

Ms. Andrea Jelinek  
Chairwoman of the European Data Protection Board

Brussels, 27 June 2022

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

Dear Ms. Jelinek,

On behalf of the European collectors and suppliers of information in support of creditworthiness assessments represented by ACCIS, I would like to thank you and your colleagues in the EDPB for offering draft guidance on the calculation of administrative fines under the GDPR.

We are supportive of your work to harmonise the methodology data protection authorities (DPAs) use to calculate fines. We agree that the calculation of a fine is no mere mathematical exercise and broadly support the five-step process outlined to reach an amount.

We think that your draft guidance appears to emphasise setting GDPR fines at a level that effectively deters future non-compliance. Whilst this is important, we would prefer similar attention to ensuring the proportionality of GDPR penalties, which would require a more flexible interpretation of Article 83(2).

In the guidelines, the EDPB does not admit mitigating effects to the absence of (any) previous infringements, the ordinary cooperation with DPAs, and the evidence that the infringement has been committed because of negligence. This strict interpretation makes it difficult for controllers and processors to persuade DPAs that any mitigation is warranted and opens therefore the door to possible legal challenges against DPAs decisions.

Additionally, we consider that the EDPB's interpretation of "*any other aggravating or mitigating factor applicable to the circumstances of the case*" as per Article 83(2)(k) should be re-assessed. Currently, the EDPB refers to the socio-economic context in which the controller or processor operates, and the legal and market contexts as possible factors. We would like to add to that list the **cessation or termination of the infringement** as soon as the supervisory authority intervenes. Whilst "*any action taken by the controller or processor to mitigate the damage suffered by data subjects*" is already considered a mitigating factor as per Article 83(2)(c) in the sense that it repairs or compensates damage already caused, the mere cessation of the infringement is not. Granting mitigating effects to that action would align your guidance with bodies of administrative sanctions<sup>1</sup> where such mitigation is contemplated.

Finally, we would like to invite the EDPB to clarify **example 1a**. That example illustrates how to identify processing operations in a given infringement case, including where the same or linked processing activities infringe several GDPR provisions. The example described is the collection and storage of the creditworthiness data by a financial institution. Whilst we understand why the EDPB may consider those processing operations as "linked", the EDPB does not describe an instance of unlawful processing, which one would expect in that context. So, the reference to those processing activities generates the perception that such activities might be unlawful. Consequently, we think that the EDPB should: (i) remove this example; or (ii) clarify that the

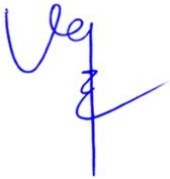
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<sup>1</sup> European Commission's Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 (= Rules on competition). See here: [https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52006XC0901%2801%29#nr1-C\\_2006210EN.01000201-E0001](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52006XC0901%2801%29#nr1-C_2006210EN.01000201-E0001)

example is merely to illustrate linked activities, without any qualification over the lawfulness of the processing involved; or (iii) clarify that the example illustrates lawful linked activities.

We are at your disposal for any questions.

With kind regards,



Enrique Velázquez  
Director General