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Subject: New EU-Japan data flows article puts consumers fundamental rights at risk

Dear Ambassador,

I am writing to you on behalf of BEUC, the European Consumer Organisation, regarding the announcement of the conclusion of the negotiations with Japan for an article on data flows. This article will be added to the Economic Partnership between the EU and Japan, which entered into force in 2019.

The [mandate](#) given by the Council to the Commission stipulates that the outcome of the negotiations should not affect the EU's rules on the protection of privacy, personal and non-personal data. This does not appear to be respected.

Why it matters for data protection and privacy

It seems that the text agreed with Japan strongly diverges from the [EU horizontal provisions on cross border data flows, data protection and privacy agreed in 2018 between EU institutions](#). The objective of these provisions is to better preserve the EU's right to regulate personal data and privacy protection. Joint [research](#) between consumer groups and digital rights organisations in 2016 demonstrated that without strong safeguards, our trading partners could win a trade dispute against the EU in relation to data protection and privacy measures, that are perceived as trade barriers.

This is due to a series of 'trade tests' that the EU would have to pass to justify diverging from its international trade commitments. One of these tests, called the 'necessity test', is about proving that a measure is necessary to achieve its objective. It makes it very complicated for governments or the Union to adopt regulations that are necessary to preserve citizens' fundamental rights.

That is why in 2018 all EU institutions decided that the EU would only negotiate rules on data flows in trade agreements on the basis of a 'model clause', called the EU horizontal provisions on cross border data flows, data protection and privacy. This model clause limits the number of trade tests to pass, accordingly the necessity test would no longer be applicable. This better preserves the Union's policy space. This was supposed to be a non-negotiable red line for the EU.

The 'necessity test' returns in EU-Japan talks, clashing with the EU's own position on data flows

We note that the EU agreed to a Japanese request to include in the data flows article, a provision which draws upon another trade agreement signed Japan: the Comprehensive and Progressive Trans-Pacific Partnership. The problem is that this provision stipulates that data protection and privacy measures should not impose restrictions on transfers of information that are greater than are necessary to achieve the objective. Concretely, this provision brings back the 'necessity test'.

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How will this new provision interact with the EU model clause, which by nature rules out the necessity test in that field? ***How will this be interpreted in case of dispute settlement with Japan? The complex combination of these provisions does not provide for a trustworthy and predictable regulatory environment.*** This is not acceptable from the perspective of protection of citizens' fundamental rights.

How this could limit the EU's ability to regulate digital markets in the future

Moreover, it appears that the Commission made other significant concessions to Japan such as prohibiting measures that would require prior approval to the transfer of data. Clarifications seems to have been inserted as footnotes to attempt to preserve EU policy space, notably regarding the AI Act and the Cybersecurity Act. The intention of these clarifications is positive, but they showcase that, without them, the Union might not be able implement acts such as the AI Act or adopt new digital acts in the future. This is counterproductive. It is impossible to predict today how the EU digital rulebook will need to evolve in the next decades to protect EU consumers and citizens.

What Council should do to protect consumers' digital rights

We call on you to reconsider the outcome of this new article on data flows with Japan. **It must not be agreed in its current form.** The EU already has an [adequacy agreement with Japan](#), which enables cross border data transfers. This is the safest solution. This article **must not create a precedent for EU trade agreements**, including the Joint Statement Initiative on e-commerce in the World Trade Organization and the digital trade negotiations with Korea and Singapore.

We note that this data flows agreement was announced by the EU at the same time as the United States vowed to no longer support the inclusion of data flows rules in the Joint Statement Initiative on e-commerce in the World Trade Organization. This decision was taken to better protect the United States' digital policy space. BEUC [welcomes](#) this change of policy. **It is now time for the EU and its Member States to rethink EU's digital trade policy and stop including data flows rules in trade agreements to better protect EU citizens.** Again, we insist on the fact that focusing on adequacy agreements would be a more considerate approach.

We thank you for considering our requests and for your efforts to fully preserve EU citizens fundamental rights. We remain at your disposal should you have any question.

Yours sincerely,

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Director General

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