

Carriers' obligations

Airlines and immigration control

Summary

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Carriers' obligations are obligations imposed on carriers pursuant to regulations. These obligations actually contribute to the immigration control exercised by the government at the Schengen external borders. Commercial carriers (airlines and shipping companies) that transport passengers from outside the Schengen territory are required to comply with the following four obligations: the obligation to return, the duty of care, the obligation to make copies of travel documents and the obligation to communicate passenger data. The obligations apply before passengers arrive at the Schengen external border, except for the obligation to return. If a carrier violates the carriers' obligations, the Netherlands Public Prosecution Service may initiate criminal proceedings. The violation of carriers' obligations carries a penalty. In theory, a prison sentence may be imposed on carriers.

Main question and scope of the review

This advisory report answers the following main question on carriers' obligations:

Why and how was privatisation implemented in migration policy, what were the consequences and what lessons can be distilled from this process?

The review underlying this advisory report was limited to passengers who are transported to Amsterdam Airport Schiphol, given that carriers transport by far the most passengers to that external border. It is important to note, that a number of the carriers' obligations equally apply to airlines operating flight services from outside the Schengen Area to other airports in the Netherlands and carriers transporting passengers from outside the Schengen Area by water to the Netherlands.

The obligation to return

Pursuant to the obligation to return, carriers are obliged to return passengers who are denied entry at the border to the location from which they departed. This encompasses a strict liability. Even if no blame is attributable to the carrier regarding denied entry at the border, the carrier is obliged to return the passenger to the location from which they departed. The legal basis for an entry denial at the border can be found in the Schengen Border code or the Aliens Act. The legal basis for an entry denial at the border can be found in the Schengen Border code or the Aliens Act (*Vreemdelingenwet 2000*). Entry may be denied at the border due not only to the absence of travel documents or a visa (Schengen Borders Code) but also a lack of sufficient

means of support (Aliens Act 2000). During the period 2015-2018, around 2,500 foreign nationals were denied entry at the border per year.

The duty of care

Pursuant to the duty of care, carriers are required to verify that passengers hold valid travel documents. Third-country nationals must hold a valid travel document and a (transit) visa to enter the Schengen territory. The duty of care is a best-efforts obligation. The regulations include a list of matters that carriers in any event are required to check. Carriers are required to sufficiently instruct their staff so that they can check passengers' travel documents. If a passenger does not hold the required travel documents, carriers must refuse the passenger on a flight. Carriers have fulfilled the best-efforts obligation unless any blame for negligent conduct can be attributed to them.

The obligation to make copies of travel documents

Carriers are obliged to make a copy of foreign nationals' border-crossing document if the airport of departure is included in a list of airports that are subject to the obligation to make copies of travel documents. The list is updated every six months. The obligation to make copies of documents was introduced to prevent foreign nationals from getting rid of the border-crossing document after they have checked in for a flight. If passengers nevertheless do so, their identity can be traced based on the copy of the border-crossing document.

The obligation to communicate passenger data

The obligation to communicate passenger data follows from two EU directives: the Advanced Passenger Information (API) Directive and the Passenger Name Record (PNR) Directive. The objectives of the API Directive are to improve border control and to combat irregular immigration. The use of API data aims to contribute to speeding up passenger flow at the border control points. The API Directive requires carriers to provide passenger data before the end of the boarding checks. Passenger data relate to the following information: the number and nature of the travel document used, name, nationality, date of birth and general flight information. Under the supervision of the Royal Netherlands Marechaussee, the API Centre checks passenger data against records and watch lists for individuals for whom an alert has been issued. If a match with such an individual is detected, the Royal Netherlands Marechaussee can intervene at the border.

PNR data consist of unverified information provided by passengers collected by the air carriers for their own commercial purposes and stored in automated reservation and departure control systems. PNR data relate to travel data and the travel itinerary, ticket information, contact details, travel

agent at which the flight was booked, means of payment used, information on the use of airline loyalty programmes, seat number and baggage information. PNR data should enable law enforcement authorities to identify individuals who were previously 'unknown', in other words, individuals not previously suspected of being involved in serious crime or terrorism. Carriers have only been required to submit PNR data since 18 June 2019.

Memorandum of Understanding

Carriers have the option of concluding a Memorandum of Understanding (MoU) with the Dutch State. The objective of an MoU is to reduce, facilitated by the Dutch State, the number of undocumented or improperly documented passengers travelling to the Netherlands. In exchange for the extra efforts undertaken by the carriers, the Netherlands Public Prosecution Service will not initiate criminal proceedings if the number of presumptive violations of carriers' obligations remain within the predetermined quota. Since KLM is the home carrier, it has a special position at Schiphol. The airline has a large share in the number of inbound and outbound flights at the airport. KLM is the only carrier that has concluded an MoU with the Dutch State. KLM has been able to remain within the agreed quota.

Immigration liaison officers (ILOs)

The Netherlands has been using a network of ILOs since 2000. Thirteen Dutch ILOs are currently active, who are stationed at embassies - close to strategic hubs - in view of the risks of irregular immigration. The Dutch ILOs are part of a European network, in which the ILOs of various Member States deputise for each other.

The duties of the ILO include:

- making and maintaining contact with the competent authorities of third countries and other organisations, and collecting information for use at operational or strategic level;
- advising carriers on whether or not to transport passengers to destinations in the Schengen Area;
- providing training courses to carriers' staff. These training courses relate primarily to document expertise, staff changes, recognising high-risk reservations and Schengen laws and regulations. Disseminating knowledge of the international protection grounds to carriers' staff, the staff of handling agents and station managers also appears to belong to the official duties of the ILOs. However, to what extent knowledge is transferred in this area did not become clear during the review.

Dutch ILOs issue between 3,500 and 4,000 negative recommendations out of a total of around 9,000 recommendations on an annual basis. ILOs use 'hard' and 'soft' grounds when advising carriers. The hard grounds relate to the absence of proper border-crossing documents. The soft grounds relate to profile refusals based, for example, on the travel route followed, combined with other circumstances. Carriers refuse passengers on both hard and soft grounds. KLM has indicated that between 4,000 and 4,500 passengers are refused on a flight on an annual basis. It may be assumed that other carriers, who are subject to the same regulations, maintain more or less the same course of action for refusing passengers. The actual number of passengers carriers refuse on a flight will therefore be far higher than 4,500 passengers a year. The Dutch government has no fundamental insight into the numbers of, and grounds on which, passengers are refused by carriers because they are not required to record and disclose the number of passengers refused pursuant to the duty of care.

The effectiveness of carriers' obligations

Due to the lack of relevant data, it is difficult to obtain insight into the effectiveness of the separate carriers' obligations. Moreover, the different obligations are interrelated. In practice, this means that the obligations reinforce each other. The Advisory Committee on Migration Affairs (ACVZ) concludes that as a result of the influence of European regulations on the implementation of carriers' obligations, a system has evolved that has become almost watertight and that all carriers' obligations jointly contribute to the more effective implementation of immigration control. This does not change the fact that from 2016 an average of around 180 undocumented foreign nationals applied for asylum at the border each year. That number includes foreign nationals, a copy of whose travel document was obtained from the carrier.

Legitimacy of the regulations

On 9 September 2003, the possibility was abolished of applying to a Dutch Embassy for an authorisation for temporary stay in order to be transferred to the Netherlands to submit an application for asylum. At that time, it was laid down in the Aliens Act Implementation Guidelines (*Vreemdelingencirculaire*) that a carrier may contact the Immigration and Naturalisation Service (IND) when considering whether or not to transport to the Netherlands an undocumented or improperly documented passenger, who claims that his life is in immediate danger. The IND will then determine whether the passenger may be transferred to the Netherlands. This procedure is not used in practice. Carriers are not bound by this policy rule. If this policy rule is intended to serve as an alternative to submitting a transfer request for the purpose of submitting an asylum application in this country, it should include an obligation requiring carriers to submit these

cases for assessment to the IND. The policy rules should be laid down in a generally binding regulation if the intention exists to bind carriers to it.

The legal protection of refused passengers against carriers

Contracts of carriage are governed by civil law. If a carrier refuses to transport a passenger and the passenger disagrees with the refusal, the latter *may* bring civil proceedings against the carrier concerned on the grounds of non-fulfilment of the contract of carriage.

As part of the carriers' obligations, carriers check passengers' travel documents pursuant to the duty of care, and refuse undocumented or improperly documented passengers on flights to the Schengen Area. The duty of care is not in contravention of human rights treaties. The Geneva Convention on Refugees has no extraterritorial effect. The protection of the non-refoulement provisions in the various international treaties, including the European Convention on Human Rights (ECHR) do not apply to passengers refused by carriers. States have not transferred any powers to carriers, and therefore - indirectly - through the acts of carriers, do not exercise extraterritorial state authority.

Apart from the fact that the policy rule, referred to in the section on the legitimacy of the regulations, cannot bind carriers, in the opinion of the ACVZ, a number of risks are attached to this procedure:

1. As already stated above, it is not clear to what extent the protection grounds in the Geneva Convention on Refugees and other human rights treaties are included in the training modules provided to the staff of carriers and handling agents who act on behalf of carriers. It is questionable therefore whether the ground crew of a carrier or a handling agent has the ability to assess or to even recognise whether a passenger is advancing reasons (on valid grounds) for requesting asylum.
2. However, should the procedure be applied, this may mean that more undocumented or improperly documented passengers will approach a carrier with a need for protection and a request for carriage. Carriers are not obliged to issue a report on the number of passengers who have invoked protection, but have nevertheless been refused on a flight to the Netherlands. The government therefore has no insight into passengers who have expressed a need for protection in countries of departure and have been refused by carriers.

The legal protection of carriers against a government that imposes sanctions

The Public Prosecution Service criminally prosecutes carriers by offering out-of-court settlements and bringing cases before the criminal court. The ACVZ

is of the opinion that a quota scheme as laid down in an MoU reflects the nature of the duty of care. In the case of a best-efforts obligation, it is appropriate that the Public Prosecution Service does not criminally prosecute a carrier if it remains within the agreed quota. Viewed in that light, the ACVZ also considers it appropriate to act favourably upon quantitative pleas from carriers. A single violation when checking large numbers of passenger should not lead to a sanction. The penalties laid down by the Public Prosecution Service in the prosecution guidelines are high. The ACVZ has noted that there are considerable differences between the level of the penalties in the guidelines and the penalties ultimately imposed by the criminal courts.

Conclusions

1. As a result of the influence of European regulations on the implementation of carriers' obligations, a system has evolved that has become almost watertight for the aviation sector. As a result, undocumented or improperly documented passengers are no longer able to reach the Schengen external border by plane. The carriers' obligations actually contribute to the more effective implementation of immigration control.
2. The MoU between the Dutch State and KLM has the intended effect, given that the number of duty of care violations by KLM remains within the determined quota.
3. The Dutch government has no fundamental insight into the absolute or the relative numbers of passengers denied entry at the border and the grounds on which carriers refuse passengers. Carriers are under no obligation to record passenger refusals and the reasons for doing so, and to report on this.
4. The possibility of applying to a Dutch representation abroad for an authorisation for temporary stay for the purpose of 'asylum' was abolished with effect from 9 September 2003. As an alternative for carriers, a policy rule was laid down in the Aliens Act Implementation Guidelines that sets out a procedure enabling carriers - who are considering whether or not to transport an undocumented or an improperly documented foreign national, who claims that his life is in immediate danger, to submit this matter to the IND. No use is made of the procedure laid down in this policy rule.
 - a. Carriers are under no obligation to transport passengers refused on the basis of hard or soft criteria, not even if they advance reasons for requesting asylum.
 - b. There are indications that ground crew are inadequately equipped to follow the procedure laid down in the policy rule referred to.

5. The penalties for non-fulfilment of the carriers' obligations as set out in the prosecution guidelines of the Public Prosecution Service are high. There is a considerable difference between the guidelines of the Public Prosecution Service and the punishment imposed by the criminal court.

Recommendations

Explanation of recommendations 1 and 2:

The policy rule - that sets out a procedure enabling carriers who are considering whether or not to transport an undocumented or an improperly documented foreign national, who claims that his life is in immediate danger, to submit the matter to the IND - does not impose any obligation on carriers. Therefore it is not an alternative for the possibility that existed until September 2003 to apply to a Dutch representation for an authorisation for temporary stay for the purpose of 'asylum'. If the actual intention is to provide protection to undocumented or improperly documented passengers, who claim that their life is in immediate danger, an obligation to submit the matter to the IND should be included in a generally binding regulation.

Recommendation 1

Abolish the policy rule in the Aliens Act Implementation Guidelines that sets out a procedure enabling carriers who are considering whether or not to transport an undocumented or an improperly documented foreign national, who alleges that his life is in immediate danger, to submit this matter to the IND.

and

Recommendation 2

Consider whether an obligation for carriers should be laid down in a generally binding regulation, if an undocumented or an improperly documented passenger claims that his life is in immediate danger, to approach the IND to assess whether there is a reason to transfer the passenger to the Netherlands.

Recommendation 3

Lay down in a generally binding regulation that carriers record the number of refused passengers and the reasons for refusal, and that they periodically report on this to the Ministry of Justice and Security.