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RESPONSE TO EDPB PUBLIC CONSULTATION

Comments on Guidelines 04/2026 on the application of the power to impose administrative fines in relation to other corrective powers *under the GDPR*

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Type of respondent	Law firm, third country (non-EU)
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1. About the respondent

MG Advocacia Digital is a Brazilian law practice focused on data protection and technology law, with particular attention to the protection of children and adolescents in the digital environment. It also advises organisations on corporate privacy compliance, international data transfers and AI governance, working across the Brazilian, European Union and United States frameworks. Many of the organisations it advises are established outside the EU and fall within the territorial scope of the GDPR under Article 3(2). These comments are offered from that comparative, third-country perspective.

2. General remarks

We welcome the Guidelines. A structured, five-step method for deciding *whether* to impose a fine, complementing Guidelines 04/2022 on the calculation of fines, will improve consistency across supervisory authorities and predictability for controllers and processors, including those outside the EU who rely on published guidance to understand enforcement risk. We particularly support the reminder in paragraph 12 that a mere reference to the Guidelines cannot replace the reasoning required in each case, and the clear treatment of reprimands as the ordinary outcome for minor infringements (paragraphs 26, 115 and 120–121).

From a comparative standpoint, the strong presumption in favour of a fine where an infringement is not minor (Step 5b, paragraph 119) is a meaningful policy choice. It differs from the US federal model, where the Federal Trade Commission generally cannot obtain civil penalties for a first violation of Section 5 of the FTC Act, and from the Brazilian model, where the national authority (ANPD) may apply a warning to minor or medium infringements absent specific recidivism (Resolution CD/ANPD No. 4/2023, Article 9). Because organisations operating globally will compare these regimes, we believe the recommendations below would strengthen the clarity and the perceived fairness of the European approach.

3. Summary of recommendations

1. **Children and vulnerable data subjects:** state expressly that infringements materially affecting children should, as a rule, not be considered minor at Step 4, and add at least one worked example involving children's data.
2. **Remediation and cooperation:** give more granular guidance on how the timing of remediation affects Steps 4 and 5, and on the weight of demonstrable accountability programmes.
3. **Controllers and processors outside the EU:** address the role of the Article 27 representative and how effectiveness and dissuasiveness are assessed for non-EU respondents.

4. **Interplay with other EU regimes:** explain how sanctions for the same conduct under other instruments (e.g. NIS2, DORA, the DSA or the AI Act) are taken into account.
5. **Transparency of non-fine outcomes:** encourage publication of reasoned summaries of decisions in which no fine is imposed.

4. Detailed comments

4.1 Children and vulnerable data subjects (paragraphs 65 and 92–93; section 5.2.13)

Paragraph 65 rightly identifies processing involving vulnerable data subjects, "in particular, children", as increasing the weight of the nature of the infringement under Article 83(2)(a). This is consistent with Recital 38 GDPR, which recognises that children merit specific protection. However, the Guidelines do not draw the practical consequence of this factor for the minor/non-minor assessment at Step 4, the discussion of categories of data under Article 83(2)(g) (paragraphs 92–93) does not mention children, and none of the practical examples in section 5.2.13 involves children's data.

By way of comparison, the Brazilian dosimetry regulation lists the processing of personal data of children, adolescents or elderly persons among the circumstances that, together with a significant effect on data subjects' rights, qualify an infringement as *serious* (Resolution CD/ANPD No. 4/2023, Article 8(3)(I)(d)). Children's online protection is also an area of fast-moving, convergent regulation in several jurisdictions, including Brazil's Law No. 15.211/2025 (the "ECA Digital"), in force since March 2026, and the protection-of-minors obligations under the Digital Services Act. Organisations increasingly deploy age-assurance and age-estimation systems that themselves involve large-scale processing of minors' data.

RECOMMENDATION

(a) Add to section 5.2.2 or 5.2 a sentence stating that, where an infringement materially affects children, this should weigh heavily against characterising it as minor at Step 4, save in exceptional circumstances. (b) Cross-refer to children's data in paragraphs 92–93. (c) Include in section 5.3.3 an example involving children (for instance, insufficient safeguards in an age-assurance process, or unlawful profiling of minors for advertising), showing how the factor operates in practice.

4.2 Remediation, cooperation and accountability (paragraphs 73–74 and 89–91)

We agree that mere compliance with the duty to cooperate under Article 31 should not be a mitigating factor (paragraph 90), and that measures implemented spontaneously before an investigation begins are more likely to mitigate (paragraph 74). The Guidelines would, however, give stronger and more predictable incentives if they distinguished more clearly between procedural stages, and if they addressed the weight of documented accountability measures (Articles 5(2), 24 and 25) that existed before the infringement.

The Brazilian regulation offers a useful reference point for this logic. It grades the mitigating effect of ceasing an infringement according to the stage at which it occurs (before any preparatory procedure, before the sanctioning procedure, or before the first-instance decision), recognises the implementation of good-practice and governance policies as a distinct mitigating factor, and, like paragraph 90, excludes from mitigation measures that merely comply with an administrative or judicial order (Resolution CD/ANPD No. 4/2023, Article 13 and §1). We do not suggest importing fixed percentages into a methodology that concerns whether, rather than how much, to fine. The stage-based reasoning, however, could usefully inform Steps 4 and 5.

RECOMMENDATION

Clarify in sections 5.2.4 and 5.2.7 how remediation at different stages (before the investigation, before preliminary findings, before the draft decision) is weighed at Steps 4 and 5, and state whether and how pre-existing, demonstrable accountability programmes (for example, DPIAs, records of processing and internal audit) may be considered under Article 83(2)(d) or (k).

4.3 Controllers and processors established outside the EU (paragraph 87)

Paragraph 87 addresses the consideration of previous infringements where the controller or processor is not established in the EU. The Guidelines do not otherwise address the specific position of non-EU respondents covered by Article 3(2), nor the role of the representative designated under Article 27. In practice, the effectiveness and dissuasiveness of a reprimand or an order, as compared with a fine, may depend on whether there is a reachable establishment or representative in the Union. Non-EU organisations also benefit from understanding whether a failure to designate a representative is likely to be treated as minor.

RECOMMENDATION

Add guidance on (a) how the presence or absence of an EU representative bears on the Step 5 assessment of effectiveness, and (b) how infringements of Article 27 itself are to be approached under the methodology, ideally with an example.

4.4 Interplay with other EU regimes

The Guidelines do not refer to other EU instruments that may sanction the same or closely related conduct, such as the NIS2 Directive, DORA, the Digital Services Act or the AI Act. A single security incident or AI deployment can engage the GDPR and one or more of these regimes at once. NIS2 already contains a coordination rule for infringements entailing a personal data breach (Directive (EU) 2022/2555, Article 35). The Guidelines also cite, in footnote 8, case law such as C-117/20 *bpost* and C-524/15 *Menci*, which concerns the cumulation of penalties of a criminal nature.

RECOMMENDATION

Include a short section explaining how penalties already imposed, or proceedings pending, under other EU regimes for the same conduct are taken into account at Step 5 (proportionality) and under Article 83(2)(k), and how supervisory authorities coordinate with the competent authorities under those regimes.

4.5 Transparency of outcomes in which no fine is imposed (paragraphs 12, 115–117 and 119–121)

The Guidelines confirm that authorities may decide to issue a reprimand, or not to exercise any corrective power (paragraphs 116–117 and Example 11). Such outcomes are as important as fines for building a consistent body of practice, yet they are less often visible. Greater visibility would help controllers, including those outside the EU, understand where the line between minor and non-minor infringements is drawn.

RECOMMENDATION

Encourage supervisory authorities to publish reasoned, anonymised where appropriate, summaries of decisions in which a reprimand is issued or no fine is imposed, and consider whether the EDPB could compile representative examples over time.

5. Concluding remarks

The Guidelines are an important step towards a predictable and consistent enforcement culture under the GDPR. The suggestions above aim to make the methodology more protective of children, give clearer incentives for early remediation and accountability, and provide better guidance for the many organisations outside the Union that are subject to the GDPR. We are grateful for the opportunity to contribute and remain available to the EDPB for any clarification.

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This contribution reflects the views of MG Advocacia Digital and does not refer to any specific client matter. References to Brazilian law are provided for comparative purposes only.