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Delegations will find in annex formal comments of the European Data Protection Supervisor on the abovementioned proposal.



E-MAIL
EUROPEAN DATA PROTECTION SUPERVISOR

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23.05.2022

WOJCIECH RAFAŁ WIEWIÓROWSKI
SUPERVISOR

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Brussels, 23 May 2022
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Subject: Formal Comments¹ of the European Data Protection Supervisor on the Proposal for a Regulation of the European Parliament and of the Council laying down management, conservation and control measures applicable in the Indian Ocean Tuna Commission (IOTC) Area of Competence, amending Council Regulations (EC) No 1936/2001, (EC) No 1984/2003 and (EC) No 520/2007

Your Excellency,
Mr Secretary-General,

Having regard to Article 42(1) of 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, please find enclosed Formal Comments on the Proposal for a Regulation of the European Parliament and of the Council laying down management, conservation and control measures applicable in the Indian Ocean Tuna Commission (IOTC) Area of Competence, amending Council Regulations (EC) No 1936/2001, (EC) No 1984/2003 and (EC) No 520/2007.

We have sent a copy of these Formal Comments to the President of the European Commission and the President of the European Parliament.

Yours sincerely,

(e-signed)

Wojciech Rafał WIEWIÓROWSKI

Encl.: Formal Comments

Cc: Mr Serge DE BIOLLEY, Director for Justice, General Secretariat of the Council

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¹Article 20(1) of the EDPS Rules of Procedure provide that "In response to requests from the Commission pursuant to Article 42(1) of the Regulation, the EDPS shall issue opinions or formal comments."





EUROPEAN DATA PROTECTION SUPERVISOR

EDPS Formal comments on the Proposal for a Regulation of the European Parliament and of the Council laying down management, conservation and control measures applicable in the Indian Ocean Tuna Commission (IOTC) Area of Competence, amending Council Regulations (EC) No 1936/2001, (EC) No 1984/2003 and (EC) No 520/2007

1. Introduction and background

1. The following comments concern the Proposal for a Regulation of the European Parliament and of the Council laying down management, conservation and control measures applicable in the Indian Ocean Tuna Commission (IOTC) Area of Competence, amending Council Regulations (EC) No 1936/2001, (EC) No 1984/2003 and (EC) No 520/2007 ('the Proposal').
2. The aim of the Proposal is the transposition into EU law of the control, conservation and management measures adopted by the Indian Ocean Tuna Commission (IOTC). The Proposal also seeks to establish a mechanism for transposing and implementing IOTC resolutions in the future¹.
3. These comments are provided in reply to the formal request by the Commission on 29 March 2022 pursuant to Article 42(1) of Regulation (EU) 2018/1725 ('EUDPR')². We limited our comments below to the provisions of the Proposal that are relevant from a data protection perspective.
4. 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. Comments

5. Pursuant to Article 2 of the Proposal, the Regulation would apply to Union fishing vessels which operate in the 'Area'³ and those which are outside of it in the case of transshipments and landings of IOTC species, as well as to third country fishing vessels

¹ COM(2021) 113 final, p. 1.

² 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, p. 39).

³ Article 3 (2) of the Proposal defines the 'Area' as those parts of the Indian Ocean as defined in the Agreement for the establishment of the IOTC (Article II and Annex A).



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making use of ports in Member States, and which carry IOTC species or fishery products originating from such species.

6. The EDPS recalls that Article 4(1) of the General Data Protection Regulation⁴ ('GDPR') and Article 3(1) EUDPR define 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 CJEU⁵. 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 relates to an identified or identifiable individual.
7. Chapter IV of the Proposal is dedicated in Sections 1 and 2 to the 'documentation on board Union fishing vessels', 'record of authorised fishing vessels', 'communication of information', 'authorisation of fishing vessels', 'obligations for Member States issuing fishing authorisations', 'measures against vessels not registered in the IOTC record of vessels', and 'record of active vessels fishing for tuna and swordfish'⁶. These provisions provide for requirements relating to fishing vessels records, and communication of data to the Commission, which include, inter alia, elements allowing for the identification of vessels' owners⁷.
8. Section 3 of Chapter IV of the Proposal establishes a 'regional observer scheme': observers on board of vessels shall collect data and information on their fishing activities and their reports shall be sent to the Commission via the flag Member States. The Commission shall forward the reports to the IOTC Secretariat⁸.
9. In Section 4 of Chapter IV of the Proposal (monitoring and surveillance), Article 36 provides for a 'charter notification scheme', according to which the chartering Member State shall notify the Commission of any vessel to be identified as chartered,

⁴ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (OJ L 119, 4.5.2016, p. 1).

⁵ Judgment of Court of Justice of European Union of 9 November 2010, *Volker und Markus Schecke Gbr and Hartmut Eifert v. Land Hessen*, Joined Cases C-92/09 and C-93/09, ECLI:EU:C:2010:662 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.

⁶ Articles 23 to 29 of the Proposal.

⁷ Article 24(3)(j) would require Member States to provide to the Commission the list of authorised vessels, which includes in particular the 'name and address of owner(s) and operator(s)'.

⁸ Article 31 of the Proposal.

by submitting information including inter alia the name and contact address of the beneficial owner of the vessel.

10. Finally, Chapter VI of the Proposal provides for rules on port State measures, inspection, enforcement and illegal, unreported and unregulated fishing ('IUU'). In particular, Article 49 foresees the possibility for a vessel to be included in the 'draft IOTC IUU vessel list from the IOTC Secretariat'. Such inclusion implies notifications to the concerned Member State and the owner and the operators of the fishing vessel. The procedure can lead to an inclusion of the concerned vessel in the 'provisional IOTC IUU vessel list', unless the Member State demonstrates that the vessel has complied with its obligations or that effective punitive action has been taken, including prosecution and imposition of sanctions of adequate severity to be effective in securing compliance and deterring further infringements⁹.
11. Against this background, the EDPS welcomes the general obligation to confidentiality contained in Article 52 of the Proposal. The EDPS notes, however, that the Proposal contains no direct reference to the applicability of Union data protection law. Article 52 of the Proposal contains an indirect reference, by referring to Article 112 of Regulation (EC) No 1224/2009. Article 112 of Regulation (EC) No 1224/2009 makes reference to both Directive 95/46/EC and Regulation (EC) No 45/2001, which have been repealed by Regulation (EU) 2016/679 and Regulation (EU) 2018/1725, respectively¹⁰.
12. The EDPS recommends adding a recital to recall the applicability of the GDPR and EUDPR to any activities covered by the Proposal involving the processing of personal data. The EDPS also suggests to clarify that the competent authorities and the Commission shall each be considered as controllers in relation to their own processing of personal data. In addition, the EDPS recalls the rules applicable to the transfers of personal data to third countries or international organisations¹¹. Finally, the EDPS recalls that data processed to prevent and fight against 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 GDPR.

Brussels, 23 May 2022

(e-signed)

Wojciech Rafał WIEWIÓROWSKI

⁹ Article 50 of the Proposal.

¹⁰ In accordance with Article 94(2) GDPR, references to the repealed Directive 95/46 shall be construed as references to the GDPR. In the same vein, Article 99 EUDPR provides that references to Regulation (EC) No 45/2001 and Decision No 1247/2002/EC shall be construed as references to the EUDPR.

¹¹ See Chapter V of the GDPR and EUDPR respectively.