Foreign Investors Council

24 June 2022

Foreign Investors Council – Position paper on draft regulatory guidelines on the calculation of administrative fines for infringements of the Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC

Foreign Investors Council (hereinafter "FIC") brings together around 120 multinational companies operating in Romania and covering a wide variety of economic sectors. Since its establishment in 1997, FIC's aim is to improve the investment climate in Romania, by focusing on the dialogue between decision-makers, local authorities, the business environment, and international financial institutions (IFIs) such as the World Bank, for ensuring transparency and predictability, development of free-market mechanisms, and facilitating the integration of the Romanian economy in the global market.

Every two years, FIC publishes the White Book, which is a radiography of the Romanian economy and a synthesis of our members' recommendations for the public authorities. In the latest edition of our White Book (wb2021.fic.ro), each chapter reflects a topic of interest for the next period, from a cross-sectoral perspective, as well as a series of recommendationsfor a sustainable economic development.

On May 16, 2022, the European Data Protection Board („**EDPB**") published draft regulatory guidelines on the calculation of administrative fines („**the Guidelines**") for infringements of the Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC („**GDPR**").

The Guidelines have the stated objective of harmonising the methodology data protection authorities („**DPAs**") use when deciding whether to impose an administrative fine and deciding on the amount of such.

We welcome the issuance of such practice guidance provided by the EDPB, as it adequately serves the purpose of ensuring a better understanding of the data protection principles at stake and of the means and methodology recommended to be used by DPAs within their enforcing activities for ensuring compliance with those principles. At the same time, we strongly consider that any of the EDPB's guidelines should be drafted in accordance with EDPB's tasks and powers, as such are provided under the GDPR.

For ensuring a correct understanding of the Guidelines and for facilitating a harmonized application of such in practice, we advance the following comments:

1. **Amending the wording used, in order to ensure a unified qualification of the Guidelines as recommendations for the DPAs**

Paragraph 6 of the Guidelines provides the following:

"These Guidelines can be seen as following a step-by-step approach, though supervisory authorities are not obliged to to follow all steps if they are not applicable in a given case, nor to provide reasoning surrounding aspects of the Guidelines that are not applicable."

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The above wording implies that DPAs are obliged to follow the steps described in the Guidelines if they are applicable in that particular case. However, under Article 70(1)(k), the EDPB can only provide recommendations on the application of fines. By establishing an obligation incumbent upon the DPAs, the EDPB would exceed its attributed powers provided under the GDPR.

Such wording can be found throughout the entire introductory section of the Guidelines (e.g. paragraphs 9, 10, 14), thus enforcing the ideea that the methodology presented by EDPB for calculating fines under GDPR is binding on the DPAs.

In light of the above, we propose amending the wording in order to emphasize that the Guidelines represent recommendations regarding the methodology for calculating the amount of fines under GDPR, and that the decision to utilize or not the described methodology remains the attribute of the DPAs.

2. Amending the methodology by removing the recommendation regarding the calculation of the amount of the fines based on the operators turnover

At paragraph 17, the EDPB provides an overview of the methodology to be used by DPAs for calculating the fines, based on a 5 steps approach. At step No. 2 of the methodology, EDPB recommends setting the starting point of the calculation based, amongst others, on the turnover of the undertaking.

Note should be made that Article 83 (2) of GDPR provides the elements to be taken into consideration by the DPAs when deciding on the amount of the administrative fine to be imposed. The turnover of the undertaking which infringed provisions of the GDPR does not forms part of the list of circumstances which must be regarded when deciding on the amount of the fines.

Article 83 (2) letter k) of GDPR provides, indeed, that DPAs may take into account other mitigating or aggravating circumstances which might be applicable to the case. However, the EU legislator circumstantiated the elements which may be considered by the DPAs, by providing 2 guiding examples of such: financial benefits gained, or losses avoided, directly or indirectly, from the infringement. Having regard to the foregoing, the additional elements that could be considered based on Article 83 (2) letter k) of GDPR for deciding on the amount of fines to be applied must have a connection with the seriousness of the infringement. This interpretation derives both from the mentioning within Article 83 (3) letter k) od GDPR of mitigating or aggravating circumstances and from the mentioning of the 2 guiding examples.

As such, the turnover of an undertaking cannot be regarded as an aggravating or a mitigating factor, due to the fact that an infringement of the fundamental right of natural persons regarding the protection of their personal data cannot be reasonably regarded as more or less serious, based on the preexisting financial situation of the undertaking which violated such right.

Thus, by introducing the turnover of an undertaking as an element based on which the amount of fines should be decided, the Guidelines establish a derogatory provision to the GDPR. We kindly highlight that a document that has the legal nature of an recommendation cannot derogate from the provisions of a binding legislative EU act, such as a Regulation.

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Considering the above, we propose amending the Guidelines by removing the turnover of an undertaking from the proposed methodology regarding the calculation of the amount of fines to be applies by DPAs.

3. Amending the paragraphs regarding the predetermination of the starting amount of the fines

At paragraph 61, the Guidelines establish 3 categories of the seriousness of infringements, based on which, the starting point of the amount of the fine should be determined.

However, Article 83 (4) and (6) of GDPR only provides the maximum amount of administrative fines that could be applied for infringements of the GDPR's provisions, while Article 58 (2) letter i) establishes the power of the DPAs to determine the fines to be applied within the legal frame established by Article 83. Moreover, recital 150 of GDPR states that GDPR should only indicate the infringements, the upper limit and criteria for setting the related administrative fines, but the determination of the amount of fines to be applied is solely within DPAs powers.

Considering that Article 83 of GDPR does not set any categories or starting points for calculating fines, by setting such a starting point for the calculation of the fines, the Guidelines derogate from the provisions of the GDPR. As indicated at point 3 above, the provisions of a non-binding document, such as the present Guidelines, cannot derogate or add to the provisions of a Regulation.

Therefore, we propose amending the Guidelines by removing the paragraphs regarding the setting of starting points for calculation of the amount of fines.

4. Amending the Guidelines in order to ensure that the conduct of the entity which infriged the GDPR is justly taken into account

Under Chapter 5 of the Guidelines which addresses the circumstances which may be taken into account as mitigating or aggravating circumstances, the conduct of the entity which infringed the GDPR is not fully and justly considered when setting the amount of fine to be applies.
This is due to the fact that the Guidelines limit the circumstances under which the elements provided under Article 83 (2) can be regarded as mitigating factors. The limitation thereof derives from the argument according to which, as long as one of the circumstances set forth under Article 83 (2) represents an obligation of the entity which infringed the GDPR (e.g., cooperation with the DPA during the investigation), such cannot be considered as a factor for minimizing the amount of the fine to be applied.

However, the GDPR's provisions does not make such distinctions, allowing the DPAs to take into account all of the circumstances of the case and decide whether any of the elements set forth under Article 83 (2) may be applied as a mitigating or an aggravating factor. As such, considering that the Guidelines cannot deviate from the provisions of the GDPR, we propose amending Chapter 5 of the Guidelines in order to ensure that the DPAs may take into account any circumstances either as mitigating or as aggravating factors, when deciding on the amount of the fine to be applied.

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