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The U.S. Electronic System for Travel Authorization (ESTA)

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1. INTRODUCTION

1.1. Purpose of this paper

On 18 April 2008, the Council adopted a recommendation to authorize the Commission to open negotiations on behalf of the European Community for the conclusion of an agreement with the United States of America (U.S.) regarding certain conditions for access to the U.S. Visa Waiver Program (VWP). For this purpose, it is necessary to consider the nature of the U.S. Electronic System for Travel Authorization (ESTA) and the modalities for its implementation.

The Commission indicated in its fourth visa reciprocity report¹ with regard to the U.S. ESTA that *"As part of the EC-track, the Commission also needs to assess whether the travel authorization under the ESTA is tantamount to a visa requirement or not. On 9 June 2008, the Interim Final Rule for the ESTA was published in the Federal Register. The Commission will provide its preliminary assessment on the basis of this Interim Final Rule as to whether the ESTA is tantamount to the Schengen visa application process as defined in the Common Consular Instructions or not, together with an analysis of the implications of ESTA for the protection of personal data. However, the Commission will be able to give a final assessment, only once the Final Rule has been published in the Federal Register; i.e. 60 days before its entry into force."*

The purpose of this paper is threefold:

- (1) to provide a preliminary assessment as to whether the ESTA is tantamount to the Schengen visa application process as defined in the Common Consular Instructions (CCI);
- (2) to provide an analysis of the implications of ESTA for the protection of personal data;
- (3) to consider in particular the position of HIV-positive persons under the ESTA and the VWP.

1.2. U.S. legislation and related documents

On 3 August 2007, U.S. President Bush signed into law the "*H.R. 1 Implementing Recommendations of the 9/11 Commission Act of 2007*"². Section 711 of this Act covers the "*Modernization of the Visa Waiver Program*". One of its key elements is the development and implementation of a fully automated ESTA which will collect biographical and other information necessary to determine, in advance of travel, the eligibility of, and whether there exists a law enforcement or security risk in permitting, the VWP traveller to travel to the U.S.

¹ COM (2008) 486 final/2 of 9.9.2008; Corrigendum to COM (2008) 486 final of 23.7.2008.

² H.R. 1 / Public Law 110-53; Aug. 3, 2007; 121 Stat. 266.

by air or sea. According to Section 711, the ESTA travel authorization will not be a determination that a traveller is admissible to the U.S. A fee may be charged for the ESTA travel authorization. The authorization would be valid for a maximum period of three years.

On 9 June 2008, the U.S. Department of Homeland Security (DHS) Customs and Border Protection (CBP) **Interim Final Rule (IFR)** for an ESTA was published in the Federal Register³. This rule amends DHS regulations to implement the ESTA requirements under Section 711, establishes ESTA and delineates the data fields DHS has determined to be collected by the system.

CBP published on its website a **Privacy Impact Assessment (PIA)** for the ESTA, dated 2 June 2008⁴.

On 10 June 2008, CBP published the **Notice of Privacy Act system of records (SORN)** in the Federal Register⁵. The publication of such a SORN is an obligation under U.S. law.

2. PRELIMINARY ASSESSMENT AS TO WHETHER THE ESTA IS TANTAMOUNT TO THE SCHENGEN VISA APPLICATION PROCESS AS DEFINED IN THE CCI

A preliminary assessment has been carried out, based in particular on the following sources:

- the ESTA application website⁶;
- Section 711 of "H.R. 1 Implementing Recommendations of the 9/11 Commission Act of 2007";
- the IFR for an ESTA as published in the U.S. Federal Register of 9 June 2008;
- the SORN as published in the U.S. Federal Register of 10 June 2008;
- the PIA for an ESTA of 2 June 2008; and
- Frequently Asked Questions (FAQs) about ESTA, version of 17 October 2008⁷.

2.1. Comparison between the I-94W form and ESTA

At present all persons, including children, travelling to the U.S. under the VWP must fill in the I-94W Nonimmigrant Visa Waiver Arrival/Departure Form (hereafter: I-94W form). This paper form must be filled in before entering the U.S. and presented at a port of entry. The I-94W form has never been considered to be tantamount to a visa by the European Union.

³ U.S. Federal Register / Vol. 73, No. 111 / Monday, June 9, 2008 / Rules and Regulations, p. 32440.
(<http://frwebgate3.access.gpo.gov/cgi-bin/PDFgate.cgi?WAISdocID=60008014545+0+2+0&WAIAction=retrieve>)

⁴ http://www.dhs.gov/xlibrary/assets/privacy/privacy_pia_cbp_esta.pdf

⁵ U.S. Federal Register / Vol. 73, No. 112 / Tuesday, June 10, 2008 / Notices, p. 32720.
(<http://frwebgate3.access.gpo.gov/cgi-bin/PDFgate.cgi?WAISdocID=60029714862+1+2+0&WAIAction=retrieve>)

⁶ https://esta.cbp.dhs.gov/esta/esta.html?flowExecutionKey=c2A5638A1-4998-DBB8-FE2E-C576C0911DC3_k29F05A65-04F6-4279-C376-EDC80064F40C

⁷ http://www.cbp.gov/xp/cgov/travel/id_visas/esta/esta_faq.xml

Once ESTA is obligatory, all nationals of VWP countries who plan to travel to the U.S. for temporary business or pleasure will require an approved ESTA travel authorization prior to boarding a carrier to travel by air or sea to the U.S. under the VWP. The U.S. authorities anticipate that the ESTA will be obligatory from 12 January 2009 onwards. However, as from 1 August 2008, travellers to the U.S., who are nationals of VWP countries can voluntarily apply for an ESTA travel authorization but still have to fill in an I-94W form. Moreover, in the case of a new country joining the VWP before 12 January 2009, its citizens will be obliged to apply for an ESTA travel authorization before travelling to the U.S. by air or sea.

2.1.1. Common features

The I-94W form and the ESTA have many features in common:

- Both are available in several languages. As from 15 October 2008, the ESTA website is available in 16 languages: Spanish, Czech, Danish, German, Estonian, English, French, Italian, Dutch, Portuguese, Slovene, Finnish, Swedish, Norwegian, Icelandic and Japanese.
- It is indicated who should fill them in: a citizen of a VWP country, not in possession of a visitor's visa, travel for 90 days or less, and travel for business or pleasure.
- The following personal data have to be provided in both processes: family name, first name, date of birth, country of citizenship, gender, passport number, airline carrier code, flight number, country where one lives, city where one boarded, and full address while in the U.S.
- In both processes the applicant has to answer seven eligibility questions with regard to: A. having communicable diseases, physical or mental disorders, or being a drug abuser or addicted; B. being arrested or convicted for offences or crimes, trafficking, criminal or immoral activities; C. being involved in espionage, sabotage, terrorist activities, genocide, or persecutions associated with Nazi Germany; D. seeking work, being excluded, deported or removed from the U.S., procurement of visa or entry into the U.S. by fraud or misrepresentation; E. being detained, retained or withheld custody of a child from a U.S. citizen; F. being denied a U.S. visa or entry into to the U.S. or a U.S. visa having been cancelled; G. having asserted immunity from prosecution.
- The applicant waives his/her rights to review or appeal to CBP's determination to admissibility and removal action.
- The applicant has to certify that he/she has understood the questions and answered to the best of his/her knowledge and belief.
- No fee is charged.
- No judicial review is possible.
- The I-94W form and the ESTA travel authorization do not provide an entitlement to entry into the U.S.

2.1.2. Differences

Nevertheless, the ESTA differs from the I-94W form in the following respects:

- The main difference is the way the traveller has to provide the information: while the I-94W form is a paper form, the ESTA is web-based automated system.
- Although the ESTA must be filled in when travelling by sea and air, no indication is given on the ESTA website on how to fill in the application when travelling by sea. The I-94W form will still be required when travelling by land. No ESTA is needed if the traveller has a valid visa for the purpose for which it was issued. In the case of a visa an I-94 Arrival/Departure Record Form needs to be filled in.
- The ESTA website provides a link to a "*Privacy Statement*" and a "*Disclaimer*". The Privacy Statement gives information on information collection and use, security notification, copyright notice, use of CBP features, and links to other sites (see below under section 3.1.1.). The Disclaimer sets out the rights and consequences of an ESTA travel authorization.
- As part of the ESTA process the traveller also reaffirms his/her waiver of rights by submitting his/her biometric identifiers (fingerprints and photograph) in accordance with U.S. VISIT upon arrival in the U.S.
- The ESTA requires additional personal data: passport issuance and expiration dates, passport issuing country, a contact e-mail, and a telephone number. The rulemaking procedure to update the I-94W form to include these last two items has been initiated.
- The following items are optional and do not have to be provided in order to complete the ESTA application: airline carrier code, flight number, city where one boarded, e-mail address, and telephone number. However, these items, including the address while in the U.S., can be introduced or updated at a later stage. The ESTA website does not indicate whether these items have to be updated before actually travelling to the U.S.
- As a third party may submit an ESTA application on behalf of an applicant, the third party has to certify that the applicant has understood the questions and answered to the best of his/her knowledge and belief.
- While the I-94W form is handed over at the US port of entry, the ESTA application must be filled in electronically from outside the U.S. before commencing the journey.
- While the I-94W form is handed over to the traveller while checking in at the airport, in the aircraft or at the latest at the U.S. port of entry, the ESTA can be filled in without specific plans for travelling to the U.S. DHS recommends obtaining an ESTA travel authorization at least 72 hours before departure.
- Contrary to the I-94W form, which does not determine whether the traveller is eligible to travel to the U.S. as the form is handed over to the CBP officer only at the port of entry, the ESTA determines whether one is eligible to travel to the U.S. before embarking the aircraft or vessel.
- The traveller has to retain part of the I-94W form and surrender it when leaving the U.S. With the ESTA the traveller does not have to present the application number or a print-out of the ESTA travel authorization. Nevertheless, the application number is required for updating the information or checking the status of a completed application at a later stage.

- Although the Secretary of Homeland Security may charge a fee for the ESTA, for the time being no fee is charged or indicated in the available legislative documents.
- ESTA applicants have the opportunity to check the status of their travel authorization. As an ESTA travel authorization may be revoked at the discretion of the Secretary of Homeland Security, the traveller should check his/her status before actually travelling to the U.S. However, the ESTA website does not indicate that the applicant should check his status before travelling.

2.1.3. Conclusion

The comparison shows that the I-94W form and the ESTA are very similar processes: similar data and questions asked for; no fee is charged; no judicial review is possible; and they do not provide an entitlement to enter the U.S. The additional features of the ESTA are mainly of procedural nature; e.g. possibility of updating information, eligibility to travel to the U.S. before embarking on the aircraft or vessel.

2.2. Comparison between ESTA and Schengen visa application process

2.2.1. Definition of a visa

The CCI⁸ defines uniform visas as follows:

"Uniform visas are the authorisation or decision taking the form of a sticker affixed by a Contracting Party to a passport, travel document or other document which entitles the holder to cross the border. It enables aliens subject to the visa requirement to present themselves at the external border of the Contracting Party which issued the visa or that of another Contracting Party and request, depending on the type of visa, transit or residence, provided that the other transit or entry conditions have been met. Mere possession of a uniform visa does not confer automatic right of entry."

An approved ESTA travel authorization means that a traveller is eligible, and grants the traveller permission to travel to the U.S. under the VWP. An authorization under the ESTA is not a determination that the traveller is admissible to the U.S. A determination of admissibility is made by a CBP officer at a U.S. port of entry.

Visas and the ESTA travel authorization both constitute an authorization to be obtained before travelling and thus a condition for travelling to a country, albeit without giving the right to enter that country.

The U.S. authorities do not consider the ESTA to be a visa. The IFR states that *"ESTA is not a visa or a process that acts in lieu of any visa issuance determination made by the Department of State"*. In the FAQs about the ESTA it is stated that: *"An approved ESTA is not a visa. It does not meet the legal or regulatory requirements to serve in lieu of a U.S. visa when a visa is required under U.S. law. Individuals who possess a valid visa will still be able to travel to the United States on that visa for the purpose for which it was issued. Individuals traveling on valid visas will not be required to apply for an ESTA. Obtaining ESTA approval, for most travelers, will be simple and easy. The visa process has separate procedures, which generally*

⁸ OJ C 326, 22.12.2005, p. 1.

require an appointment, travel to a U.S. Embassy/Consulate, an interview with a consular officer, processing time, and the payment of an application fee (currently \$131)."

The U.S. visa application process requires more than the ESTA: the visa application form; a photograph; additional documents (e.g. to prove means of subsistence, although these are not always required); personal appearance/interview, although this is not always required; fingerprints but they are not always required; running data against several data bases; and payment of a fee.

The U.S. visa application form (depending on the kind of visa requested) requires about 20 additional data items compared to the ESTA, such as: marital status; intended stay; occupation; work history; purpose of trip; previous visits; whether a U.S. visa has been issued, denied, cancelled or revoked; list of all countries one has entered in the last ten years; whether one's passport has ever been lost or stolen; whether one has performed military service; whether one has specialized skills or training, including firearms, explosives, nuclear, biological or chemical experience; whether one has been involved in an armed conflict as a participant or victim.

2.2.2. Schengen visa application process

The Schengen visa application process as defined in the CCI contains several elements: data/documents to be provided, a visa application form, a fee, providing biometrics (once the Visa Information System (VIS) has started its operations), visit to consulate/embassy for interview, and examination of the visa application. Comparison of the ESTA with this process is decisive in considering whether or not the ESTA is tantamount to the Schengen visa application process as defined in the CCI.

2.2.2.1. Data/documents to be provided with the visa application form

In addition to the personal data required in the ESTA, the Schengen visa application form requires about 20 additional data items: place and country of birth; original nationality; marital status; parents' names; whether one has the permission to return to the country in which one resides other than the country of origin; current occupation; employer's or school's address; main destination; type of visa wanted; number of entries wanted; duration of stay; in case of transit, whether one has an entry permit for the final country of destination; previous stays in Schengen states; purpose of travel; date of departure; means of transport; means of support during the stay; spouse's and children's names and dates of birth; and if applicable personal data of EU or EEA citizens one depends on.

With the Schengen visa application form, the applicant has to provide a valid travel document to which a visa may be affixed. Moreover, the applicant has to enclose, where appropriate, supporting documents. The supporting documents relate to the purpose of the journey (e.g. a letter of invitation, organized trip), means of transport and return (e.g. return ticket), means of subsistence (e.g. travel health insurance, cash, traveller's cheques), accommodation (e.g. hotel reservation), and other issues (e.g. parental authorization for minors).

In the ESTA application process the applicant does not have to provide any additional data or documents besides the data required in the ESTA website.

2.2.2.2. Fee

The applicant has to pay a fee of €60 when he applies for a Schengen short-stay visa. The fee may be waived or reduced pursuant to Council Decision (2006/440/EC) of 1 June 2006⁹ and Visa Facilitation Agreements with certain countries¹⁰.

Although the Secretary of Homeland Security may charge a fee for the ESTA, for the time being no fee has been introduced or announced in the available legislative documents.

2.2.2.3. Providing biometrics

When the VIS is operational, the applicant will have to provide a photograph and fingerprints upon lodging the application. The ESTA does not require the provision of biometrics.

2.2.2.4. Visit to consulate/embassy for personal interview

As a general rule, the applicant shall be called on to appear in person in order to explain verbally the reasons for the Schengen visa application. This requirement may be waived in cases where the applicant is well-known or where the distance from the diplomatic mission or consular post is too great, provided that there is no doubt as to the good faith of the applicant.

The ESTA travel authorization application can be done from any computer anywhere with internet access.

2.2.2.5. Examination of the visa application

When examining the Schengen visa application the consular officer will verify the answers on the visa application form, the supporting documents, the validity of the travel document, the applicant's identity. Finally, he/she will verify whether an alert has been issued on the applicant in the Schengen Information System (SIS) for the purpose of refusing entry or whether the applicant poses any other threat (to security) which would constitute grounds for refusal to issue the visa or whether, from an immigration point of view, the applicant poses a risk in that on a previous visit he overstayed the authorized length of stay. For this purpose, the personal data of the applicant will be run against national databases as well.

According to the PIA, the data of the ESTA applicant will be run against Terrorist Screening Database (TSDB) biographical records, Interpol lost and stolen passport records, and the Department of State's lost and stolen passport records and visa revocations to determine whether the applicant poses a law enforcement or security risk in travelling to the U.S.

2.2.3. *Additional features*

2.2.3.1. Decision

Three decisions can be taken on a Schengen visa application:

- (1) The visa is issued as requested.

⁹ OJ L 175, 29.6.2006, p. 77.

¹⁰ EC Visa Facilitation Agreements are in force with Albania, Bosnia and Herzegovina, the former Yugoslav Republic of Macedonia, the Republic of Moldova, Montenegro, the Russian Federation, Serbia, and Ukraine.

- (2) A visa is issued but the conditions differ from the initial request; e.g. period of validity is shorter than requested, single-entry visa is issued in stead of a multiple-entry visa.
- (3) The visa is refused.

The applicant may be able to appeal under the law of the Member State that took the decision.

The ESTA will provide one of the three following responses:

- "*authorized to travel*".
- "*pending*" the applicant will need to return to the site at a later time to obtain information concerning the resolution of his/her application.
- "*not authorized to travel*": the traveller has to contact a U.S. embassy or consulate and apply for a visa. The determination that the traveller is not eligible to travel to the U.S. under the VWP is not a determination that the traveller is ineligible for a visa to travel to the U.S. and does not preclude the traveller from applying for a visa before a U.S. consular officer.

No judicial review is possible on the ESTA decision.

A new ESTA travel authorization is required if any of the following occurs:

- The alien is issued a new passport;
- The alien changes his or her name;
- The alien changes his or her gender;
- The alien's country of citizenship changes; or
- The circumstances underlying the alien's previous responses to any of the ESTA application questions regarding "yes" or "no" (eligibility questions A to G) have changed.

2.2.3.2. Period of validity

A Schengen visa is in general valid for the period of travel; e.g. five days for a business visit or two weeks for a holiday. According to Article 11(1)(a) of the Convention Implementing the Schengen Agreement (CISA)¹¹, the period of validity shall not exceed three months in any half-year. In case of a multiple-entry visa which may be valid up to five years, the total length of the visits may not exceed three months in any half-year as well.

Whereas the I-94W form is valid for one single entry, the ESTA travel authorization is valid for multiple entries into the U.S. and is valid for a maximum period of two years or until the traveller's passport expires, whichever comes first. Each visit to the U.S. is limited to 90 days.

Pursuant to Article 13(2) of the CISA, the period of validity of a travel document must exceed that of a Schengen visa, taking into account the period of use of the visa. It must enable the traveller to return to his/her country of origin or to enter a third country. In general, Member

¹¹ OJ L 239, 22.09.2000, p. 1.

States require that the travel document is valid for three months or more after the intended date of departure.

With regard to the relation between the passport expiry date and the validity of the ESTA the following information is provided on the ESTA website: "*Your passport must be valid for six months beyond your intended visit to the U.S.*" It is not stated whether, in a case where the ESTA travel authorization is limited to the expiry date of the passport, one would or would not be able to travel to the U.S. during the six months preceding the expiry date of the passport.

2.3. Conclusion

In accordance with the preliminary assessment above, and although the period of validity of an ESTA travel authorization is similar to a multiple-entry visa, the ESTA can not at this stage be considered as tantamount to the Schengen visa application process as defined in the CCI for the following reasons:

- Almost the same data are requested for an ESTA application and in the existing I-94W form. As the I-94W form is in the process of being updated to include the e-mail address and telephone number, only additional passport information (issuance and expiration dates, and issuing country) is requested.
- The additional data and information to be provided when applying for a Schengen visa are much more substantial and comprehensive; e.g. on means of subsistence, purpose of travel, family members, previous travel, and work history.
- A traveller can fill in the mandatory elements on the ESTA website on the basis of his/her passport; no other documentation is required. In order to fill in the optional elements of the ESTA (telephone number, e-mail address, city where one is boarding, airline, and flight number) the traveller would only need his travel ticket.
- No fee is charged for the ESTA travel authorization.
- There is no specific additional "administrative visa application procedure" similar to the standard practice for obtaining a visa.
- A "not authorized to travel" response of the ESTA to an applicant is not a determination that the applicant is ineligible for a visa. This underlines that the ESTA operates consistently with the logic of the VWP and independently from that of a visa system.

3. ANALYSIS OF THE IMPLICATIONS OF ESTA FOR THE PROTECTION OF PERSONAL DATA

3.1. Description

The following preliminary assessment of the implications of ESTA for the protection of personal data has been carried out based on the sources already mentioned above in chapter 2, as well as the ESTA Privacy Act Statement (PAS)¹².

¹² <https://esta.cbp.dhs.gov/esta/privacy.htm>

The assessment focuses on the purpose for which personal data are processed by ESTA, the quality and accuracy of personal data processed, the length of the conservation period of personal data in ESTA, the redress mechanisms offered to individuals and the sharing of personal data in ESTA with other law enforcement authorities for law enforcement purposes.

The Commission Services have consulted with the Article 29 Working Party which also undertook an analysis of ESTA and provided them with comments¹³.

It is clear that insofar as personal data are processed in the European Community, the requirements of EC law must be respected. This requires at least an adequate level of protection to be ensured in the U.S.

3.1.1. The collection of personal data

For a list of the personal data to be provided in the ESTA, see section 2.1.1. and 2.1.2. above.

According to ESTA PAS and SORN, the ESTA computer is established at the U.S. CBP national data center in the U.S.

The process of making an ESTA application implies that an individual or a third person acting on his/her behalf (travel agency or carrier) connects to the ESTA on-line website from a foreign country to fill the questionnaire before commencing travel to the U.S.

According to the PAS, DHS collects technical information, namely the Internet domain and IP address from which the website is accessed, plus the type of browser and operating system used to access the site, and the date and time of access, the pages visited; and, if linked to the DHS website from another website, the address of that website. The website uses a non-persistent cookie or "per-session cookie" which expires after the browser is closed¹⁴.

3.1.2. Purposes

The broad purposes for the collection of personal data with ESTA are described in the PIA, the SORN and the PAS.

According to the ESTA PAS, the primary purpose for which the personal data are collected and processed in ESTA is to allow the Secretary of Homeland Security to determine the eligibility of, and whether there exists a law enforcement or security risk in permitting the alien, to travel to the U.S. under the VWP. The information processed may be also used by DHS and disclosed to other government agencies to assist DHS in making determinations about the alien's eligibility to travel under the VWP. This involves, inter alia, the screening of the personal data submitted against the Automated Targeting System (ATS), the Treasury Enforcement Communications System (TECS) for matches to persons identified to be of law enforcement interest and the Terrorist Screening Database (TSDB) (PIA, Section 1.2, 2.1).

¹³ See letter of the Article 29 Working Party to Director General Jonathan Faull of 24 July 2008 (http://ec.europa.eu/justice_home/fsj/privacy/news/docs/letter_cnjl_jfaull_24_07_08_en.pdf).

¹⁴ A cookie is a small file containing a string of characters that is sent to the user's computer and stored there when he visits a website. Cookies may store user preferences and other information and track users and build up a profile of them over the time (persistent cookies). Non-persistent cookies are specific cookies that are sent by the web server to the user's computer and stored there for the time the connection with the website is maintained.

The information can be also be shared "on a need to know basis" with other national agencies or foreign multilateral governmental organizations when DHS reasonably believes that the information would assist enforcement of civil or criminal laws or the disclosure of this information is appropriate to assist in anti-terrorism efforts or intelligence gathering related to national or international security or transnational crime under strict conditions established by DHS in order to ensure confidentiality and security of information exchanged.

According to the PAS, the additional technical information is gathered only for statistical purposes and is not recorded in order to keep information about individuals and their visits.

3.1.3. Data accuracy

While the paper form I-94W is filled in and processed by travellers who arrive in the U.S., an ESTA application may be filled by an individual who does not have specific plans to travel to the U.S. This means that ESTA may process personal data of persons who envisage travelling to but who do not actually travel to the U.S. This raises questions about compliance with the principle that personal data processed must be adequate, relevant and not excessive in relation to the purposes for which they are processed.

With regard to the **accuracy of data processed** by DHS in ESTA, ESTA allows an individual to update some of the data entered within 10 days after he/she made an application. If an applicant considers that the data entered were erroneous, after this period he/she may request the correction of the data by means of the DHS Traveler Redress Program (DHS TRIP)¹⁵ or by submitting a new ESTA application. ESTA will use the standard U.S. alphabet including some special characters of other languages.

3.1.4. Sensitive data

ESTA will process sensitive personal data relating to the health status of the applicant since the applicant has to reply whether he/she has a communicable disease, a physical or mental disorder or that he/she is drug abuser or addict.

It is not known whether this information will be processed in a restrictive manner and subjected to specific restrictions. It appears that this information may be also shared with other authorities as indicated earlier. Chapter 4 of this paper considers the position of HIV-positive persons.

3.1.5. Data retention periods

According to the PIA, information in ESTA will be retained "actively" for the period of time that the approved ESTA application is valid, generally two years. After this period the information will be retained for one more year and then will be purged from online access and archived for 12 years. However, data linked to active law enforcement lookout records or investigations or cases, including applications for ESTA that are denied, will remain accessible for the life of the law enforcement activities to which they may become related. The retention period seems consistent with CBP border search authority and with the border security mission mandated for CBP by the U.S. Congress.

¹⁵ http://www.dhs.gov/xtrvlsec/programs/gc_1169673653081.shtm

In those instances where an ESTA application is used in lieu of a I-94W form, the ESTA application data will be maintained in accordance with the retention schedule for the I-94W form which is 75 years. This conservation period is identical for all data bases in which ESTA related information will be stored. The reason given for the long retention period is that it would enable U.S. authorities to keep information available for providing any applicable benefits related to immigration or other enforcement purposes.

However, it is not clear which are the instances where an ESTA application is used in lieu of a paper I-94W form, which triggers the 75 year retention period and how the conservation periods of 15 years and 75 years apply.

3.1.6. *Redress and correction mechanisms*

With ESTA, DHS processes personal data of non-U.S. citizens who are not covered by the protections of the U.S. Privacy Act 1974. However, given the importance of providing privacy protection to international travellers, DHS has decided to apply several privacy protections and safeguards to all international travellers subject to ESTA¹⁶.

An individual may seek redress through the DHS Traveler Redress Program (TRIP), not only to correct erroneous information entered in ESTA but also when he/she believes he/she has been improperly denied entry or refused boarding for transportation. However, no judicial redress mechanism is available to an applicant where ESTA has denied the authorization to travel under the VWP¹⁷.

The applicant may also apply for a visa at a U.S. consulate or embassy as an alternative remedy or may submit a new ESTA application.

It is not clearly indicated whether an individual could also seek access to personal information processed in ESTA under the Freedom of Information Act (FOIA).

3.1.7. *Data security*

As stated in the PIA (section 8), technical and organizational measures are implemented in order to ensure that all ESTA records are protected from unauthorized access through appropriated administrative, physical and technical safeguards, in full compliance with the requirements of the DHS IT Security Program Handbook. ESTA transactions are tracked and can be monitored and subject to audit to ensure that the data are being handled in compliance with all applicable federal laws and regulations regarding privacy and data integrity. Data exchanges with the applicant or with entities such as CBP, Department of State and other DHS components take place over an encrypted network.

¹⁶ System of Records Notice, Federal Register, 10 June 2008, "*Categories of Individuals covered by the System*"

¹⁷ Interim Final Rule, section 9 Judicial Review: "No court shall have jurisdiction to review any eligibility determination under the System. Accordingly, a determination by DHS to not provide a traveler a travel authorisation under ESTA will be final and, notwithstanding any other provision of the law, is not subject to judicial review".

3.1.8. *Information on personal data protection to travellers*

The U.S. DHS website dedicated to ESTA contains a Privacy Act Statement¹⁸ and a set of FAQs published by the CBP. Both documents are available only in English.

These documents, in particular the FAQs contain information about the purpose of ESTA, sharing of ESTA data with third parties, the conservation period; the available redress mechanisms offered to an individual, and updating of ESTA information.

3.2. **Conclusion**

According to the EU Data Protection Directive 95/46/EC¹⁹, any processing of personal data requires a legal basis and sufficient guarantees for the transfer outside of the EU.

ESTA is built as a data processing system which produces automated individual decisions affecting the interests of the individual applicant²⁰ as it makes an automated determination about the eligibility of an individual to travel to the U.S. under the VWP.

It appears that ESTA is designed to meet several data protection concerns, in particular with regard to mechanisms offered to applicants to seek redress on ESTA decisions and to correct errors and inaccurate personal data. Even though ESTA applicants do not enjoy the protections offered by the U.S. Privacy Act 1974, as they are non-U.S. citizens/residents and the information is not processed in a “mixed-used system”²¹, DHS has decided to provide privacy safeguards and guarantees to applicants in line with the privacy safeguards recognized by the current DHS policy to foreign individuals whose personal data are processed in mixed-used system data bases (PIA Section 7.1). However, it is regrettable that this policy does not extend to the right of judicial review for non-U.S. citizens/residents²².

Furthermore, it is not clear in what circumstances an ESTA application is used in lieu of a paper I-94W form, which triggers the 75 year retention period and how the conservation periods of 15 years and 75 years apply. These points need to be clarified, as personal data may only be kept for no longer than is necessary for the purposes for which the data were collected or for which they are further processed.

The fact that the ESTA will also process personal data of persons who do not actually travel to the U.S. poses questions about the necessity and relevance of the processing of these personal data.

With regard to the processing of sensitive personal data it is not known whether they will be processed in a restrictive manner and subjected to specific restrictions and safeguards.

¹⁸ <https://esta.cbp.dhs.gov/esta/privacy.htm>

¹⁹ Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data; OJ L 281, 23.11.1995, p. 31–50.

²⁰ Article 15 of Directive 95/46/EC.

²¹ Mixed-used systems are systems housing information about both U.S. citizens and foreign nationals. As a matter of policy, U.S. DHS extends the administrative rights of access and amendment to foreign individuals the personal data of whom are processed in mixed-used systems.

²² The European Union expressly reserves its position on the lawfulness of this discriminatory regime.

DHS is making efforts to provide information in a clear and precise manner to individuals by means of its website. It has developed several FAQs which were updated on 17 October 2008 and address and explain a number of issues relating to ESTA, such as its purpose, the conservation period of personal data, the means available to correct personal information in ESTA and redress further to ESTA denial decisions, etc. ESTA applicants would benefit even more if these FAQs were included on the initial ESTA homepage and published in several languages to enhance accessibility and comprehension.

A complete assessment of the impact of ESTA on personal data protection issues cannot be carried out at this stage, in view of the lack available information on some of the issues presenting an interest from a data protection perspective. It is expected that Final Rule will clarify some of these issues. A complete assessment will be made once the Final Rule is published.

4. THE POSITION OF HIV-POSITIVE PERSONS UNDER THE ESTA AND THE VWP

4.1. State of play

Pursuant to the U.S. Immigration and Nationality Act (INA)²³ and regardless of nationality, HIV-positive persons need to apply for a visa when travelling to the U.S. and therefore HIV-positive persons cannot travel under the U.S. VWP.

On 30 July 2008, U.S. President Bush signed into law the "*H.R. 5501 The United States Global Leadership Against HIV/AIDS, Tuberculosis and Malaria Reauthorization Act of 2008*"²⁴. Section 305 of this Act amends the INA by removing the statutory obligation to list HIV as a communicable disease for the purposes of ineligibility for visa-free travel to the U.S. However, the new Act does not change the actual list of communicable diseases which is issued by the U.S. Department of Health and Human Services (DHHS) and remains in effect until DHHS completes a regulatory process removing HIV/AIDS from the list. Once the regulatory change is completed, it is understood that HIV/AIDS will no longer be deemed a communicable disease for the purposes of ineligibility for visa-free travel to the U.S.

Meanwhile, DHS has issued the "HIV Waiver Final Rule". On 6 October 2008, this Final Rule for the "*Issuance of a Visa and Authorization for Temporary Admission Into the United States for Certain Nonimmigrant Aliens Infected With HIV*"²⁵ was published in the Federal Register and is effective from that date. This Final Rule authorizes Department of State consular officers overseas to grant temporary, non-immigrant visas for up to 30 days to applicants who are HIV-positive and meet certain requirements.

One of the eligibility questions in ESTA and in the I-94W form relates to communicable diseases: "*Do you have a communicable disease; physical or mental disorder; or are you a drug abuser or addict?*" In ESTA this question is now accompanied by an instruction that explains that HIV/AIDS is a communicable disease according to U.S. law. Once DHHS has amended its regulation by removing HIV from the list of communicable diseases of public health significance, the reference to HIV will be removed from the instructions accompanying

²³ Section 212(a)(1)(A)(i) of the U.S. Immigration and Nationality Act.

²⁴ H.R. 5501 / Public Law 110-293; July 30, 2008; 122 Stat. 2918; 53 pages.

²⁵ U.S. Federal Register / Vol. 73, No. 194 / Monday, October 6, 2008 / Rules and Regulations, p. 58023.

the ESTA electronic form to facilitate its completion. That would finally allow travellers with HIV/AIDS to travel to the U.S. under the VWP.

4.2. Conclusion

The adoption of the pending measures will put an end to the restrictions imposed by the U.S. on HIV-positive travellers. This is very much welcomed as they constitute an unfair and objectively unwarranted discrimination against them. The U.S. authorities are urged to finalize the rulemaking process to end this discrimination.

5. OVERALL CONCLUSION

This working paper provides a preliminary assessment of the present status of the ESTA as laid down in the IFR for the ESTA. Based on this and other relevant sources, the preliminary conclusion is that

- the ESTA can not at this stage be considered as tantamount to the Schengen visa application process as defined in the CCI;
- the ESTA raises several data protection concerns and further clarification is needed on some substantial aspects, which it is hoped the Final Rule for the ESTA will provide. Only then will it be possible to make a complete assessment of ESTA as regards personal data protection;
- progress has been achieved with regard to the travel of HIV-positive persons to the U.S. under the VWP, but some pending measures need to be adopted to end discrimination against HIV-positive travellers to the U.S. under the VWP.

A final assessment will be issued once the Final Rule on ESTA is published and all details of the ESTA are known and stable.