WAYSTONE

Response to EDPB Public Consultation

GUIDELINES 04/2026

On the application of the power to impose administrative fines in relation to other corrective powers under the GDPR

November 2026

Waystone's practitioner perspective on clarity, consistency and predictability in GDPR enforcement.

Response to the EDPB's Public Consultation on Guidelines 04/2026 on the application of the power to impose administrative fines in relation to other corrective powers under the GDPR

Waystone welcomes the EDPB's efforts to provide a structured and transparent framework for determining when administrative fines should be imposed in conjunction with, or instead of, other corrective powers. We particularly welcome the practical examples in the Guidelines and the detailed treatment of aggravating and mitigating factors.

Our observations below are intended to build on that framework by identifying several areas where additional clarification or examples could further improve predictability and consistency in its practical application.

1) Practical Example Where Negligence Is Not Established

Paragraph 49 states that, the threshold for the element of negligence is so low that it is difficult to envisage situations where the element is not satisfied.

While we acknowledge that the threshold for negligence is low, and that this has been recognised in the relevant case law, we invite the EDPB to include a practical example illustrating circumstances in which negligence would not be established.

Recommendation: Examples 2, 3 and 4 illustrate circumstances in which conduct is found to be negligent, while the Guidelines acknowledge that an unavoidable error in law may arise exceptionally. A counter-example illustrating circumstances in which the threshold for negligence is not met would provide useful practical guidance for controllers and processors and help clarify the boundary between an unavoidable error and negligent conduct.

2) EDPB Guidance and the Assessment of Negligence

Paragraph 50 states that, where EDPB Guidelines exist, an error should always be considered avoidable and therefore at least negligent. However, we consider the statement that an error is "always" avoidable where EDPB Guidelines exist to be too categorical. The existence of EDPB guidance does not necessarily mean that the particular legal or factual issue before the controller or processor is unambiguously resolved by that guidance. They may not directly address the processing concerned, apply to complex or developing facts, or have not been affected by subsequent legal or technological developments.

Recommendation: We therefore recommend recognising that directly applicable and sufficiently clear EDPB guidance will ordinarily indicate that an error could have been avoided through appropriate due diligence. Nevertheless, the Supervisory Authority should take into account whether the relevant guidance clearly addressed the factual and legal issue in question where the finding of negligence is based on the existence of such guidance.

3) Practical Example of a Fine for a Minor Infringement

Paragraph 115 states that, even where an established infringement is considered minor, the EDPB does not exclude the possibility that a Supervisory Authority may exercise its discretion to impose an administrative fine, notwithstanding the general position that a reprimand may be issued instead of a fine in the case of a minor infringement.

Similarly, paragraph 119 states that where an infringement is not considered minor, the general rule is that an administrative fine will be imposed. However, even where an infringement is not considered minor, the Supervisory Authority retains discretion to impose another corrective measure under Article 58(2) GDPR, in addition to or instead of an administrative fine.

While an example is provided under Section 5.3.3, Step 5(b), illustrating circumstances in which an infringement that is not considered minor may nevertheless not result in a fine, there is currently no corresponding example illustrating the circumstances in which a fine may be imposed despite an infringement being considered minor.

Recommendation: Providing examples addressing both sides of the exercise of discretion would offer greater clarity as to the circumstances that may justify departing from the general approach and would avoid creating the impression that the discretion not to fine where an infringement is not considered minor is broader or more readily exercised than the discretion to fine in the case of a minor infringement. We therefore invite the EDPB to include a corresponding example illustrating the circumstances in which a minor infringement may nevertheless warrant an administrative fine.

4) Aggravating and Mitigating Factors: Clarifying the "Above and Beyond" Threshold

We agree with the general principle in paragraphs 77 and 91 that merely complying with obligations imposed by the GDPR should not, in itself, constitute a mitigating factor. However, we consider that further clarification would be beneficial as to how Supervisory Authorities should distinguish between measures required to comply with the GDPR and measures which go "above and beyond" those requirements.

This distinction may be particularly difficult in the context of Articles 24, 25 and 32 GDPR, which establish risk-based and context-dependent obligations rather than prescribing an exhaustive set of measures that controllers and processors must implement. Determining the point at which appropriate measures become measures that go "above and beyond" the controller's or processor's obligations may therefore be difficult in practice.

Recommendation: We therefore invite the EDPB to provide further guidance, preferably supported by practical examples, illustrating the distinction between (i) conduct that satisfies the applicable legal obligation, (ii) conduct that falls short of that obligation and may therefore constitute an aggravating factor, and (iii) conduct that exceeds the applicable obligation to such an extent that it may properly be regarded as a mitigating factor. Such clarification would promote greater consistency and predictability in the assessment of relevant aggravating and mitigating factors under Article 83(2) GDPR.

5) Consistency in the Application of Supervisory Authority Discretion

We welcome the structured methodology introduced by the Guidelines and recognise that Supervisory Authorities must retain sufficient discretion to take account of the circumstances of each individual case. However, a common methodology may not necessarily result in consistent outcomes where key concepts and thresholds remain qualitative. Materially comparable cases could, for example, be assessed differently depending on the weight attributed to particular aggravating or mitigating factors, the assessment of whether an infringement is "minor", or the circumstances considered sufficient to justify a fine in addition to, or instead of, another corrective measure.

Recommendation: We therefore invite the EDPB to consider providing further guidance on the interaction and relative weighting of the Article 83(2) factors, supported where possible by comparative examples showing how materially similar circumstances would ordinarily be assessed. This could promote greater consistency while preserving the case-specific assessment required by Article 83 GDPR.

We hope that the observations above will assist in further clarifying the Guidelines and promoting greater consistency and predictability in their practical application across Member States.

Waystone thanks the EDPB for the opportunity to contribute to this consultation and looks forward to the finalisation of the Guidelines.