

The Consumer Voice in Europe

## ANALYSIS OF THE EU JAPAN E-COMMERCE CHAPTER & RECOMMENDATIONS FOR THE TECHNICAL TALKS

EU-Japan trade agreement, 2017



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## General comments

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### Focus on adequacy rather than rules on data flows is a good choice

The fact that the EU is focusing first focus first on ensuring that Japan's data protection legal framework provides an essentially equivalent level of protection to the one existing in the EU is a good choice. Indeed, the protection of personal data and privacy is a fundamental right as established in the EU Charter of Fundamental Rights and the EU General Data Protection Regulation. Negotiating on data flows automatically means negotiating on data protection, even if it is not the intention. Therefore it is positive to see that there are no rules on data flows in the agreement at this stage and that nothing will be negotiated during the technical conclusion phase of the agreement. In case the EU would propose such rules despite our concerns after the entry into force of the deal, a **new rock solid data protection safeguard** must be included in the agreement.

### But where are the tangible benefits for consumers?

We are disappointed to see that once again the EU is missing the opportunity to deliver tangible benefits to consumers in a trade agreement. **The EU-Japan agreement is designed to make trade flows easier but it must not forget to make consumer life easier too.** The article on consumer protection in the e-commerce chapter would be the perfect framework for both parties to seize this opportunity. This must go beyond the protection from spam and fraudulent practices – as foreseen in the text.

**Consumers do not necessarily know whether or not they will be protected by their domestic rights** when buying services in the context of this agreement. They might not be able to benefit from easy access to a **dispute resolution mechanism** nor an effective **redress solution** if something goes wrong with Japanese providers. Consumer trust is a matter of equality online, **geo-blocking practices suffered by consumers when trying to purchase or access services abroad should be tackled.** We strongly recommend to convince the Japanese side to agree to such changes during the technical conclusion phase.

### Detailed analysis by articles

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#### Article 3 Customs duties

Elimination of tariffs is one of the main consumer benefits of free trade agreements in particular in view of reducing geo-blocking in e-commerce. Therefore it is positive to see that the EU and Japan agree in this article to remove custom duties on electronic transmissions.

#### Article 5 Domestic regulation

We urge negotiators to make sure that the criteria established to assess the compliance of domestic regulations with this agreement will not undermine the ability of the EU and its Members States to adopt positive measures for consumers in the future. **Consumer protection measures *per se* should not be seen as unreasonable or non-objective.**

## Article 7 Conclusion of contracts by electronic means

This article is limited to promotion of transatlantic contracts, but does not provide for any reassurance as to the content of these contracts or the conditions under which they may be concluded. It is taken from the e-commerce directive, but without surrounding provisions of the latter that contain common requirement re information, placing or orders, etc. it does not take account neither of the specific provisions of the Consumer Rights Directive, that is also applicable to e-commerce contracts concluded by consumers.

The drafting of this article, and its lack of accompanying provisions, might lead to the interpretation that EU or national provisions that protect consumers in contract law might be considered as obstacles for the use of electronic contracts. Therefore, we urge to make clear **that consumers are protected by their law as soon as they are targeted by the other Party's traders**. This is indeed a fundamental rule of International Private Law that must be upheld to promote consumer trust in.

## Article 9 Consumer protection

This article builds on paragraphs 1 and 3 of both the article on online consumer protection in the draft TiSA e-commerce annex and the article on online consumer trust of the draft TTIP e-commerce chapter.

As a concept, we welcome the presence of this article. Consumer protection is key for consumer trust in digital trade. We also welcome the will to establish a dialogue between consumer protection authorities to enhance consumer protection in e-commerce. We also read this article in conjunction with the following article on unsolicited commercial electronic messages. While it is important to tackle such issues, they are not the only ones that need addressing. The EU-Japan agreement is expected to be an ambitious agreement of the 21st century. Therefore it must provide opportunities for consumers. Two crucial elements are missing in this article and should be added in the form of paragraphs or of a new article:

1. **Providing information and solutions to consumer and effective redress:** An EU consumers buying a good or a service from a Japanese provider will not be automatically covered by its EU consumer rights. Therefore BEUC recommends to add a paragraph **to confirm that consumers are protected by their law as soon as they are targeted by the other Party's traders**. This is indeed a fundamental rule of International Private Law that must be upheld to promote consumer trust in the transpacific market. In addition, the EU should propose to inform consumers about their rights and the solutions (access to dispute resolution mechanism and effective redress) they could benefit from if something goes wrong after a purchase. This could for example be materialised via a voluntary bilateral online dispute resolution platform.
2. **Tackling geo-blocking practices:** While the EU-Japan agreement is mainly focused on liberalisation of trade for business, it is also key to provide opportunities for consumers who wish to be active in this bilateral market. We therefore suggest to add a reference to the principle of non-discrimination of consumers based on their nationality or residence (following the logic of article 20.2. of the services directive). Such reference could be made in a new paragraph. Geo-blocking is currently high on the Digital Single Market agenda, but this discussion could be extended to the EU-Japan agreement to provide for a more consumer friendly trade environment

## Article 10 Unsolicited commercial electronic messages

This article is inspired by some elements of the draft TiSA e-commerce annex article on spams and a similar article in the draft e-commerce chapter of TTIP.

This article is very important for consumers as it could help them avoid spam. We welcome the fact that it takes into account some of the recommendations of the Transatlantic Consumer Dialogue (TACD) on unfair commercial practices online<sup>1</sup>. It is crucial to maintain the possibility for the parties to impose an **opt-in (consent) requirement in order to receive unsolicited commercial communications** (1,b).

In this article, Parties use a wording that is intended to be read as a number of principles. However, it can also be interpreted as being a prescriptive wording (for instance with the repeated use of the word 'shall'). As direct marketing technologies are rapidly evolving it is important to make it much clearer in this article that it has to be read at principles level, not restricting the ability of legislators to go beyond its provisions. To better take into account the consumer interest, we recommend to switch the order of point a) and b) in order to have first the consent and then the opt-out.

## Article 11 Cooperation on regulatory issues

This article builds on some elements of the draft TiSA e-commerce annex. It aims at enhancing the cooperation between the EU, Japan and the rest of the world in order to promote the development of e-commerce. The current article could be improved to use this cooperation to benefit consumers as follow:

- Such cooperation shall include the development of alert systems and information sharing regarding illegal privacy practices;
- Reference should also be made to existing consumer protection international cooperation networks, such as ICPEN (International Consumer Protection and Enforcement Network) to which both the EU and Japan belong.
- It would be important to develop cooperation between national enforcement authorities of the parties.

## Article 12 free flow of data

We welcome that the EU is focusing first on discussing with Japan about a potential adequacy agreement. It is important to ensure that the Japanese data protection legal framework provides a level of protection which is essentially equivalent to the one existing in the EU. Regarding the review clause placed in this article in brackets, we stress that there is no need to include rules on data flows in this agreement. This is even more relevant as the adequacy decision is very likely to become a reality by the time of the entry into force of this agreement.

If such rules would be included through the review clause despite our concerns, it is paramount to make sure that a **new rock solid data protection safeguard** will be included in the agreement. Such safeguard should be legally tested to verify that it could be used in case of a challenge. The legal demonstration of its solidity should be made publically available before proposing it to Japan in these negotiations. The text of such proposal must be **available to the public**. Therefore, any proposal must be tabled as a parallel proposal to this consolidated text to ensure that there will be no obstacle to its publication.

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<sup>1</sup> See [the Transatlantic Consumer Dialogue resolution on unfair commercial practices online](#)



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