



EUROPEAN COMMISSION
DIRECTORATE-GENERAL JUSTICE

Director-General

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Mr Peter Storr CB
International Director
Strategy and International Group
International Directorate, Home Office
1st Floor Peel, 2 Marsham Street
London, SW1P 4DF
United Kingdom

Dear Mr Storr,

Thank you for your letter of 12 January 2012 concerning the UK's implementation of Directive 2004/38/EC.

Concerning use of biometric data in residence documents issued to non-EU family members of EU citizens under Directive 2004/38/EC, I would like to confirm that nothing in the Directive prevents Member States from including biometric data of such family members in residence cards¹ issued to them under Directive 2004/38/EC.

In doing so, Member States must comply with national implementing EU law on data protection. Among other things, they must make sure that principles such as purpose limitation and proportionality of data processed are complied with and that measures to prevent unlawful or unauthorised access and collection of biometric data are implemented.

Another aspect to be taken into account is that according to Article 20 of Directive 95/46/EC Member States shall determine the processing operations likely to present specific risks to the rights and freedoms of data subjects and shall check that these processing operations are examined prior to the start thereof. Consequently, should the United Kingdom determine that the processing of biometric data is likely to present such a risk, the data controller will have to contact the supervisory authority, the UK Information Commissioner's Office (ICO), which will have to carry out prior checks.

Member States may refuse to issue biometric residence card to non-EU family members who have not provided their biometric data. It should be noted that residence cards are documents which merely attest that the underlying right of residence exists, but the right is not conditional upon the residence card and therefore upon providing biometric data.

¹ To simplify my reply, whenever I refer to residence/residence card under Directive 2004/38/EC, I also refer to permanent residence and permanent residence card.

Regarding charges for residence documents issued to EU citizens and their non-EU family members under Directive 2004/38/EC, Article 25(2) of Directive 2004/38/EC stipulates that such documents should be issued free of charge or for a charge not exceeding that imposed on nationals for the issuing of similar documents.

This provision is expression of the fundamental principle of non-discrimination on the grounds of nationality, as expressed in Article 24(1) of Directive 2004/38/EC and Article 18 of the Treaty on the Functioning of the European Union.

In assessing compliance with EU law of the UK plans to introduce charges which are identical with charges for a UK adult passport², it is fundamental to examine whether the UK adult passports are the appropriate comparator and that there are no other, better, documents.

If that is not the case, the UK policy on passport charges may have been set up to reflect certain aspects which are relevant for passports but may not be relevant for residence documents issued under Directive 2004/38/EC – such as that passports may be issued by the UK embassies abroad, they have more security features, they must be in a harmonised format, they are more voluminous, they have a different period of validity, they are travel documents accepted by all countries or that the charges are set in such a way that the whole service is more or less self-financing.

Compliance of your plans with EU law can be assessed only on the basis of proper justification and in-depth analysis addressing the above issues. Where no appropriate comparable document other than a passport can be identified, the above justification and analysis should also examine an alternative solution – instead of issuing the residence documents free of charge or for a charge for a UK adult passport, which charges would cover the genuine administrative costs the UK authorities incur in issuing these documents³.

Yours sincerely,



Françoise LE BAIL

² The charge is £77.50 for normal service by post (*aims to return your passport within three weeks - not guaranteed*) http://www.direct.gov.uk/en/TravelAndTransport/Passports/howlongittakesandurgentapplications/DG_174109. In addition, handling charge of £8.17 must be paid to the Post Office.

³ Article 25(2) of Directive 2004/38/EC refers to charges *not exceeding* that imposed on nationals for the issuing of similar documents so it does not oblige Member States to impose charges identical to those imposed on nationals.