



Asia-Pacific
Economic Cooperation

2005/SOM3/ECSG/021

Agenda Item: III a

Final Report of the 2nd Technical Seminar on APEC Privacy Framework

Purpose: Information

Submitted by: ECSG Data Privacy Subgroup Chair

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**12th Electronic Commerce Steering Group
Meeting
Gyeongju, Korea
8-9 September 2005**

Report of Second Technical Seminar on APEC Privacy Framework

Gyeongju, Korea

5-6 September 2005

Executive Summary

This executive summary is submitted by consultants to facilitate discussion in meetings subsequent to the Seminar. It represents no more than the consultants own summing up of the lessons of the Seminar.

Framework considerations

- Consistent with the original mandate for developing the APEC privacy framework, focus on implementation models that facilitate international trade through the safe, efficient movement of personal information that is an integral component of business transactions
 - Recognise that in many economies, ‘privacy’ is not a strong public policy issue, with little public demand for action
 - Also recognise that for economies where there is a concern for the protection of personal information supported by legislative frameworks, they are seeking ways of protecting the personal information of their citizens when it is processed in other APEC economies
- Focus on accountability for personal information, wherever it happens to go, as the basis for safe, efficient flow of personal information between economies, consistent with Principle 9, rather than control of personal information at the point of it crossing the border from one economy to the next
- Framework action should recognise two complementary components
 - Governance
 - establishment of systems in businesses that demonstrably comply with APEC principles and the clearly articulated needs of regulators
 - in particular, Business gets uniform rules for back end and can get compliance mechanism efficiently approved in the region
 - Remedy
 - Use of company complaint resolution processes as a first resort
 - Simple, effective remedy for consumers, preferably through a ‘one stop shop’ contact point in their own economy that does not depend on the consumer having to chase ‘data trails’
 - Regulator remains domestic authority but gains cooperation across borders

- ‘Think big; act small’ strategies
 - Develop solutions consistent with existing laws and mandates where possible

Action Steps for the year ahead

- Working groups of the Privacy sub group of ECSG be formed to carry forward work in particular areas including
 - Cooperation between developed and developing economies in the introduction of education and training programs
 - Cooperation among developed economies to explore mechanisms for compliance with the APEC Privacy Framework in cross-border transfers of information
 - Policy initiatives to find solution paths for business and government

Particular objectives that the working groups would facilitate should include:

- Continue outreach activities to those economies without their own privacy frameworks who are seeking to implement the APEC privacy framework, whether applied to domestic or international transfers of personal information
 - This might include seminars, workshops or developing educational resources and exchanges of policy information with key economy stakeholders such as policy makers, business and consumer groups
- A development program for staff of regulatory authorities with a focus on reaching a common understanding of the mandate of individual regulator/agencies
- APEC Privacy regulatory authorities develop more effective ways of consulting with each other, perhaps drawing on the ‘London Action Plan’ and methods of interaction developed in other forums such as ICPEN
 - All economies to identify agencies/regulators that need to be involved, if any
- Business, perhaps through representative bodies, to establish dialogue with regulatory authorities also acting in concert
 - Developing a stronger common understanding of global business information flows, drawing on the data flow modelling already under way
 - Focusing on internal governance and accountability
- Exploring the potential for non-government dispute resolution and trustmark bodies to contribute to efficient and effective governance and remedy arrangements
 - Clear government support for the action of these bodies may need to be considered

- Continued progress of Multi-Layered Privacy Notices in the APEC region
 - Complete and circulate “Ten Steps to an Effective Privacy Notice” as a collaborative effort between data protection authorities, consumer organisations and the private sector

Action over the longer term

- Economies to consider whether legislative change is needed to facilitate cooperative work between regulatory authorities
- Public engagement and education strategies, focusing on consumers and small business

Introduction

The second technical seminar was held in Gyeongju, Korea on 5 and 6 September, 2005. Fifteen economies were represented by over 50 delegates. Preparations for the seminar were based on an ambitious work plan that had been agreed upon by the Privacy Sub-Group following the first seminar in Hong Kong. The targets set in that plan called for specific action by groups that were representative of business, regulators and policy makers.

The objectives were:

- to deepen the description of the way business currently collects, uses and discloses personal information;
- to consider means of cooperation between regulators, starting with common forms and identifying any legal obstacles to cooperation based on the information flows described by business; and
- to ensure the Privacy Framework is better known throughout APEC.

While the focus of the first seminar had been on the domestic implementation by economies of the APEC Privacy Framework, the second seminar addressed international aspects of implementation.

Identifying the problems (Day 1)

The seminar commenced with a ‘hypothetical’ devised to highlight the difficulties of applying privacy principles in an environment in which business transactions involve several economies. The sessions that followed analysed the problems in applying the principles in this environment and sought to distinguish practical from impractical remedies for privacy violations in such a context.

It soon became clear that the regulatory mechanisms required for the protection of privacy in an international context need further development.

From the perspective of some regulators, chief among the problems was the perceived lack of authority to cooperate with their counterparts in other economies. From the perspective of business, a major concern was the need for regulatory mechanisms to take account of the fact that, in the context of electronic commerce, the provision of services to the customer may involve the need to access data simultaneously in a number of countries and its access from a number of business centres in different countries over an extended period. These developments make the concept of limiting point to point data flows obsolete. It would be difficult to even track the movement of data let alone regulate it.

The consultants summarised discussion at the end of each day. The consultants’ summary of Day 1 is set out in [Appendix A](#).

These conclusions were intended to identify all the issues that needed to be addressed on Day 2. The conclusions were confirmed by delegates and some other issues identified:

- the risk of too much variation in privacy standards throughout APEC economies, ranging from the excessively detailed and prescriptive to arrangements that would not protect the personal information of individuals imported from other economies
- the opportunities to maximise the growth of international trade in goods and services that involves the movement of personal information, including e-commerce, outsourced data processing, safe and efficient travel etc, all of which being addressed in the context of building trust rather than achieving balance; and
- the need for more education about the safe handling of personal information, for the individual consumer and business of all sizes.

Scoping solutions (Day 2)

The issues identified on Day 1 were explored in a series of case studies, linked to the hypothetical. The case studies dealt with the collection of personal information, the operation of international call centres, the uses of personal information, Alternative Dispute Resolution and the difficulties in opting out of the receipt of promotional material.

Particular sessions examined the problems and canvassed available options from the perspectives of business, regulators and policy makers.

The consultants summarised discussion at the end of each day. The consultants' summary of Day 2 is set out in [Appendix B](#). That Appendix also contains some copies of seminar slides which, for convenience and clarity, have been amended to facilitate consideration of the outcomes of the seminar.

The case studies revealed that the APEC Privacy Framework already provides a basic structure for addressing the issues that may face consumers in protecting their interests when another jurisdiction is involved. There was considerable support for the proposition that, after company complaint processes have been followed, a consumer should be able to seek redress through the regulator in the economy where the consumer resides. This will require processes to be developed by regulators based on the Framework. Practical, efficient mechanisms will be required as they must be capable of functioning within an environment of limited resources and must take account of differences in the laws of particular economies.

The discussion recognised that the issues crystallised into two streams. The first concerned the difficulties in finding out what the right thing to do is in any

situation and the second concerned the ability to handle problems when things go wrong.

One session was devoted to discussion of a background paper¹ which examined the changes in internal governance of global companies that have taken place in response to changes in the external environment. Consolidation of data processing into global systems carries many advantages but also presents a number of challenges for the management of privacy practices. The need to comply with different legal systems is addressed through an internal governance framework but the need for the framework arises out of modern business practices. Complex issues of accountability arise from variations in standards among economies.

A survey of existing privacy laws throughout the APEC region² showed that, of those economies which have enacted legislation in this area, most either do not restrict the international transfer of data at all or, if they do, they do not make it a primary remedy. Moreover, existing legislation says virtually nothing about international cooperation. It was suggested by some that the conduct of a mapping exercise may be a useful first step in developing ways to deliver remedies internationally.

While legislative limitations on the sharing of information would, of course, have to be observed, it was also recognised that complainants may be very willing to give their consent to the sharing of their information to other regulators if that would help them resolve their complaints. Any existing legislative limitations should, therefore, not be overstated. Regulators also recognised that they are generally under a positive duty to resolve complaints regardless of jurisdictional difficulties.

One objective of the two seminars was to assist the Privacy Sub-Group of APEC's Electronic Commerce Steering Group finalise the part of the APEC Privacy Framework that had been left incomplete when the Framework was endorsed by APEC Ministers in November, 2004.

Participants therefore finished the seminar by identifying options for concrete action during the next year and in the longer term. Speakers in the last session of the Seminar were specifically requested to address "Ways Forward" as part of this exercise. Their proposals are summarised in Appendix C.

¹ Margaret P. Eisenhauer, 'Internal Privacy Governance Frameworks', Paper No 2005/SOM3/ECSG/SEM/010

² Margaret P. Eisenhauer: 'A Survey of International Data Transfer Provisions in Existing Data Protection Legislation', Paper No 2005/SOM3/ECSG/SEM/0005

Participants then added to these proposals in discussion from the floor. Their proposals included:

- Providing greater guidance by adapting the APEC Privacy Framework to language more easily incorporated into law, for example in a model law drafted on a 'building block' basis.
- Closer engagement with consumers and consumer organisations – 'do we really know what they want as a solution?'
- Accountability arrangements – a specific project on demonstrable accountability for the personal information held in an organisation
- Using the cooperative arrangements between regulators already in place in other arenas, for example broader consumer protection, and new proposals such as in the US SAFE WEB proposals, develop practical measures for cooperation between regulators; 'start using contacts and get comfortable with specific issues'; talk across the globe is cheap, whether it is email or using Voice Over IP computer connections for live discussion or other options
- Further involve ABAC, noting that one seminar participant is on the board of ABAC

Consultants Daily Summaries of the Seminar



Summary of Day 1

APEC ECSG Technical Assistance Seminar: Domestic Implementation of the APEC Privacy Framework

*Gyeongju, Republic of Korea
5 September 2005*



What is the problem?

- Complex business transactions makes privacy compliance more difficult
- Many laws, many regulators
 - Hard for anybody to see the whole
- Effective resolution of complaints
 - Cost to business; cost to consumer
- Justification introducing privacy regime for a small economy not a small task
 - International trade argument very strong

Immediate action

- Consumer empowerment
 - Improved Privacy Notices
- Education – effort from Govt; business; hot topics like ID theft
 - Consumers
 - Business, especially small business
- Privacy Regulators encouraged to coordinate more
- Business to pay more attention to flows of personal information in their business and with their business partners
- But turn this into a strategy – How?

Further action

- Strengthen domestic laws to ensure cooperation between regulators in different economies
 - Look to precedents elsewhere, eg the Canadian Federal / Province of Alberta joint investigation
- Look to precedent elsewhere
 - Eg cooperation on counter terrorism framework for criminal justice, developed to counter aircraft hijacks over last 40 yrs
- Ensure increased responsibility matched by appropriate accountabilities (eg criminal law enforcement)
 - Eg where collection, use & disclosure of personal information concealed from individuals

How to address Remedies from an international perspective?

- Clear accountability framework in privacy implementation: PIC mainly accountable?
- Which jurisdiction drives remedies process?
 - where PIC service provided from?
 - where individual resides?
- What remedies approach?
 - Litigation?
 - Arbitration?
 - Others?
- How to also seek actions/ remedies against criminals/ 3rd Party perpetrators?
 - Effective privacy protection enforcement in place?

Remedies: Framework needed?

- Who is accountable for what?
 - Individual
 - PIC
 - PIC vendors
 - 3rd Party violators
- How to determine accountability?
 - Laws/ regulations?
 - Contractual obligations?
 - Due care standards?
- How to determine privacy infringements?
 - Blatant disregard for privacy expectations/ requirements
 - Infringement of expected privacy practices
 - What if despite "due care", PIC victim of criminals' or 3rd Party's unauthorized activities?
- What drives remedies?
 - Types of privacy infringements?
 - Extent of harm to individuals impacted?
 - Remedy actions: punitive, corrective directed principally at PIC and its related vendors? What about other perpetrators?

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Further action – continued

- A framework needed?
 - Steven Lee's
- Remedies critical; consistent across locations
 - Have to start somewhere
 - But will be imperfect, so need to be able to allow for adjustments
- Explore other options
 - Trustmarks; online ADR?
 - But what support from government(s) needed to make effective in international context

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Housekeeping

- Please complete and submit
 1. Participant Registration form
 2. Seminar survey form
 3. PPTs & papers to Patty Sefcik:
patty_sefcik@ita.doc.gov

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Summary of Day 2

*APEC ECSG Technical Assistance
Seminar: Domestic Implementation of
the APEC Privacy Framework*

*Gyeongju, Republic of Korea
6 September 2005*



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Recurring themes

- Focus on accountability rather than transborder flows
- Willingness of leading business to engage
 - Data protection authorities BUT how
 - Informal; MOU; a new body; research;?
 - A basis in business internal governance structures
- Common protocol for settling complaints
 - Consumer should not have to chase the data trails
 - Consumers should be able to resolve problems on a 'one stop shop' basis, in their home economy, ie within systems that they know & understand
- Economies beginning to benchmark to APEC principles

Recurring themes – continued

- BUT respect local legislative process; requirements & accountabilities, eg collection, use, disclosure of PI
 - While transborder data flows do not either gain more obligations nor escape original accountabilities
- Drivers, incentives – again, not all economies the same!
- Learn from others who have gone before
- ‘Think big – Act small’ ?
- In short, TWO challenges
 - Governance systems that demonstrably comply with APEC principles & clearly articulated needs of regulators
 - Remedy, remedy, remedy

Peter Ford's 10 Strategic Objectives

- 1) Keep the focus on the terms of the Ministerial endorsement of November, 2004
- 2) Develop remedies that are practical
- 3) Strive for clarity
- 4) Place the focus on accountability rather than on trans-border flows
- 5) Recognise business practices that support privacy

Peter Ford's 10 Strategic Objectives

- 6) Build on Part B by developing more detailed arrangements between agencies of particular economies
- 7) Review existing privacy laws against the APEC Privacy Framework
- 8) Implement the APEC Privacy Framework in a way that fits with your legal system and traditions
- 9) Use the APEC Privacy Framework as a basis for privacy discussions with economies outside APEC
- 10) Keep the APEC Privacy Framework under review

Next Steps?

- Next year?
 - Longer term?
- How will Jim feel then?

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patty_sefcik@ita.doc.gov
- ALL papers, PPTs, background documents will be on a special web page at www.apec.org

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Session VIII – Proposals for ‘Ways Forward’ based on Session VIII presentations

Mutual cooperation among developed economies

Develop mechanisms and rules for specific items and type of industries

Explore mechanisms for compliance with the APEC Privacy Framework in cross-border transfer of personal information

Establish information reporting and sharing system among member economies

ECSG to develop processes to deal with privacy problems continuously and systematically

Cooperation between developed and developing economies

Education and training

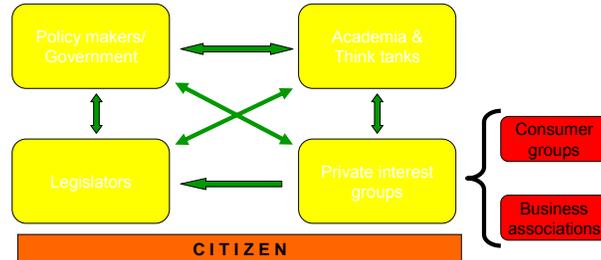
Active participation of developing economies in the information economy assisted by developed economies through an education and training program which draws upon the experiences and technologies of developed economies

Support of Study

Privacy issues need to be further studied within the context of implementing the APEC Privacy Framework in a way that is culturally sensitive to developing economies

Legislative decision making ecosystem

Implementation will be business driven rather than government driven ?



Policy makers scenario: two parallel processes...

Business driven

Corporate Global Policy Rules
 MNC's and global associations leadership (IT and non-IT)
 ADR mechanisms
 Trustmarks
 Industry codes
 Privacy policy generator and short notice system

Government driven

Law, Act, etc.
 Oversight body
 Judiciary process and redress mechanisms
 Process to align the outcome to the uniform standard (APEC framework)
 International cooperation

Solution Path : Business

- **APEC**
 - Sectoral/General
 - Binding Rules or other Mechanisms
 - Accountability/ Compliance Mechanism
- **Internal/Association**
 - Outreach/ understanding
 - Sectoral Best Practices
 - APEC Mapping
 - Governance structure
 - Operational Structure
 - Audit / Accountability
 - Training/Vendors
 - Compliance Mechanism

Solution Path: Government

- **APEC**

- Explore methods of interaction among regulators/agencies
- Determine how to define acceptable factors in compliance
- Develop process for consistent application and review

- **Internal**

- Define agencies/regulators that need to be involved
- Understand mandate of regulator/agency
- Identify resources/ expertise/ remediation
- Map to current law for implementation issues