

**EDPS Formal comments on the draft Commission Implementing Decision amending Commission Implementing Decision of 30.8.2021 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 of the European Parliament and of the Council and on the draft Commission Implementing Decision amending Commission Implementing Decision of 30.8.2021 laying down the 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 of the Council**

**THE EUROPEAN DATA PROTECTION SUPERVISOR,**

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Regulation (EU) No 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of individuals 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 ('EUDPR')<sup>1</sup>, and in particular Article 42(1) thereof,

**HAS ADOPTED THE FOLLOWING FORMAL COMMENTS:**

**1. Introduction and background**

1. On 4 July 2023, the European Commission consulted the EDPS on two draft Commission Implementing Decisions('the draft implementing decisions'):
  - draft Commission Implementing Decision amending Commission Implementing Decision of 30.8.2021 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 of the European Parliament and of the Council<sup>2</sup>, and
  - draft Commission Implementing Decision amending Commission Implementing Decision of 30.8.2021 laying down the technical rules for creating links between

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<sup>1</sup> OJ L 295, 21.11.2018, p. 39.

<sup>2</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, OJ L 135, 22.5.2019, p. 27.

data from different EU information systems, pursuant to Article 28(7) of Regulation (EU) 2019/818 of the European Parliament and of the Council<sup>3</sup>.

2. The objectives of the draft implementing decisions are to ensure consistency with Regulation (EU) 2021/1134 of the European Parliament and of the Council, which reformed the Visa Information System<sup>4</sup>; to introduce specific rules for distinguishing between different categories of identities in the Schengen Information System (SIS)<sup>5</sup>; as well as to enable correcting the outcome of the automated comparison by the multiple-identity detector and improving the matching in the future<sup>6</sup>.
3. The draft implementing decisions would be adopted pursuant to Article 28(7) of Regulation (EU) 2019/817 of the European Parliament and of the Council and Article 28(7) of Regulation (EU) 2019/818 of the European Parliament and of the Council. The EDPS issued in 2021 formal comments on the Commission Implementing Decisions currently in force laying down the technical rules for creating links between data from different EU information systems<sup>7</sup>.
4. The present formal comments of the EDPS are issued in response to a consultation by the European Commission of 04.07.2023, pursuant to Article 42(1) of EUDPR. The EDPS welcomes the reference to this consultation in Recital 14 of the draft implementing decisions.
5. These formal comments do not preclude any additional comments by the EDPS in the future, 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<sup>8</sup>.
6. 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 and are limited to the provisions of the draft implementing decisions that are relevant from a data protection perspective.

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<sup>3</sup> 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.

<sup>4</sup> See recital 4 of the draft implementing decisions.

<sup>5</sup> See recital 5 of the draft implementing decisions.

<sup>6</sup> See recital 6 of the draft implementing decisions.

<sup>7</sup> 2021-0268 of 17.5.2021 (not published).

<sup>8</sup> In case of other implementing or delegated acts with an impact on the protection of individuals' rights and freedoms with regard to the processing of personal data, the EDPS would like to remind that he needs to be consulted on those acts as well. The same applies in case of future amendments that would introduce new or modify existing provisions that directly or indirectly concern the processing of personal data.

## 2. Comments

### 2.1. General comments

7. The interoperability framework, established with Regulation (EU) 2019/817 and Regulation (EU) 2019/818, includes a number of interoperability components, one of which is the multiple-identity detector (MID). 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. The creation and storage of such links therefore is critical to ensuring the correct identification of individuals whose data are stored in the different EU information systems.
8. 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.*"
9. The specific comments below refer to both draft implementing decisions, given their identical content.

### 2.2. Flags in the multiple-identity detector

10. In his Formal comments of 17 May 2021, the EDPS commented on the proposed provisions purporting the creation of new types of links not provided for in the basic act such as "biometric false rejection links", and "biometric false acceptance links".
11. The EDPS welcomes the fact that his comment has been considered and addressed by the Commission already in the Commission Implementing Decisions of 30.08.2021<sup>9</sup>, where in such cases the Annexes do not refer anymore to 'links' but to 'flags' ('matching error flag', 'biometric false acceptance flag' and 'biometric false rejection flag').
12. The EDPS also positively notes that the draft implementing decisions further clarify and explain the purpose and the types of these flags. In particular, the flags would inform about the mistakes made by the multiple-identity detector in order to improve the matching algorithm<sup>10</sup>.

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<sup>9</sup> C(2021) 6176 final and C(2021) 6174 final.

<sup>10</sup> Article 1(4), last subparagraph of the draft implementing decisions.

13. As regards biometric false acceptance flags, the EDPS understands that these flags would indicate links that are incorrectly created by the automated processing in the MID. Thus, as they would in fact not be links to be examined, they should in principle not be returned to the end-user. While completely deleting those links may stand in the way of auditing and reporting purposes, as well as marking upgrades that are needed to the matching algorithms, maintaining the link in a visible manner to end-users seems to go beyond what is needed for these purposes. The EDPS invites the Commission to make links marked with biometric false acceptance flags 'invisible' to end-user. The Commission may decide on the criteria to be used in order to determine when a link should be 'hidden' from the end-user as such. The same consideration applies *mutatis mutandis* to flags showing biographical matching errors that resulted in the false creation of a link between two identities.

### **2.3. Links against different categories of identities in SIS**

14. In the previous formal comments referred to above, the EDPS also commented on the links against different categories of identities ('alias identities', 'misused identities', 'unconfirmed identities', 'confirmed identities') in SIS. In particular, the EDPS highlighted the possible consequences that could be triggered by a misused identity and questioned 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.
15. The EDPS positively notes that the draft implementing decisions specifically address this aspect and clarify, among other things, that in cases when an alert contains multiple identities, including a confirmed identity, the result of the comparison of the data in this identity must determine the colour of the link<sup>11</sup>. The EDPS does not have any further comments on the proposed rules concerning links against different categories of identities in SIS.

Brussels, 2 August 2023

*(e-signed)*

Wojciech Rafał WIEWIÓROWSKI

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<sup>11</sup> Article 1(2) of the draft implementing decisions.