

## Implementing the Accountability Concept in the Data Protection Regulation

### Accountability principles and implementing accountability concept

Accountability is a well-established principle of data protection, found in existing guidance such as the OECD Guidelines<sup>1</sup> and APEC Privacy Framework<sup>2</sup> and in the laws of for example Canada and Mexico. Regulators, industry and advocacy groups have further defined the essential elements of accountability<sup>3</sup>. According to the accountability principle, all organizations engaged in the processing of personal data, including controllers and processors irrespective of their size, should be held accountable for implementing appropriate, demonstrable and effective technical and organizational measures by means of a privacy program to ensure proper protection of personal data. Essential elements of effective privacy programs include:

1. Sufficient management oversight;
2. Policies, processes and practices to make the policies effective;
3. Risk assessment and mitigation planning procedures;
4. Adequately skilled data protection staff;
5. Awareness and training of staff;
6. Internal enforcement;
7. Issue response; and
8. Remedies to those whose privacy has been put at risk.

Privacy programs should be tailored having regard to the type of the organization, the nature of the processed personal data and the state of the art of technologies and available methodologies, for example to carry out a data protection impact assessment. Implementing the superior Accountability concept in the Data Protection Regulation instead of opting for the antiquated prescriptive and straight-jacked set of compliance requirements as currently proposed would in practice lead to improved data protection. Accordingly, a flexible, yet clear requirement of an effective data protection program could be established in the Regulation. Other administrative requirements, such as the overly prescriptive documentation requirements contained in the proposal, should in return be reduced.

### Data Protection Impact Assessment (DPIA) and prior consultation.

According to the Accountability concept, all processing of personal data should be planned appropriately, including the carrying out of risk assessments prior to commencing the processing. No specific type of DPIA should be mandated nor should the assessment obligation be reserved to any specific type of processing. Prior consultation should only take place when the processing is based on the legal grounds of either 'exercise of public authority' (art. 6.1 e) or the 'legitimate interests test' (art. 6.1 f) *and* the processing in question is likely to present specific significant risks to data subjects. This means for instance that a prior consultation should not be required when the processing is based on 'consent' (art. 6.1 a) or 'contract' (art. 6.1 b). The activity of supervisory authorities can consequently altogether be much more focused on ex-post controls rather than ex-ante clearance of processing operations.<sup>4</sup>

### Implications to the Regulation

This approach, including the new article 22 would effectively codify in a single article the main structural and organizational requirements necessary to effectively comply with the Regulation; it would therefore entail amending and simplifying articles 23, 28, and 33-37.

<sup>1</sup> [http://www.oecd.org/document/18/0,3343,en\\_2649\\_34255\\_1815186\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/18/0,3343,en_2649_34255_1815186_1_1_1_1,00.html)

<sup>2</sup> [http://www.apec.org/Groups/Committee-on-Trade-and-Investment/~media/Files/Groups/ECSG/05\\_ecsg\\_privacyframewk.ashx](http://www.apec.org/Groups/Committee-on-Trade-and-Investment/~media/Files/Groups/ECSG/05_ecsg_privacyframewk.ashx)

<sup>3</sup> [http://www.informationpolicycentre.com/accountability-based\\_privacy\\_governance/](http://www.informationpolicycentre.com/accountability-based_privacy_governance/)

<sup>4</sup> Recommendations of the Article 29 Data Protection Working Party in its Opinion 3/2010, par. 54 and 63