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To the
European Data Protection Board
Rue Wiertz 60
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BELGIUM

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

Dear Members of the EDPB,
Dear EDPB Secretariat,

As an organisation dealing with GDPR enforcement, we welcome the EDPB's attempt to harmonize the use of fines and other corrective measures under the GDPR. We also appreciate the opportunity to submit comments on the draft guidelines 04/2026 (hereinafter "*the Guidelines*").

Many aspects of the Guidelines bring appreciated clarification and clear thresholds. We generally support the approach of the EDPB. However, we also identified certain risks and concerns for which we suggest review.

Evidence-based enforcement: studies with DPOs show that fines and publication of findings are the key drivers for pro-active compliance

noyb invites the EDPB to read this reply in light of a *noyb* study that showed that 67.4% of DPOs consider that fines against their companies (special prevention) and other companies would influence controllers' decision-makers to opt for more compliance. 61.5% of the respondents considered that fines against other companies (general prevention) would also influence the management. These numbers make clear that fines have a deterrent and dissuasive effect both for controllers that are fined but for the whole market.

The other action that scores high is the publication of such findings, as controllers care about their reputation (special prevention) and the publication of decision about other controllers also leads to a realization that consequences can happen (general prevention).

We note that decisions that merely include findings of non-compliance (such as reprimands), scored the lowest when DPOs are asked which measures would lead to compliance.

Overall, the study shows that the approach e.g. by the Spanish SA (regular fines and published decisions) seems to be the most effective approach.

The following follows the order of the draft guidelines.

1. Introduction – General considerations on the different measures

The EDPB starts by reminding that the imposition of fines is "*at the discretion of the supervisory authority*" and then provides for a 7 steps assessment in order to determine if a fine is justified. It also recalls the distinction between preventive and punitive measure.

noyb wants to highlight that the discretion of SAs is not unfettered, also not in the imposition of corrective powers – as obvious from the wording of Article 83(1) GDPR ("*shall ensure that the imposition of administrative fines*"). We also recommend to underline the high relevance of preventive powers, central in the fulfilment of the SAs' task to enforce the GDPR. The CJEU has repeatedly highlighted the duty of SAs to act.

2. Incompatibility of warnings with other corrective powers

In section 3.3, the EDPB considers that imposing a warning "*excludes the application of all other corrective measures, including administrative fines*" (§22). Such exclusion is not directly stemming from the GDPR text and may raise confusion.

It makes sense that warnings and administrative fines shall not be combined, given that fines shall be imposed when the GDPR is infringed (recital 148). However, the EDPB goes further by making warnings incompatible with all other corrective measure. This statement undermines the effectiveness of other corrective measure: for many intended processing operations, a warning could be coupled with an order to comply with a data subject's exercise of right under Article 58(2)(c), a ban under Article 58(2)(f) or with a suspension of data transfers under Article 58(2)(j). We see no logical or legal reason that an SA could not ban an immanent unlawful processing activity. The damage must not be done for an SA to act under Article 58(2) GDPR.

Example 1: An hospital informs its patients that it intends to process all of their data to train its AI starting next month. After the announcement, a patient requests deletion of their data from the hospital's system, which the hospital refuses. Facing a complaint by the data subject, a SA could order the hospital to comply with the request prior to starting the AI training and at the same time, issue a warning for the intended processing.

Example 2: An employer bought and intends to instantly implement an AI system to analyse employees' emotions based on the tone used in their emails and at the same time, measure their reactivity to emails depending different criteria. The emotions analysis could be subject to a (preventive) ban, while at the same time, the reactivity analysis may be subject to a warning.

If some SAs could see these processing operations as separate and issue separate measures for separate operations, in order to avoid confusion, *noyb* recommends to keep the proposed incompatibility of warnings with fines and at the same time, to remove the incompatibility of warnings with other measures.

3. Warning exclusivity prior to processing

In section 3.3, the EDPB states that where an unlawful processing has not yet taken place, any corrective measure in addition to a warning would be incompatible with Article 58(2) (§23). The affirmation raises the following issues:

- First, it contradicts CJEU caselaw. The CJEU already considered that "*the GDPR does not preclude preventive involvement on the part of the supervisory authorities in the context of handling complaints*" (*CJEU, C-474/24, AR et al,* §132). In that case, it was question of filing a complaint with the purpose of preventing the publication of personal data online. The envisaged measure related to data subject rights. The CJEU considered that the complaint could validly be filed and did not include limitation on the SA's means to handle the complaint. Given that the complaint can validly be filed, the SA logically may use any relevant corrective measure in its arsenal;

- It reduces the SAs power to issue bans, suspensions, orders to provide information or orders to handle a data subject's exercise of right. This restriction undermines the SAs discretion, and directly impacts both the need for effective investigations and the protection of data subjects rights, which are not subject to the condition of the processing already taking place;

- Regarding the power to order to comply with data subjects rights (Article 58(2)(c)), restricting it *per se* restricts the rights from the data subjects perspective. The EDPB is well aware that data subjects rights stem directly from Article 8 of the Charter, which the EDPB is in no position to restrict. Even if it were in such position, the EDPB does not provide for a proportionality assessment under Article 52 of the Charter;

- For the effectiveness of an investigation, a warning followed by an in-depth investigation could logically be accompanied by an order to provide information or to access personal data or access to the premises of the controller under Article 58(1)(a), (e) and (f);

- It undermines the SAs enforcement task. SAs are tasked with monitoring and enforcing the application of the GDPR (Article 57(1)(a)). To effectively fulfil this task, they must be able to take any relevant measure, both prior and after an infringement takes place. The EDPB itself recognizes the relevance of preventive measure.

In conclusion, imposing that a warning excludes other corrective measures restricts the discretion granted to SAs in the imposition of corrective measures, deprives certain measures of their effectiveness and more generally, deprives the SAs of their task of enforcing the GDPR.

noyb therefore recommends to remove the proposed exclusivity of warnings.

4. Introduction of the notion of "separate conducts"

Still in §23, the EDPB holds that where separate conducts take place, the SA may impose different corrective measures. It seems like it foresees a situation where some "conducts" already take place and others not yet. While it seems like a conduct would equal a(n intended) processing operation, the SAs will have to interpret the notion of separate conduct introduced by the EDPB, with unavoidable fragmentation. The notion also creates a separation between different processing operations that may in some case be very theoretical.

Example 3: An AI-powered chatbot replies with politically tainted outputs with the purpose of influencing the user. It may be found that to target its users, it analyses data subjects prompts to induce information about their political opinions and examines how to target them effectively. A certain SA may analyse the situation as one, two or three "separate conducts" or as one processing but two or three "separate conducts", or as one conduct but two or three separate processing operations.

noyb therefore recommends to remove this new notion.

5. Reprimands, orders and withdrawal of certification compatible with fines

noyb welcomes that the EDPB considers that these measures are not incompatible with the imposition of fines (§25, 30 and 36).

While Article 58(2) GDPR is mostly concerned with ensuring factual complaince with the law (e.g. stop unlawful processing) Article 83 GDPR clearly deals with a reaction to a past unlawful conduct. As with any other enforcement system, these matters are logically and traditionally seperated in the GDPR.

6. Limitations, including bans where infringement is "not yet established" - confusion

In section 3.6, the EDPB considers that an administrative fine can be imposed together with a ban or limitation (§34). *noyb* welcomes this affirmation of the current practice.

In §34, the EDPB then considers that a ban or limitation can be imposed where an infringement "*has not yet been established*". It then refers to "*e.g. future processing*". It is unclear whether such affirmation relates to cases where a processing takes place but the SA takes an interim measure while it investigates, or if it covers intended processing that does not yet take place. If the second is meant, such affirmation would contradict the above-mentioned "exclusivity" of a warning in case of a processing that did not yet take place (see *supra,* section 3).

It would be appreciated that the EDPB clarifies that a ban or a suspension can be imposed in cases where the processing has not started yet, and harmonize section 3.3 (relating to warnings) accordingly.

7. Step 3 of the 7 steps test – negligence or intent – low treshold for negligence

Step 3 consists of analysing if the infringement was committed with intent or negligence.

The EDPB recalls that under Article 83(4) to (6), the criteria to assess whether a fine can be imposed is the infringement. Based on CJEU caselaw, it then, provides that "*no provision indicates a situation of imposing a fine in absence of wrongful conduct*", to deduce that there is a condition of culpability.

Regarding the negligence, the EDPB confirms the very low treshold stemming from the GDPR: it specifies that it is not required that the controller was effectively aware that their conduct was unlawful but rather that it should have been aware. *noyb* welcomes the clarification on the low treshold and the examples illustrating it.

We also very much welcome that the (common) practice of *"pay to violate"* expert statements or lawyer's opinions are tackeld in the Guidelines. It is an open secret that controllers regularly demand that a lawyer or expert produces some (well-paid) document claiming that practices are legal, in an attempt to avoid liability for legally questionable or even blatently unlawful actions. Unfortunatley, law firms or consultants that do not engage in such conduct are regularly confronted with clients switching to competitors with "more permissive views", which has generated a race to the bottom. The examples can therefore also create protection of businesses and competitors from such questionable practices.

In addition, we would suggest to also highlight the documentation and governance duties in the GDPR (for example Article 5(2), 24, 25, 30 or 32 GDPR). The legislator intendet to make it almost impossible that a controller is truly unaware of unlaful processing. In relation to Article 83 GDPR these duties make it almost impossible that a controller is truly unaware of unlawful processing.

8. Step 4 of the 7 steps test – minor infringement = no fine at all

Recital 148 relates to the imposition of fines. It states that in case of minor infringement, a reprimand may be issued; and in a separate sentence, that due regard shall be given to the elements in Article 83(2) GDPR. The general understanding is that the elements of Article 83(2) shall be taken into account when assessing whether to impose a fine and its amount.

In §57, the EDPB distorts these statements and considers that the elements must be regarded "*when assessing whether the infringement is minor*". The EDPB then creates a general rule that departs from recital 148 and the text of the GDPR: If the infringement is "minor", the SA will not impose a fine, while if is not considered minor, there would be a "*strong presumption to impose a fine*" (§57). The EDPB later even recognizes that its assessment pursues a different purpose than deciding whether to impose a fine and its amount (§61).

Stretching and changing recital 148's purpose into a general rule and making the assessment of the minor character of the infringement a central step in the assessment raises several concerns:

- First, the Guidelines suggest that reprimands shall be prioritized where an infringement is minor (see §115). The possibility given in recital 148 to issue a reprimand is already widely used and is usually not seen as the strongest enforcement tool. The new approach risks creating unnecessary complexity: while it is currently up to their discretion, SAs will now be expected to assess for each infringement if it qualifies as minor. They will likely rely on past caselaw and try to maintain consistency. Given the high use of reprimands and the need for legal certainty, the proposed approach may lead SAs to qualify many infringements as minor, in order to align with previous decisions. It will also open the door for controllers to consider infringements that were subject to reprimands in the past as minor;

- Second, while recognizing earlier in the guidelines (§26) that SAs have discretionary power to decide between a reprimand and a fine, the EDPB now proposes that fines would only be justified for non-minor infringements, suggesting to call upon reprimands for minor infringements. As such, it restricts the discretionary power granted to SAs.

- Third, the discretion granted to SAs in the imposition of corrective measures means that where their decisions are appealed, judges have a limited margin of appreciation. Limiting the discretion means (i) that courts have more margin, which leads to SAs having to motivate their fines more extensively; and (ii) in certain jurisdictions where the idea to issue a fine is communicated to the controller, that controllers will likely heavily argue on the step-by-step methodology, meaning SAs will have to reply to a whole new range of additional arguments. Ultimately for SAs, loosing discretion means loosing independance and enforcement power.

- Fourth, in many cases (e.g. when the violation was later remedied or cannot be remedied anymore) this leads to a situation where EU law has an operativie prohibition, but no consequence. This is called a *lex imperfecta* and is generally to be avoided.

We very much warn the EDPB that in practice every controller will use the (new) doctrine of "minor" violations to argue that SAs have self-limited their powers in such cases. We already see that courts regularly and unduly limit fines by SAs to an extent that their enfocement work is massively undermined. It seems the EDPB is enagaging in an act of intentional self-defeat by introducing a hard rule that "minor" violations do not lead to a fine.

➔ **Given the limited effectiveness of reprimand, as an enforcement measure, *noyb* urges the EDPB to delete step 4.**

➔ **The EDPB's approach is similar to a Police force broadcasting that "minor" traffic violations will not be prosecuted anymore – which is highly problematic with respect to the rule of law.**

➔ **The EDPB basically creates the state of a "*lex imperfecta*" for any violation that is not a major violation, which seems to violate legal logic and the text of the GDPR.**

➔ **If the text is meant to exclude purely formal or "tiny" violations, we would suggest to use a wording that reflects this better (e.g. "*insignificant violations*") and ensure that this is worded as an option ("*...SAs may not impose a fine...*") to ensure that courts do not extent the notion of "*minor*" violations to further undermine enforcement efforts by SAs.**

9. Step 5 – minor infringement assessment under Article 83(2) GDPR

Step 5 consists of examining if the infringement is minor in light of the elements of Article 83(2). It seems like this step partly overlaps with step 4.

The elements of Article 83(2) are originally meant to guide SAs when deciding on imposing a fine and its amount (minor violation = minor fine), not to serve as a rigid criterion to classify infringement as minor or not. The EDPB now uses these elements as mitigating or aggravating factors in order to determine if an infringement is minor (see i.e. §73, 80, 88, 95, 100, 104) and hence fined at all. This does not comply with the wording of the law ("*shall*").

The EDPB transforms what was a discretionary option in recital 148 into a cornerstone of the step-by-step analysis. This approach is problematic for multiple reasons:

- First, it distorts the purpose of Article 83(2) which was intended to provide flexibility and guidance within the discretion of SAs, rather than imposing a binary classification;

- Second, it elevates the concept of "minor infringement" from a secondary and discretional consideration into a determining factor for imposing a fine;

- Finally, with its assessment, the EDPB gives the impression that the "default" is that an infringement is minor, unless it is evaluated that it is not.

10. Nature of the infringement – unsupported definition

In §63, the EDPB considers that the nature of the infringement may be assessed in light of "*the interest that the infringed provision seeks to protect and the place of the provision in the data protection framework*", as well as "*the degree to which the infringement prohibited the effective application of the provision*". These indications, not supported by any hint in the GDPR, seem to set a high treshold for the nature of the infringement element. *Noyb* therefore suggests to stick with the common understanding of the nature of the infringement which would be to examine which provision is violated.

11. Purpose of the processing – processing as core activity of the controller

In §67, the EDPB suggests an original meaning for the purpose of the processing. It considers that it should be assessed based on the place of the processing in the controller's activity. This assessment departs from the usual understanding of the purpose of a processing (see WP 29 guidelines on administrative fines, p. 11) and risks to raise confusion. It should rather be aligned with the purpose as understood in the rest of the GDPR and particularly in the purpose limitation principle.

12. Measures taken to mitigate the damage – timeliness and spontaneity

In §74, the EDPB introduces elements of timeliness and spontaneity to examine the effect of measures taken by the controller or processor. *Noyb* welcomes it.

13. Degree of responsibility – unnecessary reference to pseudonymized data

In §77, the EDPB suggests to evaluate whether the data was directly identifiable or pseudonymized, which could serve in exceptional circumstances as an element to mitigate the responsibility. *noyb* suggests to remove the reference to pseudonymized data or identifiable data which could be (maliciously) interpreted as creating an artificial classification of infringements depending on the pseudonymized nature of the data.

14. Cooperation with SAs beyond necessary as a mitigating factor

In §91, the EDPB considers in summary that the cooperation with a SA in order to remedy an infringement is also a mitigating factor, provided that it goes beyond compliance with the law and beyond what would be necessary. *noyb* welcomes this high treshold.

15. Infringements commited in other jurisdictions taken into account

In §87, the EDPB mentions that previous infringements in other jurisdictions may be considered relevant to examine the previous attitude of the controller or processor. *noyb* welcomes this indication and highlighting of international cooperation.

16. Example 5 – infringement is minor "by default"

In example 5 (p. 26), the EDPB includes an example that is concluded with "*considering the recurring nature of the infringement*", such "*infringement could no longer be considered minor*", and the SA issued a fine.

Such wording, is problematic. It gives the impression that infringements are by default considered as minor, and *a contrario,* only when infringements are not minor, can the SA issue a fine. It is here referred to the section relating to step 4.

17. Categories of personal data affected – immediate damage or distress

In §92, the EDPB includes that ordinary data may be relevant to the assessment where their dissemination would cause "*immediate damage or distress to the data subject*". This wording and the examples given ignore certain realities: i.e. the online advertising ecosystem, the data input to llms and tracking data. In addition, it risks being maliciously interpreted as a separate criteria: the infringement would have to produce some sort of damage in order to lead to a fine.

noyb suggests to remove the reference to damage or distress but to highlight that both ordinary and sensitive data are relevant for the assessment. Examples related to the ad-tech ecosystem, tracking data, AI input and output, as well as the examples already given would also be welcomed.

18. Example 7 – social media pixel on SME website

Example 7 (p. 29) concerns a SME that included a tracking pixel from social media on its webpage. 50000 data subjects were affected and the SA recognized that the SME was not in a position to identify the changes that led the social media's settings to take precedence over the SME's. Considering such violation as minor is a slippery slope. On the contrary, a SA could have seen the pixel provider as a joint controller (see C-40/17, *Fashion ID*) and issued a fine.

noyb highly recommends to remove this example.

19. Step 5 – the criterion of "proportionate" - shift to necessity

The EDPB considers that proportionate, in relation to the imposition of a fine, means that of equally appropriate penalties, the SA should impose the less onerous one (§113). It sort of matches the strict necessity criteria applicable for controllers (i.e. for the legal basis of legitimate interest). This goes against the discretion and flexibility granted to SA in the choice of the enforcement tool and makes the fine a "last resort" measure. The actual meaning of "proportionate" is rather that the fine shall be a proportionate reaction to a breach (see WP 29 guidelines on administrative fines, p. 7). *noyb* suggest to amend the wording to include the WP29 definition.

20. Conclusion

The intended purpose of harmonizing the imposition of fines and its relationship with other corrective measures is appreciated.

As described above, many aspects of the assesment are welcomed. However, the methodology proposed is not fully appropriate and as such, should be amended.

In particular, making the assessment of the minor character of an infringement a cornerstone of the reasoning creates the following issues:

- a likely decrease in the imposition of fines;
- decrease of the discretion of SAs;
- a rigid step in the assessment, contrary to the flexibility that characterizes the enforcement arsenal.

A decrease of the use of fines would go against the need and willingness to enforce the regulation. According to the *noyb* study mentioned above, a large majority of DPOs indeed see fines as an effective enforcement tool.

As such, *noyb* suggests to amend the guidelines in line with the recommendations above. The most important aspects being the removal of steps 4 and 5 of the assessment and including that a ban can be issued prior to an infringement taking place.

We thank the EDPB for the attention to our comments and remain available should any point raise questions.

Kind regards,

noyb