



## Statewatch

### Further evidence on proposed Directive on aircraft passenger data

**Statewatch's further evidence to the Select Committee on the European Union, sub-committee "F": Proposed Directive on aircraft passenger data**

#### **Introduction**

Statewatch is submitting additional comments on the proposed Directive on transmission of passenger data, in light of the redrafted text of this proposal (Council document 11406/03, 11 July 2003). In our view, despite the suggested amendments, there are insurmountable objections to the legality and merits of this draft proposal.

#### **Obligations to send all passenger information**

1. The obligation to send data on all persons which a carrier is intending to carry has been curtailed in the latest draft, so that it would apply only to 'foreign nationals' and only to flights leading to crossing of a border crossing point into the Member States' territory. Also, the obligation will apply instead after the end of boarding checks, and Article 1(2) would make clear that only commercial airlines can be considered 'carriers' for the purposes of this Directive.

3. The revised wording is still ambiguous as to whether internal EU flights between Member States would be covered by the Directive; on the one hand it refers to Member States' territory in the plural but on the other it appears to be limited to cases where a person will cross a border point. On the former interpretation, the Directive would only apply where a flight enters the EU from outside it. On the latter interpretation, the Directive would also apply to flights between Member States if there is a border check. So it would apply to all flights to (although not within) the UK and Ireland, as well as all flights in the new Member States until Schengen rules are fully applicable to them.

4. If the latter interpretation is correct, the proposal still exceeds the 'legal base' relating to external borders, since logically the EU's powers pursuant to Article 62(2)(a) EC cannot cover any measures that relate to travel between Member States.

5. Although, as noted before, the 'legal base' concerning illegal immigration is arguably capable of applying more broadly, the exercise of that legal base is still subject to the principle of proportionality. Although the imbalance between the obligations imposed upon carriers and the invasion of the privacy rights of individuals on the one hand, and the objective of migration control on the other hand, would be reduced in the revised version of the Directive, it would still be substantial, particularly if the reference to 'foreigners' is interpreted to include nationals of EU Member States other than nationals of the State of the aircraft's destination. Since most travellers are EU citizens who cannot be considered illegal migrants, it follows that the proposal would remain a gross breach of the proportionality principle even though it now only applies to air carriers and to flights which cross a border. The same still applies if the Directive applies only to flights 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. Also, as noted in our previous comments, 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, and would arguably violate Article 49 EC for the reasons set out previously, if it is applied to internal cross-border flights within the EU.

7. Even if the obligation to send the boarding information concerns non-EU citizens only, it is still disproportionate given the large numbers of such persons who have the right to move within the EU as family members of EU citizens or (within the Schengen area) who enjoy the 'freedom to travel' once they have complied with Schengen rules. A large percentage of the remainder will in practice be authorised to enter the Member State in question once they reach the border crossing point.

### **Obligations to send information on ‘foreign nationals’**

8. These obligations have not been amended, except that they will only apply to airlines and only upon request of the authorities. However, this obligation is still highly questionable for the reasons set out in our previous comments.

### **Data protection principles**

9. There are no changes in the later draft relating to data protection, and so our earlier criticisms still apply fully.

### **Further comments**

10. In the absence of any additional amendments to this proposal, our earlier criticisms relating to the poor drafting of the sanctions provisions and the violation of the freedom to provide services also still apply.