

Opinion on a notification for Prior Checking received from the Data Protection Officer of the European Fisheries Control Agency regarding the "processing of inspection reports related to Joint Deployment Plans in EU waters"

Brussels, 16 July 2013 (Case 2013-0539)

1. Proceedings

On 23 May 2013, the European Data Protection Supervisor (**EDPS**) received a notification for prior checking relating to the "processing of inspection reports related to Joint Deployment Plans in EU waters" from the Data Protection Officer (**DPO**) of the European Fisheries Control Agency (**EFCA**).

On 27 May 2013, the EDPS sent a request for additional information to the DPO, who replied on 3 June 2013. The draft Opinion was sent to the DPO for comments on 3 July 2013. The EDPS received a reply on 3 July 2013.

2. Facts

For the **purpose** of operational coordination of control and inspection by Member States, the EFCA receives inspection reports related to Joint Deployment Plans (JDPs) by Member States' authorities and Union inspectors concerning inspections of fishing vessels carried out in the JDP areas of the North Sea, the Baltic Sea, or the Western Waters¹. These inspection reports concern alleged infringements by the fishing vessel (master/owner) of applicable EU legislation². Extracts of the inspection reports (which do not contain personal data, but refer to the type of infringement, the gear used or the area where the alleged infringement was reported) are used by EFCA for risk analysis and/or training purposes.

Amongst the **legal bases** cited, Articles 5(2) and 14 of Council Regulation (EC) No 768/2005³ regulate that the EFCA establishes JDPs, organises operational coordination of

¹ The EDPS previously addressed issues regarding the transmission of inspection reports related to the bluefin tuna JDP and the Northwest Atlantic Fisheries Organization/ North East Atlantic Fisheries Commission in his joint Opinion of 30 November 2011 in cases 2011-0615 and 2011-0636.

² EU and Member States legislation implementing the Common Fisheries Policy applicable to the area of fisheries control, in particular Council Regulation (EC) No 1224/2009 of 20 November 2009 establishing a Community control system for ensuring compliance with the rules of the common fisheries policy, see <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:343:0001:0050:EN:PDF> as well as Commission Implementing Regulation (EU) No 404/2011 of 8 April 2011 laying down detailed rules for the implementation of Council Regulation (EC) No 1224/2009 establishing a Community control system for ensuring compliance with the rules of the Common Fisheries Policy, see: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:112:0001:0153:EN:PDF>.

³ Council Regulation (EC) No 768/2005 of 26 April 2005 establishing a Community Fisheries Control Agency and amending Regulation (EEC) No 2847/93 establishing a control system applicable to the common fisheries policy, see <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2005:128:0001:0014:EN:PDF>.

control and inspection by Member States and undertakes an annual assessment of the effectiveness of each JDP as well as an analysis, on the basis of available evidence, of the existence of a risk that fishing activities are not compliant with applicable control measures. For these purposes, Article 123(3) of the Commission Implementing Regulation (EU) No 404/2011⁴ stipulates that if Union inspectors have detected an infringement, a copy of the full inspection report shall be sent to the EFCA.

Under the **procedure** stipulated in Article 123(3) of the Commission Implementing Regulation (EU) No 404/2011 the EFCA receives a copy of the full inspection report in cases where Union inspectors have detected an infringement. Staff of EFCA Unit C then extracts information from these inspection reports such as the type of infringement, the gear used or the area where the alleged infringement was reported, in particular to perform a risk assessment under Article 14 of Council Regulation (EC) No 768/2005, which stipulates that *"The Agency shall undertake an annual assessment of the effectiveness of each joint deployment plan, as well as an analysis, on the basis of available evidence, of the existence of a risk that fishing activities are not compliant with applicable control measures. Such assessments shall be promptly communicated to the European Parliament, the Commission and the Member States"*. As has been explicitly confirmed by the EFCA, the extracted information does not contain any personal data.

The **data processed** consists of the name, address and signature of the master of the fishing vessel subject to inspection; the name and address of the owner of the fishing vessel subject to inspection as well as the name and signature of the inspector carrying out the inspection.

Data subjects concerned are the masters of the fishing vessels subject to inspection, the vessel owners and Member States' and Union inspectors.

Only staff of EFCA Unit C has access to the inspection reports in order to extract information not containing personal data. There are no further **recipients**.

Regarding the **right of information**, a Data Protection Clause is published under "Important legal notice" on the EFCA's dedicated webpages⁵ informing data subjects as follows: *"Any personal data collected by the EFCA within the performance of its activities, shall be processed pursuant to Regulation (EC) No 45/2001 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data. It shall be processed solely for the purposes of the performance, management and follow up of EFCA activities in the framework of which it was collected. The Data Subjects shall have the right of access to their personal data and the right to rectify any such data that is inaccurate or incomplete. Should the Data Subjects have any queries concerning the processing of their personal data, they shall address them to the relevant Data Controller (Head of Unit responsible for the activity in question). The Data Subjects shall have right of recourse at any time to the European Data Protection Supervisor"*. There is a link to a privacy statement at the bottom of each respective webpage, which contains all elements required for informing data subjects of the processing operation at hand.

Regarding the **rights of access and rectification**, the notification mentions 15 days from receipt of the request as applicable time limit to block or erase upon request by the data subject. The EFCA Privacy Statement published on the EFCA's dedicated webpages stipulates

⁴ See Commission Implementing Regulation (EU) No 404/2011.

⁵ For the North Sea and Western Waters JDPs on http://www.efca.europa.eu/pages/home/jdp_north.htm, for the Baltic Sea JDP on http://www.efca.europa.eu/pages/home/jdp_baltic.htm.

that "In accordance with Art. 13 of Regulation (EC) No 45/2001, in case you wish to verify which personal data is stored on your behalf by the responsible Controller, have it modified, corrected, or deleted, please contact the Head of Unit Operational Coordination.

However, please note that, as stated in Art. 20 of Regulation (EC) No 45/2001, restrictions or exceptions may apply, as EFCA merely functions as a mailbox with regard to the reception of the inspection reports. It does not "own" the reports which are third-party documents (of the inspecting Member State) and therefore the EFCA cannot give access to them without having consulted the third party and having received a positive answer in accordance with Art. 4(4) of Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents."

Under Article 118(3) of the Commission Implementing Regulation (EU) No 404/2011, the **retention period** applied by EFCA to inspection reports is three years.

Security measures: ...

3. Legal analysis

3.1. Prior checking

Applicability of Regulation 45/2001 ("the Regulation"): The processing of data under analysis constitutes a processing of personal data ("*any information relating to an identified or identifiable natural person*" in the sense of Article 2(a) of the Regulation). The data processing is performed by actors on behalf of EU institutions and bodies (EFCA staff of Unit C), in the exercise of activities which fall within the scope of Union law and the processing of the data is done by automatic means (with the creation of electronic files in a part of EFCA's P drive). Therefore, the Regulation is applicable.

Grounds for prior checking: Article 27 (1) of the Regulation subjects to prior checking all "*processing operations likely to present specific risks to the rights and freedoms of data subjects by virtue of their nature, their scope or their purposes*" by the EDPS. Article 27(2) of the Regulation contains a list of processing operations that are likely to present such risks, which includes the processing of data relating to suspected offences, offences, criminal convictions or security measures (Article 27(2)(a)). The processing operations under review involve the processing of data indicating a suspicion of offence or an offence committed through a vessel, which data will necessarily be linked to the personal data of the owner and/or master of the vessel⁶. Even if the EFCA does not collect such data itself, the mere possession of this information by the EFCA constitutes a specific risk to the rights and freedoms of the data subjects which requires subjecting such processing to prior checking. The EDPS therefore concludes that processing operations under review must be notified for prior checking under Article 27 of the Regulation.

Ex-post prior checking: The processing operations were already in place at the EFCA before the EDPS was notified. The EDPS reminds the EFCA that the Opinion of the EDPS should, as a rule, be requested and given prior to the start of any processing of personal data. Any recommendations made by the EDPS in this Opinion must be fully implemented accordingly.

⁶ According to the notification, "*Inspection reports received concern alleged infringements by the fishing vessel (master/ owner) of applicable EU legislation. The inspection reports serve as evidence in the courts of the inspecting Member State and the Flag Member State*".

Deadlines: The notification of the DPO was received on 23 May 2013. According to Article 27 (4) of the Regulation, the EDPS Opinion must be delivered within a period of two months. The procedure was suspended for a total of 7 days for clarifications and a total of 1 day for comments. Consequently, the present Opinion must be delivered no later than 31 July 2013.

3.2. Lawfulness of the processing

Article 5 of the Regulation provides criteria for making the processing of personal data lawful. In particular Article 5(a) provides that personal data may be processed *inter alia* if "*the processing is necessary for the performance of a task carried out in the public interest on the basis of the Treaties establishing the European Communities or other legal instruments adopted on the basis thereof ...*". The EFCA carries out the processing in the frame of Council Regulation (EC) No 768/2005 and the Commission Implementing Regulation (EU) No 404/2011 and thus on the basis of specific legal instruments 'adopted on the basis of the Treaties' allowing for the notified processing operations. There is therefore a legal basis covering the processing operations.

3.3. Processing of special categories of data

Pursuant to Article 10(5) of the Regulation, "the processing of data relating to offences, criminal convictions or security measures may be carried out only if authorised by the Treaties establishing the European Communities or other legal instruments adopted on the basis thereof or, if necessary, by the European Data Protection Supervisor, subject to appropriate specific safeguards". The processing of suspicions of offences or offences by the EFCA is authorized in legal instruments adopted on the basis of the EU Treaties, in particular in Council Regulation (EC) No 768/2005 mentioned in section 3.2 above.

3.4. Data Quality

Adequacy, relevance and proportionality: In accordance with Article 4(1)(c) of the Regulation, personal data must be "*adequate, relevant and non excessive in relation to the purposes for which they are collected and/or further processed*". On the basis of the information available, the personal data processed seem adequate and non excessive for purpose of establishing the inspection reports.

Accuracy: Article 4(1)(d) of the Regulation provides that personal data must be "*accurate and, where necessary, kept up to date*" and that "*every reasonable step must be taken to ensure that data which are inaccurate or incomplete are erased or rectified*". The personal data processed are provided directly by the data subjects. The masters of fishing vessels are provided with a copy of the inspection report and sign the inspection report; these procedures help them understand the data processed about them. Furthermore, the rights of access and rectification are important means of ensuring accuracy of the data (see section 3.8).

Fairness and lawfulness: Article 4(1)(a) of the Regulation also provides that personal data must be "*processed fairly and lawfully*". Lawfulness has already been discussed (see section 3.2) and fairness will be dealt with in relation to information provided to data subjects (see section 3.9).

3.5. Data retention

Article 4(1)(e) of the Regulation states that personal data must be "*kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for*

which the data were collected or for which they are further processed". The EDPS notes that, pursuant to Article 118(3) of Commission Implementing Regulation (EU) No 404/2001, the EFCA retains the inspection reports for three years. There is no reason to believe that this retention period exceeds what is necessary for the purpose of the processing at hand.

3.6. Rights of the data subjects

Articles 13 to 19 of the Regulation establish a number of rights for data subjects. These notably include the right to access data upon request by the data subject and the rights to rectify, erase or block personal data.

The EDPS notes that the masters of fishing vessels are provided with a copy of the inspection report, which allows them to have access to the content of the report. The owner does not sign the report; only his name and address appears on the report. As the master is the owner's representative, it can be reasonably expected that the master informs the owner of the inspection⁷.

As concerns the exercise of the right of access, the EFCA must ensure that the requests it receives from data subjects to access to their own data are effectively dealt with in accordance with Article 13 of the Regulation, whether by providing itself the data requested or by ensuring that the data subject is appropriately given access by the relevant Member State who carried out the inspection.

The EDPS notes that EFCA reserves the right to restrict access to inspection reports on the basis of Article 20(1)(a) and (e) of the Regulation, considering that these "*are third-party documents (of the inspecting Member State) and therefore the EFCA cannot give access to them without having consulted the third party and having received a positive answer in accordance with Art. 4(4) of Regulation (EC) No 1049/2001*".

The EDPS reminds the EFCA that such a consultation of the Member state concerned should take place in the light of Regulation (EC) No 45/2001 (rather than Regulation (EC) No 1049/2001), as this regards requests for access to personal data under Article 13 of the Regulation. The EDPS further recalls in that context any restrictions to the right of access to such information on the basis of Article 20(1) must not exceed what is necessary to achieve this purported objective.

3.7. Information to the person concerned

Articles 11 and 12 of the Regulation provide for information to be given to data subjects in order to ensure the transparency of the processing of personal data. Article 11 provides that when the data is obtained from the data subject, the information must be given at the time of collection. When the data has not been obtained from the data subject, the information must be given when the data is first recorded or disclosed, unless the data subject already has it (Article 12).

The EDPS notes that the EFCA provides data subjects with a specific data protection notice for these processing operations on EFCA's webpages containing all the information listed in Article 12 of the Regulation.

⁷ See also joint Opinion of 30 November 2011 in cases 2011-0615 and 2011-0636: "According to most Member States legal systems, the master of the vessel forms part of the commercial unit of the vessel owner and represents the latter on board the vessel as well as on land".

In line with his recommendations made in his earlier Opinion in cases 2011-0615 and 2011-0636, the EDPS further suggests that the EFCA, in cooperation with DG MARE and in its role of coordinator of the activities of EU Member States inspectors, could help develop a template data protection notice which could be used by inspectors. This data protection notice should contain all the elements listed in Article 10 of Directive 95/46/EC, such as the identity of the controller, the categories of data collected, the purpose of collection, the recipients of the data, and the rights of individuals as concerns their data.

3.8. Security measures

...

4. Conclusion

There is no reason to believe that there is a breach of the provisions of Regulation (EC) No 45/2001 provided the above considerations are fully taken into account. In particular, the EFCA should:

- ensure that any restrictions to the right of access to the information contained in the inspection report on the basis of Article 20(1)(a) and (e) does not exceed what is necessary to achieve the purported objective;
- help develop a template data protection notice which could be used by inspectors, which would contain the information listed in Article 10 of Directive 95/46/EC.

Done at Brussels, 16 July 2013

(signed)

Giovanni BUTTARELLI