



EDPS Formal comments on the draft Commission Implementing Decisions laying down a standard form for notification of a white link pursuant to Regulation (EU) 2019/817 and Regulation (EU) 2019/818 of the European Parliament and of the Council

1. Introduction and background

Regulation (EU) 2019/817,¹ together with Regulation (EU) 2019/818² of the European Parliament and of the Council 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).

Each of these components have a specific purpose. In particular, the MID will allow to link identities within the above-mentioned different EU information systems. The purpose is twofold: to facilitate identity checks for *bona fide* travellers and combating identity fraud.⁵ In the event that multiple identities are detected, the authorities are to carry out a manual verification of the different identities.

The MID will store the identified links between the individuals present in more than one of these systems, and these links will be labelled in four categories: white, yellow, green and red. A yellow link will be created when a query of biometric or identity data indicates that there are potentially different biographical identities on the same person but that a manual verification has not yet taken place. A white link confirms that the different biographical identities belong to the same *bona fide* person. A green link confirms that different *bona fide* persons happen to share the same biographic identity. A red link indicates that there are grounds to suspect that either different biographical identities are being used by the same person in an unjustified manner or the same or similar biographical identities are being used by two different persons in an unjustified manner.

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The creation of such links provides for new data processing and requires transparency towards the individuals affected in accordance with the rights enshrined in Articles 7 and 8 of the Charter of Fundamental Rights of the European Union. In order to facilitate the implementation of the necessary safeguards in accordance with applicable Union data protection rules, especially the

¹Regulation (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), the Eurodac system 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 Recitals 39 of Regulation (EU) 2019/817 and Regulation (EU) 2019/818.

⁶ Article 32(1)(d) of Regulation (EU) 2019/817 and Article 32(1)(d) Regulation (EU) 2019/818.

right to information, where a red link or a white link is created following manual verification of different identities the individual should be informed of it in writing⁷.

More specifically, when a white link is created, pursuant to Article 33(4) of Regulation (EU) 2019/817 and Regulation (EU) 2019/818, the authority responsible for the manual verification of different identities shall inform the person concerned of the presence of similar or different identity data and shall provide the person with the following information:

- the single identification number referred to in Article 34(c) of Regulation (EU) 2019/817 and Regulation (EU) 2019/818;
- a reference to the authority responsible for the manual verification of different identities referred to in Article 34(d) of Regulation (EU) 2019/817 and Regulation (EU) 2019/818;
- the website address of the web portal established in accordance with Article 49 of Regulation (EU) 2019/817 and Regulation (EU) 2019/818.

To inform individuals that data concerning them has resulted in the creation of a white link, it is foreseen in Article 33(6) of Regulation (EU) 2019/817 and Regulation (EU) 2019/818 to lay down a standard form. The standard form should also inform the individuals concerned that they have the right to access to, rectification, erasure and restriction of processing of personal data stored in the MID.⁸ Pursuant to Article 33(4) of Regulation (EU) 2019/817 and Regulation (EU) 2019/818, in order to protect security and public order, prevent crime and guarantee that no national investigation is jeopardised, it should be possible for the authority responsible for the manual verification to decide in specific cases justified on the basis of national legislation implementing Articles 12 and 13 of Directive 2016/680 of the European Parliament and of the Council⁹, to not provide the form to inform the person concerned of a white link.

Pursuant to Article 33(6) of Regulation (EU) 2019/817 and Article 33(6) of Regulation (EU) 2019/818, the Commission has been empowered to adopt implementing acts to lay down the above-mentioned form. The Commission presented on 25 February 2021 two draft Implementing Decisions laying down:

- i. a standard form for notification of a white link pursuant to Regulation (EU) 2019/817 of the European Parliament and the Council;
- ii. a standard form for notification of a white link pursuant to Regulation (EU) 2019/818 of the European Parliament and the Council.

Both draft Implementing Decisions are accompanied by Annexes which set out the draft standard form. While the content of both draft Implementing Decisions is almost identical, it is necessary to have two acts due to variable geometry requirements.

The present formal comments of the EDPS are issued in response to the legislative consultation by the European Commission of 25 February 2021, pursuant to Article 42(1) of Regulation

⁷ Recital 45 of Regulation (EU) 2019/817 and Recital 45 Regulation (EU) 2019/818.

⁸ Recital 5 of the Proposal with regard to access to, rectification and erasure. With regard to restriction, see also Recital 73 of Regulation (EU) 2019/817 and Regulation (EU) 2019/818.

⁹ Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA, OJ L 119, 4.5.2016, p. 89.

2018/1725¹⁰. In this regard, the EDPS welcomes the reference to this consultation in Recital 13 of both draft Implementing Decisions.

2. Comments

The below comments refer to both draft Implementing Decisions and related draft standard forms set out in the respective Annexes.

2.1. Use of the term “notification”

The EDPS observes that both draft Implementing Decisions use the term “notification” when referring to the obligation set in Article 33(4) of Regulation (EU) 2019/817 and Regulation (EU) 2019/818 to inform the person concerned of the creation and storage of a white link. At the same time, the term “notification” is used in both Regulations to refer to a number of different procedures. For example, it is used to indicate that, where a red (*sic!*) link is created, the MID shall **notify** the authorities responsible for the linked data in an automated manner (see Article 32(6) of Regulation (EU) 2019/817 and Regulation (EU) 2019/818). The term “notification” is also used in Article 69(6) of Regulation (EU) 2019/817 and Article 65(6) of Regulation (EU) 2019/818 to indicate that the ETIAS Central Unit shall **notify** the Commission only once all yellow links have been manually verified and their status updated as either green, white or red links. Therefore, to better align the text of the draft Implementing Decisions with that of Regulation (EU) 2019/817 and Regulation (EU) 2019/818, the EDPS recommends to indicate that the standard form aims to **inform** individuals concerned about the creation and storage of a white link (instead of using the term “notification”) and invites the Commission to update the text of both draft Implementing Decisions accordingly, where relevant.

2.2. Draft Standard Form

2.2.1. List of EU Information Systems

The EDPS notes that the draft standard form set out in the Annexes of both draft Implementing Decisions do not include Eurodac among the possible EU information systems to be selected when a presence of discrepancies in the personal information regarding the data subject has been discovered. Since the MID will be able to indicate whether a person is known under different identities in the different information systems including Eurodac, it is the EDPS understanding that Eurodac should also be listed in the standard form and invites the Commission to update the draft standard form set out in the Annex of both draft Implementing Decisions accordingly.

2.2.2. Conclusions of the verification authorities

The EDPS notes that the draft standard form set out in the Annex of both draft Implementing Decisions informs individuals about the discovery of discrepancies in the personal information regarding him or her and then concludes that these identity data refers to him or her in a justified manner. It is the EDPS’ opinion that for the purpose of informing the data subject in a not only technically accurate, but also comprehensible manner, the verification authorities should indicate the (justified) discrepancies identified or explain at least in abstract terms possible discrepancies between the data stored in different systems and what it means practically that they are deemed justified. Consequently, the EDPS recommends the Commission to replace the statement on justified discrepancies by a more intelligible and comprehensive explanation that

¹⁰ 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.

allows the individual concerned to fully understand the outcome of the analysis carried out, how such conclusion was reached and possibly also what consequences this may have (e.g. the display of linked information referred to in Art. 33(2) of Regulation (EU) 2019/817 and Regulation (EU) 2019/818).

2.2.3. Data subject rights with regard to the processing of personal data

The EDPS observes that the draft standard form set out in the Annex to the draft Commission Implementing Decision specifies under the section entitled “Your rights with regard to the processing of personal data” that a white link does not require any action from the data subject, unless the person suspects that an error has been made. The draft standard form further explains that, in such case, the individual should contact the competent authorities to receive more information on what data was linked. The EDPS considers that this formulation is misleading as it implies that the rights to information and access to personal data is conditional upon the suspicion of an error. In fact, pursuant to Article 48(1) of Regulation (EU) 2019/817 and Regulation (EU) 2019/818: *“In order to exercise their rights under Articles 15 to 18 of Regulation (EU) 2016/679, Articles 17 to 20 of Regulation (EU) 2018/1725 and Articles 14, 15 and 16 of Directive (EU) 2016/680, any person shall have the right to address himself or herself to the competent authority of any Member State, which shall examine and reply to the request.”* The EDPS, therefore, invites the Commission to delete the statement that no action is required unless the person suspect that an error has been made and that, in such cases, data subjects should contact the competent authorities to receive more information on what data was linked.

In addition, the EDPS considers that the section entitled “Your rights with regard to the processing of personal data” is not sufficiently transparent within the meaning of that term under Article 5(1)(a) of Regulation (EU) 2016/679 and Article 4(1)(a) of Regulation (EU) 2018/1725. In line with Article 12 of Regulation (EU) 2016/679, Article 14 of Regulation (EU) 2018/1725 and Article 12 of Directive (EU) 2016/680, controllers must take appropriate measures to inform third-country nationals about the relevant aspects of their personal data being processed in a transparent, intelligible and easily accessible form. However, currently, the draft standard form does not provide any information concerning the rights of individuals to access, rectify, erase, restrict the processing of personal data and the procedure on how to exercise them. Instead, it redirects the data subjects to the relevant web page of the web portal referred to in Articles 49 of Regulation (EU) 2019/817 and of Regulation (EU) 2019/818. To improve the effectiveness of the information provided and comply with the transparency requirements laid down in Regulation (EU) 2016/679, Regulation (EU) 2018/1725 and Directive (EU) 2016/680, besides providing the link to the relevant web page, the EDPS recommends including in the standard form itself a paragraph recalling the rights individuals have to access, rectify, erase and restrict the processing of personal data stored in the MID and the procedure on how to exercise them in line with Articles 48 of Regulation (EU) 2019/817 and Regulation (EU) 2019/818.

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(e-signed)