DATA PROTECTION LAW/ COMPLIANCE

New Concept for the Imposition of Administrative Fines for Violations of the GDPR

On 16 October 2019, the *Data Protection Conference (DSK)* presented its concept for the imposition of fines in proceedings against companies for breaches of data protection laws (available for download here). This preceded earlier announcements according to which the model was to be discussed further and a decision on its publication would only be taken at the DSK Conference on 6 and 7 November 2019. The approach, which follows a complex calculation formula with various classifications, will lead to significantly higher administrative fines for data protection violations in the future. The system was developed with antitrust fines in mind.

IMPOSING ADMINISTRATIVE FINES PURSUANT TO THE GDPR

Administrative fines for GDPR infringements are subject to Article 83 GDPR. Pursuant to this Article, the administrative fines to be imposed should "*in each individual case be effective, proportionate and dissuasive*".

Depending on the specific circumstances of each individual case, the administrative fines will be imposed in addition to, or instead of, measures pursuant to Article 58 (2) GDPR (Article 83 (2) sentence 1 GDPR). Article 83 (2) sentence 2 GDPR provides for a multitude of factors when it comes to determining the amount of the administrative fine. The administrative fines may be as high as EUR 20 million or up to 4 percent of a group company's total worldwide annual turnover of the preceding financial year, whichever is higher (cf. Article 83 (4) to (6) GDPR).

RECORD-BREAKING ADMINISTRATIVE FINES PURSUANT TO GDPR

- **EUR 50 million** by the **French supervisory authority** imposed on a leading internet group for transparency infringements with regard to data processing for personalised advertising and use of an invalid declaration of consent of the users as a legal basis.

- **EUR 1 million** by the **Italian supervisory authority** imposed on a leading social network for unauthorised data transmission to a data analysis company.

- In Germany, the **Berlin supervisory authority** has imposed a fine in the amount of **EUR 14.5 million** on a real estate company. According to the authority, the company stored personal data of tenants in an archive system without a determined data deletion concept. *Inter alia*, financial data and data regarding personal circumstances were stored, *e.g.*, tax, social and health insurance data. Already in 2017, the company has been notified of the need to modify its archive system. Subsequently, the company adopted certain procedures but failed to reach an adequate level of compliance one and a half years later. Nevertheless, the authority points out to have taken into account both the measures taken and the cooperation while calculating the fine.

- The **British supervisory authority** has announced that it intends to impose fines in the amount of **GBP 183.39 million** on an airline and **GBP 99 million** on a hotel chain. The airline is accused of not having sufficiently secured its own websites, including the website for entering payment information. The hotel chain is alleged to not have sufficiently secured its booking data base, including the payment information of the customers.

NEW MODEL FOR CALCULATING ADMINISTRATIVE FINES DEVELOPED BY DSK

In a press release dated 16 October 2019, DSK states that the concept "*is intended to contribute to transparency with regard to the enforcement of data protection law*". In particular, "*responsible parties and processors*" shall be enabled to "*understand the decisions of the supervisory authorities*". The concept is, though, only intended to have a temporary effect, namely until

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a European regulation has been adopted by the European Data Protection Committee (EDSA). According to the minutes of the 2nd Intermediate Conference 2019 on 25 June 2019 in Mainz, a draft of the concept had already been presented to the *Task Force Findings of the EDSA* and had "*met with interest*" there.

CALCULATING ADMINISTRATIVE FINES PURSUANT TO THE NEW CONCEPT

The concept follows a complex five-step calculation for the determination of administrative fines:

1) Classification of the company concerned into a category of size;

2) Schematic determination of the average annual turnover;

3) Calculation of the basic economic value or a daily rate;

4) Multiplication of the daily rate by a factor derived from the seriousness of the offence;

5) Final adjustment of the determined value on the basis of suspect-related and not yet considered circumstances of the individual case.

CLASSIFICATION OF THE COMPANY CONCERNED INTO A CATEGORY OF SIZE

The basis for the calculation is the worldwide turnover (not the regularly much lower profit) of the company concerned, whereas the data protection supervisory authorities will not focus on the turnover of the individual legal entity but on the group of companies. The calculation according to the concept can therefore result in very high administrative fines and massive consequences for the companies concerned.

As a first step, the model for setting fines provides for a classification of the company concerned into one of four size categories. The size categories and the classification into these categories are based on the total worldwide sales achieved in the previous year. The size categories concern:

- Micro enterprises (up to EUR 2 million turnover; size category A);
- Small enterprises (over EUR 2 million to 10 million turnover; size category B);
- Medium-sized companies (over EUR 10 million to 50 million turnover; size category C) and
- Large enterprises (over EUR 50 million turnover; size category D).

These size categories are divided into various sales-dependent subgroups.

SCHEMATIC DETERMINATION OF THE AVERAGE ANNUAL TURNOVER

At the second stage of the calculation of the fine, an average annual turnover fixed for the specific subgroup of the size category is then determined in tabular form and by reference to the size category. For companies with an annual turnover of more than EUR 500 million, the actual turnover is used as the basis for the calculation instead of an average value, whereby the maximum fine of 2 percent or 4 percent must be observed.

CALCULATION OF THE BASIC ECONOMIC VALUE OR A DAILY RATE

At the third stage, an economic basic value is determined from the mean value in the form of a daily rate by dividing the mean value by 360 (days).

MULTIPLICATION OF THE DAILY RATE BY A FACTOR DERIVED FROM THE SERIOUSNESS OF THE OFFENCE

Stage four provides for a classification of the offence according to its seriousness into one of four levels (light, medium, heavy and very heavy). In this context, the fact-related criteria of Article 83 (2) GDPR and the circumstances of the individual case should be taken into account. The classification leads to a factor framework fixed for the respective degree of seriousness, from which in turn a factor is to be selected on the basis of the seriousness of the act. In this regard, the concept for material infringements (Art. 83 (5) and (6) GDPR) provides for higher factors than for formal infringements (Art. 83 (4) GDPR). In the case of very serious infringements only minimum factors of 6 or 12 are provided for. The factor actually determined is then multiplied by the basic value or daily rate, whereby the maximum amounts possible under the GDPR may not be exceeded. The result of the multiplication is a first indication of the fine to be imposed.

FINAL ADJUSTMENT OF THE DETERMINED VALUE

This will then be adjusted in the fifth and final step "*on the basis of all other factors in favour of and against the company concerned*", "*to the extent that these have not yet been taken into account*" at the fourth stage. The concept explicitly refers to "*a long duration of the proceedings or imminent insolvency of the company*" as circumstances to be taken into account.

The extent to which the other circumstances are to be taken into account does not follow from the concept.

However, it should be noted that this stage may also lead to (significant) increases in the calculated value and thus in the administrative fine. Before the concept was published, industry circles said that the calculated fine could be increased by up to 300 percent, but only reduced by up to 25 percent. Such a regulation has now been waived within the framework of the concept.

PRACTICAL IMPLICATIONS

The new concept is expected to cause significantly higher administrative fines in the future. The *Berlin Commissioner for Data Protection and Freedom of Information* announcing that she is planning on imposing a fine in the amount of several millions in the near future seems to paint the same picture (cf Article of Süddeutsche Zeitung). Similarly high fines might become the norm rather than the exception for large and economically successful companies in the future if the basis for calculating the fine is always the worldwide turnover of the company.

THE CONSEQUENCES – A SAMPLE CALCULATION

The serious implications are illustrated above all by a small calculation example based on a company with an annual turnover of EUR 425 million.

At the first stage, this company is to be qualified as a large company in subgroup D.VI (annual turnover of more than EUR 400 million to EUR 500 million). This results in an average annual turnover of EUR 450 million at the second stage and a daily rate of EUR 1.25 million at the third.

At the fourth stage, this basic value remains the lower limit of the fine, even in the event of a minor infringement. The reason for this is that the calculation does not provide for a factor smaller than 1 by which the daily rate can be multiplied, so that a reduction of the fine is in any event ruled out at this stage. In the case of a serious formal infringement, the multiplied basic value ranges from 4 to 6 times the daily rate, in the case of a serious material infringement even from 8 to 12 times. In the case of a very serious infringement, the maximum fine shall be 2 percent or 4 percent of the annual turnover.

A slight material infringement, e.g. of the right to immediate cancellation (Articles 17, 83(5)(b) GDPR), may result in a fine of EUR 1.25 million to EUR 5 million at stage 4 for the undertaking in the example.

The extent to which this amount is adjusted at the fifth stage and the limits are exceeded or undercut remains open and depends on the specific individual case.

Courts are, however, not legally bound to this model for calculating administrative fines. They are free to determine administrative fines in accordance with statutory regulations. This, however, is not necessarily an advantage for companies being fined as the decision of the Higher Regional Court of Dusseldorf on an antitrust law matter demonstrates (Higher Regional Court of Dusseldorf, judgment dated 28 February 2018 – V-4 Kart 3/17 OWi; this decision was later annulled by the German Federal Court of Justice (BGH) as the judgment was delivered too late, cf. BGH, decision dated 9 July 2019 – KRB 37/19).

This development once again shows how important it is to have efficient, appropriate as well as well-documented compliance measures in place from a data protection point of view. These measures will not only benefit companies in dealings with authorities but also in consequent legal disputes being a highly effective means of defence against administrative fines calculated incorrectly. On the one hand, effective and appropriate compliance measures can minimise the risk of infringing on GDPR regulations; on the other hand, they may be a mitigating factor if an infringement occurs despite the measures taken reducing the fine. Compliance measure might even constitute evidence against wilful misconduct and negligence (cf. *Handel*, DStR 2017, 1945 et seq.) However, activities in the compliance area that are only taken after a violation and during the ongoing administrative fine proceedings must also be taken into account to a lesser extent (cf. BGH, decision dated 9 May 2017 – 1 StR 265/16, margin no. 118, available at here).

LOOKING OUTSIDE THE BOX: ZERO TOLERANCE FOR NON-COMPLIANCE

If one compares the considerations presented on a hard and expensive sanctioning practice for GDPR violations with further current developments in the compliance area, a clear trend towards hard sanctions and an official “zero tolerance strategy” can be discerned. Not only in data protection law, but also in other areas, non-compliance should become much more expensive. For criminal offences (e.g. corruption, tax evasion, illicit employment, fraud, environmental offences etc.) committed from within a company, monetary sanctions of up to 10 percent of the average annual turnover should be imposed on companies. This is provided for in the current draft for a new corporate sanctions law (Verbandssanktionengesetz; VerSanG-E). Read more about this in our current Newsletter Commercial Criminal Law & Compliance.

AT A GLANCE

- According to a new concept drawn up by the data protection authorities, the calculation of fines depends to a large extent on the worldwide turnover of the company concerned.
- This model is based on the calculation of fines for antitrust infringements.
- The effect will mainly be noticeable for large companies – even in connection with small-scale infringements.
- Administrative fines are expected to amount to several millions of euros.
- So far, many different types of infringements were subject to administrative fines: insufficient technical or organisational precautions were fined as well as insufficient data flow safety.

- Data protection authorities argue that every GDPR infringement should be fined as a general rule.
- It is therefore important to also focus on an effective means of defence against fines imposed by authorities. An effective compliance organisation plays a key role in this respect.

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