

EXPLANATORY MEMORANDUM FOR EUROPEAN UNION LEGISLATION AND DOCUMENTS

EU proposal for provisions on cross-border data flows and protection of personal data and privacy

Submitted by Department for International Trade on 16 August 2018

SUBJECT MATTER

1. The purpose of this proposal is to set out horizontal provisions for cross-border data flows and for personal data protection in EU trade negotiations, including amendments based on feedback from EU Member States. These will be deployed in trade negotiations with Indonesia.
2. This proposal derives from an annex to a letter from the European Commission to the European Council published on 9 February 2018, which proposed two new articles on data protection and flows and the revision of an established article.
3. This letter and annex was the first time that the EU proposed a stand-alone chapter on cross-border data flows and personal data protection in Free Trade Agreements (FTAs), following a long period of internal consideration. In the proposal the EU seeks to prohibit protectionist barriers to cross-border data flows, while remaining compliant with and without prejudice to the EU's data protection and data privacy rules.
4. The EU has exclusive competence for trade outside the EU (as per Article 207 of the TFEU and consistent with the CJEU's Opinion 2/15 on the EU-Singapore FTA) and has published the proposal on the Commission website in the context of EU negotiations with Indonesia. This published proposal includes revisions to the original annex that Member States requested (http://trade.ec.europa.eu/doclib/docs/2018/july/tradoc_157130.pdf).
5. This most recent proposal contains three articles:
 - a. Article 1 covers cross-border data flows, which includes both personal and non-personal data. It seeks to address specific prohibitive and unjustified protectionist obstacles that inhibit the flow of data. It mandates that data flows should not be restricted by Parties:
 - i. requiring that data processing is undertaken on computing facilities or network elements in the Party's territory;
 - ii. requiring localised storage in the Party's territory or preventing storage/processing in the other Party's territory;
 - iii. making the cross-border flow of data between territories contingent on these said requirements.

The Article specifies that these provisions are reviewed and assessed within 3 years of implementation, but a Party may propose review at any time.

- b. Article 2 covers the protection of personal data (defined as ‘information relating to an identified or identifiable natural person’) and privacy. It includes:
 - i. a request that each Party recognises that high standards for privacy and protection of personal data are fundamental rights and important to trust in trade;
 - ii. a recognition that either Party can adopt safeguards that they deem appropriate to fulfil privacy and protection, but the Party must inform the other Party of these safeguards;
 - iii. a statement that the Investment Court System does not apply to Article 1 or 2.

Therefore, notwithstanding the provisions in Article 1, either Party can apply any data protection or privacy arrangements that it deems necessary to protect fundamental rights, as long as they inform the other Party.

- c. Article X is current standard language on cooperation on regulatory issues regarding digital trade. The proposal makes an addition to this Article, clarifying that the rules do not apply to a Party’s legislation on the protection of personal data and privacy.

6. These provisions only address data in the context of trade agreements – i.e. seeking to remove unnecessary and unjustified barriers to trade. They do not provide an alternative legal basis for the cross-border transfer of personal data, which is governed by the General Data Protection Regulation (EU) 2016/679 and Law Enforcement Directive (EU) 2016/680.

SCRUTINY HISTORY

7. This current Explanatory Memorandum (EM) inter-relates to an existing file which is still under scrutiny in both Houses. The Department for Culture, Media and Sport (DCMS) submitted an EM on 7 February 2017 on a “COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL Exchanging and Protecting Personal Data in a Globalised World” (EU document number 5191/17). The Commons European Scrutiny Committee (ESC) have reported on this file in two separate reports - Report 34 of 8 March 2017 (Session 2016-2017) and Report 29 of 23 May 2018 (Session 2017-19) and have recommended the Communication for debate. The Lords European Union Committee (EUC) sifted the document on 21 February 2017. The file remains under scrutiny in the Home Affairs sub-committee.

MINISTERIAL RESPONSIBILITY

8. The Secretary of State for International Trade has primary responsibility for trade policy. The Secretary of State for Digital, Culture, Media and Sport has responsibility for data protection and cross-border data flows policy.

INTEREST OF THE DEVOLVED ADMINISTRATIONS

9. The UK's policy in this area is a reserved matter under the UK's devolution settlements. Therefore, Devolved Administrations have not been consulted in the drafting of this EM.

LEGAL AND PROCEDURAL ISSUES

Legal Basis

10. Article 207 of the Treaty on the Functioning of the European Union.

European Parliament Procedure

11. The legislative procedure for the signing and conclusion of agreements under Article 207 of the TFEU is as set out in Article 218 of the TFEU. The role of the European Parliament is set out specifically in Articles 218(6) and 218(10).

Voting Procedure

12. As these provisions exist as a textual proposal for part of an FTA, there will be no formal vote in Council or the European Parliament. Qualified Majority Voting will apply for the signature and conclusion of the final FTA text.

Impact on UK Law

13. The provisions do not provide a legal basis for the transfer of personal data, so there is no impact on the Data Protection Act 2018 or the General Data Protection Regulation (EU) 2016/679 as it applies to the UK.

Application to Gibraltar

14. The proposal at this stage is a matter of policy and does not have legal effects on Gibraltar. The FTA once concluded would apply to Gibraltar to the extent to which the EU Treaties apply to Gibraltar.

Fundamental Rights Analysis

15. The proposal respects fundamental rights. In particular, article 2 provides that the protection of personal data and privacy is a fundamental right and that each Party may adopt and maintain the safeguards it deems appropriate to ensure the protection of personal data and privacy.

APPLICATION TO THE EUROPEAN ECONOMIC AREA

16. The proposal is not applicable to members of the European Economic Area who are not also members of the European Union.

SUBSIDIARITY

17. Trade is a matter of exclusive EU competence under EU Treaties and international trade negotiations are handled at a European Union level. The proposals are therefore consistent with the principle of subsidiarity and European Union action is therefore appropriate.

POLICY IMPLICATIONS (including Exit implications where appropriate)

18. On 23 June 2016, the EU referendum was held, and the people of the United Kingdom voted to leave the European Union. The Government respected the result and triggered Article 50 of the Treaty on European Union on 29th March 2017 to begin the process of exit. Until exit negotiations are concluded, the UK remains a full member of the European Union and all the rights and obligations of EU membership remain in force. During this period the Government will also continue to negotiate, implement and apply EU legislation.

19. In the lead up to Exit, the UK will continue to actively engage alongside other EU Member States and the Commission on the introduction of new provisions for cross-border data flows. The UK is keen to explore the opportunities around enabling data flows in trade, while understanding the importance of ensuring that personal data protection is not undermined. Therefore, we are engaging actively in working with the EU to ensure it works for businesses and consumers as effectively as possible.

20. There are no immediate EU Exit implications for these proposed provisions. During the implementation period the UK will no longer be a Member State of the European Union, but market access between the EU and UK will continue on current terms. Common rules will remain in place until the end of the period meaning businesses will be able to trade on the same terms until the end of 2020.

21. The European Commission has stated that these provisions will be a model for future FTA negotiations. Therefore, there are potential implications for the UK's future relationship with the EU.

22. The free flow of data is vital to economic activity and international trade. The Government, therefore, is a supporter of the removal of barriers to the free flow of data, along with high standards of protection for personal data. The UK would like to see ambitious data provisions and will continue to work with the EU to secure these in trade agreements.

CONSULTATION AND IMPACT ASSESSMENT

23. The Commission has undertaken a consultation on 'Building European Data Economy', which informed this proposal. However, there has been no formal consultation on this specific proposal.

24. In-line with previous EU FTAs, it is expected the European Commission will conduct an impact assessment of the EU-Indonesia CEPA as a whole once the negotiations have concluded.

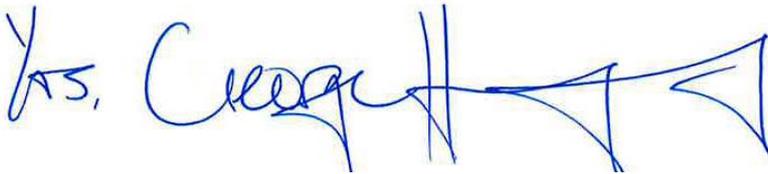
FINANCIAL IMPLICATIONS

25. There are no financial implications for the UK.

TIMETABLE

26. The EU has declared that these legal texts constitute initial proposals on topics in the EU-Indonesia trade agreement, which may change during negotiations. The full negotiated text will be published once the negotiations have concluded, in advance of signature and ratification.

27. The final text will be presented for approval or rejection to the Council and the European Parliament after the conclusion of negotiations, legal scrubbing and translation. Negotiations will enter into their 6th round in the week of 15 October 2018. Negotiations have been underway since 2016 and are thought unlikely to conclude before Exit or indeed the end of the Implementation Period.

A handwritten signature in blue ink, reading "Mr. George Hollingbery". The signature is written in a cursive style with a large, stylized initial 'G'.

**GEORGE HOLLINGBERY MP
MINISTER OF STATE FOR TRADE POLICY
DEPARTMENT FOR INTERNATIONAL TRADE**