



5<sup>th</sup> Round of Trade Negotiations between the European Union and Indonesia

## **EU provisions on *Cross-border data flows and protection of personal data and privacy* in the Digital Trade Title of EU trade agreements**

Explanatory note – July 2018

The EU has proposed that provisions on Cross-border data flows and protection of personal data and privacy would be integrated in the Digital Trade Title.

The text of the EU provisions on Cross-border data flows and protection of personal data and privacy was sent in advance and presented to the Indonesian Government experts at the fifth negotiating round.

### **Objectives**

These provisions will provide for a straightforward prohibition of protectionist barriers to cross-border data flows, in full compliance with and without prejudice to the EU's data protection and privacy rules. The protection of personal data is a fundamental right under Article 8 of the EU Charter of Fundamental rights and is not negotiable.

### **Main Elements**

This text contains two provisions:

- Article 1 "Cross-border data flows" is a horizontal clause covering all sectors of the economy and covering both personal data and non-personal data. In order to facilitate cross-border data

flows between parties of trade agreements, it addresses the following restrictions:

- the requirement to use computing facilities in a party's territory including by imposing certification requirements for such facilities;
- the forced localisation of data in a party's territory;
- the prohibition of storing and processing data in the other party's territory; and
- other restrictions making cross-border transfers dependent on the use of computing facilities in the party's territory.

It also includes a review clause on the list of prohibited restrictions and a requirement to assess its functioning within three years.

- Article 2 "Protection of personal data and privacy" will fully safeguard the parties' right to regulate in the field of personal data protection, given its character as a universal human right. It includes the following elements:
  - an explicit recognition that high standards and rules on privacy and personal data protection are

fundamental for the parties to the Agreement;

- a clause allowing the parties to adopt and maintain safeguards for privacy and personal data protection, including on cross-border transfers of personal data, which applies to the whole agreement;
  - a provision stipulating that the agreement does not affect the protection of personal data and privacy as guaranteed by the parties' laws;
  - an obligation of transparency to ensure that Parties are informed of possible future safeguards for privacy and personal data protection; and
  - a definition of personal data.
- There is also a clarification that Articles 1 and 2 will not be subject to the Investment Court System, which is being negotiated separately.
  - Moreover, an additional paragraph 3 in Article X was introduced in the Article on cooperation on regulatory issues with regard to digital trade. It clarifies that privacy and personal data issues will not be included in the regulatory dialogues that can be held under the Agreement.