



**Supplementary Rules under the Act on the Protection of Personal Information
for the Handling of Personal Data Transferred from the EU based on the
Adequacy Decision (Draft)**

**Comments of BSA | The Software Alliance
May 25, 2018**

BSA | The Software Alliance (“BSA”)¹ welcomes this opportunity to provide our comments with respect to the draft Supplementary Rules (the “**Supplementary Rules**”) under the Act on the Protection of Personal Information (“**the Act**”) for the Handling of Personal Data Transferred from the EU based on the Adequacy Decision, published by the Personal Information Protection Commission (“**the PPC**”).

BSA appreciates the efforts made by the PPC and relevant ministries in their negotiations with the EU on mutual recognition of the adequacy of each jurisdiction’s personal information protection regime. We support efforts to formulate rules to develop a system that allows for the smooth transfer of personal data between Japan and the EU, recognizing the importance and benefits of data utilization and the importance of international data transfers in the modern economy.

Prior to the negotiations, in order to respond to the appropriate usage of data and the increasing importance of international data transfers accompanying the globalization of business activities, Japan revised the Act in September 2015, with such revised version of the Act coming into force in May 2017.

Both effective protection of personal information and smooth international data transfers are important to the global economy as a whole, and they are extremely

¹ BSA | The Software Alliance (www.bsa.org) is the leading advocate for the global software industry before governments and in the international marketplace. Its members are among the world’s most innovative companies, creating software solutions that spark the economy and improve modern life. With headquarters in Washington, DC, and operations in more than 60 countries, BSA pioneers compliance programs that promote legal software use and advocates for public policies that foster technology innovation and drive growth in the digital economy.

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important for cloud services and the creation of innovative Internet-based technologies and services.

The proposed Supplementary Rules aim to facilitate the important goal of ensuring the efficient transfers of data between the EU and Japan and implement important aspects under discussion in the adequacy negotiations. However, the Supplementary Rules provide for more stringent obligations, exceeding those set forth in the Act and implementing Rules and Guidelines, for receiving information from the EU based on an adequacy decision. In particular, the Supplementary Rules would require companies to treat personal information to be transferred from the EU separately and differently from personal information acquired in Japan or transferred from other countries/regions. As a result, the proposed Supplementary Rules could impose unnecessary burdens on cross-border data transfers and stymie innovation.

In light of the potential impact of the proposed changes, we respectfully request the PPC to provide further clarity on the applicability of existing exceptions to the areas covered by the Supplementary Rules governing utilization purpose, transfers to third parties in a foreign country, and anonymously processed information. As discussed below, we also encourage the PPC to maintain the limited scope of proposed changes to the existing Rules. More broadly, we urge the Government of Japan to continue its leadership on further developing multilateral approaches to these important issues, including through the expansion of the APEC Cross-Border Privacy Rules system.

I. Specific Areas Identified in Supplementary Rules

A. Specifying a Utilization Purpose, Restrictions Due to a Utilization Purpose (Article 15(1), Article 16(1), and Article 26(1) and (3) of the Act)

The Rules describe that "in the case where a personal information handling business operator receives personal data from the EU based on an adequacy decision, the circumstances regarding the acquisition of the said personal data which shall be confirmed and recorded as prescribed by Article 26, paragraphs (1) and (3), include the utilization purpose for which it was received from the EU."

In this regard, while Article 26(1)² excludes from the duty of confirmation and recording cases falling under any of the items of Article 23(1), which relate to circumstances in which consent is not required, or Article 23(5), which includes exceptions in situations involving subprocessing, mergers and acquisitions, and joint use,³ such exclusions are not specifically described in the Supplementary Rules. These existing exceptions provide important flexibility for companies to conduct important business operations and provide innovative services. Accordingly, BSA wishes to clarify that, in the Supplementary Rules, the items of Article 23(1) and (5) will be excluded from the duty of confirmation and recording.

2. Restrictions on Provision to a Third Party in a Foreign Country (Article 24 of the Act and Article 11-2 of the Rules)

Our understanding is that the description of item (ii) of this section in the Rules intends to illustrate items 1 and 2 of Article 11-2 of the Rules by incorporating further guidance, and that such description does not change Article 11-2 of the Rules, the guidelines regarding the provision of personal information to a third party in a foreign country, or the relevant Q&A issued by the PPC. Therefore, for instance, in cases where a provider or recipient has received APEC CBPR certification, it is considered that the requirements of the Rules will be satisfied in the process of obtaining certification as described in the relevant Rules.

As mentioned above, BSA supports the Government of Japan's further promotion of multilateral frameworks, including the APEC CBPR. We also urge the Government of

² Article 26

(1) A personal information handling business operator shall, when receiving the provision of personal data from a third party, confirm those matters set forth in the following pursuant to rules of the Personal Information Protection Commission. This, however, shall not apply in cases where the said personal data provision falls under any of each item of Article 23, paragraph (1) or paragraph (5).

³ Article 23

(1) A personal information handling business operator shall, except in those cases set forth in the following, not provide personal data to a third party without obtaining in advance a principal's consent.

(i) cases based on laws and regulations

(ii) cases in which there is a need to protect a human life, body or fortune, and when it is difficult to obtain a principal's consent

(iii) cases in which there is a special need to enhance public hygiene or promote fostering healthy children, and when it is difficult to obtain a principal's consent

(iv) cases in which there is a need to cooperate in regard to a central government organization or a local government, or a person entrusted by them performing affairs prescribed by laws and regulations, and when there is a possibility that obtaining a principal's consent would interfere with the performance of the said affairs

(5) In those cases set forth in the following, a person receiving the provision of the said personal data shall not fall under a third party in regard to applying the provisions of each preceding paragraph.

(i) cases in which personal data is provided accompanied by a personal information handling business operator entrusting a whole or part of the handling of the personal data within the necessary scope to achieve a utilization purpose

(ii) cases in which personal data is provided accompanied with business succession caused by a merger or other reason

(iii) cases in which personal data to be jointly utilized by a specified person is provided to the specified person, and when a principal has in advance been informed or a state has been in place where a principal can easily know to that effect as well as of the categories of the jointly utilized personal data, the scope of a jointly utilizing person, the utilization purpose for the utilizing

Japan to adhere to the rules that have been set forth under the current guidelines of the Act.

3. Anonymously Processed Information (Article 2(9), and Article 36(1) and (2) of the Act)

In our previous public comments, BSA pointed out that business operators should be able to adopt appropriate measures to effectively prevent the identification and re-identification of individuals based on a risk-based approach that weighs the results regarding the standards set forth in Article 19 of the Act. We have also commented that the best practices proposed both currently and in the future by industry sectors should be adopted since voluntary efforts made by industry are likely to significantly contribute to effective personal data protection owing to technological advancements.

We understand that anonymously processed information under the Act and pseudonymisation under the GDPR are handled differently in the respective regimes, and that the Rules have been developed to the extent acceptable for both Japan and the EU. However, narrowing the scope of anonymously processed information by requiring particular techniques that implement a stringent irreversibility standard could diminish the use of de-identified information that otherwise poses little privacy risk to individuals, and may prevent innovative uses of data that could have significant economic and societal impact.

We expect that the rules on anonymously processed information will be revised in the near future upon gaining an understanding of the rationality and effectiveness of the proposed approach to addressing this important issue.

II. Scope of Supplementary Rules

At the present moment, the scope of the Rules is relatively limited, but if such scope is expanded in the future, the disadvantages of this complexity in business operations may outweigh the advantages brought about by the mutual recognition. Therefore, in order to ensure that the scope of coverage does not expand after the Rules have been formulated, we ask the PPC to continue to that Japan's personal information protection regime both maximizes the effectiveness of personal information protection while ensuring efficient use of data, including international transfers, in business activities. We also implore the PPC to continue the valuable dialogue between the PPC and the private sector in order to obtain adequate feedback from the private sector.

person and the name or appellation of a person responsible for controlling the said personal data

III. Multilateral Approaches to Facilitating Cross-Border Data Transfers

To maximize the benefits of cloud and Internet-based services, including the cost-effectiveness thereof, it is essential to optimize data transfers on a global scale and to ensure smooth cross-border data transfers in a global manner. To this end, it is vital that efforts be made through a broader multilateral approach, beyond this Japan-EU framework, and we sincerely hope that the Government of Japan will continue to play a leading role in further developing multilateral frameworks such as the APEC Privacy Principles and the Cross-Border Privacy Rules system.

Conclusion:

BSA would like to reiterate our gratitude to the PPC for their tremendous efforts and for granting us the opportunity to provide these comments on the Rules. We hope our comments will be useful as you finalize the Rules, but also more generally, we will be happy to continue to collaborate with the PPC into the future. Please let us know if you have any questions or would like to discuss these comments in more detail.

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