

ANNEX B- DETAILED COMPARISON OF INTERNATIONAL LEGISLATIVE INSTRUMENTS

<u>Legislative Instrument</u>	<u>CoE Convention</u>	<u>OECD Guidelines</u>	<u>EU Directive 95/46/EC</u>	<u>APEC Privacy Framework 2004</u>
Main Focus	<p>Preamble; 'respect for the rule of law, as well as human rights and fundamental freedoms' 'extend the safeguards ...in particular the right to the respect for privacy' 'reconcile the fundamental values of the respect for privacy and the free flow of information between peoples'</p>	<p>Preface: 'common interest in protecting privacy and individual liberties'... 'advance the free flow of information between MS' and 'avoid unjustified obstacles to the development of economic and social relations bet MS'</p>	<p>Internal market between MS- recital 1 Data processing systems are designed to serve man, respect fundamental rights and freedoms, notably right to privacy- recital 2 Free movement of information between MS but fundamental rights of individuals must be safeguarded-recital 3 Fundamental rights and freedoms of natural persons, ECHR, Art 8 recognized; high standard is required-recital 10 Third country processing should be governed by law of MS in which means used are located, to guarantee that Directive is respected-recital 20 Importance of respecting Art 10 (freedom of expression) of the European Convention of Human Rights, recital 37 Cross border flows necessary for international trade and where protection is guaranteed, Directive does not stand in the way of such transfers-recital 56 Otherwise, if third country does not ensure an adequate level of protection, transfer must be prohibited-recital 57 Transfers to third countries may be effected only pursuant to Directive, Art 8-recital 60</p>	<p>Preamble: 'Importance of protecting information privacy and maintaining information flows among economies in AP region'... 'Lack of consumer trust and confidence in privacy and security of on-line transactions and information networks... prevent (ME) from gaining...benefits of e-commerce' '...systems that unnecessarily restrict this (information) flow...have adverse implications for global business and economies' (3)/ 'Aims to promote e-commerce...consistent with core values of OECD' (5)/ 'Approach...focus attention on practical and consistent information privacy protection...balances information privacy with business needs and commercial interest and...due recognition to cultural and other diversities that exist within ME'(6)/ 'Appropriate privacy protections for personal information, free flow of information [is] essential for economic/social growth...' (8)</p>

Legislative Instrument

CoE Convention

OECD Guidelines

EU Directive 95/46/EC

APEC Privacy Framework 2004

Main Focus

‘ enable global organizations in APEC to develop uniform approaches for access/use of personal information, enable enforcement agencies...protect information privacy, advance international mechanisms regarding information privacy and maintain continuity of information flows among APEC and trading partners’(8)

**Member states/
economies**

Albania, Andorra, Armenia, Austria,Azerbaijan,Belgium, Bosnia & Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia,Liechtenstein, Lithuania, Luxembourg, Malta, Moldova, Monaco, Netherlands, Norway, Poland, Portugal, Romania, Russia, San Marino, Serbia, Slovakia, Slovenia, Spain, Sweden, Switzerland, Republic of Macedonia, Turkey, Ukraine, UK (46)

Australia, Austria, Belgium, Canada, Czech Republic, Denmark, Finland France, Germany, Greece, Hungary, Ireland, Iceland, Italy, Japan, S Korea, Luxembourg, Mexico, New Zealand, Netherlands, Norway, Poland, Portugal, Slovakia, Spain, Sweden, Switzerland, Turkey, UK, USA (30)

Austria, Belgium, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Slovakia, Slovenia, Spain, Sweden, UK (25)

Australia, Brunei Darussalam, Canada, Chile, HK, China, Indonesia, Japan, Korea, Malaysia, Mexico, NZ, Papua New Guinea, Peru, Philippines, Russia, Singapore, Taipei, Thailand, USA, Vietnam (21)

Type of data protected

Personal data in public and private sectors- Art 3
Personal data: any information relating to an identified or identifiable individual-Art 2a

Personal data whether in public or private sectors- s2
Personal data: any information relating to an identified/identifiable individual l(DS)-section 1b)

Personal data-public/private-Art 2(d)
Personal data: any information relating to an identified or identifiable natural person (directly or indirectly)-Art 2(a)

Personal data: public and private sectors. (10)
Personal data: any information about an identified or identifiable individual (9) (*Exception for publicly available data (11)

Scope of data protection

Automated personal data files and automatic processing of persona data Art 3(1)

Automatic processing of personal data- s3c)

Wholly or partly by automatic means, and to processing otherwise by automatic means which form part of a filing system-Art 3

Not defined, see (9) ‘the Framework has been drafted to promote a consistent approach among the information privacy regimes of APEC economies

Legislative Instrument

Data Protection Principles
*unique to instrument

CoE Convention

Art 5- Quality of Data

- a) obtained and processed fairly and lawfully
- b) stored for specific and legitimate purpose and not used incompatibly with those purposes
- c) Adequate, relevant and not excessive
- d) Accurate, kept up to date
- e) Preserved for no longer than is required

Art 6- Special categories* of data may not be processed automatically unless domestic law provides safeguards.

Art7 -Data Security (appropriate security measures to protect against destruction, loss, access, alteration or dissemination)

Art 8- Additional Safeguards for DS

- a) right to establish existence of automated data file, identity and location of controller

OECD Guidelines

s7-Collection Limitation Principle (lawful/knowledge/consent)

s8-Data Quality Principle (accurate, complete, up to date)

s9-Purpose Specification Principle (at time of collection, subsequent use limited to that purpose/if not incompatible with purpose, change must be specified)

s10-Use Limitation Principle (secondary use only with consent of DS/authority of law)

s11-Security Safeguard Principle (against loss, unauthorized access, destruction use, modification or disclosure of data)

s12-Openness Principle*(Readily available means of establishing existence and nature of personal data and purposes of their use/identity/residence of DC)

s13-Individual Participation Principle (DS to have right to obtain data relating to him from DC/confirmation within reasonable time/at reasonable charge, have data erased, rectified, completed or amended.

EU Directive 95/46/EC

Art 6-Data Quality

- a) processed fairly and lawfully,
- b) collected for specified, explicit, legitimate purpose+ not further processed incompatible way c)adequate, relevant, not excessive
- c) accurate, kept up to date
- d) kept no longer than necessary

Art 7-Legitimate Data processing*

- a) consent or
- b) necessary for performance of contract
- c) legal obligation,
- d) necessary for DS' vital interests,
- e) public interest
- f) legitimate interests of DC

Art 8-Special Data* processing prohibited: racial/ethnic, political opinions, religion philosophical belief, trade union membership, health/sex life unless

- a) explicit consent or
- b) necessary for employment law or
- c) DS' vital interests or
- d) Legitimate activities of foundation etc of members or
- e) public data or legal claims.

Art 9-Freedom of expression* derogation

APEC Privacy Framework 2004

s14-Preventing harm* (ie from the misuse of personal information, remedial measures should be proportionate to the harm caused by misuse of collection or use of information

s15-Notice

- a) that personal information is being collected,
- b) purpose,
- c) who it may be disclosed to,
- d) identity/location of personal information controller and practices
- e) choice for limiting use, disclosure, accessing, correcting information

s16- Reasonably practicable steps re notice is provided either or before time of collection of personal information or as soon as possible after

s17- some instances, notice is not appropriate or required

s18-Collection limitation (relevant to purpose, obtained through lawful and fair means and where appropriate, with notice to or consent of individual

Legislative Instrument

Data Protection Principles
*unique to instrument

CoE Convention

- b) Right to obtain confirmation of automated data file and communication of such file at reasonable intervals and without excessive delay
- c) Obtain rectification or erasure of data if processed in contravention of Art 5 and 6
- d) Remedy for breach of b) and c)

OECD Guidelines

s14-**Accountability Principle** (DC should be accountable to comply with measures that effect above principles)

EU Directive 95/46/EC

Art 10-**Information to be given to DS** by DC (identity, purpose of processing, recipients of data etc to guarantee fair processing)

Art 11-If data not obtained from DS, DC must at time data is first disclosed provide (Identity, purpose of processing, recipients, access and rectification rights etc to guarantee fair processing)

Art 12-**Right of access** (MS to guarantee DS right to obtain from DC

- a) without constraint at reasonable intervals, without excessive delay or expense confirmation if data relating to him are being processed, purposes, categories, recipients/ data being processed/knowledge of logic in automatic processing
- b) rectification, erasure blocking of data that does not comply with Directive especially if inaccurate/incomplete
- c) notification to 3rd parties of any action in b) unless impossible/disproportionate

Art 14-**Right to object***

- a) in cases 7(e)&(f) at any time on compelling legitimate grounds save otherwise provided by national legislation. If justified, DC may no longer process involving that data

APEC Privacy Framework 2004

s19-**Uses of personal information only to fulfil collection purpose**/compatible or related purposes except

- a) consent of DS
- b) necessary to provide service or product requested by DS
- c) authority of law

s20-**Choice*** (individuals should be provided with accessible, easily understandable affordable, clear, prominent mechanisms to exercise choice regarding collection, use and disclosure of personal information. May be n.a. if information is publicly available

s21-**Integrity of Personal information** (accurate, complete and kept up-to-date)

s23-**Access & Correction**

- a) Individuals should be able to
 - i)obtain confirmation if personal information is being held about them
 - ii)have that information within reasonable time, no excessive charges,
 - iii)reasonable manner,
- b)generally understandable form/
- c)challenge accuracy and have it rectified, completed, amended or deleted

Legislative Instrument

CoE Convention

OECD Guidelines

EU Directive 95/46/EC

APEC Privacy Framework 2004

Data Protection Principles
*unique to instrument

b) object free of charge where processing for direct market or for 3P direct marketing.

Art 15-Automated Individual decisions*

MS shall grant right to every person not to be subject to a decision which produces legal effects concerning him/significantly affects him...based solely on automated processing of data... evaluat(ing)...personal aspects relating to him. Exception is 2(a) entering/performance of contract, b) law which lays down measures to safeguard DS' legitimate interests

Art 16-Confidentiality of processing

Art 17-**Security**. DC must implement technological and organizational measures to prevent accident/unlawful destruction, loss, alteration, unauthorised disclosure, access and against all other unlawful forms of processing. Level of security to be appropriate to the risks and nature of data.

Art 18- Obligation to notify supervisory authority*

Art 21-**Publicising of processing operations*** in a register.

s24-access to be provided except (burden unreasonable or disproportionate, legal or security reasons, other peoples' privacy would be violated.

s25- if 23a-c denied, reason to be provided and should be challengeable

s26-**Accountability** (IC should be accountable. If transfer is required, IC should obtain consent/reasonable steps that recipient will protect information as per Framework

Legislative Instrument

Cross border flows

CoE Convention

Art 12(2)- Party shall not for the sole purpose of the protection of privacy, prohibit or subject to special authorization transborder flows of personal data going to the territory of another Party

Art 12(3): Party shall be entitled to derogate from Art 12(2):

- a) insofar as its legislation include specific regulations for certain categories of personal data or automated data files except where regulations of the other Party provide an equivalent protection
- b) where transfer is made from its territory to Non-contracting State through the intermediary of the territory of another Party in order to avoid such transfers resulting in circumvention of the legislation of the first Party.

OECD Guidelines

s16-MS to ensure TBDF are uninterrupted and secure

s17-MS to refrain from restricting TBDF between MS. Restrictions allowed if domestic legislation includes specific regulations and the other MS has no equivalent protection

s18-MS should avoid 'developing laws, policies and practices in the name of the protection of privacy and individual liberties which would create obstacles to TBDF that would exceed requirements for such protection'

EU Directive 95/46/EC

Art 25-transfer only if 3rd country ensures an adequate level of protection.

(2)Adequacy to be assessed in light of all circumstances of data transfer, nature of data, purpose/duration of processing, countries of origin and destination, rules of law (general and sectoral) in force in 3rd country and professional rules and security measures which are complied with

(4) Where Commission finds under Art 31(2) that 3rd country does not ensure adequate level of protection, MS shall take measures necessary to prevent any transfer of data

(6) Commission may find under Art 31(2) that a 3rd country ensures an adequate level of protection by reason of its domestic law or international commitments for the protection of private lives and basic freedoms and rights of individuals.

Art 26- Derogations to Art 25

- a) DS has given consent unambiguously to data transfer,
- b) transfer is necessary for performance of contract between DS and DC,
- c) performance of contract for the interest of DS between DC/third party
- d) transfer is necessary/legally required public interest,

APEC Privacy Framework 2004

44-cross border cooperation re investigation and enforcement

s46-co-operative development of cross border privacy rules

s48-not to create unnecessary barriers/burdens for business and consumers

Legislative Instrument

CoE Convention

OECD Guidelines

EU Directive 95/46/EC

APEC Privacy Framework 2004

Cross border flows

- e) protect vital interests of DS,
- f) transfer is made from register which is intended to provide information to public etc

2) Transfer is allowed where DC adduces adequate safeguards with respect to protection of privacy, fundamental rights and freedoms...from appropriate contractual clauses.

Implementation

Art 13(1)- parties agree to render each other mutual assistance to implement convention, designated authority appointed for this purpose.

Art 14- Assistance to data subjects resident abroad with respect to Art 8 principle of additional safeguards..

Art 18, 19- Consultative Committee to be established to make proposals, advise on matters regarding the Convention

Art 22- Entry into force, convention is subject to ratification, acceptance or approval.

s19-MS should establish legal, administrative or other procedures /institution for protection of privacy/individual liberties relating to personal data.

- a) adopt appropriate domestic legislation
- b) encourage and support self regulation eg codes of conduct
- c) provide reasonable means for individuals to exercise their rights
- d) provide adequate sanctions/remedies in case of failures to comply
- e) ensure there is no unfair discrimination against DS

Art 22-Without prejudice to administrative remedy before a supervisory authority, MS shall provide judicial remedy for breach

Art 23- Person who has suffered damage is entitled to receive compensation from DC unless DC proves he is not responsible

Art 24-MS shall adopt measures to ensure full implementation and sanctions

Art 28-Supervisory authority-MS shall provide 1 or more public authorities for monitoring the application of Directive

Art 29-Working Party, advisory status set up

s30-ME identify and remove unnecessary barriers to information flows and avoid creation of such barriers

s31-options are legislative, administrative, industry self regulation or combination of above methods.. Establish access pts/mechanisms for education "as ME deem appropriate"

s32-flexibility but 'overall goal should be to develop compatibility of approaches ...respectful of requirements of individual economies'

s36-education required

s37-ME to engage in dialogue with private sector groups including privacy, consumer industry groups

**Legislative
Instrument**

CoE Convention

OECD Guidelines

EU Directive 95/46/EC

APEC Privacy Framework 2004

Implementation

Art 23- Accession by non
Member States possible by
invitation of Member States

s38-ME should include
appropriate array of remedies
including redress ,stop a. violation
from continuing etc.

s39-ME to provide updates to
APEC via Individual Action Plan.