

► Newsletter from our FRANKFURT OFFICE (Tokyo - Frankfurt): *Atsumi Sakai Janssen Rechtsanwalts-gesellschaft mbH*



Atsumi & Sakai is a multi-award-winning, independent Tokyo law firm with offices in London and Frankfurt. Expanding from its highly-regarded finance practice, the firm now acts for a wide range of international and domestic companies, banks, financial institutions and other businesses. The firm operates as a foreign law joint venture, combining a comprehensive Japanese-law and German-law practice consisting of a team of highly experienced Japanese, German and other foreign lawyers. The Frankfurt office advises its clients in Japanese, English or German both in German and European law.

■ Data Transfer to Japan & Overall Compliance

| Page 1/3 |

February 2018 No.FRT_003

■ The GDPR

The EU' s new General Data Protection Regulation will come into effect on May 25, 2018 and will then be binding in all EU member states. However, many companies are still not aware of the new rules, or have yet to overhaul their data protection compliance systems to comply with them.^[1] This task should be taken seriously as the new rules allow for the imposition of fines for non-compliance of up to €20 million, or 4% of worldwide annual turnover, whichever is higher (Art. 83 GDPR).

>> Figure 1: Fundamental Terms of the GDPR

Personal Data, Art. 4 (1)

“any information relating to an identified or identifiable natural person (‘ data subject ’); and identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person ”

Special Categories of Personal Data, Art.9 (1)

- Racial or ethnic origin
- Political opinions
- Religious or philosophical beliefs
- Trade union membership
- Genetic data, biometric data for the purpose of uniquely identifying a natural person
- Data concerning health
- Data concerning a natural person’s sex life or sexual orientation



EU data protection law only applies to personal data. Information that does not fall within the definition of “personal data” is not subject to EU data protection law.

■ Transfer of personal data to Japan

A lot of the discussion over data protection in relation to EU-Japan business relationships is focused on the transfer of personal data from the EU to Japan, for example by an EU subsidiary of a Japanese company to its Japanese parent. There are two possible scenarios which might apply to permit such transfers under the GDPR regime:

A. JEFTA

The EU and Japan are currently negotiating the EU-Japan Economic Partnership Agreement (also called the Japan-EU Free Trade Agreement or “JEFTA”), as part of which they hope to agree that each will recognize the other as a country with an adequate data protection system in place. If the European Commission decides that Japan’s data protection regime is so adequate, the transfer of personal data from the EU to Japan would then be possible under Art. 45 GDPR, and would be treated in the same way as a transfer between companies in the EU. Japan and the EU have stated that they want to conclude JEFTA in the summer of 2018.^{[2][3]}

B. Japan as a third country

If no adequacy agreement is reached, Japan will be categorized as a third country for the purposes of the GDPR and the transfer of personal data from the EU to Japan would be subject to the additional requirements of Art. 46ff. GDPR. In such a case, a transfer of personal data would only be possible if the EU-based controller or processor of the personal data has implemented appropriate safeguards to ensure the protection of such data after its transfer.

The most relevant of those safeguards are the so-called “Binding Corporate Rules” (BCR), and the standard data protection clauses (SCC) adopted by a supervisory authority in an EU member state and approved by the European Commission.



Further issues to be taken into account

Although the question of the transfer of personal data is an important one, it is only one of many questions which Japan-based companies which handle personal data from the EU or which have EU subsidiaries will need to consider in relation to the GDPR; two others of particular note are the territorial application of the GDPR and, if the company has EU subsidiaries, the need for a data protection officer.

A. Territorial application

One of the novelties of the GDPR is its territorial scope. Art. 3 (2) GDPR provides that the new rules apply not only to companies based in the EU, but also to those outside the EU which process personal data of data subjects located inside the EU for the purposes of either a) the offering of goods or services to such data subjects in the EU, irrespective of whether a payment from the data subject is required; or b) the monitoring of the data subjects behavior in the EU.

Therefore, even a Japanese company that has no branch or subsidiary inside the EU may be subject to the new data protection rules of the GDPR^[4].

B. Data protection officer

Art. 37 (1) GDPR provides that an EU-based company subject to the GDPR will have to designate a data protection officer (DPO) if its data processing requires regular and systematic large-scale monitoring of data subjects, or it engages in large-scale processing of special categories of data, such as racial, ethnic or genetic data (Art. 9 (1)). According to Art. 39 GDPR, the DPO is responsible for, among other things, monitoring compliance with the GDPR, providing advice, and acting as the intermediary between the company and the supervisory authorities. Art. 37 (5) GDPR states that the data protection officer shall be designated on the basis of professional qualifications and, in particular, expert knowledge of data protection law and practices, and the ability to fulfil the tasks referred to in Art. 39 GDPR. He may be a member of staff of the data handler, etc. (Art. 37 (6) GDPR), but can also be an external service provider; the same DPO may be engaged for a group of undertakings (Art. 37 (2) GDPR). It is estimated that from May 2018, about 28,000 DPOs will be needed in Europe alone,^[5] and some 75,000 DPOs worldwide.^[6]

>> Figure 2: Fines under the GDPR

C. Overall compliance

Further examples of the scope of the GDPR include measures to take into account the rights of data subjects (Art. 12-23 GDPR), such as the right to be informed of the processing of personal data, the right to restrict such processing and the right to enforce the deletion of personal data under certain circumstances, and stipulations regarding the appropriate technical and organizational security measures for the processing of personal data (Art. 24 (1)).

Conclusions

The GDPR represents a sweeping change to EU data protection regulation, both in scope and territorial application. Although transfers of personal data from the EU to Japan may be permitted as mentioned at 2. above, Japanese companies which target individuals in the EU for business or which handle personal data from the EU should keep in mind that overall compliance with the GDPR is essential not only for avoiding administrative fines, but also for furthering customer trust and growing their business in Europe. In addition, if JEFTA is concluded with the inclusion of mutual recognition of the adequacy of data protection, it will ease EU market access for Japanese companies if they are ready to comply with the new GDPR data protection rules.

[1] E.g. <http://www.cityam.com/273499/gdpr-ignorance-should-we-worried>

[2] http://europa.eu/rapid/press-release_MEMO-17-1903_en.pdf;

<http://trade.ec.europa.eu/doclib/press/index.cfm?id=1767>;

http://www.mofa.go.jp/ecm/ie/page4e_000718.html

[3] Both have stated that they aim to accelerate work towards achieving mutual adequacy recognition as soon as possible in 2018.

http://europa.eu/rapid/press-release_STATEMENT-17-5307_en.htm

[4] For example, platforms which engage in e-commerce outside the EU may be subject to the GDPR if they offer goods to individuals in the EU.

[5] <https://iapp.org/news/a/study-at-least-28000-dpos-needed-to-meet-gdpr-requirements/>

[6] <https://iapp.org/news/a/study-gdprs-global-reach-to-require-at-least-75000-dpos-worldwide/>

Can you afford a fine of up to 4% of global annual turnover?



GDPR Administrative Fines - a two tiered sanctions regime will apply.

- Breaches of Key provisions (e.g. basic principles for processing, transfer to a third country, ...) will be subject to administrative fines of up to € 20,000,000 or, in the case of undertakings, 4% of global turnover, whichever is the higher.
- Other breaches will be subject to administrative fines of up to € 10,000,000 or, in the case of undertakings, 2% of global turnover, whichever is the higher.



Fines can be imposed (discretionary rather than mandatory) by the supervisory authorities on both data controllers and data processors; they must be imposed on a case by case basis and must be “effective, proportionate and dissuasive”.

Author(s) / Contacts

Atsumi Sakai Janssen Rechtsanwaltsgesellschaft mbH*



Frank Becker

Admitted in the Federal Republic of Germany**

> [View Profile](#)

E-mail:

frank.becker@asj-law.jp

Before opening the Frankfurt office, Frank Becker was one of the founding partners of the Munich office of a major US law firm and an associate in a Magic Circle firm.

He leads the Frankfurt office and has extensive experience in M&A transactions and joint ventures.

He studied law in Japan for a year and advises Japanese clients in connection with German law related matters, with a focus on transactional, corporate and compliance matters.

Atsumi & Sakai (Tokyo Head Office)



Takafumi Uematsu

Admitted in Japan (2004) and California (2010)

> [View Profile](#)

E-mail:

takafumi.uematsu@aplaw.jp

Takafumi Uematsu previously worked as a secondee at the Frankfurt office of Norton Rose, and since then has been involved in EU-related matters, such as EU financial regulations, antitrust, and data protection matters.

He has experience in cross-border matters between Japan and the EU. He has extensive experience in securitizations and M&A transactions. He manages the Tokyo-based German desk.

Atsumi Sakai Janssen Rechtsanwaltsgesellschaft mbH*



Dr. Pascal Soepper

Admitted in the Federal Republic of Germany**

> [View Profile](#)

E-mail:

pascal.soepper@asj-law.jp

After serving as Assistant Professor at Niigata University for a term of 3 years, Pascal Soepper joined Atsumi Sakai Janssen in 2016 and recently relocated to Frankfurt.

He works in the field of general contract and corporate law, as well as IT Law and FinTech, with a particular emphasis on crowdfunding.

Atsumi Sakai Janssen Rechtsanwaltsgesellschaft mbH*



Daisuke Tsuzuki

Admitted in Japan (2007)

> [View Profile](#)

E-mail:

daisuke.tsuzuki@aplaw.jp

Daisuke Tsuzuki is a Japanese lawyer (Bengoshi); he was admitted in 2007 and joined Atsumi & Partners (now Atsumi & Sakai) that year. He advises mainly on M&A, Corporate Restructuring, Capital Markets, Joint Ventures, and Financial Laws and Regulations. After secondment to leading Japanese security companies, he joined ASJ Frankfurt in 2017. He speaks Japanese and English.

* A German legal professional corporation

** Not Registered as a Foreign Lawyer and not practicing law in Japan

Location (Frankfurt Office)

Atsumi Sakai Janssen Rechtsanwaltsgesellschaft mbH
Taanusanlage 21, 60325 Frankfurt am Main, Germany

Contact

Europe Practice Team (Atsumi & Sakai)
E-mail: info_frankfurt@aplaw.jp

Atsumi & Sakai newsletters are prepared by Japanese lawyers (Bengoshi) and are provided as a general guide only; they do not constitute, and should not be relied on as constituting legal advice. Please see notice 2. below regarding any subsequent Japanese law advice.

NOTICES

1. ABOUT ATSUMI & SAKAI

Our firm's name is Atsumi Sakai Horitsu Jimusho Gaikokujo Kyodo Jigyō; we are a partnership organized in accordance with the Japanese Civil Code, and a foreign law joint enterprise regulated by the Bengoshi Law, the Law on Special Measures concerning the Handling of Legal Services by Foreign Lawyers and regulations of the Nichibenren (Japan Federation of Bar Associations) and bar associations to which our lawyers belong. We are authorised in Japan to advise on the laws of Japan, England & Wales, Germany (in association with Janssen Foreign Law Office), India, the PRC, the U.S. States of New York and California, United States federal law, the States of Queensland and Victoria (Australia) and Australian Federal law. For further information, please see our website, www.aplaw.jp.

2. JAPANESE LAW ADVICE

Advice on Japanese law will be provided under the supervision and authority of a Bengoshi (Japanese lawyer) Partner or Partners, as identified to you above and/or in correspondence. We will not be liable for any comments or views on Japanese law made by any member of our firm other than a Bengoshi; any such comments or views do not constitute advice on Japanese law and you act on them at your own risk.

3. FOREIGN LAW ADVICE

Advice on any foreign law referred to above will be provided under the supervision and authority of a Registered Foreign Lawyer registered to advise on that law in Japan, as identified to you above and/or in correspondence. We will not be liable for any comments or views on such a foreign law made by any member of our firm other than a Registered Foreign Lawyer as referred to in this paragraph; any such comments or views do not constitute advice on that foreign law and you act on them at your own risk.