

[IN CONFIDENCE]

Office of the Minister of Police

External Relations and Security Committee

The Europol Agreement: Approval for Signature

Proposal

1. I seek Cabinet authorisation to submit the "Agreement between the European Union (EU), of the one part, and New Zealand, of the other part, on the exchange of personal data between the EU Agency for Law Enforcement (Europol) and the authorities of New Zealand competent for fighting serious crimes and terrorism" (the Agreement) and associated National Interest Analysis (NIA), to the Foreign Affairs, Defence and Trade Committee, for Parliamentary Treaty examination as required under Standing Order 405.
2. I also seek Cabinet delegation to sign the Agreement following Parliamentary Treaty examination and making any subsequent necessary amendments.

Relation to government priorities

3. The Agreement and its consequent benefits would support the Government's priority to *lay the foundations for a better future*. Enhancing information sharing arrangements is a priority action area in the Transnational Organised Crime Strategy as well as New Zealand's Countering Terrorism and Violent Extremism Strategy, both of which were agreed in 2019. The Agreement would provide a significant positive step towards supporting these priorities for Government.

Background

4. In July 2020, Cabinet authorised New Zealand Police to commence negotiations with the EU on an agreement between the Europol and New Zealand on the exchange of personal data for fighting serious crime and terrorism. Cabinet also invited me to report back to Cabinet following negotiations of the Agreement for approval of the final text [ERS-20-MIN-0024 and CAB-20-MIN-0363 refers].
5. A New Zealand Police-led negotiating team engaged with the EU in a series of negotiations on the Agreement between December 2020 and September 2021. Negotiations concluded positively, in November 2021, with the Agreement provided at Appendix 1 to this paper. My officials have now drafted an accompanying NIA (Appendix 2).

A Summary of the Form, Intent and Structure of the Agreement

Status and Timing

6. The Agreement is a binding bilateral treaty. However each decision to disclose personal data sharing under the Agreement is voluntary, and will be made on a case by case basis at the discretion of each party.
7. The Agreement enters into application upon conclusion of the implementing administrative arrangement (as per Article 22 of the Agreement) which outlines the details of cooperation and sharing of information between Europol and New Zealand competent authorities. Information sharing under the Agreement cannot occur until the implementing administrative arrangement has been concluded. The implementing administrative arrangement will be developed between Europol, New Zealand's competent authorities, and the supervisory authorities.

Intent and scope

8. The Agreement creates a framework for the exchange of personal data between Europol and New Zealand competent authorities for enhanced operational cooperation in the field of law enforcement, while safeguarding the human rights and fundamental freedoms of all individuals concerned, including privacy and data protection.
9. Personal data may only be sought if the information is for the specific purposes of preventing, investigating, detecting, or prosecuting criminal offences as specified in Annex I of the Agreement. The Agreement does not allow transfer of personal data for any purposes other than law enforcement. This scopes out transfer for intelligence gathering, statistical purposes, health data-related purposes, and disrupting or responding to any criminal offence that is not provided in Annex I of the Agreement (i.e. minor offending such as traffic violations). As well, Article 6 of the Agreement specifically prohibits the automated transfer of personal data, without the possibility of human intervention, thereby ensuring that data is transferred in accordance with the expectations of the respective Parties' privacy frameworks.

New Zealand competent authorities

10. Presently, New Zealand Police, the New Zealand Customs Service (Customs), and the New Zealand Immigration Service (Immigration) are confirmed as New Zealand's competent authorities under the Agreement and may share and receive information from the EU. New Zealand's competent authorities are enabled to share information through their empowering legislation.¹ However, the number of competent authorities can be amended through the Agreement provided the New Zealand competent authority candidate is enabled to share information internationally.

¹ New Zealand Police, Policing Act 2008: sections 95A to 95F.

New Zealand Customs Service, Customs and Excise Act 2018: sections 318 and 320.

New Zealand Immigration Service, Immigration Act 2009: sections 305 and 306.

Structure of the Agreement

11. The Agreement has four Chapters. A summary of the structure of the Agreement and its various Articles and their intent is attached at **Appendix 3**:
 - 11.1. Chapter I covers general provisions contained in the Agreement.
 - 11.2. Chapter II is the substantive portion of the Agreement. It outlines considerations for information exchange, data protection, and data subject rights.
 - 11.3. Chapter III explores how dispute resolution will occur under the Agreement.
 - 11.4. Chapter IV provides administrative guidance to carry out the Agreement.

Safeguards

12. The Agreement will implement robust processes for information transfer, and require consequent, ongoing privacy and data protections both in New Zealand and the EU once data is transferred. All transfers of personal data are subject to rigorous privacy safeguards, including pathways for administrative and judicial redress for violations of the rights and safeguards, and oversight by respective Parties' supervisory authorities.
13. These safeguards are recognised and compliant with New Zealand and the EU's legislation and frameworks for privacy and data protection. The Agreement does not impose or require anything that would not be ordinarily expected under New Zealand's domestic privacy framework.
14. The Office of the Privacy Commissioner (OPC) and the Director of Human Rights Review Proceedings would act as New Zealand's supervisory authorities. The supervisory authorities ensure the rights and safeguards reflected in the Agreement are upheld.

Benefits

15. Entering into the Agreement will enhance law enforcement agencies' ability to respond to serious crimes, thereby improving outcomes for the victims of crime and increasing overall public safety [ERS-SUB-0024 refers]. The Agreement also reflects and reinforces strong human rights considerations, privacy protections, and data security measures that are required by New Zealand's domestic legal framework.
16. s 9(2)(f)(iv) OIA
[REDACTED]
[REDACTED]
[REDACTED]
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s 9(2)(f)(iv) OIA

Population impacts

17. I expect the Agreement will improve New Zealand law enforcement agencies' response to transnational organised crime types that disproportionately target women, the rainbow community, elderly, tamariki/rangatahi, members of faith-based groups, and marginalised groups. For example, the 2020 Report on trafficking in persons by the United Nations Office on Drugs and Crime (UNODC) states that women and girls represent more than 70% of detected trafficked victims and that 43% of women trafficked are for forced labour purposes, primarily sexual exploitation.

Te Tiriti o Waitangi implications

18. The Crown's duty of care for safeguarding Māori data as a taonga has been considered as my officials have negotiated the form and substance of the Agreement.
19. Article 5 of the Agreement expressly provides that certain categories of personal data, including personal data revealing racial and ethnic origin, must be afforded additional care as the subject of information transfer. Oversight of matters affecting privacy will be ensured by the supervisory authorities under Article 16.
20. Receipt of broader criminal justice information from Europol is expected to benefit Māori victims of serious organised criminal offending. According to the 2021 New Zealand Crime and Victim Survey, Māori adults are more likely to be victimised than the average adult (38% compared to the national average of 30%). These crimes include the impacts from serious transnational offences such as drug trafficking, organised crime, and cybercrime including online fraud which has become New Zealand's third highest volume crime. The impact of these crimes disproportionately affect Māori. For example, the New Zealand Drug Foundation 2022 State of the Nation Report found that drug-related deaths for Māori are three times the rate for non-Māori.
21. The additional receipt of criminal justice information from Europol is not anticipated to negatively impact Māori. It is not anticipated that many investigations requiring information from Europol would involve Māori offenders, as Māori appear to be underrepresented in transnational organised criminal offending. For example, according to Stats NZ, Māori made up four per cent of illicit drug import and export sentences in 2018 (despite making up 16 per cent of the population), compared to non-Māori who made up 96 per cent of sentences the same calendar year.

s 9(2)(f)(iv) OIA

22. I consider that the duty of care required for processing Māori data is appropriately met through the obligations under the Agreement and the safeguards in New Zealand and the EU's privacy frameworks and oversight by supervisory authorities.
23. Any risks that may arise in relation to the processing of Māori data are also significantly outweighed by the improved disruption of organised crime that will result from this Agreement. Such new access to EU data will help New Zealand in its battle against the coercive and violent power that organised crime disproportionately wields on Māori.

Next steps, timing, and entry into force

24. The Agreement is a bilateral treaty of significance and will therefore require a Parliamentary Treaty examination process. Accordingly, the Agreement must undergo the Parliamentary Treaty examination process (as per Standing Order 405) to progress the Agreement to signature.
25. I seek the authority to make further minor changes to the Agreement, following the Foreign Affairs, Defence, and Trade Select Committee considerations, so that I can finalise the text of the Agreement, and seek authority to any subsequent amendments and sign the Agreement.
26. The EU is going through a similar process of approval through the European Parliament, with final approved Agreement text likely to be available before the end of June 2022.

Consultation

27. The Ministry of Foreign Affairs and Trade (MFAT) has been involved in the Agreement negotiation process and has been consulted throughout. MFAT has advised that the Agreement constitutes a bilateral treaty that requires a NIA and Parliamentary Treaty examination.
28. The Privacy Commissioner is supportive of the Agreement. The Privacy Commissioner notes the Agreement includes a set of data protection and privacy safeguards for information sharing and requires competent authorities to the Agreement to work with OPC to develop an implementing administrative arrangement setting out the details of the sharing of personal information. The Privacy Commissioner looks forward to working with the relevant agencies.
29. The New Zealand Security Intelligence Service (NZSIS), the Government Communications Security Bureau (GCSB), the Department of the Prime Minister and Cabinet (DPMC), the Ministry of Business, Innovation and Employment (MBIE), MFAT, Ministry of Justice, Customs, Immigration, the Department of Internal Affairs (DIA), Ministry for Women, Ministry for Ethnic Communities, Te Puni Kōkiri, and Treasury have been consulted.
30. Several agencies were also consulted regarding their competent authority potential status under the Agreement. Those consulted for this purpose were MBIE, the Companies Office, DIA, Customs, Immigration, and CERT NZ.

31. s 9(2)(f)(iv) OIA
- [REDACTED]
- [REDACTED]
- [REDACTED]

Financial implications

32. The Agreement's implementation costs will be absorbed within New Zealand Police baselines.
33. As part of the New Zealand Police's international representation, a Police Liaison Officer (PLO) has been posted to Europol in The Hague to support the establishment of the Secure Information Exchange Network Application (SIENA)³ technology provided under the Working Arrangement (**Appendix 4**). The Europol PLO will become a permanent position to facilitate the improved information sharing between New Zealand and Europol that will flow from the new Agreement.

Regulatory Impact

34. Treasury has recommended that a RIA or extended NIA is not needed given that no enabling legislation or regulation is required by the Agreement, and therefore there is no material regulatory impact on New Zealand. Treasury have confirmed that a NIA (**Appendix 2**) is sufficient.

Human rights

35. The Agreement is consistent with the New Zealand Bill of Rights Act 1990, the Human Rights Act 1993, and the Privacy Act 2020.

Privacy Impact

36. New Zealand Police already has a Working Agreement with Europol that enables one-way information sharing of personal data from New Zealand Police to Europol, that is consistent with New Zealand privacy obligations.
37. The new Agreement will enable reciprocal information sharing from Europol back to New Zealand law enforcement agencies whilst maintaining strong privacy and data protection obligation and safeguards for EU citizens', residents', and nationals' personal data that may be shared with New Zealand.

Publicity

38. I intend to release a press statement after the Agreement enters into force.
39. My press statement will reflect New Zealand Police as the principal competent authority and national contact point under the Agreement. I have directed New Zealand Police to work with Immigration New Zealand and Customs as other competent authorities to ensure the smooth implementation of the Agreement.

³ The SIENA technology is to be supplied by the EU as the means for the highly secure exchange of the data from the EU to New Zealand.

Proactive Release

40. I propose to proactively release this Cabinet paper once New Zealand and EU Parliament have confirmed the final text of the agreement, so as not to prejudice the signing of the Agreement.

Proactive release

Recommendations

I recommend that the Committee:

- 1 **note** that in July 2020, Cabinet:
 - 1.1 authorised New Zealand Police to commence negotiations with the EU on an agreement between the Europol and New Zealand on the exchange of personal data for fighting serious crime and terrorism
 - 1.2 invited the Minister of Police to report back to Cabinet following negotiations of the Agreement for approval of the final text [ERS-20-MIN-0024 refers];
- 2 **note** that negotiations with the EU were conducted over 2021, and have now been completed, with final negotiated text available at **Appendix 1**;
- 3 **note** that the Agreement will provide New Zealand with access to critical information held by Europol for disrupting and responding to serious crimes and terrorism, will reinforce New Zealand's relationship with EU, and enhance New Zealand's credibility to enter into other international information sharing agreements;
- 4 **note** that while the Agreement does not present any legislative or regulatory change obligations, it still constitutes a bilateral treaty which requires New Zealand and EU Parliamentary consideration, as per Standing Order 405 for which a National Interest Analysis (NIA) has been prepared at **Appendix 2**;
- 5 **approve** the content of the NIA, attached at **Appendix 2**;
- 6 **note** the Agreement enters into force through exchange of diplomatic notes;
- 7 **note** the Agreement enters into application when the implementing administrative arrangement is concluded between Europol and New Zealand's competent authorities, subject to supervisory authority input and review;
- 8 **agree** the Minister of Police present the Agreement and associated NIA to the Foreign Affairs, Defence and Trade Select Committee, for Parliamentary Treaty examination, by 31 May 2022;
- 9 **authorise** the Minister of Police to make any necessary minor or technical amendments to the Agreement, following Parliamentary Treaty examination, and delegate the authority to sign the Agreement to the Minister of Police.

Authorised for lodgement

Hon Poto Williams
Minister for Police