



Formal comments of the EDPS 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 Council

1. Introduction and background

Regulation (EU) 2019/817¹, together with Regulation (EU) 2019/818² (hereinafter the Interoperability Regulations) 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).

In particular, the ESP is conceived as a centralised single-search interface that will enable competent authorities to simultaneously query the EU information systems falling within the scope of the Interoperability Regulations (C-SIS II⁵, Eurodac, VIS, the future EES, ETIAS and ECRIS-TCN systems) as well as relevant Interpol systems and Europol data, using both biographical and biometric data.

To enable the use of the ESP, the European Union Agency for the Operational Management of Large-Scale IT Systems in the Area of Freedom, Security and Justice ('eu-LISA') should, in cooperation with Member States, create an access profile for each category of user of the ESP based on the purposes of the queries.

¹ 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.

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), Eurodac 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 The Schengen Information System (SIS II) consists of national systems, developed by member countries, linked to a central system (C-SIS II) by a network.

The profiles should be reviewed regularly and at least once per year, by eu-LISA in cooperation with Member States, in order to ensure that they are up-to-date.

Pursuant to Article 8(2) of Regulation (EU) 2019/817 and Article 8(2) of Regulation (EU) 2019/818 the Commission has been empowered to adopt implementing acts laying down the technical details of the profiles for the users of the European Search Portal. The Commission presented on 22 March 2021 two draft Implementing Decisions, respectively:

- i. 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 of the European Parliament and of the Council;
- ii. laying down the technical details of the profiles for the users of the European Search Portal, pursuant to Article 8(2) of Regulation (EU) 2019/818 of the European Parliament and of the Council.

Both draft Implementing Decisions are accompanied by an Annex, which sets out the profiles for the users of the European Search Portal and their technical details.

The present formal comments of the EDPS are issued in response to the legislative consultation by the European Commission of 22 March 2021, pursuant to Article 42(1) of Regulation 2018/1725⁶. 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 any another legal act establishing a 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

2.1. General remarks

The ESP aims to enable the simultaneous query of multiple EU information systems (Central-SIS, Eurodac, VIS, EES, ETIAS and ECRIS-TCN) as well as the relevant Interpol systems and Europol data. Importantly, the ESP must only retrieve the information that correspond to the legal access rights of a specific user, which are provided for by the legal instruments that govern the information systems that the ESP should query. Thus, the creation of the access profiles for each category of user plays a key role in ensuring that existing access rights are

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

respected in full compliance with the respective legal instruments that govern the underlying systems. In this context, the EDPS understands that the categories of user profiles are exhaustively listed in the draft Implementing Decisions.

In addition, the EDPS notes that the draft Commission Implementing Decisions provide for very limited level of detail compared to the basic acts regarding the user profiles and their technical specifications. While the EDPS understands that the draft Commission Implementing Decisions and their Annexes aim to provide for a general overview of the user profiles, he recalls that in order to comply with the principles of data protection, in particular accountability, the requirements should be further developed and more details should be provided in the implementing acts. He invites the Commission to supplement the draft Implementing Decisions with further details, so to ensure legal certainty, as well as contribute to effective supervision and enforcement of the data protection principles in the future.

2.2. Central systems and interoperability components as ‘users’ of the ESP

Article 1(1)(b) of both draft Implementing Decisions provides a definition of a user of the ESP which encompasses both (i) Member States authorities or Union agencies and (ii) the central systems of the EU information systems and the CIR and MID interoperability components.

This definition seems to derogate from Article 7 of Regulation (EU) 2019/817 and Article 7 of Regulation (EU) 2019/818, which describe the uses of the ESP, and would have the effect of narrowing down the possible users of the ESP to Member States authorities and Union agencies.

The reasons for such an inconsistency with the basic act are not explained in the recitals of the draft Implementing Decisions. If the Commission considers necessary to identify additional categories of users, for instance for IT architecture purposes, the EDPS considers that it should in principle be possible.

However, the rationale for any choices should be clearly set out in the recitals of the draft Implementing Decisions (e.g. verify the execution of the operation, the verification of its outcome and to follow any changes introduced as a result of an erroneous ESP’ user actions). It is also advisable to mention examples of use cases in which these “users” would be involved. Such an approach would contribute to the necessary legal certainty and would avoid potential confusion as to the legal responsibilities of the actors concerned.

2.3. Granularity of categories of the ESP users

The EDPS considers that the categories of ESP users listed in the Annex are too general. For example, with regard to purposes listed under points 9, 10 and 11, the corresponding user categories of the ESP are respectively (i) all ESP users; (ii) all ESP users having access to the two systems between which a white link was created, and (iii) all ESP users having access to the two systems between which a green link was created and a query to those systems revealed a match with the two sets of linked data. The EDPS understands that it is necessary

to leave a certain margin of appreciation to the Member States authorities to further define the categories of users based on national legislation. However, he recommends to define and narrow down the categories of users that should be able to access the ESP for a given purpose, through references to the responsibilities that the identified categories of users have under national law. Another example is related to purpose No. 28 “Access to data in SIS by Eurojust pursuant to Article 49 of Regulation (EU) 2018/1862”. The category of ESP user listed in the table is “Eurojust”. However, according to Article 49(1) of Regulation (EU) 2018/1862, “[o]nly the national members of Eurojust and their assistants shall, where necessary to fulfil their mandate, have the right to access and search data in SIS within their mandate, in accordance with Articles 26, 32, 34, 38 and 40”. It would therefore be more appropriate to indicate “national members of Eurojust” and “assistants of the national members of Eurojust” as relevant user categories of the ESP for purpose No. 28.

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(e-signed)