GDV
DIE DEUTSCHEN VERSICHERER

Comment

of the German Insurance Association (GDV)
ID-number 6437280268-55

on the EDPB draft guidelines 04/2022
on the calculation of administrative fines under the GDPR

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Zertifikat seit 2014
audit berufundfamilie

Summary

The draft guidelines provide controllers and processors with clearer reference points for the quantification of fines, while also ensuring that all the circumstances of a case are paid due attention.

The following points might be helpful in guaranteeing consistence with established fining principles:

Art. 83 refers to the total worldwide annual turnover only with regard to the assessment of the maximum amount of the fine. As in antitrust law, the relevant geographic and product market in which the infringement took place should also play a role in the prior assessment of the fine. Otherwise, if the infringement is limited to only part of the data processing or is due to the failure of an employee, unreasonably high fines would be imposed.

In accordance with international accounting standards (especially IFRS 17 Insurance Contracts) and to ensure comparability and a level playing field with other sectors, when determining the turnover of insurance companies, amounts the insurer is obligated to repay to a policyholder regardless of whether an insured event occurs (so-called ‘investment component’) shall always be excluded.

1. Introduction

The German insurance industry welcomes the EDPB’s efforts to harmonize the methods for calculating administrative fines for infringements of the GDPR. The draft guidelines manage to provide controllers and processors with clearer reference points for the quantification of fines, while also ensuring that all the circumstances of a case are paid due attention. In practice, the circumstances of each data processing and infringement can vary wildly. As such, a calculation method that does not contain enough flexibility may never be able to appropriately address all scenarios. We, therefore, highly welcome the EDPB’s repeated references to the specific circumstances of each individual case. We would further propose to include in the guidelines that for infringements caused by mistakes of individual persons the group turnover should not be of relevance to the fine. Such infringements are not the result of systematic errors and thus do not have any relation to the group turnover.

In this context, we would like to provide the EDPB with feedback which should be helpful in guaranteeing consistence with established fining principles while ensuring that individual fines are not based on unreasonable factors:

2. Significance of the group turnover

The EDPB's proposed calculation method builds upon established principles of antitrust and competition law. The fining methods mirror each other in several ways. This appears commendable since the GDPR itself references antitrust law in recital 150.

While the deliberations on p. 34 – 36 para. 118 – 127 of the guidelines correctly follow the concept of undertaking as developed for the purpose of competition law, we would like to highlight certain established restrictions which the EDPB has not yet mentioned.

In accordance with competition law, the relevant product market and the relevant geographic market to which the infringement directly or indirectly relates are used to determine the amount of a fine.[1] The concept of the relevant market sets boundaries for the amount of the fine even if the group turnover becomes relevant because an infringement was carried out by a subsidiary whose parent company exercises decisive influence over it. Art. 83 refers to the total worldwide annual turnover only with regard to the assessment of the maximum amount of the fine. For the prior assessment of the fine it should also be taken into account if a GDPR infringement by a subsidiary clearly only relates to a limited market segment that does not have a tie to the parent company.

The concept of the relevant market is especially important with regard to insurance companies due to the obligatory separation of life and non-life insurance required by Artt. 73 and 74 of the Solvency II Directive. According to Art. 73 (4) of the Solvency II Directive, where a non-life insurance undertaking has financial, commercial or administrative links with a life insurance undertaking, the supervisory authorities shall ensure that the accounts of the undertakings concerned are not distorted by agreements between those undertakings or by an arrangement which could affect the appointment of expenses and income. Art. 74 (1) further states the separate management of life and non-life insurance shall be organized in such a way that their

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[1] see COMMISSION NOTICE on the definition of relevant market for the purposes of Community competition law (97/C 372 /03) and the EC's Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 (2006/C 210/02)

activities are distinct from one another. In particular, profits from life insurance shall benefit life policy holders as if the life insurance undertaking only pursued the activity of life insurance. In effect, this leads to the situation that the premiums obtained by life insurance companies cannot be used for purposes of another insurance undertaking to which the life insurer has links. Taking into account these circumstances, using the group turnover for calculating a fine is not justified whenever the principle of separate life and non-life insurance management applies. It could even be argued that the separation of activities pursuant to Art. 74 (1) rules out the exercise of decisive influence of a non-life parent company over the conduct of its life insurance subsidiary.

3. Determining the turnover

According to page 36 para. 138 of the guidelines, the turnover within the meaning of Art. 83 GDPR is to be understood in terms of the net turnover of Directive 2013/34/EU on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings (Annexes V or VI to Art. 13 (1) of Directive 2013/34/EU). For insurance companies, insurance premiums shall be included in the revenue (page 36 footnote 62).

We would like to highlight that pursuant to Art. 4 of REGULATION (EC) No 1606/2002 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 19 July 2002 (IAS Regulation) all publicly traded companies, which are obliged to prepare consolidated financial statements, are required to do so in accordance with international accounting standards (IFRS).[2]

In this context, it is especially important that global standard setter, the International Accounting Standards Board (IASB), issued **a new accounting standard "IFRS 17 Insurance Contracts"** in May 2017. The IASB published amendments to the standard in June 2020.

[2] REGULATION (EC) No 1606/2002 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL
of 19 July 2002 on the application of international accounting standards, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32002R1606&from=de

Subsequently, COMMISSION REGULATION (EU) 2021/2036 of 19 November 2021[3] already adopted IFRS 17. The Regulation determines that all publicly traded insurance companies shall apply IFRS 17 for their consolidated financial statements at the latest as from the commencement date of its first financial year starting on or after 1 January 2023.

As a matter of fact, IFRS 17 is of essential relevance for all publicly traded insurance companies as it determines new principles as well as recognition, measurement, presentation and disclosure requirements for insurance contracts accounting.

In particular, IFRS 17 explicitly states that the **information on the insurance revenue (first line of the profit and loss statement of insurers) shall not include amounts the insurer is obligated to repay to a policyholder regardless of whether an insured event occurs (so-called 'investment component').** These amounts represent the investment of the policyholder (e. g. the savings component of an endowment life insurance) and therefore must be fully excluded from the profit and loss statement of an insurer. In other words, insurance companies are prohibited to include amounts representing 'investment components' in the 'insurance revenue'-line.

With this explicit requirement, the IASB in its role as a global standard setter in the field of international accounting has ensured the comparability of financial statements provided by insurers and companies from other sectors.[4] The investment component is comparable to the customers' investments at banks. Furthermore, for the purposes of the insurers' internal accounting vis-à-vis the financial supervisory authorities all insurers (regardless of whether they apply IFRS 17 or local accounting principles) have to present these amounts separately in order to enable their easy identification for each business year.[5]

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[3] COMMISSION REGULATION (EU) 2021/2036 of 19 November 2021 amending Regulation (EC) No 1126/2008 adopting certain international accounting standards in accordance with Regulation (EC) No 1606/2002 of the European Parliament and of the Council as regards International Financial Reporting Standard 17, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32021R2036&from=EN

[4] IASB, IFRS 17 Insurance Contracts, May 2017, Project Summary: IFRS 17 Insurance Contracts, Page 4

[5] For life insurance in Germany compare Versicherungsberichterstattungs-Verordnung (BerVersV), Anlage 3, Nachweisung 216, Zeile 1 (sog. Normsparbeiträge) https://www.buzer.de/Anlage_3_BerVersV_Versicherungsberichterstattungs-VO.htm

Consequently, and to ensure the comparability of insurance companies with other sectors and to ascertain equal treatment with other sectors when calculating administrative fines under the GDPR, **regardless of the applied regulatory framework for their accounting** (IFRS 17 or local accounting principles based on the EU-Accounting Directive/Insurance Accounts Directive), **amounts that the policyholders are entitled to receive back should not be used to determine the starting point for the calculation of fines.**
For the purpose of determining the revenue of insurance companies, footnote 62 of the EDPB draft guidelines 04/2022 currently refers exclusively to the insurance premiums. It is therefore imperative to complement the footnote and prevent contradictions with the explicit requirements of IFRS 17. It is necessary to guarantee proportionate treatment of insurance companies that draw up their accounts in accordance with the Insurance Accounts Directive. In conclusion, equal treatment of companies across different sectors needs to be accomplished.

We propose the following amendment as an exemplary solution:

> [62] "Conversely, some of these items are relevant and should be included in the revenue in case the company operates for example in the banking sector (commissions and interest income) or in the insurance sector (insurance premiums less the amounts that an insurance contract requires the entity to repay to a policyholder, regardless of whether an insured event occurs).

Alternatively:

> [62] "Conversely, some of these items are relevant and should be included in the revenue in case the company operates for example in the banking sector (commissions and interest income) or in the insurance sector (for insurance undertakings applying IFRS: 'insurance revenue' as defined in IFRS 17 and for insurance undertakings applying local accounting principles based on the Directive 91/674/EEC[6] : insurance premiums less investment component, whereby 'investment component' is defined as the amounts that an insurance contract requires the entity to repay to a policyholder, regardless of whether an insured event occurs).

Additionally, para. 130 of the guidelines could be complemented as follows:

[6] Council Directive 91/674/EEC of 19 December 1991 on the annual accounts and consolidated accounts of insurance undertakings

If the undertaking is subject to the obligation within the meaning of Article 21 et seq. of Directive 2013/34/EU and has to prepare consolidated annual financial statements (incl. the consolidated annual financial statements as required by Art. 4 or as allowed by Art. 5 of the Regulation 1606/2002 of 19 July 2002), these consolidated financial statements of the parent company heading the group are relevant for reflecting the combined turnover of the undertaking. If such statements do not exist, any other documents shall be obtained and used that are apt to infer the worldwide annual turnover of the undertaking in the relevant business year.

Berlin, 27 June 2022