

Review of EU Data Protection Framework

Submission from the Centre for Information Policy Leadership

The contribution of the Galway Project on Accountability

Introduction

The Centre for Information Policy Leadership at Hunton & Williams LLP, seeks to develop innovative, pragmatic approaches to privacy and information governance issues. Since its establishment in 2001, the Centre has addressed such issues as transparency, conflicting national legal requirements, cross border data transfers, and government uses of private sector data.

The Centre welcomes the opportunity to contribute to the current review of the EU Data Protection Framework. This submission is not a comprehensive critique of the strengths and weaknesses of the existing legislative framework, nor a full program of recommendations. Instead, we seek to draw the attention of the Commission to the **Galway Project on Accountability** and to suggest how it might be relevant and helpful to the current Review.

With the facilitation of the Irish Data Protection Commissioner, the Centre was able to assemble a diverse group of international experts (including data protection and privacy regulators, industry and academia) to consider how an accountability-based system might be designed. The experts met twice to define the essential elements of accountability, examine issues raised by the adoption of the approach and propose additional work required to facilitate the establishment of accountability as a practical and credible mechanism for information governance.

This work led to a discussion paper - "**Data Protection Accountability: The Essential Elements**" - which was published on 27 October 2009 ("Accountability Discussion Paper"). The Accountability Discussion Paper is attached as the core of this submission.

This cover memorandum does not attempt to repeat or summarise the Accountability Discussion Paper's themes or recommendations. We also bring to the Commission's attention a parallel paper - "**Managing Global Data Privacy: Cross-Border Information Flows in a Networked Environment**" by Paul Schwartz - which was published at the same time (<http://theprivacyprojects.org/wp-content/uploads/2009/08/The-Privacy-Projects-Paul-Schwartz-Global-Data-Flows-20093.pdf>). That paper documents how six global companies protect personal data and reinforces the power of the accountability concept.

The Accountability Concept

Accountability is not new. It already features to some extent in the EU Data Protection Directive and is certainly the foundation of the Binding Corporate Rules (BCR) approach. We understand that, in its Opinion on the Future of Privacy for this review, the Article 29 Working Party will be referring to the Accountability Discussion Paper when it proposes that an accountability principle should be introduced into the comprehensive data protection framework.

Accountability does not redefine privacy, nor does it replace existing law or regulation. Accountable organisations must comply with existing applicable law. But accountability ***shifts the focus of privacy governance to an organisation's ability to demonstrate its capacity to achieve specified privacy objectives.*** This means showing transparently how it will achieve acceptable outcomes, based on criteria established in law, self-regulation and best practice. The organisation must have both the ability and the responsibility to determine appropriate, effective measures to reach those goals.

The essential elements are:

1. **Organisational commitment** to accountability and adoption of **internal policies consistent with external criteria**;
2. **Mechanisms** to put privacy policies into effect, including tools, training and education;
3. Systems for internal, ongoing **oversight** and assurance reviews and **external verification**;
4. **Transparency** and mechanisms for **individual participation**;
5. Means for **redress** for individuals if things go wrong, and **external enforcement**.

Legal instruments - at EU, national and regional level - therefore provide the foundation for the accountability concept, because organisations must demonstrate the commitment to comply with the substantive requirements and outcomes. But the concept offers several further advantages:

1. The emphasis on senior-level engagement, good practice, training, and responsible decision-making about the management of data will produce a **higher level of data protection** than can be achieved by the law alone;
2. It provides data subjects with **greater visibility and confidence** that their personal data will be processed properly;
3. It is **less burdensome** - with corresponding reductions in compliance costs - because accountable organisations have greater freedom to deliver the outcomes sought by law in ways suited to their particular circumstances;
4. It **frees resources within Data Protection Authorities** - and improves their **effectiveness** - by providing a sufficient level of assurance that the accountable organisation is likely to be legally compliant. This means that priority can be given to those with an unacceptable approach to data protection;
5. It particularly points towards ways to achieve **global standards for data protection**, offering the prospect of greater reconciliation - or at least easier co-habitation - between EU and other models of protecting privacy and personal data;
6. It gives more options to law-makers who are able to introduce **incentives for organisations to demonstrate their accountability** and to draft laws which are more focused on identified risks and clearly mandated outcomes (positive and negative) and which will **reduce the bureaucracy** associated with prescriptive compliance arrangements.

In the specific context of the current review of EU Data Protection Law, the last two of these advantages are of particular relevance.

Accountability and the Commission Consultation

We suggest that there are broadly three levels at which the Accountability Discussion Paper will be helpful according to the interest in changing the existing law.

1. **Minimal** - The Commission may conclude that the Directive is fundamentally sound and that little more is required than better application of existing law, coupled perhaps with relatively minor drafting revisions and uncontroversial improvements. The Accountability Discussion Paper spells out that more accountability can be accomplished by **reinterpreting existing law**. It charts ways forward for establishing accountability-based protection and suggests how that might be achieved with minimal legal change.
2. **Reform within the existing Framework** - A possible outcome of the current review is a determination that the overall Framework will be found to be satisfactory - especially the Data Protection Principles and other aspects of the substantive law. But it will be concluded that significant improvements could and should be proposed in the interests of increasing effectiveness and reducing the burdens - especially the enforcement and other compliance arrangements. In that event there is substantial material in the Accountability Discussion Paper which will inform and shape specific improvements. The most obvious example is with **international transfers**, where the arrangements are probably the most heavily criticised. But the accountability concept also has much to offer in such areas as:
 - replacing or improving the **notification** requirements;
 - improving formal **relationships** between data controllers and data subjects; and
 - improving the **effectiveness of independent data protection supervisory authorities**.
3. **Innovative** - The pace of technological change has been so great that the Commission may decide that the existing EU Data Protection Framework has too many limitations and weaknesses and that a more radical and innovative approach is required than contemplated with the previous option. It could for example be decided that the right approach is to place far greater emphasis on the need to identify and specify the risks of physical, financial and social harms which are faced by individuals (especially threats to fundamental rights) and to legislate to prevent those risks and harms from materialising. A pragmatic approach could be substantially more effective and proportionate, by ensuring

that **law, compliance and enforcement are targeted in the areas of highest priority.**

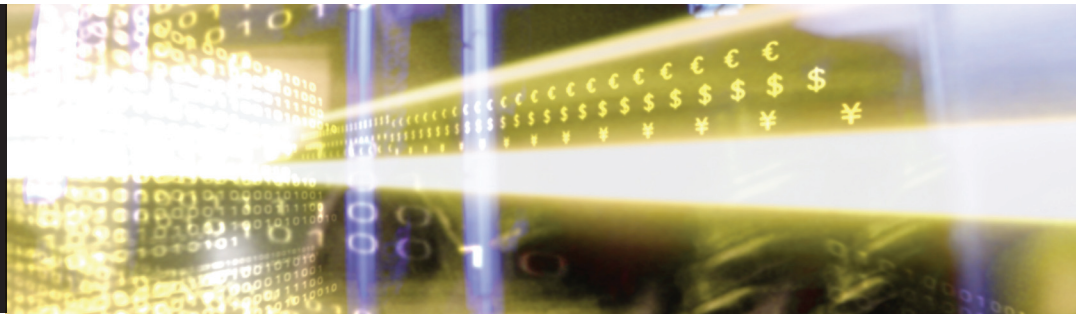
The accountability concept has a great deal to offer in this scenario. It builds on ever-growing corporate and governmental imperatives to handle personal data well for reasons of reputation and self-interest. It recognises that there are limits to what can be achieved by the law alone, but it offers a **new legislative model** which would place a very clear responsibility on all data controllers to adopt an appropriate system of information governance and to **demonstrate** (with both design and operation) the **safeguards** they have in place to address the **risks** faced by individuals. This could, for example, extend to policies and procedures (including privacy impact assessments), to technological measures (including privacy enhancing technology) and managerial aspects (such as cultural leadership, awareness and training). The compliance regime would need to be adopted at the highest level within each organisation, and verified externally where appropriate. But the fundamental feature is that the organisation would be held *accountable* - no doubt with suitable sanctions - for any failures or shortcomings.

Conclusion

The Accountability Discussion Paper signals ways forward if a new approach is sought. Further work to be undertaken with the Centre and facilitated by the CNIL in France - on “outcomes” and “mechanics” - will elaborate the basic concept and provide the Commission with more concrete material.

We would be delighted to engage in discussions with the Commission - or participate in workshops etc - to explore how the accountability concept could best be incorporated into its reform proposals. The Centre can be most useful as the broad level of reform becomes clearer, but we stand ready to help at any stage.

21 December 2009



Data Protection Accountability: The Essential Elements
A Document for Discussion
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Prepared by the Centre for Information Policy Leadership
as Secretariat to the Galway Project

Data Protection Accountability: The Essential Elements

A Document for Discussion

Preface

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Innovations in technology; rapid increases in data collection, analysis and use; and the global flow and access to data have made an unprecedented array of products, resources and services available to consumers. These developments, however, in no way diminish an individual's right to the secure, protected and appropriate collection and use of their information.

The manner in which those protections are provided is often challenged by the dynamic, increasingly international environment for information. The global flow of data tests existing notions of jurisdiction and cross-border co-operation. How can companies and regulators support movement of data while providing the protections guaranteed to the individual?

Accountability, a concept first established in data protection by the Organisation for Economic Co-operation and Development ("OECD"), may provide an improved approach to transborder data governance that encourages robust data flows and provides for the protection and responsible use of information, wherever it is processed. But the practical aspects of accountability, and how it can be used to address the protection of cross-border information transfers, have not been clearly articulated.

- What will be expected of companies in an accountability system?
- How will enforcement agencies monitor and measure accountability?
- How can the protection of individuals be ensured?

The Centre for Information Policy Leadership at Hunton & Williams LLP was privileged to assemble a group of international experts from government, industry and academia to consider how an accountability-based system might be designed.¹ The experts met twice to define the essential elements of accountability, examine issues raised by the adoption of the approach and propose additional work required to facilitate establishment of accountability as a practical and credible mechanism for information governance. This report, guided by a drafting committee and reviewed by the group of experts, reflects the results of those deliberations.

¹ The group of experts is listed in the Appendix.

While this paper is focused on accountability as a mechanism for global governance of data, the issue of how accountability relates to the general oversight of privacy was raised during our discussions. It may be that accountability principles can address both international as well as domestic protection of information. Our discussion recognised that the concepts of accountability that can support an improved approach already are reflected in long-standing principles of fair information practices and are inherent in current governance in Europe, Asia and North America. Making accountability a reality requires that businesses apply those concepts so that their management of information is both safe and productive. Our talks further suggested that the growing complexity of data collection and use requires that much of the burden for protecting data must shift from the individual to the organisation.

Much of what is written about accountability in this paper can be accomplished by reinterpreting existing law. It is our hope that this paper will both chart the course forward for establishing accountability-based protection and motivate stakeholders to take the important steps to do so.

The Centre is indebted to the experts who participated in this effort for generously giving of their time and expertise, and most especially to the Office of the Data Protection Commissioner of Ireland for hosting our meetings and providing us with wise guidance. While this report reflects the results of their deliberations, the Centre alone is responsible for any errors in this paper.

Executive Summary

Accountability is a well-established principle of data protection. The principle of accountability is found in known guidance such as the OECD Guidelines²; in the laws of the European Union (“EU”), the EU member states, Canada and the United States; and in emerging governance such as the APEC Privacy Framework and the Spanish Data Protection Agency’s Joint Proposal for an International Privacy Standard. Despite its repeated recognition as a critical component of effective data protection, how accountability is demonstrated or measured has not been clearly articulated. This paper represents the results of the Galway Project — an effort initiated in January 2009 by an international group of experts from government, industry and academia to define the essential elements of accountability and consider how an accountability approach to information privacy protection would work in practice.

Accountability does not redefine privacy, nor does it replace existing law or regulation; accountable organisations must comply with existing applicable law. But accountability shifts the focus of privacy governance to an organisation’s ability to demonstrate its capacity to achieve specified privacy objectives. It involves setting privacy protection goals for companies based on criteria established in law, self-regulation and best practices, and vesting the organisation with both the ability and the responsibility to

² Organisation for Economic Co-operation and Development Guidelines on the Protection of Privacy and Transborder Flows of Personal Data.

determine appropriate, effective measures to reach those goals. As the complexity of data collection practices, business models, vendor relationships and technological applications in many cases outstrips the individual's ability to make decisions to control the use and sharing of information through active choice, accountability requires that organisations make responsible, disciplined decisions about data use even in the absence of traditional consent.

An accountable organisation demonstrates commitment to accountability, implements data privacy policies linked to recognised external criteria, and implements mechanisms to ensure responsible decision-making about the management and protection of data. The essential elements are:

- 1. Organisation commitment to accountability and adoption of internal policies consistent with external criteria.**
- 2. Mechanisms to put privacy policies into effect, including tools, training and education.**
- 3. Systems for internal, ongoing oversight and assurance reviews and external verification.**
- 4. Transparency and mechanisms for individual participation.**
- 5. Means for remediation and external enforcement.**

While many aspects of the essential elements are already established in law, self-regulation and corporate practices, some issues remain to be resolved to encourage robust adoption of an accountability approach. Policymakers and stakeholders should address questions about how accountability would work with existing legal regimes, and whether reinterpretation or amendment of existing laws might be required to make it possible to hold organisations accountable. Third-party accountability programmes have been recognised as useful in supplementing the work of government agencies. As they may play an important part in the administration of this approach, it will be necessary to clearly describe the contours of their role and the criteria by which their credibility will be assessed. Trusted movement of data based on accountability requires that privacy enforcement agencies rely upon the oversight of enforcement bodies in jurisdictions other than their own. For the approach to work effectively, stakeholders must articulate the way in which the credibility of those programmes is established and tested. Finally, small- and medium-sized enterprises that wish to demonstrate accountability will face specific challenges that must be addressed.

While additional inquiry is needed before adoption of an accountability-based approach can be realised, its promise for international privacy protection presents an opportunity to further the long-standing goal of business, regulators and advocates — robust transfer and use of data in a fashion that is responsible and protected.

Introduction

The global flow of data drives today's information economy. Innovation, efficiency and service depend on rapid and reliable access to data, irrespective of its location. Digital technologies collect and store data in ways never before imagined, and information and telecommunications networks have evolved to provide seamless, low-cost access to data around the world.

As a result consumers have access to an unprecedented array of personalised products and services. While previously service hours ended at 5:00 p.m., the Internet enables individuals to access customer service in the middle of the night by phoning a local number that connects them to a call centre a continent away. Today, on a single server, a company can manage its email and business records for offices located in a dozen nations; travelers can rely on their debit and credit cards wherever they go; and individuals can use the Internet to download information from around the world without ever leaving their homes.

Indeed, with the increasingly global nature of data flows and the remote storage and processing of data in the "cloud", geography and national boundaries will impose few limitations on where data can be transferred but will present more practical challenges for administering and supervising global businesses.

In this environment, individuals maintain the right to the secure and protected processing and storage of their data that does not compromise their privacy. Protection must be sufficiently flexible to allow for rapidly changing technologies, business processes and consumer demand. Regulators must be equipped to articulate clear requirements for protection, educate companies and citizens, and monitor compliance in an environment in which data processing increasingly occurs outside the practical reach of most regulators, if not their legal jurisdiction.

Currently, global data flows are governed by law and guidance, which are enacted and enforced by individual countries or through regionally adopted directives or agreed-upon principles. The EU Data Protection Directive and implementing laws of member states, for example, govern the transfer of data from the European Union. The Safeguards Rule³ imposes legal obligations on U.S. organisations to ensure that data is properly secured, wherever it is transferred or processed. And yet global data flows often challenge the way in which we have traditionally approached information protection. Daniel Weitzner and colleagues have written that information protection policy has long relied on attempts to keep information from " 'escaping' from beyond appropriate boundaries".⁴ This approach is plainly inadequate in a highly connected environment in which anyone armed with a cell phone or laptop has at his or her fingertips unprecedented processing power, as well

³ Under the Gramm-Leach-Bliley Act, the Safeguards Rule, enforced by the Federal Trade Commission, requires financial institutions to have a security plan to protect the confidentiality and integrity of personal consumer information.

⁴ Daniel J. Weitzner, Harold Abelson, Tim Berners-Lee, Joan Feigenbaum, James Hendler and Gerald Jay Sussman, "Information Accountability," *Communications of the ACM*, June 2008, at 82.

as the practical ability to collect, aggregate, transfer and use personal data around the world — and in an environment in which those capabilities are growing exponentially.

Weitzner and his colleagues lead a growing multinational call for an alternative approach to securing and governing personal data based on *accountability*. An accountability-based approach to data protection requires that organisations that collect, process or otherwise use personal data take responsibility for its protection and appropriate use beyond mere legal requirements, and are accountable for any misuse of the information that is in their care.

Adoption of an accountability-based approach to governance of privacy and information in global data flows raises significant questions for business, government and individuals.

Businesses express concerns about what might be expected of them in an accountability system, how their efforts to meet those expectations will be measured and how the rules related to accountability will be defined and enforced. Privacy enforcement agencies ask how accountability might work under local law. How do enforcement agencies measure an organisation's willingness and capacity to protect information when it is no longer in the privacy protection agency's jurisdiction? How does the agency work with and trust agencies in other jurisdictions? Consumer advocates worry that accountability will lessen the individual's ability to make his own determination about appropriate use of information pertaining to him.

The Centre for Information Policy Leadership, through a process facilitated by the Office of the Irish Data Protection Commissioner, convened experts to define the essential elements of accountability; to explore the questions raised by government, business and consumers related to adoption of an accountability approach; and to suggest additional work necessary to establish accountability as a trusted mechanism for information governance.

A small group of experts met initially in January 2009 to define the contours of the inquiry and identify existing research and legal precedents involving accountability. That meeting led to a draft paper that was presented to a larger gathering in April that included data protection experts drawn from government, industry and academia from ten countries. The April meeting identified a drafting committee that oversaw the Centre staff as they prepared this document, which was then circulated for comment among all of the participants. This paper reflects the results of that process.

Accountability in Current Guidance

Accountability as a principle of data protection is not new. It was established in 1980 in the OECD Guidelines⁵ and plays an increasingly important and visible role in privacy

⁵ See, Organisation for Economic Co-operation and Development, *Guidelines on the Protection of Privacy and Transborder Flows of Personal Data* (1980).

governance. The Accountability Principle places responsibility on organisations as data controllers “for complying with measures that give effect” to all of the OECD principles.

Accountability is also fundamental to privacy protection in the European Union. While not explicitly stated in the Directive, numerous provisions require that organisations implement processes that assess how much data to collect, whether the data may be appropriate for a specified purpose and the level of protection necessary to ensure that it is secure. Accountability also has featured more prominently in data governance in Europe as binding corporate rules have served as a mechanism to ensure the trusted transfer of personal data outside the EU.

The Spanish Data Protection Agency’s February 2009 Joint Proposal for an International Privacy Standard includes an accountability principle that establishes a basis for data transfers based on an organisation’s demonstration that it is responsible.⁶

Accountability is also the first principle in Canada’s Personal Information Protection and Electronic Documents Act (“PIPEDA”), requiring that Canadian organisations put into effect the full complement of PIPEDA principles, whether the data are processed by the organisation or outside vendors, or within or outside Canada. In doing so, the accountability principle of PIPEDA establishes in law a governance mechanism for transborder data transfers.⁷

In the United States, the Federal Trade Commission (“FTC”) applies to general commerce the Safeguards Rule of the Gramm-Leach-Bliley Act (“GLBA”) — an accountability-based law that places obligations on a financial services organisation to ensure personal information is secured, but that does not explicitly explain how those obligations should be met.

The Asia-Pacific Economic Cooperation (“APEC”) Privacy Framework includes accountability as an explicit principle,⁸ basing it on the OECD language and applying it to data transfers beyond national borders. The Framework states, “A personal information controller should be accountable for complying with measures that give effect to the Principles stated above.” The Framework specifically requires such accountability “when personal information is to be transferred to another person or organisation, whether domestically or internationally.”

⁶ “Joint Proposal for a Draft of International Standards on the Protection of Privacy with Regard to the Processing of Personal Information,” version 2.3, 24 February 2009.

⁷ This governance was explicitly described in a 2009 publication of the Office of the Privacy Commissioner of Canada, “Processing Personal Data Across Borders: Guidelines”. In PIPEDA, accountability is an overarching principle that applies to protection and management of data, whether it is maintained and processed domestically or transferred outside Canadian borders for storage and processing.

⁸ For more information about the APEC Privacy Framework and a full articulation of the principles, see <http://www.apec.org_media/2004_media_releases/201104_apecminsendorseprivacyfrmwk.html#>.

Despite the inclusion of accountability in many data protection regimes, it is often unclear how companies demonstrate accountability for purposes of cross-border data transfers, how regulators measure it or why individuals should trust it.

What is an Accountability-based Approach?

An accountability-based approach to data governance is characterised by its focus on setting privacy-protection goals for organisations based on criteria established in current public policy and on allowing organisations discretion in determining appropriate measures to reach those goals. An accountability approach enables organisations to adopt methods and practices to reach those goals in a manner that best serves their business models, technologies and the requirements of their customers.

An accountability-based approach to privacy protection offers immediate advantages to individuals, institutions and regulators alike, because it recognises and is adaptable to the rapid increases in data flows.

- It will help bridge approaches across disparate regulatory systems, by allowing countries to pursue common data protection objectives through very different — but equally reliable — means. This helps to facilitate the many benefits of allowing data to move across borders, and to assure individuals a common level of data protection — even if achieved through a variety of means — irrespective of where their information is located.
- It will also heighten the confidence of individuals that their data will be protected wherever it is located and minimise their concerns about jurisdiction or local legal protections.
- It will raise the quality of data protection, by allowing use of tools that best respond to specific risks and facilitating the rapid updating of those tools to respond quickly to new business models and emerging technologies. An accountability approach requires organisations not only to take responsibility for the data they handle but also to have the ability to demonstrate that they have the systems, policies, training and other practices in place to do so.
- Allowing for greater flexibility will enable organisations to more effectively conserve scarce resources allocated to privacy protection. While it is essential that an accountable organisation complies with rules, resources devoted to fulfilling requirements such as notification of data protection authorities are not available for other, often more effective, protection measures. Accountability directs scarce resources towards mechanisms that most effectively provide protection for data. Organisations will adopt the tools best suited to guarantee that protections focus on reaching substantive privacy outcomes — measurable information protection goals — and to demonstrate their ability to achieve them.

Accountability does not redefine privacy, nor does it replace existing law or regulation. Accountable organisations must comply with existing applicable law, and legal mechanisms to achieve privacy goals will continue to be the concern of both regulators and organisations. However, an accountability approach shifts the focus of privacy governance to an organisation’s ability to demonstrate its capacity to achieve specified objectives.

Accountability does not replace principles of individual participation and consent that have been well established in fair information practices.⁹ In many cases, consumer consent to uses of data remains essential to an organisation’s decisions about data management. However, in some instances obtaining such consent may be impossible or highly impractical, and an accountability approach requires that organisations make responsible, disciplined decisions about data use even in the absence of traditional consent.

How Accountability Differs from Current Approaches

Accountability is designed to provide robust protections for data while avoiding aspects of current data protection regimes that may be of limited effect or that may burden organisations without yielding commensurate benefits. Accountability allows the organisation greater flexibility to adapt its data practices to serve emerging business models and to meet consumer demand. In exchange, it requires that the organisation commit to and demonstrate its adoption of responsible policies and its implementation of systems to ensure those policies are carried out in a fashion that protects information and the individuals to which it pertains. Accountability requires an organisation to remain accountable no matter where the information is processed. Accountability relies less on

⁹ Consent is found in the OECD Guidelines principle of Use Limitation, which states: “Personal data should not be disclosed, made available or otherwise used for purposes other than those specified in accordance with Paragraph 9 except:

- a) with the consent of the data subject; or
- b) by the authority of law.”

The principle of individual participation is also found in the OECD Guidelines, which state:

“An individual should have the right:

- a) to obtain from a data controller, or otherwise, confirmation of whether or not the data controller has data relating to him;
- b) to have communicated to him, data relating to him
 - within a reasonable time;
 - at a charge, if any, that is not excessive;
 - in a reasonable manner; and
 - in a form that is readily intelligible to him;

- c) to be given reasons if a request made under subparagraphs (a) and (b) is denied, and to be able to challenge such denial; and
- d) to challenge data relating to him and, if the challenge is successful to have the data erased, rectified, completed or amended”.

the rules that exist where the data is processed and more where the obligation is first established.¹⁰

Accountability relies less on specific rules but instead requires that organisations adopt policies that align with external criteria found in law — generally accepted principles or industry best practices — and foster a level of data protection commensurate with the risks to individuals raised by loss or inappropriate use of data. The accountable organisation complies with applicable law and then takes the further step to implement a programme that ensures the privacy and protection of data based on an assessment of the risks to individuals raised by its use. These risks should be assessed and measured based on guidance from regulators, advocates, individuals and other members of industry. Ultimately, regulators are responsible for ensuring that the risks to the data have been managed appropriately.

While the individual continues to play an important role in protecting his or her information, accountability shifts the primary responsibility for data protection from the individual to the organisation collecting and using data. Much of United States law, for example, is based on disclosure of the organisation's privacy policy, notification of individuals and obtaining their consent to specific uses of data. This approach is designed to enhance individual control over the manner in which data is used. Individuals are vested with responsibility for determining the manner in which their data is used and shared; organisations are obligated to provide the individual with sufficient information on which to base an informed choice.

In the U.S. the Federal Trade Commission is authorised to bring an enforcement action based on the organisation's notice when an organisation acts in an unfair or deceptive manner with respect to its privacy practices. In the absence of, and in some cases even with, an overarching privacy law, the individual is charged with policing the marketplace for privacy, by familiarising him- or herself with every organisation's policy and making a decision based on that information whether or not the organisation is trustworthy and using data in an appropriate manner.

Accountability does not displace the individual's ability to assert his rights, but relieves him of much of the burden of policing the marketplace for enterprises using data irresponsibly. Faced with rapid advances in data analytics and increasingly complex technologies, business models and vendor relationships, consumers find it increasingly difficult to make well-informed privacy decisions, even when they can access privacy policies. Accountability demands responsible, appropriate data use whether or not a consumer has consented to one particular use or another.

Accountability does not wait for a system failure; rather, it requires that organisations be prepared to demonstrate upon request by the proper authorities that it is securing and protecting data in accordance with the essential elements.

¹⁰ When, however, information security rules where data are processed are stronger than where the security obligation was incurred, they may indeed apply.

Enforcement of binding corporate rules (“BCRs”) or the cross-border privacy rules as defined in APEC perhaps most closely approximate an accountability approach to information management and protection. BCRs, which are more fully developed, provide a legal basis for international data flows within a corporation or a group of organisations when other options are either impracticable or of limited utility. BCRs are a set of rules, backed by an implementation strategy, adopted within a company or corporate group that provides legally binding protections for data processing within the company or group. While the Directive and national laws that implement it rely on adequacy of laws and enforcement in a particular legal jurisdiction outside the EU, BCRs allow companies to write rules for data transfer that are linked to the laws where data was collected rather than look to compliance with the law of a particular geographic location where the data may be processed. Data authorities examine whether an organisation’s binding rules export local European law with the data, and can determine whether its data practices and protections can be trusted to put those rules into effect — that it has in place the procedures, policies and mechanisms necessary to meet the obligations established in the BCR and to monitor and ensure compliance.¹¹

Essential Elements of Accountability

An accountable organisation demonstrates commitment to accountability, implements data privacy policies linked to recognised outside criteria, and establishes performance mechanisms to ensure responsible decision-making about the management of data consistent with organisation policies. The essential elements articulate the conditions that must exist in order that an organisation establish, demonstrate and test its accountability. It is against these elements that an organisation’s accountability is measured.

The essential elements are:

- 1. Organisation commitment to accountability and adoption of internal policies consistent with external criteria.**

An organisation must demonstrate its willingness and capacity to be both responsible and answerable for its data practices. An organisation must implement policies linked to appropriate external criteria (found in law, generally accepted principles or industry best practices) and designed to provide the individual with effective privacy protection, deploy mechanisms to act on those policies, and monitor those mechanisms. Those policies and the plans to put them into effect must be approved at the highest level of the organisation, and performance against those plans at all levels of the organisation must be visible to senior management. Commitment ensures that implementation of policies will not be subordinated to other organisation priorities. An organisational structure must demonstrate this commitment by

¹¹ BCRs cover only governance of data originating in the European Union. They do not apply to data originating from other regions.

tasking appropriate staff with implementing the policies and overseeing those activities.

Many global organisations have established policies in accordance with accepted external criteria such as the EU Directive, OECD Guidelines or APEC Principles. These companies demonstrate high-level commitment to those policies and the internal practices that implement them by requiring their review and endorsement by members of the organisation's executive committee or board of directors.

2. Mechanisms to put privacy policies into effect, including tools, training and education.

The organisation must establish performance mechanisms to implement the stated privacy policies. The mechanisms might include tools to facilitate decision making about appropriate data use and protection, training about how to use those tools, and processes to assure compliance for employees who collect, process and protect information. The tools and training must be mandatory for those key individuals involved in the collection and deployment of personal information. Accountable organisations must build privacy into all business processes that collect, use or manage personal information.

Organisations in Europe, North America and Asia-Pacific have implemented comprehensive privacy programmes that incorporate personnel training, privacy impact assessments and oversight. In some cases, organisations have automated processes and integrated responsibility for programme obligations into all levels and across all aspects of the enterprise, while responsibility for compliance, policy development and oversight remains in the privacy office.

3. Systems for internal ongoing oversight and assurance reviews and external verification.

Using risk management analysis, enterprises that collect and use personal information must monitor and measure whether the policies they have adopted and implemented effectively manage, protect and secure the data. Accountable organisations establish these performance-monitoring systems based on their own business cultures. Performance systems evaluate an organisation's decisions about data across the data life cycle — from its collection, to its use for a particular application, to its transmission across borders, to its destruction when it is no longer useful — and must be subject to some form of monitoring.¹²

¹² Accountable organisations have traditionally established performance systems based on their own business culture. Successful performance systems share several characteristics:

- they are consistent with the organisation's culture and are integrated into business processes;

The organisation should establish programmes to ensure that the mechanisms are used appropriately as employees make decisions about the management of information, system security and movement of data throughout the organisation and to outside vendors and independent third parties.

The organisation should also periodically engage or be engaged by the appropriate independent entity to verify and demonstrate that it meets the requirements of accountability. Where appropriate, the organisation can enlist the services of its internal audit department to perform this function so long as the auditors report to an entity independent of the organisation being audited. Such verification could also include assessments by privacy enforcement or third-party accountability agents. The results of such assessments and any risks that might be discovered can be reported to the appropriate entity within the organisation that would take responsibility for their resolution. External verification must be both trustworthy and affordable. Privacy officers may work with their audit departments to ensure that internal audits are among the tools available to oversee the organisation's data management. Organisations may also engage firms to conduct formal external audits. Seal programmes¹³ in Europe, North America and Asia-Pacific also provide external oversight by making assurance and verification reviews a requirement for participating organisations.

4. Transparency and mechanisms for individual participation.

To facilitate individual participation, the organisation's procedures must be transparent. Articulation of the organisation's information procedures and protections in a posted privacy notice remains key to individual engagement. The accountable organisation develops a strategy for prominently communicating to individuals the most important information. Successful communications provide sufficient transparency such that the individual understands an organisation's data practices as he or she requires. The accountable organisation may promote transparency through privacy notices, icons, videos and other mechanisms.

When appropriate, the information in the privacy notice can form the basis for the consumer's consent or choice. While the accountability approach anticipates situations in which consent and choice may not be possible, it also

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- they assess risk across the entire data life cycle;
 - they include training, decision tools and monitoring;
 - they apply to outside vendors and other third parties to assure that the obligations that come with personal data are met no matter where data is processed;
 - they allocate resources where the risk to individuals is greatest; and
 - they are a function of an organisation's policies and commitment.

¹³ Seal programmes are online third party accountability agents.

provides for those instances when it is feasible. In such cases it should be made available to the consumer and should form the basis for the organisation's decisions about data use.

Individuals should have the ability to see the data or types of data that the organisation collects, to stop the collection and use of that data in cases when it may be inappropriate, and to correct it when it is inaccurate. There may be some circumstances, however, in which sound public policy reasons limit that disclosure.

5. Means for remediation and external enforcement.

The organisation should establish a privacy policy that includes a means to address harm¹⁴ to individuals caused by failure of internal policies and practices. When harm occurs due to a failure of an organisation's privacy practices or to a lapse in its compliance with its internal policies, individuals should have access to a recourse mechanism. In the first instance, the organisation should identify an individual to serve as the first point of contact for resolution of disputes and establish a process by which those complaints are reviewed and addressed.

The accountable organisation may also wish to engage the services of an outside remediation service to assist in addressing and resolving consumer complaints. Third-party agents, including seal programmes and dispute resolution services, can facilitate the consumer's interaction with the organisation and enhance its reputation for complying with its policies and meeting its obligations to individuals.

Accountability practices should be subject to the legal actions of the entity or agency with the appropriate enforcement authority. Ultimate oversight of the accountable organisation should rest with the appropriate local legal authority. The nature of that authority may vary across jurisdictions. However, it is critical that the accountable organisation recognise and respond to the legal authority exercising proper jurisdiction.

Public Policy Issues

While many aspects of the essential elements are already well established in law, self-regulation and corporate practices, consideration of several issues could usefully assist and stimulate the robust adoption of an accountability approach. These include the following:

¹⁴ The concept of harm can include, among other things, compromise of an individual's financial or physical well-being; embarrassment; and damage to reputation. Additional work is needed to more clearly define and describe harm as it can result from violation of privacy and inappropriate use of data.

1. How does accountability work in currently existing legal regimes?

Adopting an accountability approach to global information privacy governance may require reinterpretation or amendment of existing laws to enable the use of accountability mechanisms and to make it easier and more practicable to hold organisations accountable.¹⁵

It may, for example, be necessary to provide in law or regulation that organisations comply with requests to inspect or review certain privacy practices to determine whether the organisation meets the essential elements of accountability as discussed in this paper. Work may be required to provide for legal recognition of the internal rules and policies organisations adopt and the measures organisations take to be accountable.¹⁶

2. What is the role of third-party accountability agents?

Third-party review of an organisation's practices against appropriate criteria will greatly facilitate the success of an accountability approach. Qualified, authorised accountability agents will be an important element to address resource constraints in order to make the accountability approach work in practice.

Establishing criteria for organisations that wish to serve as accountability agents, and articulating their role and the extent of their authority, will be a key task for policymakers. It will also be necessary to determine ways to ensure that accountability agents are worthy of public trust, and to develop the criteria by which they can be judged. Such criteria would ideally be developed through a consultative process that includes businesses, government representatives, experts and advocates.

Finally, to be useful to organisations, the services of an accountability agent must be affordable from a financial and operations perspective. Accountability agents must be able to price their services in a manner that allows them to recover their cost and build working capital, but still ensure that services are affordable to the full range of organisations that wish to avail themselves of their resources. Certification processes should be meaningful and trustworthy.

¹⁵ In its 2008 report the Australian Law Reform Commission considered the possibility that Australian law be amended to assure an accountability approach could be used to improve governance of cross-border data transfers. A number of EU countries are exploring whether amending the law could better accommodate binding corporate rules.

¹⁶ Such amendments are suggested in the APEC Privacy Framework, which requires that organisations comply with local data protection rules, but those amendments must enable them to write cross-border privacy rules that link to the APEC Principles to govern data transfers. Paragraph 46 of the Framework commentary encourages member economies to "endeavor to support the development and recognition or acceptance of organizations' cross-border privacy rules across the APEC region, recognizing that organizations would still be responsible for complying with the local data protection requirements, as well as with applicable laws".

They should also be designed to limit their disruption of business operations and to safeguard the confidentiality of an organisation's data assets.

3. How do regulators and accountability agents measure accountability?

An accountability approach does not rely on a breach to prompt review of an organisation's information practices and protections. Accountability agents and regulators must be empowered to review organisations' internal processes in a manner that allows them to ensure meaningful oversight. Policymakers may also wish to consider the measures to be taken by organisations to test for accountability and to be sure that it is working.

While an organisation's corporate policies must be linked to external criteria in the various countries where it does business, laws may differ from jurisdiction to jurisdiction. Accountability oversight must assess an organisation's overall privacy programme and allow for resolution of those differences in company policies in a manner that furthers the intent of a range of often conflicting laws or regulations.

Policymakers need to identify a way to measure confidence in an organisation's overall privacy accountability programme — commitment, policies and performance mechanisms — to determine whether an organisation is accountable even if its policies and practices are not a one-to-one match for local law and regulation.

4. How is the credibility of enforcement bodies and third-party accountability programmes established?

Trusted movement of data based on accountability requires that privacy enforcement agencies rely upon the oversight of enforcement bodies in jurisdictions other than their own. Assessing accountability requires examining and judging an organisation's entire programme — a somewhat subjective analysis — so that the credibility of accountability agents is critical.¹⁷

Third-party accountability programmes such as seal programmes may supplement the work of government agencies. The credibility of these third parties must also be established if they are to be trusted by privacy enforcement agencies and the public. Investment in robust process and experienced, thoughtful staff will be essential to their success.

Additional work should be undertaken to determine how the credibility of these organisations is tested. It will be necessary to determine ways to ensure that accountability agents are worthy of public trust, and to develop the

¹⁷ Work already undertaken at the OECD may be helpful in this regard. See Organisation for Economic Co-operation and Development, *Recommendations on Cross-border Co-operation in the Enforcement of Laws Protecting Privacy* (2007).

criteria by which they can be judged. Such criteria would ideally be developed through a consultative process that includes businesses, government representatives, experts and advocates.

5. What are the special considerations that apply to small- and medium-sized enterprises that wish to demonstrate accountability, and how can they be addressed?

In many cases, organisations that wish to demonstrate accountability may be small- and medium-sized enterprises, (“SMEs”) for which privacy protection resources may be limited. Consideration must be given to the special needs of these organisations and the impact that fulfilling the essential element may have on these enterprises. It may be that aspects of the essential elements will need to be tailored or adapted for smaller organisations in a manner that makes them more workable but does not dilute them.

Assessment requirements provide one example. While assessments may well serve the same function for SMEs as they do for larger organisations, such assessments may pose an undue burden on smaller enterprises with scarce resources. The nature of the assessment and the parties that may carry them out may differ for such entities, depending on the nature and sensitivity of the data in question. It will be important to examine how an SME might fulfill the assessment requirement without compromising itself financially. Similar questions of scalability as they apply to these organisations will need to be considered and resolved.

Conclusion

Dramatic advances in the speed, volume and complexity of data flows across national borders challenge existing models of data protection. In the face of such complexity and rapid change, data protection must be robust, yet flexible. Privacy can no longer be guaranteed either through privacy notices and consent opportunities for individuals, or through direct regulatory oversight.

An accountability-based approach to data protection helps to address these concerns. It requires that organisations that collect, process or otherwise use personal information take responsibility for its protection and appropriate use beyond mere legal requirements, and that they be accountable for any misuse of the information that is in their care.

Accountability does not redefine privacy, nor does it replace existing law or regulation. While mechanisms to achieve privacy goals will remain the concern of both policymakers and organisations, an accountability approach shifts the focus of privacy governance to an organisation’s ability to achieve fundamental data protection goals and to demonstrate that capability.

While there is already a greater focus on accountability in recent data protection enactments and discussion, and much can be accomplished within existing frameworks,

there is also a growing awareness that organisations that use personal data need to put in place and ensure compliance with the five essential elements of accountability:

- (1) Organisation commitment to accountability and adoption of internal policies consistent with external criteria;
- (2) Mechanisms to put privacy policies into effect, including tools, training and education;
- (3) Systems for internal, ongoing oversight and assurance reviews and external verification;
- (4) Transparency and mechanisms for individual participation; and
- (5) Means for remediation and external enforcement.

The path forward is clear, if at times daunting. The promise of an accountability-based approach to international privacy protection presents an opportunity to further the long-standing goal of business, regulators and advocates alike — robust transfer and use of data in a fashion that is responsible and that ensures meaningful protections for individuals. To realise this goal, policymakers and the leaders of organisations must undertake the challenging and necessary work towards greater emphasis on true accountability.

Appendix

Galway Project Participants

The following lists the participants in the Galway Project. This list indicates participation in the Galway Project deliberations only, and does not imply endorsement of the contents of this document.

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