

27 June 2022

**Ref.: Consultation**

**Re.: Feedback on Guidelines 04/2022 on the calculation of administrative fines**

Dear,

EDBP has opened the consultation with regards to "Guidelines 04/2022 on the calculation of administrative fines under the GDPR". As the branch organization for the digital sector in the Netherlands NLdigital's input comes from its members. Herewith our input in brief:

**Issue arising in the field:**

- In the digital sector we represent not only data controllers, but also many data processors.
- Authorities have been given the power under the GDPR to impose a fine on the processor and on the controller.
- The GDPR stipulates that supervising authorities must take into account the degree of culpability of the processor and controller when imposing fines. The GDPR also stipulates that supervising authorities must take into account factors which can lead to a lower or higher fine being imposed (such as having been fined more than once in the past, which could lead to 150% higher fine). Consequently, the same processing activity can lead to a fine for the controller as well as a fine for the processor. The fine imposed on the respective controller is dependent on the turnover of the respective controller as well as on factors that either mitigate or enlarge the fine imposed which are under the control of the controller. The fine imposed on the respective processor is dependent on the turnover of the respective processor as well as on factors that either mitigate or enlarge the fine imposed which are under the control of the processor. The distinction between the actions/inactions of the controller and the actions/inactions of the processor needs to be made.
- In practice we see that contractual fines are often passed on from data controllers to data processors,
  - especially smaller processors that are negotiating with larger clients are finding it difficult to give sufficient push back to this passing on of fines
- The contractual passing on of the fine can have unreasonable consequences, such as:
  - Passing on aggravating circumstances (such as previous fines or high turnover) to a party that did not participate in this itself.
  - Being fined twice for the same offense (both the fine you have been imposed yourself and the fine passed on in the case of a processor and controller who have both been fined) is disproportionate.
  - Not being able to fully insure itself against contractually charged fines. The contractual acceptance of liabilities that you would not have had without the contract clause is usually not covered.



- Not being able to officially object to the fine, because you are not the party that officially received the fine, but still having to pay the fine.

### **Our suggestion for the guidelines:**

- Make explicit in the guidelines:
  1. that the fine is to be imposed on the party according to its degree of culpability;
  2. that the fine specifically relates to the party on which it is imposed, e.g. takes into account the factors that lead to a lower or higher fine (turnover, degree of cooperation, ect).

### **How will this help the field?**

- It will help in contract-negotiations to push back on a data controller that wants to turn to the data processor to fully pay for all of its data-related fines.
- Which will in turn help prevent the contractual transfer of fines and thus prevent unreasonable consequences mentioned above.
- <https://www.nldigital.nl/news/avg-boetes>

We would like to thank you for offering the opportunity to provide feedback in this phase.  
With kind regards, on behalf of NLdigital

Joost Vente  
Public Policy Manager