



EDPS
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**Subject: New Forensic Environment (NFE) and the requirement for an Article 39
prior consultation**

Dear Ms de Bolle,

In your letter of 2 June 2021, you informed us that, in the context of drafting the New Forensic Environment (“NFE”) DPIA, you have not identified any new data processing operation that would fall under Article 39 of Regulation (EU) 2016/794 (“Europol Regulation”)¹.

However, this analysis does not coincide with the information provided to the EDPS, for example in the context of the Forensic IT Environment (“FITE”) reports. These FITE reports describe changes that are more than just improvements on existing processes; they describe new processes that are going to be implemented in the context of the NFE.

¹ Regulation (EU) 2016/794 of the European Parliament and of the Council of 11 May 2016 on the European Union Agency for Law Enforcement Cooperation (Europol) and replacing and repealing Council Decisions 2009/371/JHA, 2009/934/JHA, 2009/935/JHA, 2009/936/JHA and 2009/968/JHA, OJ L 135, 24.5.2016, p. 53–114.

For example, these are some descriptions found in the FITE reports (non-exhaustive list):



At the very least, these major changes substantially modify the risk to data subjects if not creating new ones. These processing activities imply the processing of all sorts of data (some of which will be a priori not known), including the processing of sensitive data which fall under the obligation to prior consult the EDPS according to Article 39(1)(a) ER.

In addition, the new processing activities meet four additional criteria of the list contained in the EDPS Decision of 16 July 2019 on DPIA lists issued under Articles 39(4) and (5) of Regulation (EU) 2018/1725², indicating that they do not only present “specific risks” as required under Article 39(1)(b) ER but also “high risks”:

- Data processed on a large scale, whether based on number of people concerned and/or amount of data processed about each of them and/or permanence and/or geographical coverage;
- Datasets matched or combined from different data processing operations performed for different purposes and/or by different data controllers in a way that would exceed the reasonable expectations of the data subject;
- Data concerning vulnerable data subjects: situations where an imbalance in the relationship between the position of the data subject and the controller can be identified;
- Systematic and extensive evaluation of personal aspects or scoring, including profiling and predicting.

² Decision of the European Data Protection Supervisor of 16 July 2019 on DPIA lists issued under Articles 39(4) and (5) of Regulation (EU) 2018/1725:

https://edps.europa.eu/sites/default/files/publication/19-07-16_edps_dpia_list_en.pdf

In light of the information presented above, it appears that that these new processing operations are presenting specific and high risks to data subjects and as such fall under the obligation to prior consult the EDPS in line with Article 39(1)(b) of the Europol Regulation.

In case Europol has a different viewpoint, we request that you provide us with your assessment as well as with the relevant DPIA in order to substantiate your assessment (i.e. that all changes due to the NFE are neither major changes or new processing activities when compared to the CFN and do not present specific risks for the fundamental rights and freedoms, and in particular the protection of personal data, of data subjects) by **1 October 2021**.

Yours sincerely,

[e-signed]

Wojciech Rafał WIEWIÓROWSKI

cc. 