



EUROPEAN DATA PROTECTION SUPERVISOR

EDPS OPINION ON A PRIOR CONSULTATION REQUESTED BY EUROPOL on conducting dactyloscopic searches in the Schengen Information System (SIS II)

3 June 2022
(Case 2022-0384)

Executive Summary

According to Article 39 (1) of Regulation (EU) 2016/794 (the ‘Europol Regulation’ or the ‘ER’)¹, any new type of processing operations to be carried out shall be subject to prior consultation with the EDPS where special categories of data as referred to in Article 30(2) are to be processed or where the type of processing, in particular using new technologies, mechanisms or procedures, presents specific risks for the fundamental rights and freedoms, and in particular the protection of personal data, of data subjects.

Having performed a data protection impact assessment, Europol has consulted the EDPS regarding its implementation of dactyloscopic searches in the Schengen Information System (‘SIS II’). The current prior consultation is therefore a follow-up of Europol’s previous prior consultation of biographic searches of SIS II in 2020 (EDPS case 2020-0497).

After examining the notification and appended documentation, the EDPS is of the opinion that Europol’s prior consultation does not sufficiently identify, allocate and mitigate the additional specific risks related to the dactyloscopic searching of SIS II, when compared to the previously consulted biographical searches.

However, the EDPS believes that specific risks to data subjects could well arise in this process, in particular during the assessment of the matches obtained from SIS II - in case there would be no tailored strategy to identify the different categories of matches (print to print, mark to print, mark to mark). The EDPS also places special consideration on the potential risks to data subjects stemming from comparisons between lower quality finger- and palmmarks at Europol and SIS II. Therefore, **the EDPS asks Europol to reevaluate whether it sees specific risks to data subject arise in these two areas**, and if so, adopt a tailored mitigation strategy.

Finally, the EDPS invites Europol to reassess whether alerts on missing persons should be

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.

included by default when comparing fingerprints or palm marks recovered from crime scenes, in light of the data protection principles of necessity and proportionality.

Table of Contents

Executive Summary.....	1
1. PROCEEDINGS.....	4
2. DESCRIPTION OF THE PROCESSING.....	5
3. LEGAL AND TECHNICAL ASSESSMENT	6
3.1. Need for prior consultation pursuant to Article 39 of the Europol Regulation	6
3.2. Europol's legal basis for performing dactyloscopic searches	8
3.3. Assessment of the risks to data subject from searches in SIS II.....	9
3.3.1. General comments of the EDPS on risk assessment in the context of prior consultations.....	9
3.3.2. Risks identified by Europol and potential other areas of risk.....	10
3.4. Mark to print searches of alerts on missing persons.....	11
4. CONCLUSION AND RECOMMENDATIONS.....	12

1. PROCEEDINGS

On 25 March 2022, the EDPS received a request for prior consultation from Europol under Article 39 of Regulation (EU) 2016/794 (the ‘Europol Regulation’ or the ‘ER’)² on the inclusion of a new type of query of the Schengen Information System (‘SIS II’), namely dactyloscopic searches.

The prior consultation request contained the following:

- the formal notification of the prior consultation, with an identification of four risks and a filled-out questionnaire by Europol’s staff;
- a cover letter from Europol’s Data Protection Officer (‘DPO’) to the EDPS³;
- two copies of the SIS II Interface Control Document⁴, version of 8 October 2021;
- Europol’s process description for cross checking data and managing hits⁵, version of 23 March 2021;
- Europol’s manual of data review⁶, draft version of August 2019;
- a copy of the Analysis Project (‘AP’) portfolio, amended version of 9 June 2021⁷;
- a process description for the data review process in Europol Analysis System (‘EAS’)⁸, version of 8 December 2017;
- a copy of the EAS manual⁹, version of June 2019;
- a copy of Europol Management Board Decision of 13 December 2017¹⁰ adopting guidelines further specifying the procedures for processing of information in accordance with Article 18 ER.

On 4 May 2022, the EDPS sent a request for further clarification to Europol to which Europol’s reply was received on 16 May 2022.

According to Article 39(3) of the Europol Regulation, the EDPS is to issue his Opinion to the Europol Management Board within a period of two months following the receipt of the notification of the prior consultation. That period may be suspended for a maximum period of two additional months, after which it shall be deemed favourable.

In this case, the deadline for the EDPS’ response was suspended for 12 days, meaning the deadline within which the EDPS shall issue his Opinion is **7 June 2022**.¹¹

² 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.

³ EDOC#1223841v2.

⁴ EDOC#1196887 and EDOC#1196887.2, both documents share a ‘version number’ of v.4.9.0.12.

⁵ EDOC#1145817v3.

⁶ EDOC#969053v8.

⁷ EDOC#942003v8.

⁸ EDOC#893701v12.

⁹ EDOC#886249v16.

¹⁰ EDOC#832397v36.

¹¹ For the calculation of the deadline, it is taken into account that 6 June 2022 is a public holiday.

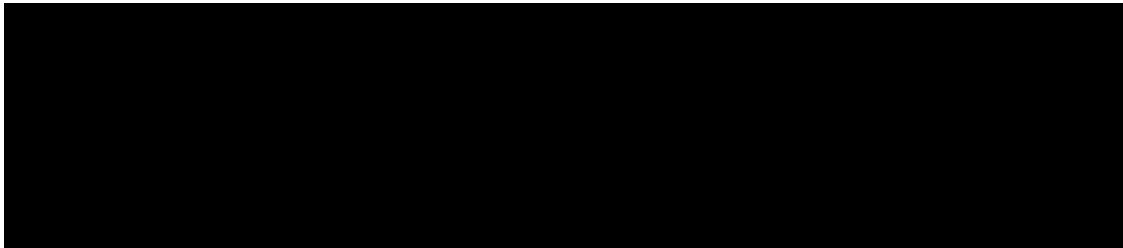
2. DESCRIPTION OF THE PROCESSING

In 2020¹², Europol prior consulted the EDPS on its extended access to SIS II following the 2018 SIS II framework¹³, in which Europol's access was broadened to all alert categories. At that time, Europol was still developing how to proceed with biometric searches of the SIS, mentioning to the EDPS that the 'processes will be described when the functionality to search biometric data becomes available'¹⁴. As such, the current prior consultation of this type of search to the EDPS should be seen as an 'update' to the previous prior consultation, following the on-going nature of the Data Protection Impact Assessment ('DPIA') process. Equally, the focus of the EDPS will lie on those specific risks that may be generated by the addition of dactyloscopic searches.

As the prior consultation does not define some of the general concepts used, the EDPS believes it is important to present its understanding of the following two concepts:

- Fingerprints and palmprints: the prints of a person, associated with a known or claimed identity, and recorded either electronically, by ink, or by another medium under controlled conditions.
- Fingermarks and palmmarks: a digital impression of a partial fingerprint/palmprint, typically recovered in a course of a crime scene investigation. The main difference with respect to the previous type of dactyloscopic data is that, in this case, the individual is not present at the time of the acquisition.¹⁵ These are also sometimes referred to as "latent" fingerprint or palmprints.

Europol plans to perform the following types of dactyloscopic searches in SIS II:




¹² EDPS case 2020-0497.

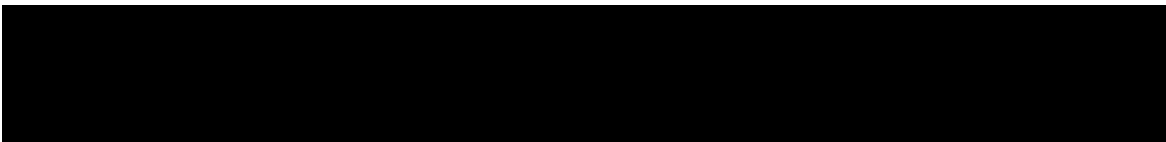
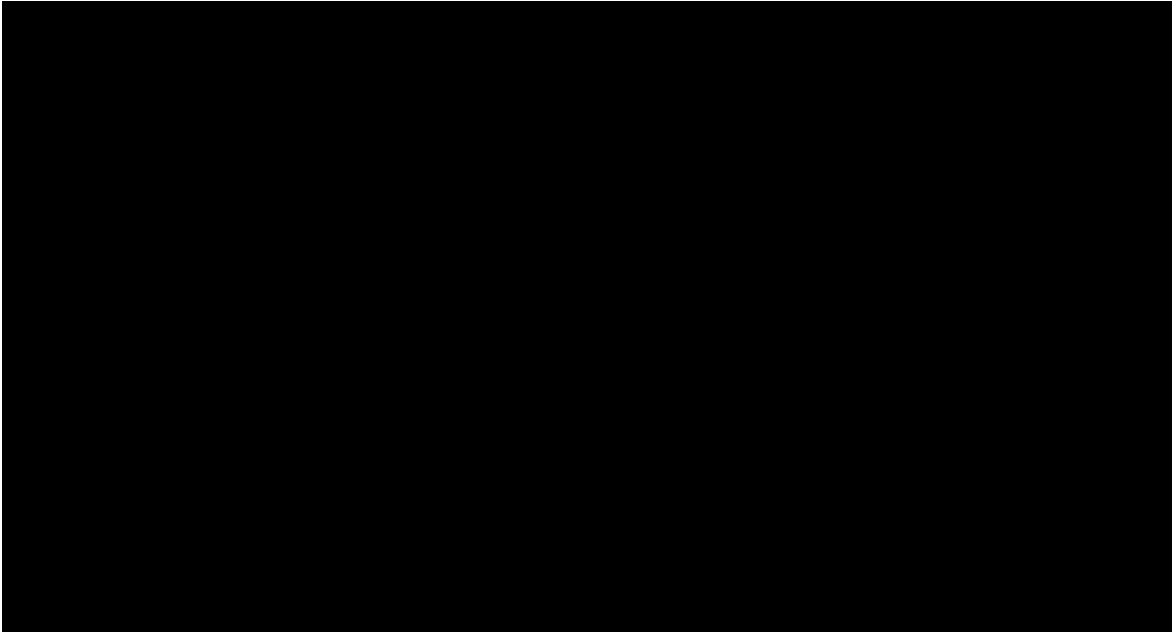
¹³ Regulation (EU) 2018/1860 of the European Parliament and of the Council of 28 November 2018 on the use of the Schengen Information System for the return of illegally staying third-country nationals, OJ L 312, 7 December 2018, p. 1-13; Regulation (EU) 2018/1861 of the European Parliament and of the 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 December 2018, p. 14-55; 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 December 2018, p. 56-106. The main provisions concerning Europol's access to, and processing of, personal data contained in the system are Article 48 of Regulation (EU) 2018/1862 in the field of police cooperation and judicial cooperation in criminal matters and Article 35 of Regulation (EU) 2018/1861 in the field of border checks. As both of these articles have identical texts, this Opinion will mainly refer to Article 48 of Regulation (EU) 2018/1862. However, these references should be understood as also referring to the corresponding provisions in Regulation 2018/1861.

¹⁴ Page 14 of EDOC#1091189v4.

¹⁵ See in this regard the JRC Science for Policy report on Fingerprint identification technology for its implementation in the Schengen Information System II (SIS-II), JRC 33516-2014, page 82.



The notification form included in the prior consultation further describes, in 8 steps, the lifecycle of dactyloscopic data as it is received, stored, and later cross-matched by Europol against SIS II. The process goes as follows:



3. LEGAL AND TECHNICAL ASSESSMENT

3.1. Need for prior consultation pursuant to Article 39 of the Europol Regulation

Article 39 of the Europol Regulation subjects some processing operations to prior consultation by the EDPS. According to Article 39(1) of the Europol Regulation, the scope of application of the prior consultation requirement covers:

- (a) processing of special categories of personal data as referred to in Article 30(2); or
- (b) types of processing, in particular using new technologies, mechanisms or procedures,

¹⁶ Meaning a file based on the standard developed by the U.S. National Institute of Standards and Technology ('NIST').

presenting specific risks for the fundamental rights and freedoms, and in particular the protection of personal data, of data subjects.

Furthermore, according to Recital 50 of the Europol Regulation: ‘the prior consultation mechanism is an important safeguard for new types of processing operations. This should not apply to specific individual operational activities, such as operational analysis projects, but to the use of new IT systems for the processing of personal data **and any substantial changes thereto.**’

In its prior consultation notification, Europol indicated that the dactyloscopic search process may be subject to prior consultation as the supplementary information related to hits on terrorism and other supplementary information can imply the processing categories of data that could reveal the religious beliefs of the data subject (as certain types of terrorism are directly linked to the religious beliefs of the data subjects). Processing alerts related to wanted persons could also reveal information on special categories of data such as a person’s physical condition or health (e.g. in a European Arrest Warrant or in the alert the issuing country may indicate that the wanted persons suffer of a serious illness or contagious disease), or data concerning a person’s sex life (e.g. persons wanted in relation to child sexual abuse).

However, Europol also states that, in this respect, the processing of special categories of personal data is largely similar to the previously consulted processing of SIS II data with biographical information.

The EDPS agrees with Europol’s view that there is no substantial difference in the processing of special categories of personal data (both when processing alerts and supplementary information) between biographic and biometric searches of SIS II. Therefore, the **EDPS does not consider that the addition of biometric searches would trigger another prior consultation under Article 39(1)(a) ER.**

However, the EDPS considers that the processing may be subject to prior consultation under Article 39(1)(b) ER, depending on whether specific additional risks to data subjects arise from the addition of biometric searches (whether of prints or marks) to Europol’s queries of SIS II. As further detailed in Section 3.3. ‘Assessment of the specific risks to data subjects’, the notification presented by Europol did not go into the specific risks posed by the processing of dactyloscopic data, but rather identified a series of cross-cutting risks, safeguards and security measures.

As the supervisory body of Europol in the field of data protection, the EDPS is not in place to define specific risks on behalf of Europol, who is the controller for this processing operation. However, in order to assist Europol with the risk assessment exercise, the EDPS will indicate areas in section 3.3 where it could see specific risks appearing. Nevertheless, the EDPS notes that based on the information provided in the risk assessment, it cannot fully fulfil its role under Article 39 ER, which is to make concrete proposals to avoid breaches of the Europol Regulation, if the opinion of the EDPS is that the notified processing may involve a breach of any provision of the Europol Regulation.

3.2. Europol's legal basis for performing dactyloscopic searches

The EDPS considers that the 2018 SIS II framework¹⁷, including its relevant Implementing Decisions on SIS-AFIS, provides a clear mandate to Europol to perform dactyloscopic searches in SIS II. Indeed, one of the aims of the SIS II reform, which can be found in Recital 65 of Regulation 2018/1862, is to allow Europol to 'comprehensively' use SIS, which includes the integrated possibility to perform dactyloscopic searches.

Under Article 4 ER, the provision which defines the tasks of Europol, the Agency has indicated that it will perform dactyloscopic searches for its tasks under paragraphs (a), (b), (e) and (h). These tasks are respectively to:

- (a) collect, store, process, analyse and exchange information, including criminal intelligence;
- (b) notify the Member States, via the national units established or designated pursuant to Article 7(2), without delay of any information and connections between criminal offences concerning them;
- (e) provide information and analytical support to Member States in connection with major international events;
- (h) support Member States' cross-border information exchange activities, operations and investigations, as well as joint investigation teams, including by providing operational, technical and financial support;

The EDPS highlights that for these tasks, and in particular point (e) and (h), Europol intends to perform dactyloscopic searches of SIS II only where it has received the dactyloscopic data from a non-Schengen country¹⁸. As to Article 4(b), which lays down the general information obligation to Member States through the Europol national units, the EDPS notes that this provision is superseded for the purposes of SIS II by Article 48(2) of Regulation 2018/1862, which requires that Europol uses the Communication Infrastructure for the exchange of supplementary information.

As to the purposes of dactyloscopic searches indicated by Europol under Article 18(2) ER, the EDPS takes particular note of the purpose of Article 18(2)(b), which covers 'thematic or strategic analysis'. Here, Europol states that 'fingerprints provided to Europol in line with its mandate, but which do not fit in the portfolio of any of the analysis projects, are stored for thematic or strategic analysis purposes'¹⁹. Europol continues by commenting that in this case, data is anonymised (and often consolidated) for more often abstract reports, or reports of a wider scope. Considering the nature of thematic and strategic analysis, Europol has not demonstrated to the EDPS that searches of the SIS II using dactyloscopic stored for these purposes would be necessary to fulfil its mandate, which is a requirement under Article 48(1) of Regulation 2018/1862. Neither would it appear necessary to the EDPS to store dactyloscopic data, obtained from SIS II as supplementary information, under strategic nor thematic analysis - in case they do not fit the portfolio of any of Europol's analysis projects. Therefore, Europol should justify clearer why dactyloscopic searches of SIS II would serve the purpose Article 18(2) ER.

¹⁷ Regulation (EU) 2018/1860, Regulation (EU) 2018/1861, Regulation (EU) 2018/1862, and Commission Implementing Decisions (EU) 2020/2165 and (EU) 2021/31.

¹⁸ Page 12 of EDOC#1222949v3.

¹⁹ Page 13 of EDOC#1222949v3.

3.3. Assessment of the risks to data subject from searches in SIS II

3.3.1. General comments of the EDPS on risk assessment in the context of prior consultations

Under Article 39(2) ER, four elements should be present in each prior consultation of the EDPS: (1) a description of the process or system that is being consulted, (2) an assessment of the specific risks posed by this process or system, (3) the mitigating measures that Europol plans to apply in order to mitigate these risks where possible, and (4) additional 'safeguards and mechanisms to ensure the protection of personal data'.

It is crucial to differentiate between specific risks generated by a process or system that cause the need for a prior consultation with the EDPS, **and cross-cutting risks which arise for the large majority of the processes or systems** at Europol.

Example of a specific risk, to be included in the risk assessment table

In EDPS case 2019-0850 on the prior consultation of an Online Service Provider (OSP) referral system, Europol proposed the introduction of a new recognition tool for text in natural images of child sexual abuse. Here Europol identified the following risk: *'failure to detect text in natural images leading to a failure to thoroughly exploit available information and impacting data subjects through their non-identification leading to victimisation or repeat victimisation and continued offending behaviour.'*

In this example, Europol has (a) proposed a new system or substantial change thereto (the inclusion of a text recognition tool for images), and (b) identified a specific risk that this change would generate.

In this case, tailored mitigating measures were *i.a.* to only accept low levels of fault tolerance (on the back-end) and the 'presentation to the Member States in a manner that makes it clear that it is intended to supplement other information in the report and should be assessed along with that' (on the front-end).

The EDPS notes that in this example of a past prior consultation, the impact on the data subject is also made explicit, which the EDPS strongly supports.

Example of a cross-cutting risk, which is treated by the 'additional safeguards and mechanisms' and does not need to be included in the risk assessment table

'Unauthorised access to a system at Europol or an external system, which can lead to the unnecessary or unlawful disclosure of personal data.'

Unauthorised access is a risk common to virtually all systems at Europol, and is typically mitigated through training and the integration [REDACTED] [REDACTED] is a baseline system employed throughout Europol, it should not form part of the specific risk assessment table - but rather at the end of the prior consultation under a 'general' or 'additional safeguards and mechanisms' section that can be largely taken over between prior consultations.

To be clear, the EDPS does not advocate to remove information about these cross-cutting risks and general safeguards and mechanisms from the prior consultation notification entirely, as these elements are relevant from a data protection point of view. However, there

should be a clear distinction between the novel elements of a process or system, and the specific novel risks posed by these elements, and those other elements which are applied horizontally.

Based on these examples, the EDPS highlights that the **main purpose of the DPIA process, and the prior consultation with the EDPS, is to identify and address the specific risks** generated by novel systems, or by substantial changes to personal data processing at Europol. These are the risks that should be focused on in the main risk table, for which mitigating measures should then be devised, and for which the resulting risk level should be estimated²⁰.

Contrary to this, where a novel process or system would only lead to cross-cutting risks and safeguards, this would likely not require a prior consultation of the EDPS. Such a prior consultation would lead to both a repetitive exercise for Europol and the EDPS, and run counter to the goal of the prior consultation exercise, namely to seek the opinion of the EDPS on novel risks and how these can be mitigated so as to avoid a breach of the Europol Regulation.

3.3.2. Risks identified by Europol and potential other areas of risk

Turning to the risk assessment table included in Europol's prior consultation form on dactyloscopic searches of SIS II, the EDPS notes that Europol has included a risk table with four risks. The risks are described as follows:

1. Disclosure of information, the relevance of which for the prevention and combating of serious crimes and terrorism, may not always be evident;
2. Unauthorised Access;
3. Indiscriminate Access;
4. Unnecessary storage of data.

The EDPS notes that the same risk descriptions were included as well in previous prior consultation requests by Europol. For instance, 'disclosure of information', 'unauthorised access' and 'unnecessary storage of data' were all included in the prior consultations on EPRIS and VIS access²¹, while 'indiscriminate access' was included in the VIS prior consultation.

Considering in particular that the prior consultation of SIS II dactyloscopic searches is a specific update to Europol's general access regime to SIS II, which was previously consulted with the EDPS, the EDPS highlights the need to focus on the specific risks posed by biometric queries. While Europol's first mitigating measure to the risk of 'disclosure of information' mentions that a fingerprint expert will perform a review of the returned matches by SIS II, the EDPS considers that both the risk and mitigating measure in this place should be further specified.

²⁰ As mentioned in the EDPS Accountability on the Ground Toolkit, page 9, (https://edps.europa.eu/sites/default/files/publication/19-07-17_accountability_on_the_ground_part_ii_en.pdf), an 'Information Security Risk Assessment ('ISRM') is far from all there is to this exercise. ISRM tends to focus on risks that stem from unauthorised system behaviour (e.g. unauthorised disclosure of personal data), while parts of the risks to data subjects and compliance risks stem from the **authorised system behaviour** for which you do the DPIA.'

²¹ EDPS cases 2022-0265 and 2020-1032 respectively.

The EDPS would like to bring to the attention of Europol that a specific policy report was issued by the European Commission's Joint Research Centre assessing fingerprint technology for its implementation in SIS II²², which identifies a series of risk areas that are likely relevant for Europol's internal risk assessment as well.

One of the elements highlighted in the report is the need to develop a specific matching strategy according to a risk assessment of the different types of query.²³ While the report expressed this need towards eu-LISA ahead of the implementation of SIS II-AFIS, such a risk assessment and strategy differentiating between the types of searches would seem relevant to Europol as well, considering the different types of biometric queries that Europol can perform against SIS II (ranging from 'print to print' to 'mark to mark').

Among these, mark to mark comparisons probably raise the largest concerns due to the anticipated low quality of both the marks received by Europol and the target mark dataset in SIS II. Defining a specific processing strategy for this particular type of data would seem to be required to the EDPS in order to meet an adequate processing standard. While such a strategy or policy may already exist at Europol, it was not provided to the EDPS in the context of this prior consultation. In case the strategy or policy document does indeed exist, it should be likely reassessed in order to ensure that it adequately addresses comparisons of SIS II marks and Europol marks.

Furthermore, concerning the documentation provided to the EDPS (and therefore deemed relevant by Europol) in the context of the prior consultation, the EDPS notes that a number of these documents do not include the proposed dactyloscopic searches of SIS II. In particular, the data review policy²⁴ included by Europol in the prior consultation package dates from December 2017, thus predating the SIS II reform package. If the aim is to apply these procedures as well in the context of dactyloscopic searches of the SIS II, then this likely requires an update to these documents to reflect the specific elements of this workflow.

3.4. Mark to print searches of alerts on missing persons

Finally, the EDPS notes that according to the notification 'mark to print searches' would be compared against all categories of person alerts, which would include alerts on missing persons. The EDPS highlights that for missing person alerts, the majority of entries concern children's data²⁵, while Regulation (EU) 2018/1862 stipulates that for SIS II to be searched with complete or incomplete sets of fingerprints or palm prints found at a crime scene it needs to be 'established to a high degree of probability that they belong to the perpetrator of the serious crime or terrorist offence'²⁶.

Considering that matches between crime scene marks and missing person alerts would appear unlikely in most cases, Europol should re-examine whether it is necessary and proportionate to search this alert category by default.

²² JRC Science for Policy report on Fingerprint identification technology for its implementation in the Schengen Information System II (SIS-II), JRC 33516-2014, Laurent Beslay & Javier Galbally.

²³ Page 44 of the JRC report.
EDOC#893701v12.

²⁵ According to the 2021 annual statistics published by eu-LISA, 70.580 missing person alerts concerned minors, while 44.863 concerned adults. See eu-LISA SIS II 2021 Annual Statistics, March 2022, page 15, available at <https://www.eulisa.europa.eu/Publications/Reports/SIS%20II%20-%202021%20Statistics.pdf>.

²⁶ Recital 24.

4. CONCLUSION AND RECOMMENDATIONS

Based on all of the above, the EDPS is of the view that Europol has not sufficiently identified the specific risks related to the inclusion of dactyloscopic searches in its SIS II workflow. Therefore, the EDPS is unable to determine if the notified processing might involve a breach of any provision of the Europol Regulation. Consequently, the EDPS is unable to make concrete proposals, where appropriate, to avoid such a breach under Article 39(3) of the Regulation to ensure compliance of the envisaged processing with the Europol Regulation.

Nevertheless, the EDPS believes that specific risks to data subjects could well arise in this process, in particular during the assessment of the matches obtained from the SIS II - in case there would be no tailored strategy to identify the different categories of matches (print to print, mark to print, mark to mark). The EDPS also places special consideration on the potential specific risks to data subjects stemming from comparisons between lower quality marks at Europol and SIS II. Therefore, **the EDPS asks Europol to reevaluate whether specific risks to data subject arise in these two areas**, and if so, adopt a tailored mitigation strategy.

Finally, **the EDPS invites Europol to reassess** whether alerts on missing persons should be included by default when comparing fingerprints or palm marks recovered from crime scenes, in light of the data protection principles of necessity and proportionality.

Done at Brussels on 3 June 2022

Wojciech Rafał WIEWIÓROWSKI

(e-signed)