

## ARTICLE 29 Data Protection Working Party



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Mr Franco FRATTINI  
Vice-President of the  
European Commission  
Rue de la Loi, 200  
B-1049 Brussels

Subject: Modified proposal for a Council regulation amending Regulation (EC) 1030/2002 laying down a uniform format for residence permits for third-country nationals  
COM(2006)110 final- 2006/0218(CNS) dated 10 March 2006)

Dear Mr Frattini.

The Article 29 Working Party's comments have been sought in respect of the modified Proposal for a Council Regulation amending Regulation (EC) 1030/2002 laying down a uniform format for residence permits for third-country nationals.

The principal purpose of the proposal is to store, on a mandatory basis, two biometric identifiers of an applicant (facial image and fingerprints) in a contactless chip, and to enable the storage of other information by incorporating a separate contact chip in the residence permit for use by national authorities.

The Working Party welcomes the opportunity now being offered to contribute anew to the decision-making process aimed at the adoption of rules that will be immediately and directly binding on all our institutions and citizens at national level. The comments below are addressed to all the EU Institutions competent for the definition and adoption of the said Proposal.

The Working Party will refer particularly to the points relating to the text presented in March 2006, taking into account the progress made in the discussion in the Council, albeit in the absence of official information in this regard.

With regard to the Working Party's Opinion 96 adopted on 11 August 2004 concerning the initial proposal, tabled in 2003, the Working Party confirms that the points raised in that Opinion remain fully applicable to those parts of the proposal that were left unchanged, and would now reiterate their importance and validity.

The critical issues addressed here concern the compulsory inclusion of fingerprints in the residence permits, partly in the light of the purposes to be achieved and the nature of such

This Working Party was set up under Article 29 of Directive 95/46/EC. It is an independent European advisory body on data protection and privacy. Its tasks are described in Article 30 of Directive 95/46/EC and Article 15 of Directive 2002/58/EC.

The secretariat is provided by Directorate C (Civil Justice, Rights and Citizenship) of the European Commission, Directorate General Justice, Freedom and Security, B-1049 Brussels, Belgium, Office No LX-46 01/43.

Website: [http://ec.europa.eu/justice\\_home/fsj/privacy/index\\_en.htm](http://ec.europa.eu/justice_home/fsj/privacy/index_en.htm)

documents, which are normally considered and used in Member States as ID rather than as travel documents; the proposed minimum age for collecting fingerprint data; the possibility of enabling further use of the permits; and the lack of harmonization as to the conditions for accessing and using the data contained in the permits.

I trust that the considerations made in the annexed document will be taken into due account and hope that they will serve as a starting point for a future in-depth discussion involving all the relevant stakeholders – including data protection authorities.

I look forward to hearing from you

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Peter Schaar', written in a cursive style.

Peter Schaar  
Chairman

Copies of this letter have also been addressed to the Director General of Justice, Freedom and Security, the Presidents of the European Parliament and LIBE Committee and the incumbent Council Presidency.

**Comments by the Article 29 Working Party on the Modified Proposal for a Council regulation amending Regulation (EC) 1030/2002 laying down a uniform format for residence permits for third-country nationals (COM(2006)110).**

**Introduction**

After the adoption, on 13 June 2002, of the Council Regulation (EC) 1030/2002 laying down a uniform format for residence permits for third-country nationals with the intention of harmonising the format of residence permits issued by Member States to third-country nationals, the Commission presented a proposal amending Council regulation (EC) 1030/2002

This proposal, together with another proposal concerning the amendment of Council Regulation 1683/95 establishing a uniform format for visas, was aimed at *ensuring the inclusion of a photograph* in visa stickers and residence permits, and two items of biometric data stored on a storage medium (contactless chip), i.e. a full-face digital photograph of the holder as the principal element for biometric identification, and two digital images of the holder's fingerprints.

On 11 August 2004, the Working Party issued a first Opinion on the two Proposals (WP 96), emphasizing the need for an appropriate preliminary assessment of the principle of proportionality. It is indeed particularly important, in the context of the purpose of including biometric elements in residents' permits and visas, to verify not only the processing procedures (modes of access, storage period etc.), but also the legitimacy of the collection of the personal data itself. The provision of particularly reliable and effective safeguards, clearly indicated in point 2.1 of the WP 96, was considered a fundamental requisite for the introduction and processing of biometric data in ID or personal documents<sup>1</sup>.

While the latter proposal was withdrawn, on 10 March 2006, the Commission submitted the modified proposal referred to above.

This proposal builds on the text submitted in 2003, including the decision on the format (a stand-alone document rather than a sticker) and allows Member States so wishing to include an additional contact chip for the provision of e-services.

The EDPS adopted an Opinion on the Proposal on 16 October 2006<sup>2</sup>.

The European Parliament, LIBE Committee, prepared a Report in order for the EP to adopt its position.

**Preliminary remarks**

The Working Party takes note of the efforts towards the harmonisation of the format of residence permits issued by Member States to third country nationals, as well of the fact that, in the proposal at issue, visa and residence permits are no longer linked as they were in the previous Commission proposal of 2003.

Residence permits are not travel documents in themselves. In fact their essential function is to

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<sup>1</sup> Opinion No. 7/2004 on the inclusion of biometric elements in residence permits and visas (WP 96)

<sup>2</sup> Opinion of 16 October 2006 on the Modified Proposal for a Council regulation amending Regulation (EC) 1030/2002 laying down a uniform format for residence permits for third-country nationals (COM(2006)110).

demonstrate, during controls by the police and/or other bodies entitled to carry out controls on individuals, that the holder is lawfully staying in the territory of a Member State. Even if they can be considered as being in the nature of an ID document, they remain, nevertheless, ineffective for moving outside the State's territory if not accompanied by a proper travel document.

Just as a simple ID card, the residence permit should respect the same high security standards as are defined for national ID cards.

The reference to the ICAO standards should therefore be maintained only in case a Member State allows a further use of the residence permit also as a travel document, otherwise it has to be replaced by more rigorous security specifications defined according to the specific situations in which the residence permit will be used.

Accordingly, a check seems necessary in order to clarify if and to what extent Art. 63 (3) (a) TEC can still be referred to as the appropriate legal base.

## **Specific remarks**

### **Introduction of biometric features**

In light of the above considerations, the legitimacy of imposing an EU wide obligation to incorporate biometric features in residence permits must be demonstrated.

Furthermore, the reason for such requirement has to be explicit, appropriate, proportionate and clear: the legal text rather than a recital must clarify that the purpose for the introduction of biometrics in residence permit is to create a more reliable link between the residence permit and its holder.

Additionally, the legal text should clarify that, when production of the residence permit is required by law, it can only be used to verify the authenticity of the document and the holder's identity by means of directly available comparable features.

The introduction of an additional mandatory biometric identifier (fingerprints), as already pointed out in the letter sent by the Working Party on 30 November 2004 with regard to the draft model for passports, goes well beyond the recommendations issued by ICAO – which are nevertheless referred to as the benchmark. Under ICAO's recommendations, a digitalised photograph integrated in the watermark is considered sufficient for the purpose of ensuring the security of a travel document.

In order to ensure compliance with the data minimization and proportionality principles set out in directive 95/46/EC, the taking of fingerprints should not be provided for on a compulsory basis if, at national level, the residence permit is not regarded as a travel document and/or a document enabling the holder to leave the national territory under the relevant legislation. In such cases the Working Party recommends using the standards used for ID cards.

Nothing is foreseen in the current proposal as regards the collection of children's biometrics. However, the introduction of a general obligation to take fingerprints from all children aged six and over, in order to issue the document, would appear to be a clear-cut request coming at present from the Council.

In this connection, the Working Party is keen to be informed about the underlying reasons for such a request, the tests performed to gauge the social and legal impact of the measure in question, as well as what evaluation was carried out, if any, to assess possible flaws and the risk of false positives among this population. The Article 29 Working Party would like to recall its working document on biometrics<sup>3</sup>.

The Working Party would also like to emphasize the need to abide by article 8 of the European Human Rights Convention in the light of the case law of the European Human Rights Court. The Working Party is keen to be informed as expeditiously as possible on the existence of national measures to this effect, in order to assess whether such measures are compatible with the principles laid down in directive 95/46/EC.

The Working Party is also concerned about the lack of fallback procedures for those people who cannot provide usable fingerprints or facial scanning because of physical reasons, such as a disability or an accident. A general obligation to provide visual images and fingerprints should be accompanied by the exemption from this obligation for any person unable to provide biometric data because of physical incapacities and the definition of specific modalities in order to respect that person's dignity.

Some issues need further clarification, in particular as to the collection of biometric data. To that end, a list of common obligations or requirements to follow should be helpful by taking into account the peculiar nature of the data in question; the development of common methodologies and privacy-enhancing best practices could also be useful. It is of the utmost importance to ensure a high security level as regards the storage medium, and it is equally important to guarantee that no other information is added in the storage medium once the residence permit is issued. Should it prove necessary to make changes, a new residence permit will be issued so as to make the holder aware of those changes.

On all these points, the Working Party would like to reiterate the considerations made in its Opinion of 2004.

#### **Access to and use of data**

As recalled in the first recital of the proposal, one of the aims of the Treaty of Amsterdam is to confer the right of initiative on the Commission for proposing necessary and relevant measures for a harmonised immigration policy.

The Working Party is of the opinion that this possibility must be exploited in order to clearly identify and define the authorities having access to the data stored in the residence permit, and provide a list of the competent authorities for carrying out checks on residence permits. This will become even more important if the e-services option is implemented, as in this case the number of authorities which might have access to the residence permit will increase considerably.

#### **Further use: e services options**

The modified proposal introduces the possibility for Member States to insert a contact chip in a defined area, i.e. Zone 16, if they intend to use the residence permit in the context of e-services (as described in the annex to the proposal.)

The possible insertion of an additional storage medium in the residence permit for national use raises several concerns, in particular for security issues. Residence permits will store biometric features, and therefore they need a security profile that must be rigorously and properly defined. If the permit is to be used for other purposes, the security profile must be re-

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<sup>3</sup> Working Document on biometrics 2003 (WP 80)

considered in the light of the risks resulting from such other purposes – as well as the increased risk related to the loss and/or damage of the storage medium.

In this connection, the Working Party fully shares the concerns and requests expressed by the EDPS in his opinion.

Ultimately, it will be necessary to lay down a list of criteria that should be met before introducing the possibility of storing e-services data - for instance, a limited list of purposes and data that may be stored for those purposes.