

## Summary

Evaluation research regarding the Personal Data Protection Act has shown that compliance with this privacy legislation is insufficient. One possible remedy might be to expand the range of sanctions available to the regulatory authority – the Dutch Data Protection Authority (DPA). Before drawing any conclusions about the desirability of expanding that range of sanctions at present, this study examines and documents what sanctions supervisory authorities elsewhere in Europe – which are bound by the same Privacy Directive as the Dutch DPA – have at their disposal.

The study focuses on the following question:

*What can we learn from a brief comparison with other countries (Belgium, Germany, Austria) about the range and application of sanctions used to enforce standards in privacy legislation?*

Several research methods were used for this study. In addition to examining privacy legislation in Belgium, Germany and Austria and reviewing relevant literature, we conducted exploratory interviews with representatives of the Dutch DPA. Then we drew up questionnaires and contacted experts in the field of privacy law and representatives of the responsible authorities in the three countries.

We first checked to see which enforcement instruments are used in the various countries. We found that in all three countries – Belgium, Germany and Austria – fines can be imposed for infringement of both procedural and substantive standards. Differences exist with regard to the amounts of the fines. In Austria the maximum fine is much lower than in the other two countries.

There are also differences with respect to the body authorized to impose fines. In Belgium only the criminal court has the power to impose fines. Formerly the Austrian regulatory authority could impose fines, but when implementing the Privacy Directive the Austrian legislator deliberately opted for separation of powers. Fines are no longer imposed by the regulatory authority but by the *Verwaltungsstrafbehörde*. In Germany some, though not all, of the regulatory authorities of the *Länder* have the power to impose fines.

In all three countries not only fines but also custodial sentences can be imposed. In Belgium and Austria data carriers can be confiscated. The Belgian court can also order the offence to be published or the data to be deleted. It can also order the person responsible to refrain from processing personal data. One of the German regulatory bodies – the *Aufsichtsbehörde* – has the authority to issue a designation order, which may be subject to a penalty in the event of non-compliance. This authority can also ban certain procedures or demand the resignation of an internal regulator.

The application of the enforcement instruments varies across the three countries. Whereas in Belgium fines are rarely imposed, in Germany this frequently happens, and the fines in question are sometimes large. We were unable to gain an idea of the number of fines

imposed annually in Austria. As far as we know the other enforcement instruments available in Belgium have never been used. In Germany and Austria criminal proceedings are not often instituted.

Our respondents in Belgium and Austria differ in their opinions as to whether fines promote compliance with the privacy legislation. Providing information and consultation are also considered important. The representative of the Austrian regulatory authority pointed out that a comprehensive reporting system with assessment of each individual case ensures compliance with the law.

The German respondents think fines are a good instrument, but point out that they are not the only important means of ensuring better compliance with the law. The appointment of internal regulators and emphasis on the commercial benefits of compliance with the privacy legislation are also important. 'Naming and shaming' and applying administrative coercion are considered to be the most effective measures.

According to our contacts in Austria no problems arise in connection with imposing fines. Our German respondents did mention some problems; for example, in some cases when fines were contested in court it turns out that the judges' knowledge of the privacy legislation was limited. Another problem is excessive strain on the regulatory authorities responsible for imposing fines. The representative of the Belgian regulatory authority mentioned ignorance of the privacy legislation among judges and citizens.

Unlike the regulatory authority in Austria, the Belgian and German regulatory authorities have certain wishes regarding the sanctions available to them. The Belgian regulatory authority is now discussing a possible expansion of its range of sanctions. The reason is that at present not all offences can be tackled effectively. Our contact at the regulatory authority is in favour of authorizing the regulatory authority to impose fines, on condition that sufficient safeguards are provided for the parties involved and that the regulatory authority has sufficiently wide investigative powers and sufficient financial resources. In Germany the authority would like to see an expansion of the range of sanctions available to all privacy regulators. Fines and penalties should be raised and the possibilities of using administrative coercion should be expanded. In the event of leakage of data, those responsible should have an obligation to report this leakage. Like our Belgian respondents, the German respondents also stressed that staff and financial requirements must be met.

On the basis of our findings, we believe that several considerations are relevant in regard to a possible expansion of the range of sanctions available to the Dutch DPA in order to improve compliance with the rules. Firstly we conclude that in many cases application of the sanctions now available is effective; this is also the DPA's own view. According to the DPA's annual report for 2008, often an order subject to a penalty for non-compliance or even just threatening such an order is effective. Secondly it is important to realize that effective enforcement depends not only on sanctions but also on the intensity of supervision. A rule of thumb is: the greater the chance of being caught, the better the level of compliance. Finally we stress that the assumption behind the desire to expand the range of sanctions seems to be that infringements of privacy do in fact occur and that the level of compliance will rise as a result of establishing further sanctions. While this desire may seem very

understandable, at present there is no empirical evidence to support the assumption on which it is based.