

Advance Passenger Information (API) - An analysis of the European Commission's proposals to reform the API legal framework ¹

ABSTRACT

This study, commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs at the request of the LIBE Committee, aims to analyse the European Commission's proposals to reform the legal framework on the processing of Advance Passenger Information (API) data. The analysis takes stock of the current legal framework regarding the processing of travellers' data. Then, it provides an outline of the Commission's proposals, followed by an assessment of the fundamental rights implications, in particular the right to respect for private life (Article 7 of the EU Charter of fundamental rights), protection of personal data (Article 8) and freedom of movement (Article 45).

Background

Council Directive 2004/82/EC (API Directive) imposes obligations on air carriers to transmit, upon request, Advanced Passenger Information (API) data to the EU Member State of destination prior to the flight's take-off. API data concern biographic data of the passenger, ideally captured from the Machine Readable Zone (MRZ) of their travel documents, as well as some information related to their flight. The API Directive is a laconic legal instrument, implemented very differently by Member States and outdated, therefore no longer fit-for-purpose. Consequently, on 13 December 2022, the Commission adopted two legislative proposals on the collection and transfer of API data that will replace the API Directive on the obligation of carriers to communicate passenger (API) data:

- A proposal for a Regulation on the collection and transfer of API for enhancing and facilitating external border controls (API border management proposal);
- A proposal for a Regulation on the collection and transfer of API for the prevention, detection, investigation and prosecution of terrorist offences and serious crime (API law enforcement proposal).

The proposals entail a series of amendments to the legal framework in particular:

- **Uniform rules on API data collection** including a closed and exhaustive list of API data elements, the means to collect API data, and a single point for their transfer;

¹ Full study in English: [https://www.europarl.europa.eu/RegData/etudes/STUD/2023/745768/IPOL_STU\(2023\)745768_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2023/745768/IPOL_STU(2023)745768_EN.pdf)



- **Mandatory API data collection for the purposes of border management and combating irregular immigration on all flights entering the Schengen area;**
- **Mandatory API data collection for law enforcement purposes for all flights to and from the EU, as well as on selected flights within the EU;**
- **Better quality API data**, as air carriers will have to collect API data by automated means only;
- **Streamlined transmission of API data** by air carriers to national authorities through a new **router**, which will be developed and managed by the EU Agency for the Operational Management of Large-scale IT Systems (eu-LISA).

Aim

This study aims to provide the European Parliament with background information on the legal framework regarding the processing of API data as well as travellers' data more broadly, a legal analysis of the proposals to revise the API framework and policy recommendations so that the study can contribute to the preparation of the two legislative reports of the LIBE Committee on each of the Commission's proposals.

Key findings

The study found that the revision of the API framework takes place after the second evaluation of the API Directive in 2020, followed up by a Study supporting an Impact Assessment. Though timely, the Commission's proposals come after the adoption of the landmark judgment in *Ligue des droits humains* which provided significant limitations to the processing of Passenger Name Record (PNR) data, to which API data is a subset, and therefore the findings of the CJEU must be taken into account and be clearly echoed in the legislation. With regard to the scope of the API-related obligations, whereas the Commission's proposals adopt a sensible approach, at the heart of the assessment lies the nature and function of the router through which the API data will be transmitted to national authorities and which will operate as a channel for information exchange and a filtering mechanism for transmitting the API data for selected intra-EU flights only, in line with *Ligue des droits humains*. The study has found that the proposed function of the router as a filtering mechanism will not be in line with the judgment, because the air carriers will transfer API data in relation to all intra-EU flights and the router will process such data in the selection process. Besides, the router may be the first step towards the forthcoming interoperability of API data with the data stored in large-scale IT systems for third-country nationals. As such, there is a heightened danger of a function creep, if in the future its operation is extended beyond the mere transmission of the API data to national authorities. The integration of API in the interoperability framework is also evident through the feeding of API data into statistics compiled by eu-LISA and the use of the technical components from the EES, ETIAS and VIS for the transfer of API data to the router. Therefore, such further use of the router is not merely hypothetical and speculative.

Whether an alternative technical solution exists is an issue that ought to have been further examined through a targeted impact assessment prior to the adoption of the API proposals, as the necessity and proportionality of the router have not been subject to a prior assessment. In any case, the development of the router should be combined with strong security standards, such as encryption of the API data, to ensure that eu-LISA does not have access to the API data transmitted and to minimise data breaches. In addition, clear assessment criteria for the collection and transfer of API data of intra-EU flights should be inserted either in the API law enforcement proposal or in a non-legislative act. These assessment criteria should not be imprecise and vague so that they can provide meaningful guidance and a methodology to the Member States in selecting intra-EU flights.

Furthermore, any extension of the scope of the API-related obligations to other modes of transport, namely sea and land carriers (railway and coaches) has already been subject to an impact assessment and it does not meet the tests of necessity and proportionality. With respect to sea carriers, reporting obligations already exist through other legal instruments. Besides, in relation to land transport the feasibility of introducing reporting obligations would disrupt the business model of carriers.

As regards the categories of API data, in particular those related to the seating and the baggage could be more precise so that the list of API data will be closed, exhaustive and precise. Furthermore, the extension of the retention period of API data (both in relation to air carriers and to border authorities) has not been justified and is not supported by the practices of the Member States in the domestic implementation of the API Directive.

In addition, the designation of eu-LISA as a data processor and not as a data controller is the legally correct assessment considering that the agency will merely provide the technical communication between the air carriers and the national authorities. In addition, from a pragmatic standpoint assigning the role of a controller to eu-LISA could create fragmentation and diffusion of responsibility and complication as to whether it is the eu-LISA or the Member States responsible for the processing of API data. The router should thus not be used as a means for Member States to evade their data protection responsibilities.

Other data protection-related provisions of the proposals must be clarified, including the exercise of individual (data protection) rights enjoyed by travellers and the supervision of air carriers as the proposed rules are unclear. Finally, the proposals should include additional safeguards regarding the use of the statistical data retrieved from the Common Repository for Reporting and Statistics (CRRS) by eu-LISA. These safeguards are necessary to ensure that the statistical data will not be used for risk analysis, profiling or predictive risk assessment, which may be detrimental to travellers who may be subject to discriminatory treatment.

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