



EUROPEAN DATA PROTECTION SUPERVISOR

Formal comments of the EDPS on the Proposal for a Council Decision on the accession of the European Union to the Convention on the Conservation and Management of High Seas Fisheries Resources in the North Pacific Ocean

1. Introduction and background

- The following formal comments concern the Proposal for a Council Decision on the accession of the European Union to the Convention on the Conservation and Management of High Seas Fisheries Resources in the North Pacific Ocean, together with its annex ('the Proposal').
- The objective of the Proposal is to approve the accession of the European Union to the Convention on the Conservation and Management of High Seas Fisheries Resources in the North Pacific Ocean ('the Convention')¹.
- The EDPS takes note that the objective of the Convention is to ensure the long-term conservation and sustainable use of the fisheries resources in the Convention Area while protecting the marine ecosystems of the North Pacific Ocean in which these resources occur².
- These comments are provided in reply to the formal request for consultation sent by the European Commission ('the Commission') on 8 July 2021 pursuant to Article 42(1) of Regulation (EU) 2018/1725 (the 'EUDPR'). 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 EUDPR.

¹ Convention on the Conservation and Management of High Seas Fisheries Resources in the North Pacific Ocean; <https://www.npfc.int/system/files/2017-01/Convention%20Text.pdf>

² Article 2 of the Convention.

2. Comments

2.1. Necessity to identify clearly which personal data will be processed and who will be the controller

- The accession to the Convention will require the EU to comply with a series of provisions that involve collecting data and sharing it with the North Pacific Fisheries Commission (the ‘NPFC’) and with other members of the Convention. In particular, Article 13(8) of the Convention indicates in substance that each contracting party should:
 - maintain a record of fishing vessels entitled to fly its flag and authorised to be used for fishing activities in the Convention area in accordance with the information requirements, rules, standards, and procedures adopted by the NPFC;
 - provide annually to the NPFC, in accordance with the procedures established by the NPFC, information with respect to each fishing vessel entered in the record required to be maintained; and
 - provide annually to the NPFC the names of the fishing vessels entered in the record that conducted fishing activities during the previous calendar year.
- The EDPS takes note that the NPFC is the entity responsible for developing standards, specifications, rules and procedures for the collection of relevant data by the members and their subsequent sharing with the NPFC and with other members³. Such NPFC rules include in particular the conservation and management measures (i) on information requirements for vessel registration⁴, (ii) on vessel monitoring system⁵ and (iii) to establish a list of vessels presumed to have carried out illegal, unreported and unregulated (‘IUU’) fishing activities⁶.
- The EDPS welcomes that the Convention refers to:
 - the obligation to take due account of the need to protect the confidentiality of personal information when the NPFC publishes the record of fishing vessels⁷; and

³ In particular: Article 7(2)(e) and Article 16 of the Convention. See also Article 11(4)(f) on the competence attributed to the Technical and Compliance Committee to develop rules and procedures governing the use of data and other information for monitoring, control and surveillance purposes.

⁴ North Pacific Fisheries Commission’s conservation and management measure on information requirements for vessel registration; [CMM 2021-01](#) (Entered into force 10 July 2021).

⁵ North Pacific Fisheries Commission’s conservation and management measure on the vessel monitoring system (VMS); [CMM 2021-12](#) (To be implemented on notice from the Chair of TCC).

⁶ North Pacific Fisheries Commission’s conservation and management measure to establish a list of vessels presumed to have carried out illegal, unreported and unregulated fishing activities in the convention area of the north pacific fisheries commission; [CMM 2019-02](#) (Entered into force 29 November 2019).

⁷ Article 13(10) of the Convention.

- the obligation to maintain confidentiality where appropriate and to take due account of the domestic practices of members of the NPFC when the NPFC establishes rules to ensure the security of, access to and dissemination of data, including data reported via real-time satellite position-fixing transmitters⁸.
- The EDPS also welcomes that the NPFC conservation and management measures provide in particular that:
 - all Vessel Monitoring System ('VMS') data received by the Secretariat should be treated as confidential information⁹;
 - mobile transmitting units (MTUs) on fishing vessels must be tamper-proof so as to preserve the security and integrity of VMS data¹⁰;
 - ensuring publicity of the NPFC IUU Vessel List should be done in a manner consistent with any applicable confidentiality requirements¹¹.
- As also noted by the Commission¹², the EDPS considers that acceding to and complying with the Convention will imply collecting and transferring personal data. However, based on the Convention, NPFC rules¹³ and the information provided by the Commission¹⁴, the EDPS understands that the personal data collected and transferred will be mainly limited to the name and address of the owner and operator of fishing vessels, fishing licences and vessel identifiers¹⁵. However, the EDPS notes that the precise list of categories of personal data collected and transferred ultimately depends on the information requirements, rules, standards, and procedures adopted by the NPFC¹⁶. **Consequently, the EDPS recommends the Commission to identify exhaustively and precisely which categories of personal data will be processed.**

⁸ Article 16(4) of the Convention.

⁹ Section 13 of [CMM 2021-12](#).

¹⁰ Annex of [CMM 2021-12](#).

¹¹ Paragraph 26 of [CMM 2019-02](#).

¹² Commission's letter of 13 July 2021; MARE/B.2/FH/BB (2021).

¹³ [CMM 2021-01](#) and [CMM 2021-12](#).

¹⁴ Commission's letter of 13 July 2021; MARE/B.2/FH/BB (2021).

¹⁵ The EDPS notes that data processed to establish a list of vessels presumed to have carried out illegal, unreported and unregulated ('IUU') fishing activities may constitute personal data relating to criminal convictions and offences, in which case appropriate safeguards for the rights and freedoms of data subjects should be provided, in accordance with Article 11 EUDPR.

¹⁶ According to Article 16(1) of the Convention, NPFC rules are adopted in compliance with Annex I of the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks of 4 December 1995. In particular, this annex refers to the collection of basic fishery data and vessel data.

- The EDPS also stresses the importance of determining whether the Commission will act as controller and to **clarify the roles and responsibilities of the Commission on the one hand and the Member States on the other hand** with regard to the processing of personal data in the context of the implementation of the Convention and of the NPFC standards, specifications, rules and procedures.
- The above-mentioned clarifications could be made in another act of EU law, as the EDPS understands from the Commission that the obligations imposed by the Convention will be transposed into EU law after the EU joined the Convention¹⁷.

2.2. Transfer of personal data

- The EDPS acknowledges that it may be challenging for the Commission to agree on specific agreements with regard to data protection that fulfil the conditions of Article 48(2) and (3) of Regulation 2018/1725 with regard to international organisations and in particular Regional Fisheries Management Organisations (RFMOs) such as the NPFC. For this reason, the Commission seems to intend to rely on the derogations in Article 50(1)(d) of Regulation 2018/1725 (i.e. transfer necessary for important reasons of public interest).
- In this context, the EDPS notes that the accession to the Convention would imply for the EU to become a member of the NPFC¹⁸, where, as a general rule, decisions are made by consensus¹⁹. This should give **the EU the possibility to promote actively the adoption of standards, specifications, rules and procedures that are in line with EU data protection principles**.
- As part of these efforts, **the EDPS encourages the negotiation and conclusion of an agreement under Article 48(2)(a) EUDPR (i.e. a legally binding and enforceable instrument between public authorities or bodies) or Article 48(3)(b) EUDPR (i.e. provisions to be inserted into administrative arrangements between public authorities or bodies which include enforceable and effective data subject rights)**, should it be confirmed that the Commission will be the controller (or the respective corresponding provisions under Regulation (EU) 2016/679 (the ‘GDPR’) should Member States be the controller). This would be the **most stable and appropriate instrument for transferring personal data** in the long-term since (i) **the Convention does not as such constitute an agreement providing appropriate safeguards to transfer personal data** and (ii) **reliance on derogations needs to be restricted to specific situations as it**

¹⁷ Commission’s letter of 13 July 2021; MARE/B.2/FH/BB (2021).

¹⁸ Article 5(1) of the Convention.

¹⁹ Article 8(1) of the Convention.

should not become the rule in practice²⁰. In doing so, the EDPS recommends the Commission to take due account of the EDPB Guidelines 2/2020 on Articles 46(2)(a) and 46(3)(b) of Regulation 2016/679 for transfers of personal data between EEA and non-EEA public authorities and bodies²¹.

- In view of the above, **the EDPS recommends adding a specific recital to the Council decision's Proposal according to which the EU will endeavour to negotiate and conclude such agreement, in order for it to constitute the legal instrument for the personal data transfer.**
- As to the possibility to rely in the meantime on the derogation provided for by Article 50(1)(d) EUDPR (i.e. transfer necessary for important reasons of public interest), the EDPS notes that this condition requires to demonstrate that the said public interest is recognised in Union law²². In this respect, the EDPS notes that:
 - The objective of the Convention is to ensure the long-term conservation and sustainable use of the fisheries resources in the Convention Area while protecting the marine ecosystems of the North Pacific Ocean in which these resources occur²³.
 - The Proposal relies on two different legal bases:
 - Article 43(2) TFEU on the common agricultural policy and the common fisheries policy; and
 - Article 218(6)(a) TFEU on agreements between the Union and third countries or international organisations;
 - The legislative financial statement of the Proposal also refers to Article 3(1)(d) TFEU according to which the EU has exclusive competence for the conservation of marine biological resources under the common fisheries policy²⁴;
 - Recital (2) of the Proposal provides that '[t]he Union is competent to adopt measures for the conservation of marine biological resources under the common fisheries policy and to enter into agreements with third countries and international organisations.'

²⁰ European Data Protection Board (EDPB), Guidelines 2/2018 on derogations of Article 49 under Regulation 2016/679; 25 May 2018, p. 11;

https://edpb.europa.eu/sites/default/files/files/file1/edpb_guidelines_2_2018_derogations_en.pdf.

²¹ European Data Protection Board (EDPB) Guidelines 2/2020 on articles 46(2)(a) and 46(3)(b) of Regulation 2016/679 for transfers of personal data between EEA and non-EEA public authorities and bodies; 15 December 2020;

https://edpb.europa.eu/sites/default/files/files/file1/edpb_guidelines_202002_art46guidelines_internationaltransferspublicbodies_v2_en.pdf.

²² Article 50(3) EUDPR.

²³ Article 2 of the Convention.

²⁴ Section 1.5.2 of the legislative financial statement.

- In view of the above, the EDPS considers that the express reference to Article 3(1)(d) TFEU and to the corresponding objective of the conservation of marine biological resources is an important element to demonstrate that the public interest is recognised in Union law, in compliance with Article 50(3) EUDPR. Therefore, **the EDPS recommends making an express reference to Article 3(1)(d) TFEU in Recital (2) of the Proposal, specifying that the EU exclusive competence evidences the existence of public interest.**
- The EDPS recalls that the applicability of derogations to a specific transfer shall be assessed on a case-by-case basis. Moreover, the EDPS draws the Commission's attention to the EDPB Guidelines 2/2018 on derogations according to which the 'derogation [on important reasons of public interest] is not limited to data transfers that are "occasional". **Yet, this does not mean that data transfers on the basis of the important public interest derogation under Article 49 (1) (d)²⁵ can take place on a large scale and in a systematic manner.** Rather, the general principle needs to be respected according to which the derogations as set out in Article 49 shall not become "the rule" in practice, but need to be restricted to specific situations and each data exporter needs to ensure that the transfer meets the strict necessity test.

*Where transfers are made in the usual course of business or practice, the EDPB strongly encourages all data exporters (in particular public bodies) to frame these by **putting in place appropriate safeguards** in accordance with Article 46 rather than relying on the derogation as per Article 49(1) (d)²⁶.*

2.3. Development of NPFC standards, specifications, rules and procedures that are in line with EU data protection rules.

- As noted above, the EDPS understands that NPFC decisions are, as a general rule, made by consensus²⁷. Therefore, this should give the EU the opportunity to advocate for the adoption of NPFC standards, specifications, rules and procedures that are in line with EU data protection rules. This is all the more valid given the references by the Convention to (i) the obligation to maintain confidentiality where appropriate²⁸ and (ii) to take due account of the domestic practices of members of the NPFC when

²⁵ Article 49(1)(d) GDPR lays down the derogation for important reasons of public interest and is mirrored in the EUDPR by Article 50(1)(d).

²⁶ European Data Protection Board (EDPB), Guidelines 2/2018 on derogations of Article 49 under Regulation 2016/679; 25 May 2018, p. 11 (emphasis added);

https://edpb.europa.eu/sites/default/files/files/file1/edpb_guidelines_2_2018_derogations_en.pdf.

²⁷ Article 8(1) of the Convention.

²⁸ Article 13(10) of the Convention.

the NPFC establishes rules to ensure the security of, access to and dissemination of data, including data reported via real-time satellite position-fixing transmitters²⁹.

The EDPS therefore recommends including a specific recital in the Council Decision's Proposal in order to recall that the EU, as member of the NPFC, will endeavour to promote the development of NPFC standards, specifications, rules and procedures that are in line with EU data protection rules.

- The EDPS encourages the Commission to promote actively the principles of data minimisation, storage limitation, restrictions and safeguards on onward transfers and purpose limitation in the context of the standards, specifications, rules and procedures developed by the NPFC. In this respect, the EDPS notes for instance that the principle of purpose limitation for the use of VMS data could be strengthened³⁰.
- In accordance with Article 42(1) EUDPR, the EDPS expects to be consulted again on the upcoming act of EU law that will transpose the obligations imposed to the EU by the Convention where there is an impact on the protection of individuals' rights and freedoms with regard to the processing of personal data.

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²⁹ Article 16(4) of the Convention.

³⁰ According to Section 15 of [CMM 2021-12](#): 'Subject to NPFC's Data-Sharing and Data-Security Protocols for Vessel Monitoring System(VMS) Data, VMS data shall only be accessed and used for the purposes included in this measure or for any other purposes as agreed by the Commission'.