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From: General Secretariat of the Council

To: Delegations

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Subject: Council Decision authorising the opening of negotiations with Japan for the amendment of the Agreement between the European Union and Japan on mutual legal assistance in criminal matters
- Text as adopted by the Council

Delegations will find attached the text of the above-mentioned Council Decision ([Annex I](#), see 12141/21), together with the relevant negotiation directives ([Annex II](#), see 12141/21 ADD 1), as adopted by the Council (Employment, Social Policy, Health and Consumer Affairs) at its 3818th meeting on 15 October 2021¹.

¹ The point was adopted as an "A" item; see ST 12707/21, point 13, including 12141/21 COR 1 (fi).

COUNCIL DECISION (EU) .../...

of ...

**authorising the opening of negotiations with Japan
for the amendment of the Agreement between the European Union and Japan
on mutual legal assistance in criminal matters**

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 16(2), in conjunction with Article 218(3) and (4) thereof,

Having regard to the recommendation from the European Commission,

Whereas:

- (1) Negotiations should be opened with a view to amending the Agreement between the European Union and Japan on mutual legal assistance in criminal matters² (the ‘Agreement’).
- (2) The processing of personal data under the Agreement involves the processing, exchange and subsequent use of relevant information for the purposes set out in Article 82 of the Treaty on the Functioning of the European Union (TFEU). That processing should comply with the applicable data protection rules. The data protection provisions of the Agreement should therefore be reviewed and new provisions agreed, that allow the Union to ensure that such processing complies with Directive (EU) 2016/680 of the European Parliament and of the Council³.

² Agreement between the European Union and Japan on mutual legal assistance in criminal matters (OJ L 39, 12.2.2010, p. 20).

³ Directive (EU) 2016/680 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 by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA (OJ L 119, 4.5.2016, p. 89).

- (3) The European Data Protection Supervisor was consulted in accordance with Article 42(1) of Regulation (EU) 2018/1725 of the European Parliament and of the Council⁴, and delivered an opinion on 16 July 2021⁵.
- (4) In accordance with Article 6a of Protocol No 21 on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice, annexed to the Treaty on European Union (TEU) and to the TFEU, Ireland is bound by Council Decision 2010/616/EU⁶ and is therefore taking part in the adoption of this Decision.
- (5) In accordance with Articles 1, 2 and 2a of Protocol No 22 on the position of Denmark, annexed to the TEU and to the TFEU, Denmark is not taking part in the adoption this Decision and is not bound by it or subject to its application,

HAS ADOPTED THIS DECISION:

⁴ Regulation (EU) 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data , and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC (OJ L 295, 21.11.2018, p. 39).

⁵ OJ: Please insert the reference to the opinion contained in document ST 10983/21.

⁶ Council Decision 2010/616/EU of 7 October 2010 on the conclusion of the Agreement between the European Union and Japan on mutual legal assistance in criminal matters (OJ L 271, 15.10.2010, p. 3).

Article 1

1. The Commission is hereby authorised to open negotiations with Japan for the amendment of the Agreement between the European Union and Japan on mutual legal assistance in criminal matters, in order to align that Agreement with Directive (EU) 2016/680 as regards the protection of personal data processed under the Agreement.
2. The negotiations shall be conducted on the basis of the negotiating directives of the Council set out in the addendum to this Decision, subject to any directives which the Council may subsequently issue to the Commission.

Article 2

The Commission is hereby nominated as the Union negotiator.

Article 3

1. The negotiations shall be conducted in consultation with the Working Party on Judicial Cooperation in Criminal Matters (COPEN).
2. The Commission shall report regularly to the COPEN Working Party on the progress of the negotiations and shall forward all negotiating documents to it without delay.

Article 4

This Decision is addressed to the Commission.

Done at ...,

For the Council

The President

Directives for the negotiations to amend the Agreement between the European Union and Japan on mutual legal assistance in criminal matters

The Commission should, in the course of the negotiations, aim to achieve the objectives set out in detail below:

- (1) The general objective of the amendments is to support and strengthen the cooperation between the Member States and Japan in the area of mutual legal assistance in criminal matters by strengthening safeguards with respect to the protection of personal data. The amendments should not change the purpose and forms of cooperation under the Agreement.
- (2) The Agreement, in particular Articles 8 (requests for assistance) and 13 (confidentiality and use limitations), already requires that:
 - requests contain a description of the purpose of the assistance requested, together with the facts pertaining to the subject of the investigation, prosecution or other proceeding (including judicial proceeding); and
 - the requesting state must not process personal data for purposes other than that described in the request without prior consent from the requested state.

This upholds the principles of purpose specification and purpose limitation.

- (3) The amendments should ensure that the Agreement provides for appropriate data protection safeguards within the meaning of Directive (EU) 2016/680⁷ for the transfer of personal data pursuant to the Agreement, including data sent as part of the requests for assistance, irrespective of the nationality or place of residence of the individuals concerned.

⁷ Directive (EU) 2016/680 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 by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA (OJ L 119, 4.5.2016, p. 89).

- (4) In particular, the amendments should comprise the following additional safeguards, to be applied to all authorities that participate in the investigation, prosecution or other proceeding (including judicial proceeding) that is described in the request:
- (a) a requirement to ensure that any personal data to be transferred between the parties is necessary to achieve the purpose of the request in line with the objectives and scope of the agreement and that is adequate, relevant and not excessive in relation to that purpose;
 - (b) a requirement to ensure that personal data is accurate and, where necessary, kept up to date; that personal data which does not fulfil this requirement is erased or rectified; and the other party is informed where there are indications that personal data is or has become inaccurate or outdated;
 - (c) a requirement to ensure, through appropriate time limits or periodic reviews, that personal data is not retained for longer than is necessary for the purpose(s) for which it has been transferred;
 - (d) a requirement that the transfer and further processing of personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, or trade union membership, of genetic data, biometric data for the purpose of uniquely identifying a natural person, data concerning health or data concerning a natural person's sex life or sexual orientation, is allowed only if such transfer and further processing is subject to appropriate safeguards addressing the specific risks entailed by the processing;
 - (e) a requirement to implement appropriate technical and organisational measures so as to be able to demonstrate compliance;

- (f) a requirement to ensure the security of personal data through appropriate technical and organisational measures, including access restrictions, and to provide notification in the event of a personal data breach;
- (g) a mechanism to ensure that the individual(s) concerned are notified of any data transfer and that basic information on the processing is made available to them, subject to any necessary and proportionate restrictions to protect the rights and freedoms of others or important objectives of general public interest;
- (h) a requirement to ensure that the individual(s) concerned have enforceable rights of access (including basic information on the processing), rectification and erasure, subject to any necessary and proportionate restrictions, and to provide for appropriate safeguards with respect to decisions based solely on the automated processing of transferred personal data that negatively affects them.
- (i) where prior consent is required pursuant to Article 13(1) of the Agreement, a requirement of the requested state to assess all relevant factors, in particular:
 - the initial purpose of processing;
 - the purpose of further processing; and
 - whether the receiving authority ensures a level of data protection for the personal data that is shared equivalent to that guaranteed by the Agreement;
- (j) a requirement to ensure that compliance with the safeguards agreed between the parties is supervised by one or more independent oversight authorities with effective powers of investigation and enforcement, in particular the power to address individuals' complaints about the use of their personal data, taking into account the specific context of data processing by courts acting in their judicial capacity; and

- (k) a requirement to ensure that individuals are granted effective judicial redress in the event of violations of the above safeguards.
- (5) The amended Agreement should contain definitions of key terms, including a definition of ‘personal data’ that is in line with Article 3(1) of Directive (EU) 2016/680.
- (6) The amended Agreement should provide the possibility to suspend the Agreement in case of breach of its provisions on personal data by one of the parties thereto; personal data falling within the scope of the Agreement transferred prior to its suspension may continue to be processed only in accordance with the Agreement.
- (7) The amended Agreement should provide that, when the Agreement is terminated by one the parties thereto, personal data falling within the scope of the Agreement transferred prior to its termination may continue to be processed only in accordance with the Agreement.
- (8) The procedure for negotiations shall be as follows:
- (a) The negotiations must be prepared for well in advance. To this end, the Commission shall inform the Council of the schedule anticipated and the issues to be negotiated and shall share the relevant information as early as possible.
 - (b) Where necessary, or upon request of the Council, the negotiating sessions shall be preceded by a meeting of the COPEN Working Party in order to identify the key issues, formulate opinions and provide guidance, as appropriate.
 - (c) The Commission shall report to the COPEN Working Party on the outcome of the negotiations after each negotiating session.
 - (d) The Commission shall inform the Council and consult the COPEN Working Party on any important issue that may arise during the negotiations.