

# APEC Privacy Initiative – Civil Society Update

## February 2009

This is a Civil Society participant report on the APEC Data Privacy Sub-group and associated technical assistance seminar, Singapore, 22-24 February 2009, attended by Nigel Waters representing [Privacy International](#). PI had official 'guest status' for the first time (APEC is considering our applications on a meeting by meeting basis whereas the business groups ICC and GBDe have continuing guest status).

The APEC privacy initiative involves a Framework, with Privacy Principles, adopted by Ministers of the 21 APEC economies in 2004. An implementation part was added to the Framework in 2005, and encourages both domestic implementation of the Principles by individual members and continuing multilateral work, by a Data Privacy Sub-group, primarily in the development of a Cross Border Privacy Rules (CBPR) approach to cross border transfers of personal data. See the Privacy International website (>[PI Reports](#)) for further background and previous reports ('the story so far'), and for a paper presented by Nigel Waters at the Technical Assistance seminar on 22 February and at the Privacy Sub-group meeting on 24 February, outlining Civil Society participants' concerns. See the [APEC website](#) for official papers (detail by [browsing](#) for specific meetings).

The meetings did little to satisfy Civil Society concerns about the Cross Border Privacy Rules approach to implementation of the APEC Framework. What we see as insuperable problems are recognised by the proponents but only as challenges to be overcome. It remains unclear as to whether CBPRs 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. (See summary of oral statement to the Sub-group below.)

## Seminar

The seminar comprised open sessions on current developments followed by a day of detailed discussion of the various Pathfinder projects. The UK Information Commissioner, Richard Thomas gave a frank assessment of the merits and drawbacks of the contrasting EU and APEC approaches to privacy protection, emphasising the degree of common ground and calling for greater dialogue with a view to convergence and greater cooperation. He saw the APEC CBPR Pathfinder as covering very similar ground to the EU Binding Corporate Rules work, and raising very similar issues. The EU Data Protection Directive is currently under review and the opportunity exists for progress towards a best practice global model if the proponents of the EU and APEC approaches are prepared to acknowledge legitimate criticisms and concerns and cooperate on designing a new approach.

In a session on Trustmarks, Chris Connolly of Galexia summarised his [research findings](#) on the weaknesses of a sample of trustmark schemes. Representatives of TRUSTe and of the US Department of Commerce acknowledged that a number of the Galexia criticisms were fair in relation to other schemes, but not in relation to TRUSTe, which remains a key participant in the Pathfinder and an obvious candidate for Accountability Agent role in the US in any long term implementation of the CBPR approach. TRUSTe and AMIPCI (Mexico) dispute some of Galexia's findings and have challenged its methodology. However, the failure so far to address the very significant problems that Civil Society perceives with reliance on *any* trustmark scheme as a key component of the CBPR system remains a significant barrier.

Sessions on governance saw a consensus on the importance of addressing a range of key issues such as independence, transparency, ongoing monitoring and the relationship to existing domestic legislation, and identified that progress had only just begun on the necessary work (Project 8). Guidelines and criteria for public sector accountability agents (part of Project 2) are closely related to the governance work.

Seminar sessions on the Pathfinder demonstrated continued confusion amongst participants as to the objectives and scope of self-certification and compliance review (Projects 1 & 3). It remains unclear whether an organisation will be tested on its compliance with all of the Principles in the APEC Framework or only those aspects of the Principles that relate directly to cross-border transfer. If the latter, how realistic is it to separate out cross border aspects, and to present this clearly to consumers? Will the answers to the questions be meaningful at a general organisational policy level, and if not, how realistic is it to expect organisations to complete, and consumers to understand, multiple CBPRs for different products, services or types of personal data?

The work on cross-border enforcement co-operation (Projects 5-7) is showing signs of progress with a very useful draft Cooperation Agreement. Subject to resolution of concerns about re-use of information shared between Enforcement Agencies, this agreement could prove very valuable across the board of cooperation, independently of any CBPR system.

While the test stage of the Pathfinder (Project 9) has been delayed, it is hoped to commence soon, with trustmark schemes in Mexico, Chinese Taipei and the USA, and several of their members, having agreed to participate in the Project 1&3 testing, and several Enforcement Authorities committed to testing other aspects.

## **Sub-group meeting**

The Sub-group meeting on 24 February was mainly a 'report-back' and no significant decisions were made (for ratification by the parent Electronic Commerce Steering Group (ECSG)). The meeting noted the progress on the various Pathfinder projects, and committed to further engagement with the OECD, EU and Council of Europe – including potentially a meeting in Madrid in November adjacent to the International Commissioners Conference.

There was an opportunity at the end of the meeting for the guests to report. I took the opportunity to make the following statement (constructed after the event from my speaking notes):

“PI thanks the Sub-group and ECSG for guest status and the opportunity to contribute

We have tabled a summary of our position and outstanding concerns (Paper DPS/23). We remain strong supporters of the cross border enforcement cooperation work, and of information sharing and capacity building towards domestic implementation of the APEC Framework.

At least two delegates reporting on the seminar earlier in the meeting stated that there was agreement that there were no 'show-stoppers'. Privacy International disagrees. We have serious reservations about the value of continued work on the CBPR approach.

We find it difficult to see:

- How most businesses will see any value in going through the CBPR process, potentially for multiple sets of data, relative to the substantial administrative burden, which in many ways will be worse than some much-criticised European registration requirements. This will especially be the case for small and medium sized enterprises, and in the context of requirements to also comply with various domestic laws.
- How many trustmarks will be able to meet the Project 2 criteria to qualify as an accountability agent
- How some governments and regulators will be able or willing to 'cede' judgements about compliance to Accountability agents and Enforcement Authorities in other jurisdictions,

which is an inherent feature of the ‘mutual recognition’ aspect of the CBPR system.

- How it will be possible to explain the complex and inevitably partial coverage of the CBPR system to individual consumers in ways which they will be able to understand and utilise, and without misleading them or raising expectations that cannot be met.
- How the required administrative infrastructure will be provided – given that there may well be constraints on APEC itself playing a number of the roles that have been identified as necessary.

While no single obstacle may in itself be a ‘show stopper’, we believe the cumulative difficulty of resolving these issues mean that it is time to review the business case for the CBPR approach (carry out a ‘reality check’). In the context of limited resources for all stakeholders, does it make sense to continue devoting so much time and effort to developing a CBPR system which seems increasingly like a dead end? There would in our view be no shame in admitting that despite best endeavours, further investment in a CBPR approach cannot be justified.

Instead, the Sub-group should turn its attention back to other ways of implementing the APEC Privacy Framework, including through co-operation with other international initiatives (OECD, EU, Council of Europe).

We realise that others may not yet have reached this point, and that there is significant support to continued development of a CBPR system. We take no pleasure in being negative about the CBPR approach, but would do no service if we did not make our position clear.”

## **Domestic implementation of the APEC Privacy Framework**

The Philippines, Peru, Thailand, Mexico, Malaysia and Chinese Taipei all reported privacy or data protection legislation at varying stages of consideration, with both EU and APEC based models still being considered in some jurisdictions. Indonesia has requested assistance from the Sub-group.

Fourteen economies have now submitted an Individual Action Plan (IAP), as required by the APEC Privacy Framework, but these have still not been published (except for the USA Plan which is on the website for the [February 2006 meeting](#)) – renewed efforts will be made to get them all onto the APEC website.

The US reported on a recent FTC staff paper on behavioural advertising guidelines, Canada on a paper on the meaning of Accountability, and Australia on the federal government’s proposed response to the Australian Law Reform Commission’s 2008 report on privacy law. The Hong Kong Privacy Commissioner has made recommendations for amendment of the HK law which are under consideration by government, with public consultation expected soon.

## **Next steps**

Work on development and testing of the components of the CBPR approach will continue between now and the next (late July) Sub-group meeting, through the Study Group and various subordinate working groups, operating by email and telephone conferences. Subject to any PI decision to withdraw from the process, Nigel Waters will continue to participating in some of out of session project working groups, to monitor developments and assess whether our outstanding concerns are being addressed.

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