

DATA PROTECTION ENFORCEMENT:

**Pour encourager les
autres**

vs

Whack-a-Mole

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John Byng, Public domain via Wikipedia.
Executed 1757 "pour encourager les autres"



ORG Background

- Founded 2005 by 1,000 members
- Cory Doctorow among founders
- Now have 11 members of staff
- Working on privacy, free expression
- Pre-crime, Migrants Data Justice
- Online Safety Act
- Data Protection and Digital Information Bill



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Our data protection work

- Long interest in Adtech
- Complaint against the Adtech industry
- Challenged decision to drop our Complaint; court agreed there is a problem with ICO legal accountability
- Filed new complaint against LiveRamp to ICO and CNIL
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DP enforcement

- Regulator
- Court actions
- Court is difficult for individuals
- No current class action model
- Reliant on ICO enforcement for DP to work



Role of the ICO

- “Monitor and enforce” GDPR.
- Duty to investigate complaints and powers to enforce against poor data practices.
- Duties to advise and to understand technological developments.



Role of the ICO

- Investigate and advise
- Issue enforcement notices
- Issue fines of up to 4% global turnover



How does the ICO enforce GDPR?

The ICO issues fines, but

- All but two in the last year related to spam email and marketing mail
- Very few enforcement notices were issued
- Most problems were answered by a “reprimand”



A closer look at reprimands

Helpful the ICO publishes these

- 'Name and shame'
- State bodies, ICO is reluctant to fine
- Problems are often very serious
- Some problems have persisted from 2018-2024, a period of six years
- ICO advice seems focused and narrow,
- Problems may be deeper

Examples of reprimands

- School in Finham has had three separate security breaches, and in the latest case faced a reprimand
- Two police authorities, Devon and Cornwall, and two councils, Norfolk and Plymouth, have had overdue SAR backlogues since 2018.
- 200,000 unauthorised recordings made by the Sussex and Surrey Police
- A victim of abuse's address was released to their abuser by Dorset NHS; similar case by Charnwood Borough Council

Examples of reprimands

- Thames Valley police disclosed witness addresses to the criminals accused in their case; similar case in Nottinghamshire
- Catastrophic loss of data by the West Mercia Police and Warwickshire Police forces
- Bank of Ireland was reprimanded for making serious errors in people's credit records
- Two cases of use of WhatsApp and Telegram to share personal data, by NHS Lanarkshire and Dover Ports

Reprimands observations

- In some cases the problems have persisted from 2018-2024, a period of six years
- ICO has published a blog noting many reprimands relate to common problems
- Unclear why Enforcement Orders are not being used in some cases eg security issues
- Enforcement Orders could be broad, eg requiring DPIAs, information governance





“Pour encourager les autres” or “Whack-a-Mole”?

- More Whack-a-mole than Pour encourager les autres.
- Several cases where the recipient hasn't taken the ICO seriously
- What chance that others see enforcement as a “Board level” issue?
- Institutions handling very sensitive personal data – NHS, Councils, Police
- They would be fined in regard of other legal breaches.
- Why is Data Protection a special case?

Who watches the watchers?

If the ICO's strategy needs change, how might this be challenged?

- Parliament appointing the Commissioners, political responsibility for their actions
- Review by EHRC
- Routes to challenge specific abuses through collective action by "data communities"
- Routes to challenge ICO enforcement decisions short of judicial review

Political support for enforcement

- Enforcement and IC independence matters for Adequacy
- The ICO needs to make a case for enforcement, pour encourager les autres.
- The cases highlighted are easy to explain to MPs
- The scope of enforcement should widen over time, has to include state actors
- AI of high political concern; the ICO needs a model now

Amendments to the Bill

The current Bill of course goes the opposite way

- Political direction of the Information Commission
- Government appointed
- Confused and contradictory regulatory duties, including commercial and law enforcement objectives; already contained in law to the extent necessary
- Harder to access the IC; need to negotiate with data controllers; rejection of SARs and complaints

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Conclusion

Enforcement is under attack but the case is clear

- Case for enforcement is not being made by the ICO
- The case is clear from its own work
- Political pressure for enforceable data rights will not go away, but is currently insufficiently directed
- The Bill is a danger to enforcement, but the ICO's strategy also needs to change.



Thank you

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