Comments on the draft Guidelines 04/2022 of the European Data Protection Board

This paper exclusively reflects the views of its author.

On 12 May 2022, the European Data Protection Board published its draft Guidelines 04/2022[1] *"on the calculation of administrative fines under the GDPR"* (hereinafter referred to as Draft Guidelines or Draft).

The Draft is one of the rare and noteworthy attempts of the EDPB to provide real guidance on a given issue (although it is just an opinion rather than guidance). In my opinion, however, the following topics would require clarification or further elaboration.

Will or may?

While the Draft, rightly, emphasises that national data protection supervisory authorities are not obliged to follow the guidelines (given their discretional power to impose fines—cf. paragraphs 6,7, 15), in paragraph 61 it uses quite straightforward provisions (i.e. "will determine") regarding derogations from the starting amounts of fines. It would, however, be reasonable to use "may" or a similar word instead of "will".

Limitations regarding administrative sanctions

The Draft remains silent about the possibility of limitations regarding administrative sanctions. In Hungary, for example, a law[2] stipulates that no administrative sanction can be imposed if six months have lapsed since the infringing conduct came to the knowledge of the authority empowered to impose sanctions (limitation period), and no administrative sanction may be imposed if three years have elapsed since the offense. Although the limitation period (in the case of subjective deadlines) may be easily interrupted, but, theoretically, this possibility exists, and it affects the imposing of administrative fines as well. The Draft should make it clear that in such a case (i.e. when the limitation period has lapsed) no administrative fine (nor other sanction) may be imposed for the conduct in question, and it may not be considered as an aggravating factor (i.e. repeated or previous violation) later either.

Undertaking or controller?

The only thing the Draft could be criticised for is the interpretation of "undertaking". While in its Guidelines 07/2020 on the concepts of controller and processor in the GDPR, the EDPB clearly separates the status of the members of a group of undertakings,[3] in this Draft it seems that the clear lines between the different legal entities are blurred. In other words: the Draft should make clear that "unit", with regard to the GDPR, is the "controller" (or "processor") and not the "undertaking". The fine must be paid by the "controller", the starting point of the fine is the turnover of the "controller" etc., and no other units of whatever name and/or

[1] https://edpb.europa.eu/system/files/2022-05/edpb_guidelines_042022_calculationofadministrativefines_en.pdf

[2] Act CXXV of 2017 on penalties for administrative infringements

[3] E.g. paragraph 89: *"It should be noted that, within a group of companies, a company other than the controller or the processor is a third party, even though it belongs to the same group as the company who acts as controller or processor."*

combination. Entities that are not considered controller cannot be responsible for the fine and the involvement of their turnover cannot be justifiable, since they are completely out of the case. The use of the term “undertaking” is therefore limited by the term of “controller”.

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In sum, the Draft – with the above clarifications – could be useful guidelines.

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