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NOTE

From:	General Secretariat of the Council
To:	Delegations
Subject:	Opinion of the European Data Protection Supervisor on the Recommendation for a Council Decision authorising the opening of negotiations for a digital trade agreement with Costa Rica

Delegations will find in the Annex to this note the Opinion of the European Data Protection Supervisor on the Recommendation for a Council Decision authorising the opening of negotiations for a digital trade agreement with Costa Rica.

EUROPEAN DATA PROTECTION SUPERVISOR

Reçu le 12. 11. 2026

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Subject: Opinion of the European Data Protection Supervisor on the Recommendation for a Council Decision authorising the opening of negotiations for a digital trade agreement with Costa Rica

Your Excellency,
Dear Secretary-General,

Having regard to Article 42(1) of Regulation (EU) 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC, please find enclosed our Opinion on the Recommendation for a Council Decision authorising the opening of negotiations for a digital trade agreement with Costa Rica.

We have sent a copy of this Opinion to the President of the European Commission and the President of the European Parliament.

Yours sincerely,

Wojciech Wiewiórowski

Digitally signed by:
WOJCIECH RAFAŁ WIEWIÓROWSKI (EUROPEAN DATA PROTECTION SUPERVISOR)
Date: 2026-11-12 16:01:46 UTC

Encl.: Opinion

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EDPS
EUROPEAN DATA PROTECTION SUPERVISOR
The EU's independent data protection authority
Opinion 37/2026
on the Recommendation for a Council Decision authorising the opening of negotiations for a digital trade agreement with Costa Rica
edps.europa.eu

The European Data Protection Supervisor (EDPS) is an independent institution of the EU, responsible under Article 52(2) of Regulation 2018/1725 'With respect to the processing of personal data... for ensuring that the fundamental rights and freedoms of natural persons, and in particular their right to data protection, are respected by Union institutions and bodies', and under Article 52(3)'... for advising Union institutions and bodies and data subjects on all matters concerning the processing of personal data'.

Wojciech Rafał Wiewiórowski was appointed as Supervisor on 5 December 2019 for a term of five years. The selection procedure for a new EDPS mandate for a term of five years is still ongoing.

*Under **Article 42(1)** of Regulation 2018/1725, the Commission shall 'following the adoption of proposals for a legislative act, of recommendations or of proposals to the Council pursuant to Article 218 TFEU or when preparing delegated acts or implementing acts, consult the EDPS where there is an impact on the protection of individuals' rights and freedoms with regard to the processing of personal data'.*

This Opinion relates to Commission Recommendation for a Council Decision authorising the opening of negotiations for a digital trade agreement with Costa Rica[1]. This Opinion does not preclude any future additional comments or recommendations by the EDPS, in particular if further issues are identified or new information becomes available. Furthermore, this Opinion is without prejudice to any future action that may be taken by the EDPS in the exercise of his powers pursuant to Regulation (EU) 2018/1725. This Opinion is limited to the provisions of the Recommendation that are relevant from a data protection perspective.

[1] COM(2026)486 final, https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=COM:2026:486:FIN

1

Executive Summary

On 18 September 2026, the European Commission issued a Recommendation for a Council Decision authorising the opening of negotiations for a digital trade agreement with Costa Rica.

The objective of this recommendation is to authorise the Commission to open negotiations with Cosa Rica to establish binding disciplines on trade enabled by electronic means ('digital trade') between the EU and Costa Rica. These negotiations may cover cross-border data flows with trust, data localisation requirements and personal data protection.

The EDPS recalls that, as the protection of personal data is a fundamental right in the Union, it cannot be subject to negotiations in the context of EU trade agreements. Dialogues on data protection and trade negotiations with third countries can complement each other but must follow separate tracks. Personal data flows between the EU and third countries should be enabled by using the mechanisms provided under the EU data protection legislation. In 2018, the Commission endorsed horizontal provisions for cross-border data flows and personal data protection in trade negotiations. The EDPS considers that these provisions reach a balanced compromise between public and private interests as they allow the EU to tackle protectionist practices in third countries in relation to digital trade, while ensuring that trade agreements cannot be used to challenge the high level of protection guaranteed by the Charter of fundamental rights of the EU and the EU legislation on the protection of personal data. The EDPS understands from the recommendation that the negotiations on data flows and data protection should be opened with a view to agree on provisions that are coherent with these horizontal provisions. For the sake of clarity, the EDPS recommends making an express reference to the horizontal provisions.

The EDPS further recommends clarifying in the negotiating directives that the negotiated rules should not prevent the EU or its Member States from requiring controllers and processors, in duly justified cases, to store personal data in the EU/EEA. This is important to ensure that the negotiated rules do not hinder the implementation of existing or future EU legislation allowing for or providing for data localisation in specific circumstances.

As regards access to source code, the envisaged Agreement should clarify that the protection of individuals with regard to the processing of personal data should be among the legitimate public policy objectives justifying such access by regulatory authorities, if the envisaged Agreement regulates this subject matter.

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THE EUROPEAN DATA PROTECTION SUPERVISOR,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Regulation (EU) 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC ('EUDPR')[2], and in particular Article 42(1) thereof,

HAS ADOPTED THE FOLLOWING OPINION:

1. Introduction

1. On 18 September 2026, the European Commission issued a Recommendation for a Council Decision authorising the opening of negotiations for a digital trade agreement with Costa Rica[3] ('the Recommendation'). An annex to the Recommendation details the directives for the negotiation of a digital trade agreement with Costa Rica and the proposed content of the rules and commitments ('the Annex').

2. The European Union and Costa Rica have a deep and dynamic economic relationship. Costa Rica is an important trading partner of the European Union in the Central American region. The Trade Pillar of the European Union–Central America Association Agreement has applied provisionally with respect to Costa Rica since 1 October 2013. While that Agreement provides a comprehensive framework for trade in goods and services between the Parties, it does not contain comprehensive rules on digital trade[4].

3. In March 2023, the European Union and the Latin America and the Caribbean ('LAC') region launched the EU–LAC Digital Alliance to strengthen cooperation across the full spectrum of digital and space-related issues. Within that framework, the European Union and Costa Rica have deepened their cooperation in areas including cybersecurity, digital innovation and human-centric artificial intelligence[5].

4. The objective of the Recommendation is to authorise the Commission to open negotiations with Cosa Rica to establish binding disciplines on trade enabled by electronic means ('digital trade') between the EU and Costa Rica, in accordance with Article 218(3) and (4) of the Treaty on the Functioning of the European Union ('TFEU').

[2] OJ L 295, 21.11.2018, p. 39.
[3] COM(2026)486 final, https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=COM:2026:486:FIN
[4] Recital 1 of the Recommendation.
[5] Recital 2 of the Recommendation.

5. The present Opinion of the EDPS is issued in response to a consultation by the Commission of 18 September 2026, pursuant to Article 42(1) of EUDPR. The EDPS welcomes the reference to this consultation in Recital 5 of the Recommendation[6].

2. General remarks

6. The EDPS has long taken the view that, as the protection of personal data is a fundamental right in the Union, it cannot be subject to negotiations in the context of EU trade agreements. It is for the EU alone to decide how to implement fundamental rights protections in Union law. The Union cannot and should not embark on any international trade commitments that are incompatible with its domestic data protection legislation. Dialogues on data protection and trade negotiations with third countries can complement each other but must follow separate tracks. Personal data flows between the EU and third countries should be enabled by using the mechanisms provided under the EU data protection legislation[7].

7. In this context, the EDPS notes that the negotiating directives, included in the Annex, provide that 'the negotiations may cover cross-border data flows with trust, data localisation requirements and personal data protection'[8].

8. The EDPS recalls that in 2018, the Commission endorsed horizontal provisions for cross border data flows and personal data protection in trade negotiations ('the Horizontal Provisions')[9].

9. The EDPS recalls its support for the legal wording of the Horizontal Provisions as the best outcome achievable to preserve individual's fundamental rights to data protection and privacy as enshrined in EU primary and secondary legislation. The Horizontal Provisions reach a balanced compromise between public and private interests as they allow the EU to tackle protectionist practices in third countries in relation to digital trade, while ensuring that trade agreements cannot be used to challenge the high level of protection guaranteed by the Charter of fundamental rights of the EU and the EU legislation on the protection of personal data[10].

10. In its Opinion 03/2021 on the conclusion of the EU and UK trade agreement and the EU and UK exchange of classified information agreement, the EDPS recommended that the wording agreed with the UK on data protection and privacy (which modified the Horizontal Provisions) remained an exception and would not be the basis for future trade agreements

[6] COM(2026) 486 final, recital 5.
[7] EDPS Opinion 03/2021 on the conclusion of the EU and UK trade agreement and the EU and UK exchange of classified information agreement, issued on 22 February 2021, paragraph 14; EDPS Opinion 18/2023 on the Recommendation for a Council Decision authorising the opening of negotiations for digital trade disciplines with the Republic of Korea and with Singapore issued on 13 May 2023, paragraph 6.
[8] Section 2(8)(d) of the Annex.
[9] https://ec.europa.eu/newsroom/just/items/627665/en.
[10] EDPS Opinion 03/2021 on the conclusion of the EU and UK trade agreement and the EU and UK exchange of classified information agreement, issued on 22 February 2021, paragraph 15; EDPS Opinion 18/2023 on the Recommendation for a Council Decision authorising the opening of negotiations for digital trade disciplines with the Republic of Korea and with Singapore issued on 13 May 2023, paragraph 6.

with other third countries[11]. The EDPS reiterated this recommendation several times since[12].

11. It is the understanding of the EDPS that the negotiations on data flows and data protection should be opened with a view to agree on provisions that are coherent with the Horizontal Provisions[13].

12. For the sake of clarity, the EDPS recommends making an express reference to the Horizontal Provisions, as was done for instance in the Commission's Recommendation for a Council Decision authorising the opening of negotiations for the inclusion of provisions on cross-border data flows in the Agreement between the European Union and Japan for an Economic Partnership[14].

13. Furthermore, the EDPS understands that transfers of personal data may occur in the context of the implementation of the envisaged agreement. In this regard, it recalls that any transfer of personal data to a third country or an international organisation must comply with the conditions laid down in Chapter V of Regulation (EU) 2016/679[15] ('GDPR').

14. As a general rule, such transfers must therefore rely on an applicable transfer mechanism, such as an adequacy decision pursuant to Article 45 GDPR or appropriate safeguards pursuant to Article 46 GDPR. In this context, the EDPS notes that Costa Rica is not currently covered by an adequacy decision pursuant to Article 45 GDPR. Consequently, any transfers of personal data to Costa Rica that may arise from the future implementation of the agreement must rely on another applicable transfer mechanism under Chapter V GDPR.

3. Negotiations on cross-border data flows and data protection

15. The negotiating directives, included in the Annex, provide that:

    a. The negotiated rules and commitments 'should be in line with the EU legal framework and should preserve the regulatory autonomy required to implement and develop the EU data and digital policies'[16].

    b. The 'negotiations should result in rules covering cross-border data flows addressing unjustified data localisation requirements, while neither negotiating nor affecting the EU's personal data protection rules and should, notably be in line with the EU legal framework on the protection of personal and non-personal data'[17].

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[11] EDPS Opinion 03/2021 on the conclusion of the EU and UK trade agreement and the EU and UK exchange of classified information agreement, issued on 22 February 2021, paragraphs 16-22 and 38.
[12] See, for example, EDPS Opinion 4/2025 on the Proposals for Council Decisions on the signing and conclusion, on behalf of the Union, of the Digital Trade Agreement between the European Union and the Republic of Singapore, 21 March 2025, paragraph 12.
[13] Section 2(11) of the Annex.
[14] COM(2022) 336 final, Recital 4.
[15] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) OJ L 119, 4.5.2016, pp. 1–88.
[16] Section 2(9) of the Annex.
[17] Section 2(11) of the Annex.

c. The 'Agreement should not prevent the European Union, its Member States and their national, regional and local authorities from regulating economic activity in the public interest, to achieve legitimate public policy objectives such as [...] privacy and personal data protection'[18].

16. The EDPS notes that these negotiating directives follow the same approach as those considered in Opinion 18/2023 on the Recommendation for a Council Decision authorising the opening of negotiations for digital trade disciplines with the Republic of Korea and with Singapore. Therefore, it reiterates the recommendation that, for the avoidance of the doubt, the negotiating directives should clarify that the negotiated rules should not prevent the EU or its Member States from requiring controllers and processors, in duly justified cases, to store personal data in the EU/EEA[19].

17. Such clarification is important to ensure that the negotiated rules do not hinder the implementation of existing or future EU legislation providing for data localisation requirements in sensitive contexts and for reasons of substantial public interest. For instance, Article 86 of Regulation (EU) 2025/327[20] expressly preserves the possibility for Member States to require, under national law and subject to certain conditions, that certain personal electronic health data processed for primary use be stored within the Union. Recently, the Commission has proposed data localisation requirements in the context of the Cloud and AI Development Act Proposal for cloud computing services across the four Union assurance levels, including requirements concerning the storage, processing and transfer of customer data within the Union[21].

4. Access to source code

18. The EDPS notes that the negotiating directives, included in the Annex, provide that the negotiations may cover 'business trust (e.g. protection of computer source code, forced technology transfer)'[22].

19. Against this background and having regard to the provisions of the Digital Trade Agreement concluded between the European Union and the Republic of Korea[23], the envisaged Agreement may be expected to address the transfer of, or access to, source code

[18] Section 2(14) of the Annex.
[19] EDPS Opinion 18/2023 on the Recommendation for a Council Decision authorising the opening of negotiations for digital trade disciplines with the Republic of Korea and with Singapore issued on 13 May 2023, Section 3.
[20] Regulation (EU) 2025/327 of the European Parliament and of the Council of 11 February 2025 on the European Health Data Space and amending Directive 2011/24/EU and Regulation (EU) 2024/2847 OJ L, 2025/327, 5.3.2025, ELI: http://data.europa.eu/eli/reg/2025/327/oj.
[21] COM(2026) 502 final. The Proposal would establish a cloud computing sovereignty framework comprising four Union assurance levels for the provision of cloud computing services to Union entities and public sector bodies (Article 16(1)). Data localisation requirements are included across all four levels. At levels 1, 2 and 3, customer data, including metadata and telemetry data, must remain exclusively within the Union during processing, storage and transfer, unless the public sector body explicitly requires otherwise (Annex II, points 1.1(c), 2.1(c) and 3.1(c)). However, levels 2 and 3 also prohibit the transfer outside the Union of data generated through the use of the audited service (Annex II, points 2.1(f) and 3.1(f)). Level 4 introduces a stricter requirement for customer data identified as sensitive following a risk assessment, which must remain exclusively within the Union, without the express exception available under the corresponding criteria at lower levels (Annex II, point 4.1(c)). The requirements are cumulative, meaning that services meeting level 4 must also comply with the applicable criteria of the lower levels (Article 20(1) of the Proposal).
[22] Section 2(8)(e) of the Annex. See also EDPS Opinion 14/2026 on the Proposal for a Regulation establishing a framework of measures for strengthening Europe's cloud and AI ecosystem (Cloud and AI Development Act), 29 July 2026.
[23] Recital 4 of the Recommendation and Article 11 of the Agreement on digital trade Between the European Union and the Republic of Korea.

of software owned by a natural or legal person in a manner similar to that provided for in the Digital Trade Agreement between the European Union and the Republic of Korea.

20. The EDPS recalls that, should the envisaged Agreement include a prohibition on requiring the transfer of, or access to, source code, along the lines of the EU–Korea Digital Trade Agreement, particular attention should be paid to the scope of the exceptions to that prohibition.

21. In particular, the EDPS refers to the exception allowing regulatory authorities to require the transfer of, or access to, source code for investigation, inspection or examination, enforcement action or judicial proceedings, in order to secure compliance with laws and regulations pursuing legitimate public policy objectives.

22. The EDPS recommends clarifying, in the relevant negotiating directives included in the Annex to the Recommendation, that the legitimate public policy objectives allowing authorities to require access to source code should include the protection of individuals with regard to the processing of personal data[24].

5. Conclusions

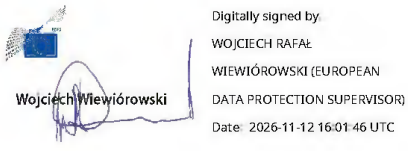
23. In light of the above, the EDPS makes the following recommendations:

(1) to make an express reference to the fact that the negotiations on data flows and data protection should be opened with a view to agree on provisions that are coherent with the horizontal provisions for cross-border data flows and personal data protection in trade negotiations endorsed by the Commission in 2018;

(2) to clarify, in the negotiating directives included in the Annex to the Recommendation, that the negotiated rules should not prevent the EU or the Member States from imposing on controllers and processors, in duly justified cases, to store personal data in the EU/EEA; and

(3) to clarify, in the negotiating directives included in the Annex to the Recommendation, that the protection of individuals with regard to the processing of personal data should be included among the legitimate public policy objectives that may justify requiring the transfer of, or access to, source code by regulatory authorities for the purposes of investigation, inspection, examination, enforcement action or judicial proceedings, if the envisaged Agreement regulates this subject matter.

Brussels,



[24] EDPS Opinion 27/2025 on the Proposals for Council Decisions on the signing and conclusion, on behalf of the Union, of the Digital Trade Agreement between the European Union and the Republic of Korea, 3 November 2025, paragraph 23.