

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

These guidelines are welcomed to give data controller and processors (and their advisors) a clearer picture of the scale of liability which they may face under GDPR.

There is an area in the English-language version of these Guidelines where clarification would be a benefit, to aid the interpretation not just of this document, but also of previous guidelines issued by the EDPB, particularly Guidelines 03/2018.

In paragraph 127 of Guidelines 04/2022, the term “addressed” is used, which appears (to this individual) to refer to the imposition of the fine on the non-compliant party. However, there has been some debate over how “address” should be interpreted in a similar context in the penultimate paragraph of Guidelines 03/2018, relating to the option of supervisory authorities to “address” GDPR fines to an Article 27 representative where their non-compliant data controller/processor client outside of the EU has been able to avoid the payment of those fines when issued against them directly.

The issue arises in the use of the word “address” in this sentence of Guidelines 03/2018: *“This includes the possibility for supervisory authorities to address corrective measures or administrative fines and penalties imposed on the controller or processor not established in the Union to the representative”*

I hold the view that, when read with Recital 80 of GDPR and the earlier – pre-consultation – version of these Guidelines, the Guidelines 03/2018 as adopted intend to confirm that the representative may be a point of substitutive liability for their clients where it has not been possible to recover fines from their client (where that client has been found non-compliant with GDPR).

Others have asserted that the intention of the word “addressed” in that part of Guidelines 03/2018 is only intending to refer to the act of identifying the location to which such notification should be mailed, rather than the entity to which it should apply.

The issue of interpretation depends on which version of the verb “address” is intended to be used:

- apply (oneself) to a task or problem, direct one’s attention to (a problem)
- write directions for delivery on

The use of the words “address”, “addressed” and “addressee” in Guidelines 04/2022 appear (to this individual) to make clear that a party “addressed” is the party to which the action in question is intended to apply, rather than the party to whose physical location a notice should be mailed. This is

particularly the case in footnote 58 to paragraph 127 of Guidelines 04/2022, which refers to “The decision is **addressed and delivered...**”, potentially drawing a specific distinction between the imposition of the fine to the party liable to pay it, and the physical delivery of the notice of that fine via the postal system. However, there is also an argument that this footnote supports the alternate definition, that you are simply setting out instructions on how to mail communications (e.g. they may view that the full sentence should be “The decision is put in an envelope, addressed and delivered...”).

It would avoid the potential for the alternate interpretation of “address”, in both Guidelines 04/2022 and others, if the intention as to the meaning of this word in the Guidelines was made clearer. Alternately, you may wish to consider using a different wording, such as “impose”, “allocated” or “awarded against”, when referring to the imposition of corrective measures against a party, and “notified” instead of “delivered”. For example, in footnote 58, instead of “The decision is addressed and delivered...”, you may prefer to say “The decision is [awarded against / imposed upon] and notified to...”.