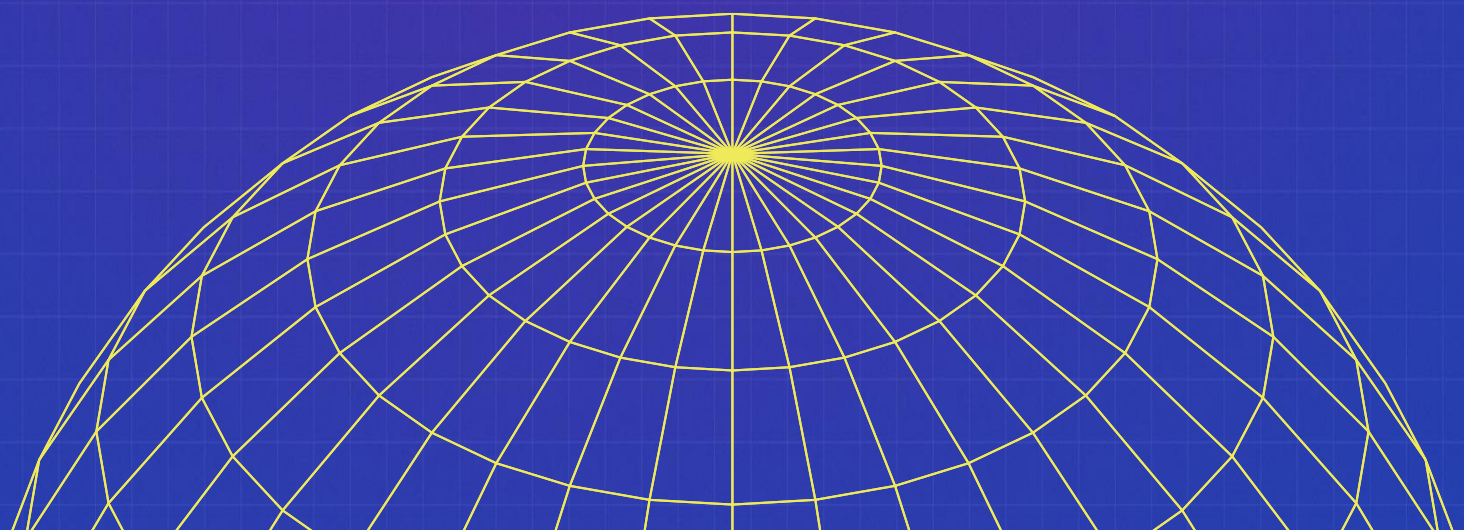
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DOT EUROPE RESPONSE TO CONSULTATION

DOT Europe contribution to the EDPB consultation on Guidelines 04/2026 on administrative fines



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1. Introduction

DOT Europe welcomes the opportunity to comment on the EDPB draft Guidelines 04/2026 on the application of the power to impose administrative fines in relation to other corrective powers under the GDPR (the "draft Guidelines").[1] A shared methodology for deciding whether to impose a fine, and which other corrective measures to use, supports the consistent and predictable enforcement that benefits individuals, supervisory authorities and the organisations that must comply.

The draft Guidelines rightly set out a structured methodology, treat culpability as a distinct precondition for a fine and recognise that a reprimand, or no corrective measure at all, can be the right response in appropriate cases. In several places, however, they move from case-by-case discretion towards presumptions: a "strong presumption" to fine, a near-automatic finding of negligence and a limited role for mitigating factors. Since fines are punitive in nature, as the draft Guidelines acknowledge, these points matter for legal certainty and procedural fairness.

2. Points we support

DOT Europe particularly welcomes the following elements of the draft Guidelines:

- **Structured methodology and culpability (paras 9 and 47 - 48).** The five-step methodology, and the confirmation that a fine requires an intentional or negligent infringement.
- **Punitive nature of fines (paras 17 - 18 and footnote 8).** The recognition that fines have a punitive function and meet the Engel criteria.
- **Warnings and intended processing (paras 22 - 23 and 34).** The confirmation that a fine cannot accompany a warning, or a limitation concerning future processing, for the same conduct.
- **Reprimands (paras 25 - 26).** The recognition that a reprimand may replace a fine for minor infringements, that the cases mentioned in Recital 148 are not exhaustive, and that a reprimand may be used where a fine would be a disproportionate burden for a legal person.

[1] EDPB, Guidelines 04/2026 on the application of the power to impose administrative fines in relation to other corrective powers under the GDPR, version 1.0, adopted on 17 September 2026 for public consultation.

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- **Refraining from corrective measures (paras 116 - 117 and 121; Examples 11 - 13).** The confirmation that no corrective measure may be needed where an infringement has been promptly brought to an end and will not recur.[2]
- **Least onerous measure and no double punishment (paras 20, 100 and 113).** The statements that not all combinations of measures are appropriate, that the least onerous of several equally appropriate penalties should be chosen, and that the same non-compliant behaviour cannot be punished twice.

3. Overarching principle: an individual and foreseeable assessment

Article 83(2) GDPR requires fines to be imposed "depending on the circumstances of each individual case", and the draft Guidelines confirm that the imposition of a fine is at the discretion of the supervisory authority (para 9). Because fines are punitive, the decision to impose one must also respect the guarantees of the Charter, including the presumption of innocence, the principle of legality and the proportionality of penalties.[3]

We therefore invite the EDPB to apply three principles throughout the final Guidelines:

- **Individual assessment, not presumptions.** Each step should remain a genuine assessment of the facts, without presumptions that decide the outcome in advance or shift the burden onto the controller.
- **The least onerous effective response.** The choice of measures should consider their combined effect. A fine should be imposed only where, together with any other measures, it is necessary to achieve compliance and deterrence (para 113).
- **Foreseeability and reviewability.** Culpability should be assessed against the law and the guidance as they stood when the conduct took place, and the reasons given should allow the addressee to understand the decision and a court to review it.

4. Specific concerns and recommendations

4.1 The "strong presumption" to fine and the role of reprimands

- **"Strong presumption" (para 57; section 5.3.3).** The draft Guidelines state a "strong presumption" to fine any infringement that is not minor, and section 5.3.3 provides that a fine "should be imposed" in that case. This sits uneasily with the discretion confirmed in para 9 and with the case-by-case assessment required by Article 83(1). It is also asymmetric: for minor infringements, the draft Guidelines speak only of a “general rule” against a fine (para 1115), and para 119 itself describes fining a non-minor infringement as a “general rule” that leaves room for other measures. We recommend removing the presumption, or, at a minimum, replacing it with the “general rule” wording of para 119, so that Step 5 remains a genuine assessment in every case, with the finding at Step 4 an

[2]CJEU, C-768/21, *Land Hessen*, 26 September 2024, ECLI:EU:C:2024:785, paras 41 - 43.

[3]Draft Guidelines, para 18 and footnote 8; Articles 48 and 49 of the Charter of Fundamental Rights of the European Union (the "Charter").

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important but not decisive factor. This is even more relevant as the draft seems to suggest that the processing by large companies can never be minor (see paras. 66-68).

- **Criteria for minor infringements (paras 56, 66 - 68 and 106 - 107).** As drafted, hardly any infringement by a large online service could qualify as minor, irrespective of its actual seriousness, which is difficult to reconcile with the individual assessment that Article 83(2) GDPR requires. The draft Guidelines give only an open-ended example of a minor infringement (para 56), while the scope and centrality of the processing, the number of data subjects and economic gain all weigh towards a fine (paras 66 - 68 and 106 - 107). The final Guidelines should therefore set out operable criteria for minor infringements that also work for large-scale services (see also the point on financial benefit in section 4.5)

- **Reprimands beyond minor infringements (paras 26 and 120; Example 14).** Para 26 rightly recognises that the cases in Recital 148 are not exhaustive. The final Guidelines should build on this with examples of infringements that are not minor but for which a reprimand, where appropriate combined with an order, is sufficient: for instance where negligence is low, where no damage was caused to data subjects, where the infringement arose from genuine legal uncertainty (as in Example 14) or where it has been fully remedied.

4.2 Combining fines with other corrective measures

- **Compliance orders (paras 27 - 30).** Article 58(2)(d) GDPR provides for orders to bring processing into compliance "where appropriate, in a specified manner and within a specified period". The final Guidelines should state that an order must identify the required steps and deadline precisely enough for the addressee to comply and for compliance to be verified. Building on para 30, they should also confirm that an order is unnecessary where the controller has demonstrably ended or changed the processing, or where there is no reason to doubt that it will act on the authority's findings.
- **Limitations and bans (paras 31 - 34).** Para 32 describes a temporary limitation as an interim measure pending clarification of the facts. The final Guidelines should confirm that because a temporary limitation or ban is an interim measure prior to a final finding of infringement, it should not be ordered in a final decision or alongside an order to bring processing into compliance under Article 58(2)(d). Building on para 33, they should also state that a definitive ban is a measure of last resort, reserved for processing that cannot be brought into compliance through other measures.
- **Combined effect of the measures (paras 17, 20 and 25).** Reprimands and orders also have corrective and deterrent effects. When deciding whether a fine is needed, the authority should take into account the other measures imposed, explain why they would not suffice on their own and, where a fine is imposed, how they affect the amount needed.

4.3 Liability for persons acting on behalf of the controller (paras 41 - 43)

Para 42 correctly reflects the case law: a controller is not liable for processing that a processor carries out for its own purposes or outside the framework set by the controller.[4] Para 43 then states that the controller can still be liable, for example under Article 32 GDPR. The final Guidelines should clarify that this concerns a distinct infringement of the controller's own obligations, which

[4]CJEU, C-683/21, *Nacionalinis visuomenės sveikatos centras*, 5 December 2023, ECLI:EU:C:2023:949, para 85.

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must be established separately, including as regards culpability, and recall that unauthorised access or disclosure by a third party is not sufficient, in itself, to show that the controller's measures were inappropriate.[5] Otherwise, para 43 risks reintroducing through Article 32 the liability the CJEU has excluded.

The same reasoning should apply to employees and other persons acting within the controller's organisation. The CJEU attributes to a legal person infringement committed by persons acting in the course of its business and on its behalf. Para 41 goes further, attributing their conduct to the controller unless they acted solely for their own private purposes or for those of a third party, an exception that rests on earlier EDPB guidance rather than on CJEU case law. Conduct outside a person's tasks, or in breach of clear and enforced instructions, is not conduct on the controller's behalf and should generally not be attributed to it. Any liability under Article 32 GDPR for such conduct ("rogue actions") should then be assessed as a separate infringement, as set out above.

4.4 Culpability: intent and negligence (paras 47 - 52)

- **EDPB Guidelines and avoidable errors (para 50).** Para 50 states that "where EDPB Guidelines exist, an error is always to be considered avoidable and therefore at least negligent". Our concern is the categorical rule, not the weight of published guidance. EDPB Guidelines are non-binding instruments issued “to encourage consistent application of the GDPR” (para 5), and a mere reference to them cannot replace reasoning in a specific case (para 12). The categorical rule is supported only by reference to the EDPB’s own binding decisions (footnote 43 on the draft Guidelines), not by case law of the CJEU. This is even more relevant as the EDPB guidance is not always simple or clearcut, and often still leaves room for different interpretations. The rule should be limited to final guidance, in force at the time of the conduct, that squarely addressed the issue, and the authority should still consider whether the organisation took reasonable steps to assess it.
- **Later guidance and novel interpretations.** In line with the principle of legality of penalties, a controller should not be considered negligent on the basis of guidance or an interpretation adopted after the conduct in question, unless the authority shows that the standard was already sufficiently clear and foreseeable at that time.[6] Likewise, where an authority has accepted a given interpretation, or has been informed of a practice without raising concerns, the controller’s legitimate expectations should be taken into account when assessing culpability.
- **Legal uncertainty and good-faith assessments (para 50 and Example 4).** Para 50, citing Advocate General Emiliou treats "mere doubts" about legality as potentially gross negligence, and Example 4 suggests that legal advice departing from prevailing views, or from an authority's known position, cannot exculpate. In Example 4(a), the fact that the opinion referred to opposing views is itself treated as showing that the company was aware of possible non-compliance. Read literally, this would make thorough legal advice evidence of negligence and discourage careful assessment. We agree that undocumented advice, or advice relied on blindly, should not exculpate (Example 4(c)). The final Guidelines should

[5]CJEU, C-340/21, *Natsionalna agentsia za prihodite*, 14 December 2023, ECLI:EU:C:2023:986, operative part, point 1.

[6]Article 49(1) of the Charter.

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distinguish unresolved legal uncertainty from conscious risk-taking, give weight to a documented, good-faith assessment that engages with contrary views, and recognise that departing from one authority's known position is not in itself negligent where the positions of supervisory authorities genuinely diverge, particularly under the one-stop-shop.

- **Negligence must be established (paras 48 - 49).** Since culpability is a condition for a fine, negligence does not follow automatically from a finding that an infringement was not intentional. Describing the threshold, by reference to an Advocate General's opinion, as so low that it is hard to envisage it not being met (para 49) risks turning Step 3 into a formality. The authority should establish negligence for each infringement, by reference to the facts that should have alerted the controller at the time, with the burden of proof resting on it.[7]

4.5 Assessment of the Article 83(2) factors (section 5.2)

- **Degree of culpability (paras 71 - 72).** The negligence needed to meet the precondition at Step 3 should not, in itself, count again against the controller at Step 4. Building on para 72 and Example 8, the final Guidelines should state that a low degree of negligence weighs in favour of finding an infringement minor, and that only features going beyond that baseline, identified in the decision, can weigh against it. For example, given the increasing number of cyber-attacks, negligence should not be presumed in the case of data breaches. Compliance with breach-notification obligations should also not place a controller in a worse enforcement position.
- **Measures taken by the controller (paras 73 - 78).** Article 83(2)(d) expressly links the degree of responsibility to the measures implemented under Articles 25 and 32 GDPR. Demonstrably effective measures should therefore be able to count even where they do not go beyond the legal minimum, and not only "in exceptional circumstances" (para 77). Para 74 rightly gives weight to timeliness, but measures taken after an investigation has become knownshould still be credited) in proportion to effectiveness; giving them little weight would discourage improvements while an inquiry is ongoing.
- **Cooperation, notification and compliance record (paras 88 - 91 and 95 - 96).** Prompt and constructive cooperation, such as proposing compliance improvements or offering to discuss them with the authority before implementation, should be able to carry meaningful mitigating weight under Article 83(2)(f) And not only in the exceptional cases contemplated by para 91. Voluntary notification, which para 96 rightly recognises may be mitigating under Article 83(2)(h), should be given meaningful weight in practice, as should compliance with measures previously ordered (Article 83(2)(i)). Likewise, while the mere absence of previous infringements may not in itself be mitigating (para 88), a sustained and demonstrable record of compliance supported by an effective compliance programme, should be able to weigh in favour of a reprimand under Article 83(2)(d) or (k).
- **Previous infringements and aggregation of cases (paras 68 and 79 - 87; Examples 5 and 10).** We welcome the recognition that the weight of previous infringements, including those on a different subject matter or established by another authority (paras 83 and 87), depends on their recency, similarity and the status of the procedure (paras 81, 84 and 86). The final Guidelines should align para 80, which suggests that any type of infringement might be relevant, with para 85, which limits different-subject infringements to those committed in

[7] CJEU, C-807/21, *Deutsche Wohnen*, 5 December 2023, ECLI:EU:C:2023:950, paras 75 - 76; Article 48 of the Charter.

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the same manner, and confirm that an infringement still under review or appeal cannot by itself make a new infringement non-minor. They should also set a defined and reasonable look-back period, rather than allowing previous infringements to be taken into account without any fixed limitation (para 82). When aggregating several minor cases, authorities should assess the number of people affected against the relevant population, as para 68 already allows, and distinguish systemic non-compliance from high absolute numbers in large-scale services.

- **Financial benefit (paras 106 - 107).** Para 106 treats profit from an infringement as a strong indication that it is not minor. For digital services, most processing supports a commercial activity. The final Guidelines should confirm, consistent with the wording of paras 106 and 107, that only profit obtained or losses avoided as a result of the infringement itself are relevant, and that the authority must identify that causal link rather than infer it from the commercial nature of the service.
- **No double counting (para 100).** The principle stated in para 100 should apply generally. The same conduct or circumstance should not weigh against the controller more than once, whether across different Article 83(2) factors, such as the categories of data affected under both points (a) and (g), or across separate findings under different provisions that rest on the same conduct.[8]

4.6 Reasoning and interplay with the Calculation Guidelines

The draft Guidelines note that the Article 83(2) factors are used both when deciding whether to impose a fine and when calculating it (para 10), and refer to the Calculation Guidelines for the latter (para 122).[9] We invite the EDPB to address the following issues arising at this interface, in the final Guidelines or in a targeted update of the Calculation Guidelines:

- **Reasons and the right to be heard (paras 3 and 12).** The decision should explain, for each infringement, how culpability was established, why the chosen corrective measure, including any fine, was imposedand how each relevant Article 83(2) factor was assessed Para 3 contemplates that the intended corrective measures, including whether a fine is envisaged, and the reasoning for them are set out in the summary of key issues and the preliminary findings "to the extent appropriate". The final Guidelines should make this the norm, so that the controller can be effectively heard on the measures and factors relied upon, in line with Articles 41, 47 and 48 of the Charter and applicable national procedural rules (Article 83(8) GDPR). This is all the more important as the GDPR Procedural Regulation (Regulation (EU) 2025/2518), which will apply from 2 April 2027, aims to accelerate cross-border proceedings. Shorter procedures leave less room to correct an inadequately reasoned assessment at a later stage, so the preliminary findings will often be the controller's main opportunity to respond to the envisaged fine and the factors on which it is based
- **Transparency of the amount.** Decisions should state the starting point for each fine, the direction and approximate weight of each aggravating and mitigating factor and, where

[8] Article 49(3) of the Charter; see also Article 50 of the Charter as regards separate proceedings..

[9] EDPB, Guidelines 04/2022 on the calculation of administrative fines under the GDPR, version 2.1, adopted on 24 May 2023.

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amounts change between draft decisions, the effect of each change (such as new findings, the removal of a mitigating factor or updated turnover). An amount above the lower end of a range should be specifically justified.

- **Same or linked processing operations (Article 83(3) GDPR).** To avoid cumulative penalties for linked infringements, authorities should identify the gravest infringement and set the total amount by reference to it, rather than adding up separate fines limited only by the statutory maximum.
- **Group turnover.** The CJEU distinguishes the maximum amount from the actual amount, which must be effective, proportionate and dissuasive in each individual case.[10] Where group turnover influences the actual amount, the decision should set out the factual basis in relation to the processing at issue, hear the parent company where the presumption of decisive influence is relied on, and disclose the effect on the amount.
- **Reference year and length of proceedings.** The final Guidelines should clarify the "preceding financial year" under Article 83(4) to (6) GDPR, so that turnover reflects the undertaking's situation at the time of the infringement, for example the year preceding the opening of the inquiry. Where a later figure is used, its effect should be explained, and the length of the procedure should not by itself increase the fine (Article 41 of the Charter).

5. Conclusion

DOT Europe supports the EDPB's objective of harmonising how supervisory authorities decide whether to impose a fine and which corrective measures to use. To make the Guidelines workable and robust in practice, we invite the EDPB to focus on three priorities:

1. preserve an individual assessment at every step, by removing the "strong presumption" to fine or at least aligning it with the “general rule” in para 119 and giving reprimands and other corrective measures their full role;
2. assess culpability fairly and foreseeably, by limiting the categorical effect of EDPB Guidelines, recognising good-faith legal assessments and requiring negligence to be established in each case;
3. give proper weight to all Article 83(2) factors, including effective compliance measures and cooperation, avoid double counting, and ensure transparent reasoning, including at the interface with the Calculation Guidelines.

These changes would encourage cooperation and early remediation, to the benefit of data subjects, and make enforcement more predictable across the EU. DOT Europe and its members remain available to share their practical experience and to continue this dialogue.

[10] CJEU, C-383/23, *ILVA*, 13 February 2025, ECLI:EU:C:2025:84.

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