Counter-terrorism and Security Bill
ILPA Briefing for House of Commons Committee stage
Part 4 Aviation, Shipping and Rail Part 1 — Passenger, crew and service information and Schedule 2 Aviation, maritime & rail security:

Authority to carry schemes: Briefing for stand part debates

About ILPA

The Immigration Law Practitioners' Association (ILPA) is a registered charity and a professional membership association. The majority of members are barristers, solicitors and advocates practising in all areas of immigration, asylum and nationality law. Academics, non-governmental organizations and individuals with an interest in the law are also members. Founded in 1984, ILPA exists to promote and improve advice and representation in immigration, asylum and nationality law through an extensive programme training and disseminating information and by providing evidence-based research and opinion. ILPA is represented on advisory and consultative groups convened by Government departments, public bodies and non-governmental organizations.

Given the speed with which the Bill is passing through the House of Commons we have simply attempted here to set out some information about authority to carry schemes and to highlight some questions that MPs may wish to raise. Because of the tight timescales, we have quoted more extensively from source documents than we should otherwise have done.

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Authority to carry schemes

Part 4 is concerned with authority to carry schemes, provision for which is found in the Nationality Immigration and Asylum Act 2002, s 124. This requires carriers to seek authority to bring passengers to the UK. It was intended to be operated by checking passenger details against a Home Office database to confirm that they posed no known immigration or security risk and that their documents were in order.[1] The first exercise of the power came a decade later when the Nationality, Immigration and Asylum Act 2002 (Authority to Carry) Regulations 2012 (SI 2012/1894) were made under the section. These came into force in July 2012.[2] The Explanatory Memorandum sets out the history of the regulations[3]. This included a consultation, in September 2011,[4] to which the Government published its response in April 2012[5].

The Explanatory notes to the Counter-Terrorism and Security Bill state

> *127. The provisions in Part 4 will allow the Secretary of State to introduce authority to carry schemes which replace the current inbound arrangements with broader inbound and outbound*

[1] As set out in the Explanatory notes to the 2002 Act.
[2] http://www.legislation.gov.uk/uksi/2012/1894/contents/made
[3] http://www.legislation.gov.uk/uksi/2012/1894/pdfs/uksiem_20121894_en.pdf
[4] Aviation Security Consultation on a Statutory Authority To Carry Scheme
https://www.gov.uk/government/consultations/aviation-security-consultation-on-a-statutory-authority-to-carry-scheme
[5] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/157788/government-response.pdf

arrangements. They also amend existing legislation to enhance the provision of passenger, crew and service information; provide that carriers may be required to use passenger information systems capable of receiving directions when authority to carry is refused or specific security measures are required and enable enforceable standing requirements for passenger, crew and service information to be imposed on specified categories of incoming and outgoing non-scheduled traffic. New regulations will establish a civil penalty regime for failure to comply with authority-to-carry and passenger, crew and service information requirements. Part 4 also provides for amendments to current provisions for directions relating to aviation, shipping and rail to strengthen our ability to impose security measures on aircraft and rail operators as a condition of their operation to the UK and on shipping operators as a condition of their entry into UK ports and in respect of aviation to establish in aviation a civil penalty for failing to provide information when required to do so or to comply with direction.

What the notes nowhere do is explain in what respect powers reviewed, consulted on and brought into effect just two and half years ago have been found wanting and the specifics of the changes made. We suggest that MPs enquire into these matters.

Scrutiny is advised because the troubled e-borders programme commenced in 2003 has rattled on for over a decade without delivering all of the anticipated benefits, and at a cost of hundreds of millions [6] plus a further sum of over £223,000,000 paid to terminate the contract with the main supplier (termination 2010[7] followed by litigation) as set out in the Home Secretary's letter of 18 August 2014[8] to the Home Affairs Committee.

There continue to be concerns as to whether the scheme is compatible with the laws of countries to which passengers are carried and with the law of the European Union. These and the earlier history of the programme is admirably summarised in two House of Commons' library notes: SN/HA/3980 *E-borders and Operation Semaphore* (November 2008) and SN/HA/5771 *The e-borders programme* (November 2010). During this period the Home Affairs Committee also reported repeatedly on the failings of the programme.[9]

Subsequent developments are set out in the Independent Chief Inspector of Borders and Immigration, *Exporting the border'? An inspection of e-Borders October 2012-March 2013*, October 2012[10], although this is not an easy read because even some of the recommendations are censored, or in the more accommodating modern parlance "redacted."

The Chief Inspector set out the difficulties with European Union law

5.12 A significant barrier to the achievement of the e-Borders data collection targets was the view taken by the European Commission that it was incompatible with EU free movement rights to impose a mandatory requirement on EEA nationals and family members to provide passenger data to e-Borders in advance of travel. The Commission also considered that the collection and processing of personal data for e-Borders purposes in the member state of departure would only

[6] HC Deb, 15 April 2013, c38W confirming that £475 million has so far been spent and that future expenditure cannot currently be predicted.
[7] See HL Deb 14 June 2010 cWA94.
[8] Available at https://www.gov.uk/government/news/home-secretary-letter-on-the-e-borders-programme-arbitration
[9] Home Affairs Committee: *The E-Borders Programme*, HC 170, 18 December 2009; *Follow-up on E-Borders and Asylum Legacy Cases*, HC 406, 7 April 2010 and *Follow-up of Asylum Cases and e-Borders Programme: Government Response to the Committee's Twelfth Report of Session 2009-10*, HC 457, 16 September 2010.
[10] Available at http://icinspector.independent.gov.uk/wp-content/uploads/2013/10/An-Inspection-of-eborders.pdf .

be permissible under the EU Data Protection Directive if a legal basis for it could be found in the domestic law of the member state concerned.

5.13 As a result of the Commission's indications, the UK decided that:

- *passengers who were EU citizens or their family members would not be refused entry/exit to the UK on the grounds that passenger data was not provided;*
- *providing passenger data was not compulsory for EU citizens or family members travelling to and from the UK;*
- *carriers would be told not to deny boarding to EU citizens and their family members travelling to and from the UK who did not provide passenger data; and*
- *the UK would make available to persons travelling to/from an EU member state the information required by the EU Data Protection Directive [EU Directive 95/46/EC – The Data Protection Directive – Section IV Information to be given to the data subject]*

5.14 On the basis of these undertakings, the Commission was satisfied that the e-Borders system would be compatible with EU free movement rights and data protection legislation, as long as member states recognised the interest being pursued by the UK and were satisfied that it met their domestic law requirements. Border Force was unable to mandate the collection and processing of advance passenger data from member states that did not do so, which included France and Germany.

5.15 As a result, the February 2012 Border Systems Procurement (BSP) outline business case contained revised passenger data targets to allow time to resolve these issues. The revised targets were:

- *95% of all air passengers and crew by the end of 2013; and*
- *95% of all passenger and crew movements (air, sea and rail) by end of 2014 – four years later than originally planned.*

5.16 Senior Border Force officials told us that even these targets were no longer achievable because the EU legal issues had still not been resolved. They were continuing to work with individual carriers, member states and the Commission to resolve these issues. They added that further revised targets had been put to Ministers for approval. These were to:

- *collect 75% of all air passengers by the end of 2013; and*
- *increase this target to 95% by the end of 2014*

5.17 We were told that it was no longer proposed to retain formal targets in respect of rail or maritime data due to specific difficulties, over and above EU legal issues, faced by those sectors.

5.18 In January 2012 the e-Borders Programme Steering Group recommended to Ministers that they mandate the provision of API from non EU passengers on intra EU routes. Ministers accepted this recommendation and we were told that Border Force was now taking action to require carriers to provide this information.

The Public Accounts Committee recorded of this report in its report 31st report session 2013-2014 The Border Force Securing the Border HC 663 2 December 2014.

"4…It was frustrating to the Committee to only see the Independent Chief Inspector's report on e-borders on the morning of our hearing. The report contains damning evidence of the nearly

half a billion pounds of public money spent so far on the development of the e-borders programme

…

6. The Border Force's IT systems are inadequate and its future development plans seem to be unrealistic. *… The Department's aim to achieve 80% passenger exit checks by April 2015 will place more demands on IT, but plans are unrealistic given it has not yet issued tender documents for the new technology required. Progress on replacing the Warnings Index system and introducing exit checks relies heavily on the development of the e-Borders programme (now the Border Systems programme) which worryingly is currently rated amber/red by the Major Projects Authority.*[11]

10. On the day of our hearing in October 2013 the Independent Chief Inspector of Borders and Immigration published a critical report on the e-Borders programme, which contained issues pertinent to the hearing. The report states that high-level findings from the inspection were first presented to the Border Force's Chief Operating Officer and Programme Director for e-Borders in March 2013 We found it frustrating that the Department did not share the detail of this report in advance of the hearing to give us sufficient time to familiarise ourselves with the findings. [original footnotes omitted]

The Public Accounts Committee It doubted that exit checks by 2015 could be delivered.[12]
In the circumstances, the report of the National Audit Office on e-borders, commissioned by the Home Secretary, is eagerly awaited.

- **Should not parliament have sight of the National Audit Office report before it is asked to agree yet more authority to carry schemes?**
- **What is it estimated that the proposals in the Bill on authority to carry will cost?**
- **Are the proposals of the Bill compatible with EU law and with the laws of other States to and from which passengers travel and with whose laws carriers must comply?**

[11] Public Accounts Committee, 31st *Report op.cit.* Evidence 20, 9 October 2013: Q192 Stephen Barclay: What is the Major Projects Authority's current RAG rating for the e-Borders project? *Sir Charles Montgomery:* Amber-red. Q193 Stephen Barclay: What is the definition of amber-red? *Sir Charles Montgomery:* It is a high-risk programme. Q194 Stephen Barclay: Red, in essence, means that the project should be cancelled, so amber-red for a continuing project is basically as high a rate as you can get. *Sir Charles Montgomery:* It is. Q199 Stephen Barclay: What assessment have you done? I would like to put on the record that I asked the House of Commons Library for the original business case for the e-Borders IT project to see what the original spec was. The Labour Member of Parliament, Frank Field, asked for it in two parliamentary questions on 24 and 30 May this year. On both occasions, the Department gave assurances to Mr Field that that document would be placed in the Library, but when I checked last night, it still wasn't there. I spoke to Frank Field today, and despite him chasing it up in that parliamentary question, he still has not had that information…. it is quite outrageous that a parliamentarian as respected as Mr Field can ask for something, chase it up, be given two assurances by the Minister that a key document, which I wanted to rely on for today's hearing, was in the Library, and it not to be there...

[12] Public Accounts Committee, 31st Report *op. cit.*, Evidence 20 Q628.