



BAKER & MCKENZIE

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Protection of Personal Information

Projected changes in Japanese personal data protection act

Daisuke Tatsuno



Amendment of APPI

- Enacted on September 3, 2015
- No immediate effect: most amendments will be in effect by September 2017
- Many details are to be provided in rules published by Personal Information Protection Commission (and not yet published)

Outline of Amendments

1. Establishment of Personal Information Protection Commission (PPC)

- PPC's powers include
 - ❖ request reports
 - ❖ conduct inspections
 - ❖ issue administrative orders
- No power to issue monetary penalty



2. Sensitive data

- Defined to mean
 - ❖ “Information that needs special care to avoid discrimination or other disadvantages,
 - ❖ such as race, belief, social status, medical history, criminal history, fact of having suffered a crime, to be further specified by the governmental ordinance”
- Collection of sensitive data requires consent
- No governmental ordinance has been issued

3. Transfers of personal data to third parties

- Consent is still required
- In addition,
 - ❖ the transferring party needs to keep records of transfer
 - ❖ the receiving party needs to confirm certain facts and keep records of receipt

in accordance with the rules to be provided by the PPC

4. Cross-border transfers of personal data

- Cross-border transfers only where
 - ❖ specific consent for transfer to overseas third party is obtained
 - ❖ the third party has system deemed equivalent to Japanese system; or
 - ❖ the third party is in a country which is designated to have adequate precautionary measures

5. Extra-territorial application of APPI

- Certain provisions such as:
 - ❖ notification of purpose of use
 - ❖ transfer of personal data to a third party
 - ❖ cross-border transfer
 - ❖ data subject's right to demand disclosure
- are directly applied to foreign entities which provides goods or services to individuals in Japan



6. Anonymized information

- New requirements to anonymize when transferring to third parties
- Data should not be capable of being recreated

7. Opt-out

- More difficult to utilize “opt-out”
- Committee notification will be required

8. More severe penalty for personal data theft

- Benesse case



Effect for the Luxury Industry

- Transfer/receipt of personal data to/from a third party
 - ❖ For example:
 - Transfer of customer data to the parent company
 - Receipt of customer data from partner company or agent
 - ❖ Provision of credit card information via online shop, etc?



Effect for the Luxury Industry

- Cross-border transfer
 - ❖ Transfer of personal data to the foreign parent company or affiliate
 - Specific consent should be obtained
 - Except if the affiliate has system to ensure protection of personal information, or is in a certified country

Will business practices change?

- The PPC noted that it does not want to cause confusion to the businesses
- The rules that PPC creates will not significantly change current business practices
- However certain additional obligations, such as record keeping requirements, cannot be avoided.





How to prepare?

- Carefully monitor PPC's publication of rules – PPC will accept submission of opinions.
- Prepare for record and maintenance relating to:
 - ❖ when personal information is received from third parties
 - ❖ when personal information is provided to third parties
- Check whether cross-border transfers are allowed
- Opt-out notifications for third party transfers

EU privacy law developments

a focus on the luxury and fashion goods industry

Kensaku Takase



EU Development of privacy laws

- Europe since 1970s / 80s
- Why?
 - ❖ advances in information and communication
 - ❖ internet
 - ❖ global corporate networks



EU Data Protection Regulation - Overview

What is it?

- ✓ Regulation v. Directive
- ✓ First major update since 1995
- ✓ What will happen to national law?
- ✓ Is it enacted yet? Is it final?
- ✓ When will it be effective?
- ✓ Does it apply to companies outside the EU?
- ✓ What are the major changes?



Basic terminology

- Data controller （データ管理者）
 - ❖ Determines the purposes of processing
- Data subject （データ主体）
 - ❖ identified or identifiable person with whom the personal data relates
- Data processor （データ処理者）
 - ❖ processes the personal data according to data controller's instructions



1 DPOs

2 Data breach reporting

3 Cross-border data transfer

4 Consent

5 Data mapping





6 Cross-border Data Transfer

7 Data Processor Obligations

8 Rights for Data Subjects

9 Enforcement and Sanctions



Data Protection Officer (DPO)



What is a Data Protection Officer

- Purpose: self regulation by companies
- Reports directly to the head of the data controller or processor
- Acts as contact person for the data protection authorities
- DPO must be capable to exercise his/her function in complete independence
- Obligation by company
 - ❖ to involve DPO in all issues relating to protection of personal data
 - ❖ to provide support (e.g., provision of resources, access, maintenance of knowledge/expertise).

Data Breach Reporting

What incidents must be reported to the DPA?

Main rule

- ✓ report any personal data breach

Main exemption

- ✓ no obligation to report if the breach is “unlikely to result in a risk for the rights and freedoms of individuals”

Example

An envelope containing credit card slips was mistakenly thrown into a waste bin rather than securely destroyed.

- ✓ **likely risk**: if the envelope was found by a third party
- ✓ **exempted breach**: if the unopened envelope was found by the controller.



When to report to the DPA?

When?

- without undue delay;
- where feasible, not later than 72 hours after having become aware of it, notify the personal data breach;
- If notified on > 72 hours: justification for delay is required

What to include in the report?

- categories and approximate number of data subjects and data records concerned;
- contact details of DPO or alternative representative;
- likely consequences and measures taken to address & mitigate

Communicating the data subject

When?

- If the personal data breach is likely to result in a high risk for the rights and freedoms of individuals;

Exemptions

- If the compromised data were rendered unintelligible (encrypted);
- If the high risk was mitigated effectively;

What?

- Same information as in notification to DPA

How?

- Default: direct communication to affected data subjects
- Public communication permitted if to avoid 'disproportionate effort'



International Data Transfers



International Data Transfers

Exceptions from transfer prohibitions include:

- consent
- contract with data subject
- contract in the interest of data subject
- public interest
- legal claims
- interests of data subject
- interest balancing
- country/state/sector adequacy decision
- data processing/transfer agreements; SCC
- BCR, Code of Conduct, Certification

US and EU Safe harbor rules

European Commission Decision (2000/520) that US corporations complying with the Framework's privacy principles and notice and opt out requirements had "adequate" levels of data protection



Schrems case

- Snowden
- Facebook data
- Claim that US offers inadequate protection:
 - ❖ against US government surveillance
 - ❖ redress for EU citizens (not “essentially equivalent”)

Safe harbor rule violates the 1998 directive



European Court of Justice decision (Oct. 2015)

- Commission failed to state that the US ensured an adequate level of protection
 - Commission cannot prevent member states from suspending data transfers to countries with inadequate protections
1. Major flaws mean Decision 2000/520 is dead
 2. Power back to member states
 3. Privacy shield developed





Privacy Shield

- Similar to Safe Harbor, but additional requirements:
 - ❖ Clear safeguards and transparency obligations on US government access
 - ❖ Strong obligations on companies handling Europeans' personal data and robust enforcement
 - ❖ Effective protection of EU citizens' rights with several redress possibilities
 - ❖ Aim to finalize Privacy Shield by June 2016



Privacy Shield

- However, EU authorities (Article 29 Working Party) said:
 - ❖ “Strong concerns.. on commercial aspects and the access by public authorities to data transferred...”



Consent

Consent Takeaways

- ✓ Consent as a processing condition is retained in principle.
- ✓ The GDPR is more prescriptive (codifying authority requirements)
- ✓ Silence, pre-ticked boxes and inactivity will no longer suffice for there to be valid consent.
- ✓ E-commerce and social media: Parents required to consent where children are under a particular age (varying between 13 to 16 years old).

Data Mapping

Data Mapping – the 5Ws of Personal Data

Who	Where	Why	When	What
are we? are our data subjects? has access to personal data?	do we keep their personal data? do we transfer personal data to?	is personal data under our control?	are we keeping personal data until? do we share personal data with others?	mechanisms do we have in place to safeguard personal data?

Data Processor Obligations



New obligations upon Data Processors

- Accountability – need to maintain written records for all processing activities
- Co-operation with authorities
- Security - must have appropriate technical and organizational measures
- Breach notifications – must notify of breach to controller without undue delay
- Sanctions – up to 4% of global annual turnover

Rights for Data Subjects



New rights for Data Subjects

- Right to be forgotten
 - ❖ The right to obtain erasure and the obligation to erase data without undue delay
- Right to restriction of processing where:
 - ❖ Accuracy of data is contested by the data subject
 - ❖ Data processing is unlawful
 - ❖ Data controller no longer needs relevant data
 - ❖ Data subject has objected the data processing and verification is pending



New rights for Data Subjects

– Right to Data Portability

- ❖ To receive personal data provided to controller in a structured and commonly used format
- ❖ To ask for transmission of data to another controller

Enforcement and Sanctions

Fines

€ 20M

**4% of total worldwide
annual turnover of
preceding financial year**

Example

Infringement of basic principles for processing, data subjects' rights, or obligations pursuant to Member State laws adopted under the GDPR



Trade secrets and TPP

Changes to the unfair competition prevention act (trade secrets)

Kei Matsumoto



Definitions

- Article 2(6) of Unfair Competition Prevention Act:
 - ❖ The term "trade secret" as used in this Act means technical or business information useful for business activities, such as manufacturing or marketing methods, that is kept secret and that is not publicly known.
- Three Requirements:
 - ❖ “useful”
 - ❖ “not publicly known”
 - ❖ “kept” as “secret”



Amendment to UCPA from Jan. 1, 2016

– Stronger Criminal Rules

Higher fine

Forfeiture Rules

Complaint unnecessary

Broader scope (attempt)

– Civil Remedies

New assumption rules

Extension of time bar

– Prohibit sales, export and import of the products made by trade secret misappropriation

Amendment to UCPA from Jan. 1, 2016

– Stronger Criminal Rules

❖ Higher Fine (JPY)

	Current	Amendment	Cross Border
Individual	10 mil	20 mil	30 mil
Company	300 mil	500 mil	1 billion

❖ Broader Scope

- Cross border or ex-territory
- Resale of wrongfully acquired trade secret
- Attempt



Amendment to UCPA from Jan. 1, 2016

– Stronger Criminal Rules

❖ Strong and flexible forfeiture

- Broader scope (e.g., can take certain “profits” from trade secret misappropriation subject to criminal sanction)
- Can consider civil remedies
- Detailed procedural rules



Amendment to UCPA from Jan. 1, 2016

- Prohibit sales, export and import of the products made by trade secret misappropriation
 - ❖ Such conduct will be subject to civil remedies and criminal sanction.
 - ➡ Was not defined as “Unfair Competition”
 - ❖ Border protection like ITC in US?
 - Amendment to the Custom Act is under discussion

TPP: What is the situation?

Junko Suetomi



TPP | Overview

- Twelve nations signed the pact in February 2016, agreeing to remove or lower tariffs and introduce unified international trade and investment rules under a deal that covers 40 percent of the global economy. Details of the TPP were agreed upon by the signees last year.
- The agreement will enter into force 60 days after all 12 countries ratify it. But if all 12 nations have not ratified it after two years, it will take effect 60 days after at least six countries, accounting for 85 percent of the combined gross domestic product of the 12 signatories, do so.





TPP | Current Situation in Japan

- **4 February 2016:** Trans Pacific Partnership (TPP) Agreement was signed by representatives of member countries.
- **8 March 2016:** The Cabinet of Prime Minister Shinzo Abe approved a set of bills to bring into effect the TPP. The government aimed to have the free-trade pact ratified and the bills enacted during the current Diet session. However, Confronting Kumamoto earthquake, it is likely that the ratification is postponed to Extraordinary Diet Session after the Upper House Election this summer.
- A total of 11 laws need to be revised in Japan to include new rules and protections against changes as a result of the TPP.



TPP | Current Situation in Japan (continued)

- Deliberations on the respective bills started in April at the level of the House of Representatives. Another panel will also be established in the House of Councilors.
- Copyrights and trademarks, for example, will be preserved for 70 years after the creators die under the deal, longer than the current 50 years in Japan.
- Violation of copyrights could be subject to presecution without a complaint from victims, while currently it is subject to presecution only when a complaint is filed by victims. In a civil litigation, courts will be able to decide damages amounts based the specific rules.

TPP | Current Situation in Other Member States

- **Malaysia:** Necessary Diet approval obtained.
- **Singapore:** Currently amending relevant systems.
- **Brunei:** No objections in the country.
- **Vietnam:** Expecting Diet approval in July.
- **Mexico, Australia:** Expecting Parliamentary approval in 2016.
- **Chile, Peru, New Zealand:** Expecting Parliament approval.
- **US:** Difficult to predict in light of current election campaign.
- **Canada:** In the process of Parliamentary approval.
- **Japan:** Completed Cabinet approval and has been submitted to the Diet.





What TPP means to Luxury & Fashion Industry in Japan



What TPP means to Luxury & Fashion Industry | Overview

1. Customs duties on industrialized products are almost zero → 99% coverage
2. Business Oriented Rules:
 - Country of Origin Rules:
 - ❖ Unified rules for country of origin among 12 nations
 - ❖ Self-certification system for country of origin
 - ❖ Introduction of a “complete accumulation” rule
 - ❖ Facilitate transportation among member countries (transportation via third country in TPP)
 - Support for small- and middle-size businesses



What TPP means to Luxury & Fashion Industry | Overview

- Introduction of Investment Chapter in the multilateral agreement
 - ❖ Investor-State Dispute Settlement system
- Facilitation of Customs Clearance Process
 - ❖ Importers can pick up cargo in six hours, if urgent. Ordinarily, within 48 hours.



What TPP means to Luxury & Fashion Industry | Relevant Chapters in TPP

1. Rules of Origin and Origin Procedures (Chapter 3)
2. Textile and Apparel Goods (Chapter 4)

Chapter 3 and 4 of the TPP will eliminate or reduce duties on textile and apparel goods that originate from any of the participating countries provided that specific rule of origin and other TPP requirements are met.



What TPP means to Luxury & Fashion Industry | Rule of Origin

1. “Yarn-forward” rule: preferential treatment under TPP will be allowed if the component determining classification meets both the following two criteria:
 - a. knit or woven in TPP countries FROM yarn spun or extruded in TPP countries; and
 - b. apparel is cut or knit to shape or both + sewn or otherwise assembled in TPP countries.
2. “Cut and sew” rule: for certain apparel goods (such as brassieres and baby garments), the yarn or fabric can be sourced from anywhere but must be cut and sewn within a TPP participating country for the final goods to qualify



What TPP means to Luxury & Fashion Industry | Rule of Origin

1. “Short Supply List of Products” allows fabrics, yarns and fibers not commercially available in the TPP participating countries to be sourced from non-TPP countries and still qualify for benefits, provided they are used in the manufacture of a specific textile or apparel goods.
2. Short Supply List contains some temporary products that will be removed from the list five years after the TPP entered into force.



Tax issues

BEPS / TP: what is the situation?

Howard Weitzman



Japan Overview – Attitude Toward BEPS

- OECD Member State
- Japanese government has expressed support for BEPS initiative
- Japan may be considered a first implementer of many initiatives:
 - ❖ CFC rules
 - ❖ Thin cap / earning stripping provisions
 - ❖ Taxes on provision of digital services
 - ❖ CBS reporting obligations
 - ❖ LOB provisions in many treaties



Japan Overview – Attitude Toward BEPS

- Japan signed the MCAA in January 2016 (BEPS Action 15)
 - ❖ Covers CBC reporting
- Japan has expressed support for entering MCAA-type agreements with respect to other issues, including treaty issues / LOB (Action 16)



Which Will Affect Foreign Corps in Japan?

– Japan signed the MCAA in January 2016 (BEPS Action 15)

❖ Covers CBC reporting

WHO

- MNEs rev \geq JPY 100B
- Japanese parent / sub / branch

WHEN

- For FY on or after 1-1-16
- Filing deadline one year after close of parent's relevant FYE
- Must be made electronically

WHAT

- Tax jurisdiction
- Int & ext revenues
- Profit / EBT
- Income tax paid
- Income tax accrued
- Stated capital
- Accumulated earnings
- Number of employees
- Tangible assets
- Activities (by entity)



Which Will Affect Foreign Corps in Japan?

– Master File

❖ What is it?

- Provides overview of MNE's global business operations, overall TP policies, global allocation of income and economic activity.
- High level – detailed information not requested BUT:
- ***Information regarding TMs, intangibles?!***

❖ Who must file?

- MNE that has group consolidated revenues of JPY 100B (both Japan HQ or branch / sub)

❖ When? FYE on or after April 1, 2016



Which Will Affect Foreign Corps in Japan?

— Master File:

WHO

- MNEs rev \geq JPY 100B
- Japanese parent / sub / branch

WHEN

- For FY on or after 1-1-16
- Filing deadline one year after close of parent's relevant FYE
- Must be made electronically

WHAT

- MNE's legal / geographic org structure (chart)
- General description of business (markets, functional analysis, etc.)
- Intangible related information (strategy for development, list of intangibles, agreements, policies relating to intangibles, etc.)
- Intercompany financing activities (description of how group is financed, which entity provides financing, TP policies relating to financing, etc.)
- Financial and tax positions (including list of any APAs, rulings, etc.)



Which Will Affect Foreign Corps in Japan?

– Local File

- ❖ More detail required than in the Master File – similar to Japanese TP documentation requirements
- ❖ Who must prepare?
 - All, but contemporaneous (i.e. by tax filing deadline) requirement for related party transactions > JPY 5 billion or intangible transactions > JPY 300 million
- ❖ When must it be submitted to the tax authorities?
“Without delay” upon request in an audit – specifically, 45 days or 60 days



Which Will Affect Foreign Corps in Japan?

– Local File:

WHO

- Related party transactions of > JPY 5B or intangible transactions > 300M
- Japanese parent / sub / branch

WHEN

- “without delay”:
- contemporaneous → 45 days
- Non-contemporaneous → 60 days

WHAT

- Local entity info (org chart, competitor list, description of business, etc.)
- Controlled transaction info (description of trans, amounts, copies of agreements, TPM used, etc.)
- Financial info (local accounts, etc.)



Which Will Affect Foreign Corps in Japan?

- Take home messages – CBC, Master File and Local File
 - ❖ For largest companies, much to prepare in terms of CBC Reporting and CBC reporting.
 - ❖ For smaller companies, Local File quantifies Japan's TP documentation rules – secret comparables are still a risk
 - ❖ For all companies, Japan is not the only concern! The EU Commission is mulling rules that would require MNCs operating in EU (with global revenue of EUR 750M / year) to publicly disclose financials



Which Will Affect Foreign Corps in Japan?

- Treaty Issues: Limitation of Benefits (LOB) provisions?
New “general anti-avoidance rules” (GAAR)?
- Japan does not currently have a domestic GAAR, BUT
 - ❖ Art. 132 of Corporate Tax Law (closely held corporations)
 - ❖ Art. 132-2, 132-3 (corporate reorgs / transactions within a consolidated group)
 - ❖ *These have similar effect to a general GAAR*



Which Will Affect Foreign Corps in Japan?

- Japan's MOF has met to discuss whether implementing a GAAR in domestic law would be feasible
 - ❖ MOF seems to be leaning toward possible implementation of a “reportable transaction” system similar to that in effect in the US – possibly to appear in Japan's 2017 tax reform.
 - ❖ Mixed results for taxpayers in the courts (Yahoo case, Guidant case)



Which Will Affect Foreign Corps in Japan?

- Comprehensive global treaty network
 - ❖ Many of Japan's older treaties have no LOB provision (Ireland, Singapore, etc.)
 - ❖ Most newer treaties do (US, Canada, Netherlands, etc.)
- Satisfying the LOB clause of a Japanese bilateral treaty may not be straightforward in the case of a privately-held offshore taxpayer, the residence of whose members is unclear
 - ❖ For example, in the case of a taxpayer that is privately held by multiple US-based funds



Which Will Affect Foreign Corps in Japan?

- As uncertainty exists under, for example, the active business test of the LOB, the fallback position for many taxpayers is obtaining CA approval
- The Japan CA is usually reasonable in granting confirmation that treaty benefits are available
 - ❖ The PPT provision of the LOB has not represented an unreasonably high threshold to overcome in obtaining CA confirmation, when a taxpayer makes good faith request



How About Japan HQ Companies?

- Japan's CFC Rules: Will any restructuring need to be implemented as EU tax rates drop?
- Business purpose in restructuring: more important than before?
- Any restructuring with hybrid entities, etc. that may be necessary?



Take Home Messages

- Japan has long had *de facto* TP documentation rules, now requirements are more clearly set out in law
- Prepare for an audit: Aside from TP documentation, Other intercompany documentation (agreements, etc.) are important. Put agreements and TP policy in place; actually conform to policy and what is written in the documents!
- CNC requirements - Gathering information necessary to comply with CBC is an arduous task. Will be a lot to deal with – start as early as practicable.
- There is much happening in the EU, in particular, with regard to BEPS developments. Watch this space!



Civil Code issues

How changes to the Civil Code will impact luxury brands?

Jean-Denis Marx



Adhesive terms and conditions (約款)

Fixed form transactions (定型取引): uniformed transactions taking place between one person and an unspecified number of persons

Adhesive terms and conditions (約款): collective body of terms and conditions made available by a specific person with the purpose of making these terms and conditions the contents of a contract



Adhesive terms and conditions (約款)

Deemed consent (みなし合意): 2 conditions

- Agreed that the adhesive terms and conditions represent the terms of a contract
- Adhesive terms have been shown to the other party as content of a contract

No deemed consent for:

“clauses that unilaterally harm the interests of the other party [...] by restricting the rights or increasing the obligations of the other party”



Obligation to show

- Obligation to show the adhesive terms and conditions during a certain period of time

Except if:

- ❖ Submitted in writing
 - ❖ Sent by email
- Refusal to show : no deemed consent



Changing adhesive terms and conditions

Possible if:

- Matches the general interest of the other party (相手方の一般の利益に適合するとき)
- Does not violate the purpose of the contract and is reasonable (契約をした目的に反せず、かつ合理的なものであるとき)

Reasonable: justified + appropriate



Consumer Contracts Law

- Changes being discussed, possible law amendment in 2016
- Rescission for mistaken belief in an important matter: extension from “quality, purpose of use, details of the object, price” to “any matter required for the consumer to enter into the contract”
- New clause to allow rescission of contract covering volumes which are more than necessary
- Extension of the period allowed for rescission from 6 months to 1 year



Consumer Contracts Law

- Rescission: no obligation to restore to initial conditions (to adjust with projected changes to the Civil Code).
- Add a black list of prohibited clauses (current law: only general clause on clauses that expand or limit rights beyond legal provisions, excessive penalties) incl. (possibly)
 - ❖ Prohibition of cancellation
 - ❖ Salvage clauses (“no liability to the extent authorized by law”)
 - ❖ Interpretation of contract to be done exclusively by operator
- Add a “grey list” (invalid if certain conditions are met)

Wrap-up and Q&A

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