

February 2019

Implementation of the Framework for Mutual and Smooth Transfer of Personal Data Between Japan and the European Union

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The Framework for Mutual and Smooth Transfer of Personal Data Between Japan and the EU (the "**Framework**") was implemented on January 23, 2019. This newsletter will explain how Japan and the EU have implemented the Framework in domestic legislation, and will also analyze the significance of the Framework.

Summary

Transfers of personal information to jurisdictions outside of Japan (when not made personally) are regulated under the Act on the Protection of Personal Information (the "**APPI**"). The APPI usually requires that the transferor of the personal information obtain the consent of the person to whom the personal information relates (the "**Data Subject**").

There are two exceptions to the requirement to obtain consent. One exception is if the jurisdiction of the party receiving the information is deemed by the Personal Information Protection Commission of Japan (the "**PPC**") to have personal information protections equivalent to the APPI. The other exception is if the information recipient voluntarily adheres to a standard of information protection laid out in PPC rules.

Prior to January 23, 2019, no jurisdiction had been designated by the PPC as having sufficient personal information protection laws to fall under the first exception. On January 23, 2019, the PPC designated the European Union as a jurisdiction falling under this exception, allowing Japanese enterprises to rely on that exception for the first time.

1. Background

In Japan, the APPI regulates the provision of personal data about a person, by a business operator possessing that data (the "**Information Transferor**"), to a third party in a foreign jurisdiction (the "**Information Recipient**"). If an Information Transferor wants to transfer personal data to an Information Recipient, it must (in principle) obtain the consent of the Data Subject, pursuant to Article 24 of the APPI.

However, exceptions from the rule requiring the Data Subject's consent exist. The Information Transferor does not need to seek the Data Subject's consent if the:

- (i) jurisdiction in which the Information Recipient is located is designated by rules of the PPC as a jurisdiction that has a personal information protection system with standards equivalent to those in Japan¹; or
- (ii) Information Recipient is a business operator handling personal information that has established a system conforming to the standards prescribed by rules of the PPC in order to ensure continuous adherence to necessary measures and standards.

In the EU², it is generally forbidden to transfer personal data from within the EU to an outside recipient (including re-transfers) under Article 44 of the EU General Data Protection Regulation (the "**GDPR**"). Transfer of personal data is only permitted under certain circumstances, such as transfer to a country that has received an "Adequacy Decision" under Article 45 of the GDPR. "Adequacy" means that the European Commission has evaluated the level of data protection of the recipient's jurisdiction and found it adequate by EU standards. The list of jurisdictions that have received an Adequacy Decision can be viewed at the Personal Information Protection Commission's website³.

2. Significance

In light of the above, the PPC and the European Commission carried out repeated negotiations which culminated in the PPC designating the EU as "a country that has a personal information protection system with equivalent standards to that in Japan" (the "**EU Designation**") in July 2018. This activates the exception described in 1(i), above. The PPC and the European Commission also reached an agreement regarding a policy on how the European Commission will make an Adequacy

¹ No country, including the EU member states, had been deemed to meet this requirement in the past.

² To be specific, this refers to the 31 member countries of the EEA including the 3 countries of Iceland, Liechtenstein and Norway, alongside with the 28 member countries of the EU consisting of Ireland, Italy, United Kingdom, Estonia, Austria, Netherlands, Cyprus, Greece, Croatia, Sweden, Spain, Slovakia, Slovenia, Czech Republic, Denmark, Germany, Hungary, Finland, France, Bulgaria, Belgium, Poland, Portugal, Malta, Latvia, Lithuania, Romania, and Luxembourg. These countries shall be referred to simply as "the EU" in this document.

³ <https://www.ppc.go.jp/enforcement/cooperation/cooperation/GDPR/>

Decision for Japan under Article 45 of the GDPR.

Based on this agreement, the PPC implemented the EU Designation on January 23, 2019 and the European Commission has also made an Adequacy Decision for Japan⁴.

Before the implementation of the Framework, for an enterprise in Japan to act as an Information Transferor to an Information Recipient in the EU, it needed to acquire the Data Subject's consent or to rely solely on the exception in 1(ii), above. Consent was also required for a the local EU subsidiary of a Japanese enterprise to transfer personal data to Japan; though the local EU subsidiary could alternatively rely on the execution of an agreement that includes appropriate clauses regarding adequate measures for the protection of privacy and personal data (Standard Contractual Clauses, the "SCC"), pursuant to Article 44 of the GDPR.

Some have pointed out that the relying on consent from the Data Subject is often difficult—either because the Data Subject cannot be contacted to give consent, or the Data Subject denies giving (or retroactively revokes) consent. Furthermore, establishing a system under exception 1(ii) and executing agreements including SCCs required both expenses and labor, which was a hindrance.

Thanks to the implementation of the Framework, an Information Transferor in Japan to an Information Recipient within the EU no longer needs to obtain the consent from the Data Subject pursuant to Article 24 of the APPI⁵. This is because, as a result of the EU Designation, the Information Transferor could rely on the exception in 1(i).

At the same time, transfer of personal data from the EU to Japan is no longer subject to the regulations of Article 44 of the GDPR. This means that, as a result of Japan receiving an Adequacy Decision, transfer of personal data from the EU to Japan became possible without requiring the consent of the Data Subject, or entering into an agreement containing SCCs.

The PPC expects that the implementation of this Framework will create the world's largest area for safe and efficient data transfers. For global business operators, this means that operational efficiency may be improved, costs reduced, and new business models potentially created. All of these factors may also eventually benefit consumers as well⁶.

⁴ https://www.ppc.go.jp/files/pdf/310123_pressestatement.pdf

⁵ Please note, however, that an Information Transferor in Japan to an Information Recipient within the EU is still subject to Article 23 of the APPI. Under this Article, the consent of the Data Subject needs to be obtained unless one of exemptions under Article 23 applies.

⁶ https://www.ppc.go.jp/files/pdf/310122_houdou.pdf

3. Conditions and Reservations

Thanks to the implementation of the Framework, the transfer of personal data between Japan and the EU will be expedited. However, both the EU Designation and the Adequacy Decision do not allow for transfers of personal data without conditions and reservations.

For transfer of personal data from Japan to the EU (under the EU Designation) the following conditions and reservations have been established based on the stipulations of Article 11-2 of the Enforcement Rules for the APPI:

- (i) to rely on the EU Designation, the foreign Information Recipient must be located in the 31 member countries of the EEA and follow the regulations of the GDPR; and
- (ii) the PPC shall review the countries exempted under the EU Designation within 2 years of January 23, 2019, and subsequently, no less than every 4 years (or when the PPC deems necessary).

For transfer of personal data from the EU to Japan after the adoption of the Adequacy Decision, all parties must comply with the “Supplementary Rule Regarding the Handling of Personal Data that has been Transferred from the EU Based on the Adequacy Decision of the Act on the Protection of Personal Information”⁷ (the “**Supplementary Rule**”).

In September 2018, before the implementation of the Framework, a draft of the Supplementary Rule was prepared and released. On January 23, 2019, the final version of the Supplementary Rule, which was substantially the same as the previous draft, was released.

In addition, with the implementation of the Framework, the “General Rules” and “Provision to a Third Party in a Foreign Country” sections of the guidelines on the APPI had been updated⁸. However, the main changes are limited to supplemental descriptions of the process surrounding receipt of the Adequacy Decision from the EU, and surrounding Japan making format modifications (such as changes to reference numbers) in accordance with the EU Designation.

Due to the above, no significant changes to the Supplementary Rule are expected in the future.

⁷ https://www.ppc.go.jp/files/pdf/Supplementary_Rules.pdf

⁸ The changes may each be viewed at https://www.ppc.go.jp/files/pdf/190123_guidelines01_shinkyu.pdf and https://www.ppc.go.jp/files/pdf/190123_guidelines02_shinkyu.pdf

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