



## Statewatch Analysis

### The Legality of the Regulation on EU Citizens' Passports

[Updated 26 November 2004]

#### Introduction

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The following analysis is updated from a spring 2004 analysis of the legality of the proposed Regulation on EU citizens' passports. The previous analysis concerned the initial proposal, which did not entail mandatory fingerprinting of all EU citizens holding passports, and concluded that the proposal exceeded the legal powers conferred upon the EC by the EC Treaty.

The updated analysis concludes that the revised Regulation, which would require mandatory fingerprinting, still exceeds the powers conferred upon the EC. In fact, this conclusion is more manifest in light of the Council's obvious concern to ensure that the Regulation is adopted as soon as possible to satisfy the demands of the United States government.

Furthermore, the updated analysis concludes that mandatory fingerprinting of all EU citizens holding a passport would violate the proportionality principle of EC law and the protection of the right to private life guaranteed by EC law.

#### The 'Legal Base' Issue

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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...'*

The Council legal service's Opinion on the legality of the passport proposal (Council doc. 6963/04, 3 March 2004) also recognizes that Article 18(3) is the starting point for the analysis.

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 (see further details of these Resolutions in the Council legal service's analysis).

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. The Council legal service agrees with the Commission as regards some of the measures in the Commission's proposal. The analysis of the two institutions is legally flawed. 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 appears that this analysis is shared by the Council; indeed it appears that the main reason for the Council potentially asking the European Parliament to use an 'urgency' procedure in its vote on the passports proposal is to meet a deadline set by the US government. Therefore it appears from the Council's actions during the legislative procedure that the aim of the proposed legislation is particularly to ensure the acceptance of EU Member States' passports by the United States authorities for the purpose of visa waiver.

It follows that as crossing external borders is only one of four contexts where the security features of passports are an essential issue, and that the acceptability of EU Member States' passports to non-Member States appears to be the predominant aim of this legislation, 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.

### **The principle of proportionality**

EC legislation must conform to the principle of proportionality (Article 5 EC, third paragraph) to be valid. It might be argued that the Commission's initial proposal conformed to the proportionality principle, but there are far greater doubts that the latest version of the legislation (Council document 15139/04) conforms to the principle. The key change is the decision to fingerprint all EU citizens who need a passport. This will entail considerable costs for citizens and Member States' administrations and considerably alter the process of obtaining a passport in most Member States.

The doubts about the proportionality principle are particularly cogent in light of the position of the US government and the ICAO standards related to document security, which do not require fingerprinting for the purposes of travel document security. The Commission's initial proposal expressly accepted that the security and identity checking objectives and objectives of meeting US and ICAO standards could be achieved without making fingerprint data mandatory. In light of this position it is difficult to justify the validity of mandatory fingerprinting in light of the proportionality principle.

### **Human Rights**

It is clear that the taking and storing of fingerprints is a breach of the right to private life as set out in Article 8 of the European Convention of Human Rights, which can in certain cases be justified in the circumstances set out in Article 8(2) of that Convention (decision of the European Commission of Human Rights in *Friedl v Austria*, 19 May 1994). However, it seems clear from this decision that the taking and storage of fingerprints is justifiable particularly in the context of a prior criminal conviction or actual or potential prosecution against persons who have broken the law. There is nothing to suggest that fingerprinting the entire population (who hold a passport) can be considered justifiable interference with Article 8 rights.

This interpretation is bolstered by the breach of the principle of proportionality entailed by mandatory fingerprinting, as described above, since proportionality is also an element in assessing whether an interference with the right to private life

set out in Article 8 ECHR is justified. Since more limited measures falling short of mandatory fingerprinting would be sufficient to ensure that Member States and non-Member States alike could check the security of documents and the identity of their holder, as confirmed by the Commission, the position of the United States, and the ICAO standards, it is not 'necessary in a democratic society' (as required by Article 8(2) ECHR) to fingerprint all EU citizens who hold passports.

## **Conclusion**

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The proposed Regulation on EU passports, with or without mandatory fingerprinting requirements, exceeds the legal powers conferred upon the Community to adopt measures concerning checks at external borders. It furthermore exceeds any other powers conferred upon the Community.

If the Regulation includes mandatory fingerprinting requirements, it would also breach the principle of proportionality that is a requirement for the legality of Community acts, and the general principles of Community law, which include the protection of the right to private life.

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