

## The Global Trajectory of Data Privacy Laws: Asia-Pacific Impact

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## Theme: 'Global trajectories'

1. What patterns are there in the *global* development of data privacy laws?
2. What are the implications for *Asia-Pacific* countries?
3. What are the prospects for a *global* data privacy Convention or treaty?

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## Quiz: A 'European thing'?

1. How many countries (+ independent jurisdictions) have a 'data privacy law' covering most of their private sector?  
[Start of this research]
  - 40+ / 50+ / 60+ / 70+ / 80+ / 90+ / 100!!
2. How many outside Europe? Where?
  - 10+ / 20+ / 30+ / 40+ / 50!!
3. How many non-Europeans have laws comparable to 'European standards'?
  - None / A few / Most / All

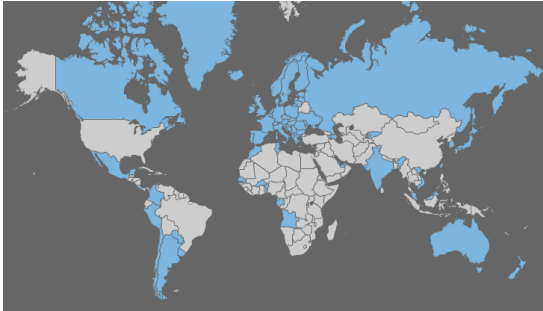
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## Unexpected answers? (1)

- Q1 - **88** 'countries' have data privacy laws
  - 90 if you add the US and Thailand (public sector only)
- By decade, the growth is accelerating
  - 1970s: 8
  - 1980s: 13
  - 1990s: 21
  - 2000s: 35
  - 2010s: 12 in 2 years (linear growth = 50)
  - A pessimistic projection, is 125 laws by 2020; an optimistic projection (modest acceleration) is 150

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88 countries with (**private sector**) data privacy laws



Map created by [interactive maps](http://www.ammap.com): <http://www.ammap.com>

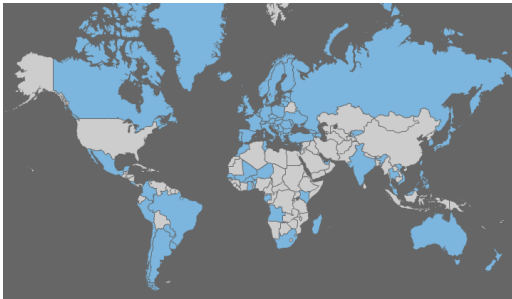
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## Unexpected answers? (2)

- Q2: **37/88** jurisdictions outside Europe
  - EU: 27 (all); Other European jurisdictions: 23 (3 not: Turkey, Belarus & Georgia - little growth potential)
  - Asia: 8; Latin America: 8; Sub-Saharan Africa: 8; N.Africa + M-East: 5; Caribbean: 4; Australasia: 2; N. America: 1; Central Asia: 1
- Significant geo-political implications:
  - Almost all *growth* will now occur outside Europe
  - By 2014-16, the *majority* of laws will be outside Europe
  - When most of the commercially significant world has such laws, the focus will not be *European* 'data exports'

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100+ data privacy laws by 2015? (private sector)



This map adds 14 countries with known official data privacy Bills  
Map created by [interactive maps](http://www.ammap.com): <http://www.ammap.com>

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## Who's missing?

- Trade-significant absent countries:
  - Brazil; S.Africa; Indonesia; Nigeria; Turkey
  - Most have bills in various states of advancement
  - And of course China and the USA... the 'outliers'
- China
  - No-one knows which way China will go
  - In 2007 an EU-style national law looked to be in favour
  - Since then a profusion of local and sectoral laws, guidelines, criminal laws, tort law etc

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## The USA - conclusions

1. No practical prospects of a *comprehensive* data privacy law passing the US Congress - lobbying against is too powerful
2. The *sum total* of US private sector laws probably don't meet the OECD Guidelines, even if applied nationally
3. Constitutional necessity (mainly 1st Amendment) *may* prevent US private laws ever meeting EU standards of restrictions on disclosure, use or collection
  - case law inconclusive but *Sorrell v IMS Health* 2011 very negative
4. Result is that Europe (and the ROW) cannot compromise with US standards without capitulation
5. Europe/ROW has to politely accept that US laws are different, then politely enforce their own laws against US companies wherever they are 'within reach'

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## Q3: 'European standards'?

- For Q3 we first have to answer 'what are *European* data privacy standards?
- Approach: What requirements are in the Directive and CoE 108 but not in the OECD Guidelines or APEC Framework (even as recommendations)
  - These differences = distinctly European standards
  - Then identified the **10 key differences**; ignored others

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## 10 distinctive European requirements

1. Has an independent DPA;
2. Allows recourse to the courts;
3. 'Border control' restrictions on data exports;
4. 'Minimality' in collection (relative to purposes);
5. General 'Fair and lawful processing' requirement;
6. Must notify DPA, and allow some 'prior checking';
7. 'Deletion': Destruction or anonymisation after use;
8. Additional protections for sensitive data;
9. Limits on automated decision-making;
10. 'Opt-out' of direct marketing uses required.

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## Do non-European laws share these standards?

- Method: Examined 33/37 laws (with assistance) against these 10 criteria
  - Omits St Lucia, Gabon, Paraguay, St Vincent & Grenadines
- Results:
  - 19/33 have *at least* 7 Euro-standards; 13 have 9+/10
  - The *average* occurrence of the 10 standards is 23/33 laws
    - By country the average is 7/10 standards present
  - Seven standards were *commonplace* (>75% laws)
    - 'border control' data exports (28); sensitive data protection (28); deletion (28); recourse to courts (26); minimum collection (26); and a DPA (25)
  - Least common are automated decision-making controls (13); and prior checking (17)

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## Most and least 'European'

- The laws with 8-10 Euro-features:
  - Peru; Uruguay; Burkina Faso; Senegal; Morocco; Angola; Argentina; Macau; S.Korea; Mauritius; Costa Rica; Benin; Cape Verde; Columbia; Tunisia
- The laws with 1-4 Euro-features:
  - India; Israel (out-of-date?); Armenia; Bahamas; Japan; Chile; Vietnam
- One third of the laws are in the middle (5-7)
- 'Euro-scores' say nothing about effectiveness of laws
  - 'Adequacy' is a different (tough) question: Burkina Faso (10); Argentina (9); compared with Canada (?); New Zealand (6)
  - Effectiveness is not a Q of 'law in the books'; investigation of actual enforcement is needed, and that is a different study
  - No direct implications for whether 'adequate' or suitable for CoE accession

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## Influence? - Implications

- Correlation is not causation
  - Repeated independent invention is logically possible
  - Raab shows indirect DPA networks of influence
  - Emulation of 'world standards' is powerful as 'adequacy'
- Does it create a rebuttable presumption?
  - **Likely that European standards have been the second most significant influence on privacy laws**
- The 'family' origins of data privacy laws
  - **Shared OECD/CoE standards from 1981 have had the most influence on privacy laws world-wide**

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## Common elements in OECD & CoE (Euro) standards

1. *Data quality* – relevant, accurate, up-to-date (OECD 8; CoE 5(c), (d))
2. *Collection* - limited, lawful and by fair means; with consent or knowledge (OECD 7; CoE 5(a))
3. *Purpose specification* at time of collection (OECD 9; CoE 5)
4. *Notice of purpose and rights at time of collection* (OECD ambiguous; APEC stronger, CoE not explicit but implied)
5. *Uses & disclosures limited* to purposes specified or compatible (OECD 10; CoE 5(b))
6. *Security* through reasonable safeguards (OECD 11; CoE 7)
7. *Openness* re personal data practices (OECD 12; CoE 8(a))
8. *Access* – individual right of access (OECD 13; CoE 8(b))
9. *Correction* – individual right of correction (OECD 13; CoE 8(c),(d))
10. *Accountable* – data controller accountable for implementation (OECD 14; CoE 8)

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## Compare OECD & APEC

- The OECD Guidelines have been influential
  - OECD / CoE 108 core principles are commonplace
  - But nothing not found in the European instruments
- APEC Framework adds 3 principles:
  - 'Preventing harm' (I); and 'Choice' (V) have not been adopted as principles in *any* non-Euro laws
  - 'Accountability' re data exports (IX) is adopted in Mexico, and recommended by law reform bodies in Australia and New Zealand; Canada's provision pre-dates APEC
  - **Result:** APEC principles have had minimal effect

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## Can CoE 108 be globalised?

- Q: Do/will ubiquitous data privacy laws make a global agreement either (I) possible or (II) useful?
  - Will see the answer to both (I) and (II) is 'Yes'
- Candidates:
  - (i) A new UN Treaty from scratch is unrealistic
  - (ii) Europe has no need to negotiate some OECD-Lite 1980s compromise with APEC and the USA
  - (iii) A global patchwork quilt of CBPRs will not happen
  - (iv) That leaves CoE data protection Convention 108 as the only contender: *How realistic is 108 globalisation?*

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## CoE Convention 108

- Convention 108 + Additional Protocol = Directive (approx.)
  - 2001 Protocol added essential missing parts (DPA required; data export restrictions; access to courts)
  - Without Protocol, Conv 108 ≠ 'Euro standards'
- 43/47 CoE member states have ratified Conv 108 and have laws
  - 31 have also ratified Additional Protocol
  - This is a very good start for a global agreement

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## Decision to globalise 108

- A 23(1) has allowed accession by non-CoE-member-states since 1981
  - Requires unanimity of contracting states for a non-European state to be invited to accede
- 2008: Consultative Committee (CC) of Conv 108 finally decided to activate 23(1)
  - Agree to consider requests from countries 'with data protection legislation in accordance with Conv. 108'
  - Prompted by resolution of DPA meeting in Montreaux
  - 2009: EU's 'Stockholm Program' included world-wide promotion of Convention 108

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## Why the Additional Protocol is essential

- What if a non-European state is allowed to accede *only* to the Convention?
  - No obligation to have a DPA or provide access to the Courts
  - No obligation to prevent onward flows of data
  - All other members are still *obliged* to allow data exports to it, unless they explicitly derogate
- A 'back-door' defeat of Euro-standards
- Problem solved if country either (i) already has all of the Additional Protocol elements or (ii) accedes to Protocol as well

*From a Civil Society perspective, non-European accession is only desirable if also to the Protocol*

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## Accession procedures & standards

- 2011 brief Note from CoE Treaty Office:
  1. Non-Euro country should write requesting accession
  2. Euro Members are consulted first: unanimity
  3. Non-Euro Members (none yet) then given time to raise objections
  4. If no objections, invitation sent
  5. Non-Euro country must comply before acceding
- Most key questions remain unanswered...

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## Problems with accession procedures & standards

1. Clarity needed on compliance with Additional Protocol standards
  - § Bureau claims that compliance with both is necessary
2. What evidence is required that a country meets CoE standards?
  - § Purely formal or substantive assessment? Cannot be purely formal - some countries have DPAs in the laws but not in fact
  - § CoE is only used to dealing with democratic countries
3. How can EU 'adequacy' findings/ Opinions be used in accession procedures?
  - § Key difference is that 'adequacy' is aimed at protection of Europeans; CoE must be concerned with country's citizens

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## Problems with accession procedures & standards (2)

4. What role will the Consultative Committee play in accession?
  - § Peers? (countries); Experts?; DPAs like WP29?
5. How can citizens of non-Euro countries enforce their rights?
  - § Non-Euro citizens cannot utilise A8 ECHR - powerless
  - § Could the CC be empowered to accept 'complaints'?
6. Procedures to enforce compliance over time?
  - § CoE 'modernisation' may include 'follow-up' procedures
- Parliamentary Assembly of CoE resolved (Oct 2011) that globalisation of CoE 108 must not lower standards

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## Advantages of accession to non-Euro countries

- Guarantees free flow of personal data from 43 Euro countries
  - Directive guarantees nothing, and only 27
- CoE (+AP) accession means EU adequacy is *unlikely* to be denied
  - It should be a higher standard than adequacy; and is an international commitment; also likely to be faster
- Avoids need to make decisions about exports to other countries (21/28 have data export laws)
- Voluntary entry into a treaty as an equal partner
  - Some non-Euro states resent 'adequacy' as an imposition

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## Advantages of non-Euro accession to Euro countries

- Creates free flow of personal data obligations on all non-Euro Parties
  - Adequacy doesn't create reciprocal obligations
  - 21/28 non-Euro laws have data export laws
- Consolidates global position of Euro standards
  - Increases consistency with Directive obligations
  - Advantages for Europe-based companies in consistent global standards
  - Improves capacity to resist pressure from USA

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## The Uruguay accession

- July 2011: Council of Ministers invited Uruguay to accede
  - Based on 2 page Opinion of Consultative Committee (CC)
  - CC Opinion was based on materials sent to 43 Member representative of CC: (i) favourable EU WP 29 Opinion; (ii) the Act; + (iii) request letter from Uruguay
  - Only 14 bothered to confirm 'no objection'; 29 silent
  - CC then adopted Opinion by written procedure
- Q: Will Uruguay accede to Additional Protocol?
  - Does it already comply?; Not addressed in CC Opinion
  - But invitation to Uruguay was to **accede to both** instruments

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## Unsatisfactory aspects of the Uruguay accession

- What procedures will be adopted when there is no WP29 Opinion to rely on?
  - Will Expert assessment be commissioned (as the EU Commission does, when a WP29 Opinion is absent?)
  - 'Adequacy' is not the correct standard for accession
- CC Opinion does not address *reality* of protection to Uruguay citizens
  - Fortunately WP29 Opinion does so to some extent
- No Civil Society or other non-State input
  - A CoE accession affects the citizens of all other countries that are Parties: they should have input

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## Will CoE 108 become a global standard?

- As yet, more promise than reality
  - CoE 108 Bureau is confident of 'a long list' of accessions
  - Mexico has announced its intention
- A lot of things may go wrong
  - CoE 108 Bureau has done little to publicise advantages and 'sell' accession
  - Civil Society may strongly oppose accessions if standards are not kept high
- But getting it right has major benefits
  - The only realistic prospect of a (high) global standard
  - This would improve both trade and human rights

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## Further details

- Greenleaf, G '[The Influence of European Data Privacy Standards Outside Europe: Implications for Globalisation of Convention 108](#)' (forthcoming) *International Data Privacy Law*, Vol. 2, Issue 2, 2012
- Greenleaf, G '[Global Data Privacy Laws: 89 Countries, and Accelerating](#)', + periodic updates to [Global data privacy laws Table](#) on home page
- [Graham Greenleaf's Web Pages - 2012](#) at <http://www2.austlii.edu.au/~graham/> has links to both above documents

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