



2010/SOM1/ECSG/DPS/013
Agenda Item: IIIi

APEC Cooperation Arrangement for Cross-Border Privacy Enforcement

Purpose: Information
Submitted by: DPS Chair



Data Privacy Subgroup Meeting
Hiroshima, Japan
28 February 2010

APEC COOPERATION ARRANGEMENT FOR CROSS-BORDER PRIVACY ENFORCEMENT

1 OBJECTIVES OF THIS FRAMEWORK

In endorsing the APEC Privacy Framework in 2004, APEC leaders recognised the importance of developing effective privacy protections that avoid barriers to information flows and ensure continued trade and economic growth in the APEC region.¹ This cross-border cooperation arrangement is a key step in achieving that goal.

The APEC Privacy Framework, Part IVB, calls on member economies to consider developing cooperative arrangements and procedures to facilitate cross-border cooperation in the enforcement of privacy laws. The APEC Privacy Framework contemplated bilateral or multilateral arrangements that include the following:

- mechanisms for promptly, systematically and efficiently notifying designated public authorities in other member economies of investigations or privacy enforcement cases that target unlawful conduct or the resulting harm to individuals in those economies;

- mechanisms for effectively sharing information necessary for successful cooperation in cross-border privacy investigation and enforcement cases;

- mechanisms for investigative assistance in privacy enforcement cases;

- mechanisms to prioritize cases for cooperation with public authorities in other economies based on the severity of the unlawful infringements of personal information privacy, the actual or potential harm involved, as well as other relevant considerations; and

- steps to maintain the appropriate level of confidentiality in respect of information exchanged under the cooperative arrangements.²

In addition, in 2007, APEC economies endorsed a 'pathfinder' for international implementation of the APEC Privacy Framework. The Cooperation Arrangement for

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- 2.4 This Cooperation Arrangement is set out as follows:
- commencement of this Cooperation Arrangement (paragraph 3);
 - definitions and legal limitations (paragraphs 4, 6 and 7);
 - the role of the Administrator (paragraph 5);
 - how to participate, or cease to participate, in the Cooperation Arrangement (paragraph 8);
 - cross-border cooperation (paragraph 9);
 - confidentiality (paragraph 10);
 - information sharing (paragraph 11); and
 - miscellaneous matters (staff exchanges, disputes, review) (paragraphs 12 to 15).
- 2.5 Annexed to the Cooperation Arrangement are:
- Request for Assistance form (Annex A).
 - Contact Point Designation form (Annex B).
 - A template for summary statement of Participant's practices, policies and activities (Annex C).

3 COMMENCEMENT

- 3.1 This Cooperation Arrangement commences one month after the Administrator is designated under paragraph 5 or such later date specified by the ECSG.
- 3.2 From the date of commencement any Privacy Enforcement Authority may participate in the Cooperation Arrangement as provided for in paragraph 8.

4 DEFINITIONS

- 4.1 In this Cooperation Arrangement:
- 'Administrator'** means the body or bodies designated under paragraph 5.1.
 - 'Cooperation Arrangement'** means APEC Cooperation Arrangement for Cross-border Privacy Enforcement.
 - 'Cross-Border Privacy Rules'** has the same meaning as in paragraphs 46 to 48 of the APEC Privacy Framework.

'ECSG' means the Electronic Commerce Steering Group or the APEC committee having responsibility for the APEC Privacy Framework.

'Participant' means a Privacy Enforcement Authority from an APEC member economy that participates in this Cooperation Arrangement.

'Privacy Enforcement Authority'

- (a) notices of intent to participate in or cease to participate in the Cooperation Arrangement under paragraphs 8.1 and 8.2;
 - (b) letters of confirmation under paragraph 8.1;
 - (c) economy contact point forms, under paragraph 11.1;
- (ii) receive such documents in paragraph 5.3(i) and verify that the

- (iii) Affect any authority or right of a Privacy Enforcement Authority or non-participating authority to seek information on a lawful basis, including in law enforcement matters, from a person located in the territory of another Participant's economy, nor is it intended to preclude any such person from voluntarily providing information to a Privacy Enforcement Authority or non-participating authority.
- (iv) Impede governmental activities authorized by law when taken to protect security, public safety, sovereignty or other public policy of an APEC member economy.
- (v) Create obligations or expectations of cooperation that would exceed a Participant's scope of authority and jurisdiction.
- (vi) Create obligations or expectations for other, non-participating government agencies.
- (vii) affect any authority or right to use information pursuant to a mutual legal assistance treaty (MLAT) or other applicable international agreements between the Requesting and Receiving Authorities' governments.

7 LIMITATIONS ON ASSISTANCE

7.1 At its sole discretion, a Participant may at any time decline to accept or proceed with a Request for Assistance, or limit its cooperation including, but not limited, under the following circumstances:

- (i) The matter is inconsistent with domestic law or policy.
- (ii) The matter is not within the Participant's scope of authority or jurisdiction.
- (iii) The matter is not an act or practice of a kind that both the Requesting Authority and Receiving Authority are authorized to investigate or enforce against under their Privacy Laws.
- (iv) There are resource constraints.
- (v) The matter is inconsistent with other priorities.
- (vi) There is an absence of mutual interest in the matter in question.
- (vii) The matter is outside the scope of this Cooperation Arrangement.
- (viii) Another body (including a private sector body, consistent with paragraph 9.4) is a more appropriate body to handle the matter.
- (ix) Any other circumstances that renders a Participant unable to cooperate. The Participant may notify the basis of these circumstances in writing.

- 9.3 Subject to paragraphs 7.1 and 9.2, Participants recognize the enforcement of APEC Cross-Border Privacy Rules as a priority for cooperation under this Arrangement.

Cooperation with non-participating agencies and organisations

- 9.4 Participants intend to use best efforts within the limits of their respective authority to cooperate with private sector organizations, self-regulatory bodies and non-participating Privacy Enforcement Authorities, whose responsibilities include the resolution of individuals' privacy complaints. Privacy Enforcement Authorities are in particular encouraged to cooperate with Accountability Agents involved in the enforcement of APEC Cross-Border Privacy Rules.
- 9.5 Participants intend to use best efforts within the limits of their respective authority to cooperate with other public sector bodies including law enforcement bodies, subject to paragraph 10.

Steps prior to requesting assistance

- 9.6 Before a Participant makes a Request for Assistance to another Participant, that Participant should:
- (i) ascertain that the request would be consistent with this Cooperation Arrangement and the goals of the APEC Privacy Framework;
 - (ii) seek consent, where appropriate and subject to any other requirements, policies or practices applicable to the Privacy Enforcement Authority in question, of individual complainants to provide information about their complaint to another Participant;
 - (iii) check the accessible information on the other Participant's practices, policies and activities (see paragraphs 11.2 and 11.3);
 - (iv) perform a preliminary enquiry, where appropriate and practicable, to identify which entity in the other member economy has front-line responsibility with respect to the contemplated Request for Assistance consistent with paragraphs 9.4 and 9.5; and
 - (v) perform a preliminary enquiry, where appropriate, with the contact point (designated under paragraph 11.1) of the other Participant or other appropriate entity in the other member economy and provide information as necessary, to identify if the other Participant will have and accept jurisdiction over the contemplated Request for Assistance.

Requesting assistance

- 9.7 A Participant making a Request for Assistance to another Participant should:
- (i) use the APEC 'Request for Assistance' form (attached at Annex A) to communicate key information about the matter in question;

- (ii) provide sufficient additional information (if any) for the Receiving Authority to take action, such as identifying any special precautions that should be taken in the course of fulfilling the request;
- (iii) specify the purpose for which any information requested from the Receiving Authority will be used and the persons to whom the information may be transferred; and
- (iv) provide information, or other assistance, requested by the Receiving Authority to assist with the handling of the referred matter.

9.8 A Participant whose assistance is requested should:

- (i) acknowledge the Request for Assistance as soon as reasonably practicable after receiving it;
- (ii) at the time of acknowledgement, or as soon as reasonably practicable thereafter, indicate whether it accepts or declines the request in whole or in part;
- (iii) if more information is needed from the Requesting Authority to enable a decision to be made on accepting or declining the request, promptly identify that further information is required and to clearly advise the Requesting Authority of this;
- (iv) if declining the Request for Assistance, provide the reason(s) for such a decision and refer the Requesting Authority, where feasible and appropriate, to a body which may be able to handle the request (consistent with paragraphs 9.4 and 9.5);
- (v) if limiting the extent of cooperation, provide the reason(s) for such decision and advise any condition(s) to be imposed for rendering assistance; and
- (vi) if accepting the Request for Assistance:
 - (a) process that request according to its usual policy and practice;
 - (b) where feasible and appropriate, communicate with the Requesting Authority about matters that may assist with the processing of the matter in question; and
 - (c) where feasible and appropriate, keep the Requesting Authority informed of the progress and outcome of the referred matter.

Communication to assist ongoing investigations

9.9 Participants should communicate with each other, as appropriate, about matters that may assist ongoing investigations.

Use of information obtained during cross-border cooperation

- 9.10 The Requesting Authority and the Receiving Authority will, on a bilateral basis, determine permissible uses of shared information consistent with applicable law and policy.

Notice of possible breaches in another Participant's jurisdiction

- 9.11 A Participant may, if it considers appropriate, provide another Participant with notice of a possible breach of the privacy laws of that other Participant's economy.
- 9.12 Where appropriate and feasible, Participants should coordinate their investigations and enforcement activity with that of other Participants to promote more effective enforcement and avoid interference with ongoing investigations.

10 CONFIDENTIALITY

- 10.1 Subject to paragraphs 9.10 and 10.3, and in accordance with any laws applicable to the Requesting and Receiving Authority, consultations, other communications or information shared between Participants pursuant to this Cooperation Arrangement, are confidential and will not be disclosed.
- 10.2 Each Participant should, to the fullest extent possible and consistent with its economy's laws, use best efforts to maintain the confidentiality of any information

or otherwise handled in accordance with the consent of the Participant that provided it.

- 10.6 Subject to paragraphs 9.10 and 10.3, Participants intend to oppose, to the fullest extent possible consistent with their economies' laws, any application by a third party for disclosure of confidential information or materials received from other Participants, subject to consultation with the Participants that provided the information.
- 10.7 Each Participant should endeavour to safeguard the security of any information received under this Cooperation Arrangement. To this effect, a Participant should have in place appropriate measures to prevent loss, unauthorized or accidental access, processing, use or disclosure of any information received under this Cooperation Arrangement. Any information received under this Cooperation Arrangement should not be retained for longer than required by domestic law or than is necessary for the fulfillment of the purpose for which the information is to be used.

11 INFORMATION SHARING

Contact point designation

- 11.1 Each Participant should designate a contact for the purposes addressed in this Cooperation Arrangement and as the main, but not exclusive, point of contact for other Privacy Enforcement Authorities. The Contact Point Designation form (or an updated version provided for this purpose by the Administrator) annexed to this Cooperation Arrangement may be used.

Participants' statement of practices, policies and activities

- 11.2 Participants should prepare a statement of information related to their enforcement practices and policies and other relevant activities. Participants should take steps to make this statement accessible to other Participants, for example, by posting it on their website. Availability of these statements will improve Participants' collective understanding of how enforcement is conducted within respective economies as well as assisting in the facilitation of particular Requests for Assistance.
- 11.3 The Administrator may request Participants to file summary statements of enforcement practices to be available to Participants in a central repository. If doing so, the Administrator will use the template annexed to this Cooperation Arrangement or an updated version of that template. Participants should provide the Administrator with an updated summary within a reasonable time frame if their policies or practices change.

14 DISPUTES

- 14.1 Any dispute between Participants in relation to this Cooperation Arrangement is to be resolved by discussions between them through their designated contacts and, failing resolution in a reasonably timely manner, by discussion between the heads of the Participants.

15 REVIEW AND UPDATE OF THIS DOCUMENT

- 15.1 Through a consultative process, Participants must review this Cooperation Arrangement and its operation three years after its commencement.
- 15.2 Having completed the review, the Administrator will submit a report to the ECSG giving an account of the review and offering recommendations of any necessary or desirable changes.
- 15.3 The Administrator will manage a process for soliciting and receiving acceptances from Participants of the changes approved by the ECSG and will appropriately update the list of current Participants and make the revised Cooperation Arrangement available.

Request for Assistance Form

Please see the instructions below

Date of the request:

1. Case name

2. Authority contact details

From:

Requesting Authority, Economy	
Contact Person, Title	
Telephone	
Email Address	
Postal address	

To:

Receiving Authority, Economy	
Contact Person, Title	
Telephone	
Email Address	
Postal address	

3. Confidentiality requirements

4. Assistance requested

5. Time and manner of response

6. Organization(s) involved

Name	
Address/URL	

7. Individual(s) involved

Name	
Address	
Telephone/ Email Address	
Any additional background information:	

Instructions

1. Case name

Provide a name, number or other indication that can be used to refer to the request.

2. Authority contact details

Provide the contact details specified in the form for the Requesting Authority and the Receiving Authority. Where appropriate, provide contact information for any other Authorities (domestic or foreign) that have been involved in the investigation or whose assistance has been requested.

Annex A

Indicate whether the subject matter of the Request relates to any of the privacy principles described in the table. You may add an explanation under each principle if necessary.

10. Possible law violations, potential sanctions, on-going proceedings and contemplated proceedings

Where appropriate, indicate the possible laws or regulations that may have been violated, the possible sanctions that could be applied, as well as information on any on-going and contemplated proceedings. Note that links to the full

Contact Point Designation Form

Economy Name: _____ Date: _____

Contact Point

Please provide information for each category. This information will be maintained in a non-public list.

Privacy Enforcement Authority	
Name	
Title/Position	
Address	
Telephone	
Fax	
E-mail	
Website address	

(Optional) Other Privacy Enforcement Authorities in your economy and their website addresses	
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Summary statement of Privacy Enforcement Authority enforcement practices, policies and activities

This form seeks to capture in summary form the enforcement jurisdiction and policies of each Participant in the APEC Cooperation Arrangement for Cross-Border Privacy Enforcement. The information will usually be posted on the relevant Participant's website and, when available, at a central reference point maintained by the Administrator.

Privacy Enforcement Authority name:

Economy:

Website address:

Key law(s) enforced by your authority:

(Consider including a link to the relevant legislation)

General sectors/jurisdictions regulated by your authority:

(Public sector, private sector, a particular industry sector? Do you operate in a particular geographical jurisdiction such as a state or province?)

Approach to investigation / resolution of enforcement matters:

(What are your key enforcement activities or roles? For example, do you receive complaints, grant approvals, investigate, mediate or make determinations on matters? Broadly speaking, what are your investigation processes? What are your enforcement powers?)

Prioritization policies:

(Does your authority have a policy on the prioritization of enforcement matters it is willing to handle? If so, please provide a link to your current policy)

Other relevant information:

(Are there any restrictions on how your agency can cooperate on enforcement? Are there any circumstances in which your agency may be required by law to provide information obtained under the Cooperation Arrangement to a third party?)