

The APEC privacy initiative – an update from a Civil Society perspective

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The APEC Data Privacy Subgroup has met for the second time in Lima from 12-15 August 2008 as part of Peru's year as APEC host, with associated public seminars on privacy. For the small number of Civil Society participants, the meetings provided re-assurance on some issues but also intensified others. It remains unclear as to whether the APEC initiative will, overall, offer any net benefit to consumers. Civil Society's strong preference remains comprehensive privacy legislation with higher standards; independent data protection or information privacy authorities; conditions on the transfer of personal information to third countries; and effective enforcement mechanisms.

Domestic implementation and Cross Border Privacy Rules

There was an encouraging acceptance that more emphasis needs to be placed, and progress made, on domestic implementation of the APEC Framework, to complement the Cross Border Privacy Rules (CBPR) work. There were reports from the Philippines, Peru and Korea that they were still progressing domestic laws which are at least in some respects stronger than the APEC minimum (updates were not provided by China or Thailand, which had reported in February that they were progressing laws). Six economies – Australia, New Zealand, Canada, Korea, Viet Nam and the Philippines – reported that they were considering making reference to the APEC Framework in their domestic law. Australia and New Zealand have proposed specific amendments to their laws. Further analysis will be required to assess whether these proposals have any substantive effect on the existing level of protection. New Zealand tabled its Individual Action Plan (IAP), as required by the APEC Privacy Framework, but the other (12?) IAPs submitted since 2004 remain inaccessible to the public, despite repeated promises. The APEC Secretariat has undertaken to address this.

Several participants in the APEC process continue to emphasise 'cultural differences' in relation to information privacy, often as a reason for not wanting to go down the path of comprehensive privacy legislation. Civil Society participants fully support the need to respect cultural differences, but this need not detract from the common ground of privacy as a universal human right, and Civil Society experience is that there is a common interest in and understanding of information privacy and personal data protection amongst citizens and consumers in all economies.

Pathfinder projects

It is becoming clearer how the CBPR approach is expected to work, although there remain a lot of unanswered questions. There are now 16 economies participating in the Pathfinder, China having joined for Projects 6 & 9, and Singapore (yet to indicate which projects), while several existing participants have extended their involvement to other projects.

There is general acceptance that the 'governance' arrangements for participation in CBPR approach will be critical. Matters such as the process and criteria for economies signing on and being accepted, monitoring and performance standards and processes for reviewing and/or revoking participation have not even been discussed yet. From a Civil Society perspective these will be crucial – it is essential that economies not be allowed to obtain the benefit of the CBPR approach (i.e. - freedom for subscribing businesses to transfer personal information to other participating economies) purely on the basis of 'self-assertion'. The need for criteria and peer review seems to be

implicitly accepted but until we see some firm proposals in this area suspicions will remain. It has been agreed to progress discussions on governance (an expanded Project 8). A useful suggestion was to ask more than one prospective accountability agent to assess draft CBPRs and self-assessment questionnaires as part of the test (Project 9), and then comparing their assessments.

The self-assessment questionnaire for businesses is being developed (Project 1) but it remains unclear how narrowly the questions will be restricted to matters directly relevant to CBPR as opposed to more general questions about compliance with the APEC principles. While conceptually the latter is a matter for assessment against domestic law (with the APEC principles as the minimum if no higher domestic requirements), it is difficult to see in practice how the two sets of questions can be easily separated or whether it makes sense practically for businesses to have to go through two separate processes. There is general agreement that accountability agents will not be expected to base their certification on the questionnaires alone – businesses would submit supporting materials such as CBPR and privacy policies, notices, FAQs etc, and contracts.

There is also a tension between the desire for detailed specific questions against which accountability agents can assess compliance and a desire for simplicity. A related question is whether accountability agents will require 100% compliance with all criteria or whether they will be able to exercise some discretion in forming a judgement that, overall, a business is compliant. There are emerging risks that some businesses and accountability agents may interpret some of the APEC Principles more 'generously' than Civil Society would expect. This is a particular concern in relation to the 'Use' and 'Choice' principles, where there is clearly no consensus on the meaning of 'unrelated' purpose or 'consent' (a problem for all information privacy regimes). All these questions relate to Project 3 which, going forward, will in effect be combined with Project 1.

There are outstanding questions about the criteria for accountability agents (Project 2), and whether and how potential conflicts of interest can be handled satisfactorily. While attention has focussed on how private sector trustmark schemes can be independent given their reliance on member funding, similar questions can legitimately be asked of public sector enforcement agencies which may play both that role and the role of CBPR accountability agent? There is also a related question about fees – who will pay for the accountability agent role, particularly where the accountability agent is a public authority.

Another question is whether businesses will be able to 'forum shop' between different economies accountability agents, and if so how to prevent this from being abused.

Despite these outstanding questions, it remains the case that participating businesses will be subject to a process of self assessment and external review which goes beyond any current legal requirement in any APEC economy. This can be seen as a selective form of European style registration requirements, although arguably going further even than those, as few EU members appear to do any meaningful assessment of registrations.

There was general agreement that transparency will be a key to the success of the initiative, and much discussion of the need for education and training – initially aimed at businesses but once the system is operating also at consumers. The website directory of compliant businesses (Project 4) will be important and there was general support for our suggestion that it contain functional contact details and links to each business's CBPR and/or privacy policy. A proposal that all bodies dealing with complaints under the system (whether accountability agents or enforcement bodies) should publish anonymised case notes also met with general support.

The cross border enforcement cooperation arrangements are progressing, but it remains to be seen

how useful these will be in practice given all the qualifications and conditions that are being included in the model agreement. In some cases these are unavoidable, given jurisdictional constraints, but it would be re-assuring to see more economies accepting the consequential need for amendments to their laws (as NZ is proposing). If in practice an enforcement authority can pick and choose which complaints from other economies to pursue, and perhaps pursue very few, pleading resource or jurisdictional constraints, then will the CBPR system be able to deliver its objective of 'equivalent' remedies for complainants wherever data is transferred? While it is unrealistic to expect a 'guarantee' of enforcement action (this is not even present in most domestic regimes) there must surely at least be some minimum performance standards against which participating economies will be judged?

It was agreed that there will need to be a version of the cooperation agreement suitable for private sector accountability agents which can apply sanctions – an 'any to any' agreement. This exposed some continued uncertainty about the relationship between accountability agents and enforcement authorities, and whether there can be more than one of either in any one economy (the provisional answer is yes).

Civil Society will need to ensure that the cooperation agreement is not restricted to private sector only, as US interests would prefer – the availability of a cooperation arrangement for privacy complaints of all types is for Civil Society one of the major benefits of the APEC initiative. Obviously participating enforcement authorities will only cooperate to the extent of their jurisdiction, but the fact that the US FTC can only act in the private sector should not deny other economies the use of the arrangement more broadly – this would also be consistent with the OECD recommendations and Guidelines.

The Pathfinder Projects will now move into a test phase (Project 9). A number of US businesses have volunteered to be part of this project, and attempts are being made to recruit businesses in other economies, including Mexico, Canada and Australia – this will give a better test of the different scenarios, with greater credibility, but it will also be desirable to put a full range of 'hypotheticals' through the test, including use of CBPR by businesses in economies with no domestic privacy law, the application to non-participating contractors etc. Another unresolved issue relates to 'forum shopping'. Will businesses be able to apply for certification to accountability agents in more than one economy?

It is encouraging to see a fuller dialogue between APEC and other international organisations about the Framework. Both the OECD and EU (through a representative of the Spanish DP authority) were observers in Lima, and there will be further discussion at the International Privacy Commissioners conference in Strasbourg in October. The projects on cross border enforcement cooperation are also trying to achieve maximum consistency with the parallel OECD initiative.

Stakeholder consultation

There is now a general acceptance of the need for and value of Civil Society participation in the APEC processes, and the 'parent' ECSG approved ad hoc guest status for EPIC and PI on the Data Privacy Subgroup, meeting by meeting. This will allow Civil Society representatives to speak independently from national delegations. Civil Society views are now actively canvassed and taken into account. As well as giving a paper at the 12 August Seminar, Nigel Waters is participating in some of our out of session project working groups, and he and Katitza Rodriguez-Pereda were able to table and explain at the Subgroup meeting the relevant section of the Civil Society [Background Paper](#) written by members of the Public Voice coalition for the June 08 Seoul OECD conference.

However, through participation in the initiative, there is an ever-present danger of 'capture', and it remains essential for Civil Society members not attending the meetings to independently and critically assess the above conclusions about the initiative.

The civil society representatives at the APEC meeting in Peru were Nigel Waters (for [Privacy International](http://www.privacyinternational.org/)) and Katitza Rodriguez-Pereda (for [EPIC](http://www.epic.org/)) as observers and members of their national delegations (Australia and Peru). For more information, see the Privacy International website <<http://www.privacyinternational.org/>> for background and previous reports, and for a paper presented by Nigel Waters at the Technical Assistance seminar on 12 August, outlining Civil Society participants concerns. See the [APEC website](http://www.apec.org/apec/apec_groups/committee_on_trade/electronic_commerce.html) for official papers (detail by [browsing](#) for specific meetings) <http://www.apec.org/apec/apec_groups/committee_on_trade/electronic_commerce.html>.