



EDPS formal comments on (i) the Proposal for a Council Decision on the signing, on behalf of the European Union, and provisional application of the Protocol (2021-2024) on the implementation of the Sustainable Fisheries Partnership Agreement between the European Union and the Government of the Cook Islands, (ii) the Proposal for a Council Decision on the conclusion, on behalf of the European Union, of the Protocol (2021-2024) on the implementation of the Sustainable Fisheries Partnership Agreement between the European Union and the Government of the Cook Islands and (iii) the Proposal for a Council Regulation on the allocation of fishing opportunities under the Protocol (2021-2024) on the implementation of the Sustainable Fisheries Partnership Agreement between the European Union and the Government of the Cook Islands

1. Introduction and background

- On 28 February 2017, the Council adopted a Decision approving the Sustainable Fisheries Partnership Agreement between the European Union and the Government of the Cook Islands¹ ('the Agreement'). The Agreement and the protocol on its implementation were provisionally applied since 14 October 2016, for a period of four years².
- On 7 July 2020, the Council authorised the European Commission ('the Commission') to open negotiations with the Government of the Cook Islands for the conclusion of a new protocol on the implementation of the Agreement³. Pending the finalisation of the negotiations, the current protocol was extended for one year and is set to expire on 13 November 2021⁴.
- Following the negotiations, a new protocol on the implementation of the Agreement was initialled on 28 July 2021 ('the Protocol')⁵. The Protocol should now be signed and approved on behalf of the EU.
- In parallel, the Commission prepared a proposal for a Council Regulation on the allocation of fishing opportunities under the Protocol⁶.
- 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 Protocol (2021-2024) on the implementation of the

¹ Council Decision (EU) 2017/418 of 28 February 2017 on the conclusion on behalf of the European Union of the Sustainable Fisheries Partnership Agreement between the European Union and the Government of the Cook Islands and the Implementation Protocol thereto, OJ L 64, 10.03.2017, p. 1.

² Recital (1) of the Proposal for a Council Decision on the signing, on behalf of the European Union, and provisional application of the Protocol (2021-2024) on the implementation of the Sustainable Fisheries Partnership Agreement between the European Union and the Government of the Cook Islands ('the Signing Proposal').

³ Recital (2) of the Signing Proposal.

⁴ Recital (3) of the Signing Proposal.

⁵ Recital (4) of the Signing Proposal.

⁶ COM(2021) 611 final 2021/0310 (NLE).



Sustainable Fisheries Partnership Agreement between the European Union and the Government of the Cook Islands ('the Signing Proposal');

- the Proposal for a Council Decision on the conclusion, on behalf of the European Union, of the Protocol (2021-2024) on the implementation of the Sustainable Fisheries Partnership Agreement between the European Union and the Government of the Cook Islands ('the Conclusion Proposal'); and
 - the Proposal for a Council Regulation on the allocation of fishing opportunities under the Protocol (2021-2024) on the implementation of the Sustainable Fisheries Partnership Agreement between the European Union and the Government of the Cook Islands ('the Regulation Proposal').
- The objective of the Signing Proposal is to approve the signing of the Protocol, in accordance with Article 43(2) in conjunction with Article 218(5) TFEU⁷.
 - The objective of the Conclusion Proposal is to approve the Protocol, in accordance with Article 43(2) in conjunction with Article 218(6)(a)(v) and (7) TFEU⁸.
 - The objective of the Protocol is to enable the EU and the Government of the Cook Islands to continue working together to promote a sustainable fisheries policy and the sound exploitation of fisheries resources in Cook Islands' fishery waters and to allow Union vessels to fish in those waters⁹.
 - The objective of the Regulation Proposal is to allocate among the EU Member States the fishing opportunities established under the Protocol¹⁰.
 - These formal comments are provided in reply to the request for consultation sent by the Commission on 6 October 2021 pursuant to Article 42(1) of Regulation (EU) 2018/1725 (the 'EUDPR')¹¹. The comments below are limited to the provisions of the Signing Proposal and the Conclusion Proposal that are relevant from a data protection perspective. The EDPS does not have any specific comment regarding the Regulation Proposal but would nevertheless invite the Commission to make reference to the consultation of the EDPS in the preamble of the Regulation Proposal, as is the case for the Signing Proposal and the Conclusion Proposal.
 - 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,

⁷ Article 1 of the Signing Proposal.

⁸ Article 1 of the Conclusion Proposal.

⁹ Recital (5) of the Signing Proposal.

¹⁰ Article 1 of the Regulation Proposal.

¹¹ 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.

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 the Annex to the Protocol of the Agreement, masters of Union vessels will endeavour to report the presence in the Cook Islands' fishery waters of any other fishing vessel, in order to strengthen the monitoring of fisheries and the fight against Illegal, unreported and unregulated fishing (IUU) fishing¹²,
- According to Article 8(3) of the Protocol, the implementation of the Protocol will imply the processing of several categories of personal data:
 - identification and contact data;
 - data relating to vessel owners and operators (position or role), masters and crew members;
 - all other data related to the subject matter of the Agreement.
- Article 8 of the Protocol provides for rules on confidentiality and personal data.

2.1. General comments on Article 8 of the Protocol

- The EDPS welcomes the inclusion of Article 8 in the Protocol, which reinforces the level of protection for data subjects. In particular, the EDPS welcomes:
 - the provisions on confidentiality¹³ and purpose limitation¹⁴;
 - the identification of a specific retention period and the obligation to anonymise the remaining personal data after at most 10 or 20 years¹⁵.
- In addition, the EDPS welcomes that Article 8(3) of the Protocol provides an indication of the categories of personal data that will be processed¹⁶. **In this respect, the EDPS recommends clarifying the scope of the first category relating to 'identification and contact data'**

¹² Section 1 of Chapter VI of the Annex to the Protocol.

¹³ Article 8(1) of the Protocol.

¹⁴ Article 8(2) of the Protocol.

¹⁵ Article 8(4) of the Protocol: *'Personal data shall not be kept beyond the time necessary for the purpose for which it was exchanged, at most 10 years, except if the personal data is necessary to allow the follow up of an infringement, an inspection, or judicial or administrative procedures, or scientific research. In these cases, the personal data may be stored for 20 years. If personal data is retained for a longer period, the data shall be anonymized.'*

¹⁶ Article 8(3) of the Protocol: *'For the proper implementation of the Protocol, several categories of personal data will be processed:*

(a) Identification and contact data

(b) Data relating to vessel owners and operators (position or role), masters and crew members

(c) All other data related to the subject matter of the Agreement.'

(in particular by specifying the categories of data subjects to whom the identification and contact data relate). Furthermore, the EDPS notes that the third category is formulated in very generic terms (“all other data related to the subject matter of the Agreement”). **Therefore, the EDPS recommends to further specify this third 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 8(6) of the Protocol¹⁷.

- 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’)¹⁸.
- More generally, **the EDPS recommends detailing further the data protection requirements of Article 8 of the Protocol by way of appropriate safeguards and legal remedies that may be established by the Joint Committee in accordance with Article 8(6) 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 hand**¹⁹. Such clarification could also be provided by way of a separate act of EU law.

2.2. Article 8 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 bodies²⁰, controllers or processors are required to provide appropriate safeguards and ensure that enforceable data subject rights and effective legal remedies for data subjects are available²¹.
- 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 data²². Among those requirements, the EDPS points out in particular to

¹⁷ Article 8(6) of the Protocol provides that: ‘*Appropriate safeguards and legal remedies may be established by the Joint Committee.*’

¹⁸ See in particular Chapter V and VI of the Annex to the Protocol.

¹⁹ Article 8(5) of the Protocol: ‘*The European Commission or the flag Member State, in the case of the Union, and the Ministry of Marine Resources, in the case of the Cook Islands, shall be the authorities responsible for the processing of data.*’

²⁰ Article 48(2)(a) EUDPR and Article 46(2)(a) GDPR.

²¹ Article 48(1) EUDPR and Article 46(1) GDPR.

²² 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-2020-articles-46-2-and-46-3-b->

the obligation to provide for redress mechanisms, supervision mechanisms, data subjects rights or restrictions on onward transfers and sharing of data.

- 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 8(6) of the Protocol provides that appropriate safeguards and legal remedies may be established by the Joint Committee²³. 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 State²⁴. In this respect, the EDPS notes that:
 - One of the objectives of the Protocol is to promote a sustainable fisheries policy and the sound exploitation of fisheries resources in Cook Islands' fishery waters²⁵, notably by exchanging relevant information relating to the activities of Union vessels in the Cook Islands' fishery waters for the purpose of managing and conserving the marine living resources²⁶.
 - 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.

[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.

²³ Article 8(6) of the Protocol: 'Appropriate safeguards and legal remedies may be established by the Joint Committee.'

²⁴ 50(3) EUDPR and Article 49(4) GDPR.

²⁵ Recital (5) of the Signing Proposal and Recital (3) of the Conclusion Proposal.

²⁶ Article 4(2) of the Protocol.

- 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)²⁷ 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)²⁸.*

* * *

Brussels, 3 November 2021

p.o.

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(e-signed)

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²⁷ 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).

²⁸ 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.