RWE

RWE AG | Altenessener Str. 35 | 45141 Essen

European Data Protection Board
Rue Wiertz 60, B-1047 Brussels

Group Data Protection

Your ref.	Public Consultation
Our ref.	EO
Contact	Elena Ostwald
Phone	+4920151798145
Email	elena.ostwald@rwe.com
Postal address	Altenessener Str. 35 45141 Essen

Essen, 24 June 2022

A. Introduction

The Draft of the Guidelines ("The Draft") facilitates a proportionate fining approach for lower-turnover companies, but they raise a number of issues of concern for controllers and processors subject to the GDPR that are part of corporate groups with large global revenues. Whilst the Draft does provide for supervisory authorities discretion, the focus on revenues at various stages of the EDPB's proposed methodology and the difficulty controllers and processors may face in persuading supervisory authorities that any mitigation is warranted, mean that controllers and processors might fear larger fines being issued across the EU against high-revenue companies/groups in respect of GDPR infringements.

B. In Detail

The following aspects require further explanation:

1. Recital 54 states that assessment of each infringement should consider certain specific elements and one of them is the number of data subjects concretely or potentially affected, where "the higher the number of data subjects involved, the more weight the supervisory authority may attribute to this factor". In this regard, the clarity is needed for larger group of companies where a number of smaller entities belong to a parent company. In which relation should they stand (e. g. sharing a common IT infrastructure) in order the infringement within a smaller company to be considered as the one affecting the parent company and thus increasing the number of affected data subjects?

2. The Draft suggests a complete turnover of the "undertaking" as a baseline for the calculation of the sum of the fine, where undertaking should form a single economic unit. Recital 122 states that, whether several entities form a single economic unit depends largely on whether the

...

RWE Aktiengesellschaft

RWE Platz 1
45141 Essen
Germany

T +49 201 5179-0
F +49 201 5179-5299
I www.rwe.com

Supervisory Board:
Dr. Werner Brandt
(Chairman)

Executive Board:
Dr. Markus Krebber
(CEO)
Dr. Michael Müller
Zvezdana Seeger

Head Office:
Essen
Registered at:
Local District Court
Essen
Registered No.
HR B 14 525

VAT Registration No.
DE 8130 23 584

individual entity is free in its decision-making ability or whether a leading entity, namely the parent company, exercises decisive influence over the others. In this regard, it is not clear which kind of influence of the parent company is meant i. e. if a smaller company makes its own decisions concerning privacy, data processing, etc. but in economic aspects stays under the influence and/or in strong cooperation with/of the parent company – would this company be considered as free in its decision-making and will it be solely responsible for data protection infringements?

3. The Draft states that the existence of (relevant) previous infringements can be considered as aggravating, whereas the absence of (any) previous infringements "cannot be considered a mitigating factor, as compliance with GDPR is the norm"; "it is likely that" the degree of responsibility of the controller or processor "will be considered an aggravating or a neutral factor"; ordinary cooperation with supervisory authorities, and similarly compliance with measures previously ordered, is mandatory and should therefore "be considered neutral (and not a mitigating factor)"; and in respect of notifiable personal data breaches under Article 33 GDPR, such notification should be considered neutral (analogous to §43 para. 4 of the German Data Protection Act) . In this respect, more clarity would be desirable as to how exactly the controllers and processors can achieve a mitigating factor?

C. Statement

For companies being part of group of companies which act independently in many aspects and where a parent company has little or no impact on the actions of its group companies (even if connected via financial and economical dependencies), it might be disproportionate to use the complete revenue of the group of companies as a baseline for calculations of fines. In fact, despite the severance of the infringement, the actual freedom in decision-making in regard to data protection management, controlling and processing of the particular company shall be investigated. In consequence, if the particular company is found solely liable for its actions, the revenue of this company should be used for the calculation of fine.

Best regards,

RWE SE