



Practical and Legal Considerations in Transferring Personal Information Across Borders

An overview of International Instruments and Initiatives

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TBDF: Instruments & Initiatives

- **OECD Guidelines – 30th Anniversary Review**
 - Essential Elements of Accountability “Galway Initiative”
- **EU Data Protection Directive -**
 - Consultations & Review
- **APEC Framework**
 - Privacy Pathfinder/CBPR System
- **Council of Europe Convention 108**
 - Non-member Invitation to Ratify
- **Proposed International Standard**
 - Conference of Spanish DPA
- **Security Prosperity Partnership (SPP)**
- **Etc...**





OECD

- **Government participants from 30 member countries working with business and civil society to address economic, social environmental and governance challenges of the world economy & to exploit its opportunities**

- **WPISP (Working Party on Information Security and Privacy)**
 - Reports to the Committee for Information, Computer and Communications Policy (ICCP)
 - ** Supported by OECD Secretariat **
 - Develops policy options by consensus to sustain trust in the global networked society
 - Addresses security & privacy issues
 - Serves as platform to monitor trends, share and test experiences, analyse the impact of technology on information security and privacy
 - Provides policy guidance
 - Work serves as foundation for the development of national coordinated policies
 - Guidelines on the Protection of Privacy and Transborder Flows of Personal Data (1980)





OECD Guidelines: 30th Anniversary

- **2008 Ministerial meeting on the Future of the Internet Economy: Seoul Ministerial Declaration**
 - Called for the OECD to assess existing instruments addressing (amongst others) privacy, in light of changing technologies, markets and user behaviour and the growing importance of digital identities”
- **Fortuitous: 2010 will mark the 30th anniversary of the OECD Guidelines**
- **Recent OECD events examining technological & social changes since 1980:**
 - Technology Foresight Forum: Cloud computing (Paris, October 2009)
 - Sensor-based Networks Conference, Lisbon, June 2009
 - APEC – OECD Joint Symposium: Safer Internet for Children (Singapore, April 2009)
 - Securing Personal Data in Global Economy (OECD/APEC/FTC Co-sponsors – March 2009, Washington)
- **Papers tabled at October 2009 WPISP meeting**
 - Accountability & Transborder Data Flows (Galway Initiative)
 - Case Studies on privacy & tbd





OECD Guidelines: 30th Anniversary

- Major Conference on global privacy issues to mark the 30th anniversary of the Guidelines (Fall 2010)
- 2009: Fact finding: events & documents to inform & contribute to privacy dialogue arising from Seoul Declaration
- 2010: Drawing from 2009 efforts, document to be developed on key changes in privacy landscape since 1980. Document to serve as background document for 2010 Conference.
- Conference outcomes to form the basis of Guidelines review & assessment
- Opening/revising the guidelines not necessarily outcome of Review. Options include updating explanatory memorandum, new annexes, supplements, etc.





EU Data Protection Directive

- **Authorizes data transfers (about EU Citizens) within EU + EEA**
- **Transfers outside EU authorized if:**
 - Adequacy Finding (eg. Canada)
 - US Safe Harbor Agreement
 - Authorization by Supervisory Authority
 - Use of Standard Contractual Clauses
 - Consent!
 - Binding Corporate Rules
- **Reactions & Comments re: EU Directive:**
 - Complex and administratively burdensome, too prescriptive (eg. registration of databases, DPA authorization for transfers)
 - Obsolete, difficult to reconcile with today's complex, multi-country & multi-party data transfers
 - National differences: Implementation & interpretation vary amongst EU Member States





EU Data Protection Directive Review

- **Study commissioned by UK Information Commissioner (“Rand Report”) – Released May 2009)**
 - Report found that Directive requires updating, to better deal with international data flows. Directive will remain useful and relevant, however will need to be supported by a more effective enforcement regime.
- **Data Protection Experts Group**
 - Created in November 2008 to advise European commission to advise on amendments to the Data Protection Directive.
 - Google, Intel, Hunton & Williams, Covington & Burling, Dutch DPA
 - Disbanded in early 2009, EC opted for broad public consultations
 - May 2009 Conference held to launch public consultation process
- **EU Directive Review Online Public Consultation (July 7 – Dec 31 2009)**
 - “Consultation on the legal framework for the fundamental right to protection of personal data”
 - *Seeks views on “new challenges for personal data protection in order to maintain an effective and comprehensive legal framework to protect individuals’ personal data within the EU”*
 - http://ec.europa.eu/justice_home/news/consulting_public/news_consulting_0003_en.htm





Asia Pacific Cooperation (APEC)

- **APEC**
 - Forum comprised of 21 « member economies »
 - 41% of world population
 - 54% of world GDP
 - 44% of world trade
 - Established in 1989 to enhance economic growth and strengthen Asia Pacific Region
 - Reducing tariff and other trade barriers
 - Increase exports
 - Create efficient domestic economies
 - Operates on the basis of non-binding commitments
 - has no treaty obligations
 - decisions are reached by consensus
 - commitments made on a voluntary basis





APEC & Privacy

- **Electronic Commerce Steering Group (ECSG)**
 - Promotes the development and use of electronic commerce by creating legal, regulatory and policy environments in the APEC region that are predictable, transparent and consistent.
 - Performs a coordinating role for APEC electronic commerce activities, based on the principles set out in the 1998 APEC Blueprint for Action on Electronic Commerce.

- **Data Privacy Sub-Group (created in 2003)**
 - Responsible for managing the work on data privacy within APEC
 - Primarily engaged in the implementation of the APEC Privacy Framework
 - Mandate relates to assisting APEC member economies to develop consistent national approaches to data protection
 - Responsible for developing solutions respecting the application of the Framework to cross-border transactions so as to maintain the free flow of personal data internationally





APEC Privacy Framework & Data Privacy Pathfinder

- **APEC Framework**
 - Non binding - Set of 9 principles governing protection of personal information
 - Endorsed by APEC Ministers of Trade in 2004
 - Aim to build consumer trust and confidence in electronic commerce while ensuring the free flow of information in the region

- **Data Privacy Pathfinder**
 - Endorsed by Ministers in 2007
 - Commitment by economies to work together to develop a system that provides for accountable cross-border data flows across the Asia-Pacific Region
 - Guides the development of “Cross-border privacy rules” system
 - Endorsed by Sixteen of 21 Member economies





APEC Cross Border Privacy Rules (CBPR)

Elements of the CBPR System

- **Self-assessment**
 - Organizations develop rules and procedures consistent with the APEC Privacy Principles
- **Compliance review**
 - The organization's rules are checked according to APEC-wide agreed guidelines to ensure compliance with APEC Privacy Principles
- **Recognition/acceptance**
 - Organizations certified as compliant are placed on a publicly available list of participating organizations
- **Dispute resolution and enforcement**
 - Domestic and cross-border procedures for resolving complaints.
 - “Accountability Agents” and Regulators (DPAs)





APEC Data Privacy Pathfinder CBPR Projects

- 1. Self-Assessment Guidance for Organizations**
- 2. Criteria for “Accountability Agents”**
- 3. Program Requirements**
- 4. Directory of Compliant Organizations & Contact Info**
- 5. DPA Directory**
- 6. Cooperation Arrangement for cross-Border Enforcement**
- 7. Cross-Border Complaint handling form**
- 8. Governance**
- 9. Testing – Pilot Project**





Council of Europe Convention 108

- **Opened for signature on 1981: First legally binding international instrument for data protection.**
- **Considers privacy as a fundamental human right**
- **Legally binding.**
 - In order to become a Party to the Convention, countries are required to apply the Convention's principles in their domestic laws governing the public and private sectors
- **In July 2008, non member States with equivalent privacy laws were allowed to accede to Convention**
- **International Conference of Data Protection and Privacy Commissioners 2008 Resolution on Protecting Privacy in a Borderless World:**
 - Included an invitation that Non-Member States consider responding to the Council of Europe's invitation to accede to Convention 108





Proposed International Standards on Privacy and Personal Data Protection

- **Resolution adopted by 30th Conference of Data Protection and Privacy Commissioners (Strasbourg 2008)**
 - “*Resolution on the urgent need for protecting privacy in a borderless world and for reaching a Joint Proposal for setting International Standards on Privacy and Personal Data Protection*”
 - Mandated the Spanish DPA to create a working group and to coordinate the drafting of a joint proposal which would be submitted at the 31st Conference in Madrid in 2009
- **Drafting Process benefited from broad level of participation:**
 - Included 54 experts from 15 countries
 - DPAs, Industry, civil society, academia, international fora, etc.
- **Per 2008 Resolution, Proposal to be submitted at 31st Conference**
 - Next steps tbd post Conference





Security & Prosperity Partnership

- **Trilateral initiative launched by Canada, US & Mexico in 2005**
 - Objective: increasing economic integration and security cooperation - focus on border security & trade
- **2005 *Framework of Common Principles for Electronic Commerce***
 - *Establishes an action plan for trilateral cooperation*
 - *Aims to promote the growth of the North American Online Marketplace*
 - Strengthening the Internet as a medium for e-commerce
 - Building Confidence
 - Removing unnecessary impediments to transborder online trade
- **Statement on Free Flow of Information (February 2008)**
 - *Recognizes that sustained economic growth is dependent on .transparent legal, policy and regulatory environment that permits the free flow of information across borders and facilitates its use for the conduct of trade and commerce*
 - *Trilateral Committee on Transborder Data Flows created to promote the Statement's goals*





SPP: Trilateral Committee on TBDF

- **Consultation Sessions**
 - *Washington (Sept 2008) - Mexico (Feb 2009) - Ottawa (June 2009)*
 - *Included representatives from government, business, academia, civil society*
 - *Aimed to identify and address issues affecting tbdf - understand how impediments to TBDF affect business & the North American marketplace*
- **Outputs**
 - Micro & macro economic studies
 - Summary Reports - Guidance document
 - Information websites
 - <http://www.ic.gc.ca/ecom/spp>
 - *OPC Guidelines for Processing Data Across Borders*
- **The Future being Explored**
 - Outreach
 - Case Studies/Scenarios

