English summary

Research questions and methods

This research aims at defining the interests to be taken into account in the exchange of supervisory data among supervisors, and between supervisors on the one hand and the Ministry of Justice, the police and special investigating officers on the other. In addition, it examines the desirability and juridical possibility to insert a general regulation on data exchange in the General Administrative Law Act (Awb) and/or in other laws.

In order to make an inventory of the interests involved in data exchange between the public agencies mentioned above, and to evaluate their respective importance, we examined the relevant literature and jurisprudence, executed a quickscan, studied specific cases, held discussions with experts in the field, organised a round table meeting with experts and, for the sake of a multicriteria analysis (MCA), conducted an internet inquiry among qualified people on the work floor.

Findings

Juridical recognition of the interests involved

Supervisory data can be subdivided into personal data, company or manufacturing data and other data. For the latter category, there are no obstacles to exchange: it is assumed that exchange of such non-sensitive data contributes to the efficiency and effectiveness of government action, while there are no interests that plead against doing so. For the first two categories, the interests of privacy and protection of company data are legally guaranteed. The nature of the data to be exchanged, and the weight of the interests involved, are thus interdependent.

Private interests to be weighed are the confidential treatment of data (confidentiality), protection of company and manufacturing data, protection of personal data (including personal data of third parties), transparency in the exchange of data, possible benefits of diminishing administrative burdens, and the interest in careful collection and use of data in view of professional liability.

Public interests are the efficiency and effectiveness of government action, maintaining the flow of information (confidentiality and organisational interest), trustworthiness of government in protecting privacy and other confidential data (privacy, image, and organisational interest), keeping track of exchanged data for the sake of official responsibility and public confidence (purpose limitation), results that can be achieved with the obtained data (benefits for the agency), disadvantages of providing the data for the agency's information-position, the interest of precision/good quality of the data, and the risk of no - or incorrect - reception of supervisory data.

A number of these interests can be tagged as protection of personal data, protection of company and manufacturing data and obligations of confidentiality. The interests that do not fit these juridical categories can be attributed to organisational, practical and ICT-related circumstances.

Evaluation of interests

The MCA and the round table meeting with experts revealed that the most highly valued interest was purpose limitation, followed by confidentiality and privacy, and, in the case of government authorities, the benefits for the organisation receiving or delivering data. The reason for this unambiguous choice is not only a profound respect for fundamental rights. Important for governmental agencies is, in addition, maintaining trust in the government, and thereby safeguarding the effectiveness and efficiency of its actions.

Organisational interest and transparent evaluation processes

Voluntary agreements are entered into for the purpose of creating a structural framework for cooperation. The law then more easily permits data exchange. These agreements are generally statements of intent and offer little clarity concerning the positions and competences of the various parties. A voluntary agreement often is incorrectly viewed as a legitimation of data exchange. Competence has to be founded by law. An agreement is useful, however, for detailing procedures. Thus an agreement ought to spell out the purpose of cooperation, which data are to be prepared or delivered, who ensures that this will be done in accordance with the Personal Data Protection Act (Wbp), what medium is to be used for the exchange (databank, or cloud), and how the security of these media will be ensured.

Our research has shown that data exchange between administrative supervisors and implementing organisations encounters no juridical problems concerning the protection of personal data. Neither European law nor the Personal Data Protection Act (Wbp) contain any obstacles. For personal data used in criminal proceedings, the Police Data Act (Wpg) and the Judicial and Criminal Procedure Data Act (Wjsg) offer competence to exchange data within a formal cooperative framework. That is also possible outside such a framework if important issues are at stake. From our research it would appear that requesting parties find sometimes that the police and the Ministry of Justice are too reserved in making a balanced decision. In the view of requesting parties, organisational self-interest, the obtaining and retention of the agency's own information-position, regularly receives a higher priority than the good functioning of government in a broader sense.

All types of supervisory data are subject to confidentiality obligations. Such obligations serve the proper functioning of public administration, including the interests of supervision, checks and investigation. Confidentiality is thus above all in the interest of organisations: maintenance of an incoming stream of information and non-surrender of the agency's information position during an investigation. A confidentiality obligation offers the possibility to hide behind it in cases of doubt about the desirability or permissibility of providing the requested data. To increase acceptance of the result by requesting parties, it is advisable to make the decision-making process more transparent and testable.

A general regulation?

With regard to the need for a general regulation, our research has not resulted in an unambiguous picture. We have nonetheless researched what a general regulation might look like. The General Administrative Law Act (Awb) is for various reasons a less appropriate location. A Framework Act might well be a fitting instrument. Such an Act would need to comprise both a clear regulation concerning the competence to exchange data, and clarify how different providing regimes can be coordinated. A Framework Act makes it possible to create special legislation and delegated rules for specific policy areas. A Framework Act has, however, the disadvantage that new problems might arise as a result of its parallel existence with the Personal Data Protection Act (Wbp).

The purpose limitation requirement raises many questions. This makes parties that hold personal data - as they are frequently in doubt about the permissibility of exchanging them - inclined not to do so. Clarification in the law of the criteria to be applied (sufficient relationship) could resolve this problem.

All in all, we conclude that a general regulation may be possible, but only offers a solution for a limited number of the problems signalled in this report.

Recommendations

1. We recommend that the provisions in the Personal Data Protection Act (Wbp) with regard to the required purpose limitation in data processing – which currently form an obstacle to exchanging data – be clarified in a Framework Act, possibly with more detailed clauses in sectoral legislation. These specifications, together with the other provisions of the Wbp, might be transformed into a broad Framework Act.

2. With respect to the requirement of purpose limitation in transmitting data to a third public agency, we recommend that the criterion of sufficient relationship be taken out. Incompatibility of purpose is often easier to establish than relationship. Dropping the element of related purpose for the supervisors (section 9(2) Personal Data Protection Act (Wbp)) would make it simpler in practice to meet the requirements of the Personal Data Protection Act (Wbp) on this point.

3. Voluntary agreements should not be drawn up with the primary goal of regulating what data may be exchanged, and between which parties. The central problem in data exchange is that the legal norms that currently cause confusion need to be clarified. Even if it were possible to concretise these norms in an agreement so that one could work with them, it would still be unclear whether these concretisations would be in accordance with the legal norms. Voluntary agreements might help, however, in applying the legal norms of a Framework Act or sectoral legislation, on condition that these norms are sufficiently concrete to begin with. It is recommended to restrict such agreements to practical and procedural issues that may come up between the provider and the receiver of data.

4. For cases where data exchange is hindered by unwillingness, a legal obligation to exchange data might be an option. A general obligation in a Framework Act, however, does not seem appropriate, and might exceed its goal. It would be sufficient to create such an obligation in a Framework Act by inserting the phrase 'by or by virtue of the law'. Exceptions to this obligation should be allowed for important reasons, which would be made explicit in the motivation of the decision to refuse.

5. In cases where a legal obligation to exchange data, as formulated in Recommendation #4, is not chosen, we recommend that the considerations that lead to a refusal to provide data be made more transparent and testable. This may prevent governmental agencies from proceding on the basis of opposed interests, thereby prioritising the interest of their own organisation. Moreover, transparency could lead to better acceptance of a refusal by the requesting party.

6. Modification of legal provisions can help to resolve the problems discussed in this research report. Independently of this, we recommend that practical guidelines be developed for the officials who have to decide whether or not to provide data. This should enhance responsible and transparent decision-making on their part.