



Formal comments of the EDPS on the draft Commission Implementing Decisions laying down the technical rules for creating links between data from different EU information systems pursuant to Article 28(7) of Regulation (EU) 2019/817 and Article 28(7) of Regulation (EU) 2019/818 of the European Parliament and of the Council

1. Introduction and background

Regulation (EU) 2019/817,¹ together with Regulation (EU) 2019/818² of the European Parliament and of the Council establish a framework to ensure interoperability between three existing³ and three future⁴ 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 has a specific purpose. In particular, the MID will allow to link identities within the above-mentioned different EU information systems. The purpose is twofold: to facilitate identity checks for *bona fide* travellers and combating identity fraud.⁵ In the event that multiple identities are detected, the authorities are to carry out a manual verification of the different identities.

The MID will store the identified links between the individuals present in more than one of these systems, and these links will be labelled in four categories: white, yellow, green and red. A yellow link will be created when a query of biometric or identity data indicates that there are potentially different biographical identities on the same person but that a manual verification has not yet taken place. A white link confirms that the different biographical identities belong to the same *bona fide* person. A green link confirms that different *bona fide* persons happen to share the same biographical identity. A red link indicates that there are grounds to suspect that either different biographical identities are being used by the same

¹Regulation (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), the Eurodac system 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 Recitals 39 of Regulation (EU) 2019/817 and Regulation (EU) 2019/818.

person in an unjustified manner or the same or similar biographical identities are being used by two different persons in an unjustified manner.⁶

The creation of such links provides for new and additional data processing. Consequently, Recital 39 of Regulation (EU) 2019/817 and Recital 39 of Regulation (EU) 2019/818 explain in **this context**, "(...) The linked data should be strictly limited to the data necessary to verify that a person is recorded in a justified or unjustified manner under different identities in different systems, or to clarify that two persons having similar identity data may not be the same person. Data processing through the ESP and the shared BMS in order to link individual files across different systems should be kept to an absolute minimum and therefore limited to multiple-identity detection, to be conducted at the time new data are added in one of the systems which has data stored in the CIR or added in SIS."

Pursuant to Article 28(7) of Regulation (EU) 2019/817 and Article 28(7) of Regulation (EU) 2019/818, the Commission has been empowered to lay down the technical rules for creating links between data from different EU information systems.

The Commission submitted two draft Implementing Decisions on 5 March 2021 to the EDPS laying down:

- i. technical rules for creating links between data from different EU information systems pursuant to Article 28(7) of Regulation (EU) 2019/817 of the European Parliament and the Council;
- ii. technical rules for creating links between data from different EU information systems pursuant to Article 28(7) of Regulation (EU) 2019/818 of the European Parliament and the Council.

Both draft Implementing Decisions are accompanied by Annexes which contain the technical rules. These technical rules should, according to Recital 4 of the drafts, include details of the multiple identity detection processes, the different possibilities for each type of link as well as the categories of data to be compared.

The present formal comments of the EDPS are issued in response to the legislative consultation by the European Commission of 5 March 2021, pursuant to Article 42(1) of Regulation 2018/1725⁷. In this regard, the EDPS welcomes the reference to this consultation in Recital 11 of both draft Implementing Decisions.

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, or another legal act establishing a

⁶ Article 32(1)(d) of Regulation (EU) 2019/817 and Article 32(1)(d) Regulation (EU) 2019/818.

⁷ 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.

large-scale IT system, included in the interoperability framework. 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.

2. Comments

The comments below refer to both draft Implementing Decisions and their respective Annexes.

2.1 **Linking data in systems that already contain internal “links” (alias identities, misused identities, unconfirmed identities, confirmed identities)**

Section 4.3 of the draft Implementing Decisions deals with linking data in the Schengen Information System to data from a different EU information system. The Schengen Information System can already differentiate internally between confirmed identities, unconfirmed identities, misused identities, and alias identities, and can contain several biographic data sets associated with the same natural person. Section 4.3 foresees that all of the different types of data will be used in order to find same, similar or different identity data, and concludes, “[d]ata belonging to the same person, of which the Schengen Information System is aware, can only result in one link towards data from a different EU information system”.

From the perspective of data protection, the effort to minimize additional personal data in the form of links by allowing only one link per SIS alert is appreciated. However, the technical rules do not regulate precisely how to solve conflicts between different possibilities to create (i.e. to label) links, depending on the kind of identity already stored in an alert for one natural person (confirmed identity, alias identity, etc.). It is likely that a misused identity would trigger a different kind of link than a confirmed identity. The question arises - and is not discussed in the draft - whether the confirmed identity should not prevail over other less reliable identities for the same person with regard to the type of link to be created. On the other hand, there may be good reasons to favor a different approach. The EDPS recalls that the processing in such cases should be clear and transparent to the user, so that links involving complex alerts with multiple identities are interpreted correctly. Therefore, he invites the Commission to further reflect on this aspect and, if necessary, clarify it in draft Implementing Decisions.

2.2 Provisions creating new types of links

The EDPS notes that Sections 2, 4.5, 4.6 and 4.7 of the Annexes to the draft Implementing Decisions seem to introduce new categories of links beyond the white, yellow, green, and red links established by Regulation (EU) 2019/817 and Regulation (EU) 2019/818, namely “erroneous links”, “biometric false rejection links”, and “biometric false acceptance links”.

All three new types of links would also be displayed to end users under certain conditions.

The EDPS understands the importance of the accuracy issues of the biometric technology and of the human verification as a final part in the process of linking identities among the respective repositories. He also acknowledges the fact that the retention of false positives and false negatives could play a role in improving the relevant algorithms.

The EDPS recalls that Articles 28(7) of Regulation (EU) 2019/817 and Regulation (EU) 2019/818 empower the Commission to lay down the technical rules for creating links between data from different EU information systems, by implementing acts. However, Article 28(7) of said Regulations does not authorize to define new categories of links by implementing acts, going beyond the categories of links defined by Articles 30 to 33 of said Regulations. Therefore, the EDPS considers that it is not legally permissible to widen the range of possible links by an Implementing Act, without amending the delegation provision of the basic act.

During an informal meeting with the Commission services, the EDPS was informed that the Commission Implementing Decisions do not aim to create new types of links, but rather introduce additional “flagging” that aims at averting the negative impacts of possible false positive links or falsely omitted links, both for the data subject and for the reliability of the system.

In this context, the EDPS recommends that the draft Implementing Decisions and their Annexes are amended accordingly, so that the “flags” are not presented in the same way as the links established by the Regulations. The technical nature and the method of operation of these flags should be also laid down in the draft Implementing Decisions.

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(e-signed)