

Unequal powers



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Outline

- Instruments for enforcing privacy
- Unequal powers
- Co-operation and co-ordination
- International privacy enforcement mechanisms
- Challenges
- Strategies for enforcing privacy
- Pyramids and other paradigms

PHAEDRA: interviews with DPAs

- Two main sets of questions:
- What are the powers at the disposition of DPAs for enforcing privacy?
- What are DPAs doing to improve privacy enforcement coordination internationally?

Interviews so far with:

- EDPS, OECD, Canada, Finland, France, Ireland, Israel, Italy, Netherlands, Portugal, UK, US

Instruments for enforcing privacy - 1

- “The objective is to get organisations to comply, not necessarily to punish. Punishment is useful, but not always necessary.”
- Raising public awareness and education
- Setting guidelines or codes of practice
- Establishing sectoral working groups
- Registering databases
- Handling complaints
- Warnings to the data controller
- Formal notice to comply
- Information notices – forcing controllers to hand over certain information

Instruments for enforcing privacy - 2

- Audits and inspections, announced and unannounced
- Orders (“enforcement notices” or injunctions) – non-compliance is a criminal offence
- Naming and shaming
- Fines, administrative and/or punitive
- Initiating court cases
- Criminal sanctions
- Licence suspension
- Personal liability (including jail terms)

Unequal powers

- Not all DPAs have all of these instruments at their disposition
- Even where they do, they may use some instruments more than others
- Some have to investigate complaints, others don't
- Some can issue fines, others have to take offenders to court
- Level of fines vary
- Some DPAs can make unannounced inspections, others can't
- Some have order-making powers, others don't

Resorting to co-operation & co-ordination

- It seems data controllers will respond to blandishments of DPAs, if they know the DPA has strong powers, even if the powers are rarely (or never) used.
- However, some (all?) DPAs would welcome an increase in their powers.
- Some DPAs with weak powers see collaboration with other DPAs as a way of leveraging such powers as they do have
- Even where DPAs have more or less the full range of powers, they see strength in numbers
- Article 29 Working Party is a good example of strength in numbers
- “Interoperability” (e.g., BCRs and CBPRs)

International privacy enforcement mechanisms

- European Conference of Data Protection Commissioners ("Spring Conference")
- Article 29 Working Party
- Council of Europe T-PD
- International Working Group on Data Protection in Telecommunications (IWGDPT) (aka the Berlin Group)
- Central and Eastern Europe Data Protection Authorities
- Conference of Balkan Data Protection Authorities
- Coordinated Data Protection Supervision Group of Eurodac
- Coordinated Data Protection Supervision Group of the European Visa Information System (VIS)
- International Conference of Data Protection and Privacy Commissioners (ICDPPC)
- OECD Working Party on Information Security and Privacy (WPISP)
- Global Privacy Enforcement Network (GPEN)
- Data Privacy Subgroup (DPS) of the APEC Electronic Commerce Steering Group (ECSG)
- APEC Cross-border Privacy Enforcement Arrangement (CPEA)
- Asia Pacific Privacy Authorities (APPA)
- Ibero-American Data Protection Network
- Association of Francophone Data Protection Authorities (AFAPDP)
- Nordic DPAs meetings
- Informal meetings, communications between Isle of Man, UK, Ireland, Jersey, Guernsey, Gibraltar
- Some "big" DPAs provide support to some smaller or new DPAs
- MoUs between countries and within countries
- Twinning projects
- Study visits
- EC Leonardo da Vinci (LDV) mobility projects
- TAIEX (Technical Assistance and Information Exchange), managed by EC's DG Enlargement
- Etc.

Challenges to more effective co-ordination

- Differences in enabling legislation
- Trust
- Security of GPEN and how to share confidential information
- Process and substantive issues
- Information-sharing and awareness
- Jurisdictional issues
- Resources
- Number of cases that might be referred to the European Data Protection Board
- One-stop shop and the consistency mechanism (EU)
- MoUs: where there is a will, there's a way
- Work-around solutions can be found

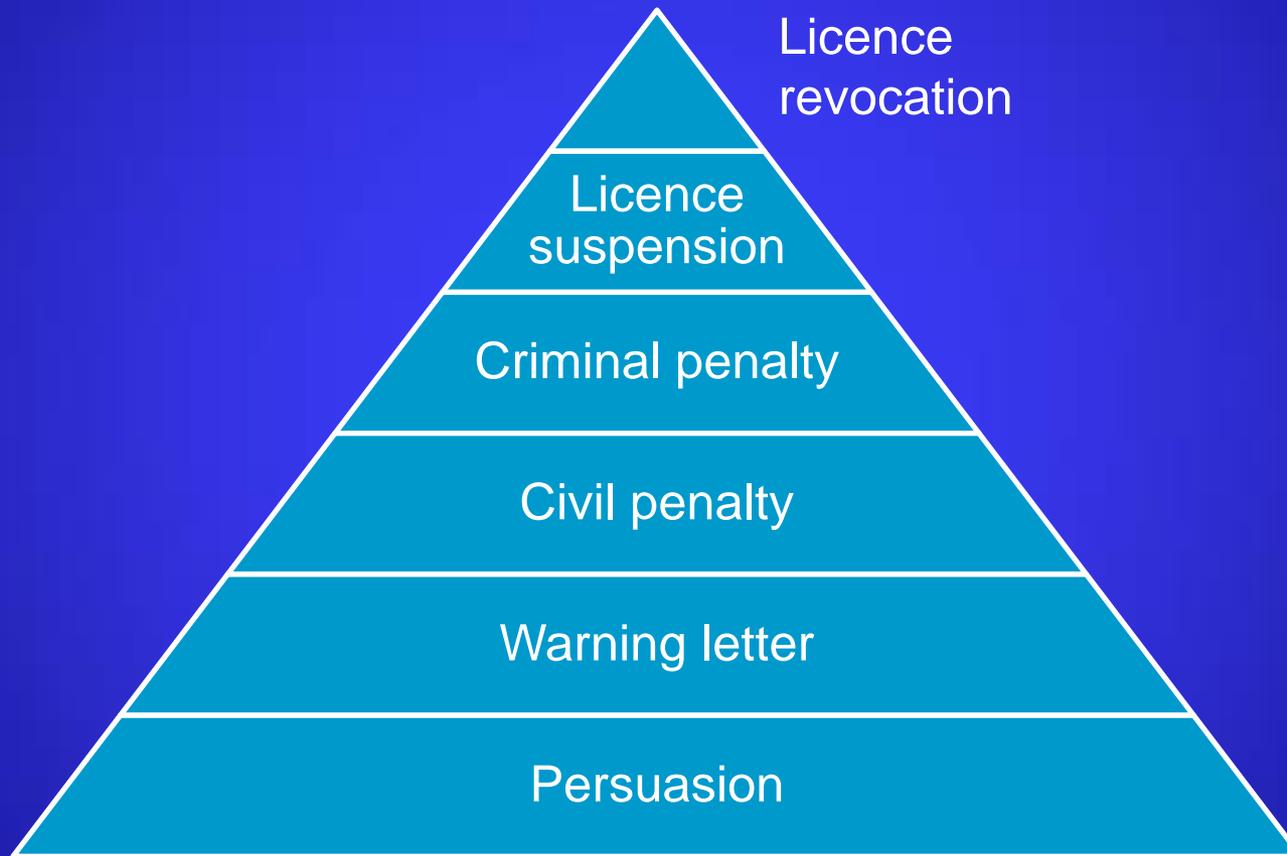
Strategies for enforcing privacy

- There appears to be general agreement that admonishment should come before imposition of penalties
- Sanctions should be graduated
- How to repair damages to data subjects
- Finnish sectoral working groups
- WG proposals at the ICDPPC in Warsaw
- Best way to improve co-ordination is through personal relationships at the Commissioner level and staff level

Pyramids and other paradigms

- Tit for tat – the regulator refrains from a deterrent response as long as the firm is co-operating
- Regulatory enforcement pyramid – aimed at a single regulated firm
- Regulatory strategy pyramid – aimed at an entire industry
- Toolbox of instruments
- Walk softly, but carry a big stick
- Layers of co-operation

Regulatory enforcement pyramid



Regulatory strategy pyramid

