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Cross-border Data Flows between the EU, Japan and the UK

A Triangular Relationship

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I Introduction

Despite the agreement between the EU and Japan on a reciprocal recognition of the level of data protection,[1] the UK's exit from the EU means the UK is no longer part of this bilateral framework for data protection, complicating the legal landscape of data flows. This short opinion piece advances some considerations on the state of play of the data regimes in the trilateral relationship between the EU, the UK and Japan, including some of the latest developments in digital trade and data. The piece is structured around

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1）Elaine Fahey and Isabella Mancini 'The EU as an Intentional or Accidental Convergence Actor? Learning from the EU-Japan Data Adequacy Negotiations',（2020）26.2 International Trade Law and Regulation, 99−111.

four parts: after introducing the EU as global data convergence actor, it discusses in turn the EU-Japan data adequacy decision at the time of the trade negotiations for the EU-Japan Economic Partnership Agreement（EUJEPA）;[2] the data regime in the context of the recent Japan-UK Comprehensive Economic Partnership Agreement（CEPA）;[3] and the data arrangements between the EU and the UK post-Brexit.[4]

Traditionally, it is via trade that the EU has also been able to deepen its ties with third countries the most. Trade is probably one of the most prominent manifestations of EU's global actorness. The Commission Strategy of 2017 on Exchanging and Protecting Personal Data in a Globalised World expresses an ambition for the EU to be a global actor in *data*.[5] The Commission is very clear that the aim is to foster regulatory convergence towards EU standards, while facilitating trade relations. The EU is determined and increasingly explicit about these efforts at de facto and de jure regulation of high data standards – which it intentionally expressed as a form of global actorness. Many speak of the global reach of EU data protection law and also, global effects, extraterritoriality and Europeanisation of data protection law. However, by looking at trade and data together, it appears that the EU pursues these two aims via parallel routes which are nonetheless complimentary.

II　EU-Japan Economic Partnership Agreement（EPA）

The EU-Japan EPA is an example where convergence was not initially sought with re-

2）Agreement between the European Union and Japan for an Economic Partnership（EUJEPA）［2018］OJ L330/3.

3）Japan-UK Comprehensive Economic Partnership Agreement（CEPA）, signed 23 October 2020.

4）As Part of this project evidence was given by Professor Elaine Fahey to the House of Commons, International Trade Commission, on digital trade and data; See Elaine Fahey, 'Professor Elaine Fahey-Written Evidence（UST0057）'（31 August 2020）. Available at: <https://committees.parliament.uk/writtenevidence/10712/pdf/ > accessed 31 January 2022.

5）European Commission, 'Communication from the Commission to the European Parliament and the Council: Exchanging and Protecting Personal Data in a Globalised World' COM（2017）7 final, Brussels, 10.1.2017.

spect to data, but which was eventually strived for. The agreement was set to create the largest open economic area between two major developed economies. The economic benefits of free flows of data yet were only appraised at a later stage. Politically, Japan repeatedly expressed its interest in free data flows and the prohibition of data localisation requirements. It asked for more precise and operational provisions on cross-border transfer of information, but the EU refused to negotiate any substantive standard on data protection via the FTA. What they did, however, was to start parallel dialogues on data in 2016, reaching an agreement foreseeing a mutual recognition of their levels of data protection. Eventually, and despite the EU's reticence of doing so, the EU and Japan did engage in negotiations and talks on data, with a view to fulfilling adequacy requirements. The way efforts have been carried out and equivalence assessed are a unique case which provide the context to understand the subjects and objects of EU data convergence and the role of the EU as a convergence actor.

III　The EU-Japan Adequacy Decision: How the EU and Japan tried to reach convergence

In terms of the adequacy decision, the EU and Japan successfully concluded their talks on adequacy in 2018, right before the signing of the EPA.[6] The decision is highly significant because it is the first decision post-GDPR（the General Data Protection Regulation 2016/679）,[7] which sets stricter criteria compared to the previous Directive 95/46/EC,[8] both substantively and procedurally. The decision is also significant be-

6）European Commission, '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'（The Japan Adequacy Decision）［2019］OJ L76/1.

7）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（GDPR）［2016］OJ L119/1.

8）Directive 95/46 of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data［1995］OJ L281/31.

cause it represents an important precedent for future adequacy findings. Despite the stricter criteria of the GDPR, the finding of adequacy does not require a *replication* of standards by the other country, but it requires an *alignment* of standards with the principles enshrined in the GDPR. The requirement is for the level of protection to be essentially equivalent（see the *Schrems I* case）.[9] Most importantly, the adequacy decision is indicative of what is understood as *convergence* of legal regimes, and how the EU assesses a third country's legal framework and its level of protection of personal data.

Even though some of the EU's values in relation to data had already emerged in Japanese courts,[10] there were several efforts of the EU and Japan to reach convergence. These efforts included talks, negotiations and exchanges of inputs from a wide range of actors: from the EU Commission to the Personal Information Protection Commission Japan（PPC）, the European Data Protection Board（EDPB）, an ad hoc delegation of the LIBE Committee of the European Parliament, not least respective governments and parliaments. The result was the introduction of supplementary rules adopted by the PCC to bridge what had been perceived as gaps; more powers to the PPC; and also some assurances from Japanese authorities to address some EU's concerns in relation to the fact that the Government could have access to personal information for criminal law enforcement purposes as well as national security purposes. Following Brexit, there have been new developments in the relationship between Japan and the UK, which have resulted in the conclusion of a trade agreement.

IV　UK-Japan Comprehensive Economic and Partnership Agreement（CEPA）

The UK-Japan Comprehensive Economic and Partnership Agreement（CEPA）was

9）Case C-362/14 Maximillian Schrems v Data Protection Commissioner（Schrems I）（2015）EU:C:2015:650

10）E.g. the 'right to be forgotten'（Supreme Court Decision of 31 January 2017 Minshu 71−1−63）. Even though these were not phrased as such, the essence was recognised.

signed in Tokyo on 23 October 2020, as part of the UK's efforts to 'roll-over' existing EU trade agreements. These efforts were not uncontroversial, largely existing of copy-pasting of agreements.[11] In principle, CEPA provided for continuity once the EU-Japan EPA ceased to apply to the UK, but it also represented a 'stepping-stone' for the UK's accession to the Comprehensive and Progressive Agreement for Trans-Pacific Partnership（CPTPP）.[12] While the timing and legal context of the negotiations meant that the CEPA largely rolled over the EU-JP EPA, there are some important differences and additions.[13] In particular, the provisions on digital and data were asserted to 'go beyond' the trade agreement between the EU and Japan.[14] The preamble of the agreement already shows that there is a recognition of the importance of digital trade in contemporary trade – something which was not present in the preamble of the EU-Japan EPA.

The UK Department of International Trade advocated that the UK-Japan CEPA went further than the EU-Japan agreement, in that for example CEPA prevents the forced transfer of algorithms, broadens digital trade facilitation, by encouraging i.a. the use of interoperable electronic authentication and electronic signatures, and also expands future cooperation, for example in emerging technologies and electronic trust services.[15]

11）E.g. Adam Lazowski, 2020. 'Copy-pasting or Negotiating? Post-Brexit Trade Agreements between the UK and non-EU countries' in Juan Vara and Ramese Wessel（eds）, *The Routledge Handbook on the International Dimension of Brexit*（Routledge 2020）Ch. 9, 117−132.

12）Comprehensive and Progressive Agreement for Trans-Pacific Partnership（CPTPP）, signed 8 March 2018.

13）There are mixed views as to the relevance of these. Fahey and Mancini（n 1）; Joris Larik, 'Brexit, the EU-UK Withdrawal Agreement, and Global Treaty（Re-）Negotiations?'（2020）114 AJIL 443.

14）Department for International Trade（UK）, 'The United Kingdom's Future Trading Relationship with Japan'（October 2020）, <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/929175/UK-Future-Trading-Relationship-with-Japan-accessible.pdf> accessed 17 January 2022.

15）Department for International Trade（UK）, 'Digital and Data provisions in the UK-Japan CEPA' No 933990. Available at: <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/933990/uk-japan-cepa-digital-and-data-explainer.pdf> accessed 31 January 2022.

The UK Department of International Trade has also been very clear – in response to some public concerns – that the agreement is a *good* deal for data protection.[16] It is undeniable, however, that the agreement takes a '*less European approach*' to privacy, as observed by the Secretary of State for Digital, Culture, Media and Sport.[17] Minako Morita-Jaeger, of the UK Trade Policy Observatory, also has called this an '*Asia-Pacific style digital trade governance, which values more innovation and the free data flows*'.[18] Against this backdrop, a question arises as to whether the approach in CEPA or the United States-Mexico-Canada Agreement（USMCA）has more attraction than the EU's approach. Yet another question is to what extent the approach is different when compared to the one of the EU, also considering that the UK adopted the EU adequacy decision towards Japan. The UK has confirmed that it will keep these adequacy decisions under review, but it is still to be seen what this would mean in the future and whether this would lead to more lenient requirements. While the EU is also keeping adequacy under review, in a post-Brexit context it would be up to the UK to decide.

There seems to be a very clear consensus from a lot of businesses and many NGOs and privacy organisations that it is very important for the UK to keep aligned to the GDPR for reasons of compliance. But of course, there is a very strong impetus from the part of the UK to join CPTPP. That being said, China has also made an application to join recently, and the EU itself is very much interested in joining the agreement potentially. There are many significant questions here upon the difference in emphasis on CEPA on free data flows and how much this impinges a post-Brexit adequacy decision for the UK that it has with the EU. To what extent is this Asian pivot a direction toward some-

16）Department for International Trade（UK）, 'UK-JP CEPA - a good deal for data protection' No 941402. Available at: <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/941402/uk-japan-cepa-data-protection-explainer.pdf> accessed 31 January 2022.

17）House of Commons, International Trade Committee, 'Digital trade and data First Report of Session 2021−22'（2021）21.

18）Minako Morita-Jaeger, oral evidence to the International Trade Committee, 'UK trade negotiations: Agreement with Japan'（11 November 2020）, at 12, available at <https://committees.parliament.uk/oralevidence/1170/pdf/> accessed 31 January 2022.

thing quite different to what the EU values might be understood in this context?

V　UK-EU Trade and Cooperation Agreement（TCA）

The post-Brexit free trade agreement signed between the EU and the UK in December 2020, the UK-EU Trade and Cooperation Agreement（TCA）is a very modern and contemporary agreement but still a very slim agreement, falling short of a single market membership and a very 'hard' Brexit that had been negotiated.[19] There had been a tremendous amount of differences for businesses, importers and so on, aiming at the provisions of this in practical operation. But in terms of digital trade, it is arguably aligned to other more contemporary EU agreements. The digital trade chapter in Title III is a short chapter, and contemporary as to its terminology. There was also a very important UK adequacy decision that had finally been granted in 2021. The EU Horizontal Strategy on Data flows, which had to be negotiated after the GDPR, seeks to draw links between the GDPR and external relations policy incentives to all partners, e.g. Australia, China, Indonesia, Mexico. In the EU Horizontal Strategy for Data, the model clauses of Article A provide for cross-border data flows and ban of localisation, but it also protects personal data in Article B.[20] The EU-Japan EPA clause on the matter of free data flows had been opened for re-negotiation and this is the subject of discussion at the time of writing.

The TCA made provision for data flows pending the adoption of an adequacy decision.

19）See Federico Fabbrini（ed）, *The Law & Politics of Brexit*（Oxford University Press 2017）; Federico Fabbrini（ed）, *The Law & Politics of Brexit Volume 2*: The Withdrawal Agreement（Oxford University Press 2020）; Federico Fabbrini（ed）, *The Law & Politics of Brexit Volume 3*: The Framework of New EU-UK Relations（Oxford University Press 2021）; Federico Fabbrini（ed）, *The Law & Politics of Brexit Volume 4*: The Protocol on Ireland / Northern Ireland（Oxford University Press 2022）.

20）European Commission, 'Horizontal provisions for cross-border data flows and for personal data protection（in EU trade and investment agreements）'（2018）Tradoc 156884, <https://trade.ec.europa.eu/doclib/docs/2018/may/tradoc_156884.pdf> accessed 31 January 2022.

It proved to be a controversial process, with vocal opposition from the European Parliament. Ultimately, a UK-EU adequacy decision was adopted on 28 June 2021 on the basis of its alignment to the GDPR. There are notable carve outs for immigration and a sunset clause which limits its duration.[21] There is also a review to take place of all EU adequacy decision clauses in 2022 by the Commission, thus an increasingly interesting backdrop. Throughout the early years of the TCA, i.e. during 2020 and 2021, the relationship between the UK and the EU has been politically toxic and legally complex. Many thorny issues as to the CJEU and Northern Ireland have dominated rather than the actual practical operation of the relationship or its institutional evolution. Notable proposals from the UK to show Brexit 'being done' have included recently a so-called 'bonfire' of retained EU law: i.e. to 'get rid of' all EU law or the UK to depart from the bureaucracy of the GDPR despite a unified assertion from businesses, consumer groups, etc. as to the need for an infrastructure of this kind and existing compliance.[22]

VI What Role for Regulatory Cooperation?

There is a broader question that is difficult in this environment which is: can there be successfuly regulatory cooperation as a way forward which would square the circle of UK-EU-Japan relations? The UK-EU TCA chapter on regulatory cooperation echoes the provisions of the EU-JP EPA, whereas the UK-JP CEPA goes beyond that, by envisaging regulatory cooperation on financial services. As to data protection, Japan arguably plays a very significant part in global governance as an increasingly committed multilateralist, deploying in particular regulatory cooperation. Yet Japan has signed up

21）European Commission, 'Commission Implementing Decision of 28.6.2021 pursuant to Regulation（EU）2016/679 of the European Parliament and of the Council on the adequate protection of personal data by the United Kingdom'（EU-UK Adequacy Decision）C（2021）4800 final, Brussels, 28.6.2021.

22）Lord Frost, 'Statement to the House of Lords: 16 September 2021'（Oral statement to Parliament）; See Michael Cross, 'Government plans bonfire of retained EU law'（The Law Society Gazette, 17 September 2021）. Available e at: <lawgazette.co.uk/law/government-plans-bonfire-of-retained-eu-law/5109831.article> accessed 31 January 2022.

to many forms of international data transfer agreements such that there are data protection scholars who suggest that there is a problem about Japan being a 'middle party' power, party to too many conflicting regimes- irrespective of the amount of regulatory cooperation provisions.[23] And to what extent is it positive for international standards to have states such as these or are there pin-points of future tensions? The EU might join the CPTPP with this thwart the UK's intentions but might also alter this complex dynamics as to the place of the EU. There are plans of the UK to start negotiations on digital trade and lots of very interesting things happening with US, in particular, and South Korea which also has a new adequacy decision from the EU. Moreover, the G7 digital trade provisions have been agreed to have data free flows with trust.

VII Conclusions

At this point, it is very curious as to how to frame conclusions, whether there is a 'strangulation' of data flows more than 'triangulation' between the UK, EU and Japan. The UK is 'wagering' heavily on membership in the CPTPP and lowering of standards to reduce the burden of the GDPR, which seems quite difficult to place. There is the EU's ambitions and even China's in joining into this frame, but in the background, there is the US, which is contemplating a Federal Privacy Law and Federal Privacy Agency. Thus the idea of lowering the standards, a very American approach, cannot be taken for granted and it is different from the European approach. In fact, there is a lot of evidence to suggest the other way. But above all, we see Japan as a key global partner in the upwards of the standards. It is and remains a key partner in the post-Brexit UK-EU-Japan nexus of relationships.

23）Graham Greenleaf, 'Japan: EU Adequacy Discounted'（2018）155 Privacy Laws & Business International Report 8; Marija Bartl and Kristina Irion, 'The Japan EU Economic Partnership Agreement: Flows of Personal Data to the Land of the Rising Sun'（2017）Amsterdam Centre for Information Law Institute Working Paper.