Agreement (CETA) a different technique has been used to preserve the link to the law of the place where personal data originates from:

> If the transfer of financial information involves personal information, such transfers should be in accordance with the legislation governing the protection of personal information of the territory of the Party where the transfer has originated.[15]

The formulation used in CETA is likely more prudent compared to the language proposed in the Agreement with Japan. From the outset, it lays down a better division of labor between trade law and domestic data protection law. Given that the EU trade negotiators tend to work on blueprints of their earlier agreements reverting to the language of the 1994 Understanding on Financial Services and the text of the earlier EU - Singapore Free Trade Agreement[16] would mean a regressive development for the safeguards on data privacy.

Telecommunications Services

In a similar vein, the Section on Telecommunications Services addresses the flow of data between the participating economies in a particular way:

> **(draft) Article [X] 4 Access and Use**
>
> 3. Each Party shall ensure that service suppliers of the other Party may use public telecommunications transport networks and services for the movement of information within and across borders, including for intra-corporate communications of such service suppliers, and for access to information contained in databases or otherwise stored in machine-readable form in either Party or in any other member of the WTO.
>
> 4. Notwithstanding the provisions of paragraph 3, a Party may take such measures as are necessary to ensure the security and confidentiality of messages subject to the requirement that such measures are not applied in a manner which

[14] The 1994 Understanding is an appendix to the Final Act of the Uruguay Round which establishes the World Trade Organization, < https://www.wto.org/english/tratop_e/serv_e/21-fin_e.htm >.
[15] EU - Canada Comprehensive Economic and Trade Agreement (CETA), Chapter Thirteen Financial services, Article 13.15. Transfer and processing of information <http://ec.europa.eu/trade/policy/in-focus/ceta/ceta-chapter-by-chapter/>.
[16] EU - Singapore Free Trade Agreement (Authentic text as of May 2015). Chapter 8 Services, Establishment and Electronic Commerce. Sub-Section 6 Financial Services. Article 8.54(2) <http://trade.ec.europa.eu/doclib/docs/2013/september/tradoc_151743.pdf >.

> would constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on trade in services.[17]

The purpose of this provision is to ensure that service suppliers have access to and can use the transport layer in electronic communication, either connecting it with their own infrastructure or through leasing network components or as virtual service suppliers. The provision is technology neutral and benefits suppliers of public and non-public communications services that are for example necessary to access remote computing, such as cloud services. In spite being in the section on telecommunication, as was observed by Mira Buri, these rules benefit mostly non-telecommunication services, such as banking, insurance or cloud computing for that matter, which require access to and use of electronic communications infrastructure and services.[18]

When service suppliers move information within and across borders there can be legal requirements on the security and confidentiality of communications content, if they are "necessary" and "not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on trade in services." This counterbalancing clause is modelled after the 1994 GATS Annex on Telecommunications[19] which incorporates concepts that are already outdated by technological developments. For example, parties' right to regulate is limited to ensuring the security and confidentiality of "messages"; a term alluring to the content of inter-personal communications.

There is a risk that this first line of defense would not be sufficiently "digital" to except the extensive rules on electronic privacy in the EU. Whether ePrivacy rules protecting metadata, location data of connected mobile devices or the consumption of online content can be excepted under this provision ("messages") is quite unclear. In this aspect the reproduction of accepted GATS language in telecommunications chapters is stuck in the analogue era, even though as a second line of defense the more flexible general exceptions can be relied on (see below).

Cross-border Trade in Services

The impact of the classical trade law disciplines (ie. market access, national treatment, domestic regulation and most favored nation treatment) on a party's regulatory autonomy should not be underestimated either. Being inherently flexible these disciplines would apply to situations of cross-border service supplied via electronic means.[20] Those classical trade law disciplines enshrine powerful principles, such as the principle of non-discrimination, which require a high level of consistency in the regulatory treatment of service suppliers, be they local or belong to different third countries.

Our comprehensive study on the interface between international trade law and EU data protection law concluded that it is by no means certain that there is not already a conflict between these rules.[21]

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[17] Japan - EU Economic Partnership Agreement Consolidated Text (Status 5 July 2017), Title [X] – Trade in Services, Investment and e-Commerce, Chapter V Regulatory Framework, Section IV Telecommunications Services, Article 4(3) and (4) <http://trade.ec.europa.eu/doclib/docs/2017/july/tradoc_155708.pdf>.

[18] Mira Burri, "The Law of the WTO and the Communications Law of the EC: On a Path of Harmony or Discord?" (2006) Journal of World Trade 41(4): 833.

[19] General Agreement on Trade in Services (GATS), Annex on Telecommunications, Article 5(d) <https://www.wto.org/english/tratop_e/serv_e/12-tel_e.htm>.

[20] Mira Burri, 'The Regulation of Data Flows Through Trade Agreements' (2017) 48 Georgetown Journal of International Law 407, 411.

[21] Kristina Irion, Svetlana Yakovleva and Marija Bartl, "Trade and Privacy: Complicated Bedfellows? How to Achieve Data Protection-Proof Free Trade Agreements" (2016) <https://www.ivir.nl/publicaties/download/1807>; for an academic discussion Svetlana Yakovleva and Kristina Irion, "The Best of Both Worlds? Free Trade in Services and EU Law on Privacy and Data Protection" (2016) 2 European Data Protection Law Review, 191.

Insofar it should be mentioned that the appraisal of a possibly trade law inconsistent measure would not take into account the aim and effect of a piece of national regulation. Every instance of a trade law inconsistent measure would instead need justification under one of the exceptions provided for in the free trade agreement at hand.

Moreover, in May 2018 EU's brand-new General Data Protection Regulation (GDPR) will enter into force and apply to the processing of personal data of individuals who are in the EU by an organization not established in the Union in certain circumstances.[22] Such external effect is expected to have a profound impact on suppliers of goods and services from outside the EU who will be expected to observe the GDPR in its entirety. This will doubtless raise formerly unknown questions about regulating foreign suppliers of goods and services who operate across borders in the interest of privacy and data protection versus digital trade.

General Exceptions

The general exceptions in the Chapter on Cross-Border Trade in Services are the central bulwark to justify a measure inconsistent with the free trade agreement. The general exceptions clause in the Japan EU Economic Partnership Agreement replicate those of the GATS Article XIV.[23] Reliance on the general exceptions is subject to a number of trade conforming conditions some of which can be hard to satisfy (eg. a measure "necessary to secure compliance" with laws or regulations "not inconsistent with the provisions of this agreement").[24] Against the backdrop of this critique the European Parliament has called for:

> a comprehensive, unambiguous, horizontal, self-standing and legally binding provision based on GATS Article XIV which fully exempts the existing and future EU legal framework for the protection of personal data from the scope of this agreement, without any conditions that it must be consistent with other parts of the [agreement];[25]

> "The Parliament urged the Commission that raising the stakes on cross-border data flows means raising the bar on data protection."
>
> - *Viviane Reding and Jan Philipp Albrecht, Members of European Parliament*

The high level of regulatory convergence between data privacy laws in Japan and the EU likely mitigates the risk of a trade law dispute over data privacy measures more effectively than the general exceptions would be capable off.

[22] 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), Official Journal of the European Union L119/51, 1, Article 3(2)(a) and (b).

[23] Japan - EU Economic Partnership Agreement Consolidated Text (Status 5 July 2017) Title [X] – Trade in Services, Investment and E-Commerce, Chapter VII – Exceptions, Article 1(2), <http://trade.ec.europa.eu/doclib/docs/2017/july/tradoc_155709.pdf>.

[24] See Irion, Yakovleva and Bartl, "Trade and Privacy: Complicated Bedfellows? How to Achieve Data Protection-Proof Free Trade Agreements" (fn. 23), p. 34f.

[25] Resolution of 3 February 2016 containing the European Parliament's recommendations to the Commission on the negotiations for the Trade in Services Agreement (TiSA), (2015/2233(INI) <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA- 2016-0041+0+DOC+XML+V0//EN>, para. (c).iii.

Regulatory Cooperation

Unlike regulatory cooperation in particular chapters (such as Financial Services Committee[26]), the EU proposal for a general Chapter on Good Regulatory Practices and Regulatory Cooperation[27] still does not form a part of the political agreement in principle. Yet it remains crucial to discuss this relatively newer institutional risk for data protection insofar it threatens to substitute the avenues of cross-border cooperation under EU's data privacy laws with new exchanges and institutions formed under trade law.

Scope of Regulatory Cooperation

Regulatory cooperation aims to address old and new "behind the borders barriers to trade", ie. barriers to trade which result from differences in regulation between various countries. It aims to do so by creating institutional channels for the exchange of information, methodologies and knowledge between regulators in the belief that this mutual engagement should align the ways regulators "think", and consequently act. Regulatory cooperation thus does not, on its own, lead to decisions with formal legal and binding power.[28] Rather, through the exchange with Japanese regulators, and abetted by stakeholders and "interested parties", the EU regulators should come up with more trade-friendly solutions.

The EU chapter on regulatory cooperation the EU – Japan agreement is very broad in scope, applying "to regulatory measures issued by regulatory authorities in respect to any matter that may affect trade or investment."[29] While the Regulatory Cooperation Chapter explicitly states not to interfere with parties' autonomy to regulation in pursuit or furtherance of its public policy objectives, among others, in personal data,[30] this provision does not exclude data flows from the scope of activities, and therefore data privacy issues could be tabled as part of the regulatory cooperation mechanisms.

Good Regulatory Practices

The EU proposal for a Chapter on Good Regulatory Practices and Regulatory Cooperation, similar to other EU's Free Trade Agreements, has two major elements. The first element is the so-called "regulatory practices", ie. the obligation to adjust internal regulatory processes to a particular format. The mechanisms envisaged include internal coordination mechanism to foster good regulatory practices,[31] early stakeholder participation in the regulatory process,[32] impact assessment,[33] or

[26] European Commission, Japan – EU EPA/FTA. Consolidated Text. Status 5 July 2017. Title [X] Trade in Services, Investment and e-Commerce, Section V on Financial Services, Annex to Section V.
[27] EU proposal for Chapter on Good Regulatory Practices and Regulatory Cooperation EU - Japan FTA, published March 2017 <http://trade.ec.europa.eu/doclib/docs/2017/march/tradoc_155449.pdf>.
[28] See European Commission, JEFTA Factsheet: Regulatory Cooperation <http://trade.ec.europa.eu/doclib/docs/2017/july/tradoc_155720.pdf>.
[29] EU Proposal for Chapter on Good Regulatory Practices and Regulatory Cooperation EU - Japan FTA, Art. 1(1).
[30] EU Proposal for Chapter on Good Regulatory Practices and Regulatory Cooperation EU - Japan FTA, Art. 1(2).
[31] European Commission, EU Proposal for Chapter on Good Regulatory Practices and Regulatory Cooperation EU - Japan FTA, Art. 4. What is meant by this provision is that state parties should maintain a body akin to the EU's 'Regulatory Scrutiny Board' (previously Impact Assessment Board). For some of the associated democratic concerns see Marija Bartl, "Regulatory Convergence through the Back Door: TTIP's Regulatory Cooperation and the Future of Precaution in Europe", German Law Journal 18 (2017), 969.
[32] EU Proposal for Chapter on Good Regulatory Practices and Regulatory Cooperation EU - Japan FTA, Art. 5 - 7.
[33] Ibid., Art. 8.

retrospective evaluations.[34] While not all aspects of regulatory practices are of concern, submitting data privacy to economic benchmarking, for instance, which is not very attuned to internalising normative values, certainly may become. Furthermore, an important consequence of these rules is that they legally bind parties to open up their domestic regulatory processes to a greater influence of domestic and international stakeholders, which has generally served better larger industry.[35]

Institutions of Regulatory Cooperation

The second element of EU proposal are the new institutions of regulatory cooperation, most importantly the "Regulatory Cooperation Council" (RCC), which is a main agenda setting and controlling body.[36] This body will be further complemented by various "sectorial committees", out of which relevant for data protection is, for instance, a Financial Services Committee.[37] These bodies will be adjoined by, often ad hoc working groups on particular topics.[38] Finally parties may also engage in a simple bilateral exchange between regulators.[39] While the RCC will be the body to coordinate the substance of the exchanges, including the collection and evaluation of proposals for regulatory cooperation from the "interested parties", the technical aspect of cooperation activities will fall on the designated "contact points" in each party.[40]

Preserving a party's 'right to regulate' within these chapters would not capture several points of pressure that may come about in the context of regulatory cooperation. First, the obligation of parties to observe certain "regulatory practices" required by the Agreement will increase the influence of powerful stakeholders in domestic regulatory processes,[41] while at the same time they constrain the regulatory space by demanding particular methodological processes (e.g. quantification).[42] Second, as we develop in more detail below, very little thus far seems to be able to prevent "diagonal" encroachment on data protection through regulatory cooperation in various sectors, such as electronic commerce, telecommunications or financial services.

Institutional Design and the Risks for Data Protection

The right to the protection of personal data in the EU enjoys constitutional status (Charter of Fundamental Rights), is subject to institutional guarantees (the right to independent supervision at the EU and national level), governed by a brand-new regulatory framework (the General Data Protection Regulation) and is support by powerful actors in the EU, such as the Court of Justice or the European Parliament,[43] as well as the Justice Directorate-General of the European Commission. The regulatory cooperation may be seen as an institutional intervention into this landscape: opening up new institutional spaces, where data protection can be challenged - either directly as a protectionist

[34] Ibid., Art. 9.
[35] See Wendy E. Wagner, "Administrative Law, Filter Failure, and Information Capture", Duke Law Journal 59 (2010), 1321
[36] Ibid., Art. 13.
[37] European Commission, Japan – EU EPA/FTA. Consolidated Text. Status 5 July 2017. Title [X] Trade in Services, Investment and e-Commerce, Section V on Financial Services, Annex to Section V.
[38] EU Proposal for Chapter on Good Regulatory Practices and Regulatory Cooperation EU - Japan FTA, Art 13/3/j.
[39] Ibid., Art. 11.
[40] Ibid., Art. 13.
[41] See for instance Wendy E. Wagner, "Administrative Law, Filter Failure, and Information Capture", Duke Law Journal 59 (2010), 1321
[42] Mark Dawson, "Better Regulation and the Future of EU Regulatory Law and Politics", Common Market Law Review 53, no. 5 (2016): 1209–1235.
[43] There are however also oppositional forces, see for instance Draft INTA report "Towards a digital trade strategy", 18 September 2017 <http://www.europarl.europa.eu/oeil/popups/ficheprocedure.do?lang=&reference=2017/2065(INI>

measure, or through the interpretation of provisions of other chapters[44] – strengthening the voices of opposition to this fundamental right where it is perceived to put a burdens on digital trade. Four elements of the institutional design of the Chapter on Regulatory Cooperation suggest this will be the case:

1. The first problem relates to the representation of data protection actors in the institutions of regulatory cooperation. There is generally is very little clarity as to who would be the officials sitting in the aforementioned institutions of regulatory cooperation, or how should those 'concerned' officials be identified. In fact, after receiving a considerable amount of criticism for the over-representation of trade officials and regulatory affairs officials in its TTIP proposal,[45] the European Commission has decided not to mention the question of participation any further (instead of, for instance, engaging with the question of diversity in the institutional design). In this constellation, we have little reason to believe that the membership in regulatory cooperation would not continue being dominated by the aforementioned officials (trade and regulatory affairs officials). Those have been so far proven rather supportive of re-framing of data concerns as those of data flows,[46] with a consequent down-scaling of the rights dimension of personal data protection.

> "Of course they say that, they are trade ministers."
>
> - *attributed to Martin Selmayr, Jean-Claude Juncker's Chief of Cabinet*

Moreover, in the EU the right to independent supervision is guaranteed at constitutional level, which is performed by independent data protection authorities in the member states and at EU level. There is no mandate to form new regulatory cooperation institutions that would trespass on their independent mandate to implement and enforce EU data protection law. The new European Data Protection Board which will become operational in May 2018 would be the only legitimized body at EU level to turn to for matters of regulatory practice.

2. Second, even if the representation in the bodies of regulatory cooperation were more balanced, placing the discussion within the framework of trade agreement will have important consequences. The Regulatory Cooperation Chapter opens up with "the objectives of this Chapter are to promote good regulatory practices and regulatory cooperation between the Parties with the aim to enhance bilateral trade and investment."[47] Framing the purpose in this way will have two major effects: first, the institutions will have an understanding of their role as that of promoting trade and investment (above the fact that their most stable constituency will be trade officials), called to intervene on non-trade barriers so as not to hinder trade. Consequently, re-interpreting data questions as those of data flows, or furthering data protection insensitive interpretation of provisions in various chapters, is not all that unlikely.

A second consequence of the aforementioned aim relates to incentivizing a particular group of

[44] For instance, terms such as "necessary for the conduct of the ordinary business of a financial service supplier"; European Commission, Japan – EU EPA/FTA. Consolidated Text. Status 5 July 2017. Title [X] Trade in Services, Investment and e-Commerce, Section V on Financial Services, Art. 6.

[45] For NGO criticism see for instance Corporate European Observator, "TTIP leaks highlight the dangers of regulatory cooperation", of May 12, 2016 <https://corporateeurope.org/international-trade/2016/05/ttip-leaks-highlight-dangers-regulatory-cooperation>. For academic engagement with the subject see Marija Bartl, "Making Transnational Markets: The Institutional Politics behind the TTIP", Europe and the World 1, no. 1 (19 June 2017): 1–37 <http://discovery.ucl.ac.uk/1559538/1/Bartl%20article.pdf>.

[46] For the survey of latest political developments and positions see Jakob Hanke, Joanna Plucinska and Hans von der Burchard, „EU trade, the Martin Selmayr way", Politico, 18 October 2017 <http://www.politico.eu/article/eu-trade-the-martin-selmayr-way/>.

[47] EU Proposal for Chapter on Good Regulatory Practices and Regulatory Cooperation EU - Japan FTA, Art. 1(1).

stakeholders to reach out to these bodies by "proposals for regulatory cooperation activities submitted by persons of either Party which are duly justified and accompanied by supporting evidence".[48] If the aim is to liberalize trade and investment flows, the "friends" of personal data protection will have no incentive to reach out to these institutions – instead of, for instance, national and the EU parliaments or independent data protection authorities. The stakeholders who will approach the regulatory cooperation institutions will do so with a intention to lower the impact of data protection rules on their business operation. This incentive structure further strengthens the historical experience suggesting that opening up regulatory process to stakeholders has usually meant voice for larger businesses - stakeholders with focused interest and large resources (including knowledge).[49]

3. Third problem relates to democratic oversight. Even if the regulatory cooperation would not lead to direct decisions with formal legal/binding power, the lack of democratic oversight is a considerable danger to data protection. This problem will shine through in two ways. First, when it comes to legally entrenched obligation to engage in "regulatory practices", we will face a number of concerns regarding the impact of the "better regulation" agenda on non-economic normative concerns,[50] of which personal data protection is an excellent example. Secondly, the exchanges that pertain to the realm of regulatory cooperation will take place at early stages of regulatory process, before legislative process even closely commences. Operating mainly at the level of the executive, in the phase of the preparation of the rules and regulations, we may expect little parliamentary oversight of the processes. The lack of such oversight will eventually further strengthen the risks to personal data protection posed by previously mentioned concerns (dominant expertise and the purpose of the agreement) especially considering the important role that the European Parliament has played in safeguarding this fundamental right.

4. Fourth, and perhaps the most serious threat to personal data protection will come from the change of the internal balance of powers in the EU. The new institutions of regulatory cooperation will give an important institutional entrenchment to those forces that see the EU as a global leader in setting rules for "data flows"[51] instead of a global leadership in "personal data protection" (as was the case so far).[52] Shall regulatory cooperation end up (as it seems so far) in the hands of trade officials and regulatory affairs officials, combined with higher incentives to corporate interests to propose issues of concern to these institutions, the RCC and sectorial committees are also likely to become an important "lobby" in promoting the discourse of data flows - also in the framework of the rendez-vous clause in the Chapter on Electronic Commerce.[53]

[48] Ibid., Art. 11 (4)(b).
[49] Wagner, "Administrative Law, Filter Failure, and Information Capture"; Beate Kohler-Koch, "Governing with the European Civil Society", De-Mystification of Participatory Democracy. EU Governance and Civil Society, 2013, 18–40.
[50] Dawson, "Better Regulation and the Future of EU Regulatory Law and Politics".
[51] See INTA report (fn. 43).
[52] Burri, "The Regulation of Data Flows through Trade Agreements".
[53] European Commission, Japan - EU EPA/FTA. Consolidated Text. Status 5 July 2017. Title [X] Trade in Services, Investment and e-Commerce. Chapter XI Electronic Commerce, Article 12.

The Regulatory Handshake with Japan's Data Protection Rules

Both, the EU and Japan have a variety of mechanisms in their regulatory systems to authorize the cross-border transfer of personal data that would preserve the substantial protections afforded to individuals. Both, the EU and Japan aim for the mutual recognition of their data protection laws in early 2018, which have been already substantively aligned.

At the time of writing the European Commission' Justice and Consumers Directorate General is occupied with assessing Japan's law and practice with a view to granting a so called adequacy decision which would become the basis for the cross-border flow of personal data originating from the EU to Japan.[54] Likewise, the Japanese competent authority, the Personal Information Protection Commission (PPC), is preparing its own regulatory handshake with the EU that would recognize the EU as a foreign designation for personal data transfers originating from Japan.[55]

> "Dialogues on data protection and trade negotiations with third countries follow separate tracks"
> - *Mina Andreeva, Commission Spokesperson*

For this to become a workable proposition Japan and the EU have to maintain a high level of policy consistency in its international arrangements on personal data flow. Japan, for that matter, has been entering a number of international commitments in a variety of fora involving cross-border personal data transfers. Japan, being a member of the Asia-Pacific Economic Cooperation (APEC), participates in the 2015 APEC Privacy Framework. In 2014, Japan has joined the APEC Cross-border Privacy Rules System (CBPR) which facilitates moving personal data based on contractual accountability by the involved organizations.[56] To Graham Greenleaf this system is of little practical relevance at present since it only facilitates data exports to a handful of US businesses.[57]

The CBPR system however has been criticized for having no effective limitations on the onward transfer of personal data to destinations where data protection laws are weaker. This may raise issues of interoperability with EU's General Data Protection Regulation which will govern adequacy decisions as of May 2018 but insists on such rules being in place in order for a third country to afford an by EU standards adequate level of protection.[58] In principle this could be resolved by exempting transfers pursuant to the CBPR system from the scope of the EU adequacy decision for Japan.

In a similar fashion, free trade agreements could upset the mechanisms of bilateral recognition in cross-border data protection. As was mentioned earlier Japan is a planning to ratify the TPP Agreement, which has a horizontal provision on data flows in its Chapter on Electronic Commerce requiring that:

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[54] European Commission, "Joint statement by Commissioner Věra Jourová and Haruhi Kumazawa, Commissioner of the Personal Information Protection Commission of Japan on the state of play of the dialogue on data protection", Brussels, 4 July 2017 <http://europa.eu/rapid/press-release_STATEMENT-17-1880_en.htm>.

[55] The Personal Information Protection Commission, "Concerning the Smooth and Mutual Transfer of Personal Data Between Japan and the European Union", 4 July 2014 <https://www.ppc.go.jp/files/pdf/290704_Concerning_the_Smooth_and_Mutual_Transfer_of_Personal_Data.pdf>.

[56] See for more information Ministry of Economy Trade and Industry (METI), "Japan's First Certification of a Business under the APEC CBPR System", 20 December 2016 <http://www.meti.go.jp/english/press/2016/1220_002.html>.

[57] Graham Greenleaf, "Japan joins APEC---CBPRs: Does it matter?" (2016) 144 Privacy Laws & Business International Report, 18 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2964499>.

[58] General Data Protection Regulation (fn. 22), Article 45(2)(a).

> [e]ach Party shall allow the cross-border transfer of information by electronic means, including personal information, when this activity is for the conduct of the business of a covered person.[59]

There is a separate provision on personal information protection, as it is called here, and a specific exceptions to the free flow rule providing for restrictions on transfers of information that are not greater than required to achieve the objective.[60] Small details as these can change the course of regulatory protection away from seeking bilateral recognition of data protection regimes to prioritizing data flows. This is also why Japan's consistency in its handling of cross-border transfers of personal data should become a matter of concern - instead of trying to implement what is from a human rights point of view potentially a false "golden standard" in digital trade.

Conclusions

In this brief we assessed the state of affairs of the Japan and EU economic relations, with a view to the exchange of personal data. We have followed parallel tracks under the discussion between the two partners: the first track concerned the EU's and Japan's respective personal data protection laws, while the second track, in the envisaged Economic Partnership Agreement, aimed to introduced a new language on data flows.

No compelling argument been made why the Japan-EU Economic Partnership Agreement needs to engage with regulating data flows. Both countries maintain similar data privacy laws, which offer institutional avenues for bilateral recognition of each other's privacy regimes, and create conditions for the cross-border flow of personal data – while at the same time ensuring adequate safeguards for individuals' personal data. Both the EU and Japan have initiated the necessary steps to achieve this "regulatory handshake" between their respective personal data protection laws in early 2018. This would certainly not be a step back, and even less a preference for "analog" as opposed to "digital" trade. Rather, this would be a recognition that the EU and Japan regulate personal data flows in their distinctive way.

> *"Member states are divided, Parliament is worried and Japan doesn't really need it"*
> - *Anon., Commission Official*

In contrast, trade law in the making in the form of the EU Japan Economic Partnership Agreement follows a rather one-sided trajectory, accepting GATS-plus liberalization and idolizing what is deemed the "golden standard" of digital trade, while failing to see that much of its classical safeguards reflect the state of affairs in the analog era. The routine replication of existing provisions in WTO law, as we discuss above, largely fails to recognize the growing importance of personal data in digital trade and data-driven business models, which require broad safeguards for a party's regulatory autonomy in the field of privacy and personal data protection. Such recognition would grist to the mill of the European Parliament calling for a "comprehensive, unambiguous, horizontal, self-standing and legally binding" exception for the autonomy to regulate privacy and personal data protection in the Japan-EU Economic Partnership Agreement.

A caveat for the end. Even if we leave free data flow provisions "outside" trade agreements, as it is the case with the Japan EU Economic Partnership Agreement for the moment, this seemingly does not remove personal data from the emergent trade law institutions. There are very few institutional

[59] The Trans-Pacific Partnership Agreement (fn. 8), Chapter on Electronic Commerce, Article 14.11(2).
[60] Ibid., Article 14.11(3).

safeguards preventing biting on data protection laws from the side, through regulatory cooperation – either by directly challenging certain provisions in the regulatory cooperation institutions, or through interpretation of provisions in chapters on electronic commerce, financial services, or telecommunications. This is made particularly salient in an institutional context where it is unclear when the participation of data protection supervisor can be called for, while those deciding on the involvement, have very little interest to recognize such need. Regulatory cooperation as envisaged by the European Commission will run into the same impasse as investment courts have been earlier: creating new institutions under the trade law where the EU has institutional channels to ensure independent supervision of the right to the protection of personal data. The question that we need to pose yet again is why this is the case.

Quotes

Cecilia Malmström, EU Trade Commissioner:
"In line with our commitment to transparency, we have published the bulk of the text, where agreed. I hope the rest can follow soon."[61]

Jan Philip Albrecht, Member of the European Parliament:
"Human Rights are not to be negotiated in trade agreements; that doesn't mean they don't need protection in trade agreements"[62]

Japanese government spokesperson:
"Japan would like to work together [with the EU] to establish a state of the art digital economy which can be a model for the rest of the world."[63]

Mina Andreeva, Commission Spokesperson:
"Dialogues on data protection and trade negotiations with third countries follow separate tracks"[64]

Attributed to Martin Selmayr, Jean-Claude Juncker's Chief of Cabinet:
"Of course they say that, they are trade ministers"[65]

Viviane Reding and Jan Philipp Albrecht, Members of the European Parliament:
"The Parliament urged the Commission that raising the stakes on cross-border data flows means raising the bar on data protection."[66]

Attributed to Commission Official:
"Member states are divided, Parliament is worried and Japan doesn't really need it"[67]

[61] Cecilia Malmström, "The Benefits of an EU-Japan Free Trade Agreement", Brussels, 11 July 2017, Speech by EU Trade Commissioner Cecilia Malmström, Event at EU-Japan Business Round Table <http://trade.ec.europa.eu/doclib/docs/2017/july/tradoc_155745.pdf >.
[62] Jan Philip Albrecht, Digital Trade Lab, Civil Society Trade Lab, Brussels, 26 June 2017.
[63] Attributed in Alberto Mucci, Laurens Cerulus and Hans von der Burchard, "Data fight emerges as last big hurdle to EU-Japan trade deal", Politico 12 September 2016 <http://www.politico.eu/article/eu-japan-trade-deal-caught-up-in-data-flow-row-cecilia-malmstrom/>
[64] Attributed in Jakob Hanke, Joanna Plucinska and Hans von der Burchard, „EU trade, the Martin Selmayr way", Politico, 18 October 2017 <http://www.politico.eu/article/eu-trade-the-martin-selmayr-way/>.
[65] A citation attributed to Jean-Claude Juncker's Chief of Cabinet Martin Selmayr, <http://www.politico.eu/article/eu-trade-the-martin-selmayr-way/>.
[66] Viviane Reding and Jan Philipp Albrecht, "Don't trade away data protection", PoliticoPro, 3 March 2017 <https://www.politico.eu/pro/opinion-dont-trade-away-data-protection/> (subscription required).
[67] Attributed in Laurens Cerulus, "Cheese, cars — but no data in EU-Japan deal", PoliticoPro, 7 June 2017 <https://www.politico.eu/pro/cheese-cars-but-no-data-in-eu-japan-deal/> (subscription required).