EDPB at a glance *by Taylor Wessing*

TaylorWessing

Recommendation 04/2022 Framework of fines under the GDPR

With its Recommendation 04/2022 of 12 May 2022, the European Protection Board "**EDPB**" presents a harmonised methodology for calculating GDPR fines in five steps. We summarise the key points at a glance:

5 steps to calculate fines according to EDPB

1: Recording the behaviour worthy of sanctions

The determination is based on the (criminal) concurrence doctrine (unity of action, plurality of action, coincidental concurrence, etc.).

Example: A company sends a large number of emails for marketing purposes without a legal basis.

→ Unit of action, i.e. only one offence to be sanctioned.

2: Determine the initial amount

Maximum statutory fine under the GDPR as a "**starting amount**". Classification of the infringement according to type and severity and turnover as a corrective.

- Severity of the infringement: 0-10% (low), 10-20% (medium) or 20-100% (severe) of the starting amount.
- Corrective of the starting amount based on the annual turnover: reduction to up to 0.2% (≤ 2m EUR), 0.4% (≤ 10m EUR) or 2% (≤ 50m EUR) of the starting amount.

Example: Start-up (500,000 EUR turnover) sells sensitive personal customer data to data brokers. There is an infringement according to Art. 83 (5) (a) GDPR:

- Starting amount: 20m EUR
- Serious offence: 20-100% of the starting amount; Consideration of turnover (reduction to 0.2% of the starting amount)
- Fine: 16,000 EUR

3: Aggravating or mitigating circumstances

Factors to be considered include measures of damage limitation, degree of responsibility, previous violations, degree of cooperation with the authority, manner in which the authority obtained knowledge.

Example: Agency charges fee for responding to requests for information.

→ serious infringement + financial profit from infringement as aggravating circumstance

4: Determine the maximum fine as the limit of the specific fine increased in step 3, if applicable.

The statutory maximum amount pursuant to Art. 83 (4) to (6) GDPR shall be determined (differentiation between statutory or turnover-based maximum amount – "whichever is higher"). Increases made in step 3 or step 5 may not exceed this amount.

Example: Agency (3 bn EUR turnover) commits infringement with 20m EUR as starting amount (Art. 83 (5) GDPR).

→ dynamic ceiling: 120 m EUR (4% of 3bn EUR).

5: Review of the fine in terms of effectiveness, deterrence and proportionality

Further increase or reduction of the fine is possible.

Example: Fine significantly jeopardises economic viability of the company.

→ further reduction (burden of proof on company)

Other

- **Non-application of the principles of § 30 German Act on Regulatory Offences:** according to EDPB misconduct by a person in the enterprise is sufficient (expressly not required: culpable violation by a management person who is attributable to the enterprise).
- **Comments:** Deadline until June 2022

Our conclusion

The one-to-one application of the EDPB recommendation would lead to significantly higher fines, as the maximum fine under the GDPR is always applied as the starting amount.

Please note: It is a recommendation without any binding effect on the courts. We assume that, among other things, the non-application of Sec. 30 German Act on Regulatory Offences will be viewed highly critically by the courts. The final judgements on the EDPB guidelines will be made by the ECJ.

Author

Dr. Carolin Monsees
Salary Partnerin, Hamburg
+49 40 63803–402
c.monsees@taylorwessing.com

Stephanie Richter, LL.M. (Torino)
Associate, Hamburg
+49 40 63803–282
s.richter@taylorwessing.com

taylorwessing.com