



The Chairman

Monsieur Jonathan FAULL
Director General
DG JLS
European Commission
B-1049 Brussels

Paris, le 24 JUL. 2008

N/Réf. : AT/YPA/SN/SRE/CS081066

Dear Mr Faull,

The Article 29 Working Party has been informed that the European Commission is about to make some comments to the US authorities regarding the introduction of their Electronic System of Travel Authorisation (ESTA) and requested the Art. 29 WP to provide it with input as far as data protection issues are concerned.

The members of the PNR subgroup of the Article 29 Working Party met last week in Vienna and discussed this matter of high interest and exchanged their views on the topic.

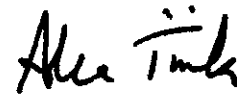
Consequently, to accommodate your request for comments on this US ESTA system, I would like to share with you the concerns raised so far on this very sensitive topic. You will find the first preliminary remarks formulated by the subgroup in the attached document.

Let me stress that these comments represent a first reaction and are without any prejudice to a future intervention by the Working Party in the form of an official opinion which still needs the consensus of all members of the Working Party and has to be formally adopted at one of the next plenary sessions.

This Working Party was set up under Article 29 of Directive 95/46/EC. It is an independent European advisory body on data protection and privacy. Its tasks are described in Article 30 of Directive 95/46/EC and Article 15 of Directive 2002/58/EC.
The secretariat is provided by Directorate C (Civil Justice, Rights and Citizenship) of the European Commission, Directorate General Justice, Freedom and Security, B-1049 Brussels, Belgium, Office No LX-46 06/80.
Website: http://ec.europa.eu/justice_home/fsj/privacy/index_en.htm

Nevertheless, I hope that these first remarks are useful for your discussion with the US authorities and I would appreciate if you could inform the Working Party about the results of these talks.

Sincerely yours,

A handwritten signature in black ink that reads "Alex Türk". The signature is written in a cursive style with a prominent flourish at the end of the word "Türk".

Alex Türk

Chairman of the Art. 29 Working Party

Preliminary analysis of the US ESTA by the Art. 29 WP's PNR subgroup at the request of the EU Commission of 10 July 2008

July 24th, 2008

In June 2008, the US Department of Homeland Security (DHS) announced a new system of records, the Electronic System for Travel Authorization (ESTA), a new online system as part of the Visa Waiver Program (VWP) being required by the Implementing Recommendations of the 9/11 Commission Act of 2007, which will replace the current paper form I-94W to be filled in on board.

This system aims to collect and maintain a record of non-immigrant aliens who want to travel to the US under the VWP. According to this new system, from January 2009 all citizens of VWP planning to travel to the United States by air or sea for temporary business or pleasure will be obliged to receive an electronic travel authorisation prior to their trip to the US.

1 Impact of ESTA on the privacy of transatlantic passengers

- a) ESTA comes in addition to other programmes demanding the collection of personal data, such as API data and the PNR system, information to be provided under the US Visit programme (fingerprints, address while in the US) and bilateral agreements on the exchange of personal data (Germany, Hungary etc). ESTA and these programmes overlap in that some information sought via ESTA is also required by other programmes. It is not clear why some information is requested twice and how these programmes complement each other.
- b) An electronic rather than a paper-based system has a far greater impact on passengers' privacy through automated checking of databases and the widespread sharing of information with third agencies.
- c) By filling in the data electronically in advance of travel, the US is moving its borders outside the US and submitting personal data through the new system significantly changes the quality of data collection and creates new risks for the individual. The collection of data in advance rather than on board results in a lack of face-to-face interviews with border officials, with most probably fewer possibilities for explanations, justification or redress.
- d) If the system mainly relies on automated decision making this can have serious consequences for the individual, including the denial of boarding by the air carriers concerned. What happens if one of the "whether questions" is answered "yes"? Is immediate feedback through TRIP possible in case the system refuses boarding? Is direct contact possible on the website or by email? It is unclear how TRIP will assist the passenger in getting support where questions arise or even entry is denied (see comments at section 9).

2 Purpose

The purposes given in the SORN and the DHS Privacy Policy are very broad. The system is designed to determine, in advance of travel, whether the applicant is eligible to travel to the United States under the VWP and whether such travel poses a law enforcement or security risk by checking passenger information against various security and law enforcement databases. It is not clear what eligibility for travelling means and what might be considered a law enforcement and security risk. (See also comments at section 6 c.) The wide data sharing envisaged with other agencies suggests that the purposes might even be broader.

3 Scope

The scheme covers nationals of VWP countries who do not need a visa. By launching ESTA the question arises whether the US wants to introduce a secondary visa system. ESTA also covers children regardless of whether they travel alone or with their legal representatives. Children need special care. Is the focus of ESTA in the interest of the child? The I-94W form for children under the age of 14 is currently filled in and signed by an adult (legal representative or an adult authorised to travel with the child/children) although this is not specified in the form itself. Will the ESTA be the same? Who is considered responsible for filling in and signing the new electronic form? What happens to family members travelling together? What will be the procedure (and checks) for children under age travelling alone? Since passengers may be denied entry into the US due to given answers, attention must be paid to the different aspects linked to applications related to children, and accurate information on how to fill in the form must be in place. But on the other hand, a child who wants to go to the US to enjoy protection (such as staying with a US family) does not seem to be taken into account by ESTA, but by a visa regime).

4 Data elements and their necessity

ESTA collects three kinds of information: API data and flight information, contact details and “whether questions” to be answered yes/no.

It is not clear why the US needs all the API data and flight information which will be submitted by the air carrier under the PNR agreement. It has to be clarified what happens when there are discrepancies where data provided by the carrier are different from those submitted by the passenger.

- a) In addition to the paper form I-94W, ESTA requires the e-mail address if available and the phone number. These details might be useful to contact the individual to get more information on the passenger, but is that how they are used?
- b) Is the additional phone number mandatory and what happens if it is not filled in? Not everybody has a phone number.
- c) Why does the US need information about the individual that it already has in its own databases, such as details relating to previously refused visas or detaining children?

5 Data quality and accuracy

While API data and flight information are easily verifiable, contact data such as address and e-mail address can be filled in randomly and might be subject to errors.

In particular, the answers given to the “whether questions” can’t be easily verified. For example, one has to assume that most passengers answer “no” when asked about their Nazi past. What value do these questions have if they can’t be verified at the border? Are those questions really understandable and necessary in particular when the applicant is a child?

If a passenger erroneously fills in the form and submits a new form, what happens to the previously submitted data? Who is responsible for the accuracy of the data if a third person fills them in? It is not enough to assume consent or to ask the third party to say they have the individual's consent - how can this be verified? What happens if somebody sets up a bogus ESTA to prevent the passenger from travelling? One major shortcoming of the system is that passengers can’t, apart from a few exceptions, verify their own data once they have submitted them.

The information passengers can modify in the form is not essential for the assessment of the eligibility for travelling.

6 Sensitive data

- a) Some “whether questions” ask for sensitive data. Assuming that most passengers will answer “no” and the accuracy of the answers can’t be checked, what is the relevance of asking such questions? What are the consequences if somebody answers “yes” given the unknown scope of database interconnections of the new system? In the future will there be medical checks on a random basis at airports? What about sensitive data which become irrelevant over time but are stored in the system and the passenger fills in a second form with updated information? How does DHS treat passengers who fill in a second form with false data because their first application was denied after having provided correct answers?
- b) How are sensitive data protected? There are doubts about their protection and a possible lack of safeguards with regard to their processing. Are they treated as normal data?
- c) There are concerns over some of the wording used in the questionnaire, for example, whether an individual has a communicable disease, or a mental or physical disorder. Who defines such illnesses and their impact on the eligibility for travel? Is somebody suffering from depression ineligible for travelling? If the necessity of these questions is established and they are maintained, it would be helpful to have definitions of what is considered a communicable disease, a physical or mental disorder.

7 Onward transfers

According to the SORN published by DHS, passenger data received under the ESTA can be widely shared with third parties such as national, foreign and transnational agencies. It is not clear whether this sharing takes place on a case-by-case basis or not, and what safeguards are in place in particular when it comes to further onward transfers by third parties.

DHS provides US Embassies with information concerning denied entries to allow passengers to look for redress. Can US Embassies correct information stored in ESTA at the request of the traveller where this is justified?

8 Transparency and passenger information notices

The language of the privacy act statement needs to be more passenger friendly. It is too legalistic and bureaucratic. Information given to travellers is insufficient, in particular concerning passengers travelling with family members and children under age. There is no mention of the recipient of the data, onward transfers, or TRIP. There are no explanations regarding the “whether questions”. There could be more information given on passenger rights.

It is not clear what happens if there are language problems. Even if the questions appear in October in different EU languages, there might be problems, for example, when EU citizens whose mother tongue is a non-EU language fill in the form.

Once questions are asked in other languages travellers will also respond in their mother tongues. Does the system understand the answers given in foreign languages to avoid discrepancies? For example, when travellers fill in country and town names in their mother tongues (Rome instead of

Roma, Köln instead of Cologne). What about letters that do not exist in English such as è, ñ, Ä, Ü, etc?

9 Passenger rights

Passengers might seek redress through TRIP. How fast does the system work in case passengers need to correct data after they have been denied boarding? What happens if the problem can't be resolved through TRIP? What about legal measures? What rights do passengers have in cases where data are shared with other national or foreign agencies?

Who is responsible for erroneously filled-in data by a third party such as an employer, a travel agent, or an air carrier? What about privacy rights in such cases? In particular, if the passenger reveals sensitive data (illness, disorders) to the third party?

10 Retention period

75 years is disproportionate and not consistent with the retention periods of other schemes. For how long will erroneously filled-in forms be retained?

11 Technical and organisational measures

They seem adequate.

12 Security

Access to the system is only lightly secured or not secured at all. If someone knows the passport number of a person who wants to travel to the US they can easily cause problems by creating a false ESTA. If someone is in possession of the passport and the tracking number, they can find out the travel status of the passenger.

The Privacy Impact Assessment states that all applicants must provide an "electronic signature". But this is not secure enough as it only means to virtually sign the ESTA by clicking a box. To avoid the mentioned risks the system should optionally accept qualified digital signatures from travellers. Qualified digital signatures are digital signatures issued by a certified trust center or a member state of the EU (like the Austrian citizen card). These qualified digital signatures should also allow access to the ESTA server to modify any previously submitted data if necessary and to replace any reference numbers.

Travellers using qualified digital signatures should, in case of a conflict with a previously established ESTA that has been "signed" with a "simple" electronic signature (for example, a checkbox), have the possibility/advantage to overrule/overwrite their previous form.

It is not clear what happens if a second ESTA is filed. Does the system accept it and ignore the previously submitted one, or will it be refused due to discrepancies arising from different answers?

Travellers accessing the system with qualified digital signatures would be able to fill in the form and look into their previous files without memorising or mentioning the tracking number. They could identify the old record as wrong, outdated or a fake entry without contacting TRIP or a US Embassy and would also be able to update their ESTA continuously and comfortably. This would avoid problems where the tracking number has been lost or stolen.

It should be acknowledged, however, that not all individuals will be able to use digital signatures. An extra layer of security can be provided by introducing passwords as well as the tracking number and other personal details.

Conclusion

In this preliminary analysis the PNR subgroup has identified a number of issues and questions related to the imminent launch of ESTA. The current scheme raises many questions, in particular with regards to proportionality, necessity, data accuracy, data quality, and safeguards for sensitive data. Also, the rights of data subjects need to be addressed as well as the information notices.

This paper, without prejudice to a future thorough analysis in the form of an opinion to be adopted by the Art. 29 WP, is submitted to the EU Commission with the expectation that it takes up these issues with DHS and provides the Art. 29 WP with more details on the scheme so it might properly assess the impact of ESTA on the privacy of transatlantic travellers