

EDPS Formal comments on the draft Commission Implementing Decisions amending Commission Implementing Decisions of 9.11.2021 laying down technical details for European search portal user profiles, pursuant to Article 8(2) of Regulation (EU) 2019/817 and pursuant to Article 8(2) 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')¹, and in particular Article 42(1) thereof,

HAS ADOPTED THE FOLLOWING FORMAL COMMENTS:

1. Introduction and background

1. On 22 August 2023, the European Commission consulted the EDPS on the draft Commission Implementing Decisions amending Commission Implementing Decisions of 9.11.2021 laying down technical details for European search portal user profiles, pursuant to Article 8(2) of Regulation (EU) 2019/817 and pursuant to Article 8(2) of Regulation (EU) 2019/818 of the European Parliament and of the Council ('the draft implementing decisions').
2. According to Recital (5) of the draft implementing decisions, their objective is to amend the existing Commission Implementing Decisions C(2021)5052, adopted under Regulation (EU) 2019/817², and C(2021)5053, adopted under Regulation (EU) 2019/818³, in order to adjust them to the changes brought by Regulation (EU) 2021/1134⁴ for the purpose of reforming the Visa Information System as well as

¹ OJ L 295, 21.11.2018, p. 39.

² 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.

³ 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.

⁴ Regulation (EU) 2021/1134 of the European Parliament and of the Council of 7 July 2021 amending Regulations (EC) No 767/2008, (EC) No 810/2009, (EU) 2016/399, (EU) 2017/2226, (EU) 2018/1240, (EU) 2018/1860, (EU) 2018/1861, (EU) 2019/817

Regulations (EU) 2021/1150⁵, 2021/1151⁶ and 2021/1152⁷ as regards the establishment of the conditions for accessing other EU information systems for the purposes of the European Travel Information and Authorisation System. According to Recital (6), it was also necessary to lay down the user profiles enabling access to Europol data by Member State authorities and Union Agencies. In addition, the Commission informed the EDPS in the accompanying letter that the amendments include also changes necessary to reflect the development of business processes relevant to interoperability.

3. The draft implementing decisions are adopted pursuant to Article 8(2) of Regulations (EU) 2019/817 and (EU) 2019/818.
4. The EDPS previously issued Opinion 4/2018 of 16 April 2018 on the Proposals for two Regulations establishing a framework for interoperability between EU large-scale information systems⁸ and formal comments of 17 May 2023 on the draft Commission Implementing Decisions laying down the technical details of the profiles for the users of the European search portal, pursuant to Article 8(2) of Regulation (EU) 2019/817 and Article 8(2) of Regulation (EU) 2019/818 of the European Parliament and of the Council⁹.
5. The present formal comments of the EDPS are issued in response to a consultation by the European Commission pursuant to Article 42(1) of EUDPR. The EDPS welcomes the reference to this consultation in Recital 13 of both draft implementing decisions.
6. 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 acts¹⁰.

and (EU) 2019/1896 of the European Parliament and of the Council and repealing Council Decisions 2004/512/EC and 2008/633/JHA, for the purpose of reforming the Visa Information System, OJ L 248, 13.7.2021, p. 11.

⁵ Regulation (EU) 2021/1150 of the European Parliament and of the Council of 7 July 2021 amending Regulations (EU) 2018/1862 and (EU) 2019/818 as regards the establishment of the conditions for accessing other EU information systems for the purposes of the European Travel Information and Authorisation System, OJ L 249, 14.7.2021, p. 1.

⁶ Regulation (EU) 2021/1151 of the European Parliament and of the Council of 7 July 2021 amending Regulations (EU) 2019/816 and (EU) 2019/818 as regards the establishment of the conditions for accessing other EU information systems for the purposes of the European Travel Information and Authorisation System, OJ L 249, 14.7.2021, p. 7.

⁷ Regulation (EU) 2021/1152 of the European Parliament and of the Council of 7 July 2021 amending Regulations (EC) No 767/2008, (EU) 2017/2226, (EU) 2018/1240, (EU) 2018/1860, (EU) 2018/1861 and (EU) 2019/817 as regards the establishment of the conditions for accessing other EU information systems for the purposes of the European Travel Information and Authorisation System, OJ L 249, 14.7.2021, p. 15.

⁸ Download available at https://edps.europa.eu/data-protection/our-work/publications/opinions/interoperability-between-eu-large-scale-informations_en.

⁹ Download available at https://edps.europa.eu/data-protection/our-work/publications/comments/technical-details-profiles-users-european-search_en.

¹⁰ 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.

7. 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.

2. Comments

2.1. General comments

8. The EDPS notes that the proposed changes concern the table in the Annex, amending existing lines or also adding new lines to it. The EDPS further notes that the structure of the table as a whole would not be changed by the amending implementing decisions.
9. According to Article 8(1) and (2) of Regulations (EU) 2019/817 and (EU) 2019/818, it is eu-LISA's task to create the concrete profiles based on each category of ESP user and on the purpose of the queries, whereas the purpose of the implementing acts is to specify the technical details of the aforementioned profiles. The wording of the basic acts seems to grant a wide margin of appreciation as to what the "technical details" may be. In this regard, the EDPS welcomes that the Commission has chosen a rather comprehensive approach in 2021 and would now elaborate further on it, to 'translate' the various provisions of applicable legal acts into a table format which may further their technical operationalisation. Such approach seems legitimate and useful to ensure the correct implementation of the applicable legal acts.
10. In addition, the EDPS also welcomes that new or re-introduced references to legal acts contain the number of the Article and the precise paragraph, to provide the necessary clarity.

2.2. Use of the single identification number as referred to in Article 34(c) of Regulation (EU) 2019/817 and of Regulation (EU) 2019/818

11. The EDPS notes that in several places throughout the draft table, the column 'data to be used for querying' is now filled in with 'Single identification number as referred to in Article 34(c) of Regulation (EU) 2019/817 and of Regulation (EU) 2019/818', while it was previously filled with 'n/a'.
12. The EDPS recalls that so far Regulations (EU) 2019/817 and (EU) 2019/818 refer to the single identification number in the context of the exercise of data subjects' rights. Article 32(4) of Regulation (EU) 2019/817 provides that where a red link is created, the authority responsible for the manual verification of different identities shall inform the person concerned of the presence of multiple unlawful identity data and shall provide the person with the single identification number referred to in Article 34(c)

of this Regulation, a reference to the authority responsible for the manual verification of different identities referred to in Article 34(d) of this Regulation and the website address of the web portal established in accordance with Article 49 of this Regulation. Identical provision is provided for in Article 33(4) concerning white links. In addition, Art. 49(3) provides in sentences 3 and 4 that the web portal shall include a template e-mail to facilitate communication between the portal user and the competent authority of the Member State responsible for the manual verification of different identities. Such e-mail shall include a field for the single identification number referred to in Article 34(c) in order to allow the competent authority of the Member State responsible for the manual verification of different identities to identify the data concerned. Accordingly, Recital (45) of Regulation (EU) 2019/817 explains that

“[t]he creation of links requires transparency towards the individuals affected. In order to facilitate the implementation of the necessary safeguards in accordance with applicable Union data protection rules, individuals who are subject to a red link or a white link following manual verification of different identities should be informed in writing without prejudice to limitations to protect security and public order, prevent crime and guarantee that national investigations are not jeopardised. Those individuals should receive a single identification number allowing them to identify the authority to which they should address themselves to exercise their rights.”

13. As a result, it could be argued that Regulations (EU) 2019/817 and (EU) 2019/818 introduced the single identification number mainly to facilitate the exercise of data subjects' rights. At the same time, the draft implementing decisions envisage wider use of the single identification number (e.g. lines 4 - 13 and 15 of the table in the Annex). For the sake of legal clarity, the EDPS invites the Commission to consider clarifying the use of the single identification number in the CIDs, e.g. in the section with definitions of the Annex.

2.3. Other

14. The EDPS notes that in line 3, last column, the sentence “(...) the MID will notify the authority responsible for (...) & the single identification number as referred to in Article 34(c) of Regulation (EU) 2019/817” the meaning is not quite clear. Either the authority is also responsible for the single identification number, or the second half of the sentence requires a verb such as ‘indicate’.

Brussels, 19 September 2023

(e-signed)
Wojciech Rafał WIEWIÓROWSKI