WIRTSCHAFTSKAMMER ÖSTERREICH

Guidelines 04/2022 on the calculation of administrative fines under the GDPR

The Austrian Federal Economic Chamber provides the following comments:

In the draft Guidelines the EDPB sets out a methodology, consisting of five steps, for calculating administrative fines for infringements of the GDPR.

The clarification that the circumstances of the specific case are the determining factors leading to the final amount of the fines is to be welcomed. The possibility of issuing a reprimand (Art 58 (2) (b) and Recital 148 GDPR) should also be addressed.

With regard to the term "undertaking" in Art. 83(4)-(6) GDPR, the draft Guidelines rely on Recital 150 GDPR – in fact it is only this Recital that suggests the use of the broader concept of undertaking under antitrust law: "Where administrative fines are imposed on an undertaking, an undertaking should be understood to be an undertaking in accordance with Articles 101 and 102 TFEU for those purposes."

However, Recital 150 contradicts the definitions in Article 4(18) and (19) of the GDPR and a Recital has no normative effect. The aforementioned definitions in Article 4, on the other hand, have binding effect. They clearly distinguish between undertakings[1], groups of undertakings and groups of undertakings engaged in a joint economic activity. Accordingly, the term "undertaking", as distinct from the separately defined group of undertakings, would have to be seen in relation to the legal entity (that committed the infringemet), i.e. the individual legal person.

Anything else would be incomprehensible: According to the draft, an infringement by a small enterprise with a turnover of up to € 2 million could be charged on the basis of a sum down to 0.2% of the starting amount, the same infringement by a small group enterprise with an assumed group turnover of € 200 million with down to 20%, i.e. a hundredfold.

This disparity cannot be justified by a general assumption that group companies would always act for the benefit of a large group and that therefore the infringement would result in an advantage for the entire group, which must be skimmed off: the economic circumstances must be taken into account separately and may increase the fine if it is really the case that the controller or third parties have actually benefited economically from the infringement. However, this must be taken into account elsewhere and, in our view, should not distort the calculation logic for the assessment of the starting point.

In para 124 the EDPB refers to the 'Akzo presumption' (which was developed in the context of competition law). Under the Akzo presumption, where a parent company holds 100% of shares or almost 100% of shares in a subsidiary which has infringed the GDPR and therefore

[1] However, there are differences in the language versions, e.g. in the English version the term "enterprise" is used in Article 4 (18)

is able to exercise decisive influence over the conduct of its subsidiary, a (rebuttable) presumption arises that the parent company does in fact exercise a decisive influence over the conduct of its subsidiary, including with regard to the subsidiary's processing of personal data. The parent and subsidiary can therefore be considered to form a single undertaking for the purpose of calculating administrative fines.
On the other hand, in para 125 the EDPB notes that the Akzo presumption may be rebutted, but it is not clear in which cases this can be assumed – other than to state that "account must be taken of all the relevant factors relating to those links that tie the subsidiary to the parent company, which may vary from case to case".

These vague statements seem unclear and unsatisfactory. We are of the opinion, that this makes it difficult for organizations with a large number of subsidiaries or with complex corporate/data protection structures to quantify the risk of being fined by the authorities for GDPR breaches in subsidiaries, over which the parent company does not have a decisive influence, especially for stock corporations. According to Austrian stock corporation law, stock corporations must be able to act independently. Especially in the energy / industry sector (e. g. with regard to the so called "unbundling decisions" under the Austrian Gas Industry Act), parent companies have no means of influencing their subsidiaries (due to the legal framework).

• In this context, it should therefore be made clear that in such cases the parent company has no possibility of influencing the behavior of the subsidiary and that penalties should in no case be imposed on the parent company but on the company, which has infringed GDPR rules.
• Moreover the penalties should by no means be based on the group turnover of the parent company, but only on the fined subsidiary.

Kind regards,

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