Public consultation on: Guidelines 04/2026 GDPR.

*(*The comments below represent exclusively the personal point of view of the author)*

I welcome the EDPB's effort to harmonise the methodology for deciding whether an administrative fine should be imposed.

My main comment concerns **legal certainty, foreseeability and the structuring of supervisory discretion**. The Guidelines themselves recognise that GDPR administrative fines have a **punitive and deterrent function**, while also confirming that the decision whether to impose a fine remains within the discretion of the supervisory authority and must be assessed on a case-by-case basis.

Such discretion is necessary. However, given the potentially significant impact of GDPR fines, greater **ex ante predictability** would be desirable, particularly as regards the distinction between a **minor and non-minor infringement**. Under the Guidelines, a minor infringement will generally not lead to a fine, whereas a non-minor infringement creates a strong presumption in favour of one.

This concern is also consistent with broader principles developed in European and national case law concerning punitive sanctions. **EU case law has expressly recognised that Articles 83 and 84 GDPR pursue an essentially punitive purpose.** More generally, European and national jurisprudence reflects the principle that, where sanctions pursue punitive or deterrent objectives, the applicable framework should ensure an adequate degree of **legality, foreseeability, proportionality and protection against arbitrary enforcement**. Administrative or judicial discretion may be necessary, but it should operate within sufficiently clear and predetermined criteria capable of guiding the decision and making its exercise objectively reviewable.

This appears particularly relevant in the GDPR context, where the financial consequences may be significant and where the qualification of an infringement as minor or non-minor may substantially affect whether an administrative fine is imposed.

Against this background, at the level of the Guidelines, I would suggest that the EDPB provide:

- more objective indicators for distinguishing **minor and non-minor infringements**;
- clearer guidance on the relative weight of **aggravating and mitigating factors**, including prompt remediation;
- indicative or rebuttable presumptions on when a **reprimand or another corrective measure** should normally be sufficient instead of a fine.

This would not eliminate the necessary case-by-case assessment, but would help structure supervisory discretion and improve **legal certainty, foreseeability, proportionality and consistency of enforcement across the EEA**.

At the same time, there is an inherent limit to what Guidelines can achieve. As an interpretative **soft-law instrument**, the Guidelines cannot alter the discretionary framework established by Articles 58 and 83 GDPR.

Therefore, if greater structural predictability and stronger ex ante constraints on the exercise of the fining power are considered desirable, this issue would ultimately require consideration by the EU legislator.

From a legislative perspective, consideration could be given to introducing more clearly predetermined criteria governing when an administrative fine should normally be imposed, when another corrective measure should be preferred, and how mitigating and aggravating circumstances should affect that choice.

In this sense, the Guidelines can improve harmonisation, but they cannot fully resolve an underlying issue of foreseeability where the primary legislation itself leaves broad discretion to supervisory authorities.

The objective should not be to eliminate discretion, but to ensure that punitive discretion operates, as far as possible, within a framework that is **clear, foreseeable, proportionate and objectively reviewable**.

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