

Comments to the draft of EDPB-Guidelines 4/2022 on the calculation of administrative fines under the GDPR

I. Introduction

On 16 May 2022, the draft of „*Guidelines 4/2022 on the calculation of administrative fines under the GDPR*“ was submitted by the European Data Protection Board (EDPB) for public consultation. This document constitutes the contribution of dacuro GmbH to this process. The comments below refer to the paragraphs (further as “para. “ or „paras. “) of the draft.

II. Comments

- **Para. 123:** In para. 123 one can read as follows: *“In line with the SEU doctrine, Article 83(4)–(6) GDPR follow the principle of direct corporate liability, which entails that all acts performed or neglected by natural persons authorized to act on behalf of undertakings are attributable to the latter and are considered as an act and infringement directly committed by the undertaking itself. The fact that certain employees did not comply with a code of conduct is not sufficient to disrupt this attribution. Rather it is only disrupted where the natural person acts solely for its own private purposes or for purposes of a third party, thereby becoming itself a separate controller (i.e., the natural person has acted in excess of their permitted remit). This European Union law principle and scope of corporate liability takes precedence and must not be undermined by limiting it to the acts of certain functionalities (like principal managers) by contradicting national law. It is not relevant which natural person acted on behalf of which of the entities. The supervisory authority and national courts therefore must not be required to determine or identify a natural person in the investigations or the fining decision”*. Dacuro would like to express its gratitude for the EDPB’s efforts to clarify the matter, which has been debated in Germany for some time. One group follows the EDPB’s line - the liability of an undertaking as a controller/processor for violating the provisions of GDPR, the other group claims the liability of the members of the management board for the GDPR violations of an undertaking as a controller/processor (e.g., the decision of the Higher Regional Court of Dresden dated 30 November 2021, case-no. 4 U 1158/21, link: <https://openjur.de/u/2381765.html>). Due to the importance of this subject matter, our suggestion would be to add the following passage (see the highlighted text) to the first sentence of para. 123: **“In line with the SEU doctrine, Article 83(4)–(6) GDPR follow the principle of direct corporate liability, which entails that all acts performed or neglected by natural persons authorized to act on behalf of undertakings are attributable to the latter and are considered as an act and infringement directly committed by the undertaking itself. Therefore neither the members of the management board nor the data protection officers are liable for the data protection violations of an undertaking under art. 83 GDPR”**.