Assessing the APEC Privacy Framework

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Outline

• What is APEC?
• What is the APEC Privacy Framework?
• What does it matter?
• APEC's 9 Privacy Principles - 'OECD Lite'
• Implementation - anything goes!
• Data exports - helping or hindering?
• In practice: Implications for the Asia-Pacific?
• Implications for Europe <=> Asia-Pacific links?
What is APEC?

• ‘Asia-Pacific Economic Cooperation’
• Grouping of 21 ‘economies’ from Chile to Singapore
  – Includes China and the USA
• It’s big! - 4 continents; 1/3 world population; 1/2 world GDP; 1/2 world trade
  – Too big? - Will it be overtaken by an Asian body?
• No ‘APEC treaties’, no constitution
  – Everything works on consensus and cooperation
  – Few if any legal requirements or constraints
What is the APEC Privacy Framework?

- Asia-Pacific has more privacy laws than any other region outside Europe
- A regional agreement is logical:
  - To create a minimum privacy standard
  - To help ensure free flow of personal data
- Potentials: which is it?
  - The most significant global privacy initiative since the EU Directive: a spur for new laws
  - A divisive low-standard ‘counter bloc’ to the EU
History of the APEC Privacy Framework

- ‘Seoul Declaration’ mentions privacy (1995)
- APEC Electronic Commerce Steering Group (ECSG, 99), Privacy Sub-group (03)
- Australian proposal to base APEC privacy on OECD Guidelines (Feb 03)
- Consultation on 9th draft of IPPs (Apr 04) - one NGO submission, no changes made
- No consultation on implementation (Pt IV)
- APEC Ministers announce APEC Privacy Framework (Nov 04)
  - But data export elements are missing
Implementation of the Framework

- US-funded project with 2 Australian consultants (Ford, Crompton)
  - Canadian Chair, HK, S.Korea influential
- 1st Implementation Seminar (Hong Kong, June 05) - 15 ‘economies’ attend
- US draft of missing data export elements discussed by Sub-group - finalised soon?
- 2nd Implementation Seminar (S.Korea, Sept 05) on ‘international’ aspects
APEC's 9 Privacy Principles

I  Preventing Harm
II  Notice
III  Collection limitation
IV  Uses of personal information
V  Choice
VI  Integrity of Personal Information
VII  Security Safeguards
VIII  Access and Correction
IX  Accountability (includes Due diligence in transfers)
Criticisms made in submissions

- **Criticisms** of **Draft v9** (Feb 04) (Greenleaf for APF & APPCC, March 04 - see Jan 05 article) - had no effect:
  - Categories of ‘national exceptions’ are open-ended;
  - Ineffective controls on each ‘national exception’ scope
  - Notice to individuals not clearly required
  - Collection is not limited to the minimum information necessary for purpose.
  - Secondary uses are allowed for ‘compatible’ purposes
  - Separate ‘choice’ Principle aids commodification of privacy.
  - ‘Commercial proprietary’ exception to access and correction
  - ‘Maximising Benefits’ should not become a Principle
  - **OECD Principles missing** - Purpose Specification; Openness; Data Export Limitation
  - No Deletion Principle
APEC's IPPs = 'OECD Lite'
5 types of criticisms

(1) Weaknesses inherent in OECD IPPs
   • OECD now 20 years old, even Kirby is critical
   • Allows secondary uses for ‘compatible or related purposes’
   • No IPPs on deletion

(2) Further weakening of OECD IPPs
   • OECD ‘Purpose specification’ and ‘Openness’ IPPs missing - both are valuable
   • Broader allowance of exceptions
   • Otherwise substantially adopts OECD
   • Slightly stronger than OECD on notice
APEC's IPPs = 'OECD Lite'

5 types of criticisms

(3) Potentially retrograde new IPPs

- ‘Preventing harm’ (I) - sentiment is OK, but a strange IPP; really a basis for rationing remedies or lowering burdens; could justify piecemeal coverage
- ‘Choice’ (V) - redundant in use and disclosure IPPs; does not seem to justify contracting out of other IPPs
APEC's IPPs = 'OECD Lite’

5 types of criticisms

(3) Regional experience ignored
  • No borrowings from the often stronger laws in the region (eg Korea, HK, NZ, Australia, Canada) - 17 years ignored
  • Some stronger IPPs are ‘standards’

(4) EU compatibility ignored
  • No borrowings of new EU IPPs (eg automated processing)
  • Is this an attempt to define ‘adequacy’ as ‘OECD Lite’? - or ‘just don’t care’?
APEC IPPs - Does ‘Lite’ matter?

- If there are no ‘free flow’ consequences, a low APEC baseline does not matter much
  - It merely encourages countries with no privacy laws to adopt them: most APEC countries
- APEC IPPs are a ‘floor not a ceiling’
  - Nothing explicit in Framework to deter national adoption of stronger IPPs
  - This approach seemed accepted at 1st Seminar
  - However, bias favouring free flow of information
- Encourage stronger implementations
  - Emulation of regional laws seems to be encouraged
  - Aim of Asia-Pacific Privacy Charter Council
Implementation
- anything goes!

- **Framework Part IV(A): ‘Domestic Implementation’**
  - non-prescriptive in the extreme
- **Any form of regulation is OK**
  - Legislation not required or even recommended
  - ‘an appropriate array of remedies’ advocated
  - ‘commensurate with the extent of the actual or potential harm’
  - Choice of remedies supported
- **No central enforcement body required**
  - A central access point for information advocated
  - Education and civil society input advocated
Implementation
- anything goes!

• Accountability
  – ‘Individual Action Plans’ - periodic national reports to APEC on progress
  – No current proposals for self-assessment or collective assessment (contra v1, 2003)

• Bottom line
  – Part IV exhorts APEC members to implement the Framework without requiring or proposing any particular means of doing so, or any means of assessing whether they have done so
  – considerably weaker than any other international privacy instrument
Data exports (Pt V(B) - helping or hindering?

• 2003 v1 proposals (neither are active)
  – Ford (Australia) proposed self-assessment of compliance as a basis for free flow within APEC
  – Stewart (NZ) proposed a 2 tier model of collective assessment (Commissioners and Ministers) along European lines

• Feb 2005 US proposals (now under debate)
  – Merely encourages economies to develop mechanisms which enabling recognition of when corporate cross-border privacy rules do satisfy local requirements
  – Also encourages consistent rules across economies
  – Little here requiring data transfers at a low standard
Data exports (Pt V(B) - agenda revealed? (Sept 2005)

- ‘Consultants Issues Paper’ (July 05) for 2nd implementation seminar in Korea (in materials)
  - Claims APEC laws ‘do not restrict data exports at all, or if they do...’ - accurate?
  - Raises technical issue that data transfers are often no longer ‘point to point’, but rather ‘follow the sun’ across data centres - does this change much?
  - Recommends 3 ‘APEC implementation objectives’ including (3) ‘prevention of data flow across borders should not be put forward as a general remedy suitable for privacy infringements that involve two or more economies’ - does the EU do this?; what is the alternative?
Data exports (Pt V(B) - agenda revealed? (Sept 2005)

- Claims OECD takes a ‘reasonably balanced approach’ - but avoids admitting that OECD allowed data export restrictions
- Claims EU has failed to enforce export restrictions because either (I) it is not serious; or (ii) there have been no breaches; or ‘it is not really a practical control or remedy’.
- Concludes: (a) ‘any attempt to stop (or improve) modern distributive practices would be like trying to stop (or improve) the flow of the tide’ (ie give up);
- (b) ‘Of course there may still be circumstances in which a regulator may consider it appropriate to restrict the transfer of information ...’ (how?) but this is exceptional
Implications for data exports
Europe <=> Asia-Pacific?

• Asia-Pacific ==> Europe
  – APEC Framework has little direct impact except it supports free flow of information globally
  – Neither guarantees exports to Europe or prohibits them (contra EU Directive which does both in reverse)

• Europe ==> Asia-Pacific
  – Framework will have little direct impact on adequacy assessments, or on assessment of individual transfers
  – ‘APEC compliance’ in national implementations will not guarantee EU adequacy
    • ‘OECD-style’ IPPs help but may not be strong enough
    • APEC does nothing to ensure adequate implementation
  – Will APEC’s approach to data exports prevent adequacy of APEC laws?
The bottom line: Implications for the Asia-Pacific?

- Framework was appearing as a benign but active force to encourage new privacy laws
  - Not attempting to require free flow at a low standard
- But the dangers of a counter-bloc to the EU stemming from an ‘anti-export-restriction’ Pt IV(B) has re-emerged
- The extent of uniformity is hard to predict because there is little agreement on the desirable standard
  - ‘Floor not a ceiling’ accepted in relation to both IPPs and remedies
  - Framework is so vague on both exceptions and implementation
- Increasingly uniform corporate rules for data transfers, and local acceptance mechanisms, may emerge
References

• Asia-Pacific Privacy Charter pages (includes key APEC documents and critiques) <http://www.bakercyberlawcentre.org/appcc/>

• 1st Implementation Seminar (HK, June 05) papers <http://www.pco.org.hk/english/infocentre/apec_ecsg1_2.html>.

