

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

### Preliminary remarks

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The German Association for the Digital Economy (BVDW) e.V. has been representing digital business models since 1995. It incorporates the experience of its founding members from the online industry as well as the global perspective of tech players from all over the world. More than 650 companies are now organized within BVDW which means that the association covers the entire spectrum of the diverse digital ecosystem. Our positions represent the interests of the industry as a whole which makes BVDW a reliable partner for decision makers in Germany, Europe, and the world.

### Contact

**David Pfau**  
T. 0151 61728308  
[pfau@bvdw.org](mailto:pfau@bvdw.org)

We thank the European Data Protection Board for the opportunity to provide comments on its new Guidelines 04/2022 on the calculation of administrative fines under the GDPR. BVDW would like to share a few points with regards to the content.

### 1. Need for a consistent application of fines

BVDW welcomes a standardization of the assessment of fines by data protection supervisory authorities in the European Union. With the EDPB Guidelines, the EDPB fulfills its legal mandate of Art. 70(1)(e) GDPR to ensure a consistent application of the GDPR. A uniform framework of fines and, in particular, uniform and comprehensible bases for assessment create legal certainty and fair market conditions for market participants in Europe.

### 2 Transparency and proportionality

In the context of the supervisory practice, it will be crucial to justify fine decisions transparently and to base the calculation criteria on individual cases. This is the only way to ensure consistent application by the authorities and to guarantee traceability.

The present guideline emphasizes the need for effective and deterrent fines more clearly than the need for proportionate sanctions. But the question of the right balance between the proportionality of fines and the deterrent effect of

fines must be clearly answered in the sense of the GDPR. This means in our view that proportionality must be the central criterion, as fines are about punishing data protection violations. It should not be about issuing deterrent fines that create uncertainty among market participants and thus prevent innovation in the data environment. In particular, proportionality must come into play when companies can demonstrate that they have taken appropriate measures to comply with data protection legislation.

### **3. Ensuring that remedial action have /have been taken prior to the imposition of fines**

In the context of these Guidelines, it should also be noted that fines should be the last resort, if data controllers do not show compliance or remedies for data protection deficiencies and take remedial action. The goal of data protection, which is the strengthening of the informational self-determination of individuals and the protection from misuse of their personal data, would be contradicted if remedial measures were to become irrelevant in this respect if a fine were to be imposed at the end of every contact with a supervisory authority anyways. Thus, the assessment of the effectiveness of fines should be based on the issues of proportionality and remedial measures taken, not on deterrent effects of those fines.

In addition, the Guideline takes the view that direct parent companies can also be addressed with a fine for violations of their subsidiaries. This is justified by the fact that violations within the group can be enforced. In addition, it is assumed that fines can be addressed directly to companies. This is contrary to German administrative offenses law, for example, which does not require proof of a breach of supervisory duty by a company manager that has become causal for the data protection violation. This can be viewed critically, particularly since this has already been viewed in a differentiated manner by German courts.

A standardization of the practice of imposing fines in Europe is to be welcomed. In addition, the proportionality of fines should be given greater importance in the interest of all parties involved.