

Background Paper for workshop proposal No 86: “Solutions for enabling cross-border data flows”

A thriving global Internet economy depends on international transactions and, therefore, cross-border flows of data. The free flow of information across borders is also a sign of a healthy and global information society. Accordingly, it is important to closely examine the multiple factors that may enable or impede this activity so that constructive strategies may be implemented to achieve this objective.

At the same time, an appropriate balance also needs to be struck between this policy goal and other policy goals, such as the protection of personal data and security. Achieving this balance on an international scale is challenging as cultural and legal environments differ. Nonetheless, there are **a number of examples of international and regional approaches in the field of privacy which strive to reach this balance, such as:**

- *OECD Guidelines on the Protection of Privacy and Transborder Flows of Personal Data*¹;
- *Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (Convention 108)*²;
- *APEC Privacy Framework*³;
- *31st International Conference of Data Protection and Privacy Commissioners' Joint Proposal for a Draft International Standards on the Protection of Privacy with regard to the processing of Personal Data ("the Madrid Resolution")*⁴;
- *APEC Cross-Border Privacy Rules System*⁵.

It is timely to consider these issues anew as the guiding principles laid down in the *OECD Privacy Guidelines* and the *European Convention*, mirrored in domestic laws in countries all over the world, are presently under review to see if they remain as relevant today as they were 30 years ago, before the explosion of transborder digital transactions.

Data protection/privacy is but one piece of the puzzle: there are multiple and varied issues that need to be considered if lasting and effective solutions are to be realised.

The future evolution of the Internet, its governance, and laws covering online activities will play an important role in shaping how, when, where and why data flows across borders.

¹ http://www.oecd.org/document/18/0,3746,en_2649_34223_1815186_1_1_1_1,00.html

² <http://conventions.coe.int/Treaty/en/Treaties/html/108.htm>

³ http://publications.apec.org/publication-detail.php?pub_id=390

⁴ <http://www.gov.im/lib/docs/odps/madridresolutionnov09.pdf>

⁵ <http://apec.org/Groups/Committee-on-Trade-and-Investment/Electronic-Commerce-Steering-Group.aspx>

Economics is a major underlying driver of cross-border interactions. So too are societal forces which are trending towards a globally connected society, evident with the rapid uptake of social media, applications and other services to communicate across borders.

A crucial issue is how to ensure government and business decisions support unconstrained capacity for growth, invention and new opportunities.

IPv6 is a key component to ensuring the Internet can continue to grow and connect the billions that are not connected today. Further, efficient and cost effective local, regional, and international interconnection and peering strategies are also important facilitators for cross-border data flows. Open interoperable standards together with a principle of permission-less innovation provide a platform for data exchange and innovation in data use.

Channels for secure, reliable and private communication between entities, which can be clearly authenticated in a mutually understood manner, are important foundations for trusted cross-border data flows and interactions. **The mechanisms to provide this must support both the end-to-end nature of Internet architecture and reasonable means for individuals to manage and protect their own identity details.**

Workshop description

The Internet has revolutionised our ability to communicate and share data beyond national boundaries, thereby facilitating cross-border social and commercial interactions.

Enabling cross-border data flows, however, raises a number of important Internet governance policy considerations for a broad range of stakeholders, such as business, intermediaries, users, law enforcement agencies, governments, policymakers and the wider Internet technical community.

There are many policy choices that can be impediments to the flow of data across borders; trade, privacy, data protection, security to name a few.

This workshop will explore policy issues, from various stakeholder perspectives such as:

- The challenge of striking the right balance in regulation (e.g. the balance between privacy and free flow of data; giving practical effect to human rights across borders)
- How the technical structure of the Internet plays a critical role in enabling cross-border data flows
- Commercial and sociological features of the debate (e.g. multilingualism; business strategies, factors affecting trade)

This paper also provides substantive background and resources on some of these policy issues from ICC and the Internet Society's perspectives:

- ICC Policy statement on “Cross-border law enforcement access to company data – current issues under data protection and privacy law”, 7 February 2012⁶
- ICC Policy Statement on “Business views on regulatory aspects of cloud computing”, 29 February 2012⁷
- ICC comments on Directive 95/46/EC ‘A comprehensive approach on personal data protection in the European Union, 14 January 2011⁸
- ICC Policy Statement on “ICC policy recommendations applied to the issue of mandatory certification requirements for Information Technology (IT) products and services”, 13 February 2009⁹
- ICC practical tools:
 - ICC Task Force on Privacy and Protection of Personal Data: “Standard Application for Approval of Binding Corporate Rules for the Transfer of Personal Data outside the EU”, 5 July 2006¹⁰
 - ICC Task Force on Privacy and Protection of Personal Data: “Final Approved Version of Alternative Standard Contractual Clauses for the Transfer of Personal Data from the EU to Third Countries (controller to controller transfers)”, January 2005¹¹
- ISOC Core Values and Principles - <http://www.internetsociety.org/who-we-are/mission/values-and-principles>
- ISOC Papers and other resources regarding IPv6 can be found via <http://www.internetsociety.org/ipv6>
- ISOC Papers and other resources regarding Net Neutrality can be found via <http://www.internetsociety.org/net-neutrality>
- “An Introduction to Interconnection” (An ISOC paper) can be found via <http://www.internetsociety.org/introduction-internet-interconnection>
- Papers from the 2011 2nd African Peering and Interconnection Forum (AfPIF) “Regional Interconnection: Outlining the business case” can be found via <http://www.internetsociety.org/events/african-peering-and-interconnection-forum-afpif/past-afpif-events/afpif-2011/afpif-2011>

⁶ http://www.iccwbo.org/uploadedFiles/Law_enforcement_access_to_company_data_final_20March12.pdf

⁷ http://www.iccwbo.org/uploadedFiles/ICC/policy/e-business/Statements/ICC%20Cloud%20policy%20statement_final_29%2002%2012_plain.pdf

⁸ <http://www.iccwbo.org/uploadedFiles/ICC/policy/e-business/Statements/ICC%20Comments%20on%20EU%20Directive%20Review%2015%2001%202011.pdf>

⁹ <http://www.iccwbo.org/uploadedFiles/ICC/policy/e-business/Statements/ICC%20statement%20mand%20certif.pdf>

¹⁰ http://www.iccwbo.org/uploadedFiles/ICC/policy/e-business/pages/Standard_Application_for_Approval_of_BCRs.pdf

¹¹ <http://www.iccwbo.org/uploadedFiles/ICC/policy/e-business/pages/ICC%20model%20clauses+FAQs%20final%20approved%20%20Jan%202005.pdf>