



EDPS Formal comments on the draft Commission Delegated Regulations laying down detailed rules on the operation of the web portal 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.

That framework includes a number of interoperability components which involve the processing of significant amounts of sensitive personal data. As a consequence, it is important that persons whose data are processed through those components can effectively exercise their rights as data subjects as required under Regulation (EU) 2016/679, Directive (EU) 2016/680 and Regulation (EU) 2018/1725. To this end, and pursuant to Article 49 of Regulation (EU) 2019/817 and Article 49 of Regulation (EU) 2019/818 a web portal should be established for the purpose of facilitating the exercise of the rights of access to, rectification, erasure or restriction of processing of personal data. Furthermore, the web portal should enable persons whose data are processed in the Multi-Identity Detector (MID) and who have been informed of the presence of a red or white link to retrieve the information of the competent authority of the Member State responsible for the manual verification of different identities. The web portal should also 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. The template e-mail should be available in the languages established in the draft Delegated Regulations and it should provide an option on the language(s) to be used for a reply.

Pursuant to Article 49(6) of Regulation (EU) 2019/817 and Regulation (EU) 2019/818 the Commission has been empowered to adopt a delegated act laying down detailed rules on the operation of the web portal, including the user interface, the languages in which the web portal shall be available and the template e-mail. The Commission presented on 24 February 2021 two draft Delegated Regulations laying down:

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).

- i. detailed rules on the operation of the web portal, pursuant to Article 49(6) of Regulation (EU) 2019/817 of the European Parliament and of the Council;
- ii. detailed rules on the operation of the web portal, pursuant to Article 49(6) of Regulation (EU) 2019/818 of the European Parliament and of the Council

Both draft Delegated Regulations are accompanied by two Annexes which set out the template email and the information that should be covered by the privacy notice (data protection notice) of the web portal. While the content of both draft Delegated Regulations 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 24 February 2021, pursuant to Article 42(1) of Regulation 2018/1725⁵. In this regard, the EDPS welcomes the reference to this consultation in Recital 16 of both draft Delegated Regulations.

2. Comments

The below comments refer to both draft Delegated Regulations and respective Annexes. They focus on those aspects of the draft Delegated Regulations that are most relevant from the data protection point of view.

2.1. Stakeholders and responsibilities

The EDPS notes that the stakeholders and responsibilities for the website are introduced in Article 2 of the draft Delegated Regulation and recommends the explicit definition of controller and processor according to the roles and responsibilities laid down by Regulation (EU) 2019/817 and Regulation (EU) 2019/818. The clear attribution of the roles of controller and processor is important because it will determine the responsibilities of the different actors in relation to data protection obligations, including those relating to data subject rights.

The EDPS also notes that according to Article 2 of the draft Delegated Regulation, eu-LISA shall annually review the contact details provided by the Member States. In order to ensure that the contact details made available via the web portal are always up to date following the regular review carried out by the Member States pursuant to Article 49(4) of Regulation (EU) 2019/817 and Regulation (EU) 2019/818, the EDPS recommends including the possibility to update the contact details more than once a year, should the need arise.

Furthermore, the EDPS notes that Article 3(2) states that “[u]pon verification of the validity and completeness of the input data, the web portal shall retrieve the contact details of the responsible authority in accordance with Article 49(2) of Regulation (EU) 2019/817.” The EDPS notes that the mechanism used by the web portal to retrieve the contact details of the responsible authority is described in Article 49(3), notably where it indicates that the web portal shall use the reference introduced by the person who has been informed of the presence of a red link in order to retrieve the contact information of the competent authority of the Member State responsible for the manual verification of different identities. Therefore, the Commission is invited to update the reference to the relevant provision accordingly.

⁵ 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 2018/725).

The EDPS also invites the Commission to update the text of Article 3(3) by indicating that the single identification number is referred to in Article 34(c) instead of Article 49(3) of Regulation (EU) 2019/817 and Regulation (EU) 2019/818.

2.2. Security considerations

Article 5 of the draft Delegated Regulation should clearly provide that any information transmitted to, stored in, related to, processed by and collected from the user interface shall be protected, in accordance with Articles 36 and 37 of Regulation (EU) 2018/1725. Therefore, the EDPS recommends to add a reference to Articles 36 and 37 of Regulation (EU) 2018/1725 at the end of paragraph 3 of Article 5 of the draft Delegated Regulation.

In addition, the EDPS recalls that the web portal should ensure the right authentication of the person and that enforcing the logging of the user's access alone does not prevent misuses, contrary to what is claimed in Recital 9 of the draft Delegated Regulations. From a security perspective, it does not seem to be sufficient to establish the data subjects' identity only by the reference of the responsible authority for the manual verification. Therefore, the EDPS invites the Commission to ensure that, where the controller has reasonable doubts about the identity of the natural person with whom information is exchanged, necessary measures are put in place to confirm the identity of the data subject, in line with Article 12(6) of Regulation (EU) 2016/679. Furthermore, the EDPS recalls the need to ensure the security of the exchanged data while in transit.

In addition, it is the opinion of the EDPS that the technical and organisational implementation of the web portal shall be compliant not only with the security plan but also with the business continuity plan and a disaster recovery plan (which are also referred to in Article 42(3) of Regulation (EU) 2019/817 and Regulation (EU) 2019/818) and invites the Commission to include this reference in Article 5(3) of the draft Delegated Regulations.

2.3. Logs

The EDPS notes that the web portal will log the access by users, for the purpose of monitoring the usage of the web portal in order to prevent any misuse and for statistical purposes. The logs shall be also retained for security purposes, and this especially matters for the case of the logs on the administration interface of Article 7(3). The security purpose should therefore be added in Article 7(2). In addition, security safeguards for the logs availability and integrity should be explicitly laid down in Article 7. In addition, Article 7 does not include any information on the administration of the logs and the EDPS recommends clearly defining the roles and purpose(s) for access to the logs of the website.

2.4. Annex II

The EDPS notes that Annex II of the draft Delegated Regulations only refers in general terms to the information that the privacy notice (data protection notice) of the web portal should provide, by including the information listed in Article 15 of Regulation (EU) 2018/1725.

The EDPS wishes to recall that the provision of information is an important precondition for the effective exercise of third country nationals' rights to access to, rectification, erasure and restriction of processing of their personal data and that the privacy notice (data protection notice) plays an important role in this respect. Thus, the EDPS invites the Commission to ensure that the data protection notice of the web portal provides third country nationals with clear,

specific and precise information about the processing of their personal data and the procedure they should follow if they wish to exercise their rights.

In particular, the EDPS observes that point (f) of Annex II of the draft Delegated Regulation includes among the information to be provided in the privacy notice (data protection notice), the fact that, where applicable, personal data may be transferred to a third country or international organisation and the conditions for such transfer and the means by which to obtain a copy of them or where they have been made available. Yet, pursuant to Article 50 of Regulation (EU) 2019/817 and Regulation (EU) 2019/818 personal data stored in, processed or accessed by the interoperability components shall not be transferred or made available to any third country, to any international organisation or to any private party, with the exception of transfers to Interpol. Although point (f) specifies that such information should be included ‘where applicable’, the EDPS considers that it would be clearer to indicate that the data protection notice shall provide information about the fact that personal data is not transferred or made available to third countries, international organisations or private parties with the exception of transfers to Interpol, in line with Article 50 of Regulation (EU) 2019/817 and Regulation (EU) 2019/818.

Finally, the EDPS observes that point (j) of Annex II refers to the right to lodge a complaint with the European Data Protection Supervisor. The EDPS would like to recall that data subjects have the possibility to lodge a complaint not only before the European Data Protection Supervisor but also before the Member States supervisory authorities⁶. Moreover, the EU Information systems guarantee the right to bring a complaint before the courts or a competent authority⁷. Therefore the EDPS invites the Commission to update the text accordingly.

⁶ - Article 77 of Regulation (EU) 2016/679 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 and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (Text with EEA relevance) OJ L 119, 4.5.2016, p. 1;

- Article 52 of 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.

⁷ See:

- Article 40(1) of Regulation (EC) No 767/2008 of the European Parliament and of the Council of 9 July 2008 concerning the Visa Information System (VIS) and the exchange of data between Member States on short-stay visas (VIS Regulation), OJ L 218, 13.8.2008, p. 60;

- Article 68 of 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, OJ L 312, 7.12.2018, p. 56;

- Article 54 of 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, OJ L 312, 7.12.2018, p. 14;

- Article 19 of 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, OJ L 312, 7.12.2018, p. 1;

- Article 54 of Regulation (EU) 2017/2226 of the European Parliament and of the Council of 30 November 2017 establishing an Entry/Exit System (EES) to register entry and exit data and refusal of entry data of third-country nationals crossing the external borders of the Member States and determining the conditions for access to the EES for law enforcement purposes, and amending the Convention implementing the Schengen Agreement and Regulations (EC) No 767/2008 and (EU) No 1077/2011, OJ L 327, 9.12.2017, p. 20;

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- Article 29(14) of Regulation (EU) No 603/2013 of the European Parliament and of the Council of 26 June 2013 on the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of Regulation (EU) No 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes, and amending Regulation (EU) No 1077/2011 establishing a European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice, OJ L 180, 29.6.2013, p. 1;

- Article 64(4) of Regulation (EU) 2018/1240 of the European Parliament and of the Council of 12 September 2018 establishing a European Travel Information and Authorisation System (ETIAS) and amending Regulations (EU) No 1077/2011, (EU) No 515/2014, (EU) 2016/399, (EU) 2016/1624 and (EU) 2017/2226, OJ L 236, 19.9.2018, p. 1;

- Article 27 of Regulation (EU) 2019/816 of the European Parliament and of the Council of 17 April 2019 establishing a centralised system for the identification of Member States holding conviction information on third-country nationals and stateless persons (ECRIS-TCN) to supplement the European Criminal Records Information System and amending Regulation (EU) 2018/1726, OJ L 135, 22.5.2019, p. 1.