

Meijers Committee

standing committee of experts on international immigration,
refugee and criminal law



CM1811 Comments on a European ID card

Proposal for a regulation on strengthening the security of identity cards of Union citizens and of residence documents issued to Union citizens and their family members exercising their right of free movement (COM(2018)212 final)

This proposal concerns two types of documents:

- national identity cards of EU citizens.
- residence documents issued to EU citizens and their (non-EU) family members.

General observations

The initial aim of the proposal was not to create new rights or obligations of EU citizens, but to make it easier for EU citizens to exercise their current rights. On basis of individual complaints, questionnaires to the Member States and a survey, the European Commission concluded that the legal reality of the right of freedom of movement does not always match with the daily reality of EU citizens. The proposal aims at ensuring that the EU citizens are effectively in a position to fully exercise their rights.

The text of the proposal, however, appears to be based on two alternative thoughts. The initial aim, ensuring the rights of EU citizens, seems to have become less predominant. The reason is that this proposal is placed under the heading 'security' in REFIT¹ 2018. The proposal now explicitly also focuses on the fight against terrorism and organized crime, and the strengthening of the external borders of the Union. The proposal also aims to 'protect public authorities and EU citizens and their family members from crime, falsification and document fraud.' For this reason, the proposal is not limited to the harmonization of the ID cards, but also aims at bringing the safety aspects to a higher level: biometrical information (in particular fingerprints) must be introduced.

What problems does this proposal aim to solve? The Commission concretely mentions three underlying problems:

(1) National ID cards and residence documents are not sufficiently accepted in other Member States than the one issuing it, by both public and private actors.

As an illustration, the Commission is showing a number of individual cases in which EU citizens encounter difficulties having their national ID cards accepted (when crossing a border, boarding an airplane, opening a bank account, shopping online). The exact numbers of these problems are unknown.

(2) Document fraud which endangers the security chain through the proverbial 'weakest link.'² The Commission mentions that weak cards are more often stolen and counterfeited. However, it remains unclear how these forms of fraud effectively contribute to weaker external borders. As the

1 The Commission's Regulatory Fitness and Performance (REFIT) programme ensures that EU legislation delivers results for citizens and businesses effectively, efficiently and at minimum cost. REFIT aims to keep EU law simple, remove unnecessary burdens and adapt existing legislation without compromising on policy objectives.

2 Based on an analysis by FRONTEX, reported in the Impact Assessment SWD(2018)110, p.13

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Commission states in its impact assessment, there is a decrease in cases of fraud at the external border (and an increase at the internal borders).

(3) Complexity of document issuance for EU citizens residing in another Member State.

The proposal does not provide any measures to address this issue – for example – issuance through consular posts or even by Member State of residence.

Summarized, neither of the three problems mentioned by the Commission gives convincing evidence of the need for the proposal.

Legal basis

As a legal basis, Article 21 (2) TFEU has been chosen, which provides that the European Parliament and the Council may, in accordance with the ordinary legislative procedure, adopt provisions to facilitate the free movement of persons. On the basis of the initial aim of the proposal, this legal basis seems correct. If the Commission persists in the use of this legal basis, the proposed measures should indeed promote the free movement of persons, and should not furtively aim to raise the EU external borders.

Given the content of the final proposal, which explicitly aims to ensure the internal security of the EU, it can be questioned whether this proposal should not rather have been based on Article 77 (3) TFEU. This article regulates the authority to adopt provisions on passports, identity cards, residence permits and equivalent documents in the context of checks on the internal and external borders. The latest provision is subject to a special legislative procedure requiring unanimity within the Council, after consulting the European Parliament. The Meijers Committee does not express any preference for the special legislative procedure, but takes the view that this proposal which has considerable impact on individuals should not be based on a flawed legal basis. This doubt about the correct legal basis is a further proof of the need for clarity on the purpose of the proposal.

Costs of the card

The proposal does contain a provision on the costs of the European ID card. The decisions on costs are fully left to the Member States.

This may also have consequences for the costs of residence documents on the basis of Directive 2004/38 and also for the costs of residence permits of third country nationals. The Meijers Committee refers to Article 25(2) of Directive 2004/38, which reads as follows: "All documents mentioned in paragraph 1 shall be issued free of charge or for a charge not exceeding that imposed on nationals for the issuing of similar documents." Normally, a comparison is made with national ID cards, which will disappear with the arrival of the EU ID cards. The Court of Justice made this comparison with regard to third country nationals in case *C-92/07 Commission/Netherlands* and in case *C-579/14 CGIL*. The cost of the national ID as basis for the comparison will disappear with the arrival of the EU ID card.

The Meijers Committee suggests including a provision on the maximum price of the ID Card. This price should be set at a reasonable level, The proposal could provide that the price of the European ID card should not exceed 50 euro, with a possible increase as a result of the rise of the general costs of living due to inflation. In the absence of a maximum price the costs of the European ID could become a barrier to the free movement of EU nationals.

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Data Protection

The Commission proposal proposes a card that, on the one hand, meets very high security requirements. On the other hand, the information stored on the card should be easily exchanged with machine-readable systems, for instance in the area of banking, health or insurance. Indeed, the proposal allows Member States to include additional digital information, in accordance with national legislation. This wider use of the card may provoke security risks and may, in a wider sense, lead to risks for the violation of individuals' rights to privacy and data protection.

Article 10 of the proposal deals with data protection. The Meijers Committee welcomes the specific attention given to data protection, including a reference to the General Data Protection Regulation (GDPR). Data protection is highly relevant, if only because the instrument, when adopted, would require the processing of biometric data which are recognised as special categories of personal data in Article 9 GDPR. The processing of special categories of data is subject to additional safeguards.

The proposal requires the processing of both fingerprints and facial images. The Meijers Committee is not convinced that inclusion of fingerprints is necessary, in particular because the ID card may also be used, under Member States law, for additional purposes (such as health insurance). Moreover, including fingerprints in national ID Cards is not common practice in the Member States, so the need for including fingerprints is not justified by the objective of harmonising national law and thus making lives of EU citizens easier. Finally, the storing of fingerprints may create unnecessary security risks. It is for these reasons that the Meijers Committee supports the very critical observations of the European Data Protection Supervisor (EDPS) on the inclusion of fingerprints on the ID card.³

In addition, the proposal includes the introduction of fingerprints for all users, from the age of 12 years. The Meijers Committee supports the plea of the EDPS to, at least, set the age limit at 14 years.⁴

Member States may store other data on a storage medium for electronic services or other purposes relating to the identity card or residence document (Article 7 (3) and recital 19). The proposal does, however, not contain the conditions for this storage of additional data. The Meijers Committee takes the view that a general reference to the GDPR, is not sufficient and that the proposal should include specific safeguards for the storage of additional data. These safeguards should, in any event, include limitations of the purposes for which additional data can be stored, preclude the storage of special categories of data as meant in Articles 9 and 10 GDPR, and provide for a clear provision on the way individuals are informed about the additional data stored on the card.

Furthermore, Article 10 (1) of the proposal mentions the rights to access and rectification "without prejudice" to the GDPR. The proposed provision, however, does not more than repeat the rights data subjects have under Article 8 of the Charter and the GDPR. In order to make this provision meaningful, we suggest that the instrument provides that the Member States put in place specific procedures that facilitate the exercise of these rights.

³ EDPS Opinion 7/2018 on the Proposal for a Regulation strengthening the security of identity cards of Union citizens and other documents, at various places.

⁴ EDPS Opinion 7/2018, at 55-58.

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Finally, the proposal should be accompanied by a data protection impact assessment as meant in Article 35 GDPR.⁵ The proposal aims at introducing a new technology and is likely to result in a high risk to the rights and freedoms of individuals.

On the basis of these considerations the following questions arise:

1. Is the proposal really necessary? The proposal aims to solve practical problems that some mobile EU citizens are apparently running into. However, the majority of EU citizens do not use their right to free movement or does not experience problems when doing so. It therefore appears disproportionate to oblige all EU citizens (in so far as their Member States require the use of ID cards) to purchase a very secure - and therefore expensive - identity card.
2. Does the proposal address and resolve a real problem? On the basis of the impact assessment, the question seems justified as to whether the proposal actually addresses existing problems and to what extent these are solved by the proposal. The problems quoted seem to concern a very limited group of citizens. Moreover it is unclear whether these problems will be solved with the introduction of a harmonized card. Would it not be sufficient to provide better information to public and private actors? Should it not be the Commission's and the Member States' task to do so?
3. Are the external borders actually better protected by this proposal? The argument of the protection of the external borders seems more far-fetched since the ID-cards and residence cards are mainly intended to facilitate free travel within the Union. The European Commission underlines the importance of the ID-cards for the external borders by pointing to agreements that some third States have with Member States, on the basis of which the border can be crossed with a national ID-card. It is not demonstrated by any means there is actually a problem there.
4. Has the proportionality principle been respected? All previous questions already refer to this. In its response to the citizenship report 2017, the European Parliament welcomes the idea of introducing a European ID-card. However, it also proposes to introduce this in addition to existing cards. In this way, EU citizens who exercise their free movement rights and can therefore enjoy the benefits of such a harmonized card. They may opt for it, without others having to bear the burden.
5. Is the legal basis of the proposal correct? The proposal is based on two opposite thoughts. On the one hand, the desire to ensure the free movement of EU citizens as smoothly as possible, on the other hand to upscale the fight against terrorism and illegal border crossing. As legal basis, the Commission opted for Article 21 (2) TWEU, that is limited to promoting free movement. The ordinary legislative procedure then applies. In view of the content of the final proposal it may be considered that Article 77 TFEU is the correct legal basis. In fact, the proposal expressly aims at ensuring the internal security of the EU and controlling external borders, also by taking into account the Regulation 2017/458, adopted in 2017 which allows systematic control on EU citizens and their family members at the external borders. Article 77 requires a special legislative procedure.
6. Are the privacy and data protection rights of individuals adequately protected? The new card will offer the possibility to store more information than is strictly necessary for identification, including

⁵ See on this also EDPS Opinion 7/2018.

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the fingerprints of the holder. Is such information really necessary and proportional, also in view of security risks? This should at least be demonstrated by a data protection impact assessment as meant in Article 35 GDPR.

7. Should the proposed regulation not limit the charges that Member States can require for the issue of a European ID?

The Meijers Committee recommends the European Parliament and the Council to raise these questions during the legislative negotiations, and to make the adoption of the proposal (possibly in an amended version) dependent on satisfactory answers to these questions.