



EDPS formal comments on the Proposal for a Council Decision on the signing, on behalf of the European Union, and provisional application of the Sustainable Fisheries Partnership Agreement between the European Union and the Islamic Republic of Mauritania and the Implementing Protocol thereto and on the Proposal for a Council Decision on the conclusion of the Sustainable Fisheries Partnership Agreement between the European Union and the Islamic Republic of Mauritania and of the Implementing Protocol thereto.

1. Introduction and background

- On 8 July 2019, the Council adopted a Decision¹ authorising the European Commission ('the Commission') to open negotiations with Mauritania with a view to concluding a new sustainable fisheries partnership agreement and a new protocol implementing that agreement.
- Following these negotiations, the Sustainable Fisheries Partnership Agreement between the European Union and the Islamic Republic of Mauritania ('the Agreement') and the Implementing Protocol thereto ('the Protocol') were signed on 28 July 2021².
- The signing of the Agreement and the Protocol should therefore now be approved on behalf of the European Union ('the EU'), subject to their conclusion at a later date³.
- The following formal comments concern:
 - the Proposal for a Council Decision on the signing, on behalf of the European Union, and provisional application of the Sustainable Fisheries Partnership Agreement between the European Union and the Islamic Republic of Mauritania and the Implementing Protocol thereto ('the Signing Proposal'); and
 - the Proposal for a Council Decision on the conclusion of the Sustainable Fisheries Partnership Agreement between the European Union and the Islamic Republic of Mauritania and of the Implementing Protocol thereto ('the Conclusion Proposal').

¹ Council Decision of 8 July 2019 authorising the opening of negotiations with the Islamic Republic of Mauritania with a view to concluding a Sustainable Fisheries Partnership Agreement and a Protocol implementing that Agreement (ST 10231 2019 INIT).

² Recital (4) of the Proposal for a Council Decision on the signing, on behalf of the European Union, and provisional application of the Sustainable Fisheries Partnership Agreement between the European Union and the Islamic Republic of Mauritania and the Implementing Protocol thereto.

³ Recital (6) of the Proposal for a Council Decision on the signing, on behalf of the European Union, and provisional application of the Sustainable Fisheries Partnership Agreement between the European Union and the Islamic Republic of Mauritania and the Implementing Protocol thereto.

- The objective of the Signing Proposal is to approve the signing of the Agreement and the Protocol, in accordance with Article 218(5) TFEU⁴.
- The objective of the Conclusion Proposal is to approve the Agreement and the Protocol, in accordance with Article 218(6)(a)(v) and (7) TFEU⁵.
- The objective of the Agreement is to establish a framework for legal, environmental, economic and social governance for fishing activities carried out by EU fishing vessels in Mauritanian fishing areas⁶.
- The objective of the Protocol is to implement the provisions of the Agreement by laying down, in particular, the conditions for access by Union vessels to the Mauritanian fishing zone⁷.
- These formal comments are provided in reply to the formal request for consultation sent by the Commission on 29 September 2021 pursuant to Article 42(1) of Regulation (EU) 2018/1725 (the ‘EUDPR’)⁸. The comments below are limited to the provisions of the Signing Proposal and the Conclusion 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.

2. EDPS comments

- According to Article 12 of the Agreement, the EU and the Islamic Republic of Mauritania should cooperate to prevent and combat illegal fishing, in particular through the exchange of information and close administrative cooperation.
- According to Article 17(3) of the Protocol, the implementation of the Protocol will imply the processing of several categories of personal data:
 - identification and contact data;
 - activities of a vessel or relating to a vessel, its position and movements, its fishing activity or fishing-related activity;

⁴ Article 1 of the Signing Proposal.

⁵ Article 1 of the Conclusion Proposal.

⁶ Article 2 of the Agreement.

⁷ Article 2 of the Protocol.

⁸ 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.

- data relating to vessel owners and operators (position or rank), masters and crew members; and
 - any other data relating to the subject matter of the Agreement.
- Article 17 of the Protocol provides for confidentiality and data protection rules.

2.1. General comments on Article 17 of the Protocol

- The EDPS welcomes the inclusion of Article 17 in the Protocol, which reinforces the level of protection for data subjects. In particular, the EDPS welcomes:
 - the express reference to processing of the data in accordance with data protection principles⁹;
 - that the data will be processed by competent authorities exclusively for the implementation of the Agreement¹⁰;
 - the identification of a specific retention period and the obligation to anonymise the remaining personal data after at most 10 or 20 years¹¹.
- In addition, the EDPS welcomes that Article 17(3) of the Protocol provides an indication of the categories of personal data that will be processed¹². **In this respect, the EDPS recommends clarifying the scope of the first category relating to ‘identification and contact data’ (i.e. identification and contact data of which data subjects?).** Furthermore, the EDPS notes that the fourth category is formulated in very generic terms (“any other data related to the subject matter of the Agreement”). **Therefore, the EDPS recommends to further specify this fourth category in order to provide a comprehensive overview of the categories of personal data concerned.** Specific details concerning the exact information to be collected could then be set out by the Joint Committee, in accordance with Article 17(7) of the Protocol¹³.

⁹ Article 17(1) of the Protocol.

¹⁰ Article 17(2) of the Protocol.

¹¹ Article 17(4) of the Protocol: *‘Personal data shall not be kept for longer than is necessary for the purpose for which they were exchanged, up to a maximum of 10 years, unless the personal data are necessary to follow up an infringement, inspection or judicial or administrative proceedings. In such cases, the personal data may be stored for 20 years. If personal data are kept for longer, they shall be anonymised.’*

¹² Article 17(3) of the Protocol: *‘In order to ensure proper implementation of the Protocol, several categories of personal data shall be processed:*

(a) identification and contact data;

(b) the activities of a vessel or relating to a vessel, its position and movements, its fishing activity or fishing-related activity;

(c) data relating to vessel owners and operators (position or rank), masters, and crew members;

(d) any other data relating to the subject matter of the Agreement.’

¹³ Article 17(7) of the Protocol: *‘Appropriate safeguards and legal remedies may be established by the Joint Committee.’*

- In addition, the EDPS recalls that data processed to prevent and combat illegal fishing 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 and/or Article 10 Regulation (EU) 2016/679 (the ‘GDPR’)¹⁴.
- More generally, **the EDPS recommends detailing further the data protection requirements of Article 17 of the Protocol by way of appropriate safeguards and legal remedies that may be established by the Joint Committee in accordance with Article 17(7) of the Protocol. Moreover, the EDPS recommends clarifying further the roles and responsibilities of the Commission on the one hand and the ‘flag Member States’ (i.e. the EU Member States whose vessels are flying their flags) on the other hand¹⁵.** Such clarification could also be provided by way of a separate act of EU law.

2.2. Article 17 of the Protocol does not provide on its own appropriate safeguards to transfer personal data

- In order to transfer personal data on the basis of a legally binding and enforceable instrument between public authorities or bodies¹⁶, controllers or processors are required to provide appropriate safeguards and ensure that enforceable data subject rights and effective legal remedies for data subjects are available¹⁷.
- The European Data Protection Board (‘the EDPB’) has clarified what safeguards should be put in place by legally binding and enforceable instruments between public bodies to enable transfers of personal data¹⁸. Among those requirements, the EDPS points out in particular to the obligation to provide for redress mechanisms, supervision mechanisms, data subjects rights or restrictions on onward transfers and sharing of data.

¹⁴ See in particular Article 2(e), 7, 11(1), 12, 14(3)(d) of the Agreement, as well as Section 4 of Chapter VI and Section 5 of Chapter VII of Annex 1 to the Protocol.

¹⁵ Article 17(6) of the Protocol: *‘The authorities responsible for data processing shall be the European Commission or the flag Member State, for the Union, and the Ministry, for Mauritania.’*

¹⁶ Article 48(2)(a) EUDPR and Article 46(2)(a) GDPR.

¹⁷ Article 48(1) EUDPR and Article 46(1) GDPR.

¹⁸ 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, available at https://edpb.europa.eu/our-work-tools/our-documents/guidelines/guidelines-22020-articles-46-2-and-46-3-b-regulation_en. The same guidance also clarifies the safeguards required to be put in place by provisions to be inserted into administrative arrangements between public bodies, subject to authorisation from the competent supervisory authority.

- In view of the above, it is apparent that the Protocol does not meet all the requirements to be considered as a legally binding and enforceable instrument between public authorities or bodies on which the transfer of personal data could be based.
- However, the EDPS notes that Article 17(7) of the Protocol provides that appropriate safeguards and legal remedies may be established by the Joint Committee¹⁹. In this respect, the EDPS considers that the Joint Committee could and should indeed establish appropriate safeguards, enforceable data subject rights and effective legal remedies, allowing thus for personal data to be transferred lawfully.
- Therefore, in order to ensure the lawful transfer of personal data, **the EDPS recommends the swift establishment of such legally binding and enforceable provisions**. In doing so, the EDPS would recommend 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 bodies.
- In case it would be envisaged to rely in the meantime on the derogation provided for by Article 50(1)(d) EUDPR or Article 49(1)(d) GDPR (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 law or in the law of a Member State²⁰. In this respect, the EDPS notes that:
 - One of the objectives of the Agreement is to to promote sustainable fishing in the fishing zone²¹.
 - Recital (5) of the Signing Proposal and Recital (2) of the Conclusion Proposal both indicate that one of the objectives of the Agreement and of the Protocol is to further promote the development of a sustainable fisheries policy and the responsible exploitation of fisheries resources in the Mauritanian fishing zone and the Atlantic Ocean.
 - The substantive legal basis for the Signing Proposal and the Conclusion Proposal is Article 43(2) TFEU on the common agricultural policy and the common fisheries policy.
 - According to Article 3(1)(d) TFEU, the EU has exclusive competence for the conservation of marine biological resources under the common fisheries policy.

¹⁹ Article 17(7) of the Protocol: ‘*Appropriate safeguards and legal remedies may be established by the Joint Committee.*’

²⁰ 50(3) EUDPR and Article 49(4) GDPR.

²¹ Article 3(1) of the Agreement.

- In view of the above, the EDPS considers that an express reference to Article 3(1)(d) TFEU and to the corresponding objective of the conservation of marine biological resources would be an useful element to demonstrate that the public interest is recognised in Union law, in compliance with 50(3) EUDPR and Article 49(4) GDPR. Therefore, **the EDPS recommends making an express reference to Article 3(1)(d) TFEU in Recital (5) of the Signing Proposal.**
- The EDPS also 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 of Article 49 under Regulation 2016/679 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)²² 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)²³.*

* * *

Brussels, 14 October 2021

(e-signed)

Wojciech Rafal WIEWIÓROWSKI

²² 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).

²³ 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.