



**Formal comments of the EDPS on the draft Commission Implementing Decision laying down the specifications for technical solutions to manage user access requests for the purpose of Article 22 of Regulation (EU) 2019/817 and to facilitate the collection of the information for the purpose of generating reports, pursuant to Article 78(10) of Regulation (EU) 2019/817 of the European Parliament and of the Council, as well as on the draft Commission Implementing Decision laying down the specifications for technical solutions to manage user access requests for the purpose of Article 22 of Regulation (EU) 2019/818 and to facilitate the collection of the information for the purpose of generating reports, pursuant to Article 74(10) of Regulation (EU) 2019/818 of the European Parliament and of the Council**

## **1. Introduction and background**

- The following comments concern two draft Commission Implementing Decisions ('the draft Decisions'):
  - draft Commission Implementing Decision laying down the specifications for technical solutions to manage user access requests for the purpose of Article 22 of Regulation (EU) 2019/817 and to facilitate the collection of the information for the purpose of generating reports, pursuant to Article 78(10) of Regulation (EU) 2019/817 of the European Parliament and of the Council, and
  - draft Commission Implementing Decision laying down the specifications for technical solutions to manage user access requests for the purpose of Article 22 of Regulation (EU) 2019/818 and to facilitate the collection of the information for the purpose of generating reports, pursuant to Article 74(10) of Regulation (EU) 2019/818 of the European Parliament and of the Council.
- On 22 May 2019, the European Parliament and the Council adopted two Interoperability Regulations. Regulation (EU) 2019/817<sup>1</sup> establishes a framework for interoperability between EU information systems in the field of borders and visa whereas Regulation (EU) 2019/818<sup>2</sup> establishes a framework for interoperability between EU information systems in the field of police and judicial cooperation, asylum and migration

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<sup>1</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. 27–84.

<sup>2</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. 85–135.

(hereinafter: the Interoperability Regulations or the Regulations). The following information systems fall under the scope of interoperability: the Entry/Exit System, the Visa Information System, the European Travel Information and Authorisation System, the European Asylum Dactyloscopy Database, the Schengen Information System, and the European Criminal Records Information System for third-country nationals.

- The European Commission is mandated to adopt the relevant Implementing Acts necessary for the design and development of interoperability.
- Pursuant to Article 78(10) of Regulation (EU) 2019/817 and Article 74(10) of Regulation (EU) 2019/818, the Commission shall adopt implementing acts laying down specifications for technical solutions to manage user access requests for the purpose of Article 22 of Regulation (EU) 2019/817 and Article 22 of Regulation (EU) 2019/818 and to facilitate the collection of the information for the purpose of generating reports.
- Pursuant to Article 22 of Regulation (EU) 2019/817, where there are reasonable grounds to believe that consultation of EU information systems will contribute to the prevention, detection or investigation of terrorist offences or other serious criminal offences, the designated authorities and Europol may consult the common identity repository in order to obtain information on whether data on a specific person are present in the EU information systems.
- In order to enable designated authorities and Europol to consult data in the common identity repository for this purpose, the European Agency for the Operational Management of Large-scale IT Systems in the Area of Freedom, Security and Justice ('eu-LISA') should make a technical solution available to them. The European search portal established by the Interoperability Regulations, which enables launching a query to the common identity repository, should according to the Recitals of the draft Decisions be used as this technical solution.
- The draft Decisions also include the re-use of the architecture of the central repository for reporting and statistics, for facilitating the collection of information referred to in Article 78(7) and (9) of Regulation (EU) 2019/817 and Article 74(7) and (9) of Regulation (EU) 2019/818.
- These comments are provided in response to the legislative consultation by the European Commission of 2 August 2021 pursuant to Article 42(1) of Regulation (EU) 2018/1725 ('the EUDPR')<sup>3</sup>. We limited our comments below to the provisions of the draft Decisions that are relevant from a data protection perspective.

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<sup>3</sup> 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.

- 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. 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.

## **2. Comments**

- The focus of the present formal comments is on how the rights and freedoms of individuals with regard to these processing operations supported by the technical solutions are protected by the draft Decisions, especially whether the limitation in Article 22(2) of the Regulations is respected, that the query should only indicate whether data on the specific person are present in any of the relevant EU information systems. Regarding the gathering of information for statistical purposes, the analysis focuses in particular on whether the information collection is excessive or, on the other hand, as some data helps in assessing the lawful application of the Regulations, whether the technical solution provides all the information required by Articles 78(7) and (9) of Regulation (EU) 2019/817 and Article 74(7) and (9) of Regulation (EU) 2019/818 that is necessary to assess the lawful application of the Regulations.
- Article 1 of the draft Decisions regarding queries under Article 22 of the Interoperability Regulations refers to the ESP profiles referred to in the Commission Implementing Decisions specifying the technical details of the ESP profiles. The EDPS has commented on the drafts of those implementing acts on 17 May 2021.<sup>4</sup> While the final shape of these implementing acts is not yet known to us, we recall that a search profile for purposes specific to the Interoperability Regulations and for the prevention, detection or investigation of terrorist offences or other serious criminal offences according to Article 22(1) of the Regulations had been provided for in the Annex to the draft implementing acts. As data to be provided in the reply, the Annex to these implementing acts provides for the following description: “In case of match(es), reference to the EU Information system(s) which contains data about the person”, which appears in line with Article 22 of the Regulation. The same holds true for the description of the searchable data, which also do not appear to raise concerns from a data protection perspective.
- Article 2(2) provides for the re-use of the central repository for reporting and statistics (CRRS) established by the Interoperability Regulations. The EDPS recalls that this repository, according to the Regulations, should contain anonymised statistical data from the EU information systems, the CIR, the MID and the shared BMS. The data contained in the CRRS should not enable the identification of individuals. eu-LISA should render the data anonymous in an automated manner and should record such anonymised data in the CRRS. The process for rendering the data anonymous should

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<sup>4</sup> See [https://edps.europa.eu/data-protection/our-work/publications/comments/technical-details-profiles-users-european-search\\_en](https://edps.europa.eu/data-protection/our-work/publications/comments/technical-details-profiles-users-european-search_en).

be automated and no direct access by eu-LISA staff should be granted to any personal data stored in the EU information systems or in the interoperability components. We therefore conclude that the CRRS may be a suitable technical solution to collect anonymous data. Article 2(9) of the draft Decisions confirms that the information stored in the technical solution shall not allow for the identification of individuals.

- The EDPS welcomes the fact that access to the technical solution shall be logged according to Article 2(7) of the draft Decisions and takes note that logs enabling the identification of the users accessing the technical solution shall be kept at national level and by the European Commission, respectively, according to Article 2(8) of the draft Decisions.
- The EDPS takes note of the fact that Article 2 (5)(b) of each draft Decision states that, for reporting purposes, any information regarding security incidents and other incidents dealt with outside the cooperation procedure should, at least, include the date, type and severity of the incident, the response time, and the outcome of the procedure. The EDPS generally welcomes this degree of detail. However, since neither Regulation (EU) 2019/817 nor Regulation (EU) 2019/818 define frameworks for measuring the impact of security incidents, it is unclear how Member State authorities and Europol should measure their severity. This uncertainty could lead to discrepant evaluations by the different Member States, with prejudice for the comparability of results. Inability to compare the impact of different incidents might result in a lack of accountability. The EDPS recommends that the provision in Article 2(5)(b) be amended by a referral to a common mechanism, available to Member States and Europol alike, which would contribute for a homogeneous measurement on the impact of security incidents. In the absence of such a mechanism, the classification criteria could be provided immediately in the draft Decisions.
- **The EDPS takes note** of the fact that the draft Decisions do not provide for specific selectable answers or minimum content of answers other than in paragraph (5) regarding security incidents. That means that there exists no definition how Member States would provide the necessary information regarding inter alia the following topics from the Regulations:
  - the exact purposes of the consultations including the types of terrorist offences or other serious criminal offences;
  - the reasonable grounds given for a substantiated suspicion that a suspect, perpetrator or victim is covered by Regulation (EU) 2017/2226, Regulation (EC) No 767/2008 or Regulation (EU) 2018/1240;
  - the need and use made of the exceptions for cases of urgency including those cases where that urgency was not accepted by the ex post verification carried out by the central access point;

- information to allow an assessment of the use of the CIR for preventing, detecting or investigating terrorist offences or other serious criminal offences (cf. Article 78(4)(g) of Regulation (EU) 2019/817); and
- other information to assess the Regulations' impact on fundamental right (cf. Article 78(4)(b) of Regulation (EU) 2019/817).

The EDPS recalls that information for purposes of Article 78(4) of Regulation (EU) 2019/817 and Article 74(4) of Regulation (EU) 2019/818 are included in the referral in paragraph (7) of the same articles. The EDPS recommends not to exempt information for purposes of Article 78(4) of the Regulations from the provisions of the current Decisions. The EDPS further recommends to precisely set out the (categories of) data to be provided by the Member States , following the example of paragraph (5) of the current Decisions, so that meaningful reports can be created, which will improve policy decisions and also deliver indications for future supervisory activities.

Brussels, 27 September 2021

Wojciech Rafał WIEWIÓROWSKI  
(*e-signed*)