EDPS Formal comments on the draft Commission Delegated Regulations supplementing Regulation (EU) 2019/817 and Regulation (EU) 2019/818 of the European Parliament and Council with regard to cases where identity data may be considered as same or similar for the purpose of the multiple identity detection

1. Introduction and background

Regulation (EU) 2019/817[1], together with Regulation (EU) 2019/818[2] of the European Parliament and of the Council establish a framework to ensure interoperability between three existing[3] and three future[4] EU information systems in the areas of border checks, asylum and immigration, police cooperation and judicial cooperation in criminal matters.

Such interoperability is achieved through four components: The European Search Portal (ESP), the shared Biometric Matching Service (BMS), the Common Identity Repository (CIR) and the Multiple-Identity Detector (MID).

Each of these components have a specific purpose. In particular, the MID creates and stores links between data in the different EU information systems in order to detect multiple identities, with the dual purpose of facilitating identity checks for bona fide travellers and combating identity fraud.[5] The linking of data is essential for the multiple-identity detector to fulfil its objectives.

The multiple-identity detection process results in the creation of automated white and yellow links. A white link indicates that the identity data of the linked files are the same or similar whereas a yellow link indicates that the identity data of the linked files cannot be considered to be similar and manual verification of different identities should be carried out.

To limit the burden for both persons whose data is registered in the EU information systems and the national authorities as well as Union agencies, it is crucial to limit the number of cases in which yellow links are generated in MDI and therefore to require manual verification. To this end, it is necessary to lay down the procedures to determine the cases in which identity data on a person stored across several systems can be considered the same or similar for the purpose of multiple-identity detection. In order for identity data to be

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[1]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, OJ L 135, 22.5.2019, p. 27.

[2] 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, OJ L 135, 22.5.2019, p. 85.

[3] The Schengen Information System (SIS), Eurodac and the Visa Information System (VIS).

[4] The Entry/Exit System (EES), the European Travel Information and Authorisation System (ETIAS), the European Criminal Records Information System for third-country nationals (ECRIS-TCN).

[5] Recital 39 of Regulation (EU) 2019/817 and Regulation (EU) 2019/818.

considered similar, eu-LISA should use an algorithm in order to calculate the similarity between identity data from different data fields from different EU information systems. This algorithm should indicate cases where identity data can be considered similar in accordance with previously established thresholds of similarity.

Pursuant to Article 28(5) of Regulation (EU) 2019/817 and Article 28(5) of Regulation (EU) 2019/818, the Commission has been empowered to adopt delegated acts laying down the procedures to determine the cases in which identity data can be considered to be the same or similar. The Commission presented on 4 March 2021 two draft Delegated Regulations:

i. supplementing Regulation (EU) 2019/817 of the European Parliament and Council with regard to cases where identity data may be considered as same or similar for the purpose of the multiple identity detection;

ii. supplementing Regulation (EU) 2019/818 of the European Parliament and Council with regard to cases where identity data may be considered as same or similar for the purpose of the multiple identity detection.

Both draft Delegated Regulations are accompanied by Annexes, which set out cases where identity data may be considered as the same (Annex I) and cases where identity data may be considered as similar (Annex II). While the content of both draft Delegated Regulations is almost identical, it is necessary to have two acts due to variable geometry requirements.

The present formal comments of the EDPS are issued in response to the legislative consultation by the European Commission of 4 March 2021, pursuant to Article 42(1) of Regulation 2018/1725[6]. In this regard, the EDPS welcomes the reference to this consultation in Recital 15 of both draft Delegated Regulations.

2. Comments

The EDPS draws the attention on the potential risks by the use of the envisaged algorithm to determine in an automated manner whether an identity can be considered similar, due to, for instance, problems with the design of the algorithm or with the training data. To mitigate such risks and ensure that the algorithm provides the right conclusions, the EDPS recommends putting in place appropriate correction mechanisms and setting up a formal procedure whereby Member States inform eu-LISA of cases where wrong conclusions are made by the algorithm so that the Agency can address the issues identified by re-testing and re-training the algorithm before deployment.

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, for example as a result of the adoption of other related implementing or delegated acts, pursuant to Regulation (EU) 2019/817 and Regulation (EU) 2019/818. 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 Regulation (EU) 2018/1725.

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[6] 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 (Regulation 2018/725).

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(e-signed)