FEDMA
Federation of European Data and Marketing

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Position Paper

EDPB Guidelines 04/2026 on the application of the power to impose administrative fines in relation to other corrective powers

Executive summary

FEDMA welcomes the EDPB Guidelines 04/2026 on the application of the power to impose administrative fines in relation to other corrective powers under the GDPR as well as their objective of promoting a consistent approach to GDPR enforcement across the EU. In particular, FEDMA welcomes the recognition that supervisory authorities must determine the appropriate corrective measure in light of the circumstances of each individual case and the principles of effectiveness, proportionality and dissuasiveness.

Building on this, FEDMA considers that the Guidelines should further ensure that administrative fines do not become a quasi-automatic response to infringements. Effective enforcement should focus on achieving compliance and protecting data subjects. For FEDMA's members, which represent the data and marketing sector across Europe, predictable and proportionate enforcement is essential to encourage investment in compliance while ensuring a high level of personal data protection.

FEDMA therefore encourages the EDPB to reinforce the Guidelines in five areas:

1. ensuring that proportionality remains a meaningful safeguard in each individual case;
2. prioritising the restoration of compliance when selecting corrective measures;
3. preserving an individual assessment of the impact and circumstances of each infringement;
4. distinguishing good-faith legal interpretations from negligent non-compliance; and
5. requiring clear reasoning so that fines can be meaningfully scrutinised.

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1. Ensure that proportionality remains a meaningful safeguard in each individual case

As FEDMA strongly supports the Guidelines' recognition that administrative fines must be proportionate to the circumstances of the individual infringement. In particular, paragraph 113 provides that, where several equally appropriate penalties are available, the supervisory authority should impose the least onerous one, and that the effects of the penalty on the person concerned must be proportionate to the aims pursued. The Guidelines also recognise that, even where an infringement is not considered minor, a reprimand may be appropriate where a fine would constitute a disproportionate burden on a legal person (paragraph 120).

FEDMA recommends that this principle be reflected more consistently throughout the methodology. In particular, the conclusion in paragraph 57 that there is a "*strong presumption*" to impose an administrative fine where an infringement is not considered minor, risks making the choice of a fine appear quasi-automatic. This should not detract from the individual assessment required under Article 83 GDPR and the Guidelines' own recognition that supervisory authorities retain discretion to select another corrective measure (paragraph 119).

As a result, FEDMA also recommends clarifying that the classification of an infringement as non-minor does not, in itself, determine that a fine is the appropriate corrective measure. Supervisory authorities should assess whether a fine is necessary and proportionate in the individual circumstances and whether a less onerous corrective measure could achieve the objectives of the GDPR equally effectively.

Moreover, paragraph 96 should clarify that voluntary notification, effective cooperation and prompt remediation should be relevant not only as mitigating factors in determining the amount of a fine, but also to the prior assessment of whether a fine is necessary and proportionate at all. Giving appropriate weight to such conduct would incentivise proactive compliance and constructive engagement with supervisory authorities.[1]

2. Prioritise restoring compliance when selecting corrective measures

Beyond the question of whether a fine is appropriate at all, the Guidelines should also address the order in which supervisory authorities consider their corrective powers. The objective of supervisory action should first and foremost be to achieve effective compliance and protect data subjects. FEDMA therefore welcomes the recognition in paragraphs 15, 17 and 27-30 that supervisory authorities should consider the respective purposes of the different corrective powers when determining which measures are appropriate, necessary and proportionate.

[1] By analogy, leniency programmes in EU competition law illustrate that incentives for voluntary disclosure and cooperation can strengthen enforcement without undermining its deterrent effect: the risk of enforcement remains, while companies have an additional incentive to identify and bring infringements to the attention of the competent authority. While the GDPR does not provide for an equivalent leniency regime, a similar rationale supports giving meaningful weight to proactive notification, cooperation and remediation when assessing whether an administrative fine is necessary, proportionate and effective.

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However, where an infringement can be effectively remedied by requiring a company to adjust its practices, supervisory authorities should give priority to the least onerous corrective measure capable of effectively achieving compliance before determining whether an administrative fine is also necessary. This is particularly relevant where an infringement results from a technical configuration, implementation issue or interpretation of the applicable requirements that can be promptly corrected. The GDPR itself places administrative fines and corrective measures on an equal footing,[2] and paragraph 18 should therefore better reflect this balance rather than characterising administrative fines as a "central element in the enforcement regime introduced by the GDPR".

FEDMA recommends further clarifying this approach in the Guidelines. Supervisory authorities should first consider whether effective compliance can be achieved through corrective measures. Deterrence should not be treated as the default objective of supervisory action; rather, where effective compliance can be achieved through less onerous measures, supervisory authorities should assess separately whether the additional dissuasive effect of an administrative fine is necessary, effective and proportionate in the individual circumstances. This would also be consistent with the least onerous measure principle in paragraph 113 referred to above.

Furthermore, FEDMA recommends reconsidering the approach to economic gain in paragraph 106. While profit obtained or losses avoided as a result of an infringement may be relevant, the statement that such economic gain cannot be compensated through measures without a direct pecuniary component appears to go beyond the role assigned to economic benefit under Article 83(2)(k) GDPR. Article 83(2)(k) identifies financial benefits gained, or losses avoided, as an aggravating or mitigating factor to be considered in the individual case. It does not establish a principle that such benefits must be offset through a corresponding administrative fine paid to a data protection authority. Moreover, other corrective measures may in practice neutralise any economic benefit derived from an infringement. An order to bring processing into compliance, to suspend or discontinue a processing activity, or to delete data removes the source of that benefit, and often entails significant costs, such as investment in alternative compliance tools or business models. These effects should therefore be taken into account when assessing whether an administrative fine is also necessary, effective and proportionate.

3. Preserve an individual assessment of the impact and circumstances of an infringement

FEDMA particularly welcomes Example 7 in paragraph 5.2.13, concerning an SME's use of a third-party tracking pixel. The infringement involved the unintentional transfer of hashed contact details of approximately 50,000 users over a two-year period because a technical function within a social-media provider's developer tool took precedence over settings configured in the company's Customer Data Platform. Nevertheless, the infringement was considered minor after

[2] Article 58(2)(i) expressly provides that a fine may be imposed "in addition to, or instead of" other corrective measures, depending on the circumstances of each individual case.

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an assessment of the circumstances, including that the transferred data was hashed and unusable, did not include sensitive data, safeguards had limited the scope of collection and there had been no uncontrolled public disclosure.

This example illustrates an important principle that should be made more explicit throughout the Guidelines: the scale of processing should not, on its own, determine the seriousness of an infringement or whether a fine should be imposed. Paragraphs 62-70 appropriately envisage a broader assessment encompassing the nature and scope of the processing, the number of data subjects concerned, and the level of damage suffered.

Such a broader assessment is particularly important where an unintended technical issue affects a large number of individuals but results in limited risk or harm. The Guidelines should allow such cases to be distinguished from more serious infringements involving intentional conduct, sensitive data or significant harm. In such cases, a fine should not be presumed to be the appropriate response. Intentional conduct, repeated infringements, the processing of sensitive data or significant harm to data subjects are the circumstances that may typically justify an administrative fine.

FEDMA therefore recommends that the overall assessment give appropriate weight to the actual circumstances and impact of the infringement, the degree of culpability, safeguards already implemented, and timely and effective remedial measures.

The same contextual approach should be reflected in paragraph 76. FEDMA recommends that the Guidelines recognise more positively that pseudonymisation and other privacy-enhancing technologies can constitute meaningful mitigating factors where they effectively reduce the residual risks to data subjects. Clear recognition of such safeguards in enforcement would also incentivise companies to invest in privacy-enhancing technologies that enhance personal data protection in practice.

Similarly, FEDMA recommends reconsidering the example in paragraph 88. The number of complaints should not, in itself, determine whether an infringement is recurring or systemic. The assessment should instead consider whether the complaints substantively demonstrate a recurring deficiency in the processing concerned and an impact on the protection of personal data.

FEDMA also recommends clarifying paragraphs 92-93 to ensure that the assessment reflects the nature, context (e.g. granularity of the data) and potential consequences of the data concerned, rather than relying on the category or volume of data in isolation. For example, precise location data revealing an individual's movements may raise very different risks from less granular location data indicating that a consumer is located within a broad geographic area, such as a region, for the purpose of selecting locally relevant advertising. Similarly, the disclosure of a single highly sensitive data point may have considerably greater consequences for an individual than the processing of a larger volume of comparatively low-risk data that is less readily linked to an identified individual. The amount of data should therefore remain one relevant factor, but should be assessed in conjunction with its sensitivity, identifiability, context and potential impact on data subjects. This contextual approach would also be consistent with Example 7,

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where the Guidelines recognise that even a relatively large dataset may give rise to limited risks depending on the nature of the data and the safeguards in place.

4. Distinguish good-faith legal interpretations from negligent non-compliance

FEDMA welcomes the clarification in paragraphs 47-50 that an administrative fine may only be imposed where an infringement was committed intentionally or negligently. However, the Guidelines should better address situations where the applicable GDPR provisions leave room for interpretation or where a specific use case has not yet been addressed by the EDPB or supervisory authority guidance. In such cases, a supervisory authority reaching a different interpretation should not, in itself, be sufficient to establish negligence.

While legal uncertainty or reliance on legal advice cannot automatically exclude negligence, the assessment should take into account whether the company exercised appropriate due diligence, including the clarity of the applicable rules, the guidance available at the time, and the reasonable steps taken to ensure compliance. This is consistent with AG Kokott's Opinion in Schenker, which links an excusable error of law to the reasonable steps taken to avoid the infringement.[3] It is also consistent with the Court of Justice's judgment in Deutsche Wohnen, which, drawing on Schenker, held that a controller acts negligently where it could not have been unaware of the infringing nature of its conduct.[4]

5. Require clear reasoning so that fines can be meaningfully scrutinised

Proportionality can only operate effectively where the reasons for imposing a fine, and for determining its amount, are sufficiently clear. Greater transparency is therefore needed to enable companies to understand, and where appropriate challenge, whether a fine is proportionate. It would also support consistent enforcement of the GDPR across the EU (recognised in paragraph 7), by allowing other supervisory authorities to understand why a fine was considered appropriate and how its amount relates to the circumstances of the infringement. FEDMA welcomes paragraph 12, which stresses that supervisory authorities must provide sufficient reasons for their decisions and that a mere reference to the Guidelines cannot replace the reasoning required in an individual case.

[3] See Opinion of AG Kokott in Case C-681/11, paras. 57-70. AG Kokott recognises that, where undertakings are required to assess the legality of their own conduct, good-faith reliance on incorrect legal advice should have an impact on the assessment of fault (para. 58), while emphasising that such advice cannot provide an automatic exemption from liability (para. 60). The Opinion identifies factors relevant to due diligence, including the completeness of the factual information provided, consideration of relevant case law and regulatory guidance, and the plausibility of the advice obtained (paras. 63-70). This supports an assessment of negligence that weighs all reasonable steps taken by a company to understand and comply with the law, rather than treating a subsequently rejected legal interpretation as sufficient, in itself, to establish negligence.

[4] Judgment of 5 December 2023, Deutsche Wohnen, C-807/21, EU:C:2023:950, para. 76.

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Given the potentially significant consequences of administrative fines, this reasoning should explain not only why an infringement has been established, but also why a fine is necessary and proportionate compared with other corrective measures available under Article 58(2) GDPR. While paragraph 109 requires supervisory authorities to take due account of mitigating and aggravating factors when calculating a fine, the Guidelines should go further by requiring sufficiently clear reasoning on how the relevant factors affected the amount ultimately imposed. This would reinforce the individualised assessment envisaged in paragraphs 108-113.

FEDMA therefore recommends that the Guidelines require supervisory authorities to provide sufficiently clear and individualised reasoning to explain both the choice and the amount of an administrative fine, including why less onerous corrective measures would not be equally effective. This should enable the company, and ultimately a reviewing court, to meaningfully assess whether the fine imposed is proportionate to the infringement, while also supporting a more transparent and consistent application of the GDPR across supervisory authorities.

Conclusion

FEDMA supports the EDPB's objective of ensuring effective and consistent GDPR enforcement across the EU. Consistency should be achieved through the coherent application of common principles, while preserving the individual assessment required to determine the most appropriate response in each case.

The final Guidelines should therefore support an enforcement approach centred on effective compliance and the protection of data subjects, while ensuring that any administrative fine is necessary, proportionate and appropriately reasoned. Giving greater weight to corrective action, effective safeguards, proactive cooperation, genuine legal uncertainty and the actual impact of an infringement would contribute to this objective.

Such an approach would provide greater legal certainty for companies, incentivise effective investment in compliance and privacy-enhancing measures, and ultimately contribute to a consistently high level of data protection across the EU.

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