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JAPAN'S DATA PROTECTION REGIME -THE WAY OF THE FUTURE?-

PRIVACY RULES REGIONAL CONFERENCE (BEIJING)
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Akira Matsuda
(Tokyo and Singapore)
IWATA GODO

Overview of the Presentation

Part 1

- Overview of the Japanese data protection regulation
- Wholly amended effective May 2017

Part 2

- Adequacy Decisions between EU and Japan (Jan, 2019)
- Additional safeguard measures requirements in Japan

Part 1: CHANGES IN JAPAN (2017)

Key points (APPI)

- Small and Medium Enterprises (SMEs) no longer exempted
- Introduction of the concept of “Sensitive Personal Data” (definition varies among jurisdiction (narrower than EU, but includes victim history))
- Traceability Requirements for Third Party Transfer
- “OPT-OUT” exemption for third party transfer: Stricter Requirements
- Cross-Border Transfer Restriction
- Extra-territorial Application

1 SME Exemption- Abolished

SME Exemption (before 2017)

- SMEs were exempted from APPI obligations
- Definition of SME: Volume of personal database- less than 5,000 during the past six months

No SME Exemption (current)

- Any business operator using personal information database for its business is covered by APPI
- Any foreign corporation which has an office in Japan will be covered by APPI (regardless of size)
- Extra-territorial application

2 Personal Information/Personal Data

Personal Information

i. Information relating to a living individual by which a specific individual is identified; and

ii. Information relating to a living individual containing an individual identification code (i.e. passport number, driver's license number) (New)

- Including information which can be readily combined with other information and make the identification of a specific individual possible

Personal Data

Personal Information which constitutes a "Personal Information Database" (a collective body of information comprising Personal Information systematically organized to be able to retrieve Personal Information)

3 APPI- Main Obligations

Phase		Type of information	Summary of duties
Phase I	Collection	Personal Information	• Disclosure of the Purpose of Use prior to collection of Personal Information. • No need to obtain the individual's consent (except for Sensitive Personal Information).
Phase II	Utilization	Personal Information/Personal Data	• No need to obtain the individual's consent, when utilizing within the scope of a previously disclosed Purpose of Use. • Duty to take reasonable security measures when handling Personal Data. ◦ Mitigated Duties for SMEs
Phase III	Disclosure (to a third party)	Personal Data only	• Consent Requirement • Traceability Requirement • Cross-border Transfer Restrictions.

4 Traceability Requirements (Unique in Japan)

Third Party Transfer

Obligation on Transferring Organization

- **Recording Requirements:** information regarding the transfer (and retain record for designated periods)

Obligation on Receiving Organization

- **Requirements to confirm:** (i) identity of the transferring organization; and

  (ii) source/manner of acquisition of personal data by the transferring organization
- **Recording Requirements:** information regarding the transfer (and retain record for designated periods)

5 Disclosure of Personal Data- Domestic

- Disclosure to a “Third Party”
  - “Third Party” = separate legal entity (i.e. including transfer among group entities)
  - Consent is required for third party transfer of the personal data
- Carve Outs from “Third Party” Definition

Carve Outs (generally applicable)	
Carve out (i)	Entrustment of handling of the Personal Data
Carve out (ii)	Business Succession (i.e. M&A)
Carve out (iii)	Joint Utilization

- Carve out (iii) is important for intra-group personal data management perspectives (i.e. freely transfer personal data among the group if Joint Utilization requirements are met)

6 Disclosure of Personal Data- Overseas

- Specific Consent from the data holder is required.
- Exemptions (generally applicable)

Cross-Border Transfer Exemption	
Exemption (i)	• Transfer to countries listed under the "White List" (currently, EEA only) • Reciprocal Adequacy Decision between Japan and EU (effective Jan 23, 2019)
Exemption (ii)	Appropriate and Reasonable Measures between the Disclosing Party and the Receiving Party (located overseas) : **1) Contracts** between the disclosing Business Operator and the recipient; or **2) Internal Corporate Rules** that are commonly applied to the disclosing Business Operator and the recipient
Exemption (iii)	The recipient receives certification based on the APEC cross-border privacy rules framework (CBPR)

7 What is APEC-CBPR?

- Cross-Border Privacy Rules System (CBPR) introduced by APAC (http://www.cbprs.org/)
- Participating Countries: US, Japan, Mexico, Canada, South Korea, Singapore, Taiwan and Australia
- Accountability Agents (AA) in each participating country will certify that the privacy policies and practices of participating companies are compliant with the CBPR System program requirements. This is to ensure that the cross-border transfer is meeting the requirements as required by APEC Privacy Framework.
- Currently, only two AAs are registered.
  1. Truste (USA (June 25, 2013))
  2. JIPDEC (Japan (January 19, 2016))

7 What is APEC-CBPR? (Cont)

- Entities certified by Truste

Adaptive Insights, Inc.	Hightail, Inc.	Rackspace
Apple Inc.	HP Inc.	Rimini Street, Inc
Asurion	IBM	Saba Software, Inc
Box, Inc.	Kobre & Kim	The Ultimate Software Group
Cisco Systems	lynda.com, Inc.	Workday, Inc.
Electronic Arts	Mashable	Yodlee, Inc.
Hewlett Packard Enterprise Company	Merck & Co., Inc., Kenilworth, NJ, USA	Ziff Davis, LLC

- CBPR Certification Standards (JIPDEC): https://english.jipdec.or.jp/protection_org/CertificationStandards.pdf
- Cost for Certification (JIPDEC): https://www.jipdec.or.jp/protection_org/JIPDEC_AOP_CBPR_003.pdf
  - Model Cost- approx. 6,000 USD
  - Certification Cost per year- approx 700-9,000 USD (Based on revenue of the previous fiscal year)

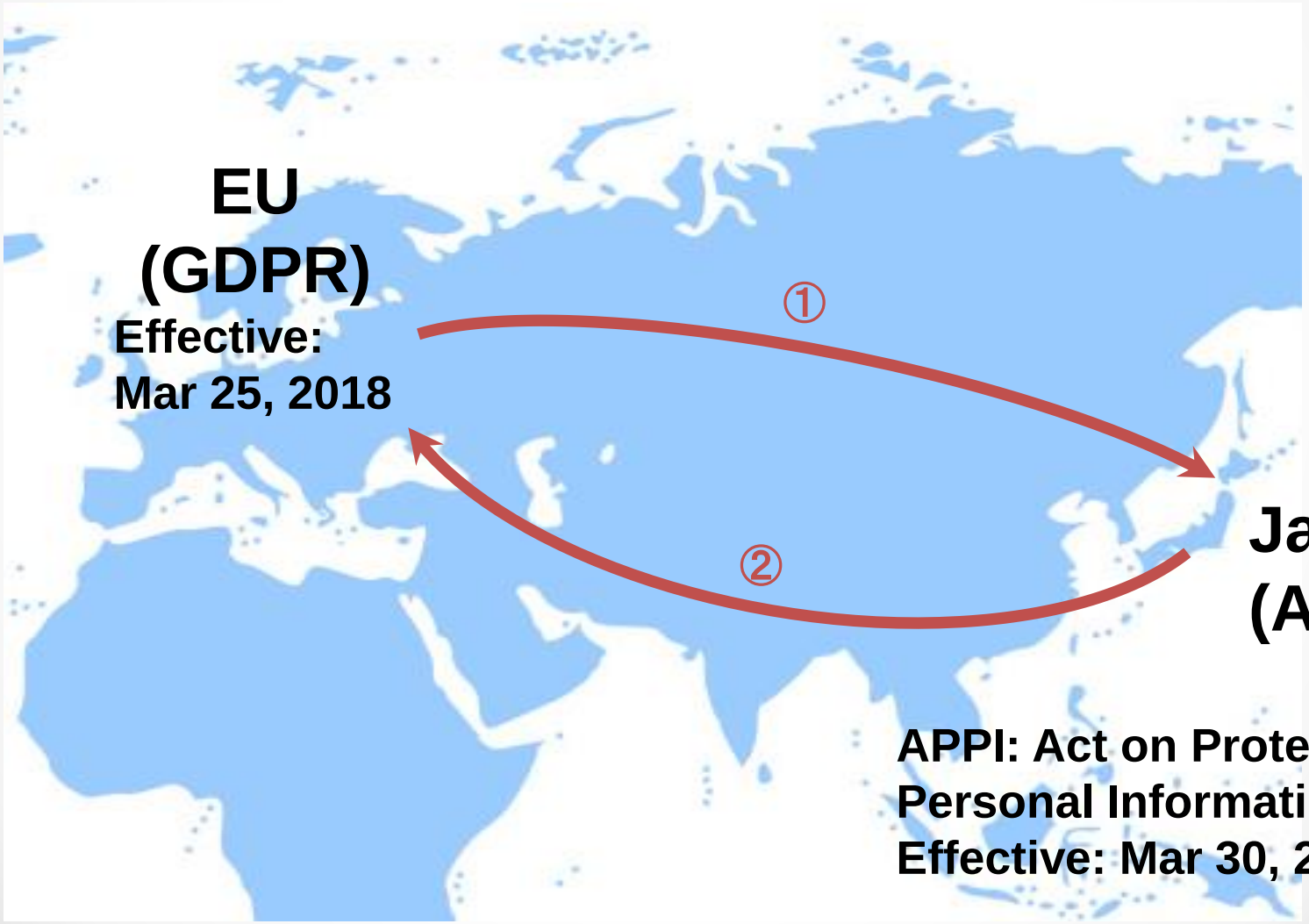
Concluding Remarks (APPI general)

- SMEs exemption lifted off- small operations of foreign corporations in Japan now regulated by APPI
- Legal obligation to install compliance measures:
  - B to B or B to C?- Importance of privacy impact assessment
  - Privacy Policy
  - Internal Rules
  - Coordination with global rules?
  - Cross Border Transfer: Data Transfer Agreement/Binding Corporate Rules
- Regulation in Japan is following the global trends. However, data protection regulation are different in each jurisdiction. Necessity for localization.
- Importance of legal counsels in multiple jurisdiction to work together.
  - Global Compliance structuring
  - Crisis management- data breach: similarity to cartel investigation?

Part 2: Reciprocal Adequacy Decision

- Became effective on Jan 23, 2019
  - EU Commission determined Japan as “adequate” jurisdiction.
  - Japan admitted EEA as countries/areas where adequate protection of personal data equivalent to APPI is ensured.
- EU and Japan will consist the world’s largest “free trade zone” of personal data
- Japan has taken several steps to fill in the gap between GPDR and APPI (also responding to concerns raised by EDPB and EU Commission)
  - Japan enacted “Supplemental Rules,” which prescribes additional safeguards to APPI to fill in the gap between GDPR and APPI.
  - Japan also has amended General Guidelines and Q&A issued by Personal Information Protection Committee.

Cross-border transfer: In the case of EU and Japan



Adequacy Decisions: EU and Japan

EU- GDPR

- Transfer of personal data from EEA to Japan
- SCC or BCR- Lifted for transfer to Japan
- However, additional safeguards in Japan (mandatory) for personal data transferred from EEA under adequacy agreement

Japan- APPI

- Transfer of personal data from Japan to EEA
- Cross-border transfer restriction is lifted

Additional safeguards requirement in Japan

- Coverage: EEA personal data transferred from EEA to Japan based upon adequacy decision.
- Exempted:
  - EEA personal data transferred from EEA to Japan based upon methods other than adequacy decision (i.e. SCC/BCR/consent of the data subject); and
  - Non-EEA personal data

Additional Safeguards	
(i)	Expansion of definition of sensitive personal data
(ii)	Expansion of personal data which is covered by access and correction rights by data subjects
(iii)	Limitation on the purpose of use of personal data as to original purpose and traceability requirements
(iv)	Cross-border transfer restriction on onward transfer of EEA personal data from Japan to outside Japan
(v)	Deletion of anonymization methods for “Anonymized Data” to prevent re-identification

Concluding Remarks (Adequacy Decision)

- To Do List (for entities in Japan):

EEA Personal Data (in Japan)	
(i)	Reflect additional safeguards requirements into internal rules and privacy policy. ○ Additional set of safeguards: Not applicable to EU personal data transferred based on BCR or SCC to Japan. ○ Also not applicable for non-EEA personal data.
(ii)	SCC arrangements (or data transfer agreement) required for onward transfer of EEA Personal Data from Japan to outside Japan.

Cross-border Transfer of Personal Data (from Japan)	
(i)	Explicit Consent from the data subjects
(ii)	Either of below as necessary safeguards: a) Data Transfer Agreement; b) (Binding) Internal Corporate Rules; or c) APEC-CBPR Framework

Presenter : AKIRA MATSUDA

Partner, head of AI/TMT practice group at Iwata Godo. University of Tokyo (LL.B., 2006), Columbia University Law School (LL.M., 2015 (Awarded Harlan Fiske Stone Prize)) and passed NY State Bar in 2015. Nagashima Ohno & Tsunematsu (2008-2015). Currently seconded to Drew & Napier LLC in Singapore (double hat between Tokyo and Singapore).

Mr. Matsuda mainly handles cross-border transactional matters and cross-border disputes. He heads the data protection practice group at Iwata Godo, and in addition to advising client on Japanese revised personal data protection law, he also advises client on GDPR and Singapore data protection law in conjunction with local counsels. Furthermore, he has many track records on advising clients regarding competition law both on domestic and cross-border matters.

≪CONTACTS≫
IWATA GODO
TEL: +81 3 3214 6282 **E-MAIL: amatsuda@iwatagodo.com**

Drew & Napier
TEL: +65 6531 4112 **E-MAIL: akira.matsuda@drewnapier.com**