



Statewatch

Evidence on proposed Directive on aircraft passenger data

Statewatch evidence to the Select Committee on the European Union, sub-committee “F”: Proposed Directive on aircraft passenger data

Introduction

1. Statewatch welcomes the chance to comment on the proposed Directive on transmission of passenger data. In our view, there are insurmountable objections to the legality and merits of this draft proposal. Its adoption should not be pursued further and the UK should not participate in further discussions.

Obligations to send all passenger information

2. The obligation to send data on all persons which a carrier is intending to carry is the most questionable obligation in this proposal. As worded, this obligation would apply to all flights (and presumably any form of passenger transport), regardless of the nationality of the person concerned and regardless of the start or end point of the journey. So the obligation would apply to travel within the EU, and even within a single Member State. Read literally, in the absence of a definition of ‘carriers’ or any other definition or clarification, the obligation would apply to every single person taking any journey within the Member States, even on trains or buses.

3. This is a highly problematic suggestion. The application of this obligation to domestic buses and train journeys would be grossly disproportionate to the intended objective, taking into account the current practice of the absence of a passenger list in most cases.

4. Moreover, the ‘legal base’ of the proposal, to the extent that it relates to external borders, cannot cover any measures that relate to domestic travel within a Member State or between Member States.

5. The 'legal base' concerning illegal immigration is capable of applying more broadly, but the exercise of that legal base is still subject to the principle of proportionality. The imbalance between the obligations imposed upon passengers and the invasion of the privacy rights of individuals on the one hand, and the objective of migration control on the other hand, is massive, particularly because this aspect of the proposal appears to apply regardless of nationality. Since most travellers are EU citizens who cannot be considered illegal migrants, it follows that the proposal is a gross breach of the proportionality principle even if it only applies to air carriers and/or only applies to flights which cross a border. The same even applies if the Directive applies only to flights leaving or entering the EU, since a huge proportion of passengers on those flights will still be EU citizens or other persons with the right to enter the EU or whose entry and presence has been or clearly would be authorized.

5. Also, application of this measure to EU citizens or their family members travelling within the EU could only be based on the 'legal base' of the provisions of free movement of persons in the EC Treaty, which entails completely different rules on decision-making. It is also arguable that the proposal would violate Article 49 EC by imposing massive, unnecessary and disproportionate restrictions on the freedom to provide and receive services within the EU, if it is applied to internal cross-border flights.

6. Although the UK government claims that this proposal is proportionate, it gives no indication of any analysis it has carried out to this effect. In fact, by comparison with the current UK law as set out in the government's memorandum, the proposal is clearly disproportionate as compared to what the UK government currently believes is a necessary obligation.

Obligations to send information on 'foreign nationals'

7. This obligation is clearly linked to the objectives of controlling illegal immigration. However, there is still a legal base problem in the absence of a definition of 'foreign nationals'. The usual definition of this term would include EU citizens from other Member States, who cannot be included within this proposal for the reasons set out above. Even if the term is restricted to third-country nationals, it is highly questionable whether it could be applied to the family members of EU citizens or to persons who have rights under agreements with the Community.

8. Moreover, as the UK government's memorandum points out, the suggestion is impractical as travelers frequently change their plans for legitimate reasons, and might easily still be entitled to a considerable period of stay in the country as their intended date of departure will often be well before the date when their authorized stay has expired. Therefore there is no direct link with the enforcement of immigration control.

9. For those reasons, the obligation should be rejected as an unnecessary and disproportionate obligation. It is again unfortunate that the UK government concluded without further examination that the proportionality principle was satisfied in this case.

Data protection principles

10. The proposal would violate Article 8 ECHR because, for the reasons set out above, the restrictions which it would impose on the use of information would affect private life and could not be justified by the public interest objectives set out in Article 8(2), due to manifest breach of the proportionality test set out in ECHR case law.

11. Moreover, the proposal contains no provisions on data protection for individuals or supervision by supervisory authorities, even by reference to the EC's data protection directive or the Council of Europe's Convention (or to the ECHR, for that matter). There need to be rules in particular banning further transmission of the data, especially to third States, in light of the safeguards required by the EC Directive and other international rules. There also need to be rules on blocking, correcting, deleting data and on the data subject's right of access, along with provisions on access to justice and remedies.

Further comments

12. It should also be observed that the drafting of this proposal is so inadequate that Article 2 does not make clear what breach of obligations the 'sanctions' are being imposed for. Is it for breach of either obligation in Article 1, or for only one of them, and if so, which? Could the sanctions instead or also apply to a breach of some other obligation?

13. The extent of these sanctions would also clearly violate the right to provide services within the EC if applied to cross-border movement within the internal market, given the clear breach of the obligation that restrictions on such rights must be necessary and proportionate (for the reasons set out above).

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(prepared by Steve Peers)