

Commission's EU biometric passport proposal exceeds the EC's powers

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The proposal to adopt a Regulation regarding security features in EU passports on the sole 'legal basis' of the EC's powers to regulate external border controls appears to exceed the EC's powers.

The starting point for this analysis is Article 18(3) EC, which provides expressly that the EC's powers to adopt legislation to facilitate the free movement rights of EU citizens:

'shall not apply to provisions on passports, identity cards, residence permits or any other such document...'

There is no other provision of the EC Treaty which gives express powers for the EC to adopt measures concerning such matters, and no precedent for the adoption of EC legislation harmonising any aspect of Member States' passports. Instead, there have been Resolutions of national ministers on this issue.

In its judgment on the validity of the 1998 Directive banning tobacco advertising, the Court of Justice considered a similar clause which specified that the EC's public health powers could not be used to harmonise national health laws, and stated that '[o]ther articles of the Treaty may not...be used as a legal basis in order to circumvent the express exclusion of harmonisation laid down in Article 129(4) of the Treaty' (para. 79 of the judgment in Case C-376/98, *Germany v EP and Council*). Ultimately the Court ruled that the Directive being challenged in that case was indeed invalid, as the EP and Council had wrongly used the 'legal base' giving the EC power to adopt internal market laws. It follows that the proposed legislation containing "provisions on passports" would equally exceed the EC's powers unless another "legal base" in the Treaty conferring powers on the EC were sufficient to confer powers to harmonise the security features of passports.

The Commission argues that the power to adopt measures on external border controls is sufficient. It is true that passports are checked at the EU Member States' external borders, but it is equally true that they are used within the territory of the Community to prove the nationality of persons who have crossed internal EC borders in order to exercise free movement rights conferred by EC law, and outside the territory of the Community to prove nationality to the authorities of non-Member States. On the first point, EC free movement legislation and case law expressly refers to the use of a passport or equivalent document as a

condition for exercising free movement rights (see in particular the 1999 judgment of the Court of Justice in Case C-378/97 *Wijzenbeek*, and Arts. 2 and 3 of each of Directives 68/380 and 73/148). On the second point, the Commission expressly admits that one of the reasons for its proposal is the change in US policy regarding passports, and it is clear that one of the main purposes of the proposal is to ensure that US authorities are more willing to accept passports issued by the EU Member States. Furthermore, passports are also frequently used in practice or legally required to be used as proof of identification in various contexts even inside the territory of a single Member State. In each of these contexts, the security features of the passport may be significant; in fact the Commission admits that the security features of Member States' passports are a particularly important issue for the US government.

It follows that as crossing external borders is only one of four contexts where the security features of passports are an essential issue, the proposed Regulation cannot be based on the EC's external borders powers alone. In fact, given the express exclusion of EC powers to regulate the free movement aspects of passports, and the absence of any powers in the EC Treaty for the EC to regulate any aspect of EU citizens' crossings of borders of non-EU countries or the use of passports within a single Member State for identity purposes, it can be concluded that no powers conferred upon the EC by the EC Treaty, taken separately or together, confer upon the EC the power to adopt the proposed Regulation.

This analysis applies also to the adoption of the anticipated proposal for legislation establishing a 'European Passport Register' which the Commission refers to in its explanatory memorandum. Such a measure would obviously be a 'provision on passports' and furthermore would also concern 'any other such document' if it applied instead or additionally to other travel documents, as the Commission further suggests. So it would equally exceed the EC's powers, for the reasons discussed above, although it might be arguable that the register could be adopted pursuant to the EC's external borders powers if it was confined to the exclusive use of the Member States' external border authorities. In any event, since it would be impossible to confine the use of the security features of passports exclusively to the Member States' external border authorities, this argument could not be used to justify the legality of the present proposal for a Regulation.

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Documentation

1. **Proposal for a Council Regulation on standards for security features and biometrics in EU citizens' passports** (pdf)
2. **The road to "1984" Part 2: EU: Proposal for biometrics on all citizens' passports: [Report](#)**

3. EU: Security research programme to look at creating "smart" biometric documents which will "locate, identify and follow the movement of persons" through "automatic chips with positioning": **Report and documentation**

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