

APEC Privacy work – a Civil Society update

Nigel Waters, Privacy International, 19 February 2009

This paper gives a Civil Society perspective on developments since the last APEC Data Privacy Subgroup meeting in Lima¹ and is tabled at the Subgroup meeting in Singapore on 24 February 2009 and at the preceding Technical Assistance Seminar.

For the first time, Privacy International has been granted independent ‘guest’ status, similar to the business groups International Chamber of Commerce (ICC)² and the Global Business Dialogue on Electronic Commerce (GBDe)³, although in our case only for this particular meeting.

The APEC privacy work has continued ‘out of session’ with teleconferences and email exchanges on the various Pathfinder projects designed to progress the Cross Border Privacy Rules (CBPR) approach to implementation of the APEC Privacy Framework.

The work has comprised:

- Projects 1 (self-certification questionnaire) & 3 (compliance review by accountability agents (AAs) – led by the ICC;
- Project 2 (standards/criteria for AAs), led by the US Dept of Commerce;
- Projects 5,6 &7 (cross border liaison and cooperation by enforcement authorities (EAs) – led by the Australian Privacy Commissioner’s office, and
- an overarching ‘Study Group’ chaired by the Australian government official who is also chair of the APEC Subgroup).

While 16 of the APEC economies have signed up to participate in the Pathfinder, the only regular participants in the out-of-session work have been the US, Canada, Australia, NZ and Hong Kong. The level of real interest in the CBPR approach from the other member economies is unclear, even from Japan, Singapore and Mexico, from where there has been some interest in a role for trustmarks. There are indications from other sources that some member economies (e.g. China, Mexico, Peru, the Philippines) are continuing to explore the option of European style data protection laws.

While some limited but useful progress has been made on the arrangements for cross border enforcement cooperation (Projects 5-7), the other work - on the self-certification questionnaire (Project 1), criteria and guidelines for AAs (Project 2), and compliance review processes (Project 3) - is still struggling to resolve some major practical and conceptual difficulties. Project 9 - the practical trial of the CBPR processes by some volunteer businesses, AAs and EAs, being led by the US Department of Commerce - has been delayed by the absence of agreed documentation, in particular from Projects 1-3.

¹ See summary at [http://www.privacyinternational.org/article.shtml?cmd\[347\]=x-347-563530](http://www.privacyinternational.org/article.shtml?cmd[347]=x-347-563530)

² See <http://www.iccwbo.org/>

³ See <http://www.gbd-e.org/>

Meanwhile, despite increasing recognition that governance arrangements for the whole scheme are critical to its credibility, there has been little practical progress on that front (Project 8) or on the public website for CBPR participants (Project 4). The only other output from the Study Group has been a new version of a 'Friends of Chair' document designed to publicly explain the CBPR approach and Pathfinder Projects in particular, although this has yet to be approved for public release.

It remains unclear what benefits businesses would gain from developing CBPRs relative to the increasingly apparent administrative burden involved, or how many businesses – particularly smaller and medium sized enterprises – are likely to be interested in the CBPR approach. Interest to date has been confined to a small number of multinational companies, some Trustmark schemes, and the umbrella groups ICC and GBDe.

Another issue is the value of work which focuses exclusively on cross-border data transfers relative to more general work on compliance with privacy and data protection principles across all of a business' operations, which is increasingly required either to meet statutory requirements and/or to fulfil customer and employee expectations.

Another important context is evidence of the failure of self-regulatory and trustmark approaches to privacy protection – in particular Chris Connolly's highly critical analyses of trustmarks and of the US Safe Harbor scheme.⁴ Given that the APEC CBPR approach relies so heavily on trustmarks in at least some jurisdictions, there must now be serious question marks over the future of the CBPR approach, until and unless these criticisms are adequately addressed.

Related international developments

International Privacy Commissioners issued a Resolution⁵ from their October 2008 Strasbourg Conference supporting the development of new global privacy standards, in the context of an overall call for calling for a universal legally binding instrument on data protection and privacy, and taking into account existing initiatives including the APEC Privacy Framework.

The OECD privacy work programme is continuing, under the auspices of the Working Party on Information Security and Privacy (WPISP)⁶, and includes work on cross border enforcement of privacy laws which overlaps with the APEC Pathfinder Projects 5-7.

New arrangements for input from Civil Society (and from Internet professionals) to the work of the OECD WPISP are progressing⁷, with two new advisory committees to sit alongside the existing business and labour groups BIAC and TUAC.

⁴ See <http://www.galexia.com/public/research/articles/>

⁵ See http://www.privacyconference2008.org/adopted_resolutions/STRASBOURG2008/resolution_international_standards_en.pdf

⁶ See http://www.oecd.org/document/46/0,3343,en_2649_34255_36862382_1_1_1_1,00.html

⁷ See <http://esisac.org/>

A ‘Galway project’⁸, organized by the Centre for Information Policy Leadership at Hunton & Williams LLP and facilitated by the Office of the Data Protection Commissioner of Ireland, is debating the meaning of ‘privacy accountability’. Two ‘experts’ meetings have been held with a view to providing input to the OECD WISP meeting in April 2009, to the next APEC Subgroup meeting in July in Singapore, and to the International Commissioner’s Conference in Madrid in November.

The International Standards Organisation has a privacy Task Force which is currently consulting its technical committees and others about the need for new Standards development work on privacy⁹. Many civil society NGOs have reservations about the appropriateness of international and national standards bodies as a forum for privacy initiatives, as they tend to be dominated by technical, business and/or government interests, with little realistic opportunity for civil society input. Standards bodies have also historically tried to ‘re-invent’ privacy from a security perspective instead of building on established international privacy instruments and experience.

Civil Society NGOs around the world joined in a call on International Privacy Day (28 January) for non-member countries to accede to the Council of Europe (CoE) Data Protection Convention 108, and to pass strong privacy laws¹⁰. However, the benefits of CoE accession to consumers and citizens still need to be assessed in the context of each particular country.

Civil Society NGOs are generally concerned about the number of overlapping international privacy initiatives, and in particular the inability of key stakeholders, including Civil Society NGOs but also privacy regulators, to adequately resource considered participation in the initiatives.

Conclusion

There has been some misunderstanding in the past about Civil Society NGOs position on the APEC Privacy initiative. Following discussion of the APEC privacy work at the International Commissioners Conference in Strasbourg in October 2008, I sent a statement of clarification of the civil society position, at least as I perceived it as the Privacy International representative involved in the APEC work (attached).

In light of developments over the last six months, there is a sense that Civil Society should move from the relatively passive ‘critical observer’ role we have played to date to a more vocal criticism of the value of continued work on the CBPR approach. This change of approach is based on an assessment that the CBPR approach appears increasingly like a ‘dead end’, on which limited time and resources of all stakeholders are now being wasted.

In order for Civil Society to justify any further engagement with the CBPR initiative (as opposed to the APEC Framework as a whole), the proponents need to clearly address the criticisms of private sector accountability agents, and simultaneously

⁸ See http://www.huntonfiles.com/files/webupload/CIPL_Galway_Conference_Summary.pdf

⁹ There is only limited public information about this project – see <http://www.nia.din.de/gremien/ISO%2FIEC+JTC+1%2FSC+27%2FWG+5/en/94445513.html>

¹⁰ See <http://thepublicvoice.org/>

provide much clearer indications of the quality control, accreditation, monitoring and governance aspects of the initiative.

Civil Society will continue to support other work by the APEC Privacy Subgroup aimed at promoting implementation of the Privacy Framework through a combination of strong domestic legislation and enhanced cross border enforcement cooperation – building on the work of the Pathfinder Projects 5-7 and the parallel OECD cross border enforcement work.

We note that the cross border cooperation is included in the APEC Framework in a wider context than the development of a CBPR scheme (Framework Part IVB), and it is important that Pathfinder Projects 5-7, while designed as a component of the CBPR approach, should not be limited to enforcement of CBPR.

Attachment

Summary of Civil Society position on APEC Privacy Initiative

October 2008

Response to possible misrepresentations at the International Privacy and Data Protection Commissioners Conference in Strasbourg, October 2008.

- a.. Civil Society has not endorsed either the APEC Privacy Framework or the Pathfinder process.
- b.. Civil Society has very limited expectations of the Pathfinder process and it remains unclear to us whether it can produce anything of value other than better cooperation between national authorities, which would be very valuable. We also remain concerned that the Pathfinder could lead to undesirable outcomes in terms of either lower standards of privacy protection and/or misleading compliance claims.
- c.. However, Civil Society considers that it needs to be aware of what is happening in the APEC privacy processes, and therefore welcomes opportunities to participate in sub-group meetings when limited resources allow. While attending it is our policy to make constructive suggestions where appropriate, but these do not represent either support or expectations of successful outcomes. You may be aware of a number of critical commentaries over the last year, including papers by Nigel Waters <http://law.bepress.com/unswwps/flrps08/art59> ; Chris Pounder <http://www.out-law.com/default.aspx?page=8550>; and Chris Connolly <http://www.galexia.com/public/research/> (two papers on Asia Pacific Privacy and on Trustmarks). These represent personal views, with varying degrees of scepticism about the APEC initiative.

I would however suggest that those of you who are more optimistic about the initiative need to understand and address the reservations that are expressed in these and other commentaries.

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See also more recent relevant critiques:

Galexia [2008] The US Safe Harbor - Fact or Fiction? - December 2008
at http://www.galexia.com/public/about/news/about_news-id143.html

Greenleaf G [2008], *Five years of the APEC Privacy Framework: Failure or promise?* Presented at the ASLI conference - forthcoming in *Computer Law & Security Report* [2009] 25 CLSR 28-43