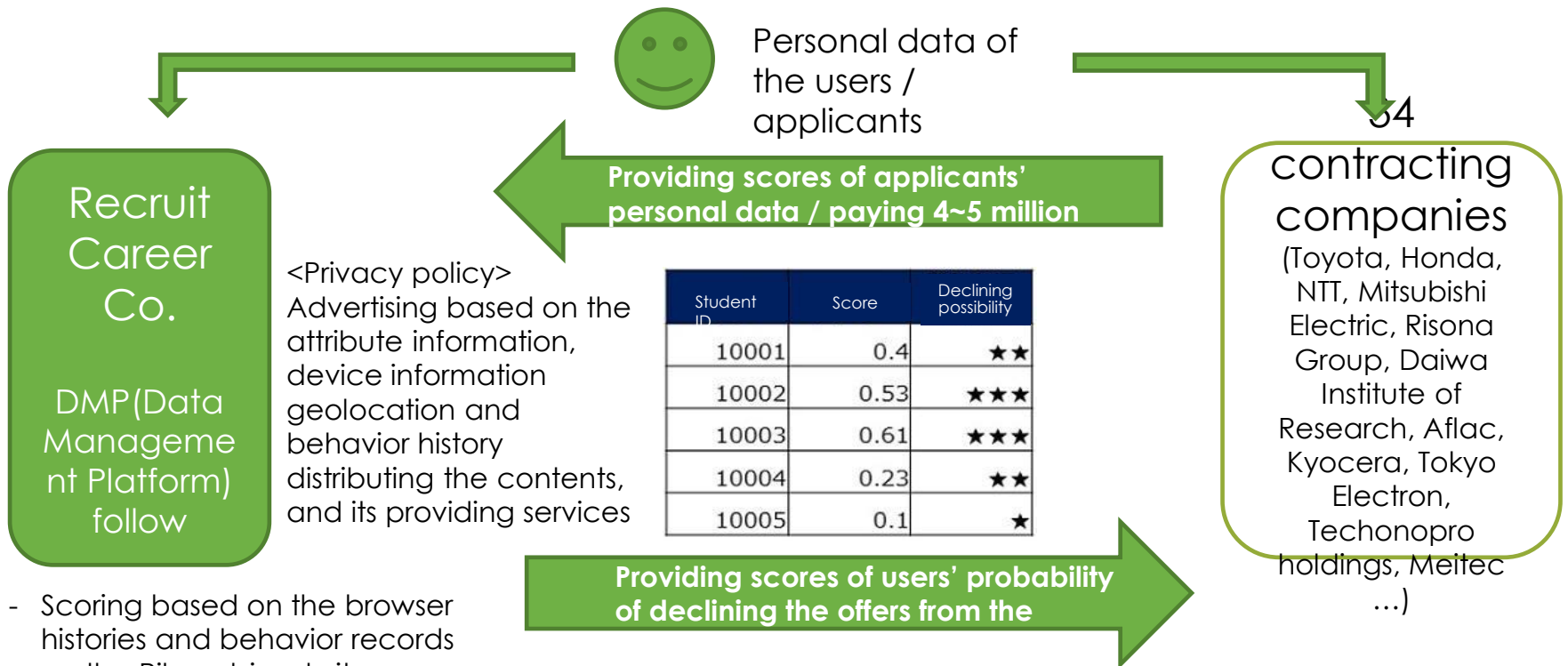


Convention 108+: Europe and East Asia  
Convention 108 + And the future data protection global standard  
19 November 2019, Council of Europe

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# AI DATA PROCESSING BY RIKUNABI (RECRUITING SERVICES)

- Rikunabi: job hunting platform with approximately 820,000 users for 2020
- Rikunabi DMP follow with analytic score: 74,878 (Rikunabi 2020: 62,548 / Rikunabi 2019: 12,330)
- Failure to obtain consent of Rikunabi 2020 users: 7,983
- The number of companies to be provided scores: 34 (contracting companies 38)



- Scoring based on the browser histories and behavior records on the Rikunabi website
- Predicting the applicants behavior regarding the companies' offers

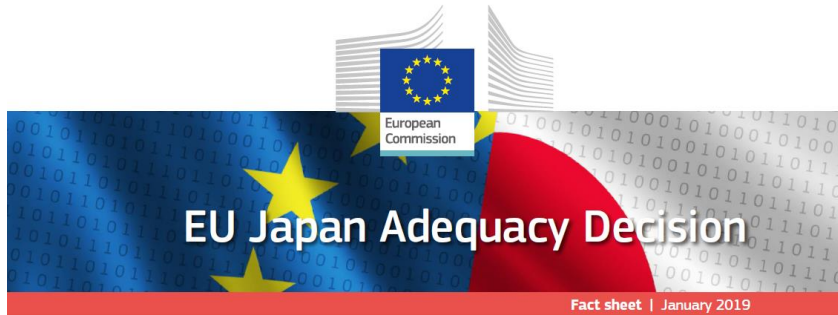
## ENFORCEMENT REGARDING RIKUNABI CASE (AS OF 15 NOVEMBER 2019)

- **Personal Information Protection Commission** (26 August 2019) – **recommendations & instructions**
  - failure to take necessary and proper measures after the changes of handling personal data
  - improper management system of failing to obtain consent in the change of privacy policy
  - failure to obtain consent from the 7,983 data subjects in the system change
- **Ministry of Health, Labour and Welfare, Tokyo Labour Bureau** (6 September 2019) – **instructions**
  - Check the compliance with the Employment Security Act and take a necessary and corrective preventive measures such as improve the operation and system
  - Make sincere responses to the students being scored
  - Operate the business in line with the job introduction business purposes
- **Ministry of Health, Labour and Welfare, Employment Security Bureau** (6 September 2019) – **notice**
  - Consent is obliged to given. Even if data subject consented, there is a possibility of violating the Employment Security Act.
- **JIPDEC PrivacyMark** (16,330 certifications as of 14 November 2019)
  - revocation of PrivacyMark

### <Unsolved questions>

- **“Blackboxing” & profiling:** Were the AI predicting analytics accurate and fair (no bias)?
- **Transparency:** What information (eg. AI analytic logic) should be provided to the data subject?
- **Consent:** Was the consent of a data subject valid without informing the scoring and the AI analytics?
- **Controller / processor:** Was the contract of scoring within the scope of trustee of processing?
- **Sanction:** Were the recommendations by PPC and instructions by MHLW proportionate?

# THE MUTUAL ADEQUACY DECISION (23 JANUARY 2019) AND THE REMAINING ISSUES



The Personal Information Protection Commission (PPC) has established Contact Point to receive a complaint from an individual in EU who suspects that his/her data transferred from the EU has been collected or used by Japanese administrative authorities in violation of the applicable rules.

- The Commission considers that the APPI as complete, together with the official representations, assurances and commitments contained in Annex II, **ensure a level of protection for personal data transferred from the European Union that is essentially equivalent to the one guaranteed by Regulation (EU) 2016/679.** (para 171)
- this Decision should be subject to a first review **within two years** after its entry into force

## **EDPB Opinion** (5 December 2018)

*'there are no general rules applicable across sectors in Japan governing automated decision making and profiling.'*

## **European Parliament Resolution** (13 December 2018)

*'Notes with concern that as regards automated decision-making and profiling, differently from EU law, neither the APPI nor the PPC Guidelines contain legal provisions and that only certain sectoral rules address this matter, without providing a comprehensive overall legal framework with substantial and strong protections*

*against automated decision-making and profiling.'*

*\*The scope of profiling .... shall be issues to be discussed further, taking into consideration the current affairs of harm, the effectiveness of private sector-initiated self-regulatory efforts, and the trends in foreign countries.'*

Strategic Headquarters for the Promotion of an Advanced Information and Telecommunications Network Society, Policy Outline of the Institutional Revision for Utilization of Personal Data, 24 June 2014

## ■ Scope COMPARISON WITH THE CONVENTION 108+ AND THE JAPANESE APPI

- Comprehensive vs Sectoral (public/ private distinctions)
- Negative liberty vs Positive obligation

## ■ Consent

- The free, specific, informed and unambiguous consent

## ■ Special categories

- Trade-union membership, sexual life

\* *'Although the exact boundaries of what information may be passed to whom under which circumstances differ from other cultures, the Japanese are not uniquely possessed of a lack of a sense of information privacy'*. Andrew Adams, Kiyoshi Murata, and Yohko Orito, *The Japanese sense of information privacy*, AI & Society vol. 24 no.2 (2009) p.339.

## ■ Data subject's rights

- Right not to be subject to a decision based solely on an automated processing/ Right to obtain knowledge of the reasoning underlying AI data processing See also CoE's Guidelines on Artificial Intelligence and Data Protection, January 2019.
- Without excessive expense/ Free of charge

## ■ Assistance to data subjects

- Assistance for data subjects whatever his or her nationality or residence

\* *'The Japanese Act can be seen as a charter of fundamental duties of the controllers and the processors, not a charter of fundamental rights of data subjects'*; Hiroshi Miyashita, *Japan amends its DP Act in light of Big Data and data transfers*, Privacy Laws & Business International Report, October 2015, p.9

## PHILOSOPHY OF DATA PROTECTION LAWS

- **Convention 108+ as a conditional "adequacy"?**
  - EU GDPR recital 105: the international commitment  
eg.) Andorra, Guernsey, the Isle of Man, Jersey, Switzerland, and Uruguay
- **Automated decision**
  - *'the lowering of data processing costs, the availability of "intelligent" data processing devices and the establishment of new telecommunication facilities for data transmission'* (Convention for the Protection of Individuals with regard to "Automatic Processing" of Personal Data, Explanatory Report, 1981)
  - *'Data protection, in other words, is a part of a general system of calculated access, or of calculated denial of access'* (Simitis, CoE's Rome Conference, 1983)
  - *'[the registered data-images of persons] brings with ... the threat of alienation and a threat to human dignity'* (Bygrave, Automated profiling, 2001)
  - Quoting Rotenebrg's word *'a giant sleeping in the EU Directive'* (Terwangne, Is a Global Data Protection Regulatory Model Possible, 2009)
  - Algorithm transparency and trade secret: prohibition of transfer of or access to source code of software and algorithm, Japan-U.S. Digital Trade Agreement Art.17, 7 October 2019
- **Human dignity as a philosophy of data protection laws**
  - European flavored "human dignity" was spiced in Japan (and probably in Asia)
  - Protection of NOT data NOR place, BUT an individual in the data processing
  - A human-centric approach (humans not being as an object) is likely to be accepted in an age of AI in Japan (and probably in Asia) (eg. Cabinet Office of Japan, Social principles of human-centric AI (2019))