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Will the U.S.-Japan Digital Trade Agreement Change the Civil Liability Exposure of Online Platform Service Providers in Japan?

■ Data Protection and Privacy

Recent Trends of the Personal Information Protection Commission of Japan

Recently, the Personal Information Protection Commission of Japan (the “PPC”) has been proactive in publicizing cases of data breaches that have had a significant social impact, together with the names of the companies.

I. Background

With the partial enforcement of the amended Act on the Protection of Personal Information (the “Act”) from January 2016, the PPC was established as a regulatory body responsible for managing and ensuring compliance with the Act. Under the Act, the PPC has been granted supervisory authority over companies that had previously been regulated by the relevant competent ministers. Specifically, the PPC is empowered to:

- issue formal requests to report, conduct onsite inspections, and issue formal guidance (*shidou*) and advice (*jogen*) to companies to the extent necessary for the enforcement of the Act; and
- issue formal recommendations (*kankoku*) or orders (*meirei*) to companies when they violate certain provisions and requirements of the Act.

The establishment of the PPC has significantly increased the exercise of supervisory authority at large.¹ On the other hand, until recently, it was common practice for the PPC not to publicize the names of the companies that were subject to the exercise of its supervisory authority. In fact, until July 2019, the PPC had publicized only one case where it identified the relevant company by name.²

1 For example, there were less than 10 formal requests to report per year prior to the PPC being established in 2016. However, the PPC issued 305 formal requests to report in FY2017 and 391 in FY2018. On the other hand, no more than one recommendation has been issued per year in the past few years, and no orders have been issued thus far.

2 On October 22, 2018, the PPC publicized, together with the name of the relevant company, the fact that it had issued formal guidance to a major social networking service company headquartered in a foreign country. According to the PPC, it found that (i) the company had inappropriately received personal data such as website browsing history, (ii) the company had inappropriately provided its users’ personal data

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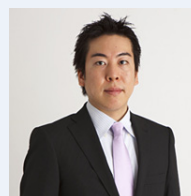
■ Data Protection and Privacy



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II. Recent cases publicized by the PPC

From August to December 2019, the PPC publicized three cases of data breaches together with the names of the relevant companies:

- (a) On August 26, 2019, the PPC publicized, together with the name of the relevant company, the fact that the PPC had issued a formal recommendation and guidance to a major Japanese human resources service company that operates a job-hunting website (“Company X”). The PPC found that Company X provided the personal data of approximately 8,000 job-hunting students who were members of its website to its client companies without obtaining the consent of the data subjects, and that Company X had not taken necessary and appropriate measures for the secure management of personal data. In the recommendation and guidance, the PPC instructed Company X, among other things, to improve its awareness of the protection of personal data on a company-wide basis, to ensure that personal data is handled appropriately in accordance with the Act when designing and operating new services, and to clearly provide information necessary for data subjects to determine whether or not to agree to the provision of their personal data to third parties. The PPC announced that it publicized the case in light of its social impact.

Furthermore, on December 4, 2019, the PPC publicized, together with the names of the relevant companies, the fact that the PPC had issued (i) a formal recommendation and guidance to Company X for a second time, (ii) a formal recommendation to a company that outsources work to Company X, and (iii) formal guidance to a total of 37 client companies of Company X that had used the services provided by Company X.³ In terms of the relevant background, an investigation conducted after the first recommendation had been issued to Company X revealed new facts concerning violations of the Act which increased the number of data subjects affected by the data breach to approximately 26,000. In the recommendations and guidance, the PPC (i) instructed Company X, among other things, to establish a system to ensure that personal data is handled appropriately in accordance with the Act when designing new services, (ii) instructed the outsourcing company to conduct necessary and appropriate supervision over subcontractors when outsourcing work, and (iii) instructed the client companies, among other things, to notify or announce the purpose of its use of personal data appropriately and, in certain cases, to conduct an organization-wide legal review and take necessary actions when providing personal data to third parties.

- (b) On September 17, 2019, the PPC publicized, together with the name of the relevant company, the fact that the PPC had issued formal guidance twice to a Japanese company that provides taxi-related services, such as a taxi dispatch application. According to the publication by the PPC, it found that the company did not sufficiently inform taxi users that it would capture the facial images of taxi users with a camera attached to a tablet terminal installed in its taxis and use the images for optimizing advertisement distribution. Although the PPC issued guidance to the company in November 2018 and instructed the company to provide a simplified explanation to taxi users, the company did not implement improvement measures until April 2019. In light of the above circumstances, the PPC issued guidance for a second time and publicized the case together with the name of the company in September 2019.
- (c) On October 11, 2019, the PPC publicized, together with the name of the relevant company, the fact that the personal data (e.g., name, delivery address and order history) of approximately 110,000 user accounts on an e-commerce website operated by a major online retailer headquartered in a foreign country may have been viewable by other users due to a temporary system error. While the PPC

obtained through an application to a third party, and (iii) its users’ data had been accessed without authorization by a third party. In the guidance, the PPC instructed the company, among other things, to provide a simplified explanation to its users and to make sure to thoroughly monitor the status of application activities on its platform. The PPC said that it publicized the case in light of its social impact.

³ However, with respect to (iii), the PPC did not publicize the names of three companies that had not purchased the personal data in question.

Recent Publications

- ***The International Comparative Legal Guide to: Merger Control 2020 - Chapter 28 Japan***
(Global Legal Group Limited, December 2019)
by Ryohei Tanaka and Kota Suzuki
- ***The International Comparative Legal Guide to: Corporate Tax 2020 - Chapter 21 Japan***
(Global Legal Group Limited, December 2019)
by Shigeki Minami
- ***Does Interest Rate Restriction Act apply to corporate bonds?***
(International Law Office Online Newsletter “Capital Markets-Japan”, December 2019)
by Takashi Tsukioka
- ***Japanese Gambling Industry Prospects: Interview with an Expert***
(LoginCasino - online gambling business magazine, November 2019)
by Masayuki Fukuda
- ***Chambers Global Practice Guides Project Finance 2019 Second Edition Japan - Law & Practice***
(Chambers & Partners Publishing, November 2019)
by Rintaro Hirano
- ***The International Comparative Legal Guide to: Gambling 2020 - Chapter 24 Japan***
(Global Legal Group Limited, November 2019)
by Masayuki Fukuda
- ***Offshore Wind Fact Sheet - Japan***
(Watson Farley & Williams LLP (online), November 2019)
by Kiyoshi Honda (Co-author)
- ***The International Comparative Legal Guide to: Cartels & Leniency 2020 - Chapter 18 Japan***
(Global Legal Group Limited, November 2019)
by Yusuke Kaeriyama and Takayuki Nakata

instructed the company to take measures to prevent a recurrence and to respond to inquiries from the users, it did not exercise supervisory authority over the company pursuant to the Act.

III. Comment

As described above, the PPC has recently been proactively publicizing cases of data breaches that have a significant social impact, even when the PPC did not exercise supervisory authority over the company. We should carefully monitor whether such trend will continue in the future.

The PPC's views expressed in the above three cases may also provide the following practical points of reference for companies:

- In the first case described above, the PPC pointed out that there was a procedural mistake when Company X changed its service and amended its privacy policy. As a result, Company X provided the personal data of the members who registered prior to the service change to the third party without obtaining their consent. This suggests that when companies change their service and amend their privacy policy, they should consider carefully whether they are doing so in accordance with the procedures required by the Act (e.g., whether they need to obtain consent from existing users).
- In the first case described above, the PPC found that Company X did not appropriately consider compliance with the Act when providing the service in question, and had no system to prevent, detect, or correct any procedural deficiencies. This suggests that companies need to establish a system capable of protecting personal data, including detecting and correcting any identified deficiencies. Companies also need to sufficiently consider whether they are structured to comply with the requirements of the Act when they commence the provision of new services.
- In more than one case, the PPC mentioned that the provisions of the privacy policy and/or the explanations of how the companies handle personal data were not easy for users to understand. It is anticipated that the PPC will continue to closely review whether privacy policies and/or explanations to data subjects are appropriate and easily understandable.

■ IT and Telecommunications

Will the U.S.-Japan Digital Trade Agreement Change the Civil Liability Exposure of Online Platform Service Providers in Japan?

I. Introduction: The U.S.-Japan Digital Trade Agreement

On October 7, 2019, Japan and the United States signed an agreement concerning digital trade⁴ (the “U.S.-Japan Digital Trade Agreement”) which establishes rules addressing various priority areas to help enhance digital trade between the two countries. According to the *FACT SHEET on U.S.-Japan Digital Trade Agreement* published by the Office of the U.S. Trade Representative, these rules achieve the following important objectives:⁵

1. *Prohibiting application of customs duties to digital products distributed electronically, such as e-books, videos, music, software, and games.*
2. *Ensuring non-discriminatory treatment of digital products, including coverage of tax measures.*
3. *Ensuring that data can be transferred across borders, by all suppliers, including financial service suppliers.*
4. *Facilitating digital transactions by permitting the use of electronic authentication and electronic signatures, while protecting consumers’ and businesses’ confidential information and guaranteeing that enforceable consumer protections are applied to the digital marketplace.*
5. *Prohibiting data localization measures that restrict where data can be stored and processed, enhancing and protecting the global digital ecosystem; and extending these rules to financial service suppliers, in circumstances where a financial regulator has the access to data needed to fulfill its regulatory and supervisory mandate.*
6. *Promoting government-to-government collaboration and supplier adherence to common principles in addressing cybersecurity challenges.*
7. *Protecting against forced disclosure of proprietary computer source code and algorithms.*
8. *Promoting open access to government-generated public data.*
9. *Recognizing rules on civil liability with respect to third-party content for Internet platforms that depend on interaction with users.*
10. *Guaranteeing enforceable consumer protections, including for privacy and unsolicited communication, that apply to the digital marketplace, and promoting the interoperability of enforcement regimes, such as the APEC Cross-Border Privacy Rules system (CBPR).*
11. *Ensuring companies’ effective use of encryption technologies and protecting innovation for commercial products that use cryptography, consistent with applicable law.*

Among the above, item 9 is particularly noteworthy because it appears that the U.S.-Japan Digital Trade Agreement contemplates a change to the current legislative perspective regarding the civil liability exposure of online platform service providers in Japan.

II. Civil Liability Exposure of Online Platform Service Providers in Japan

Recently, in Japan, like in many other countries of the world, providers of online platform services, most notably social networking services like Facebook and Twitter, are facing significantly increasing numbers of Internet-related legal claims. These often comprise (i) claims for the removal of allegedly defamatory or copyright-infringing content, (ii) claims seeking disclosure of information relating to users who post allegedly infringing content, and (iii) claims seeking compensation for damages or for other forms of legal relief.

In Japan, the civil liability of online platform service providers is limited by a statutory law commonly called the “Provider Liability Limitation Act.”⁶ Article 3, paragraph 1 of such Act provides that an online platform provider shall not be liable

⁴ https://ustr.gov/sites/default/files/files/agreements/japan/Agreement_between_the_United_States_and_Japan_concerning_Digital_Trade.pdf

⁵ <https://ustr.gov/about-us/policy-offices/press-office/fact-sheets/2019/october/fact-sheet-us-japan-digital-trade-agreement>

⁶ The official name of the Act is the “Act on the Limitation of Liability for Damages of Specified Telecommunications Service Providers and the Right to Demand Disclosure of Identification Information of the Senders” (Act No. 137 of 2001).

for any content posted on its platform unless it is or could have been aware that such content infringes on a third party's legal right, including intellectual property rights. That is to say, an online platform provider may be liable in Japan if it fails to remove or take other appropriate action against infringing content within a reasonable period after it becomes aware of it. In that sense, an online platform provider in Japan cannot enjoy the same broad scope of immunity from liability provided under the Communications Decency Act of the United States (Title 47, United States Code, Section 230), which provides in part: "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."

III. Will the U.S.-Japan Digital Trade Agreement Change the Civil Liability Exposure of Online Platform Service Providers in Japan?

Article 18, paragraph 2 of the U.S.-Japan Digital Trade Agreement states the following:

"neither Party shall adopt or maintain measures that treat a supplier or user of an interactive computer service as an information content provider in determining liability for harms related to information stored, processed, transmitted, distributed, or made available by the service, except to the extent the supplier or user has, in whole or in part, created or developed the information"

Some may argue that this provision indicates that the Japanese government is committed to granting online platform service providers a higher level of immunity from civil liability similar to that provided under the Communications Decency Act. In fact, the New York Times has reported that "[t]he Trump administration has begun inserting legal protections into recent trade agreements that shield online platforms like Facebook, Twitter and YouTube from lawsuits."⁷

However, concurrent with the signing of the U.S.-Japan Digital Trade Agreement, the Japanese and U.S. governments exchanged side letters confirming that the Provider Liability Limitation Act "is not inconsistent with Article 18 [of the U.S.-Japan Digital Trade Agreement]" and that "Japan need not change its existing legal system, including laws, regulations, and judicial decisions, governing the liability of interactive computer services suppliers, to comply with Article 18."⁸ The Japanese government also officially stated at a National Diet session that it does not plan to amend the Provider Liability Limitation Act for the time being.

Therefore, it appears that a difference in the legislative perspectives of the United States and Japan regarding the civil liability exposure of online platform service providers will continue to exist even after the U.S.-Japan Digital Trade Agreement takes effect.

⁷ <https://www.nytimes.com/2019/10/07/business/tech-shield-trade-deals.html>

⁸ https://ustr.gov/sites/default/files/files/agreements/japan/Letter_Exchange_on_Interactive_Computer_Services.pdf

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