



## Report on the cross-border exchange of police data

For the purpose of the administrative approach  
to organised crime



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# General description

For the purpose of an effective administrative approach to organised crime, a good information position is essential. Cases submitted to the EURIEC regularly involve police data that the foreign authorities could use in their administrative approach to organised crime. In order to strengthen the information position of foreign authorities, it is therefore desirable to provide police data from one country to the authorities in the other country. After all, it is undesirable that the local authorities have more options/a better information position when a resident is engaged in criminal activities than when a foreign person who lives a few kilometres across the border engages in similar activities.

**Police data** (in Belgium: police information) is understood to mean: all data obtained by the police in Belgium, Germany (NRW) and the Netherlands in the performance of their duties. It is possible that a national distinction is made between several categories of police data, to which different disclosure rules apply. In other words, this does not concern information on court convictions.

The national options for using police data for administrative purposes are not (always) the same as the cross-border options. Three different routes exist for providing police data from one country to the administration in another country:

1. Provision of police data by (the mayor of) one municipality to (the mayor of) another foreign municipality
2. Direct provision by the police to a (mayor of a) foreign municipality
3. Provision by the police of one country to the police of another country, authorising data to be passed on to and used by the authorities for the purpose of the administrative approach to organised crime.

Section 1 contains a discussion on the international legal frameworks. Subsequently, the domestic options for exchanging police data for the benefit of the authorities in Belgium, Germany and the Netherlands are explained. In addition, the cross-border possibilities for information exchange for the administrative approach to organised crime are discussed in more detail for each country. Section 2 combines the findings from the first section and examines the practical consequences of (legal) bottlenecks, challenges and opportunities. Finally, section 3 finishes with a conclusion.





# 1 Legal framework

This chapter starts by examining the various international and bilateral treaties to which Belgium, Germany and the Netherlands are parties and which are important for the cross-border exchange of police data for the administrative approach to organised crime. Subsequently, the national possibilities for using police data for administrative purposes will be discussed for each country. Finally, the routes mentioned in the general description for providing police data to the foreign authorities are elaborated for each country.

## 1.1 European regulations

Several European/bilateral instruments apply to the exchange of police data between Belgium, Germany and the Netherlands.

- Convention Implementing the Schengen Agreement
- Treaty of Enschede
- Swedish Framework Decision
- Benelux Police Treaty (updated version dated 2018 is yet to be ratified)
- Directive (EU) 2016/680.

### 1.1.1 Use of police data for other purposes

With the exception of the renewed, but not yet entered into force, Benelux Police Treaty, none of these regulations contain a provision that explicitly concerns the exchange of police data for administrative purposes. However, almost all of these regulations provide for the option of using police data for purposes other than those referred to in the regulation, provided that there is permission from the providing authority and in accordance with the national law of the providing and receiving Member States.<sup>1</sup> Cross-border exchange of police data for administrative purposes is therefore possible if:

1. The national authorities give their consent and;
2. national legislation so provides.

### 1.1.2 Benelux Police Treaty

In the future, the new Benelux Police Treaty will provide more clarity since it explicitly includes the use of police data for administrative purposes. This possibility is limited to providing information in response to a request, however. The new treaty does not offer any additional tools for spontaneous data exchange. In principle, the provisions in the Benelux Police Treaty will apply to data exchange between the Netherlands, Belgium and Luxembourg. However, Germany (or some of its federal states) may join in the future. Although the treaty was signed in 2018 by the

Netherlands, Belgium and Luxembourg, it is yet to be ratified by the Member States.

### 1.1.3 Directive on police and judicial data protection

As of 2018, the General Data Protection Regulation (GDPR)<sup>2</sup> and the Data Protection Directive by the police and judicial authorities<sup>3</sup> apply to the processing of personal data within the European Union. Processing of personal data is always subject to either the Regulation or the Directive (subject to some specific exceptions).

Police data is generally governed by the Directive. After all, the Directive lays down rules for 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, including protection against and prevention of threats to the public safety.<sup>4</sup> Although the term ‘competent authority’ is defined in the Directive, it appears that not all countries interpret this term in the same way. It is clear from the Directive that ‘competent authority’ does not refer to law enforcement authorities exclusively. This term also includes any other body that is authorised under Member State law to exercise public authority and powers for the purposes of the Directive.<sup>5</sup> In our view, this definition could therefore also be understood to mean a municipality that acts in the context of implementing the administrative approach to organised crime. However, not all countries interpret this so broadly in their national legislation. These differences in the implementation of the Directive indicate the effect of the differences in the allocation of competences between the different countries and affect the rights of the data subject (for example, the obligation to provide information).

In Belgium, for example, the Directive has been implemented together with the Data Protection Regulation in the Act on the Protection of Natural Persons with regard to the

1 Art. 126 paragraph 3 under a in conjunction with 129 under b Convention Implementing the Schengen Agreement.

2 Regulation (EU) 2016/679.

3 Directive (EU) 2016/680.

4 Art. 1 Directive (EU) 2016/680.

5 Recital 11 Directive (EU) 2016/680.

Processing of Personal Data. The Directive only applies to certain competent authorities. Competent authorities in Belgium include police services (the federal police and the local police forces) and the judicial authorities (the courts and tribunals and the public prosecutor's office).<sup>6</sup> For the time being, municipalities are not part of the category of competent authorities within the meaning of the Directive. Processing of personal data by municipalities in Belgium will therefore always fall under the scope of the Data Protection Regulation rather than the Directive.

The federal state legislator in North Rhine-Westphalia in Germany has transposed the JHA Directive via the provisions of the Police Act.<sup>7</sup> This act also largely applies to the public *Ordnungsbehörden* (the local authority responsible for public order and security).<sup>8</sup> Regarding the prosecution and punishment of administrative offences and the enforcement of sanctions, they are also covered by the provisions adopted when transposing the JHA Directive by reference.<sup>9</sup> In all other regards, the General Data Protection Regulation (GDPR) applies directly to the data processing of the *Ordnungsbehörden*, as it does for the largest parts of the government.<sup>10</sup>

In implementing the Directive, the Dutch legislator has, where possible, aimed to prevent authorities from being confronted with different processing regimes.<sup>11</sup> In implementing the Directive, the legislator recognises that maintaining public order as part of the police task falls under the Directive, while the Directive does not cover the processing of personal data for purposes such as the use of administrative powers.<sup>12</sup> According to the Dutch legislator, the Directive only applies in the context of criminal justice. The regulation applies to the processing of personal data for the purpose of other forms of enforcement, e.g. by means of administrative law.<sup>13</sup>

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6 Art. 26, 7° Act on the Protection of Natural Persons with regard to the Processing of Personal Data.

7 §§ 22ff. PolG NRW.

8 § 24 I OBG NRW.

9 § 35 II NRWDSAnpUG-EU.

10 § 24 II OBG NRW.

11 Parliamentary Papers II 2017/18, 34889, no. 3, p. 4. (MvT).

12 Parliamentary Papers II 2017/18, 34889, no. 3, p. 8-9 (MvT).

13 Parliamentary Papers II 2017/18, 34889, no. 3, p. 4 (MvT).

## 1.2 Belgium

### 1.2.1 National use of police data in the context of the administrative approach

In certain cases, Belgian municipalities may receive information from the Belgian police. For example, the police services have a duty to inform the mayor about information regarding public order that may give rise to preventive or enforcement measures.<sup>14</sup> Preventive measures include the advice of the police in the context of the granting of licences. The mayor may also take enforcement action after being informed about disturbances to the public order in their municipality. Based on this information, the mayor may, inter alia, close a public institution.

In this context, the mayor may also receive information from the judicial police. In that case, the information can only be transferred provided that two conditions are met<sup>15</sup>:

- Principle of finality: the information must be of relevance for the performance of the tasks of the administrative police and the information must be able to give rise to decisions by the administrative police
- The transfer of information should not jeopardise the progress of criminal proceedings.

If the police data is useful in a municipality located in a different district or police zone, one police zone will inform the other police zone. The latter may then, in turn, inform the mayor.

### 1.2.2 Provision of police data by (the mayor of) the Belgian municipality to (the mayor of) the German/Dutch municipality

Belgian mayors are informed by the Belgian police about police data that could affect the public order in their municipality. In addition, mayors also hold the capacity of officer of the administrative police.<sup>16</sup> As a result, mayors have access to police data in various cases, for example, data on the results of certain police investigations in their territory.

Any police data the mayor obtains is subject to a duty of confidentiality. Since the confidentiality is linked to the information, it is transferred to the person who receives the information. The further provision of police data requires a legal basis. No such legal basis exists regarding the transfer of police data by the mayor. In other words, there is no legal ground for the mayor to pass on the police data to foreign

mayors. Incidentally, there is no legal basis either for Belgian mayors to share police data with other Belgian mayors. After all, as described above in paragraph 1.2.1, in that case the information must be provided via the police-to-police detour.

### 1.2.3 Direct provision by the Belgian police to a (mayor of a) German/Dutch municipality

In Belgium, there is no legal or international legal basis that can serve as a ground for providing Belgian police information directly to foreign local authorities. After all, Belgian police services are, in principle, not allowed to transfer personal data to other organisations, except to comply with legal obligations or if the judicial authorities explicitly request it.

Belgian national legislation only provides for the possibility of transferring police data to national authorities, foreign police services, intelligence and security services and supervisory bodies that need the data for their tasks.<sup>17</sup> This legislation makes it possible for the Belgian police to exchange information with Belgian local authorities, with a view to maintaining the public order.<sup>18</sup> This information will also enable the competent authorities to take appropriate measures efficiently and at an early stage.<sup>19</sup> However, foreign local authorities are not mentioned in the legal provisions, meaning that the Belgian police cannot provide police data directly to foreign local authorities.

### 1.2.4 Provision by the Belgian police to the German/Dutch police, whereby permission is given for data to be passed on to and used by the administration for the purpose of the administrative approach to organised crime

The police and police systems have plenty of information that may be useful in the fight against organised crime through the administrative approach. Within Belgium, clear rules exist about when the Belgian police can/should exchange information with the Belgian local authorities. As discussed above, the Belgian police cannot provide information to foreign local authorities since there is no legal basis to do so. However, the Belgian police services may provide information to foreign police services from an international point of view.<sup>20</sup> Please see below for a description of whether and how the foreign police services could, in turn, provide this Belgian police information to the local authorities abroad.

<sup>14</sup> Art. 5/1 Act on the Police Force.

<sup>15</sup> B. De Ruyver, E. Vereecke & T. Kazadi Tshikale, *Bestuurlijke handhaving van georganiseerde misdaadfenomenen: een leidraad [Administrative enforcement of organised crime phenomena: a guide]*, Gent: Institute for International Research on Criminal Policy, 2016, 57.

<sup>16</sup> Art. 4 Act on the Police Force.

<sup>17</sup> Art. 44/1 Act on the Police Force.

<sup>18</sup> Art. 14 and 15 Act on the Police Force.

<sup>19</sup> Explanatory Memorandum, art. 14 Act on the Police Force, 4 June 1991.

<sup>20</sup> Art. 44/1 and 44/11/13 Act on the Police Force.

Belgium is a party to several of the international treaties and agreements referred to in paragraph 1.1. As already mentioned in paragraph 1.1.1, certain international regulations offer scope for the cross-border exchange of police data, including for purposes other than criminal law. To this end, two (cumulative) conditions must be met:

1. Consent from the national authorities, and
2. In accordance with national legislation.

In the Belgian context, these conditions create issues regarding the provision of police data to a foreign police service for administrative purposes. After all, doing so requires permission from the providing authority in accordance with the national law of the providing Member State. The condition that the further provision must be in accordance with the national law of the provider, requires a national legal ground for the provision.<sup>21 22</sup> However, Belgian national law has no legal framework that provides rules or procedures to provide police data across borders for other purposes. This lack of provisions in national law leads to vagueness and uncertainty regarding the full and effective implementation of various treaties on Belgian territory. As long as Belgian legislation does not provide for the possibility to give consent and the use of Belgian police data for other purposes abroad, the requirements for the cross-border provision of police data will not be met.

As a result of this lack of clarity, it is possible that some Data Protection Officers in police zones see opportunities to give permission to use the police data for other purposes. When in doubt, which will often be the case as there is little experience to date with the cross-border administrative approach, the DPOs will ask the Police Data Control Body (COC) for an opinion. This supervisory body has already indicated in its opinions that, in their view, there is no national ground for allowing to pass on data for other purposes.<sup>23</sup> The EURIEC has asked the COC for an opinion on passing on data with a view to administrative enforcement. In this opinion, the COC confirmed that passing on data for other purposes is not possible under applicable Belgian legislation.

As already mentioned in paragraph 1.1, the new 2018 Benelux Police Treaty is the first treaty to explicitly provide for the possibility of using police data, after permission, for administrative purposes. However, in this case too, Belgian national legislation will need to be adapted to make the

exchange possible in practice. The control body for police data therefore argues for a specific legal ground for passing on police data across borders in order to facilitate administrative enforcement. As long as no national transposition of the treaty has taken place or the possibility to grant permission for the cross-border forwarding of police data for administrative purposes is otherwise included in national law, exchanging cross-border Belgian police data with other police forces for administrative purposes is not possible.

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21 *Supervisory body on police information, 12 February 2020: Report on the control and visitation at the Directorate of International Police Cooperation of the Federal Police by the Control Body of Police Information in the context of its supervisory and inspection powers.*

22 *Supervisory body on police information, 12 February 2020: Report on the control and visitation at the Directorate of International Police Cooperation of the Federal Police by the Control Body of Police Information in the context of its supervisory and inspection powers.*

23 *Supervisory body on police information, 12 February 2020: Report on the control and visitation at the Directorate of International Police Cooperation of the Federal Police by the Control Body of Police Information in the context of its supervisory and inspection powers.*



## 1.3 Germany

### 1.3.1 National use of police data in the context of the administrative approach

Police information may also play an important role in performing the tasks of the German municipalities. Police information is of particular importance for local public order authorities in ensuring public safety at the local level. But also in the context of trade supervision – *Gewerbeaufsicht* – a careful investigation into the required reliability of a certain person according to the trade or catering law may also include police information.

In North Rhine-Westphalia, the transfer of information from the police to other authorities in the national sphere is regulated by the Police Act (*Landespolizeigesetz*).<sup>24</sup> According to this provision, the police may also pass on information to authorities other than the police and to other government agencies, provided that this is permitted by a legal provision or is necessary for the performance of the police task, for the prevention of danger or the performance of a danger prevention task by the receiving authority, for the prevention or elimination of significant harm to the public interest or for the prevention or elimination of a serious infringement of the rights of a person.<sup>25</sup>

This means that an exchange could take place in the domestic sphere if, in the specific case, it concerns an activity of the State related to the prevention of danger. Based on factual indications, transfer is also possible for the performance of a hazard prevention task by the receiving body, which also includes activities that are understood to be hazard prevention in a broader sense. This danger prevention in a broader sense also includes commercial law – *Gewerberecht* – as the municipalities' area of responsibility.<sup>26</sup> The competent authority may also, for example, request police information to assess the specific integrity of a person in the framework of a trustworthiness investigation under the Trade Act in the security sector.<sup>27</sup>

However, this does not constitute an opportunity for global exchange for all purposes of commercial law or other areas related to hazard prevention. Only areas that clearly require police information for assessment, such as for the granting of hunting and surveillance licenses, are under discussion. The provision must be interpreted in a restrictive manner with regard to the requirement of factual indications.<sup>28</sup> Regarding the reliability investigation, factual indications require, for example, concrete doubts about the person

of the applicant, and the police investigates whether the necessary facts are available.<sup>29</sup> Finally, the necessity of the exchange requires that other information channels of the requesting authority, for example, requesting the applicant to provide a statement of conduct, have been completed before a request to the police can be considered.<sup>30</sup>

If, on the other hand, it concerns data relating to ongoing or completed criminal proceedings, the provisions of the Criminal Procedure Code – *Strafprozessordnung* – apply to the exchange of data (see also the memorandum on judicial data).<sup>31</sup>

As indicated in Chapter 1, there are, in theory, three possible ways of cross-border provision of police data for the administrative approach to organised crime.

### 1.3.2 Provision of police data by (the mayor of) the German municipality to (the mayor of) the Belgian/Dutch municipality

Since German municipalities may have access to police information in individual cases, the exchange of information from German municipalities to Belgian or Dutch municipalities appears possible in principle.

According to the settled case-law of the *Bundesverfassungsgericht*, however, any processing or disclosure of data as personal data requires an independent legal ground as an infringement of fundamental rights.<sup>32</sup> However, neither the Police Act of North Rhine-Westphalia (*Polizeigesetz* NRW), nor any of the sector laws that also affect the performance of municipal duties, explicitly regulate the exchange of police information from German municipalities to foreign municipalities. On the other hand, the NRW Police Act does regulate the direct provision of police data to certain foreign authorities.<sup>33</sup> These provisions also apply, by reference, to the tasks of the municipal services for public order.<sup>34</sup> In terms of risk prevention by the municipalities, therefore, the same conditions apply as for the transmission of information by the German police to public authorities in the European Union (see next paragraph).

However, outside the area of risk prevention, there is no corresponding legal ground for transmitting specific police information. As a result, a direct exchange with foreign municipalities would circumvent the regulations in the Police Act and its specific factual requirements. Moreover,

24 § 27 PolG NRW.

25 § 27 II 1 PolG NRW.

26 BeckOK PolR NRW/Ogorek, § 27 PolG NRW, Rn. 26.

27 BeckOK PolR NRW/Ogorek, § 27 PolG NRW, Rn. 36.

28 BeckOK PolR NRW/Ogorek, § 27 PolG NRW, Rn. 27.

29 BeckOK PolR NRW/Ogorek, § 27 PolG NRW, Rn. 27.

30 BeckOK PolR NRW/Ogorek, § 27 PolG NRW, Rn. 35 f.

31 In particular §§ 474, 475 StPO.

32 BVerfG, Urteil des Ersten Senats vom 19. Mai 2020, - 1 BvR 2835/17 -, Rn. 212 f.

33 §§ 28, 29 iVm 27 PolG NRW.

34 § 24 I Nr. 9, 10 OBG NRW.

the principle of purpose limitation,<sup>35</sup> which is also included in the Police Act of North Rhine-Westphalia and in the Data Protection Act of North Rhine-Westphalia,<sup>36</sup> clearly opposes the exchange of data with a foreign municipality for purposes beyond the scope of the prevention of danger or danger prevention in a broader sense. The Police Act of North Rhine-Westphalia does not permit such further use for other purposes, in principle.<sup>37</sup>

### 1.3.3 Direct provision by the German police to a (mayor of a) Belgian/Dutch municipality

Direct provision of police data, including to foreign municipalities, is possible, in principle. The Police Act of North Rhine-Westphalia equates the provision to police authorities, security authorities and also other public authorities in the Member States of the European Union with provision to domestic authorities.<sup>38</sup> As a result, the previously described conditions (see above) for domestic provision also apply. Accordingly, provision is mainly possible in cases of danger prevention, e.g. in the context of commercial legislation or the Alcohol Licensing and Catering Act.

If information is requested for the assessment of a trustworthiness investigation under commercial law, the German police in particular must be obliged to obtain the requested police information.<sup>39</sup> More specifically, a comparable national authority should first use its own information channels as much as possible.<sup>40</sup> However, the provision does not require a concrete danger; concrete indications for the relevance of the requested police information are sufficient here, which may arise, for example, from the person of the applicant for a commercial license.<sup>41</sup>

However, the principle of purpose limitation also applies here, which will be pointed out to the foreign authorities separately in the event of such a transfer.<sup>42</sup> Although a change of purpose is possible,<sup>43</sup> this will generally not succeed due to the high factual requirements of police intervention standards and the corresponding requirements for a change of purpose. In addition, provision may be refused for a variety of reasons if, for example, the security interests of the Federation and the Länder or ongoing investigations are

endangered or the interests of the data subject's interests that warrant protection outweigh the general interest of the disclosure in the context of a consideration.<sup>44</sup>

### 1.3.4 Provision by the German police to the Belgian/Dutch police whereby permission is given for data to be passed on to and used by the administration for the purpose of the administrative approach to organised crime

The provision of German police information by the Dutch or Belgian police to a Dutch or Belgian municipality in connection with the fight against organised crime is only possible if direct provision of the information by the German police or the German public order authorities to the foreign municipality itself were permissible.

This issue is not regulated by bilateral police cooperation agreements. For example, the agreement of 27 March 2000 between the Government of the Federal Republic of Germany and the Government of the Kingdom of Belgium on cooperation between police and customs authorities in border areas<sup>45</sup> only applies to cooperation between the police, border guards and customs authorities in matters of security and prosecution.<sup>46</sup>

However, regarding the protection of personal data, this agreement refers to the Convention Implementing the Schengen Agreement.<sup>47</sup> This means that, in principle, the use of the information provided is only permitted for the purposes for which the disclosure would have been permitted under the Convention Implementing the Schengen Agreement.<sup>48</sup> However, the information may also be used for other purposes if the providing state consents.<sup>49</sup>

However, whether this also refers to processing by a competent authority other than the one mentioned in the Convention Implementing the Schengen Agreement remains unclear. Ultimately, the scope of both the Convention Implementing the Schengen Agreement and the German-Belgian Agreement on cooperation between police and customs services in border areas clearly opposes extension to other

35 BVerfG, Urteil des Ersten Senats vom 20. April 2016, - 1 BvR 966/09 -, BVerfGE 141, 220, Rn. 276 ff.

36 § 23 II PolG NRW. § 9 DSG NRW for the area of activity of the Land administration outside the JHA Directive. According to § 35 II DSG NRW, § 39 iVm 35 DSG NRW is otherwise applicable to the regulatory authorities in the implementation of the JHA Directive for the state of NRW for the area of administrative offences.

37 § 26 VII 1 PolG NRW.

38 § 28 I iVm 27 PolG NRW.

39 § 28 I iVm 27 II Nr. 2 PolG NRW.

40 BeckOK PolR NRW/Ogorek, § 27 PolG NRW, Rn. 36.

41 BeckOK PolR NRW/Ogorek, § 27 PolG NRW, Rn. 27.

42 § 26 VII 4 PolG NRW.

43 § 26 VII 2 iVm § 23 II PolG NRW.

44 § 26 V 1,VI Nr. 1,2 PolG NRW.

45 BGBl. 2002 II, Nr. 23 v. 25.6.2002, 1532.

46 Art. 2 I. The authorities mentioned in Artt. 3,4 are all effective in this area. The same applies to the Treaty of 2 March 2005 between the Federal Republic of Germany and the Kingdom of the Netherlands on cross-border cooperation and cooperation in criminal matters pursuant to its Artt. 2, 3 I, BGBl. 2006 II, No. 7 v. 22.3.2006, 194.

47 Art. 2 IV of the Agreement of 27 March 2000 between the Government of the Federal Republic of Germany and the Government of the Kingdom of Belgium on Cooperation between Police Authorities and Customs Administrations in Border Areas in conjunction with Art. 126-130 of the Schengen implementation agreement.

48 Art. 127 II iVm Art. 126 III a) 1 SDÜ.

49 Art. 126 III a) SDÜ.

administrative authorities. Both conventions do not apply to the general exchange of police services with administrative authorities of other states.

In any case, a legal ground under the national legal system is required for any further transfer, which in this case is provided by the Police Act of North Rhine-Westphalia (see above). However, the principles of this law must not be circumvented by a transfer by a foreign police authority. In such a case, the principle of purpose limitation may also be infringed upon. As a result, provision of data is only possible on the condition that a direct provision from the German police or the German public order authorities to the foreign municipality itself is possible.

On the strength of the elaboration above, it is often possible for the German police to provide police data for administrative purposes across borders based on current laws and regulations in Germany. The passing on of police data by other departments of the municipality such as the public order department or provision via the so-called U-turn construction is only possible on the condition that a direct transmission from the German police or the German public order authorities to the foreign municipality itself were possible.

## 1.4 The Netherlands

### 1.4.1 National use of police data in the context of the administrative approach

Under various laws, the Dutch police are authorised to provide information to a Dutch (mayor of a) municipality. In the Netherlands, the police are under the authority of the mayor when acting within a municipality to maintain public order, and as a result, mayors have police data at their disposal in the framework of this role.<sup>50</sup> For example, if the police find narcotics in a building, they will inform the mayor about this in the context of maintaining public order.<sup>51</sup> The mayor receives this information by means of an administrative report.<sup>52</sup> Based on this administrative report, the mayor is authorised to close the relevant building and revoke the license.<sup>53</sup> The mayor also receives police data for the purpose of granting an Alcohol Licensing and Catering Act license, gambling license, or in the context of a Bibob investigation.<sup>54</sup>

The administrative approach to organised crime and the need for information exchange between several partners is deeply rooted in the Netherlands. For example, all regions have their own Regional Information and Expertise Centre (RIEC). One of the activities of the RIEC is to support the administration in its administrative approach. Several partners (including the municipalities and the police) have agreed on a covenant and privacy protocol for the benefit of the RIEC partnership. These entail agreements about the mutual exchange of information for the purpose of an optimal approach to organised crime. The Police Data Act also contains a provision that relates to the provision of police data to the RIEC.<sup>55</sup> For example, police data may be provided to the RIEC for the purpose of analysing enforcement bottlenecks and performing integrated case analyses.<sup>56</sup>

### 1.4.2 Provision of police data by (the mayor of) a Dutch municipality to (the mayor of) a Belgian/German municipality

Police data received by the mayor is subject to a duty of confidentiality.<sup>57</sup> In other words, the mayor may not independently pass on this information to other (foreign) author-

ities. Furthermore, the (U) GDPR applies to data provision by a mayor. This means that when a Dutch mayor wishes to provide police information known to them to a Belgian or German administrative body, the duty of confidentiality under the Police Data Act and the (U) GDPR must be taken into account.

The mayor is only authorised to pass on the received police data if there is a legal provision that obliges the mayor to pass on information or if their task necessitates this insofar as this falls within the scope of the purpose of the provision.<sup>58 59</sup> There is no statutory provision that obliges the mayor to pass on police data to another (foreign) municipality. It is also difficult to argue that provision to another (foreign) municipality is necessary for the performance of the mayor's duties within the scope of the purpose of the provision. The purpose of the provision is to enable the mayor to make use of their own powers, e.g. maintaining public order (within their municipality) or, for example, to close a (narcotics) building and/or withdraw a license. Execution of these powers does not require passing on the police data to another (foreign) municipality.

After consultation with KU Leuven and the privacy officers of the Dutch police, EURIEC concludes that there is insufficient legal basis for direct provision by a Dutch mayor of a municipality to a mayor of a foreign municipality. This consideration applies not only to the provision of police information to a foreign municipality; Within the Netherlands, a mayor is not able to rely on art. 7 paragraph 2 of the Police Data Act to provide police information to another Dutch municipality. However, the police may provide information to the police force of another Dutch municipality, which can then inform the administration.

The duty of confidentiality to which police data is subject is not breached when one states that an administrative decision is based on police data or has been taken in connection with police data,<sup>60</sup> as long as one does not go into the content of the police information. In a limited number of cases, it is also possible to share administrative information, particularly where legal entities are concerned. More information about the sharing of administrative information is included in the EURIEC memorandum on the cross-border exchange of administrative data.<sup>61</sup> This memorandum also addresses the informal exchange of information and the exchange of information based on public sources (e.g. media).

<sup>50</sup> Art. 11 paragraph 1 Police Act.

<sup>51</sup> Art. 16 paragraph 1 part b Police Data Act.

<sup>52</sup> Art. 18 Police Data Act in conjunction with art. 4:3 paragraph 5 Police Data Decree.

<sup>53</sup> Art. 13b Opium Act in conjunction with art. 31 Alcohol Licensing and Catering Act.

<sup>54</sup> Art. 4:3(5), fourth indent Police Data Decree in conjunction with art. 4:3 paragraph 1, part I Police Data Decree.

<sup>55</sup> Art. 18 paragraph 1 Police Data Act.

<sup>56</sup> RIECs-LIEC privacy protocol, p. 18.

<sup>57</sup> Art. 7 paragraph 2 Police Data Act.

<sup>58</sup> Art. 7 paragraph 2 Police Data Act.

<sup>59</sup> Attinger e.a./Mevis e.a., *Handboek Strafzaken* [Manual of Criminal Cases], chapter 18.8.

<sup>60</sup> *Model privacy protocol for intra-municipal data sharing*, p. 38.

<sup>61</sup> This memorandum is currently under development and will be made available by the EURIEC in the future.

### 1.4.3 Direct provision by the Dutch police to a (mayor of a) Belgian/German municipality

Dutch law, as well as international, European and bilateral laws and regulations relating to the exchange of police data, do not provide for the possibility of providing police data directly to anyone other than the competent authorities. The competent authority/department to which information may be provided is defined in every regulation relating to the exchange of police information.<sup>62</sup> The Dutch Explanatory Memorandum on the application of the Data Protection Investigation and Prosecution Directive clearly shows that the processing of personal data for administrative or administrative law purposes does not fall under the scope of the Directive.<sup>63</sup> It states the example of the processing of personal data in the context of conducting a Bibob investigation.<sup>64</sup> However, this Explanatory Memorandum shows that the Dutch Data Protection Authority (AP) holds the opinion that the mayor, if exercising authority over the police in the context of maintaining public order, can indeed be considered a competent authority.<sup>65</sup>

Dutch police data may be made available to competent authorities in other EU Member States that are charged with performing police duties.<sup>66</sup> Provision must be based on a legal instrument such as the Benelux Police Treaty or the Treaty of Enschede (Netherlands-Germany). Despite the fact that in the Explanatory Memorandum mentioned above, the Dutch AP designates the mayor as the competent authority in certain situations, it appears that this is not seen as such for cross-border provision. It is important to note here that the AP's finding is based on Dutch mayors and their role in the performance of police duties. This is not necessarily arranged in the same way abroad. Discussions with the privacy officers of the Dutch police show that providing Dutch police data directly to a foreign mayor is undesirable and against the law. In this respect, particular reference is made to the infringement of sovereignty represented by such disclosure. It is undesirable for the Belgian administration to obtain Dutch police information without the Belgian counterpart of the Dutch police, the Belgian police, being aware of this information.

Despite the fact that mayors are designated as the competent authority for the performance of certain tasks – charged with the performance of police duties – it does not

appear possible nor desirable to provide cross-border Dutch police data directly to the foreign administration.

Another possibility that has been suggested is the Dutch article of law concerning the incidental provision of police data to third parties.<sup>67</sup> Despite the fact that this is not explicitly described in the law, conversations with the privacy officers of the police suggest that this article only refers to the domestic provision of data. Cross-border provision of police data is regulated in other sections of the law.

### 1.4.4 Provision by the Dutch police to the Belgian/German police, whereby permission is given for data to be passed on to and used by the administration for the purpose of the administrative approach to organised crime

Two variants are conceivable for passing on Dutch police data via the Belgian/German police to the administration for the administrative approach to organised crime:

1. Cross-border provision of police data for police purposes, after which permission is requested to pass on the received data for other (administrative) purposes;
2. Request for police data for administrative purposes, whereby the data is provided to the foreign administration via the police.

#### **Cross-border provision of police data for police purposes, after which permission is requested to pass on the received data for other (administrative) purposes**

This possibility of passing on data is found several times in various existing European and bilateral laws and regulations. This regularly includes a provision relating to passing on data for other purposes, provided that the national law provides for this and the national authorities give permission for this.<sup>68</sup> Until 1-1-2019, Dutch law explicitly included the purposes for which further processing was possible, including further processing for other purposes with the consent of the controller or data subject.<sup>69</sup> The explanatory memorandum states that the consent of the person concerned (the citizen concerned) is not used in the Netherlands.<sup>70</sup> It is not further explained for which 'other purposes' passing on data is possible. As of 1 January 2019, the legal text has been amended, whereby the explicit provision for further use for other purposes, including permission for other purposes, is no longer included in the text. This leads to a lack of clarity about the possibilities for granting permission for passing on data for other purposes. The explanatory

62 See, *inter alia*, art. 3 under 7 Directive (EU) 2016/680 on the protection of individuals regarding the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection and 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.

63 *Parliamentary Papers II 2017/18*, 34 889, no. 3, p. 9.

64 *Parliamentary Papers II 2017/18*, 34 889, no. 3, p. 9.

65 *Parliamentary Papers II 2017/18*, 34 889, no. 3, p. 24.

66 Art. 15a paragraph 1 in conjunction with art. 1 part a Police Data Act (Wpg).

67 Art. 19 Police Data Act.

68 *Benelux Police Treaty, Convention Implementing the Schengen Agreement*.

69 Art. 5:3 paragraph 4 under d Police Data Decree (old).

70 *Gazette 2012,130*, p. 27-28.



memorandum accompanying this amendment to the law shows that the Dutch legislator did not intend to change the content of this article, but only wanted to make technical adjustments.<sup>71</sup> Even though it was not the legislator's intention to adjust the purport of the article, by removing the text relating to the granting of permission for the cross-border use of Dutch police data for other purposes, the legislator has created ambiguity and uncertainty. However, it was unclear even under the old legal text whether it was possible to give permission for further processing of Dutch police data abroad for administrative purposes. This is not further specified in the Explanatory Memorandum or other parliamentary documents. The predominant view that emerges from conversations with privacy officers is that the old legal text (possibly unintentionally) offered more room for passing on data for other purposes. What is clear, in any case, is that this scope is lacking under current laws and regulations.

Another possibility that has been suggested and is used incidentally in practice is the Dutch article of law that deals with incidental provision of police data to third parties.<sup>72</sup> This article is said to be used to give permission for passing on data to the administration after the initial provision. Although this is not explicitly described in the law, it appears from conversations with the privacy officers of the Dutch police that this article only refers to the domestic provision of data. Cross-border provision of police data is regulated in other sections of the law.

#### **Request for police data for administrative purposes, whereby the data is provided to the foreign administration via the police**

This provision option has been introduced in the new Benelux Police Treaty, which is expected to enter into force in the first half of 2022. This Treaty includes a new provision that allows police services to exchange information for the purpose of taking administrative measures.<sup>73</sup> Such an exchange may take place under the Treaty if the 'national law of the requested Contracting Party does not expressly preclude it'. This appears to imply that such provision is possible under the Treaty, even if national legislation does not explicitly provide for this (see also p. 15 Explanatory Memorandum). However, it appears from the Dutch Explanatory Memorandum to the Convention that Dutch police data will only be provided for administrative measures if there is an explicit ground to do so in national or EU law.<sup>74</sup> In view of the findings mentioned above under paragraph 1.4.4., this would mean that the Benelux Police Treaty does not allow for provision for administrative purposes since national legislation does not allow this.

This leads to a great deal of ambiguity and the pressing question of what this provision means in practice. The EURIEC has raised the importance of proper implementation of this article with the various experts who are involved in the Netherlands and Belgium. In the Netherlands, the input of the EURIEC is submitted to the working group involved in the implementation of the Treaty.

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<sup>71</sup> *Gazette 2018, 496, p. 27.*

<sup>72</sup> *Art. 19 Police Data Act.*

<sup>73</sup> *Art. 4 paragraph 3 Benelux Police Treaty (new).*

<sup>74</sup> *Parliamentary Papers II, Explanatory Memorandum of Approval and Implementation of the Benelux Police Treaty (MvT), dated 17-12-2020, p. 15.*

## 2 Practical consequences

The EURIEC has experienced the practical issues that the legislation mentioned above entails in various cases. This means, for example, that someone who owns a restaurant in a municipality in one country where drugs are found by the police can open a restaurant in another country, only a few kilometres away, after the license has been revoked in the former country. The analysis above of the legislation shows that police data that leads to withdrawal of the license and possible closure of a building in one country cannot be provided to or for the benefit of the foreign municipality where a new branch of the same restaurant is opened, despite the fact that this data may be of vital importance to the foreign municipality. After all, the data may constitute a reason for this foreign municipality to refuse/ revoke the license or to perform additional checks in order to prevent the foreign government from facilitating the continuation of criminal activities.

Another practical example of the legislation mentioned above leading to an undesirable situation is when the police discover a drugs lab in a person's home in one country and this person owns, for example, a sex club in the other country. In this case, too, the information about the drugs lab in the home of this entrepreneur may be relevant for the foreign municipality. There is a risk that the drugs will be sold/ used in the sex club or that the foreign company will be used to launder the drugs lab proceeds. The foreign municipality in which the company is located could, based on such information, perform additional checks with a view to preventing the facilitation of criminal activities by the foreign government. Based on the EURIEC case histories, it appears that the current legislation in the three countries does not allow for the exchange of police data for administrative purposes, and in practice leads to an unworkable situation.

## 3 Conclusion

National legislation creates obstacles regarding the provision of police data to the foreign administration to aid the administrative approach to organised crime. In principle, EURIEC aims to find solutions for the most direct way to exchange cross-border information. The elaboration above shows that direct exchange of police data between mayors or between the police of one country and a foreign municipality is virtually impossible.

Both the literature and practice cases often refer to the U-turn: the provision of police data by the (central authority of the) police force from one country to the (central authority of the) police force in another country, after which the received data are provided to the administration. This is generally seen as the ideal solution for using police data across borders for administrative purposes. However, further study of the national legislation based on the case histories as well as discussions with various experts lead to the conclusion that this U-turn does not, or insufficiently, function in practice, and therefore does not constitute a workable solution in the context of the administrative approach. Despite the fact that European and bilateral treaties offer possibilities for cross-border exchanges of police data for other purposes, this is not yet, or insufficiently, reflected in national legislation.

Although the Netherlands appeared to have more options in principle to provide police data to/for the benefit of the foreign administration, the amendment of the Police Data Decree in 2019 has resulted in a great deal of uncertainty. This legal uncertainty leads to a situation where, in practice, people are very reluctant to provide information. Discussions with specialists in data protection also show that (consent for) cross-border provision of Dutch police data is not possible under current laws and regulations. In Belgium and Germany, there is no provision, in any case, for giving permission for the use of police data for other purposes abroad. As a result, cross-border exchange of police data for administrative purposes from Belgium and Germany is not possible. In order to create more clarity and to make optimal use of the possibilities envisaged by the legislator, it is necessary to adapt national legislation in all three countries.

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