

In Confidence

Office of the Minister of Police

Chair, External Relations and Security Committee

International Agreement with the European Union: Negotiating Mandate

Proposal

1. This paper seeks Cabinet approval of a New Zealand negotiating mandate for an International Agreement on data sharing for law enforcement purposes with the European Union (EU).

Executive Summary

2. In August 2019, following Cabinet approval, I wrote to the European Commission, formally expressing New Zealand's interest in negotiating an International Agreement on personal data¹ sharing for law enforcement purposes. An International Agreement would enable the European Union Agency for Law Enforcement Cooperation (Europol) to quickly and efficiently share personal data with New Zealand law enforcement agencies.
3. On 13 May 2020, the European Council authorised the opening of negotiations for an agreement. I am seeking Cabinet approval of the New Zealand negotiating mandate so negotiations can begin.

Relation to government priorities

4. This proposal relates to the *Support healthier, safer and more connected communities* priority. Enhancing information sharing powers is a priority action area in the Transnational Organised Crime Strategy which was approved by Cabinet in November 2019.
5. The Department of the Prime Minister and Cabinet and the Ministry of Justice are leading work to consider whether New Zealand should accede to the Budapest Convention on Cybercrime, the only international treaty seeking specifically to address internet and computer crime. A paper was considered by Cabinet's Social Wellbeing Committee on 27 May 2020. A key aim of the Convention is to make international cooperation on cybercrime easier. An International Agreement with Europol would align well with these objectives.

International Agreement for information sharing supported by the EU

6. The International Agreement would be a treaty-level instrument concluded at government level by New Zealand and the EU. In June 2019, Sir Julian King, the then European Commissioner for European Union Security, visited New Zealand.

¹ Personal data means any information relating to an identified or identifiable natural person, as defined in article 4(1) of the General Data Protection Regulation.

The Commissioner indicated that, with the Christchurch attack and recent high-level engagements, there would likely be strong support from the European Commission leadership for advancing negotiations on an International Agreement.

7. In August 2019, following Cabinet approval, I wrote to the European Commission requesting it seek the approval of the European Council to begin negotiations for an International Agreement for data sharing. In October 2019 the European Commission formally recommended that the European Council authorise the opening of negotiations on an agreement. On 13 May 2020, following consideration by the Committee on Civil Liberties, Justice and Home Affairs, the European Council authorised the opening of negotiations.

Information sharing is crucial for law enforcement

8. Police is prioritising improved cross-border information flows to assist investigations due to the transnational nexus between organised crime, cybercrime, violent extremism, money laundering and terrorism funding. Given the significant flow of people, commodities and money across borders, the ability to share information is crucial to combatting crime and broader harm to New Zealand and its citizens. To do this, we need to work with our international partners.
9. Europol is able to share information with a non-member EU state in exceptional circumstances or under formal Mutual Legal Assistance (MLA) processes. Following the Christchurch attacks, Europol enacted its exception avenues to share personal data with New Zealand for the first time. However, under usual circumstances Europol is not able to lawfully share personal data with New Zealand law enforcement agencies except under MLA processes which often take six to eight months or more.

Increased cooperation between New Zealand and Europe

10. Police is growing stronger law enforcement relationships with partners in Europe. In April 2019, then Police Commissioner Mike Bush signed a Working Arrangement with Europol which enables one way information sharing of personal data from NZ Police to Europol. The Commissioner also signed two further sub-agreements which will grow law enforcement cooperation between New Zealand and Europe:
 - an agreement to have a permanent New Zealand Police Liaison Officer (PLO) based within Europol and
 - a Memorandum of Understanding regarding NZ Police's access to Europol's secure operating platform.
11. The agreements provide a framework for structured cooperation, including a direct secure communication line. However, they do not provide a legal basis for the sharing of personal data from Europol to NZ Police. The regular and structured exchange of personal data from Europol to New Zealand is essential for effective operational cooperation.
12. An International Agreement would enable timely sharing, for law enforcement purposes, of personal data held directly by Europol. It would also allow the New

Zealand PLO based at Europol to request information directly from EU PLOs. Exchange of this information would no longer require a MLA process, significantly increasing New Zealand law enforcement data sharing capability and the speed at which information can be shared.

13. MLA requests would still be required for information not already held by Europol (for example if a search warrant is required to obtain telecommunication data) and, in some instances, to ensure admissibility of evidence.
14. In addition, an agreement with Europol will not enable sharing of personal data held at a national (ie, EU member state) level. Bilateral agreements between New Zealand and individual EU member countries will still be required in some instances (such as the proposed agreement between New Zealand and the Netherlands for customs purposes, considered by ERS on 2 June 2020). This reflects the division of data held by law enforcement at the EU and the individual member state level.

Negotiating Mandate

15. The European Commission identified the following objectives for the International Agreement negotiations:
 - i. to provide the legal basis for the transfer of personal data between Europol and New Zealand authorities while ensuring appropriate safeguards for the protections of privacy, personal data and fundamental rights and freedoms of individuals
 - ii. to guarantee that the cooperation and exchange of data under the Agreement should be aimed at preventing and combating terrorism, serious crime, disrupting organised crime and fighting cybercrime
 - iii. to set out the necessary safeguards and controls for the protection of personal data and fundamental rights and freedoms of individuals.
16. I propose New Zealand's negotiating mandate mirror these objectives and optimise the coverage of the data sharing arrangement to meet New Zealand's enforcement priorities.

Next steps

17. Once negotiations begin, Police will liaise closely with the Ministries of Foreign Affairs and Trade and Justice, and the Office of the Privacy Commissioner to ensure issues related to data protection and privacy are appropriately addressed.
18. Before bringing the final text back to Cabinet for endorsement, Police will seek advice on whether the Minister of Foreign Affairs is required to make an assessment that the proposed Agreement is of particular national significance and therefore subject to the parliamentary treaty examination process.

Enforcement agencies covered by the International Agreement

19. Domestic law enforcement agencies other than Police have interests in personal data sharing for enforcement purposes with Europol. New Zealand Customs Service,

Immigration New Zealand and the Department of Internal Affairs have indicated their interest in being included in the Agreement.

20. The EU will require enforcement agencies to meet data storage and security standards and these will become clear during the negotiation phase. The extent of these requirements, and the value of data from Europol for the different enforcement agencies, will be key considerations when determining which agencies, in addition to Police, are included in the Agreement.

Financial Implications

21. There are no financial implications associated with this paper. The cost of negotiating the proposed arrangement will be met from existing baseline funding.

Legislative Implications

22. There are no legislative implications associated with this paper.

Impact Analysis

Regulatory Impact Statement

23. Police already has a Working Agreement with Europol which enables one way information sharing of personal data from NZ Police to Europol. At this stage, the impact of an International Agreement with the EU on personal data sharing appears positive, with limited impact on New Zealand's obligations. More extensive analysis will be undertaken once negotiations are underway and/or have been concluded. At a later point an assessment of impacts will be undertaken and Cabinet approvals will be sought before any binding treaty action is taken.

Population Implications

24. An International Agreement on data sharing for law enforcement purposes may impact Māori because Māori have higher rates of criminal prosecutions and convictions. The 2018 Crime and Victims Survey also found that Māori were more likely to experience crime (37%) than the national average (29%). While Māori may be more likely to be the subject of data sharing under an International Agreement than other population groups, Māori would also benefit from data sharing if it leads to disruption of criminal offending.

Human Rights

25. Analysis of an International Agreement's consistency with the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993 will be undertaken as part of the negotiation process. No human rights implications have been identified at this stage.

Consultation

26. The Ministries of Foreign Affairs and Trade, Justice, and Business, Innovation and Employment, the New Zealand Customs Service, Department of Internal Affairs, the Government Communications Security Bureau, the New Zealand Security and

Intelligence Service, Crown Law and the Office of the Privacy Commissioner were consulted about this Cabinet paper and their comments incorporated.

Communications

27. No communications are proposed for this paper.

Proactive Release

28. There are no barriers to proactive release of this Cabinet paper. I intend to release it when negotiations begin. It is unlikely to generate public interest.

Recommendations

I recommend that the Committee:

1. **note** that the European Council has authorised the opening of negotiations for an International Agreement on personal data sharing for law enforcement purposes with New Zealand;
2. **note** that the European Commission identified the following objectives for the negotiation of the International Agreement:
 - 2.1. to provide the legal basis for the transfer of personal data between Europol and New Zealand authorities;
 - 2.2. to guarantee that the cooperation and exchange of data under the Agreement should be aimed at preventing and combating terrorism and other serious crime; and
 - 2.3. to set out the necessary safeguards and controls for the protection of personal data and fundamental rights and freedoms of individuals.
3. **approve** a New Zealand negotiating mandate that mirrors the objectives identified by the European Commission (2.1 to 2.3) and optimises the coverage of the data sharing arrangement to meet New Zealand's enforcement priorities
4. **note** that the final nature of an International Agreement will need to be negotiated and that a final Agreement is likely to take the form of an international treaty
5. **note** that I will come back to Cabinet following negotiations for approval of the final text of the Agreement.

Authorised for lodgement

Hon Stuart Nash

Minister of Police