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Citation: Fahey, E. & Mancini, I. (2020). The EU as an intentional or accidental convergence actor? Learning from the EU-Japan data adequacy negotiations. *International Trade Law and Regulation*, 26(2), pp. 99-111. doi: 10.2139/ssrn.3606087

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Link to published version: <https://doi.org/10.2139/ssrn.3606087>

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THE EU AS AN INTENTIONAL OR ACCIDENTAL CONVERGENCE ACTOR? LEARNING FROM THE EU-JAPAN DATA ADEQUACY NEGOTIATIONS

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Introduction

Scholarship, from international economic law,¹ international investment law,² international human rights law³ to sources of Public International Law (PIL),⁴ increasingly frames new shifts in sources, practice and jurisprudence, as an explicit narrative of ‘convergence’.⁵ Despite the origins of convergence in PIL, convergence has a powerful resonance with how we understand the EU as a global actor.⁶ The EU increasingly sets new international agendas, standards and rules and is referred to in a vast literature as a ‘norm promoter’.⁷ An increasingly explicit endeavour of the EU is to drive global data convergence.⁸ The EU now has data transfer regimes which count as some of the largest in the globe and this article focuses upon how the EU and Japan have recently agreed on a reciprocal recognition of the adequate level of protection, which is said to create the world's largest area of safe data flows.⁹

The recent EU-Japan adequacy decision represents an another significant global endeavour, ostensibly creating global reach. This innovation is worthy of reflection given the scale of data transfer involved, but most importantly to study the assessment of “equivalence” of two legal orders, and the processes of convergence and institutionalisation at play. We contend that it is of significance and an important coincidence that the adequacy decision was a side-product of the EU-Japan Economic Partnership Agreement (EPA): despite the EU’s initial goal of excluding data from the trade negotiations, Japan insisted on data dialogues and the EU eventually accommodated the demands, hence triggering the process for an assessment of equivalence. This process is of interest given the scale of the agreement but also the broader parameters of how a partner proposes a field not aligning with EU interests and ends up becoming subject to significant EU institutionalisation procedures. The EU-Japan efforts at reaching convergence provide a unique setting to study the EU as an emerging global legal actor in data.

We thus consider a series of questions relating to convergence and the role of the EU in nudging it: How do we understand then the EU as a global actor in data and its efforts and willingness to be so? How does the EU nudge convergence more or less intentionally towards its own standards? Alternatively, which mechanisms make convergence happen as a result of “unintended consequences” as opposed to a more ‘hard’ power of the EU?¹⁰

¹ See Jurgen Kurtz, *The WTO and International Investment Law: Converging Systems* (CUP 2016)

² Daniel Behn, Szilárd Gáspár-Szilágyi and Malcolm Langford (eds), *Adjudicating Trade and Investment Law: Convergence or Divergence?* (CUP 2019 Forthcoming) (manuscript on field with the author).

³ Buckley M Carla, Alice Donald and Philip Leach (eds), *Towards Coherence in International Human Rights Law: Approaches of Regional and International Systems* (Brill/ Nijhoff 2017); Christine Evans, *The Right to Reparation in International Law for Victims of Armed Conflict* (CUP 2014), Ch.12; Magdalena Forowicz, *The Reception of International Law in the European Court of Human Rights* (OUP 2010); Meryll Dean ‘Bridging the Gap: Humanitarian Protection and the Convergence of Laws in Europe’ (2014) 20 *European Law Journal* 34

⁴ Mads Andenæs and Eirik Bjorge (eds), *A Farewell to Fragmentation: Reassertion and Convergence in International Law* (CUP 2015)

⁵ *Ibid.*, (outlining convergence as a response to fragmentation, ch.1, p.1).

⁶ E. Fahey (Ed.), *Framing Convergence with the Global Order: the EU and the World* (Hart, 2020). For a historical overview see Joseph HH Weiler (ed), ‘Epilogue, Towards a Common Law of International Trade’ in *The EU, WTO and the NAFTA: Towards a Common Law of International Trade?* (OUP 2001)

⁷ See the iconic Ian Manners, ‘Normative Power Europe: A Contradiction in Terms?’ (2002) 40 *Journal of Common Market Studies* 235. See Elaine Fahey (ed.) *EU Convergence with the Global Legal Order* (Hart, forthcoming); See Marise Cremona and Joanne Scott (eds), *EU Law Beyond EU Borders: The Extraterritorial Reach of EU Law* (OUP 2019)

⁸ European Commission Communication from the Commission to the European Parliament and the Council, ‘Exchanging and Protecting Personal Data in a Globalised World’ (COM/2017/07 final).

⁹ E.g. EU-US Privacy Shield, 2016 EU-Japan Data Adequacy.

¹⁰ Olga Burly, ‘Unintended Consequences of EU External Action’ (2019) 54 *International Spectator* 1

What lessons do we learn from the adequacy decision negotiations as to the EU as a global data convergence actor? We argue that convergence and institutionalisation appear as outcomes of the EU accepting to engage in data dialogues with Japan, thus resulting in ‘accidentality’ of ending up with negotiating an adequacy decision with Japan. The convergence and institutionalisation are important outcomes of the EU and Japan efforts to reach a mutual adequacy decision and resonate with how we understand the EU as a global convergence actor. We argue that convergence and institutionalisation are important ‘accidental’ outcomes of the adequacy decision and show the EU to be a flexible global trade actor.

EU as a Global Data Convergence Actor

The EU appears as a distinctively consistent internationalist in a world shifting towards populism, and localism, both within and beyond the EU. The EU has a recent history of promoting and nudging institutional multilateral innovations, from the International Criminal Court, a UN Ombudsman to a Multilateral Investment Court.¹¹ Data protection can be understood to be part of this global agenda, as driving convergence in data protection laws and practices is among the stated aims of the EU and while there is little about the contemporary digital age that is not global irrespective of the specificities of the law, the EU’s data protection law is a specific legal regime that is broadly understood to have had global reach and effects.¹² Many even speak of the global reach, effects and the extra-territoriality and ‘Europeanisation’ of data protection law all as a monolithic idea, which has become all ears, eyes and arms.¹³ In the era of Big Data, the idea that individuals can effectively control their personal data may be viewed as simply naïve. Still, EU law (initially through its courts) has sought to defy the odds and to grant rights to those to whom it was thought fell beyond regulatory reach, often conflating data protection and privacy issues.¹⁴ The EU has essentially developed an approach to data protection because it is widely understood to have had *extra-territorial reach and effects*, both de facto and de jure.¹⁵ In the case study of EU data protection, this ‘global’ dimension may be understood to comprise its norm evolution, both ‘inwards’ and ‘outwards’, nudging often a multitude of standards and enforcement paradigms.

The EU’s Data Protection Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and the free movement of such data was adopted in an age at which the digital relocation was merely nascent. Meanwhile, the digitization of data has led to an exponential increase in the scale of personal data processing and the ease within which it can occur. Nevertheless, *judicial* scrutiny of its provisions in more contemporary times has managed to generate a revolution with significant global effects. After the landmark decisions of the CJEU in *Google v. Spain*,¹⁶ *Schrems v. Facebook*¹⁷, *Digital Rights Ireland*¹⁸ and *Weltimmo*¹⁹, the place of EU law as a global standard-setter has evolved with much force as an idea, which in turn has also provoked many legitimacy and accountability questions.²⁰ In particular, *Google v. Spain* generated a global debate on the parameters

¹¹ See E. Fahey (Ed.) *Institutionalisation beyond the Nation State* (Springer, 2017).

¹² EU Commission Communication, 2017 (n 8); E. Fahey, ‘The Global Dimension of the EU’s AFSJ: On Internal Transparency and External Practice’ (2014/4) *Jean Monnet Working Paper Series*. Since the Treaty of Lisbon, EU data protection law is comprised of a mix of primary and secondary law whereby Article 16 TFEU is the legal basis for EU data protection legislation while Article 8 of the Charter sets out a right to data protection [1995] OJ L 281

¹³ On the territorial scope of the General Data Protection Regulation: see Cedric Ryngaert ‘Symposium Issue on Extraterritoriality and EU Data Protection’ (2015) 5 *International Data Privacy Law* 4, 221; see Paul De Hert and Michal Czerniawski, ‘Expanding the European Data Protection Scope Beyond Territory: Article 3 of the General Data Protection Regulation in its Wider Scope’ (2016) 6 *International Data Privacy Law* 3, 230; see Christopher Kuner, ‘Extra Territoriality and Regulation of International Data Transfers in EU Data Protection Law’ (2015) 5 *International Data Privacy Law* 242; see Orla Lynskey, ‘The Europeanisation of Data Protection Law’ [2016] *Cambridge Yearbook of European Legal Studies* 1

¹⁴ See Orla Lynskey, ‘Deconstructing Data Protection: The Added Value of a Right to Data Protection in the EU Legal Order’ (2014) 63 *International and Comparative Law Quarterly* 3, 569

¹⁵ See Paul De Hert and Michal Czerniawski, *supra* n13; see Kuner *supra* n13

¹⁶ See Case C-131/12 *Google Spain SL, Google, Inc. v Agencia Española de Protección de Datos, Mario Costeja González* EU:C:2014:317

¹⁷ See Case C-362/14 *Maximilian Schrems v Data Protection Commissioner* EU:C:2015:650

¹⁸ See Case C-293/12 and C-594/12 *Digital Rights Ireland and Others* EU:C:2014:238

¹⁹ See Case C-230/14 *Weltimmo s.r.o. v Nemzeti Adatvédelmi és Információszabadság Hatóság* EU:C:2015:639

²⁰ For example, see Anu Bradford, ‘The Brussels Effect’ (2012) 107 *Northwestern University Law Review* 1; see Alasdair Young, ‘The European Union as a Global Regulator? Context and Comparison’ (2015) 22 *Journal of European Public Policy* 9, 1233; see Gregory Shaffer, ‘Globalisation

of the 'right to be forgotten' and whether it was a de facto or de jure 'European' or 'global' right [...] enabling the EU to 'claim' jurisdiction over processes occurring outside of the EU borders when the data controller had a relevant revenue-generating subsidiary in the EU. The legislator has in turn responded and the subjects and objects of EU data protection law have in this process been considerably reformulated. As a result, the Directive was replaced in May 2018 by the EU's new General Data Protection Regulation (GDPR).²¹

When dealing with transborder data flows, the EU is yet faced with different systems of personal data protection, which have resulted in both fragmentation and competition in standard setting. As trade and the global economy rely ever more on data, countries from North America to Asia are becoming aware of the importance of data flows in trade and potential challenges for data protection, which explains the upward increase of regulation on cross-border data flows in recent years.²² Legal frameworks at the international and regional level already existed since the 1980s, under the auspices of the UN²³, the OECD,²⁴ the Asia-Pacific Economic Cooperation (APEC) Privacy Framework, the Council of Europe Convention 10825 and the already mentioned EU GDPR. These frameworks are however far from setting both a global and binding direction as to the regulation of personal data flows. In the absence of a comprehensive and binding international convention relating to privacy or data protection, there has been an uprise in laws and measures having been introduced as a way to address data flows and privacy and data protection. As of January 2013, Kuner had identified 43 countries, plus the 27 EU member states, having data protection and privacy legislation in force, and 5 countries having legislation not fully in force, the majority of instruments dating from 2008 and 2011.²⁶ The overall picture is one of legal fragmentation,²⁷ reflecting divergent approaches, preferences and priorities.²⁸ For instance, while on the one hand the EU Member States have traditionally relied on high standards, which are now set even higher following the adoption of the European Union General Data Protection Regulation (GDPR);²⁹ the US and Asia have a more self-regulatory approach.³⁰ In particular, the US is highly defiant of regulating privacy and mostly relies on the private sector, as opposed to the EU where a more prominent role is given to government regulation and regulatory agencies.³¹ Next to national legislation, as of January 2013, around 10 (more or less) binding bilateral agreements and instruments to govern transborder data

and Social Protection: The Impact of EU and International Rules in the Ratcheting up of US Data Privacy Standards' (2000) 25 Yale Journal of International Law 1

²¹ Regulation EU 2016/69 on the protection of natural persons with regard to the processing of personal data and the free movement of such data is a significant attempt on the part of EU law to modernise its approach to data protection and to engage in regulatory coherence in the aftermath of landmark CJEU decisions. The new Regulation is perceived to mark a significant extension of the extra territorial application of EU law with respect to EU and non-EU established companies pursuant to Article 3 thereof and thereby refining the landmark developments begun by the CJEU in *Google v. Spain*. National authorities had not been satisfied with the pre-existing regime precisely because it had resulted in 'ad hoc transnational enforcement'. [...] The GDPR is thus understood to have generated a process of 'Europeanisation' whereby there is a significant shift from decentralised application of data protection law to centralised enforcement

²² Christopher Kuner, *Transborder Data Flows and Data Privacy Law* (OUP 2013) 10

²³ General Assembly (1990) 'Guidelines for the Regulation of Computerized Personal Data Files' UN DOC.E/CN.4/1990/72 of 14 December 1990

²⁴ Council Recommendation (1980) 'Guidelines on the Protection of Privacy and Transborder Flows of Personal Data' (OECD 1980)

²⁵ Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data (1981) CETS 108 28 January 1981

²⁶ Appendix Data Protection and Privacy Law Instruments Regulating Transborder Data Flows (as of January 2013) in Christopher Kuner, *Transborder Data Flows and Data Privacy Law* (OUP 2013). Among the instruments and amendments identified by Kuner, it is possible to count 6 dating the 90s, and all the rest from the turn of the century, in particular, 9 in 2011; 4 in 2010; 2 in 2009; 7 in 2008; 2 in 2007; 1 in 2006; 3 in 2005; 4 in 2004; 3 in 2003, 1 in 2002, 4 in 2001 and 2 in 2000. Countries not having legislation fully in force: Barbados, Malaysia, Hong Kong, Singapore, South Africa

²⁷ Christopher Kuner *supra* n22, 26

²⁸ United Nations Conference on Trade and Development, 'Data Protection Regulations and International Data Flows: Implications for Trade and Development' (New York and Geneva 2016)

²⁹ 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) OJ L119-59

³⁰ Rolf H. Weber, 'Transborder Data Transfers: Concepts, Regulatory Approaches and New Legislative Initiatives' (2013) 3 International Data Privacy Law 117

³¹ Kuner *supra* n27, 21

flows were in place,³² as well as a series of private sector instruments, such as contractual clauses, as well as non-binding codes of practices.³³

Nonetheless, calls for a global regulatory framework have not dissipated. Against the expectations about personal data being protected, the awareness of digital interconnectedness has spurred calls for “global data laws”³⁴ and “international privacy standards”,³⁵ and has led some to investigate the feasibility and features of “global data protection regulatory model”.³⁶ In this picture of both fragmentation and demands for global data regulation, competition has arisen as to which model would be the best apt to achieve the mission. Disagreement pervades as to which legal frameworks, approaches and principles should be adopted and which standards employed as reference points. While Google’s Global Policy Counsel calls for international privacy standards being based on the APEC,³⁷ the Microsoft CEO points at the EU GDPR as the framework to be relied upon.³⁸ This backdrop has resulted in a “patchwork of private and public regulation”³⁹ where the distinction between the two is becoming ever more blurred and moving towards a “polycentric governance” of transborder data flows.⁴⁰ The situation of fragmented transborder data flows regulation has prompted scholarship to adopt a legal pluralist stance for the study of it; acknowledging the existence of competing authority claims, diverse normative schemes and difficulty, or even undesirability, of pressures for more coherence.⁴¹

In a context of global mushrooming of data protection laws, the EU wants to play a central leading role, and so far, has indeed acted as, and claimed to be, a leader in data protection laws.⁴² The EU now has data transfer regimes which count as some of the largest in the globe, with US and Japan, featuring significant institutional dimensions.⁴³ The institutional configurations of this transfer of data matter considerably alongside significant efforts at trading regimes. The EU’s data regimes vary in scale, complexity but mostly as to institutional design. A turn to institutions and deeper forms of institutional oversight, accountability and legitimations is regarded as ‘European’ or ‘EU-centric’ and differing substantially from US models of looser accountability and oversight.⁴⁴ The EU-US Privacy Shield has

³² Ibid. Binding Corporate Rules: Article 29 Working Party, ‘Working Document setting up a framework for Binding Corporate Rules’ (WP 154, 24 June 2008); Standard Contractual Clauses: Commission Decision 2010/87/EU of 5 February 2010 on standard contractual clauses for the transfer of personal data to processors established in third countries under Directive 95/46/EC of the European Parliament and of the Council, [2010] OJ L39/5; Commission Decision 2004/915/EC of 27 December 2004 amending Decision (EC) 2001/497 as regards the introduction of an alternative set of standard contractual clauses for the transfer of personal data to third countries, [2004] OJ L385/74; Safe Harbor Privacy Principles issued by the US Department of Commerce on 21 July 2000, and recognized as ‘adequate’ under European Commission Decision 2000/520/EC of 26 July 2000, [2000] OJ L215/7; Agreement between the European Union and Australia on the processing and transfer of European Union-sourced passenger name record (PNR) data by air carriers to the Australian Customs Service, [2008] OJ L213/49; Agreement between the United States of America and the European Union on the use and transfer of passenger name records to the United States Department of Homeland Security, [2012] OJ L215/5; Agreement between the European Union and the United States of America on the processing and transfer of Financial Messaging Data from the European Union to the United States for purposes of the Terrorist Finance Tracking Program, [2010] OJ L8/11; Reports by the High Level Contact Group (HLCG) on information sharing and privacy and personal data protection (23 November 2009); Infocomm Development Authority of Singapore (IDA) and the National Trust Council of Singapore (NTC) Voluntary Model Data Protection Code for the Private Sector; Madrid Resolution ‘International Standards on the Protection of Personal Data and Privacy’ (non-binding); Treasury Board of Canada ‘Taking Privacy into Account before Making Contracting Decisions’ (2006)

³³ Christopher Kuner, *Transborder Data Flows and Data Privacy Law* (OUP 2013) 21

³⁴ See eg. Satya Nadella Microsoft CEO <<https://thediplomat.com/2019/02/japan-calls-for-global-consensus-on-data-governance/>> accessed on 6 January 2020.

³⁵ Peter Fleischer, Global Privacy Counsel, ‘Call for global privacy standards’ (14 September 2007) <<https://publicpolicy.googleblog.com/2007/09/call-for-global-privacy-standards.html>>

³⁶ Cécile de Terwangne, ‘Is a Global Data Protection Regulatory Model Possible?’ in Serge Gutwirth, Yves Poulet, Paul De Hert, Cécile de Terwangne, Sjaak Nouwt (eds), *Reinventing Data Protection?* (Springer 2009)

³⁷ Peter Fleischer, Global Privacy Counsel, ‘Call for global privacy standards’ (14 September 2007) <<https://publicpolicy.googleblog.com/2007/09/call-for-global-privacy-standards.html>> accessed on 6 January 2020.

³⁸ Satya Nadella Microsoft CEO in Daniel Hurst, ‘Japan Calls for Global Consensus on Data Governance’ (02 February 2019) <<https://thediplomat.com/2019/02/japan-calls-for-global-consensus-on-data-governance/>> accessed on 6 January 2020.

³⁹ *Supra* n31

⁴⁰ Bert-Jaap Koops, ‘Criteria for normative technology: the acceptability of “code as law” in light of democratic and constitutional values’, in Roger Brownsword and Karen Yeung (eds), *Regulating Technologies: Legal Futures, Regulatory Frames and Technological Fixes* (Hart 2008) 161

⁴¹ *Supra* n39 22-23

⁴² Christopher Kuner and others, ‘Editorial: The global data implications of ‘Brexit’’ (2016) 6 *International Data Privacy Law* 167

⁴³ E.g. EU-US Privacy Shield, 2016 covering over one billion citizens, EU-Japan Data Adequacy, pending, relating to the world’s third largest free trade agreement

⁴⁴ P. Schwartz, ‘The EU-U.S. Privacy Collision: A Turn to Institutions and Procedures,’ (2013) 126 *Harvard Law Review* 1966.

also recently come into force in 2017, as a legal instrument, which is intended to replace the US Safe Harbour Agreement, the voluntary self-certification system with public enforcement by the US FTC, requiring US companies to treat data on EU citizens as if the data were physically in Europe.⁴⁵ It specifically addresses concerns around data collection and privacy that arose in the case of *Schrems*.⁴⁶ The European Parliament threatened to vote for suspension of the Privacy Shield unless considerable changes were made to comply with EU data protection rules in 2018, as to clarity on data control, remedies and oversight and it remains under much scrutiny and litigation.⁴⁷

The EU-US is not the only highly significant arrangement in place. In 2018, the EU and Japan agreed to recognise each other's data protection systems as 'equivalent', to allow data to flow safely between the EU and Japan.⁴⁸ The EU maintains that its mutual adequacy arrangement will create the world's largest area of safe transfers of data based on a high level of protection for personal data.⁴⁹ The EU-Japan data adequacy talks are worthy of reflection given the scale of data transfer involved and the inevitable institutionalisation at play despite varying considerably from the EU's initial goals. The adequacy decision is also said to complement the EU-Japan Economic Partnership Agreement (EPA), although not a leading innovation in trade terms.⁵⁰ While the EU is typically described as a global actor in trade, the EU-Japan trade negotiations and the parallel data adequacy negotiations, provide a setting to study how the EU actorness in data has developed alongside its actorness in trade.

Data's complex relationship with trade negotiations

Trade and data are in a complex interdependent relationship, making the regulation of data in the context of trade a compelling challenge for the years to come. In a digitalized global economy, *data* is also crossing borders: not only data is now an inherent component of goods and services across borders; it has also become a commodity on its own, accounting for significant revenue of businesses operating globally. As Felbmayr has outlined, most services nowadays are highly data intensive, in particular in fields such as financial services, telecommunications and logistics, where trade flows between the EU and Japan are very substantial.⁵¹ There are increasingly concerns expressed surrounding the interplay of data with trade as a disciplinary exercise.⁵² Newman and Farrell indicate how the linkages that data generates as to both trade and security continue to constitute one of the most difficult features of our times, particularly as to conceptual depth and practical regulatory engagement.⁵³ If on the one hand the economic benefits of free flow of data have been largely appraised, events such as the Snowden revelations have disclosed the precariousness of personal data transfers and have thus aroused worldwide concerns about data protection. As the economy increasingly moves towards a digital and information space, the more data inevitably flow and the more protection and privacy become relevant.⁵⁴

Data continues to occupy a complex place in all major global trade agreements in recent times. In the most large-scale formulation of trade agreements, such as the megaregionals CPTPP and USMCA, data may be understood to

⁴⁵ Commission Implementing Decision (EU) 2016/1250 of 12 July 2016 pursuant to Directive 95/46/EC of the European Parliament and of the Council on the adequacy of the protection provided by the EU-U.S. Privacy Shield (notified under document C(2016) 4176) C/2016/4176 OJ L 207, 1.8.2016, p. 1–112.

⁴⁶ *Supra* n17

⁴⁷ Peter Sayer 'EU Lawmakers Threaten Business by Relying on Privacy Shield' (16 July 2018) <www.cio.com/article/3289632/eu-lawmakers-threaten-businesses-relying-on-privacy-shield.html> accessed on 6 January 2020.

⁴⁸ Agreement between the European Union and Japan for an Economic Partnership ST/7965/2018/INIT OJ L 330, 27.12.2018, p. 3–899.

; EU-Japan Adequacy Decision: 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 (Text with EEA relevance) C/2019/304/ OJ L 76, 19.3.2019, p. 1–58.

⁴⁹ European Commission (2018) Press-Release – The European Union and Japan Agreed to Create World's Largest Area of Safe Data Flows' (Tokyo) 17 July 2018

⁵⁰ Hitoshi Suzuki, 'The New Politics of Trade: EU-Japan' (2017) 39 *Journal of European Integration* 7

⁵¹ Gabriel Felbmayr, Fukunari Kimura, Tashihiro Okubo and Marina Steininger, 'Quantifying the EU-Japan Economic Partnership Agreement' (2019) 51 *Journal of the Japanese and International Economies*

⁵² Robert Wolfe, 'Learning about Digital Trade: Privacy and E-Commerce in CETA and TPP' (2019) 18 *World Trade Review* S1

⁵³ Henry Farrell and Abraham Newman 'Linkage Politics and Complex Governance in Transatlantic Surveillance' (2018) 70 *World Politics* 4

⁵⁴ *Supra* n28

have been overlooked despite its salience. In the context of the EU-US talks for TTIP, data largely remained outside trade negotiations. The EU increasingly separates data regimes formally as well as laterally seeking their inclusion in a confusing strategy that tiptoes with global partners and global understandings as to rights. The most progressive of EU trade deals, the CETA Agreement, has numerous provisions cross-cutting data yet without regulating its flow or positively providing protections to personal data.⁵⁵ The complex place of data in trade agreements can be understood by the qualification of data protection as a fundamental right, and therefore not to be negotiated in the context of trade negotiations. The EU-Japan trade negotiations confirm that the place of data in trade is not a standardised one, and provide an exceptional case of increased data convergence. The adequacy decision is significant in ensuring that the EU's data protection rules under the GDPR do not disrupt the EU's services trade with Japan, kept intentionally separate from the trade agreement, which is next subject to further analysis.

The EU-Japan EPA negotiations: data 'outside'

The EU-Japan trade negotiations are worthy of reflection given the scale of data transfer involved and the inevitable institutionalisation at play despite varying considerably from the EU's initial goals. During the negotiations of the EU-Japan Economic Partnership Agreement (EUJEA), data arose as a controversial issue, where EU and Japan's interests did not align. The EU first refused, but eventually accommodated, Japan's request to engage in data dialogues. The condition by the EU for engaging in data protection talks was that such talks be "outside" the negotiations of trade agreement.

The political premises for such developments were much on their way. The EU and Japan had expressed their ambitions, and also acted, to lead the way in tackling current challenges of the digital economy. From the EU side, it had been stated that "in deepening our relations with our Japanese counterparts, we define common approaches to manage the digital transformation of our economies and societies."⁵⁶ Their ambitions not only covered the digital economy, but also touched upon the place of data in it. The Japanese Prime Minister Shinzo Abe had expressed his willingness for the Osaka G20 to be remembered "as the summit that started world-wide data governance".⁵⁷ The EU and Japan eventually emerged as the major actors responsible for the delineation and promotion of rules and standards of global data governance.

Beyond the political premises, concrete and further steps for the digital agenda were called for by Japan at the time of the negotiations of EUJEA. During the trade negotiations with the EU, Japan repeatedly expressed its interest in free data flows.⁵⁸ Particularly during the trade talks of the working group on business environment, Japan wanted to have clarified expressions such as the EU-suggested "cross border transfers of information";⁵⁹ and to include provisions in the EPA that would ensure the free flow of data and that would prohibit localisation requirements.⁶⁰ Yet the EU rejected to have substantive data protection standards being included in the FTA.⁶¹

Not only had the relationship between data and trade been dismissed by the EU; it had also been overlooked in the economic analyses behind the trade agreement. Economic research on the proposed benefits of the EU-Japan agreement largely focused upon market access and regulatory restrictiveness. Economists' measurements of regulatory barriers for example focuses upon OECD Regulatory Restrictiveness Index measuring statutory limitations on FDI. Trade Facilitation and Services Trade Restrictiveness are also relatively general metrics that are deployed.

⁵⁵ Instead, data protection either falls under the exceptions (see 28.3(2)(c)(ii) Comprehensive Economic Trade Agreement (CETA) or becomes an object for which the Parties shall "maintain or adopt" (Article 16.4 CETA) or measures or "adequate safeguards" (Article 13.15 CETA) to ensure its protection

⁵⁶ Khalil Rouhana, Deputy Director-General of DG Connect at the European Commission, 'EU-Japan Digital Week 2018 in Vienna' Digital Single Market Blog <<https://ec.europa.eu/digital-single-market/en/blogposts/eu-japan-digital-week-2018-vienna>> accessed on 6 January 2020.

⁵⁷ Shinzo Abe, 'Toward a New Era of "Hope-Driven Economy": the Prime Minister's Keynote Speech at the World Economic Forum Annual Meeting' (23 January 2019) <http://japan.kantei.go.jp/98_abe/statement/201901_00003.html> accessed on 6 January 2020.

⁵⁸ See the European Commission (2016) 'Report of the 15th EU-Japan FTA/EPA Negotiating Round' (Brussels) 29 February - 4 March 2016 <https://trade.ec.europa.eu/doclib/docs/2016/march/tradoc_154368.pdf>; and European Commission, 'Report of the 18th EU-Japan FTA/EPA Negotiating Round' (Tokyo) Week of 3 April 2017, 2-3 https://trade.ec.europa.eu/doclib/docs/2017/april/tradoc_155506.pdf accessed on 6 January 2020.

⁵⁹ See 'Report of the 15th EU-Japan FTA/EPA Negotiating Round' *ibid*.

⁶⁰ See 'Report of the 18th EU-Japan FTA/EPA Negotiating Round' *supra* n59

⁶¹ *Ibid*

Certain economics studies of EUJPA engage in WTO-X issue comparisons and assess overlap and divergences.⁶² We may say that economics comparisons are typically issue-convergence oriented. As Felbamyer argues, without the MRA, the EU–Japan EPA would be void in respect of many key service industries.⁶³ The mutual adequacy decision is therefore significant in ensuring that the EU’s data protection rules under the GDPR do not disrupt the EU’s services trade with Japan, kept intentionally separate from the trade agreement.

It is therefore significant how data arose with respect to the EPA text in so far as the EU were unable to agree a common position. The process of reciprocal recognition of the adequate level of protection is particularly of interest given the broader parameters of how a partner proposes a field not aligning with EU interests and ends up becoming subject to significant EU institutionalisation procedures. EU-Japan is heralded as one of the most far reaching of all time as the largest area but as an adequacy decision.

EU-Japan Data Adequacy Decision of 2018

An adequacy decision is the EU’s way of ‘protecting the rights of EU citizens by insisting upon a high standard of data protection in foreign countries where their data will be processed’. The concept of an ‘adequate’ level of protection existed under Article 95/46 and has been significantly developed by the CJEU in Case C-263/14 *Schrems v. Data Protection Commissioner*. While the level of protection in the third country must be essentially equivalent to that guaranteed in the EU the means may differ from that employed within the EU. It is significant that Japan has negotiated specific, structure rules which are binding and enforceable and applicable only to personal data transferred from the EU. It results in a new architecture of Adequacy relating upon Supplementary Rules. The EU-Japan Adequacy decision is the first adequacy decision since the entry into force of the GDPR and a significant precedent. The decision has as its goal convergence of legal frameworks rather than replication and has been designed with the intention of convergence. The direction of the processes of legal alignment and their moulding through law and language puts an interesting twist of the EU’s efforts at institutionalisation and Europeanisation. The outcome of the adequacy decision was a suggestion to put parameters on the life cycle of data as to data accuracy, minimisation, storage limitation, data security, purpose limitation and an independent supervisory authority.

The European Commission has the power to determine, on the basis of article 45 of Regulation (EU) 2016/679 whether a country outside the EU offers an adequate level of data protection. The adoption of an adequacy decision involves a proposal from the European Commission, an opinion of the European Data Protection Board, an approval from representatives of EU countries, the adoption of the decision by the European Commission. At any time, the European Parliament and the Council may request the European Commission to maintain, amend or withdraw the adequacy decision on the grounds that its act exceeds the implementing powers provided for in the regulation. The effect of such a decision is that personal data can flow from the EU (and Norway, Liechtenstein and Iceland) to that third country without any further safeguard being necessary. In other words, transfers to the country in question will be assimilated to intra-EU transmissions of data.

The criteria for how adequacy decisions are made is outlined in the GDPR and corresponding CJEU case law.⁶⁴ There, the European Commission assesses the data protection laws in the third country and the way in which those laws are enforced, examines wider factors such as the country’s judicial system, the rule of law and its national security policies and as a result, the overall system for data protection must be deemed ‘essentially equivalent’ to the EU’s for a positive decision to be made, it is periodically reviewed by the European Commission and it can be revoked at any time. It can also be invalidated by the CJEU and while the European Commission has never revoked an adequacy decision following a review, the CJEU has.

⁶² Andre Sapir, Sonali Schowdhry, and Alessio Terzi (2018) The EU-Japan Economic Partnership Agreement <<https://bruegel.org/2018/10/the-eu-japan-economic-partnership-agreement/>> accessed on 6 January 2020.

⁶³ Supra n51

⁶⁴ See Oliver Patel and Nathan Lea, ‘EU-UK Data Flows, Brexit and No-Deal: Adequacy or Disarray?’ (23 August 2019) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3441698> accessed on 6 January 2020.

Following the conclusion of the EU-Japan talks on personal data protection in July 2018, the Commission launched the procedure for the adoption of its adequacy decision. Thereafter the Commission adopted the adequacy decision on Japan. The agreements reached are largely standard but yet the scale and the nature of the history of the negotiations suggests otherwise- that the place of data is not standardised in trade negotiations. In September 2018 the European Data Protection Board (EDPB), composed of representatives of the EU Member States, adopted an Opinion on the EU-Japan adequacy decision on the basis of an assessment pursuant to documentation of the European Commission.⁶⁵ The function of the EDPB in this regard was to assess whether the Commission had ensured sufficient guarantees for the adequacy of data protection of individuals within Japanese law - not to replicate EU data protection law- but rather to increase convergence between the two legal frameworks. The decision raises interesting questions as to institutionalisation and Europeanisation and its relationship to convergence. Convergence in EU trade is not predominantly a goal but rather alignment remains the goal. However, convergence arguably emerges as the first most essential principle of adequacy according to the EDPB. Pursuant to Article 45 of the GDPR where a third country's legislation needs to be aligned to the essence of the GDPR.

One significant question then in understanding convergence and frameworks is as to how to understand EU assessments of other legal orders, ie its subjects and objects. Japanese data protection framework, Supplementary Rules negotiated by the European Commission and assurances and commitments of the Japanese Government provided the tool for this context. An adequacy decision is one of the tools provided for under the General Data Protection Regulation to transfer personal data from the EU to third countries. The EDPB expressly invited the European Commission to clarify in its adequacy decision the power of the supervisory authorities to bring action against the validity of an adequacy decision following a complaint, relating to the broader powers of DPAs following from the GDPR. Another invitation issued by the EPDB to the Commission was to closely monitor the effective protection of data transferred throughout their life cycle beyond the obligation under Japanese law to keep records for a maximum of three years. The place of transparency and the obligation to inform data subjects also arose for consideration. EU information materials circulated on the EU Japan Adequacy Decision clearly communicates the 'closeness' of Japanese data protection standards to EU law. Recent caselaw of the Japanese Supreme Court appears to align Japanese law closer to EU standards of individuals and company or business rights rather than collective communitarian ideas'.⁶⁶

We next return to the broader overall themes explored here.

Between institutionalisation and convergence: EU-Japan data relations in context

It is significant that most economic studies on the impact of the EU-Japan agreement firmly predict economic gains from the agreement but consider data protection to form part of the social impact issues of EUJPA rather than anything else. The Adequacy Decision involved an opinion of the EU Data Protection Board and consultations with a committee of representatives of all MS. Japanese law also has been evolved to include specific additional rules on transfers to the EU and enable EU citizens to have equivalent procedures and rights before Japanese courts, subject to periodic reviews of the adequacy decision. Thereafter within three years of the entry into force of the EPA the parties will also reassess the inclusion of provisions on free flows of data in the agreement. Economic surveys understood EU-Japan relations to foster a high level of alignment. Within the EPA itself there were five layers of institutional structures- joint committee, ten specialized committee two working groups and contact points, in addition to annual meetings by all committees and working groups. The institutionalisation here of data into the

⁶⁵ Opinion 28/2018 regarding the European Commission Draft Implementing Decision on the Adequate Protection of Personal Data in Japan (adopted on 5 December 2018) <https://edpb.europa.eu/sites/edpb/files/files/file1/2018-12-05-opinion_2018-28_art.70_japan_adequacy_en.pdf> accessed on 6 January 2020.

⁶⁶ IFLA, 'The Right to be Forgotten in National and International Contexts: <https://www.ifla.org/files/assets/clm/statements/rtbf_background.pdf> accessed on 6 January 2020.

agreement with a view to its integration at the behest of Japan but clearly on highly Europeanized terms makes for a notable development.

One of the significant parts of the EU-JPA- and to a degree also the SPA- is its intention to form a longer-term dialogue founded upon stability and certainty. In an age of tariff bars and exits from international organisations, the EU's approach is founded upon certainty, in the form of a limited set of legal areas or fields, largely perceived as safe, and limited. This desire for legal certainty in a limited set of overall parameters is a curious formula for a so-called deeper trading arrangement for one of the largest trading areas in the world which is simultaneously open and closed. The SPA and EPA both provide for a broader formulation of the relations, similar to all of the EU's major new trading relations. Yet the place of data is considered one where considerable room for improvement exists as to data flows. While the mutual adequacy decision of the EU and Japan as to equivalence of systems is highly significant in ensuring the EU's data rules under the GDPR do not disturb the Union's services trade with Japan, it is significant that the MRA was intentionally separated from the trade agreement and without which the EPA is alleged to be void in many service industries.

Conclusions

The EU-Japan negotiations arguably demonstrate many significant issues chief among them the exclusion of data. The history of the unfolding relationship so far shows many contrary indicators and important developments of integration, convergence and synthesis of data. The negotiations have shown the EU acting as a data convergence actor and raise important questions as to the type of convergence taking place particularly in light of the history of the negotiations excluding data. There are many specific novelties arising from the Japanese legal framework mostly applying to EU data to the exclusion of Japanese personal data. Even if no significant substantive convergence can be said to result from the EU-Japan relationship, it still demonstrates an important processes of institutionalisation, liable to trigger more convergence and alignment.