EDPS Formal comments on draft Commission Implementing Decision on the technical rules necessary for entering, updating, deleting and searching data in the Schengen Information System (SIS) and other implementing measures in the field of border checks and return and Commission Implementing Decision on the technical rules necessary for entering, updating, deleting and searching data in the Schengen Information System (SIS) and other implementing measures in the field of police cooperation and judicial cooperation in criminal matters

1. Introduction and background

The Schengen Information System ("SIS") contains alerts on persons and objects entered by national competent authorities with the purpose of locating those persons or objects in another Member State and taking a specific action. It supports operational cooperation between national competent authorities, in particular border guards, the police, customs authorities, immigration authorities, and authorities responsible for the prevention, detection, investigation or prosecution of criminal offences or execution of criminal penalties. Thus SIS constitutes one of the most essential tools for maintaining a high level of security within the area of freedom, security and justice of the Union.

On 28 November 2018, three new Regulations were adopted concerning SIS to operationally and technically update and strengthen the system and to extend its scope of application: Regulation (EU) 2018/1860[1] ("SIS-return"), Regulation (EU) 2018/1861[2] ("SIS-border checks"), Regulation (EU) 2018/1862[3] ("SIS-police"). These Regulations will enter into full application in the end of 2021 and will repeal and replace the legal framework applicable to SIS at present.

Certain aspects of SIS are not covered exhaustively by the Regulations, given their technical, highly detailed and frequently changing nature. Regulation (EU) 2018/1861 and Regulation (EU) 2018/1862 therefore empower the Commission to adopt implementing measures in order to ensure uniform conditions for the implementation of the new SIS. Those aspects include quality requirements for each category of alert, minimum data elements and quality rules for entering data in SIS as well as technical rules and common standards on updating, deleting and searching data and common standards, protocols and technical procedures for the national systems (N.SIS).

The Commission presented on 26 June 2020 two draft Implementing Decisions on:

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[1] Regulation (EU) 2018/1860 of the European Parliament and of the Council of 28 November 2018 on the use of the Schengen Information System for the return of illegally staying third-country nationals.
[2] 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.
[3] 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

(i) the technical rules necessary for entering, updating, deleting and searching data in the Schengen Information System (SIS) and other implementing measures in the field of border checks and return[4], and

(ii) the technical rules necessary for entering, updating, deleting and searching data in the Schengen Information System (SIS) and other implementing measures in the field of police cooperation and judicial cooperation in criminal matters[5].

Both draft Implementing Decisions are accompanied by Annexes.

The Commission Implementing Decisions are a technical prerequisite for the entry into operation of the new SIS. Due to the *'variable geometry'* whereby not all Member States participate in the SIS in both the fields of border checks and return, and police cooperation and judicial cooperation in criminal matters, it is necessary to adopt parallel implementing acts based on the separate empowerments in the Regulations establishing the SIS in these different fields.

The present formal comments of the EDPS are issued in response to the legislative consultation by the European Commission of 30 June 2020, in line with Article 42(1) of Regulation 2018/1725[6] . In this regard, the EDPS regrets the fact that there is no reference to this consultation in the preambles of the two draft Commission Implementing Decisions.

2. Comments

2.1. General comments

Processing of personal data of a very large number of people in SIS is liable to have a significant impact on the lives of the individuals concerned. For that reason, both the legal framework and the technical rules applicable to SIS must ensure full compliance with the data protection legal framework. The EDPS has already made concrete recommendations in this regard in his Opinion 7/2017 on the new legal basis of the Schengen Information System[7].

The EDPS welcomes the introduction in the draft Implementing Decisions of specific measures and tools aimed at ensuring high quality of the data entered in SIS, such as minimum data elements for each category of alert or code tables for entering alphanumeric data in SIS in a uniform way, regardless of the language used by the end-user. This approach is in line with principle of data accuracy and helps prevent possible errors with potentially serious negative consequences for the affected data subjects.

The EDPS also positively notes the attention paid in the draft Implementing Decisions to the coherence between 'reason for the alert' and 'action to be taken', as well as to measures related to possible misused identities. In that regard, the Commission rightly recalls in the draft implementing acts the requirement for explicit consent of the person, whose identity has been misused, for entering additional data about him or her in SIS.

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[4] Pursuant to Article 9(5), Article 20(3), and Article 47(4) of Regulation (EU) 2018/1861

[5] Pursuant to Article 9(5), Article 20(4), Article 26(6), Article 32(9), Article 34(3), Article 36(6), Article 38(4), Article 54(5) Article 62(4) and Article 63(6) of Regulation (EU) 2018/1862

[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, 21.11.2018, L.295, p.39 (Regulation 2018/1725).

[7] https://edps.europa.eu/sites/edp/files/publication/17-05-02_sis_ii_opinion_en.pdf

2.2. Delegation of powers

Regulation (EU) 2018/1861, in particular Article 9(5), Article 20(3), and Article 47(4) thereof, and Regulation (EU) 2018/1862, in particular Article 9(5), Article 20(4), Article 26(6), Article 32(9), Article 34(3), Article 36(6), Article 38(4), Article 54(5) Article 62(4) and Article 63(6), delegate to the Commission the power to adopt implementing acts in line with Article 291 TFEU. The purpose of these implementing acts is to lay down common standards, protocols, procedures and other technical rules for entering, updating, deleting and searching the data in SIS.

At the same time, Article 13 of the draft Implementing Decision on border checks and return and Article 16 of the draft Implementing Decision on police cooperation and judicial cooperation in criminal matters delegate to eu-LISA[8] the power to "define further details on the technical rules for entering, updating, deleting and searching data in SIS in the Technical Specifications and SIS Interface Control Document". The SIS Interface Control Document should describe the relationship between CS-SIS and the N.SIS, including in particular:
(c) the technical specifications of the uniform national interface 'NI-SIS';
(d) the technical specifications of the system-to-system interactions;
(e) data items and messages passed, protocols used and timing and sequencing of events.

The EDPS considers that the legal status of the Technical Specifications and SIS Interface Control Document is not clear, especially in the light of its binding nature for Member States, Europol, Eurojust and the European Border and Coast Guard Agency. Moreover, according to Article 13(4), respectively Article 16(4) draft Implementing Decisions, eu-LISA at its own discretion, may update the technical rules to reflect changes in the business logic. These changes have to be accommodated by the Member States and the above-mentioned agencies into their systems, with all the technical, organisational and financial consequences they may entail. . The EDPS recalls that the superior nature of EU law towards national legislation does not mean that documents issued by an executive agency shall overrule national legislation.

The EDPS understands that due to the growing complexity of the EU large-scale IT systems, eu-LISA may possess specialised knowledge and expertise which may not be available in the Commission services. Nevertheless, the sub-delegation of powers by the Commission to a Union agency raises a number of questions, including about legal competence and allocation of responsibility.

Both Regulation (EU) 2018/1861 (SIS-border checks) and Regulation (EU) 2018/1862 (SIS-police) delegate the power to adopt implementing acts in order to lay down more detailed technical rules only to the Commission. Furthermore, the basic act of eu-LISA - Regulation (EU) 2018/1726[9], circumscribe exhaustively the tasks of the Agency. Regarding the operational management of SIS, according to Article 3 thereof, eu-LISA shall perform only the tasks conferred to it by the respective legal basis of SIS.

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[8] The European Union agency for the Operational Management of Large-Scale IT Systems in the Area of Freedom, Security and Justice

[9] Regulation (EU) 2018/1726 of the European Parliament and of the Council of 14 November 2018 on the European Union Agency for the Operational Management of Large-Scale IT Systems in the Area of Freedom, Security and Justice (eu-LISA), and amending Regulation (EC) No 1987/2006 and Council Decision 2007/533/JHA and repealing Regulation (EU) No 1077/2011

The legal framework thus presented should be interpreted in the light of the jurisprudence of CJEU on delegation of powers, namely the *Meroni* case law[10], according to which no discretionary power may be delegated.

The EDPS notes that the rules in the Technical Specifications and SIS Interface Control Document would have direct impact on the means and methods of processing of personal data in SIS of a large number of data subjects, both at central and at national level. Hence, even if the sub-delegation by the Commission to eu-LISA is presumed to be lawful, it still leaves open the question who will bear the responsibility if the implementation of the binding SIS Interface Control Document by Member States or by Europol, Eurojust, etc. leads to risks for the protection of personal data.

Therefore, the EDPS recommends that the Technical Specifications and SIS Interface Control Document, even if developed by eu-LISA on the basis of the Agency's specific knowledge and expertise, should be either formally adopted or at least reviewed and officially approved by the Commission, as the Union body empowered by the EU legislators to adopt delegated and implementing acts with technical rules for the functioning of SIS. The same approach should apply to any subsequent amendment of the document.

Brussels, 26 August 2020

Wojciech Rafał WIEWIÓROWSKI
    (e-signed)

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[10] Cases 9/56 and 10/56 Meroni v. High Authority [1957–1958] ECLI:EU:C:1958:7