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European Union Committee

5th Report of Session 2003-04

**Fighting illegal
immigration: should
carriers carry the
burden?**

Report with Evidence

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ABSTRACT

The proposal to require carriers to transmit passenger data to immigration authorities in advance of travel has not been thought through properly and should not be approved in its present form. It is open to substantial objections.

- Its effectiveness as a tool to combat organised crime or national security threats has not been substantiated.
- The duties it would impose on carriers are disproportionate to the aim of combating illegal immigration.
- It would cause serious delays to passengers and require substantial expenditure by carriers.
- It is unacceptable that no estimate of costs has been made.
- It makes no provision for remedies for passengers wrongly denied boarding.

Requiring carriers to notify immigration authorities of the non-use of return tickets is also excessive, and likely to be ineffective.

Fighting illegal immigration: should carriers carry the burden?

CHAPTER 1: INTRODUCTION

1. Requirements for airlines and other carriers to assist national authorities to combat illegal immigration are nothing new. In the United Kingdom sanctions on carriers for transporting passengers without the required documents are well-established, as are arrangements for them to share passenger data with Customs and Excise.¹ At the European Union (EU) level a Directive adopted in 2001 obliges Member States to penalise carriers for transporting illegal immigrants.²
2. The current proposal, which was tabled by the Spanish Government in March 2003, goes considerably further than that. It would require carriers to co-operate with Member States' border control and immigration authorities by transmitting to them information on their passengers in advance of travel. When the Committee first examined the proposal in July 2003, we recognised that it would have considerable implications for both carriers and passengers and invited comments from both carriers' associations and a number of non-governmental organisations (NGOs).³ A list of those who submitted written evidence is at Appendix 3. The Committee also took oral evidence from Ms Caroline Flint MP, Parliamentary Under-Secretary of State, Home Office, on 3 December 2003. The Committee's correspondence with the Minister is reproduced in Appendix 4. We are very grateful to all those who responded so helpfully to our invitation to submit evidence.
3. The proposal contains two main elements. First, it would require Member States to establish an obligation on air and sea carriers to transmit passenger data to border control authorities at their request, in advance of departure. According to the latest draft,⁴ the data to be transmitted would comprise:
 - the number and type of travel document used
 - nationality
 - full names
 - date of birth
 - the border crossing point of entry into the territory of the Member States
 - code of transport
 - departure and arrival time

¹ In accordance with Directions made by the Commissioners of Customs and Excise under sections 35 (1) and 64 (2) (b) of the Customs and Excise Management Act 1979.

² Official Journal L 187, 10 July 2001, page 45.

³ The inquiry was undertaken by Sub-Committee F of the Select Committee on the European Union, whose membership is shown at Appendix 1. The letter inviting the submission of written evidence is reproduced at Appendix 2.

⁴ Council document 5183/04, 9 January 2004. That version does not reproduce the Preamble, which is contained in the previous version, document 15165/03, 24 November 2003.

- total number of passengers carried
 - initial point of embarkation
4. Secondly, the Directive would give Member States discretion to require carriers to transmit to immigration authorities data on passengers who have not used their return tickets. Such a request would have to be based on a national risk assessment and transmitted to the carrier within 24 hours of the end of boarding. The data required would comprise the passengers' full names, the border crossing point of exit, the code of transport and the date and departure time.
 5. The obligation on carriers to transmit passenger data in advance of departure is not a new concept in United Kingdom law, where similar "Authority to carry" schemes are already in place (although they have not yet been brought into effect). Section 18 of the Immigration and Asylum Act 1999 and the Immigration (Passenger Information) Order 2000 place a requirement on carriers to provide advance passenger information (API) on request. The Immigration Service has undertaken that only data contained in the machine-readable zone of a travel document will be requested.⁵ An exception was introduced by Schedule 7 to the Terrorism Act 2000 (Information) Order 2000. This implements the provisions of the Terrorism Act 2000 relating to advance passenger information and allows for the transmission of other data, such as place of birth, which are currently not machine-readable.
 6. The United States authorities have introduced stringent checks on passengers travelling to the United States, which have recently led to long delays and the cancellation of some flights. We have taken account of these developments—and we discuss them later in this report—but it needs to be borne in mind that the American arrangements were introduced for security reasons as a result of continuing concerns following the events of 11 September 2001, whereas the proposal that is the subject of this report is intended primarily to counter illegal immigration.

⁵ The main data contained in the machine-readable zone comprise full names, sex, date of birth, nationality, issuing State, passport number, and date of expiry.

CHAPTER 2: ANALYSIS OF THE PROPOSAL

7. In our examination of the proposal we have focused on:
- the justification for the proposal
 - whether it would achieve its objective
 - whether its perceived benefits are proportionate to the obligations and costs imposed on passengers and carriers
 - the practical implications for international travel
 - the challenges it may pose to the protection of personal data.

The justification for the proposal

8. The Preamble to the draft Directive justifies its adoption as necessary to combat illegal immigration. However, as the Immigration Law Practitioners' Association (ILPA) noted, the draft contains no explanatory memorandum setting out the background, history and justification for the proposal. Consequently it is unclear what it is expected to achieve, and ILPA was doubtful whether the measures envisaged would effectively combat illegal immigration.⁶ In her evidence to the Committee, the Minister argued that the proposal “is all about border control, whether it is illegal immigration or criminals coming in, or people who are a threat to national security”.⁷ More specifically, the Home Office maintains that the proposal will:
- enable passengers who are deemed to pose known immigration and security threats to be identified before they travel,
 - assist in establishing the identity of passengers who subsequently arrive undocumented, having destroyed their travel document en route—this will be facilitated by developments in biometric technology, and
 - help to identify passengers who are travelling with lost or stolen documents.⁸
9. However, no concrete examples of how the proposal will help in the fight against organised crime and national security threats have been given. Moreover, the Government themselves evidently regard the proposal as primarily an immigration measure, since they see it as building on the carriers' liability rather than the policing provisions in the Schengen Convention. **The effectiveness of the proposal as a tool to combat organised crime or threats to national security has not been substantiated.**
10. In justifying the proposal as a measure to combat illegal immigration, the Home Office evidence focused primarily on the need to identify passengers who have destroyed their travel documents during the flight. It is doubtful, however, whether the transmission of passenger data prior to boarding will assist the identification of such passengers. If they arrive without documents, it will be difficult to identify the flight on which they travelled and so

⁶ p 23.

⁷ Q 44.

⁸ Home Office supplementary memorandum, p 12.

establish a link with the information provided at check-in.⁹ It is also doubtful whether the proposal would help to detect passengers travelling with false documents, since it seems unlikely that such people would choose to travel in the identity of someone already on the list of inadmissible passengers. **In our view an adequate case for the need for the proposal has not been made.**

Effectiveness of the proposal

11. The main purpose of the proposal would seem to be to give immigration authorities advance notification of passengers who are likely to be inadmissible. It would not be fully effective for this purpose, however, unless it enabled inadmissible passengers to be denied boarding. It is not entirely clear from the text whether this is the intention, but the Government are strongly advocating such an approach. It would require a direct link to a database of inadmissible passengers, such as the Schengen Information System or the UK Warnings Index, with an instantaneous automated 24 hour response facility, so that the carrier could be informed before the check-in procedure was completed if a person was to be denied boarding.

Proportionality

12. The Directive would place carriers under a duty to transmit information on all their passengers in advance of departure, if requested to do so. Statewatch argued that this was disproportionate to the aims pursued, noting that “the imbalance between the obligations imposed upon passengers and the invasion of the privacy rights of the 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 of the passengers affected are EU citizens, who cannot be considered illegal immigrants”.¹⁰ The Minister, however, maintained that it was necessary to collect information on all passengers, both because EU identity documents were those most often abused in terms of identity theft and fraud, and in order to simplify the check-in process.¹¹ **We do not see how the proposal would help to counter identity theft or document forgery and conclude that in its present form the requirement that would be imposed on carriers is disproportionate to its objective.**
13. Another aspect of the proposal that raises proportionality concerns is the wide range of journeys to which the Directive could apply. According to Article 3(1) carriers are under a duty to transmit data at the request of border authorities on “the passengers they will carry to an authorised border crossing point through which these persons will enter Member States’ territory”. It is not clear from this wording whether the Directive would apply to journeys between the United Kingdom and Schengen Member States, between acceding countries and existing Member States, and even to intra-Schengen journeys, where there are currently no border controls.¹² It is

⁹ This may change when biometric data is routinely included in passports, but that is unlikely to be available for some time.

¹⁰ p 27.

¹¹ Q 22.

¹² Statewatch, p 28.

also unclear whether it would apply to transit passengers.¹³ The Government would prefer the Directive to apply to all journeys between EU Member States, even intra-Schengen journeys.¹⁴ But this would have massive implications for travel in Europe and would affect millions of passengers. In the United Kingdom alone, in 2002 the number of international air passengers (a great proportion of whom would have travelled to or from other EU countries) was 146.6 million.¹⁵ **We believe that the application of the Directive to the borderless Schengen area would be disproportionate to its objective. It would in effect re-introduce border checks through the back door. It would also run counter to the main thrust of EU border control policy in recent years, which has concentrated effort on strengthening the external borders of the Union.**

14. Finally under this heading, the imposition on carriers (at the discretion of Member States) of a duty to transmit information to immigration authorities on whether third country nationals have used their return tickets gives rise to substantial proportionality as well as practical concerns.¹⁶ This provision was heavily criticised by both carriers and NGOs. British Airways argued that it would require a “new, complex and expensive system linking all carriers’ information” and even this would be of limited use “because of the complex practices associated with airline ticketing procedures and passenger behaviour”.¹⁷ As ILPA tellingly observed, the proposal

“ignores the fact that airline pricing policy means that two return tickets are often cheaper than one where a requisite Saturday night stay is not included, thus the airline world is awash in return tickets where no one ever plans to use the return portion and usually has left the territory on another return ticket before the first return ticket has fallen due”.¹⁸

15. Although the Government’s Explanatory Memorandum of 5 November 2003 explicitly stated that the Government did not believe that this requirement would add value, the Minister did not exclude the use of such data on a “proportionate and need-to-know basis”.¹⁹ But no evidence has been given on how this would work in practice. Carriers would be obliged to collect considerable amounts of personal data (which, according to Britannia and the Chamber of Shipping, have no commercial benefits for them) for long periods of time.²⁰ It would be particularly inappropriate for the United Kingdom to require this information when the Government have themselves discontinued embarkation checks on departing passengers. **We believe that the imposition on carriers of a duty to transmit information on the**

¹³ In giving evidence to the Committee on the Irish Presidency’s programme the Irish Ambassador said that this was one of the issues that remained unresolved in negotiations in Brussels (*Evidence by the Ambassador of Ireland on the Irish Presidency: 2003-04 3rd Report HL Paper 26, Q 25*). In a recent compromise proposal (Council document 5183/04) the Irish Presidency has suggested excluding from the Directive a provision requiring details of transit arrangements to be provided.

¹⁴ QQ 25-27.

¹⁵ The Future of Air Transport, Department of Transport, Cm 6046, December 2003, p.152.

¹⁶ Article 3(4).

¹⁷ p 19.

¹⁸ p 23.

¹⁹ Q 20.

²⁰ pp 16, 20.

use of return tickets by third country nationals is disproportionate and impractical. Leaving Member States discretion on whether to implement this aspect of the proposal would be likely to lead to substantial differences between Member States and considerable confusion for both carriers as to their duties and passengers as to their rights. The provision should be deleted.

Implications for carriers

Technology

16. The draft Directive originally applied only to air carriers. Not surprisingly, this provoked a strong reaction from airlines, which saw it as discrimination against them *vis à vis* other types of carriers.²¹ The latest draft applies to sea as well as air carriers (but not land carriers). As the airlines have noted, the Directive would require the installation of passport machine readers at every check-in desk at every airport from which flights come to EU destinations, and the electronic transmission of data would require a technological infrastructure that many EU airports currently do not possess.²² Moreover, there is, as the Government acknowledge, a major gap in the technological capacity necessary to implement the Directive between airlines on the one hand and sea (and land) carriers on the other.²³ The other carriers would have to do even more to put in place the necessary technological infrastructure.

Check-in times

17. The transmission of passenger data “in advance of departure” would increase the time taken for boarding. It is not clear at exactly which point before departure the data would be transmitted. The Government are in favour of transmission at check-in (in line with the domestic Advance Passenger Information regime). The Minister claimed that the Government were looking at a response time of no more than six seconds per passenger (although this appears to be a medium to long-term aim).²⁴ Carriers on the other hand believe that the whole process would take considerably longer. British Airways estimate that data collection would increase each check-in transaction time by 40 seconds.²⁵ Britannia’s estimate is at least a minute, which they say would extend the check-in time from two to five hours per flight. This would reduce the capacity of the terminal for passengers, increase the length of time the aircraft was on the ground, and consequently reduce the number of slots that could be issued by airports.²⁶ The delays in the organisation of journeys would have considerable cost implications for carriers,²⁷ and, as British Airways noted, “there is nothing in the proposal that refers to passenger facilitation benefits”.²⁸ **A proper assessment of the**

²¹ British Airways p 18, BAR UK p 15.

²² BATA p 16, Britannia p 16.

²³ Q 19.

²⁴ Q 16, p 12.

²⁵ p 18.

²⁶ p 17.

²⁷ Britannia p 17, Chamber of Shipping p 21.

²⁸ p 18.

implications for carriers, passengers and airport authorities of the increase in check-in times that would result from the implementation of the Directive is essential.

Costs

18. As Britannia have pointed out, no Regulatory Impact Assessment of the proposal has been produced.²⁹ Indeed, neither the Spanish Government nor the Home Office has produced any estimate of the costs of this proposal. We find it astonishing that serious consideration could be given to such a far-reaching measure without a rigorous examination of all the direct and indirect costs to weigh against the benefits claimed for it. **The financial implications of the proposal should be fully assessed. There should be no question of adopting the Directive in advance of submission of a detailed Regulatory Impact Assessment.**

The shifting of responsibility for immigration control

19. Another issue that has arisen from the evidence is whether the proposal would transfer immigration control functions from the State to carriers. Both ILPA and carriers have argued that this would be the case. The British Air Transport Association said that carriers would be placed “in the totally unacceptable position of being informers”;³⁰ and the Board of Airline Representatives in the UK that “Our members are in the business of transporting passengers, not operating border controls”.³¹
20. The Government do not share this view. In her letter of 9 October,³² the Minister noted that the decision to grant or refuse entry would remain with the control authority: carriers would not be required, or expected, to assess a passenger’s admissibility for entry—rather, their role would be to provide specified information about passengers on board their services to support the function of the control authorities. In her oral evidence to the Committee, Ms Flint said, “we do not want carriers to be involved in making judgments; we just want the information we need, and we want the control authorities to make the judgment”.³³
21. It is the carriers, however, who would have to transmit the data and subsequently enforce the immigration authorities’ decision by denying boarding to passengers identified as inadmissible. This could cause major difficulties in cases where passengers had been wrongly identified as inadmissible. As explained below, carriers would face severe penalties if they did not transmit information to the authorities. On the other hand, under an EC Regulation which was adopted by the Council on 26 January 2004,³⁴ carriers are obliged to compensate passengers in the event of their being denied boarding, except where there are reasonable grounds for doing so. It

²⁹ p 17.

³⁰ p 16.

³¹ p 15.

³² Appendix 4, p 21 *et seq.*

³³ Q 7.

³⁴ Regulation of the European Parliament and of the Council establishing common rules on compensation and assistance to air passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91.

remains to be seen whether a wrong decision of an immigration authority is deemed to be such an exception.

Sanctions

22. The Directive would impose sanctions on carriers who “as a result of fault” have not transmitted data or have transmitted incomplete or false data. The insertion of the fault requirement as a condition for the imposition of sanctions is welcome, to the extent that it avoids the automatic imposition of penalties without an examination of the particular circumstances of each case. Also welcome is Article 5, which calls on Member States to ensure effective rights of defence and appeal for the carriers involved.
23. However these safeguards may be of limited value if the penalties to be imposed are high and inflexible. At present Article 4(1), in calling for “dissuasive, effective and proportionate” sanctions, contains three alternative penalty options. The first provides for a maximum penalty of no less than €5000 per journey, and the second a minimum penalty limit of €3000 per journey. The Government would prefer to calculate these fines per passenger rather than per journey.³⁵ This has not been accepted by other Member States, but instead a third option has been added providing for a maximum lump sum penalty not less than €500,000. This may avoid the inflexibility of the €3000 minimum penalty, which, following the Court of Appeal ruling in *Roth*,³⁶ would seem to be contrary to the ECHR fair trial principles. However, the lump sum option, which is not limited to each journey but refers to an “infringement”, could open the door to the imposition of draconian penalties for non-compliance. **We do not favour a minimum penalty because of its inflexibility. It would also be more appropriate to relate the sanction to the journey rather than to the passenger.** The situation envisaged is different from the carriers’ liability regime, where the sanction is imposed for failing to ensure that a passenger was in possession of the correct documents. Here what is at issue is an administrative failure to transmit standard information.
24. Similar concerns are raised by Article 4(2), which enables Member States, at their discretion, in cases of very serious infringements to impose other sanctions, such as the seizure and confiscation of the means of transport. We were pleased to note that the Government consider such sanctions to be disproportionate. As with the three options in Article 4(1), far from achieving a harmonised regime, the discretion left to Member States would be likely to lead to substantial differences in implementation. **We recommend that Article 4(2), which provides for additional sanctions for very serious infringements, be deleted.**

Remedies for passengers denied boarding

25. ILPA has criticised the Directive on the ground that it creates a grey area in which there are no remedies for the individual affected either against the State or against the carrier.³⁷ As we have already pointed out,³⁸ the extent to

³⁵ Q 50.

³⁶ *International Transport Roth GmbH v Secretary of State for the Home Department*, [2002] 3 WLR 344 (CA).

³⁷ p 24.

³⁸ In paragraph 21.

which passengers will have a claim against carriers under the new EC Regulation for being denied boarding as a result of the transmission of data under this Directive is uncertain. As far as State authorities are concerned, the Minister told the Committee that passengers would have access to a 24-hour staff telephone number.³⁹ This is a minimal safeguard of questionable value. It is most unlikely that the staff manning the service would be in a position to give detailed reasons for the decision or to countermand it in the event of, for example, mistaken identity, in time for the passenger to travel. There is a need for effective redress against the immigration authorities and provision for compensation, where boarding has been denied unjustifiably. Unlike in the case of carriers, **the Directive contains no provision for remedies for aggrieved passengers. This is unacceptable.**

Data protection

26. The Directive contains separate data protection provisions for each of the two categories of transmitted data. Passenger data transmitted prior to departure may be communicated only to border control authorities and for the sole purpose of facilitating the performance of border checks. The authorities are required to delete the data after the passengers have entered the country. The carrier is required to delete them within 24 hours of the arrival of the flight (or sea transport) at the latest. Member States must ensure that carriers comply with this obligation.
27. Data on the use of return tickets must be transmitted to the immigration authorities for the sole purpose of combating illegal immigration. The authorities are required to delete the data within 24 hours of transmission, unless they are needed for criminal prosecution or “execution of measures to end illegal presence in the territory”. The carrier is required to delete the data immediately after transmission. As with the advance passenger data, Member States are required to ensure that carriers fulfil their obligation in this respect. **The safeguards on the transmission of passenger data are largely compatible with the data protection principles in domestic and international legislation, including on length of retention, but may fail the proportionality test (“data must not be excessive in relation to the purpose for which they are processed”).**
28. The Government believe that the Directive complies fully with domestic and international data protection standards.⁴⁰ They are against retention limits and in favour of data sharing between various agencies. This is linked with the Government’s focus on creating risk profiles on individuals.⁴¹ It also goes hand in hand with the Government’s attempt to justify the Directive as an “organised crime/national security” measure, which could justify broader exemptions from data protection principles. But, as we have already noted,⁴² we have received no evidence to support the view that the Directive is necessary to combat organised crime and threats to national security.
29. The Information Commissioner stressed the obligation on carriers which are subject to EU data protection law to ensure that passengers are aware of whom their data are passed to and why, and to ensure that arrangements for

³⁹ Q 17.

⁴⁰ QQ 39, 44.

⁴¹ Q 13.

⁴² In paragraph 9.

transmission are secure.⁴³ The Commissioner noted, however, that not all carriers would necessarily be subject to EU data protection law and suggested that, where they were not, the Directive should impose the relevant EU data protection obligations on them.⁴⁴ As the Minister recognised in her evidence, this is a tricky area as it raises the question of how far the EU could or should go to impose its data protection standards on third countries.⁴⁵ It would be unusual to seek to impose EU standards on third countries, and it is doubtful whether they could be enforced outside the EU.

United States requirements

30. We have taken account of the fact that the United States Government are currently seeking to impose requirements on airlines flying to the United States analogous to but even more stringent than those in this proposal. The US Aviation and Transportation Security Act 2001 requires airlines operating passenger flights to, from or through the United States to provide the US Customs and Border Protection Bureau with electronic access to passenger data contained in their reservation and departure control systems (these are called the “Passenger Name Record” (PNR) data). Non-compliant airlines will be liable to penalties consisting of fines of up to \$6,000 per passenger and loss of landing rights.
31. In the opinion of the EU Data Protection Working Party,⁴⁶ EU airlines complying with these requirements would be in breach of EU data protection legislation.⁴⁷ The Commission has been conducting negotiations with the United States authorities in order to reach a solution to this problem. An agreement was reached on 16 December 2003, according to which, following the provision of a number of safeguards by the United States authorities, the Commission accepted the United States data protection standards as “adequate”. A Decision confirming this agreement is due to be adopted in the next few months, together with an international agreement between the EC and the United States.⁴⁸
32. Notwithstanding some progress made in the negotiations, EU carriers are thus under a duty to submit no fewer than 34 categories of data to the US authorities. Significantly, the Data Protection Working Party commented that “the transfers of such data to the US are in any case illegal and nothing should be done to blur this fact”.⁴⁹ The danger of disregarding the EU data protection standards is clear.

⁴³ p 26.

⁴⁴ p 26.

⁴⁵ QQ 45-48.

⁴⁶ The Working Party, which is composed of the Information Commissioners of Member States, was set up under the Data Protection Directive to monitor its application and the level of data protection in third countries.

⁴⁷ Opinion 4/2003 on the level of protection ensured in the US for the Transfer of Passengers’ Data, doc. 11070/03/EN WP 78. *Record (PNR) Data: A Global EU Approach*, COM (2003) 826 final, Brussels, 16 December 2003.

⁴⁷ Ibid.

⁴⁸ Communication from the Commission to the Council and the Parliament, *Transfer of Air Passenger Name Record (PNR) Data: A Global EU Approach*, COM (2003) 826 final, Brussels, 16 December 2003.

⁴⁹ Ibid.

33. The practical difficulties caused by arrangements of the kind introduced by the United States have been vividly demonstrated by recent delays to BA flights to Washington. The Chief Executive of British Airways, Mr Roy Eddington, is reported to have attributed the delays to the fact that a total of 22 different agencies in the United States claimed a reason to check one passenger list.⁵⁰
34. Justifying the agreement, the Commission called for a “global” EU approach and the creation of a multilateral framework for passenger data transfer within the International Civil Aviation Organisation (ICAO). The value of a multilateral approach is indubitable, provided that existing safeguards are not eroded and standards are not lowered. **The Committee expects to be provided with ample time to scrutinise fully any EC/EU Decision or international agreement in the field of advance passenger information.**

UK participation

35. This is one of several recent EU proposals in the Justice and Home Affairs field where there is some uncertainty about the United Kingdom’s participation. The recitals determining UK participation have not yet been finalised, so it is unclear whether the Schengen Protocol to the Amsterdam Treaty (which excludes United Kingdom participation in border issues) or its Title IV Protocol (which gives the United Kingdom the option to opt into immigration and asylum measures on a case by case basis) will apply. The Government are keen to take a full part in the proposal and argue that it is a measure similar to the 2001 Carriers Liability Directive, which the United Kingdom has opted into. Although the Government have in the past expressed the view that the proposal has “serious and fundamental flaws” they now unreservedly support it in principle. Given the deeply flawed nature of the proposal, we would in other circumstances recommend that the Government exercise their right not to opt into it. The nature of the proposal is such, however, that United Kingdom airlines and passengers will be affected by it even if the Government choose not to opt into it. **We believe that, in view of the wide-ranging implications of the proposal, it would be better for the Government to participate fully in the negotiations in order to seek to remove some of the more objectionable features, if it is not possible to secure its withdrawal altogether.**

⁵⁰ Financial Times, 13 January 2004.

CHAPTER 3: CONCLUSIONS AND RECOMMENDATIONS

36. The effectiveness of the proposal as a tool to combat organised crime or threats to national security has not been substantiated (*paragraph 9*).
37. An adequate case for the need for the proposal has not been made (*paragraph 10*).
38. We do not see how the proposal would help to counter identity theft or document forgery and conclude that in its present form the requirement that would be imposed on carriers is disproportionate to its objective (*paragraph 12*).
39. The application of the Directive to the borderless Schengen area would be disproportionate to its objective. It would in effect re-introduce border checks through the back door. It would also run counter to the main thrust of EU border control policy in recent years, which has concentrated effort on strengthening the external borders of the Union (*paragraph 13*).
40. The imposition on carriers of a duty to transmit information on the use of return tickets by third country nationals is disproportionate and impractical. Leaving Member States discretion on whether to implement this aspect of the proposal would be likely to lead to substantial differences between Member States and considerable confusion for both carriers as to their duties and passengers as to their rights. The provision should be deleted (*paragraph 15*).
41. A proper assessment of the implications for carriers, passengers and airport authorities of the increase in check-in times that would result from the implementation of the Directive is essential (*paragraph 17*).
42. The financial implications of the proposal should be fully assessed. There should be no question of adopting the Directive in advance of submission of a detailed Regulatory Impact Assessment (*paragraph 18*).
43. We do not favour a minimum penalty because of its inflexibility. It would also be more appropriate to relate the sanction to the journey rather than to the passenger (*paragraph 23*).
44. We recommend that Article 4(2), which provides for additional sanctions for very serious infringements, be deleted (*paragraph 24*).
45. The Directive contains no provision for remedies for aggrieved passengers. This is unacceptable (*paragraph 25*).
46. The safeguards on the transmission of passenger data are largely compatible with the data protection principles in domestic and international legislation, including on length of retention, but may fail the proportionality test (“data must not be excessive in relation to the purpose for which they are processed”) (*paragraph 27*).
47. The Committee expects to be provided with ample time to scrutinise fully any EC/EU Decision or international agreement in the field of advance passenger information (*paragraph 34*).
48. In view of the wide-ranging implications of the proposal, it would be better for the Government to participate fully in the negotiations in order to seek to remove some of the more objectionable features, if it is not possible to secure its withdrawal altogether (*paragraph 35*).

49. Overall the proposal has not been thought through properly and should not be approved in its present form.

Recommendation to the House

50. The proposal on advance passenger information has important implications for carriers, passengers and border control authorities, and we therefore recommend this report for debate.

APPENDIX 1: SUB-COMMITTEE F (HOME AFFAIRS)*

Sub-Committee F

The members of the Sub-Committee which conducted this inquiry were:

- Lord Avebury
- † Earl of Caithness
- Lord Corbett of Castle Vale
- Lord Dubs
- Baroness Gibson of Market Rasen
- ‡ Baroness Greengross
- ‡ Lord Griffiths of Fforestfach
- Baroness Harris of Richmond (Chairman)
- ‡ Lord King of West Bromwich
- ‡ Baroness Knight of Collingtree
- § Earl of Listowel
- ‡ Baroness Stern
- § Viscount Ullswater
- Lord Wright of Richmond

* Since 9 December 2003 (Formerly Sub-Committee F (Social Affairs, Education and Home Affairs)).

† Since 16 December 2003

‡ Until 9 December 2003

§ Since 9 December 2003

APPENDIX 2: CALL FOR EVIDENCE

Letter sent to organisations representing air and sea operators (a similar letter was sent to a number of non-governmental organisations)

Proposal for a Council Directive on the obligation of carriers to communicate passenger information (Council document 7161/03)

Sub-Committee F (Social Affairs, Education and Home Affairs) of the Select Committee on the European Union is currently examining this draft directive under the arrangements for parliamentary scrutiny of European Union legislation. I attach a copy of it together with the Government's Explanatory memorandum.

The proposal would impose an obligation on carriers to transmit to the authorities responsible for carrying out border checks information on:

- the identity of their passengers at the time of boarding; and
- the identity of foreign nationals who have not made their return journey on the date stipulated on their ticket.

Under Article 1 of the draft directive the information required would include the number of the passport or travel document used, nationality, first and family name(s) and the date and place of birth. Under Article 2 carriers who did not comply with the requirement would be subject to sanctions including fines of not less than 3000 Euros for each journey for which passenger data was not communicated or were communicated incorrectly. Sanctions might also include the confiscation of the means of transport or the suspension/withdrawal of the operating licence.

This is a far-reaching proposal, which would have considerable implications for both carriers and passengers. It would impose a wide-ranging obligation on carriers to routinely report their passengers' personal data to the authorities, which also raises significant data protection concerns.

In examining the proposal the Sub-Committee would find it very helpful to have the views of the carriers themselves, and I would therefore be grateful for any comments you may have. It would be helpful to receive comments by Friday 5 September.

17 July 2003

APPENDIX 3: LIST OF WITNESSES

The following witnesses submitted evidence. The Home Office gave oral evidence.

Board of Airline Representatives in the UK (BARUK)

British Air Transport Association

Britannia Airways

British Airways

Chamber of Shipping

Home Office

Immigration Law Practitioners' Association (ILPA)

Information Commissioner

Statewatch

APPENDIX 4: CORRESPONDENCE BETWEEN THE CHAIRMAN OF THE EUROPEAN UNION COMMITTEE AND THE HOME OFFICE MINISTER

Letter from Lord Grenfell, Chairman of the Committee to Caroline Flint MP, Parliamentary Under Secretary of State, Home Office

Sub-Committee F (Social Affairs, Education and Home Affairs) of the Select Committee on the European Union examined this draft directive on 16 July.

This is a far-reaching proposal, which would have considerable implications for both carriers and passengers. It would impose a wide-ranging obligation on carriers to routinely report their passengers' personal data to the authorities – data which includes the name, passport number and date and place of birth of all passengers. The proposal does not define “carriers”, so presumably it applies to all modes of transport. As currently drafted, it would seem to apply to all journeys (even domestic ones). The proposal thus establishes a generalised mechanism for collection of everyday data.

We note that information regarding the non-use of the return ticket will be transmitted only regarding “foreign” nationals. The meaning of “foreign” is not clear. Would this include any third country national in relation to the country where the border controls are operated? Would EU nationals be excluded from the scope of Article 1(b)?

The proposal raises considerable data protection concerns. There is, regrettably, no reference to standards set out in the 1981 Council of Europe Convention on data protection, the EU data protection Directive or the Charter of Fundamental Rights.

From the carriers' point of view, the proposal may be unduly intrusive. It would place an additional obligation on the private sector, (which is already subject to the carriers' liability Directive) to assume police/immigration control duties. As demonstrated by the *Roth* case, the proportionality of existing carriers' sanctions is debatable.

Finally, as you note in your Explanatory Memorandum, parts of the proposal are likely to be ineffective. It is not clear, however, what the Government's view is with regard to the establishment of a generalised mandatory reporting system as envisaged by Article 1(a).

We would welcome your comments on these points. It would also be helpful to know what passenger information from ships' and airline manifests is already routinely provided to Customs and Excise and to the Immigration Service. In view of its far-reaching implications, the Committee also decided to consult carriers' associations and NGOs on the proposal, since it appears that the Government has not done so. In the meantime we will retain the document under scrutiny.

16 July 2003

Letter from Caroline Flint MP, Parliamentary Under Secretary of State, Home Office to Lord Grenfell, Chairman of the Committee

I am writing further to your letter of 16 July on the proposal for a Council Directive on the obligation of carriers to communicate passenger information in which you raise a number of points about this document on behalf of your Committee.

The Government recognises that the proposal has considerable implications and while the UK has been generally supportive of the Spanish initiative in principle, we are aware that carriers will be concerned about the routine supply of information, which the proposal appears to support, and the requirement for certain data to be supplied.

The Government recognises that the current text of the draft Directive implies that the proposal is intended to refer only to airlines, and the UK delegation will be seeking to clarify the intended scope of the Directive during discussions on a revised text. The Committee may also wish to know that the UK's own passenger information legislation applies in respect of all carriers (air, sea and rail).

The Government believes that the Directive is intended to apply to any third Country national in relation to the country where border controls are operated. EU nationals would appear to be excluded from the scope of Article 1 (b), but again we will seek to clarify this during discussions at the Frontiers Working Group.

The Government notes your comments regarding data protection concerns and again will seek to clarify the situation regarding the draft directive on the issue of data protection and the invasion of privacy of individuals during discussions at the Frontiers Working Group. On a related point, the Government is confident that the UK's own powers as regards the provision of passenger information are fully compliant with the relevant principles of the Data Protection Act 1988.

The Directive requires that carriers advise Member States of those foreign nationals who have not returned to their country of origin or continued their journey to a third country. In this respect, it imposes a mandatory requirement, which differs from current UK immigration legislation, which requires carriers to provide certain specified data on passengers arriving in or departing from the UK, but only when requested to do so. It is therefore not anticipated that carriers operating into the UK will be tasked with checking specifically for departure for those passengers they carry to the UK.

The UK supports in general the approach taken on sanctions by the draft Directive. Reliability of passenger information is key to pre-screening and the Directive provides carriers with an incentive to provide accurate and complete information. However, the sanctions proposed by the Directive may be disproportionate to the offence.

You also asked about passenger information from ships and airline manifests, that is routinely provided to HMCE and the Immigration Service. The Immigration Service's powers to require passenger information are provided by Paragraphs 27(2) and 27(B) (as inserted by section 18 of the Immigration and Asylum Act 1999) of the Schedule 2 to the Immigration Act 1971. Under paragraph 27(2) an immigration officer may require the captain of a ship or aircraft to provide the names and nationalities of arriving passengers. To date the majority of requests for passenger information have been made under this

paragraph; These powers were extended by section 18 of the Immigration and Asylum Act 1999 to allow an immigration officer to require a carrier to provide specified information on ships and aircraft which have arrived, or are expected to arrive, or which have left or are expected to leave the United Kingdom. (Under the Channel Tunnel (International Arrangements) (Amendment) Order 2000), this power is extended to through trains and shuttle trains travelling through the tunnel). The Immigration (Passenger Information) Order 2000 specifies the information which may be requested. The Order is divided into two parts. Part 1 specifies detail; relating to a passenger as given or shown by the passenger's passport or other travel document. This is commonly referred to as Advance Passenger Information (API). Part 2 specifies passenger data, which may be held in a carrier's reservation system and includes information on ticketing and routing. This information is commonly referred to as Passenger Name Record (PNR) information. The composition of the Order reflects legal advice to the effect that the Immigration Service had to demonstrate a justifiable need for each individual element to ensure compliance with the relevant privacy legislation.

Since the introduction of the new legislation, implementation has been on a limited basis and restricted to pilot exercises trailing new powers. This approach recognises the challenges faced by carriers in meeting their obligations. Carriers do not currently collect advanced passenger information on a routine basis and there is no existing infrastructure to facilitate collection and provision of such information to the UK Immigration Service. Consequently, use of the Order has been largely limited to those circumstances where particular services have been identified as suitable for flexible clearance.

The Nationality, Immigration and Asylum Act 2002 contained provisions for an Authority to Carry scheme. Under this scheme carriers will be required to submit passenger bio-data, consistent with Part 1 of the Passenger Information Order, for a check against Home Office databases at the time of check-in. Depending on the outcome of the check, carriers will be advised whether they have authority to carry the passenger or whether the passenger should be referred to the immigration Service for further advice. A business case for this scheme is currently being developed as part of the e-borders programme. In view of the extent and complexity of the IT infrastructure required, it is envisaged that implementation will be on a phased incremental basis, with the ultimate aspiration being blanket coverage of all services operating into the UK based on routine provision of advanced passenger information. Laying of regulations will be necessary before the scheme may be implemented. The legislation provides for these to operate in a way similar to the current carriers' liability legislation and provides for the penalty for non-compliance.

At present Customs and Excise is empowered to require air and sea carriers departing and arriving in the UK to provide certain details of persons carried. In terms of sea carriers, the data is downloaded from the carrier's systems into an HMCE database. HMCE legislation only provides for data to be supplied if it is already collected as part of the carriers' commercial practice. In the aviation sector, HMCE access to passenger data is achieved via the granting of access rights to air carrier booking and reservation systems, which is downloaded into an HMCE database and used online.

I hope this response is helpful to the Committee. As requested, the Government will keep the Committee informed of any progress on this proposal, depositing revised texts as appropriate.

12 September 2003

**Letter from Lord Grenfell, Chairman of the Committee to Caroline Flint MP,
Parliamentary Under Secretary of State, Home Office**

Sub-Committee F (Social Affairs, Education and Home Affairs) examined this proposal again on 17 September. As you will recall from our letter of 16 July, the Committee invited comments from interested NGOs and carriers' associations. We received helpful comments from all of those we consulted and their submissions, copies of which I enclose, reinforce the concerns expressed in our letter. We also considered your letter of 12 September, which was helpful in indicating areas where the UK would be pressing for clarification of the draft and in explaining current UK requirements for advance passenger information.

Justification and proportionality

As the Immigration Law Practitioners' Association (ILPA) notes, unlike a Commission initiative, the draft directive contains no explanatory memorandum setting out the background, history and justification for the proposal, and it is far from clear exactly what it is intended to achieve. Assuming its main objective is for immigration rather than security purposes how will the measures envisaged combat illegal immigration effectively? Indeed, it is difficult to see what the current proposal adds to the 2001 Carriers Liability Directive, especially as we assume that, unlike carriers' liability legislation, it is not intended to have the effect of preventing inadmissible passengers from boarding. We note from your letter that the proposed UK Authority to Carry scheme would have that effect, but we are sceptical about the practicability of that given the very tight deadlines under which airlines have to operate. Moreover, as Statewatch notes, the proposal as drafted is disproportionate to the aims pursued since most of the passengers affected are EU citizens, who cannot be considered illegal immigrants.

The shift of responsibility from the State to the private sector

The proposal would transfer immigration control functions from the State to carriers. ILPA argues that this could result in a grey area in which there are no remedies for the individual affected by these controls either against the State or against carriers. Carriers have also reacted vigorously against this development, which would put them, in the words of the British Air Transport Association (BATA), "in the totally unacceptable position of being informers". They are also of the view that the proposed sanctions are draconian. We note the acknowledgment in your letter that the sanctions may be disproportionate.

Data protection

Both Statewatch and ILPA criticise the proposal on the ground that it is inconsistent with EC and Council of Europe data protection principles. We are aware that our sister committee in the Commons has asked to see the opinion of the Information Commissioner and we shall also be interested to see his views on the proposal.

Scope

The scope of the Directive is now limited to air carriers (Article 1(2)). Not surprisingly, the airlines and their representatives are strongly opposed to what they reasonably see as discrimination against them *vis à vis* other carriers. They point out that far more people enter and leave the Community by various other

surface modes of transport, which raises another question about the effectiveness of the measure if it applies to only a minority of journeys.

The Directive places airlines under the duty to report information on “foreign nationals”. As we noted in our letter of 16 July, the meaning of “foreign” is not clear. The lack of clarity was criticised by ILPA and Statewatch, which notes that the term appears to cover EU citizens from another Member State (who have free movement rights across the EU) and even if, as you suggest, the term is intended to be 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.

Practical considerations

As you will see, there are a lot of telling criticisms of the practical implications of the proposal. The carriers point out that no account seems to have been taken of agreements reached between IATA and the World Customs Organisation on advance passenger information (API). In particular, the airlines argue that the categories of data they would be asked to produce is too broad, notably information such as the place of birth of passengers, which is vague and not machine readable. Obtaining this information would require check-in staff to question passengers and enter the information manually, which would result in serious delays.

Perhaps the strongest criticism was targeted at the requirement for carriers to provide information on foreign nationals who have not used their return ticket. British Airways argue that this would require a “new, complex and expensive system linking all carriers’ information” and even the use of such system would be limited “because of the complex practices associated with airline ticketing procedures and passenger behaviour” (para. 11). A further fundamental objection is that many passengers purchase two separate tickets. As ILPA eloquently points out, the proposal

“ignores the fact that airline pricing policy means that two return tickets are often cheaper than one where a requisite Saturday night stay is not included, thus the airline world is awash in return tickets where no one ever plans to use the return portion and usually has left the territory on another return ticket before the first return ticket has fallen due”.

It is surprising that the Government is prepared to support this aspect of the proposal when it is not prepared to conduct any checks of its own on embarking passengers. We note that you do not envisage that carriers would be required to provide information about the departure of passengers from the UK. But if that is the case, it would be preferable for it to be reflected on the face of the Directive. It would be unsatisfactory for such a power to be available if there was no intention of using it, and it is also important to consider the implications for British carriers operating in other Member States, which may be readier than the United Kingdom to invoke the power.

We would welcome your comments on these points. We note from your letter of 31 July to Jimmy Hood that the Government has already decided to opt into this measure. We are surprised by the Government’s precipitate decision to participate in such a deeply flawed proposal given its reluctance to opt into many much more positive Title IV measures. The Committee decided to retain the proposal under scrutiny and produce a short report on it. To assist us in the

preparation of this report Sub-Committee F would welcome the opportunity to take oral evidence from you and we will contact your office to find a convenient date.

18 September 2003

Letter from Caroline Flint MP, Parliamentary Under Secretary of State, Home Office to Lord Grenfell, Chairman of the Committee

I refer to your letter of 18 September, and welcome the opportunity to provide further clarification on the Government's position with regard to this initiative.

As I wrote in my letter of 12 September, the Government recognises that this proposal has significant implications for the transport industry and has read the comments from those parties the Committee has consulted. The Government agrees that the proposal in its current form is unsatisfactory and we have maintained this position in the Council Working Group where the proposal is discussed. The Government has also made clear to the Presidency where we have specific concerns that we would like to be addressed during detailed discussions on the text. We have also agreed to seek clarity on the intended scope of the Directive in the context of modes of transport and nationalities.

Many of the Government's concerns reflect those raised by the Committee and consulted parties, for example, the nature of information to be transmitted. The draft Directive specifies this information as first names, date and place of birth, nationality, passport or travel document number. With the exception of place of birth, this information is wholly consistent with the Immigration (Passenger Information) Order 2000. But the Government is also fully aware that place of birth is not in the machine-readable zone of a passport. The Government agrees that it is important that any proposals regarding the nature of information to be submitted comply with global guidelines being developed by ICAO/IA T A, and the World Customs Organisation (WCO). The latest draft of guidelines, issued March 2003, includes place of birth information in the list of the additional data requirements, largely as a result of the arguments submitted by the National Co-ordinator Ports Policing who regards such information as being essential for the work of the Special Branches.

The Government also agrees that the proposal in Article 1 (b), that carriers provide information on passengers who have not used their return ticket, is unworkable. We have already suggested to the Presidency, along with several other Member States, that this proposal is wholly impractical, as there are many reasons why passengers change their booking. And in the UK permission to enter is generally given for a longer period than that sought by a passenger and enforcement action may not be appropriate in the majority of instances.

I would like to take this opportunity to clarify a point in respect of the UK's proposals relating to departing passengers. Whilst it is not proposed that carriers operating into the UK will be required to check for the departure of those whom they have brought here, current passenger information legislation allows immigration officers to require a carrier to collect specified data on embarking passengers and it is proposed to implement this provision under the e-Borders programme.

The Committee has questioned how the initiative can be effective in combating illegal immigration. The provision of advance passenger information provides control authorities with a tool for identifying passengers who are a known immigration or security threat (which may include facilitators of any nationality), supports a risk assessment of passengers in advance of their arrival and provides intelligence to assist in the identification of trends in immigration abuse. Where advance passenger information is provided between the end of the check-in process and before the arrival of passengers at the port (as is the proposal here), it allows an assessment to take place which helps to determine the appropriate level of examination due to a passenger. However the Government agrees that in its current form the proposal is of limited value, particularly as the Spanish intention is not to prevent the boarding of inadmissible passengers. The current draft of the text proposes to collect passenger information at the time of boarding. This does not support the board/don't board principle of the UK "Authority to Carry" scheme, for which there is already a provision in UK legislation and to which I referred in my letter of 12 September. It relies on carriers transmitting passenger information at the time of check-in and will enable a check to be made against Home Office databases. In the event that the passenger is identified as a known security or immigration risk, it may result in authority to carry the passenger being denied. Transmitting information once boarding is closed, as this initiative proposes, is too late if the control authority is to take a decision on whether to deny boarding to a passenger for which adverse information is received. The Government recognises that check-in is an extremely time-sensitive process but consider that the use of OCR document readers wherever possible to collect the information automatically, coupled with a maximum 6 second response time, will minimise the impact upon check-in times. The Government will work closely with carriers in developing Authority to Carry processes.

The Government does not agree with the view that advance passenger information transfers immigration control functions from the State to carriers. The decision to grant or refuse entry remains with the control authority. Carriers are not required, or expected, to assess a passenger's admissibility for entry. Rather, their role is to provide specified information about passengers on board their services to support the function of the control authorities. This role is similar in principle to the requirement under the carriers liability provisions for carriers to ensure that passengers are properly documented for travel. Although both are intrinsically linked with the operation of an immigration control, neither are primary control functions. In the context of data processing, the Government agrees that there is a need to establish that the proposed measures do not offend against any of the key principles of data protection. The Directive will be referred to the Information Commissioner for comment and I should be pleased to share views on the proposal with the Committee. In addition, we seek to clarify through the medium of the Frontiers Working Group whether, in developing the proposal, the issue of privacy invasion was explored in consultation with relevant competent authorities. The Directive specifies that the API should be provided for the sole purpose of facilitating immigration checks at external borders and that the information should be deleted on completion of these checks. E-Borders includes proposals to the effect that API received will also be used to support the work of the border agencies. These proposals will be developed in a way which ensures compliance with the relevant principles of the Data Protection Act 1998 and we will seek endorsement from the Information Commissioner as part of the development process.

The Committee has also commented on the Government's decision to opt-in to this initiative in its current form. The Government chose to participate in this measure as it is consistent with UK policy to participate to the fullest extent possible in EU measures to combat illegal immigration, where these are compatible with our ability to operate our own frontier controls. We were, and remain aware that this measure as currently drafted has serious and fundamental flaws, and Lord Filkin's letter of 12 June to the EP committee seeking approval to opt-in highlighted these concerns and recognised that significant issues remained to be agreed. However the recommendation to opt-in was based on the potential benefits of API in combating illegal immigration and because the UK Immigration Service has developed a certain degree of experience and expertise in this area in the last couple of years that it could usefully share with EU partners. It was also on the understanding that we would have an opportunity during the course of working group discussions to shape the final text to reflect UK concerns as is the custom with such measures. It is unfortunate therefore that negotiations have thus far continued to focus on the principle of the issue and have not yet progressed to substantive discussion on the text. The Committee will note that no revised text has been produced since July.

I should be pleased to provide oral evidence to the Committee on this issue and I understand you have already been in contact with my office. In the meantime the Government will continue to seek to influence negotiations in the Council working group and will keep the Committee advised on progress on this issue.

9 October 2003

APPENDIX 5: OTHER RECENT REPORTS FROM THE SELECT COMMITTEE

Reports from the Select Committee

Review of scrutiny of European legislation (1st Report session 2002–03, HL Paper 15)

The Draft Constitutional Treaty (41st Report session 2002–2003, HL Paper 169)

Annual Report 2003 (44th Report session 2002–03, HL Paper 19)

Reports on Justice and Home Affairs matters prepared by Sub-Committees E and F

The legal status of long-term resident third-country nationals (5th Report session 2001–02, HL Paper 33)

Counter Terrorism: The European Arrest Warrant (6th Report session 2001–02, HL Paper 34)

Minimum standards of reception conditions for asylum seekers (8th Report session 2001–02, HL Paper 49)

The European Arrest Warrant (16th Report session 2001–02, HL Paper 89)

Asylum applications—who decides? (19th Report session 2001–02, HL Paper 100)

Defining refugee status and those in need of international protection (28th Report session 2001–02, HL Paper 156)

Combating racism and xenophobia—Defining criminal offences in the EU (29th Report session 2001–02, HL Paper 162)

A common policy on illegal immigration (37th Report session 2001–02, HL Paper 187)

Europol's role in fighting crime (5th Report session 2002–03, HL Paper 43)

Proposals for a European Border Guard (29th Report session 2002–03, HL Paper 133)

The Proposed Framework Decision on racism and xenophobia—an Update (32nd Report session 2002–03, HL Paper 136)

EU/US Agreements on extradition and mutual legal assistance (38th Report session 2002–03, HL Paper 153)

Evidence by Lord Filkin CBE on the Proposed Council Directive—Defining refugee status and those in need of international protection (43rd Report session 2002–03, HL Paper 173)