



## **EDPS formal comments on a Proposal for a Regulation of the European Parliament and of the Council laying down conservation and management measures applicable in the Western and Central Pacific Fisheries Convention Area and amending Council Regulation (EC) No 520/2007**

### **1. Introduction and background**

- The following comments concern the Proposal for a Regulation of the European Parliament and of the Council laying down conservation and management measures applicable in the Western and Central Pacific Fisheries Convention Area and amending Council Regulation (EC) No 520/2007 together with its three Annexes ('the Proposal').
- The aim of the Proposal is to implement into European Union (EU) law the conservation and management measures adopted by the Western and Central Pacific Fisheries Commission ('WCPFC'). The EU has been a contracting party to the WCPFC since 2004, when it ratified the Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean ('the Convention'). The WCPFC is the regional fisheries management organisation ('RFMO') responsible for managing fishery resources in the Western and Central Pacific Ocean. WCPFC conservation and management measures apply to the entire WCPFC Convention Area.
- These comments are provided in reply to the formal request by the Commission on 26 April 2021 pursuant to Article 42(1) of Regulation (EU) 2018/1725 ('the EUDPR')<sup>1</sup>. We limited our comments below to the provisions of the Proposal that are relevant from a data protection perspective.
- These formal comments do not preclude any future additional comments by the EDPS, in particular if further issues are identified or new information becomes available. Furthermore, these formal comments are without prejudice to any future action that may be taken by the EDPS in the exercise of his powers pursuant to Article 58 of the EUDPR'.

### **2. EDPS Comments**

#### **2.1. General Comments**

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<sup>1</sup> 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, OJ L 295, 21.11.2018.

- Article 22 of the Proposal provides that Member States shall ensure that vessels have been placed on the Record of fishing vessels. Any Union fishing vessel not included in the Record shall be deemed not to be authorised to fish for, retain on board, tranship, transport or land highly migratory fish stocks in the Convention Area.
- Pursuant to Article 23 of the Proposal, each flag Member State shall submit, electronically, to the Commission the information with respect to each vessel listed in the Record. Moreover, pursuant to Article 27, the chartering Member State shall notify the Commission of any vessel to be identified as chartered by submitting electronically the information with respect to each chartered vessel.
- The EDPS points out that the proposal would imply the processing of personal data in certain cases, including the processing of sensitive data. This would in particular include names and addresses of the ship owner(s), the master and the charterer pursuant to Articles 23 and 27 of the Proposal, as well as the processing of health data of the ROP Observer pursuant to Article 30 of the Proposal. This data may be transferred either via email or other electronic means or transmitted manually via the web portal<sup>2</sup>.
- Article 4(1) GDPR (Article 3(1) EUDPR) defines personal data as ‘*any information relating to an identified or identifiable natural person. An identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person*’. Even the data concerning legal persons may therefore in some cases be considered as personal data, as clarified by the CJEU<sup>3</sup>. In these cases, the determining factor is whether the information ‘relates to’ an ‘identifiable’ natural person. Consequently, personal data would normally be processed in all cases where the information concerning the ship-owner or master of the vessel pertains to an identified or identifiable individual.
- In this context, the EDPS welcomes the reference to the confidentiality as highlighted in Article 39 of the Proposal concerning the “(...) confidential treatment of electronic reports and messages transmitted to and received from the WCPFC Secretariat”.

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<sup>2</sup> Article 23(6) Members States shall submit complete fishing vessel record data to the Commission that meet the structure and format specifications of Attachment 1 to CMM 2014-03, and submit vessel photographs that meet the specifications of Attachment 2 to CMM 2014-03

Article 23 (7) Submission of vessel record data to the Commission shall be in an electronic transmission that meet the electronic formatting specifications of Attachment 3 to CMM 2014-03.

<sup>3</sup> See Court of Justice of European Union in Joint Cases C92/09, Volker und Markus Schecke Gbr v. Land Hessen, and C-93/09, Eifert v. Land Hessen and Bundesanstalt für Landwirtschaft und Ernährung, at paragraph 53, where the CJEU considered that legal persons can claim the protection of Articles 7 and 8 of the Charter in so far as the official title of the legal person identifies one or more natural persons.

- However, **the EDPS notes the lack of a basic provision on the applicability of data protection law.** In this regard, we recommend adding a recital underlining the applicability of the GDPR and EUDPR.
- Furthermore, the EDPS considers that the storage period should be established in the Proposal by setting a maximum period of retention. Consequently, we recommend including provisions in the Proposal that would specify retention periods based on each of the categories of data in relation to each purpose of processing.

## 2.2 The role of flag Member States and the Commission within the meaning of data protection law

- The EDPS takes note of Article 23 and Article 27 of the Proposal under the titles ‘Submission of vessel information’ and ‘Charter Notification Scheme’ respectively, according to which the name and address of the owner and charterer, along with the name and nationality of the master of the fishing vessel should be notified by each flag Member State and submitted to the Commission electronically for purposes of record keeping and tracking.
- In this regard, and in light of the information available, the EDPS is of the view that the Member States and the Commission could possibly be considered as joint controllers within the meaning of data protection law (pursuant to Article 26 GDPR and 28 EUDPR). Therefore, the EDPS considers that the Proposal should specifically mention (preferably in the operative part of the Proposal) that the Member States and the Commission involved in the processing of personal data would be assuming the role of joint controllers of personal data within the meaning of data protection law. This would also require the joint controllers to enter into an arrangement, in order to determine in a transparent manner their respective responsibilities for compliance with their data protection obligations, including for the exercise of data subject’s rights.

## 2.3 Sensitive data category of the ROP observer

- Article 30 (3) of the Proposal states that *“If an ROP (Regional Observer Programme) observer suffers from a serious illness or injury that threatens his or her health or safety, the master of the fishing vessel shall: (a) immediately cease fishing operations; (b) immediately notify the flag Member State; (..) and (e) cooperate fully in any and all official investigations into the cause of the illness or injury.”*
- The EDPS wishes to stress that the notification would normally imply the processing of data related to health of the ROP observer, which constitutes a special category of personal data within the meaning of data protection rules. It will therefore be of paramount importance to ensure that the processing takes place in full compliance

with the GDPR [or the EUDPR]. More specifically, the EDPS considers that the only legal basis available for the processing of special categories of personal data (health data) of the ROP observer can be found in Article 9(2)(c) of the GDPR, as it is understood that the ROP observer is independent and not under employment contract with either the Member States or the Commission.

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*(e-signed)*