

**Public consultation on: Guidelines 04/2022 on the calculation of administrative fines under the GDPR**

**Version 1.0**

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*(\*The comments below represent the personal point of view of the author)*

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The Guidelines in question represent a very useful material in terms of description of the main hypothetical steps in relation to the calculation of the amount of GDPR administrative fines. As pointed out, anyway, it is always a case by case scenario in reality to be assessed.

The administrative fines are a central element in the GDPR being a powerful part of the enforcement toolbox of the supervisory authorities.

For imposing adequate fines, Article 83 GDPR invokes the principles developed in the CJEU's interpretation of the right to fair trial under Article 47 Charter of Fundamental Rights of the European Union ("CFR").

In fact, the fines imposed in a concrete case must be effective, proportionate and dissuasive in order to be justified.

Article 83 GDPR, thus, enumerates a number of criteria which help to determine the appropriate amount of the fine to be imposed in a concrete case. The main criteria are the nature, gravity, and duration of the infringement, its intentional or negligent character; the degree of effort on the side of the controller or processor to avoid damage and the cooperation with the supervisory authority; and the previous history of the controller or processor concerning infringements of data protection law.

In addition, the procedures for supervisory authorities to their power of imposing fines are to be determined by the Member States. Article 83 (8), indeed, reminds the national

and also the EU Legislators that Article 47 CFR must be respected which requires a “fair trial” before imposing fines, including effective judicial remedy and due process.

Moreover, in relation to the subject in question, it is important to mention that the administrative fines in GDPR are very high and might be considered a kind of “punitive” fines also. Indeed, the Article 84 GDPR requires Member States to foresee additional penalties other the administrative fines, e.g. under criminal law. According to recital 149 GDPR, “the imposition of criminal penalties for infringements of such national rules and of administrative penalties should not lead to a breach of the principle of *ne bis in idem*, as interpreted by the Court of Justice (Article 50 CFR). It means that the same infringement should not be punished both by criminal penalties and by administrative fines of a criminal nature. Also, it is important to mention that in accordance with the general principle of main jurisprudence and constitutional charters, the punitive sanctions require detail and high specific structured legal provisions and not general open clauses provisions.

The determination of the amount of fines, therefore, is a crucial matter and as rightly indicated by the EDPB: “*no mere mathematical exercise*”. Therefore, the guidelines can help to have a detail theoretical scheme but - in concrete - it will be always upon the discretion of the supervisory authority involved in the specific case to assess the real scenario.

It will be interesting to see, thus, the evolution of the methodology expressed in the guidelines and also the future application by the supervisory authorities and the eventual jurisprudence on this important topic.

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