



Dienst Justis  
Ministerie van Veiligheid en Justitie

# Screening Omtrent het Gedrag

Den Haag

## Pre-employment screening in the border regions of the Benelux and Germany - Summary

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## Introduction

Citizens of the European Union are entitled to free movement of workers, which includes the right to work in another EU country without a work permit (Article 45 TFEU).<sup>1</sup> These 'open borders' within Europe mean that there is more and more cross-border employment: Europeans from other countries are looking for and/or have a job in the Netherlands, and more and more Dutch people live or work across the border.

In several European countries, a form of judicial background screening of potential employees is applied, known as 'pre-employment screening'. This is often done prior to, or within the context of, an appointment procedure. This screening allows employers to check whether potential employees have criminal records relevant to the job and to decide whether they constitute an obstacle to recruiting the applicant. The legal frameworks, methodologies and criteria for this screening vary from one Member State to another.

The Netherlands has put pre-employment screening on the agenda for the Benelux annual plan 2017. In order to explore broader information exchange with other Member States for screening purposes, a Benelux work group was set up. As the only non-Benelux member state, the German federal state of North Rhine-Westphalia is also a member of this work group.

In addition to participating in the work group, the Directorate for Protection, Action and Prevention of the Ministry of Justice and Security wishes to gain insight into the application of pre-employment screening of employees on judicial antecedents (i.e. criminal records), especially in the border regions of the Netherlands. In the Benelux, there were approximately 81,000 cross-border workers in 2016 ([www.benelux.int](http://www.benelux.int)). These are employees who work in one country and live in another. In the Netherlands and North Rhine-Westphalia, there were approximately 33,000 cross-border workers in the border regions of the Netherlands with North Rhine-Westphalia in 2012 (CBS, 2015). It is expected that more cross-border employment is taking place in border regions and therefore, that more use is being made of screening for criminal records from neighbouring countries.

Between 1 June 2017 and 1 June 2018, in cooperation with the Vrije Universiteit Amsterdam and on behalf of the Scientific Research and Documentation Centre (in Dutch: WODC) of the Ministry of Justice and Security, DSP-groep conducted research into the screening of applicants in the border regions.

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<sup>1</sup> The free movement of workers is in principle also applicable to the other countries of the European Economic Area: Iceland, Liechtenstein and Norway.

## Problem definition and research questions

The study provides insight into the extent to which employers and (potential) employees in the border regions of the Benelux and Germany (more specifically North Rhine-Westphalia) make use of the systems of pre-employment screening of another country, the choices and considerations that are made in this respect, and what their experiences are with the screening. The researchers answer three central research questions:

- 1 What are the main characteristics of the screening systems in the Benelux and Germany?
- 2 To what extent is screening of potential cross-border workers used?
- 3 What have been the experiences of employers and employees in the border regions with the screening of criminal records?

## Approach

Desk research was carried out to answer the first research question about the characteristics of the screening methods in the four countries and the legal regulations. The legal regulations, legal history, explanatory notes to the legislation and policy were studied. In addition, in the four countries concerned (the Netherlands, Belgium, Luxembourg and Germany) we sent out a written questionnaire to the persons and departments responsible for screening for criminal records. In addition, we conducted a literature research on a number of points from the legal frameworks and the information provided.

In order to answer research questions two and three, a digital questionnaire was distributed among a sample of 8,000 employers in the border regions of the Netherlands-Belgium, the Netherlands-North Rhine-Westphalia, Belgium-North Rhine-Westphalia and Belgium-Luxembourg. A total of 1,567 employers (rounded 20% response) completed the questionnaire. In drawing the sample, an oversampling took place of sectors in which, on the basis of the desk research, it was expected that pre-employment screening would be applied more frequently. This concerns sectors which work with vulnerable persons, the medical sector, transport of persons and goods and financial services. A sample of 1,000 companies/organisations per country from these specific sectors and a sample of 1,000 companies/organisations from other sectors were selected. The analyses have been corrected for this oversampling. Of the 1,567 respondents, 478 employers had dealt with applicants from one or more neighbouring countries in the past five years (30%). These employers are the subject of this survey.

Subsequently, 15 in-depth interviews were conducted with (representatives of) employers in the four countries, and with six employees. The aim of these interviews was to give a qualitative colour to the results from the digital questionnaire.



### **What are the main characteristics of the screening systems in the Benelux countries and Germany?**

#### ***Method of Screening***

In the four countries it is possible to screen (potential) employees for criminal records, or have them screened. In the Netherlands, (potential) employees can apply for a Declaration of Good Behaviour (in Dutch: VOG). In Belgium, Germany and Luxembourg, in principle the employee requests an extract from the criminal register (respectively an *uittreksel uit het strafregister* or *extrait de casier judiciaire* in Belgium, an *Führungszeugnis* in Germany and an *extrait de casier judiciaire* in Luxembourg). The costs of applying for these documents vary from one member state to another: in the Netherlands and Germany, a fixed amount is requested, in Belgium the costs differ per municipality and it is free of charge if the application is made digitally. In Luxembourg it is free of charge.

#### ***Differences in screening methodology***

Although the principles in the screening system are the same in the four countries (protection and security of society, protection of the privacy of the employee, proportionality and social rehabilitation in the sense of offering a second chance), the methodologies used differ.

The main differences are as follows:

- 1** In the Netherlands, an independent organisation (Justis) assesses whether the criminal record constitutes an obstacle to the position. In the other three countries, the employer assesses this.
- 2** In the Netherlands, the VOG does not provide access to criminal records. Only in the event of the VOG being rejected or proposed to be rejected will the employee be notified of any judicial record relevant to the position. It is then up to the employee whether he or she passes the rejection on to the employer and thus gives access to his or her own judicial documentation. In the other three countries, it is usually the employee who requests an extract from the criminal register. He/she then submits this extract to the employer. Both of them have access to the criminal records of the person concerned. Exceptions to this principle exist in the four countries because some (often public) employers have direct access to the criminal register, have the right to obtain an extract from it directly, or are sent an extract directly with the employee's consent.
- 3** The judicial data included in the extract (or assessed in the case of a VOG) and the time periods to look back at (the review period: the period of judicial history made available or taken into account) differ between the four countries. In the Netherlands, the criminal record under assessment and the review period depend on the function for which the VOG is requested and/or the type of offence. In the other three countries, there are different types of extracts depending on the function for which they are requested. The extent of the review period depends on the purpose for which the extract is requested and in Germany and Luxembourg, also on the authority for which the extract is intended. Even if the extracts/VOGs are comparable (for comparable functions), there are differences between

countries. In the Netherlands, for example, unlike in the other three countries, irrevocable convictions and other judicial data are taken into account when assessing whether a VOG should be issued. In addition, a different, more lenient rule applies to young people in the Netherlands and Germany. For young people up to 23 years, for example, a shorter review period is used in the Netherlands.

- 4 In the Netherlands, there is an obligation in certain sectors to produce an extract from the criminal record or a VOG before a person can be employed. This is the case, for example, in childcare, education, long-term care and the taxi industry. There is no legal prohibition on hiring a person with a relevant criminal record but, since in some sectors the obligation to produce a VOG is mandatory, it does ensure that a person without VOG is not employed. Sectoral policies are fragmented on this point. In Germany, however, there is a legal ban on hiring a person with a relevant criminal record for jobs involving young people or people with disabilities. The employer can check this by requesting a *Führungszeugnis*. Belgium and Luxembourg do not prohibit the appointment of persons with relevant criminal records, except when a professional ban is imposed by the court.
- 5 In addition, the Netherlands has a system of continuous screening in childcare and the taxi industry, whereby a report is made if the employee concerned has committed a relevant criminal offence. In Germany, too, there are forms of periodic screening, but without automatic reporting.

#### **Screening in sectors working with minors**

For jobs related to working with minors, EU countries must comply with the obligations imposed on Member States by the EU Directive on combating sexual abuse and sexual exploitation of children and child pornography.<sup>2</sup> For the screening of individuals who wish to work with children, this means that Member States will be obliged to allow employers to request information regarding the existence of criminal convictions for sexual offences committed against children. It also obliges Member States to share irrevocable convictions of nationals for sexual offences and professional bans for working with children, as long as this is requested by another Member State. The four countries in this study all implement this obligation in their legislation. The Directive does not prescribe how Member States should fulfil these obligations. The effects of the Directive therefore differ from one country to another.

In the four countries, employers can obtain information about the existence of criminal convictions for sexual offences committed against children. For positions related to working with minors, a similar relatively strict assessment takes place in the Netherlands and Germany. In the Netherlands, the VOG screening is carried out on the basis of a stricter assessment framework for positions involving a relation of authority, custody or dependency, and where there is a conviction for a sexual offence. The stricter assessment framework also applies if there is a conviction for sex crimes and if the work would be carried out at a location where vulnerable persons may be located, even if there is no authority or dependency relationship. Moreover, in the case of convictions for sexual offences, the review period is unlimited. In this way, the Netherlands offers greater protection than to minors alone. In Belgium, Luxembourg and Germany, for

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<sup>2</sup> EU Directive on combating the sexual abuse and sexual exploitation of children and child pornography (2011/93/EU). See, in particular, Article 10 of this Directive.

positions relating to working with minors, the excerpts are most extensive. Convictions continue to be mentioned in these countries for a long time, or even forever. Germany, too, has a higher level of protection than that required by the Directive and also sets stricter requirements for working with people with disabilities, for example. In the Netherlands for positions that involve working with minors it is legally stipulated that the employees must be in the possession of a VOG. In Germany it is against the law to employ persons with a criminal conviction for sexual offenses in these positions.

In addition, the four countries are complying with the EU Directive's obligation to exchange information on criminal convictions for pre-employment screening. The Netherlands is the only country to provide not only irrevocable criminal convictions, but also other judicial information.

### ***Exchange of information between these countries***

Since April 2012, European exchanges of information on convictions have been carried out (automatically) through the European Criminal Records Information System (ECRIS). ECRIS is not a stand-alone database, but an interconnection of national criminal records of EU Member States. Each European country has a central authority, often also the administrator of the judicial database. There are differences between the countries which authority is designated as the central authority. In the Netherlands, Justid, the judicial information service, is the central authority that can request access via ECRIS. For the VOG screening, Justis is the national competent authority that may request information from other EU Member States through the Central Authority and ECRIS. In the other countries, the central authority that can request access via ECRIS is the same authority that also provides extracts from the criminal record.

As far as the exchange of information between the four countries is concerned, in the context of pre-employment screening, the four countries are only obliged to share information if the request concerns a person who is working or wants to work with children. On nationals of the Benelux countries who reside in one of the neighbouring countries and apply for an extract or a VOG, requests are only made via ECRIS from the country of nationality in this context, and not for other positions Germany is an exception to this rule. EU citizens can apply for a European extract in Germany. This extract may include entries from the criminal register of the Member State of nationality on request. If the Member State of the person's nationality does not provide information because, for example, national legislation does not allow it, an entry to that effect shall be made in the extract.



## **To what extent is screening of potential cross-border workers used and what considerations are made?**

### ***Extent to which pre-employment screening is carried out***

We note that on average more than half of the responding employers in the border regions conduct pre-employment screening with applicants from neighbouring countries. Employers who carry out screening screen both applicants from their own country and applicants from neighbouring countries. Most employers do not distinguish between different categories of employees in pre-employment screening. Temporary

agency workers are an exception. Employers often assume that the screening is carried out by the temporary employment agency. As a result, no additional screening takes place. Also with regard to different positions, most employers do not differentiate between different employees during screening. However, in some sectors there are positions for which screening is required by the regulator or licensing authority (such as in financial services, aviation, the transport of persons and goods). The extent to which employers apply screening for other jobs also differs.

### ***Pre-employment screening components***

For more than half of the employers, screening consists of asking for an extract from the criminal record or a VOG. In about half of these, this is the only form of pre-employment screening that is applied. The other employers combine this method with other methods, such as checking the authenticity of documents, carrying out research in public sources and/or requesting references.

### ***Pre-employment screening in sectors working with vulnerable persons***

Almost all employers who work with vulnerable persons have an extract or VOG submitted. This is in line with the legal obligations in those sectors in the Netherlands and Germany. In Belgium and Luxembourg, there is no legal obligation for screening and no prohibition on hiring employees with a criminal record. The study shows that screening has been made compulsory in some of these sectors by the inspectorate, supervisors, or in the context of granting a licence.

### ***Reasons to carry out pre-employment screening or not***

The reasons for pre-employment screening are diverse. The most common reason is the employer's own risk assessment or previous experience. As mentioned earlier, screening is only legally required or compulsory by an inspector, a supervisor or a licensing authority in a (limited) number of sectors. It often turns out that an incident at the employer's premises or within the sector is the reason for regulations to screen for criminal records.

The main reasons for not screening for criminal records of applicants from neighbouring countries are that screening is not a standard procedure (also in the case of applicants from their own country) and the unfamiliarity with the possibilities of this screening. This is more often the case in the Netherlands, Belgium and Germany than in Luxembourg.

### ***Where do applicants from the neighbouring countries apply for an extract or VOG?***

Candidates from neighbouring countries are usually asked to submit an extract or VOG from their 'country of residence'. In most cases, this is also the country of their nationality. However, it is unclear in which country applicants with a nationality from one of the neighbouring countries who are already resident in the country of employment must apply for an extract or a VOG. The same applies to applicants who are nationals of the country of employment but reside in a neighbouring country.

Based on this research, we can conclude that in the Netherlands, Belgium and Luxembourg, the policy of the central authority responsible for issuing the extract or VOG is to apply for an extract or VOG in the

country of nationality. In practice, however, this is not standard. Some employers request an extract or VOG from both countries, both the country of nationality and the country of residence. The information that the country of nationality is the central authority responsible for collecting judicial information from its nationals is not sufficiently known to employers and employees. In the case of applicants who do not apply for an extract in their country of nationality, there may therefore be gaps in the extract or in the assessment of their criminal record, since only convictions in their country of residence are taken into account. This does not apply for positions that involve working with minors. For those positions, a request can be made via ECRIS. Employers are also not sufficiently aware of this information. Based on the requests made to the Netherlands we conclude that in practice, however, relatively little use is made of requests via ECRIS. This research gives no insight into the reasons why.

In Germany, the specific situation is that nationals of other European Member States can obtain a European extract. Germany then inquires with the country of nationality, but the German informant states that in practice not all Benelux countries provide the information needed. A note to this effect is made on the extract, making the gap visible.



## **What are the experiences of employers and employees with screening?**

### ***Ease of requesting extracts/VOG***

In general, requesting an extract or VOG is experienced as easy by employers. In the Netherlands and Germany it takes longer to obtain than in Belgium and Luxembourg. In the Netherlands, this is due to the fact that the assessment is carried out by Justis. Some employers include a clause in the employment contract. This clause allows the contract to be terminated if no VOG or extract can be submitted.

### ***Usefulness of requesting extracts/VOG***

On average, employers in all border regions give a report of 6.5 to the usefulness of obtaining an extract or VOG for assessing the suitability of an applicant for the job. But opinions vary. Screening for criminal records is seen by some employers as a mandatory administrative act which is not given much weight. In particular this is because it is said to be a snapshot of a given moment in time, and it would not say everything about an employee's behaviour and integrity. Other employers find screening very useful, and also indicate that requesting an extract or a VOG is just one part of a broader policy on screening and integrity. This is particularly the case in the financial sector, the transport sector (both passenger and freight transport) and organisations working with minors in the four countries covered by the survey. The fact that it is considered important in these sectors also has to do with legal (sectoral) obligations or the rules of supervisors, which make employers more aware of the importance.

### ***Response to criminal records by employers***

In most cases, applicants who refuse to submit an extract or a VOG will not be accepted. If the applicant submits an extract with an antecedent, the majority of employers decide whether or not to take on

someone depending on the nature and seriousness of the offence in relation to the job. Some employers then ask for additional references from former employers. Other employers assess the person during a probationary period. Employers are therefore prepared to give a person a second chance if they can make an assessment of their criminal record and weigh up whether this will hinder their execution of the job. From these results we deduce that employers consider openness to be important. In this respect, not mentioning the nature of the antecedents on the VOG can be seen as a disadvantage. Employers have no insight into judicial facts that have not been assessed as relevant. The lack of insight into the judicial data can be overcome in the event of a rejection of a VOG, because the employee can show the rejection decision. This negative decision does contain the relevant judicial antecedents. In our study, we did not find any example where this has happened.

### ***Bottlenecks and areas for improvement***

Neither employers nor employees have a clear picture of what information is stated on an extract or what information is taken into account in the assessment of issuing a VOG. Nor is it known that it only applies to a certain period of time. This may affect the assessment of usefulness by employers. In most cases, blank extracts or a VOG are submitted. Employers are not aware that there are differences in the system of extracts or a VOG from another country. They assume that applicants from neighbouring countries are screened in the same way as applicants from their own country.

Finally, in the survey, we found that in a number of international sectors or for employers who have companies in multiple countries, local legal rules may sometimes conflict with the rules applied by the supervisors or inspectorates, or which are customary within the sector. These sectors and employers therefore advocate more uniform European rules in those relevant sectors.

### ***Restrictions of the research***

This study has a number of limitations. The survey was carried out on a sample of employers in the border regions. The response rate was 20%. There is a chance that employers who deem pre-employment screening to be positive may be better represented. The survey focuses on employers who have had applicants from a neighbouring country in the past five years. This concerned 30% of the respondents. Although most employers do not differentiate between screening of applicants from neighbouring countries and applicants with the nationality of the country of employment, the results of this survey cannot be generalised for pre-employment screening in the border regions. We have not examined how employers carry out pre-employment screening without applicants from the neighbouring countries.

## **General conclusion and discussion**

The reason for this study was the DBA&V management's wish to gain insight into the application of pre-employment screening of employees for judicial antecedents, especially in the border regions of the Netherlands, and to explore whether broader information sharing between the countries in the Benelux working group and North Rhine-Westphalia is possible and necessary.

The question of whether much or little use is made of pre-employment screening cannot be answered. However, it is clear that, in border regions, the screening methodology from neighbouring countries is used. This research gives insight into the consequences of the differences in legal frameworks, methodologies and the criteria of screening in the Benelux and North Rhine-Westphalia for the screening of potential cross-border workers. Employers in the border regions are not aware of these differences. There is a need for reliable information in one's own language on extracts and the VOG for both employers and employees. If we consider the screening of applicants from neighbouring countries within the context of equal treatment of workers, we have to conclude that this is not entirely equal, due to the differences in systems between countries. A person with a similar judicial history may receive a blank extract in one country, a notification on the extract in another country, or will or will not receive a VOG in the Netherlands.

On the basis of this study, the question can be asked whether more information exchange is needed than currently is regulated through ECRIS. Convictions in other Benelux member states and Germany are passed on to the country of nationality. Thus, in principle all convictions are taken into account when applicants request an extract in their country of nationality. If the Benelux countries and Germany handle their exchange of information properly, then further exchange of information within these four countries would appear redundant. The data is then already processed in the country of nationality. However, in order for this system to work properly, a number of conditions must be met. Firstly, foreign certificates must be accepted. This research demonstrated that this is done in practice. This research did not investigate whether national and sectoral legislation allow foreign certificates to be submitted. This can be subject of further research. Secondly, employers and (potential) employees must be well informed regarding in which country the extract or VOG is to be applied for, and how. There is a need for more specific information for the different categories of cross-border workers (with the nationality of the neighbouring country of the country they work in and with the nationality of the land they work while residing in a neighbouring country). Finally, it must be (easily) possible to apply for the excerpt or the VOG from abroad, and lead times should not be an obstacle to hiring the applicant.

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