

# PEACE & SECURITY

## PAIX ET SÉCURITÉ INTERNATIONALES

09

2021



### EUROMEDITERRANEAN JOURNAL OF INTERNATIONAL LAW AND INTERNATIONAL RELATIONS



ISSN 2341-0868

DOI: [http://dx.doi.org/10.25267/Paix\\_secur\\_int.2021.19](http://dx.doi.org/10.25267/Paix_secur_int.2021.19)

**Citation:** TASSINARI, F: «The Externalization of Europe's Data Protection Law in Morocco: an Imperative Means for the Management of Migration Flows», *Peace & Security – Paix et Sécurité Internationales*, No 9, 2021.

**Received:** 30 April 2021.

**Accepted:** 3 August 2021.

## THE EXTERNALISATION OF EUROPE'S DATA PROTECTION LAW IN MOROCCO: AN IMPERATIVE MEANS FOR THE MANAGEMENT OF MIGRATION FLOWS

Francesca TASSINARI<sup>1</sup>

I. INTRODUCTION – II. THE INTERNATIONAL TRANSFER OF PERSONAL DATA TO THIRD COUNTRIES: AN EU APPROACH – III. EU-MOROCCO TRADE RELATIONS: THE WAY FORWARD TO EXTERNALISE DATA PROTECTION PRINCIPLES – IV. 2.0 MANAGEMENT OF MIGRATORY FLOWS – V. CONCLUSION

**ABSTRACT:** EU data protection Law allows the transfer of personal data to third countries and international organisations only when the European protection standards are met. This condition demands for the externalisation of the EU legal framework to ensure the flow of information in all sectors. Morocco has been moving towards the EU data protection principles for trade purposes, though it has not reached an equivalent level of protection as required by Article 44 General Data Protection Regulation (GDPR). As a result, the exchange of personal data from the EU to Morocco is based on less guarantors means as far as the individuals' fundamental rights are concerned. Concretely, the operational activity conducted by the European Border and Coast Guard to return irregular migrants is founded on the derogative clause of «important reasons of public interest». This article maintains that the approximation of Moroccan law to the continental one is an indispensable means to fairly manage migration flows. For this purpose, the EU not only promotes high data protection standards, but it also outsources its IT model enclosed in the Interoperability Regulations, no. 817 and 818 of 2019.

**KEY WORDS:** International data transfer, General Data Protection Regulation (GDPR), Morocco, Migrants management, Interoperability of AFSJ large-scale IT systems.

---

<sup>1</sup> PhD Researcher, University of Granada, Spain. Researcher ID: H-5751-2018, ORCID ID: 0000-0003-4487-7130. This work was originally a contribution to the International Conference organised by the Jean Monnet Centre of Excellence «Migration and Human Rights in Europe's External Borders», held in Tangier (Morocco), on November, 28<sup>th</sup> and 29<sup>th</sup> 2019. Special thanks shall be addressed to Prof. Del Valle Gálvez and Prof. El Houdaïgui, as well as to Prof. Fajardo del Castillo for her insightful suggestions. Any errors remain at my expense.

## **L'EXTERNALISATION DE LA RÉGLEMENTATION EUROPÉENNE SUR LA PROTECTION DES DONNÉES AU MAROC: UN MOYEN INDISPENSABLE POUR LA GESTION DES FLUX MIGRATOIRES**

**RESUMÉ:** La législation européenne sur la protection des données n'autorise le transfert de données personnelles vers des pays tiers et des organisations internationales que si les normes de protection européennes sont respectées. Cette condition exige l'externalisation du cadre juridique de l'UE pour garantir le flux d'informations dans tous les secteurs. Le Maroc s'est rapproché des principes de protection des données de l'UE à des fins commerciales, mais il n'a pas atteint un niveau de protection équivalent à celui requis par l'article 44 du Règlement général sur la protection des données (RGPD). En conséquence, l'échange de données personnelles de l'UE vers le Maroc repose sur des moyens moins garants des droits fondamentaux des individus. Concrètement, l'activité opérationnelle menée par le Corps Européens de Garde-frontières et Garde-côtes pour renvoyer les migrants irréguliers est fondée sur la clause dérogatoire des «raisons importantes d'intérêt public». Cet article soutient que le rapprochement du droit marocain avec le droit continental est un moyen indispensable pour gérer équitablement les flux migratoires. À cette fin, l'UE non seulement promeut des normes élevées de protection des données, mais elle externalise également son modèle informatique enfermé dans les Règlements sur l'Interopérabilité, n° 817 et 818 de 2019.

**MOTS-CLÉS:** Transfert international de données, Règlement général sur la protection des données (RGPD), Maroc, Gestion des migrants, Interopérabilité des systèmes IT à grande échelle de l'ELSJ.

## **LA EXTERNALIZACIÓN DE LA NORMATIVA EUROPEA DE PROTECCIÓN DE DATOS EN MARRUECOS: UNA MEDIDA INDISPENSABLE PARA LA GESTIÓN DE LOS FLUJOS MIGRATORIOS**

**RESUMEN:** La ley de protección de datos de la UE sólo permite la transferencia de datos personales a terceros países y organizaciones internacionales cuando se cumplen las normas de protección europeas. Esta condición exige la externalización del marco jurídico de la UE para garantizar el flujo de información en todos los sectores. Marruecos se ha acercado a los principios de protección de datos de la UE para fines comerciales, pero no ha alcanzado un nivel de protección equivalente al exigido por el artículo 44 del Reglamento General de Protección de Datos (RGPD). En consecuencia, el intercambio de datos personales de la UE a Marruecos se basa en medios menos garantistas en lo que respecta a los derechos fundamentales de las personas. Concretamente, la actividad operativa llevada a cabo por la Guardia Europea de Fronteras y Costas para devolver a los migrantes irregulares se basa en la cláusula derogatoria de «importantes razones de interés público». Este artículo sostiene que la aproximación del derecho marroquí al continental es un medio indispensable para gestionar de forma justa los flujos migratorios. Para ello, la UE no sólo promueve altos estándares de protección de datos, sino que también externaliza su modelo informático encerrado en los Reglamentos sobre la Interoperabilidad, n° 817 y 818 de 2019.

**PALABRAS CLAVE:** Transferencia internacional de datos, Reglamento General de Protección de Datos (RGPD), Marruecos, Gestión de migrantes, Interoperabilidad de sistemas TI a gran escala del ELSJ.

## I. INTRODUCTION

This Note tries to consider the crucial role played by the exchange of information for the management of migration flows, with particular emphasis on the EU-Morocco relationship. In order to demonstrate the existing interrelation between the European Union (hereinafter EU) data protection policy and the migration one, the analyses below is organised as follows: firstly, it introduces the EU competence on personal data and the regime allowing its exchange with third countries; secondly, it gives an introspection on the EU-Morocco trade relationship and its impact on the management of migration flows and, finally, it shows how the transfer of personal data between the EU and Morocco is mainly conducted at the operational level thanks to the implementation of interoperable large-scale IT systems and the brokering of EU agencies, taking as an example the European Board and Coast Guard agency's (hereinafter EBCG Agency) activity for the return of irregular migrants.

## II. THE INTERNATIONAL TRANSFER OF PERSONAL DATA TO THIRD COUNTRIES: AN EU APPROACH

As long as global standards do not exist, diversity will remain. Transborder data flows have to be facilitated whilst, at the same time, ensuring a high level of protection of personal data when they are transferred to and processed in third countries.<sup>2</sup>

Global standards on the protection of personal data are indispensable to guarantee the flow of information worldwide.<sup>3</sup> The EU has been committed to the protection of personal data of its citizens and residents from the very beginning of the technological revolution.<sup>4</sup> Today, the EU has become one of the most important players to actively promote the fundamental rights to

<sup>2</sup> See Article 29 Data Protection Working Party, *The Future of Privacy: Joint contribution to the Consultation of the European Commission on the legal framework for the fundamental right to protection of personal data*, 1 December 2009, para. 29.

<sup>3</sup> BENNETT, C. J., and RAAB, C., *The Governance of Privacy. Policy Instruments in Global Perspective*, Edit. The Massachusetts Institute of Technology Press, Cambridge, 2003.

<sup>4</sup> BLASI CASAGRAN, C., *Global Data Protection in the Field of Law Enforcement. An EU Perspective*, Edit. Routledge, Oxfordshire, 2018.

privacy and to the protection of personal data thanks to its peculiar recognition in EU primary law.<sup>5</sup>

## **1. The EU Competence on the Protection of Personal Data and its Free Movement**

During the 1970s, the rapid evolution of information technology (IT) enabled the automatic processing of huge amount of personal data by European companies raising the concerns of the international community on the respect of the fundamental right to a private and family life.<sup>6</sup> A first regional harmonisation was laid down by the Council of Europe in the Convention no. 108 for the protection of people against the automated processing of personal data.<sup>7</sup> The Treaty served as a starting point for the EU when developing its own legal framework in 1995, namely Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and the free movement of such data (Data Protection Directive hereinafter).<sup>8</sup> The European Community and bodies were firstly bound by the

<sup>5</sup> *Cfr.* SALUZZO, S., “The EU as a Global Standard Setting Actor: The Case of Data Transfers to Third Countries”, in Carpanelli, E., and Lazzarini, N., (Eds) *Use and Misuse of New Technologies*, Edit. Springer, Cham, 2019, pp. 115-134. DOI: [https://doi.org/10.1007/978-3-030-05648-3\\_6](https://doi.org/10.1007/978-3-030-05648-3_6), and the *Opinion of the European Data Protection Supervisor on the Commission Communication on Internet Policy and Governance – Europe's role in shaping the future of Internet Governance*, Brussels, 23 June 2014, p. 8.

<sup>6</sup> LYNKEY, O., *The Foundations of EU Data Protection Law*, Edit. Oxford Studies in European Law, Oxford, 2015.

<sup>7</sup> Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, *ETS* n° 108, 28.01.1981, and its relevant Protocols: Additional Protocol for the Protection of Individuals with regard to Automatic Processing of Personal Data to the Supervisory Authorities and cross-border data flows of 8 November 2001, *ETS* n° 181 (ratified by forty-four parties among which eight countries that are not part of the Council of Europe, last consult on 21<sup>st</sup> March 2021), and Additional Protocol amending the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data of 10 October 2018, *ETS* n° 223 (it counts on eleven ratification among which one country is not part of the Council of Europe, last consult on 21<sup>st</sup> March 2021). On the leading role played by the continental data protection model see, for example, GREENLEAF, G., “The influence of European data privacy standards outside Europe: implications for globalization of Convention 108”, *International Data Privacy Law*, Vol. 2, n° 2, May 2012, pp. 68–92. DOI: <https://doi.org/10.1093/idpl/ips006>.

<sup>8</sup> Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free

data protection principles under Article 286 TEC of the Amsterdam Treaty in 1997.<sup>9</sup> This disposition was substituted by current Article 16 TFEU<sup>10</sup> that empowers the European Parliament and the Council to adopt rules relating to the protection of individuals «[...] with regard to the processing of personal data by Union institutions, bodies, offices and agencies, and by the Member States when carrying out activities which fall within the scope of Union law, and the rules relating to the free movement of such data». Article 16(2) TFEU provides the EU with a horizontal-concurrent competence that acquires sectoral application in certain areas or under pre-defined EU policies<sup>11</sup> Besides, the Treaty of Nice<sup>12</sup> entrenched data protection in a specific provision on the fundamental right to the protection of personal data that is now recognised in the EU Charter of Fundamental Rights independently from the right to a private and family life.<sup>13</sup>

---

movement of such data (OJ L 281, 23.11.1995, p. 31–50).

<sup>9</sup> According to which: «From 1 January 1999, Community acts on the protection of individuals with regard to the processing of personal data and the free movement of such data shall apply to the institutions and bodies set up by, or on the basis of, this Treaty», Treaty establishing the European Community (Consolidated version 1997) (OJ C 340, 10.11.1997, pp. 173–306).

<sup>10</sup> Consolidated version of the Treaty on the Functioning of the European Union (OJ C 326, 26.10.2012, p. 47–390).

<sup>11</sup> On the third/second pillars dichotomy see, for instance, HIJMANS, H., and SCIROCCO, A., “Shortcomings in EU data protection in the third and the second pillars. Can the Lisbon treaty be expected to help?”, *Common Market Law Review*, Vol. 46, n° 5, 2009, pp. 1485-1525.

<sup>12</sup> Treaty of Nice amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts (OJ C 80, 10.3.2001, p. 1–87).

<sup>13</sup> Article 7: «Everyone has the right to respect for his or her private and family life, home and communications»; and Article 8: «1. Everyone has the right to the protection of personal data concerning him or her. 2. Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified. 3. Compliance with these rules shall be subject to control by an independent authority», in Charter of Fundamental Rights of the European Union (OJ C 326, 26.10.2012, p. 391–407). Some hints on the distinction between Article 8 of the Charter and Article 8 of the European Convention on Human Rights of 4 November 1950 are made by RODOTÁ, S., “Data Protection as a Fundamental Right”, in Gutwirth, S., *et al.*, *Reinventing Data Protection?*, Springer, The Netherlands. 2009, pp. 77-82, as well as by KOKOTI, J., and SOBOTTA, C., “The distinction between privacy and data protection in the jurisprudence of the CJEU and the ECtHR”, *International Data Privacy Law*, Vol. 3, n° 4, November 2013, pp. 222–228. DOI: <https://doi.org/10.1093/idpl/ipt017>. On their convergence, instead, see

## 2. The EU Regime on the International Transfer of Personal Data

Under the new General Data Protection Regulation (hereunder GDPR)<sup>14</sup> international data transfer is governed by the main principle set forth in Article 44 for which the disclosure of personal data to third parties shall not undermine the level of protection guaranteed under that Regulation<sup>15</sup>. Otherwise, personal data destined to or contained in the European files cannot be exchanged.<sup>16</sup> This prohibition has crucial impacts on EU external policies, especially international trade ones, since it may hamper the economy of both the EU and the third country or organisation.<sup>17</sup> To avoid any damage, the EU promotes continental data protection standards beyond its borders,<sup>18</sup> externalising the Western model to third countries.<sup>19</sup> Concretely, the transfer of

---

TZANOÛ, M., "Data protection as a fundamental right next to privacy? 'Reconstructing' a not so new right", *International Data Privacy Law*, Vol. 3, n° 2, May 2013, pp. 88–99. DOI: <https://doi.org/10.1093/idpl/ipt004>.

<sup>14</sup> 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 (General Data Protection Regulation) (Text with EEA relevance) (OJ L 119, 4.5.2016, p. 1–88).

<sup>15</sup> On the extraterritorial application of EU data protection law see SVANTESSON, D. J. B.: *Extraterritoriality in Data Privacy Law*, Edit. Ex Tuto Publishing, Copenhagen, 2013; "A "layered approach" to the extraterritoriality of data privacy laws", *International Data Privacy Law*, 2013, Vol. 3, n° 4, pp. 278-286; "The regulation of cross-border data flows", *International Data Privacy Law*, 2011, Vol. 1, n° 3, pp. 180-198.

<sup>16</sup> Especially in case data protection is not perceived as a fundamental right issue as noted by WEBER, R. H., "Transborder data transfers: concepts, regulatory approaches and new legislative initiatives", *International Data Privacy Law*, 2013, Vol. 3, n° 2, pp. 117-130.

<sup>17</sup> MEZIAN, M., "Le RGPD (GDPR) est-il applicable au Maroc?", *Touchmedia - Blog actualités publicité digitale maroc*, 8.06.2019. In: <https://www.touchmedia.ma/blog/2018/06/08/rgpd-applicable-au-maroc/>. Last consult on 26<sup>th</sup> April 2021.

<sup>18</sup> For example, with the dissemination of democratic principles under the South III Program together with the Council of Europe. The information is available in the official website of the latter here: <http://southprogramme3-eu.coe.int>.

<sup>19</sup> SAAD ALAMI, Y., "Protection des données personnelles: Ce que propose l'Union européenne". *L'ECONOMISTE.com*, 21.10.2019. In: <https://www.leconomiste.com/article/1040120-protection-des-donnees-personnelles-ce-que-propose-l-union-europeenne>. Last consult on 26<sup>th</sup> April 2021. See also, Fox, B (edited by Radosavljevic, Z.), "Morocco moves closer to 'privileged' partnership with EU". *Enractiv*, 27.06.2019. In: <https://www.euractiv.com/section/global-europe/news/morocco-moves-closer-to-privileged-partnership-with-eu/>. Last consult on 26<sup>th</sup> April 2021.

personal data from the EU to foreign countries and international organisations is regulated under three alternative forms: adequacy decisions,<sup>20</sup> appropriate safeguards,<sup>21</sup> and derogation clauses.<sup>22</sup> Adequacy decisions represent the most guaranteeing instrument since they allow a global evaluation of the foreign legal system and have direct effect in the Member States' legal orders.<sup>23</sup> In this sense, adequacy decisions only enable the information to fluently flow beyond the EU external borders.

### III. EU-MOROCCO TRADE RELATIONS: THE WAY FORWARD TO EXTERNALISE DATA PROTECTION PRINCIPLES

2019 has been a positive year for Morocco that reaffirmed its position as a strategic partner of the EU external relations.<sup>24</sup> Thanks to its colonial ties, Morocco has always benefited from a favourable treatment in terms of market conditions. Already the Rome Treaty ensured Morocco more advantageous

<sup>20</sup> Article 45 GDPR.

<sup>21</sup> Article 46(2) and (3) GDPR.

<sup>22</sup> Article 49 GDPR, see KUNER C., *at al.*, *The EU General Data Protection Regulation (GDPR): A Commentary*, Edit. Oxford University Press, Oxford, 2020; TEHRANI, P. M., SABARUDDIN, J. S. B. H., and RAMANATHAN, D. A. P., “Cross border data transfer: Complexity of adequate protection and its exceptions”, *Computer Law & Security Review*, Vol. 34, n° 3, 2018, pp. 582-594.

<sup>23</sup> Among others, see: SOBRINO GARCÍA, I., “Las decisiones de adecuación en las transferencias internacionales de datos. El caso del flujo de datos entre la Unión Europea y Estados Unidos”, *Revista de Derecho Comunitario Europeo*, n° 68, pp. 227-256, DOI: <https://doi.org/10.18042/cepc/rdce.68.07>; BLUME, P., “EU adequacy decisions: the proposed new possibilities”, *International Data Privacy Law*, 2015, Vol. 5, n° 1, and TASSINARI, F., “La adopción de actos delegados y actos de ejecución (Comentario a los artículos 92 y 93 del RGPD)”, in Troncoso Reigada, A. (Dir.), *Comentario al Reglamento General de Protección de Datos y a la Ley Orgánica de Protección de Datos personales y Garantía de los Derechos*, Vol. II, Edit. Editorial Civitas, Pamplona, 2021, para. 202.

<sup>24</sup> MORAN, J., “Winds of change for EU-Morocco relations”. *Center for European Policy Studies Blog*, 23.10.2019, in: <https://www.ceps.eu/winds-of-change-for-eu-morocco-relations/>. Last consult on 26<sup>th</sup> April 2021. See also the Joint Declaration EU-Morocco for the fourteenth meeting of the Association Council, *European Council Press Release*, 27.06.2019, available at: <https://www.consilium.europa.eu/es/press/press-releases/2019/06/27/joint-declaration-by-the-european-union-and-the-kingdom-of-morocco-for-the-fourteenth-meeting-of-the-association-council/>. Last consult on 29<sup>th</sup> April 2021.



customs procedure,<sup>25</sup> and the six founding States committed to build up an EU-Morocco economic association.<sup>26</sup>

Following the Barcelona Process, the Euro-Mediterranean Partnership Agreement concluded between the EU and Morocco in 1996 marked a turning point for the establishment of an advanced *status* of Morocco. Indeed, the intergovernmental dialogue included the enhancement of relationships on several fronts: political; economical; financial; social, and cultural.<sup>27</sup> On that occasion, the EU promoted its basic values and fundamental principles inserting a democratic clause comprising the protection of human rights,<sup>28</sup> including a list of data protection principles applicable to the EU-Morocco trade relations.<sup>29</sup> These principles basically retraced the Data Protection Directive, a European standard that Morocco accepted in its domestic law by

---

<sup>25</sup> Treaty establishing the European Community (consolidated version) - D. Protocols annexed to the Treaty establishing the European Community - Protocol n° 13 on goods originating in and coming from certain countries and enjoying special treatment when imported into a Member State (1957) (*OJ C 321 E*, 29.12.2006, p. 250).

<sup>26</sup> Council Regulation (EEC) No. 1462/69 of 23 July 1969 concluding the agreement establishing an association between the European Economic Community and the Kingdom of Morocco and concerning the measures to be taken and the procedures to be followed in applying it (*OJ L 197*, 8.8.1969, p. 1–2), signed in Rabat on the 13.3.1969 and entered into force on the 1.09.1969. The Agreement was replaced by Council Regulation (EEC) No. 2211/78 of 26 September 1978 concerning the conclusion of the Cooperation Agreement between the European Economic Community and the Kingdom of Morocco (*OJ L 264*, 27.9.1978, p. 1–1) signed in Rabat on the 27.04.1976.

<sup>27</sup> MARTÍNEZ CAPDEVILA, C., “El «estatuto avanzado» de Marruecos en la Unión Europea”, *Revista de Derecho Comunitario Europeo*, n° 34, 2009, pp. 895-914.

<sup>28</sup> MANGAS MARTÍN, A., and LIÑÁN NOGUERAS, D. J., *Instituciones y derecho de la Unión Europea*, Edit. Tecnos, Madrid, 2016.

<sup>29</sup> Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Kingdom of Morocco, of the other part - Protocol 1 on the arrangements applying to imports into the Community of agricultural products originating in Morocco - Protocol 2 on the arrangements applying to imports into the Community of fishery products originating in Morocco - Protocol 3 on the arrangements applying to imports into Morocco of agricultural products originating in the Community - Protocol 4 concerning the definition of originating products and methods of administrative cooperation - Protocol 5 on mutual assistance in customs matters between the administrative authorities - Final Act - Joint Declarations - Agreements in the form of an Exchange of Letters - Declaration by the Community - Declarations by Morocco (*OJ L 70*, 18.3.2000, p. 2–204).

adopting Law 09-08.<sup>30</sup> Despite this, in 2010 the Moroccan Law did not pass the adequacy test of the European Commission<sup>31</sup> that would have enabled the free flow of data by virtue of Article 36 Data Protection Directive. All in all, the Moroccan divergent regulation remits to an underlying legal system built upon its own set of principles and values.<sup>32</sup> Law 09-08, for example, echoes Muslim religion by not including sexual life and sexual orientation within the definition of sensitive data,<sup>33</sup> in contrast to the GDPR.<sup>34</sup>

In the EU-Morocco Action Plan (2013-2017) both parties committed to realise «an area of shared values» in which Morocco particularly would have made further efforts to «raise awareness among all parties and stakeholders concerned at national level of the importance of following the principles and values laid down by the Council of Europe’s European Convention on Human Rights, the EU Charter of Fundamental Rights, the Partial Agreements of

<sup>30</sup> Dahir No. 1.09.15 du 22 safar 1430 (18 février 2009) portant promulgation de la loi No. 09-08 relative à la protection des personnes physiques à l’égard du traitement des données à caractère personnel, BO n° 5714 - 7 rabii I 1430 (5.3.2009). Available at: <https://www.cndp.ma/images/lois/Loi-09-08-Fr.pdf>. Last consult on 26<sup>th</sup> April 2021.

<sup>31</sup> WAGNER, J., “The transfer of personal data to third countries under the GDPR: when does a recipient country provide an adequate level of protection?”, *International Data Privacy Law*, Vol. 8, n° 4, 2018, pp. 318–337. DOI: <https://doi.org/10.1093/idpl/ipy008>.

<sup>32</sup> See MAKULILO, A. B., “Data Protection in North Africa: Tunisia and Morocco” in MAKULILO, A. B., *African Data Privacy Laws, Law, Governance and Technology Series*, n° 33, 2016, pp. 27-44. DOI: 10.1007/978-3-319-47317-8, and Délégation de l’Union Européen au Royaume du Maroc, “Maroc/EU : la protection des données personnelles comme vecteur de l’intégration économique”. *Press Release*, 29.01.2019. Available at: [https://ec.europa.eu/delegations/morocco/57310/maroc-eu-la-protection-des-donnees-personnelles-comme-vecteur-de-l-integration-economique\\_fr](https://ec.europa.eu/delegations/morocco/57310/maroc-eu-la-protection-des-donnees-personnelles-comme-vecteur-de-l-integration-economique_fr). Last consult on 26<sup>th</sup> April 2021.

<sup>33</sup> Article 3(1) Law 09-08: «Données sensibles: données à caractère personnel qui révèlent l’origine raciale ou ethnique, les opinions politiques, les convictions religieuses ou philosophiques ou l’appartenance syndicale de la personne concernée ou qui sont relatives à sa santé y compris ses données génétiques».

<sup>34</sup> Article 9(1) GDPR: «Processing of personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, or trade union membership, and the processing of genetic data, biometric data for the purpose of uniquely identifying a natural person, data concerning health or data concerning a natural person’s sex life or sexual orientation shall be prohibited». Generally, on the adequacy of African countries see BONIFACE MAKULILO, A., “Data Protection Regimes in Africa: too far from the European ‘adequacy’ standard?”, *International Data Privacy Law*, 2013, Vol. 3, No. 1, pp. 42-50.

the Council of Europe, and the relevant EU directives [...]».<sup>35</sup> Morocco was strongly encouraged to adopt the European model and especially to adhere to the Council of Europe Convention no. 108, which it finally did in January 2019.<sup>36</sup>

In the meantime, the Data Protection Directive was repealed by the new GDPR in force since May 2018, the 25<sup>th</sup>. While maintaining the international data transfer model of the Data Protection Directive, the GDPR introduces significant changes that spur the flow of information between the EU and third countries and international organizations. Specifically, the GDPR: 1. establishes new instruments for legitimising international data transfers that are spread on three different layers – namely adequacy decisions<sup>37</sup>, appropriate safeguards,<sup>38</sup> and derogative clauses,<sup>39</sup> and 2. it suppresses bureaucratic requirements that hindered international trades and, concretely, the need of a specific authorisation in the absence of an adequacy decision, as well as the duty of data controllers or processors to notify the supervisory authority of any wholly or partly automatic processing operation or set of such operations.<sup>40</sup> In any case, adequacy decisions remain the primary preferable channel to transfer personal data since this instrument calls for the European Commission to realise an in-depth analysis of the third party's legal order and international commitments, including the respect of Rule of Law and Fundamental Rights'

---

<sup>35</sup> Council Decision of 21 October 2010 on the position to be taken by the European Union within the Association Council set up by the Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Kingdom of Morocco, of the other part, with regard to the adoption of provisions on the coordination of social security systems (2010/697/EU) (OJL 306, 23.11.2010, p. 1–1).

<sup>36</sup> Precisely, it ratified it on 01.01.2019, Member States' signatures and ratifications are available at: <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/108/signatures?pauth=72dZxGWV>. Last consult on 26 April 2021.

<sup>37</sup> Article 45 GDPR.

<sup>38</sup> Article 46 GDPR.

<sup>39</sup> Article 49 GDPR.

<sup>40</sup> In the Spanish case, for example, the Ley Orgánica 15/1999, de 13 de diciembre, de Protección de Datos de Carácter Personal, BOE n° 298, de 14.12.1999, required data experts to ask for the Agencia Europea de Protección de Datos (AEPD) a prior authorization to transfer data to importers established in third countries that did not have an adequate level of protection, as long as they provided certain guarantees. In case they did have this level, then, a notification was sufficient – see Article 33.

principles.<sup>41</sup> In particular, recital (195) GDPR gives special relevance to the Convention no. 108 of the Council of Europe of January 28, 1981 and its Protocols.

All things considered, moving towards the European parameters Morocco would gain the issuance of an adequacy decision which would enhance a fast-track proceeding exchange of personal data.<sup>42</sup> By doing so, the two partners would kill two birds with one stone: on one hand, Morocco would ensure its privileged access to the European Single Market; on the other one, the EU-Morocco alliance would open up safe and effective commercial channels to their operators.<sup>43</sup>

#### IV. 2.0 MANAGEMENT OF MIGRATORY FLOWS<sup>44</sup>

The exchange of information has acquired a leading role in the management of the EU migration policy, especially to overcome the lack of collaboration by third countries of transit and origin.<sup>45</sup> Nevertheless, the disclosure of personal data to third parties raises concern with regard to the protection of individuals' fundamental rights and, specifically, the right to privacy and the right to the protection of personal data. A regulatory convergence of

<sup>41</sup> Article 45(2) GDPR.

<sup>42</sup> See the list of countries with which a decision in this regard has already been taken in: <https://www.aepd.es/reglamento/cumplimiento/transferencias-internacionales.html>. Last consult on 29<sup>th</sup> April 2021.

<sup>43</sup> The innovation of the EU trade policy under the aegis of new technologies has been clearly affirmed by the European Commission in its Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Trade Policy Review - An Open, Sustainable and Assertive Trade Policy, COM(2021) 66 final, Brussels, 18.2.2021. Notably, on the issue of data it states that: «The Commission will work towards ensuring that its businesses can benefit from the international free flow of data in full compliance with EU data protection rules and other public policy objectives, including public security and public order. In particular, the EU will continue to address unjustified obstacles to data flows while preserving its regulatory autonomy in the area of data protection and privacy», at p. 15.

<sup>44</sup> Inspired by the brilliant reflections made by the relevant doctrine in DE BRUYCKER, P., DE SOMER, M., and DE BROUWER, J. L., “From Tampere 20 to Tampere 2.0: Towards a new European consensus on migration”, *European Policy Centre*, 2019.

<sup>45</sup> CARRERA, S., *et al.*, “EU-Morocco Cooperation on Readmission, Borders and Protection: A model to follow?”, *European Centre of Policy and Social Studies*, n° 87, 2016.

Morocco standards in the protection of personal data will unavoidably impact the management of migratory flows from and toward the EU as it is further explored below.

### **1. An Unattractive EU Migration Policy: The Morocco Case**

While EU-Morocco trade relations have been progressively deepening with satisfactory results, their migration policies strongly diverge due to the subsistence of different perceptions and priorities.<sup>46</sup> The negotiations for an EU-Morocco readmission Agreement that started in 2000 have never seen the light.<sup>47</sup> Likewise, the implementation of the mobility agreement signed in 2013<sup>48</sup> has been cyclically suspended because of further strains, such as the difficult negotiation of an agricultural and fisheries Treaty. One of the most critical points of the negotiations pivoted around the return of third country nationals who attempt to irregularly enter or stay in the territory of a Member State. In a nutshell, Morocco refuses to accept third countries nationals because its commitment goes to the management of immigration flows from the southern Sahara and, even more importantly, because it fears to becoming a buffer State by welcoming thousands of third-country nationals. On the contrary, Morocco accepts the readmission of its own nationals subject to the granting of huge economic benefits and greater flexibility as far as the EU visa policy is concerned.<sup>49</sup>

### **2. The Role of Large-Scale IT Systems and their Interoperability in the Management of Migratory Flows**

The wide spreading of improved and cheaper biometric technology is increasingly supporting global policies directed to the management of external

---

<sup>46</sup> ABDERRAHIM, T., “A Tale of Two Agreements: EU Migration Cooperation with Morocco and Tunisia”, *European Institute of the Mediterranean: Papers IE Med. EuroMesco Series*, n° 41, 2019.

<sup>47</sup> KAISER, K., “EU-Morocco Negotiations on a Readmission Agreement: Obstacles to a Successful Conclusion”, *College of Europe EU diplomacy*, 2019.

<sup>48</sup> Joint Declaration Establishing A Mobility Partnership Between The Kingdom Of Morocco And The European Union And Its Member States, Brussels, 3 June 2013 (05.06), 6139/13 Add1rev3.

<sup>49</sup> Statewatch, “Aid, border security and EU-Morocco cooperation on migration control”, *Statewatch.org*. In: <http://www.statewatch.org/news/2019/nov/eu-morocco-borders.htm>. Last consult on 26<sup>th</sup> April 2021.

borders, migration flows,<sup>50</sup> and security threats also, but not only, because of the development of long-distant recognition techniques.<sup>51</sup>

#### A. Few Hints on Large-Scale IT Systems and their Interoperability

The EU commitment in the fields of smart borders and interoperability goes precisely in this direction. Concretely, the Visa Information System (VIS),<sup>52</sup> the European Dactyloscopy System (Eurodac System),<sup>53</sup> and the Schengen Information System (SIS II)<sup>54</sup> have been recently reformed, while

<sup>50</sup> MODI, S. K., *Biometrics identity management concepts*, Edit. Artech House, Boston, 2011. It shall be noted that the Global Compact for Safe, Orderly and Regular Migration adopted on 11 December 2018 and lately formalised by the UN General Assembly in the A/RES/73/195, contemplates as a first objective the collection and use of data in an accurate and disaggregated manner as a basis for evidence-based policies. For an exhaustively comment on the Global Compact see FAJARDO DEL CASTILLO, T., “The Global Compact for safe, orderly and regular migration a Soft Law instrument for management of migration respecting human rights”, *Paix et sécurité internationales: Journal of International Law and International Relations*, n° 8, 2020, pp. 51-94.

<sup>51</sup> GUTHRIE FERGUSON, A., “Big Data Surveillance: The Convergence of Big Data and Law Enforcement” in Gray, D., and Henderson, S., (Eds.), *The Cambridge Handbook of Surveillance Law*, Edit. Cambridge University Press, Cambridge, 2017, pp. 171-197. DOI: 10.1017/9781316481127.008.

<sup>52</sup> 2004/512/CE: 2004/512/CE: Council Decision of 8 June 2004 establishing the Visa Information System (VIS), (OJ L 213, 15.6.2004, p. 5–7), and Regulation (EU) 2019/1155 of the European Parliament and of the Council of 20 June 2019 amending Regulation (EC) No. 810/2009 establishing a Community Code on Visas (Visa Code) PE/29/2019/REV/1 (OJ L 188, 12.7.2019, p. 25–54).

<sup>53</sup> Regulation (EU) No. 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (OJ L 180, 29.6.2013, p. 31–59). See also the Amended proposal for a Regulation of the European Parliament and of the Council on the establishment of ‘Eurodac’ for the comparison of biometric data for the effective application of Regulation (EU) XXX/XXX [Regulation on Asylum and Migration Management] and of Regulation (EU) XXX/XXX [Resettlement Regulation], for identifying an illegally staying third-country national or stateless person and on requests for the comparison with Eurodac data by Member States’ law enforcement authorities and Europol for law enforcement purposes and amending Regulations (EU) 2018/1240 and (EU) 2019/818, COM/2020/614 final, currently under negotiations.

<sup>54</sup> Regulation (EC) No. 1986/2006 of the European Parliament and of the Council of 20 December 2006 regarding access to the Second Generation Schengen Information System (SIS II) by the services in the Member States responsible for issuing vehicle registration

new databases will soon enter into running, namely: the Entry and Exit System (EES)<sup>55</sup> that records the time and place of entry and exit of third-country nationals who plan to stay in the territory of the Member State for a short period of time; the European Travel Information and Authorisation System (ETIAS)<sup>56</sup> that establishes the criteria to be applied by the authorities of the Member States to determine the admissibility of third-country nationals exempt from the visa requirement before their journey to the Schengen Area on the basis of a risk assessment that analyses if the journey represents a security, illegal immigration, or high epidemic risk; and, finally, the European Criminal Records Information System of third-country nationals (ECRIS-TCN) that digitally stores the criminal records of third-country nationals.<sup>57</sup> Similarly, the European Commission plans to adopt a new Schengen strategy

---

certificates (*OJ L 381*, 28.12.2006, p. 1–3); Regulation (EU) 2018/1861 of the European Parliament and of the Council of 28 November 2018 on the establishment, operation and use of the Schengen Information System (SIS) in the field of border checks, and amending the Convention implementing the Schengen Agreement, and amending and repealing Regulation (EC) No. 1987/2006, PE/35/2018/REV/1 (*OJ L 312*, 7.12.2018, p. 14–55), and Regulation (EU) 2018/1862 of the European Parliament and of the Council of 28 November 2018 on the establishment, operation and use of the Schengen Information System (SIS) in the field of police cooperation and judicial cooperation in criminal matters, amending and repealing Council Decision 2007/533/JHA, and repealing Regulation (EC) No. 1986/2006 of the European Parliament and of the Council and Commission Decision 2010/261/EU, PE/36/2018/REV/1 (*OJ L 312*, 7.12.2018, p. 56–106).

<sup>55</sup> Regulation (EU) 2017/2226 of the European Parliament and of the Council of 30 November 2017 establishing an Entry/Exit System (EES) to register entry and exit data and refusal of entry data of third-country nationals crossing the external borders of the Member States and determining the conditions for access to the EES for law enforcement purposes, and amending the Convention implementing the Schengen Agreement and Regulations (EC) No. 767/2008 and (EU) No. 1077/2011 (*OJ L 327*, 9.12.2017, p. 20–82).

<sup>56</sup> Regulation (EU) 2018/1240 of the European Parliament and of the Council of 12 September 2018 establishing a European Travel Information and Authorisation System (ETIAS) and amending Regulations (EU) No. 1077/2011, (EU) No. 515/2014, (EU) 2016/399, (EU) 2016/1624 and (EU) 2017/2226, PE/21/2018/REV/1 (*OJ L 236*, 19.9.2018, p. 1–71).

<sup>57</sup> Regulation (EU) 2019/816 of the European Parliament and of the Council of 17 April 2019 establishing a centralised system for the identification of Member States holding conviction information on third-country nationals and stateless persons (ECRIS-TCN) to supplement the European Criminal Records Information System and amending Regulation (EU) 2018/1726, PE/88/2018/REV/1 (*OJ L 135*, 22.5.2019, p. 1–26).

and on September 23<sup>rd</sup>, 2020, proposed a new Pact on Migration and Asylum<sup>58</sup> that increasingly relies on Artificial Intelligence<sup>59</sup>.

All these reforms are characterized by the following circumstances: an increased number and type of data stored therein, including biometrics with the sole exception of ETIAS; the normalisation of the storage timeline up to a five-year period – deadline corresponding to the SIS II alerts known as entry ban, and the provision of automated checks that enable the systems to query each other without the need of human intervention.

Interoperability Regulations nos. 817 and 818 of 2019<sup>60</sup> crown the innovation of an EU border management strategy that rely more and more on large-scale IT systems in order to: improve the efficiency of inspections at external borders; contribute to prevent and combat irregular immigration, and achieve a high level of security within the Schengen area.<sup>61</sup> The IT wave brought by the Interoperability Regulations relies upon four main components, that is: the European Search Portal (ESP); the Multiple-Identity Detector (MID); the shared Biometric Matching Service (sBMS), and the Common Identity Repository (CIR). The complexity of the sister Regulations prevents a quick analysis of their content.<sup>62</sup> It is here sufficient to point out that this reform

<sup>58</sup> Consult the official webpage of the European Commission at: [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_20\\_1706](https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1706). Last consult on 26<sup>th</sup> April 2021.

<sup>59</sup> Proposal for a Regulation of the European Parliament and of the Council laying down harmonized rules on artificial intelligence (artificial intelligence act) and amending certain union legislative acts, COM(2021) 206 final, Brussels, 21.4.2021.

<sup>60</sup> Regulation (EU) 2019/817 of the European Parliament and of the Council of 20 May 2019 on establishing a framework for interoperability between EU information systems in the field of borders and visa and amending Regulations (EC) No. 767/2008, (EU) 2016/399, (EU) 2017/2226, (EU) 2018/1240, (EU) 2018/1726 and (EU) 2018/1861 of the European Parliament and of the Council and Council Decisions 2004/512/EC and 2008/633/JHA PE/30/2019/REV/1 (OJ L 135, 22.5.2019, p. 27–84), and Regulation (EU) 2019/818 of the European Parliament and of the Council of 20 May 2019 on establishing a framework for interoperability between EU information systems in the field of police and judicial cooperation, asylum and migration and amending Regulations (EU) 2018/1726, (EU) 2018/1862 and (EU) 2019/816 PE/31/2019/REV/1 (OJ L 135, 22.5.2019, p. 85–135), hereinafter the Interoperability Regulations.

<sup>61</sup> Recital (9) of the Interoperability Regulations.

<sup>62</sup> See the European Data Protection Supervisor (EDPS), *Reflection paper on the interoperability of information systems in the area of Freedom, Security and Justice*, Brussels, 2017, and the contributions by illustrious scholars in *European Public Law*, Vol. 1, n° 1, 2020, pp. 59-226.



owes its success to the flood of personal data that migrants give, more or less consciously, to the EU to cross its external borders.<sup>63</sup> In terms of cross-border impact, Interoperability will expedite the exchange of data between Member States and, as a consequence, between them and third countries.

#### B. The Transfer of Personal Data in the Operational Layer

Special attention shall be given to the operational activity carried out by EU agencies involved in the management of migration flows, among which the European Border and Coast Guard Agency stands out (EBCG Agency hereinafter). Thanks to its strategic partnership with third countries of origin and transit,<sup>64</sup> the EBCG Agency will be able to compare the information recorded in large-scale IT systems with the one stored by third countries. Nevertheless, being this comparison a «transfer of personal data» from the EU to Morocco in terms of the GDPR,<sup>65</sup> this shall be backed up by an appropriate legal basis. For example, in the case of returning irregular migrants,<sup>66</sup> and in

---

<sup>63</sup> With especial emphasis on biometrics as pointed out by TASSINARI, F., “The evolution of Interoperability under the new pre-entry screening procedure: toward the normalisation of biometric identification in the area of freedom, security and justice?”, *Sociedad Digital*, 29.11.2020, available at: <https://sd2.ugr.es/the-evolution-of-interoperability-under-the-new-pre-entry-screening-procedure-toward-the-normalisation-of-biometric-identification-in-the-area-of-freedom-security-and-justice/>. Last consult on 29<sup>th</sup> April 2021.

<sup>64</sup> On the operational activity of the EBCG Agency and its accountability see: SANTOS VARA, J., *La gestión de las fronteras exteriores de la UE: los nuevos poderes de la agencia Frontex*, Edit. Tirant Lo Blanch, Valencia, 2021; FERNÁNDEZ ROJO, D., *EU Migration Agencies. The Operation and Cooperation of FRONTEX, EASO, and EUROPOL*, Edit. Edward Elgar Publishing Limited, Cheltenham, 2021; FINK, M., *Frontex and Human Rights. Responsibility in 'Multi-Actor Situations'. Under the ECHR and EU Public Liability Law*, Edit. Oxford Studies in European Law, Oxford, 2018, and MUNGIANU, R., *Frontex and Non-Refoulement. The International Responsibility of the EU*, Edit. Cambridge Studies in European Law and Policy, Cambridge, 2016. Specifically, on information exchange see MARIN, L., “The Cooperation Between Frontex and Third Countries in Information Sharing: Practices, Law and Challenges in Externalizing Border Control Functions”, *European Public Law*, Vol. 26, n. 1, 2020, pp. 157-180.

<sup>65</sup> According to Kuner, the concept of international data transfer shall include «[...] personal data that are sent or made accessible across national borders, rather than based on a set definition». See KUNER, C., “Chapter V Transfer of Personal Data to Third Countries or International Organizations (Articles 44-50). Article 44. General principle for transfers”, in Kuner, C., *et al.*, *The EU General Data Protection Regulation (GDPR): A Commentary*, Oxford University Press, USA, 2020, pp. 762-762.

<sup>66</sup> On the EU policy for returning irregular migrants see FAJARDO DEL CASTILLO, T., “La

absence of an adequacy decision,<sup>67</sup> before the impossibility to conclude an EU-Morocco readmission agreement<sup>68</sup> the transfer of information to this third country could be backed up by Frontex's administrative arrangements authorised by the competent national supervisory authority<sup>69</sup> or, as a last resort, the derogative clause of «important reasons of public interest».<sup>70</sup> At the current day, Frontex and Morocco bilateral meetings have not been formalised in a working agreement<sup>71</sup> so that personal data can be transferred only under derogative conditions.<sup>72</sup> Yet, the processing of personal data for «general

---

Directiva sobre el retorno de los inmigrantes en situación irregular», *Revista de Derecho Comunitario Europeo*, Vol. 33, no 13, 2009, pp. 453-499.

<sup>67</sup> Article 45 GDPR.

<sup>68</sup> That would be backed up by Article 46(2)(a) GDPR as we have analysed in TASSINARI, F., «Privacy enhancing readmission: the clause on data protection in the EURAs», *ADiM Blog, Analyses & Opinions*, 30.06.2021, available at <https://www.adimblog.com/wp-content/uploads/2021/06/ADiM-Blog-Giugno-2021-Analisi-Opinioni-E.pdf>. Last consult on 1st July 2021. The EU competence on the conclusion of readmission agreements is sealed under Article 79(3) TFEU – analysed by GARCÍA ANDRADE, P., in her masterpiece *La acción exterior de la Unión Europea en materia migratoria. Un problema de reparto de competencias*, Edit. Tirant Lo Blanch, Valencia, 2015, pp. 333-358. Nevertheless, Morocco retains this privilege for very special partners, as it did with Spain – see FAJARDO DEL CASTILLO, T., «La politique de retour de l'Union Européenne et le Maroc», in El Houdaïgui, R. and del Valle Gálvez A. (Dirs.), *Les risques en Méditerranée-conséquences sur le trinome: Union Européenne, Espagne, Maroc : actes des deuxième journées de dialogue Euro-marocain*, Edit. Universidad de Cádiz, Cádiz, 2011, pp. 79-92, and GONZÁLEZ GARCÍA, I., «El acuerdo España - Marruecos de readmisión de inmigrantes y su problemática aplicación: Las avalanchas de Ceuta y Melilla», *Anuario de derecho internacional*, XXII, 2006, pp. 255-284.

<sup>69</sup> Article 46(3)(b) GDPR, and concretely for the EU institutions, bodies, offices, and agencies see Article 48(3)(b) 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 (Text with EEA relevance), PE/31/2018/REV/1 (*OJ L* 295, 21.11.2018, p. 39–98) (hereinafter EUDPR).

<sup>70</sup> Article 49(1)(d) GDPR.

<sup>71</sup> *Cfr.* Frontex official webpage at the following link: <https://frontex.europa.eu/about-frontex/key-documents/?category=working-arrangements-with-non-eu-countries>, last consult on 29<sup>th</sup> April 2021.

<sup>72</sup> Regulation (EU) 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624, PE/33/2019/REV/1 (*OJ L* 295, 14.11.2019, p. 1–131)

public interest» enables the restrictions of data subjects' subjective rights such as: the right to information, to access, rectify and erase personal data; the right to restrict the processing of personal data; the right to portability; the right to object the processing of personal data, and the right to not to be subject to a decision based solely on automated processing.<sup>73</sup> For this reason, this clause shall be interpreted restrictively, as the *ultima ratio* justifying *ad hoc* exchange of personal data.<sup>74</sup>

Last but not least, the possibility that Morocco is the one transferring or disclosing personal data to the EU shall also be contemplated as far as data protection rules obstacle an efficient operational policy. Provided that Morocco is cooperative, neither Member States' nor EU's authorities can be considered «recipient» in terms of the GDPR<sup>75</sup> and are subject to data protection

---

(hereinunder Frontex Regulation), whose recital (101) states that:

In order to properly implement its tasks in the area of return, [...] the Agency might need to transfer the personal data of returnees to third countries. The third countries of return are not often subject to adequacy decisions adopted by the Commission [...] and have often not concluded or do not intend to conclude a readmission agreement with the Union or otherwise provide for appropriate safeguards [...]. Where such agreements do not yet exist, personal data should be transferred by the Agency for the purposes of facilitating the return operations of the Union, provided that the conditions laid down in point (d) of Article 50 (1) of Regulation (EU) 2018/1725 are met.

<sup>73</sup> Article 23(1)(e) GDPR. Notably, Article 86(3) of the Frontex Regulation specifies that the Agency shall indicate «[...] any restrictions on access to or use of those data, in general or specific terms, including as regards transfer, erasure or destruction. Where the need for such restrictions becomes apparent after the transfer of personal data, the Agency shall inform the third country or the international organisation accordingly».

<sup>74</sup> Notably, the regime on international data transfer applicable to Frontex is the one regulated under Chapter V EUDPR, which excludes the application of the special dispositions so-called «operational data» set forth under Chapter IX. In Chapter IX, it is clearly maintained that the transfer can be backed up by an international agreement concluded between the EU and the third country – or international organization – pursuant to Article 218 TFEU «[...] adducing adequate safeguards with respect to the protection of privacy and fundamental rights and freedoms of individuals». However, this possibility leads back to the provision on appropriate safeguards and, concretely, to «legally binding and enforceable instrument between public authorities or bodies» set forth in Article 48(2)(a) EUDPR. Such an instrument can be concluded by the EU on the basis of Article 16 TFEU in application of the *ATER* doctrine or, most frequently, in a clause on data protection inserted in a treaty with a wider scope. On the EU external action see LIÑÁN NOGUERAS, D. J., “La acción exterior de la Unión: las relaciones exteriores”, in Mangas Martín A. and Liñán Noguerras, D. J., *Instituciones y derecho de la Unión Europea*, Edit. Tecnos, Madrid, 2016, pp. 553-557.

<sup>75</sup> Article 4(9) GDPR.

principles, foremost, the principle of purpose limitation. Yet, the acceptance of personal data from a third country that does not comply with an adequacy decision may also hamper the exercise of data subject's subjective rights, as the latter may not be guaranteed by the third state *tout court*. In this sense, and under the same rationale adopted in Title V GDPR, personal data should not be accepted from third States that do not meet the EU standard of protection. Despite this, the GDPR does not expressly address this issue and could have been more incisive to ensure the effectiveness of the protection granted under the EU roof.

Besides, the possibility to exchange personal data with third countries – specifically biometrics – requires a major effort from the EU, that goes beyond the externalisation of its data protection standards. Concretely, the EU shall outsource its biometric identity management model in foreign territories. An example is the case of Nigeria, a pioneer State in the implementation of digital database. Under the sponsorship of the International Organization for Migration (IOM), Nigeria now has a centralized database in Niamey that stores the data processed by the Migration Data Information and Analysis System (MIDAS), dedicated to the identification of travellers at the border entry and exit points.<sup>76</sup> The system is connected to the US Personal Identification System for Safe Comparison and Evaluation (PISCES), the Interpol Alert System and the Eurosur system of the European Border and Coast Guard (EBCG).<sup>77</sup> More recently, *Statewatch* has published last minute information on the EU funding for the implementation of biometric databases in Senegal.<sup>78</sup>

## V. CONCLUSION

The approximation of Morocco's national law on the protection of personal data to the EU standards and values promoted in the commercial

<sup>76</sup> ZANDONINI, G., "Biometrics: The new frontier of EU migration policy in Niger", *The New Humanitarian*, 06-06-2019. In: <https://www.thenewhumanitarian.org/news-feature/2019/06/06/biometrics-new-frontier-eu-migration-policy-niger>, last consult on 26<sup>th</sup> April 2021.

<sup>77</sup> Currently under reform, see "La Commission européenne précise les obligations de Frontex dans le cadre du système EUROSUR", *Bulletin Quotidien Europe*, n° 12695, 10.4.2021.

<sup>78</sup> Statewatch, "Senegal: Biometric population database will facilitate deportations, restricted EU document confirms", *Statewatch.org*, 14.04.2021, available at: <https://www.statewatch.org/news/2021/april/senegal-biometric-population-database-will-facilitate-deportations-restricted-eu-document-confirms/>. Last consult on 26<sup>th</sup> April 2021.

field will have prominent impacts on the management of migration flows if it leads to the adoption of an adequacy decision. The latter is also the most guaranteeing solution from the perspective of the protection of migrants' fundamental rights. The interoperability of large-scale IT systems provides efficient tools to smartly identify third country nationals which will facilitate the readmission of irregular migrants notwithstanding the conclusion of an EU-Morocco readmission agreement. This task is mainly deployed by the EU agencies and, concretely, the EBCG Agency that facilitates the transmission of personal data from the EU to third countries for the purposes of returning irregular migrants. While from an institutional point of view adequacy decisions require substantial reforms to guarantee the respect of individuals' fundamental rights to privacy and to the protection of personal data, from an operational perspective the EU shall outsource its IT identification model in order to ensure its technical compatibility – which it has already started to do<sup>79</sup>. A further field of study remains to be explored, namely the possibility that the implementation of the EU operational *apparatus* in third countries will allow the interconnection of foreign databases with the continental ones, including with the large-scale IT systems in the terms analysed above.

## **BIBLIOGRAPHICAL REFERENCES**

- ABDERRAHIM, T., “A Tale of Two Agreements: EU Migration Cooperation with Morocco and Tunisia”, *European Institute of the Mediterranean: Papers IE Med. EuroMesco Series*, n° 41, 2019.
- BENNETT, C. J., and RAAB, C., *The Governance of Privacy. Policy Instruments in Global Perspective*, Edit. The Massachusetts Institute of Technology Press, Cambridge, 2003.

---

<sup>79</sup> Recently confirmed in “La Commission européenne demande à l'agence Frontex de favoriser davantage de retours ‘volontaires’ de migrants en situation irrégulière”, *Bulletin Quotidien Europe*, n° 12707, 28.4.2021. This circumstance would straddle the line between «externalization» and «extraterritoriality» that DEL VALLE GÁLVEZ, A., reconducts to the widen concept of de-territorialization – see DEL VALLE GÁLVEZ, A., “La fragilidad de los derechos humanos en las fronteras exteriores europeas, y la externalización/extraterritorialidad de los controles migratorios”, in Soroeta Licerias, J. (Dir.), *Anuario de los cursos de derechos humanos de Donostia-San Sebastián. Vol. XVIII.*, Edit. Tirant Lo Blanch, Valencia, 2019, pp. 25-58, at p. 41.

- BLASI CASAGRAN, C., *Global Data Protection in the Field of Law Enforcement. An EU Perspective*, Edit. Routledge, Oxfordshire, 2018.
- BLUME, P., “EU adequacy decisions: the proposed new possibilities”, *International Data Privacy Law*, 2015, Vol. 5, n° 1, pp. 34-39.
- BONIFACE MAKULILO, A., “Data Protection Regimes in Africa: too far from the European ‘adequacy’ standard?”, *International Data Privacy Law*, 2013, Vol. 3, n° 1, pp. 42-50.
- DE BRUYCKER, P., DE SOMER, M., and DE BROUWER, J. L., “From Tampere 20 to Tampere 2.0: Towards a new European consensus on migration”, *European Policy Centre*, 2019.
- DEL VALLE GÁLVEZ, A., “La fragilidad de los derechos humanos en las fronteras exteriores europeas, y la externalización/extraterritorialidad de los controles migratorios”, in Soroeta Licerias, J. (Dir.), *Anuario de los cursos de derechos humanos de Donostia-San Sebastián. Vol. XVIII*, Edit. Tirant Lo Blanch, Valencia, 2019, pp. 25-58.
- CARRERA, S., *et al.*, “EU-Morocco Cooperation on Readmission, Borders and Protection: A model to follow?”, *European Centre of Policy and Social Studies*, n° 87, 2016.
- FAJARDO DEL CASTILLO, T., “La Directiva sobre el retorno de los inmigrantes en situación irregular”, *Revista de Derecho Comunitario Europeo*, Vol. 33, no 13, 2009, pp. 453-499.
- FAJARDO DEL CASTILLO, T., “La politique de retour de l’Union Européenne et le Maroc”, in El Houdaïgui, R., and Del Valle Gálvez A. (Dir.), *Les risques en Méditerranée-conséquences sur le trinome: Union Européenne, Espagne, Maroc : actes des deuxièmes journées de dialogue Euro-marocain*, Edit. Universidad de Cádiz, 2011, pp. 79-92.
- FAJARDO DEL CASTILLO, T., “The Global Compact for safe, orderly and regular migration a Soft Law instrument for management of migration respecting human rights”, *Paix et sécurité internationales: Journal of International Law and International Relations*, n° 8, 2020, pp. 51-94.
- FERNÁNDEZ ROJO, D., *EU Migration Agencies. The Operation and Cooperation of FRONTEX, EASO, and EUROPOL*, Edit. Edward Elgar Publishing Limited, Cheltenham, 2021.

- FINK M., *Frontex and Human Rights. Responsibility in 'Multi-Actor Situations'. Under the ECHR and EU Public Liability Law*, Edit. Oxford Studies in European Law, Oxford, 2018.
- GARCÍA ANDRADE, P., *La acción exterior de la Unión Europea en materia migratoria. Un problema de reparto de competencias*, Edit. Tirant Lo Blanch, Valencia, 2015, pp. 333-358.
- GONZÁLEZ GARCÍA, I., “El acuerdo España - Marruecos de readmisión de inmigrantes y su problemática aplicación: Las avalanchas de Ceuta y Melilla”, *Anuario de derecho internacional*, XXII, 2006, pp. 255-284.
- GREENLEAF, G., “The influence of European data privacy standards outside Europe: implications for globalization of Convention 108”, *International Data Privacy Law*, Vol. 2, n° 2, May 2012, pp. 68–92. DOI: <https://doi.org/10.1093/idpl/ips006>.
- GUTHRIE FERGUSON, A., “Big Data Surveillance: The Convergence of Big Data and Law Enforcement”, in Gray, D. and Henderson, S., (Eds.), *The Cambridge Handbook of Surveillance Law*, Edit. Cambridge University Press, Cambridge, 2017, pp. 171-197.
- HIJMANS, H., and SCIROCCO, A., “Shortcomings in EU data protection in the third and the second pillars. Can the Lisbon treaty be expected to help?”, *CMLR*, Vol. 46, n° 5, 2009, pp. 1485-1525.
- KAISER, K., “EU-Morocco Negotiations on a Readmission Agreement: Obstacles to a Successful Conclusion”, *College of Europe EU diplomacy*, 2019.
- KOKOTT, J., and SOBOTTA, C., “The distinction between privacy and data protection in the jurisprudence of the CJEU and the ECtHR”, *International Data Privacy Law*, Vol. 3, n° 4, November 2013, pp. 222–228. DOI: <https://doi.org/10.1093/idpl/ipt017>.
- KUNER, C., *et al.*, *The EU General Data Protection Regulation (GDPR): A Commentary*, Edit. Oxford University Press, Oxford, 2020.
- KUNER, C., “Chapter V Transfer of Personal Data to Third Countries or International Organizations (Articles 44-50). Article 44. General principle for transfers”, in Kuner, C., *et al.*, *The EU General Data Protection Regulation (GDPR): A Commentary*, Oxford University Press, USA, 2020, pp. 762-762.

- LIÑÁN NOGUERAS, D. J., “La acción exterior de la Unión: las relaciones exteriores”, in Mangas Martín, A., and Liñán Nogueras, D. J., *Instituciones y derecho de la Unión Europea*, Edit. Tecnos, Madrid, 2016, pp. 553-557.
- LYNSKEY, O., *The Foundations of EU Data Protection Law*, Edit. Oxford Studies in European Law, Oxford, 2015.
- MANGAS MARTÍN, A., and LIÑÁN NOGUERAS, D. J., *Instituciones y derecho de la Unión Europea*, Edit. Tecnos, Madrid, 2016.
- MAKULILO, A. B., “Data Protection in North Africa: Tunisia and Morocco”, in Makulilo, A. B., *African Data Privacy Laws, Law, Governance and Technology Series*, n° 33, 2016, pp. 27-44.
- MARIN, L., “The Cooperation Between Frontex and Third Countries in Information Sharing: Practices, Law and Challenges in Externalizing Border Control Functions”, *European Public Law*, Vol. 26, n° 1, 2020, pp. 157–180.
- MARTÍNEZ CAPDEVILA, C., “El «estatuto avanzado» de Marruecos en la Unión Europea”, *Revista de Derecho Comunitario Europeo*, n° 34, 2009, pp. 895-914.
- MODI, S. K., *Biometrics identity management concepts*, Edit. Artech House, Boston, 2011.
- MUNGIANU, R., *Frontex and Non-Refoulement. The International Responsibility of the EU*, Edit. Cambridge Studies in European Law and Policy, Cambridge, 2016.
- RODOTÁ, S., “Data Protection as a Fundamental Right”, in Gutwirth, S., *et al.*, *Reinventing Data Protection?*, Springer, The Netherlands, 2009, pp. 77-82.
- SALUZZO, S., “The EU as a Global Standard Setting Actor: The Case of Data Transfers to Third Countries”, in Carpanelli, E. and Lazzerini, N., (Eds) *Use and Misuse of New Technologies*, Edit. Springer, Cham, 2019, pp. 115-134. DOI: [https://doi.org/10.1007/978-3-030-05648-3\\_6](https://doi.org/10.1007/978-3-030-05648-3_6).
- SANTOS VARA, J., *La gestión de las fronteras exteriores de la UE: los nuevos poderes de la agencia Frontex*, Edit. Tirant Lo Blanch, Valencia, 2021.
- SOBRINO GARCÍA, I., “Las decisiones de adecuación en las transferencias internacionales de datos. El caso del flujo de datos entre la Unión Europea y Estados Unidos”, *Revista de Derecho Comunitario Europeo*, n° 68, pp. 227-256.
- SVANTESSON, D. J. B., *Extraterritoriality in Data Privacy Law*, Edit. Ex Tuto Publishing, Copenhagen, 2013.
- SVANTESSON, D. J. B., “A “layered approach” to the extraterritoriality of data privacy laws”, *International Data Privacy Law*, 2013, Vol. 3, n° 4, pp. 278-286.



- SVANTESSON, D. J. B., “The regulation of cross-border data flows”, *International Data Privacy Law*, 2011, Vol. 1, n° 3, pp. 180-198.
- TASSINARI, F., “La adopción de actos delegados y actos de ejecución (Comentario a los artículos 92 y 93 del RGPD)”, in Troncoso Reigada, A., (Dir.), *Comentario al Reglamento General de Protección de Datos y a la Ley Orgánica de Protección de Datos personales y Garantía de los Derechos*, Vol. II, Edit. Editorial Civitas, Pamplona, 2021, pp. 4901-4919.
- TASSINARI, F., “Privacy enhancing readmission: the clause on data protection in the EURAs”, *ADiM Blog, Analyses & Opinions*, 30.06.2021, available at <https://www.adimblog.com/wp-content/uploads/2021/06/ADiM-Blog-Giugno-2021-Analisi-Opinioni-F.pdf>.
- TEHRANI, P. M., SABARUDDIN, J. S. B. H., and RAMANATHAN, D. A. P., “Cross border data transfer: Complexity of adequate protection and its exceptions”, *Computer Law & Security Review*, Vol. 34, n° 3, 2018, pp. 582-594.
- TZANOU, M., “Data protection as a fundamental right next to privacy? ‘Reconstructing’ a not so new right”, *International Data Privacy Law*, Vol. 3, n° 2, May 2013, pp. 88–99. Doi: <https://doi.org/10.1093/idpl/ipt004>.
- WAGNER, J., “The transfer of personal data to third countries under the GDPR: when does a recipient country provide an adequate level of protection?”, *International Data Privacy Law*, Vol. 8, n° 4, 2018, pp. 318–337.
- WEBER, R. H., “Transborder data transfers: concepts, regulatory approaches and new legislative initiatives”, *International Data Privacy Law*, 2013, Vol. 3, n° 2, pp. 117-130.

# PEACE & SECURITY

## PAIX ET SÉCURITÉ INTERNATIONALES

09  
2021

EUROMEDITERRANEAN JOURNAL OF INTERNATIONAL LAW AND INTERNATIONAL RELATIONS

SOMMAIRE / Janvier -Décembre 2021 / N° 9

### EDITORIAL

José Manuel SOBRINO HEREDIA

The Loss of Institutionalism in International Organizations, and their Decline in the Contemporary International Society

La pérdida de institucionalidad en las Organizaciones Internacionales, y su declive en la Sociedad Internacional contemporánea

### ÉTUDES

Carmen MARTÍNEZ SAN MILLÁN

The Different Initiatives on Due Diligence for Responsible Mineral Supply Chains from Conflict-Affected and High-Risk Areas: Are there More Effective Alternatives?

Francisco PASCUAL-VIVES

Maximizing the International Human Rights Litigation Toolkit: the Role of Consensus

### NOTES

Eduardo JIMÉNEZ PINEDA

The Dispute Settlement System of the Future Third UNCLOS Implementation Agreement on Biodiversity beyond National Jurisdiction (BBNJ): a Preliminary Analysis

Ángeles JIMÉNEZ GARCÍA-CARRIAZO

The Maritime Delimitation between Turkey and the Libya's Government of National Accord: another Concern for the European Union

### AGORA

Simone MARINAI

The Control of Migration Flows in the Central Mediterranean Sea: Insights from Recent Italian Practice

Giuseppe CATALDI

Euro-Mediterranean Experiences on Management of Migration Governance

Luis PÉREZ-PRAT DURBÁN

España y Marruecos en el estrecho de Gibraltar, el *statu quo* de Perejil

Francesca TASSINARI

The Externalization of Europe's Data Protection Law in Morocco: an Imperative Means for the Management of Migration Flows

Juan Manuel DE FARAMINÁN GILBERT

El universo de la posCOVID-19 y la recuperación de las libertades individuales

The Post-COVID-19 Universe and the Recovery of Individual Freedoms

Juan Manuel LÓPEZ ULLA

About the Case Law of the European Court of Human Rights Regarding Unaccompanied Children

Enrique DEL ÁLAMO MARCHENA

Migration and Human Displacement in the Context of Climate Change: Reflections on the Category of Climate Refugees

### BIBLIOGRAPHIE CRITIQUE

OANTA, G. A.: La sucesión de Estados en las Organizaciones internacionales: examen de la práctica internacional, Ed. J.M. Bosch, Barcelona, 2020, 382 pp. par Enrique DEL ÁLAMO MARCHENA

BADIA MARTÍ, A. M., HUICI SANCHO, L. (Dir.) y SÁNCHEZ COBALEDA (Ed.), Las Organizaciones Internacionales en el siglo XXI, Madrid, Marcial Pons, 2021, 358 pp. Par María de los Ángeles BELLIDO LORA

