

**Legislative Council Panel on
Information Technology and Broadcasting
Meeting on 12 July 2010**

**Agenda Item IV – Facilitating a digital economy,
and promoting technological innovation, cooperation and trade**

PURPOSE

The purpose of this paper is to inform the Panel of the involvement of the Office of Privacy Commissioner for Personal Data (PCPD) in an APEC data privacy initiative that facilitates a digital economy within the APEC region.

ELECTRONIC COMMERCE STEERING GROUP (ECSG)

2. Comprising 21 member economies¹, APEC spans four continents and represents more than one third of the world's population. In 1998, the APEC Ministers endorsed a "Blueprint for Action on Electronic Commerce"². It was acknowledged that the potential of electronic commerce cannot be realized without government and business cooperation *"to develop and implement technologies and policies, which build trust and confidence in safe, secure and reliable communication, information and delivery systems, and which address issues including privacy ..."*.

3. In 1999, the APEC established a special task group, the Electronic Commerce Steering Group (ECSG). All 21 APEC economies are represented on ECSG. It is committed to promoting and facilitating the development and use of electronic commerce by creating legal, regulatory and policy environments in the APEC region that are predictable, transparent and consistent. In addition, the ECSG is working to promote mechanisms that increase trust and confidence of participants in electronic commerce.

¹ APEC consists of 21 member economies. They are referred to as "economies" because the APEC cooperative process is concerned with trade and economic issues and members engage with one another as economic entities. The member economies are: Australia, Brunei Darussalam, Canada, Chile, People's Republic of China, Hong Kong, China, Indonesia, Japan, Republic of Korea, Malaysia, Mexico, New Zealand, Papua New Guinea, Peru, The Republic of the Philippines, The Russian Federation, Singapore, Chinese Taipei, Thailand, United States and Viet Nam.

² (http://www.apec.org/apec/leaders__declarations/1998/apec_blueprint_for.html)

APEC DATA PRIVACY SUBGROUP

4. The challenge for economies in addressing the issue of data privacy is protecting the personal information of consumers while also facilitating trans-border data flows. In order to foster the development of compatible approaches to data privacy in the APEC region, in 2002 the ECSG undertook a mapping exercise of member economies' approaches to data privacy. In February 2003 the ECSG established a Data Privacy Subgroup ("DPS") to develop a set of privacy principles and implementation mechanisms, to continue the exchange of information on developments related to data privacy within individual economies and to encourage public awareness by identifying and sharing best practices on data privacy protection. Members of the DPS include Australia, Canada, China, Hong Kong, China, Japan, Korea, Malaysia, New Zealand, Chinese Taipei, Thailand and the United States. At present, the Chair of the DPS is Australia.

PCPD'S PARTICIPATION IN THE DPS

5. The PCPD was first invited by the then Commerce, Industry and Technology Bureau to participate in the work of the DPS in 2003. Since then, the PCPD has been working in the DPS undertaking the project initiative almost solely by itself. The Privacy Commissioner and his staff attend every meeting of the DPS and participate actively in the inter-sessional meetings, telephone conferences and exchange of emails in handling the work of the DPS. As the privacy regulator in Hong Kong, the Privacy Commissioner contributes by way of providing opinions and comments from a regulator's perspective. In the early days of the DPS, the PCPD focused on assisting the DPS in drafting the APEC Privacy Framework. Then, the PCPD continues to work in the DPS by participating in different working groups of the various projects undertaken by the DPS with a view to facilitating the international implementation of the Framework.

ENDORSEMENT OF THE APEC PRIVACY FRAMEWORK

6. After the establishment of the DPS, its immediate task was to draft a set of data privacy principles. Hong Kong takes a leading role in Asia Pacific region in terms of personal data privacy protection. Hence the PCPD offered professional opinions during the drafting of the information privacy principles in the capacity as a privacy regulator. After endless discussions and deliberations on more than 10 drafts, the DPS prepared the final text of the

APEC Privacy Framework. In 2005, the Framework³ was endorsed by the APEC Ministers.

7. The Framework divides into four parts. Part I is a preamble, followed by Part II on the scope of application. Part III contains nine Information Privacy Principles. They are:

- (1) Preventing Harm Principle
- (2) Notice Principle
- (3) Collection Limitation Principle
- (4) Uses of Personal Information Principle
- (5) Choice Principle
- (6) Integrity of Personal Information Principle
- (7) Security Safeguards Principle
- (8) Access and Correction Principle
- (9) Accountability Principle

Part IV contains guidance for domestic and international implementation.

8. By its efforts and insistence, the PCPD was able to secure a set of APEC Information Privacy Principles that are generally consistent with the Data Protection Principles under the Personal Data (Privacy) Ordinance (“the Ordinance”) (Chapter 486, Laws of Hong Kong). This outcome is significant in that if the Administration elects to do so, Hong Kong may participate in the APEC Privacy Framework with minimal impact on its current domestic legal framework.

IMPLEMENTATION OF THE APEC PRIVACY FRAMEWORK

9. The DPS then strives to work on issues in relation to the implementation of the Framework.

10. At domestic implementation level, the DPS has prepared a template of Information Privacy Individual Action Plans and member economies are encouraged to complete the template, reporting the progress on implementation of the Framework locally. The PCPD provided comments to the Administration in the drafting stage of Hong Kong’s Individual Action Plan. Its final text⁴ was submitted to the DPS in August 2006.

³ (http://www.apec.org/apec/apec_groups/committee_on_trade/electronic_commerce.html)

⁴ (http://www.apec.org/apec/apec_groups/committee_on_trade/data_privacy_iaps.html)

11. As regards international implementation, the APEC Ministers endorsed the Data Privacy Pathfinder in 2007 to join efforts in carrying out nine projects aiming to develop an implementation mechanism built on the foundation of trust, with a view to ensuring the free flow of information across the Asia Pacific region.

DATA PRIVACY PATHFINDER PROJECTS

12. The projects created under the Data Privacy Pathfinder are:-

No.	Project Title	Nature of Project
1	<i>Self-assessment guidelines for organizations</i>	Develop a standard self-assessment guidance document for use by organisations to assist the organisation in developing its cross-border privacy rules (“CBPRs”)
2	<i>Trustmark (accountability agent) guidelines</i>	Develop guidelines for what a trustmark must do in order to be recognised as an APEC CBPR accreditation provider
3	<i>Compliance review process of Cross Border Privacy Rules</i>	Develop guidelines for trustmarks to use when assessing an organisation’s compliance with the APEC Information Privacy Principles
4	<i>Directories of compliant organizations</i>	Develop a publicly accessible directory of organizations that have CBPRs that have been accredited as complying with the APEC Information Privacy Principles
5	<i>Contact directories for data protection authorities and privacy contact officers</i>	Establish and maintain a directory of relevant data protection authorities, supervisory authorities and/ or privacy contact officers in APEC economies

6	<i>Templates for enforcement cooperation arrangements</i>	Develop template documentation which provides for cooperative arrangements between relevant enforcement authorities to exchange information and increase and promote cross-border cooperation in investigation and enforcement
7	<i>Templates for cross-border complaint handling forms</i>	Develop a template cross-border complaint handling form
8	<i>Guidelines and procedures for responsive regulation in Cross Border Privacy Rules system</i>	Develop guidelines and procedures (e.g. flowchart) to assist in determining at which stage of the CBPR responsive regulation pyramid a cross-border privacy complaint should be handled and identify the triggers for escalating a complaint to a higher level of the pyramid
9	<i>Cross-Border Privacy Rules International Implementation Pilot Project</i>	Develop and implement a pilot project between interested economies for the implementation and testing of a CBPR system in the APEC region

13. Different working groups are formed responsible for drafting the relevant project documents for consideration and comments by the DPS. As the PCPD is one of the few privacy regulators within the APEC member economies, there has been general expectation for its active participation in the working groups. With limited resources, the PCPD has to be selective in joining the working groups. At present, PCPD maintains itself as an active member of the working groups of Projects 2, 5, 6, 7 and 9. In carrying the works, the PCPD has to attend regular telephone conferences of the working groups and exchange emails with the members on different working drafts of the project documents. Comments from the PCPD are very often recognized and accepted by the working groups in finalizing the documentations. Project 6 which concerns cross-border cooperation is a very controversial project. In proposing amendments to the draft documents, the PCPD was minded to create a framework that would be flexible for Hong Kong to participate with minimal impact on its current legal framework and simple in operation for local consumers to make cross-border complaints.

The nature and extent of the cooperation, the confidentiality arrangements and limitations on assistance are the main aspects where there had been very heated debates within the working group before the relevant provisions were finally settled.

ENDORSEMENT OF THE APEC COOPERATION ARRANGEMENT FOR CROSS-BORDER PRIVACY ENFORCEMENT

14. The year 2010 is of profound significance, which marks another milestone in DPS's work. Endorsed by the APEC Ministers in November 2009, the APEC Cooperation Arrangement for Cross-Border Privacy Enforcement ("Cooperation Arrangement") (comprising documents developed under Pathfinder Projects 5, 6 and 7) will come into operation on 16 July 2010.

15. The Cooperation Arrangement⁵ aims to foster consumer confidence in electronic commerce involving cross-border data flows by establishing a framework for regional cooperation in enforcement of privacy laws. With the growth of electronic commerce, there will be an increasing concern about information privacy with a cross-border element. This can pose practical difficulties in investigating and resolving complaints about violations of consumers' personal information privacy. The Cooperation Arrangement will assist participating privacy enforcement authorities in the APEC region to address these challenges, through cross-border cooperation on consumer privacy investigations and enforcement matters.

16. In endorsing the Cooperation Arrangement, the APEC Ministers stated in the Joint Statement of the 21st APEC Ministerial Meeting:-

"We endorse the APEC Cooperation Arrangement for Cross-Border Privacy Enforcement and associated documents, a key step in establishing a voluntary system of cross-border privacy rules based on the APEC Privacy Framework. We encourage all economies to continue the development of this system to allow for effective privacy protections while avoiding barriers to information flow and the promotion of trade, investment and economic growth."

17. The PCPD was initially offered the appointment of being one of the administrators of the Cooperation Arrangement. Since the Administration has

⁵ (http://aimp.apec.org/Documents/2010/ECSG/DPS1/10_ecsg_dps1_013.pdf)

not yet decided on whether Hong Kong would participate in the Cooperation Arrangement, the appointment could not be made.

18. The Cooperation Arrangement is a non-binding, multilateral arrangement to facilitate privacy enforcement cooperation among APEC member economies. The PCPD's participation in the Cooperation Arrangement appears to fulfil the functions specified in section 8(1)(g)⁶ of the Ordinance in that the enforcement cooperation among privacy enforcement authorities is a matter of mutual interest concerning the privacy of individual in relation to personal data.

19. Pursuant to section 8(2)(e) of the Ordinance, prior approval from the Chief Executive has to be obtained before the PCPD may become a member of or affiliate to any international body concerned with privacy of individuals in relation to personal data. The PCPD is currently seeking the approval so that PCPD may participate in the Cooperation Arrangement as soon as it becomes operative on 16 July 2010.

PCPD'S CONTRIBUTION

20. The PCPD's contribution in the DPS is highly recognized and commended. The Chair of the DPS in his letter dated 4 November 2009 to the Privacy Commissioner made the following comments in describing PCPD's participation in the work:-

“In my view the active involvement of your Office in the work of the Sub-Group has made an important contribution to the success of the Sub-Group's work. As well as participation in the ongoing work of the Sub-group, your Office's involvement has taken the form of participation in Data Privacy Pathfinder project groups which have met regularly by email and teleconference, as well as participation in the regular monthly teleconferences of the Sub-Group members. Your Office has worked to develop and comment upon policy documents. This contribution has helped to ensure these policy documents recognize the different approaches of APEC member economies.

⁶ Section 8(1)(g) of the Ordinance provides as follows:-

“The Commissioner shall liaise and co-operate with any person in any place outside Hong Kong—

(i) performing in that place any functions which, in the opinion of the Commissioner, are similar (whether in whole or in part) to any of the Commissioner's functions under this Ordinance; and
(ii) in respect of matters of mutual interest concerning the privacy of individuals in relation to personal data”

I have particularly valued your personal participation in the activities of the Sub-Group. My observation is that you have personally led the work of your Office and have brought to the Sub-Group your experience as a privacy regulator in the Asian region.”

TRADE FACILITATION

21. APEC has been working at the forefront of international efforts to facilitate trade by identifying obstacles that hinder trade and implementing activities and actions to address these obstacles. In the Second Trade Facilitation Action Plan⁷ prepared by the APEC Committee on Trade and Investment (CTI), electronic commerce remains one of the four areas of concern. It is recognized that cross-border data flows are the currency of the digital economy that fuels growths in the information age. The DPS will continue its work on the implementation of the APEC Privacy Framework, to explore ways in which procedures for protecting personal information may be implemented in practice in the cross-border context, taking into account the views and interests of the parties involved in the legal frameworks in which they operate.

CONSULTATION ON THE PATHFINDER PROJECT DOCUMENTS

22. The ultimate goal of the Pathfinder projects is to facilitate responsible and accountable cross-border data transfers and effective privacy protections without creating unnecessary barriers to cross-border information flows.

23. According to Paragraph 46 of the APEC Privacy Framework, member economies will endeavor to support the development and recognition or acceptance of organization’s cross-border privacy rules across the APEC region. In order to give effect to such cross-border privacy rules, paragraph 47 of the Framework provides that member economies will endeavor to work with appropriate stakeholders to develop frameworks or mechanisms for the mutual recognition or acceptance of cross-border privacy rules between and among the economies.

24. As the draft documents of the Pathfinder projects are approaching their

⁷ (http://www.apec.org/apec/apec_groups/committee_on_trade.html)

finalization stage, the PCPD has asked the Trade and Industry Department (TID) to consider whether stakeholders in Hong Kong should be consulted or not. To PCPD's knowledge, some member economies which are represented in the DPS have already carried out consultations with their local stakeholders. The PCPD hopes that the Administration will take a leadership role in carrying out the consultation. In PCPD's view, Hong Kong cannot hope to reap the benefits of the project initiatives without the well-informed participation of the business sector.

25. The work done by the PCPD has strongly contributed to the collective efforts by member economies of the APEC to enhance the protection of personal data in the region, thereby fostering public confidence in the development of e trade and commerce. It is now time for the Government to take a clear lead in forging ahead with the development of e-trade and commerce.

*Office of the Privacy Commissioner for Personal Data
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