

# The German concept for the calculation of GDPR fines

The German DPAs put forward a formula for calculating fines in Germany until the EDPB issues guidance. **Dr. Moritz Hüscher and Daniel Röhl of Covington & Burling LLP Germany explain.**

The general framework for fines for infringements of the Regulation (EU) 2016/679 (GDPR) is set forth in Article 83 GDPR. Fines can, at the upper end, go up to 4% of the total worldwide annual turnover, Article 83 (5) GDPR. However, neither Article 83 GDPR nor other Articles of the GDPR contain a process or methodology on how fines should be calculated in an individual case. Pursuant to Article 70 (1) k) GDPR, it is up to the European Data Protection Board (EDPB) to draw up European guidelines which have not been published yet. So far, there are only the general guidelines on the application and setting of administrative fines available which were issued by the Article 29 Working Party (now EDPB) in 2017.<sup>1</sup> In the absence of a more detailed concept at a European level, Germany's data protection authorities (DPAs), within their regular conference (*Datenschutzkonferenz*, or DSK), have developed their own concept for the calculation of GDPR fines.

## THE DSK

Germany is the only Member State which has many DPAs, 18 in total. Each of the 16 Federal States has its own DPA which control the public authorities and private companies in the Federal State. Bavaria is the only Federal State which has two DPAs, one for the public and one for the non-public sector. In addition, Germany has one DPA on a national level, the Federal Commissioner for Data Protection, who, among others, controls all public authorities of the Federal Government, i.e. federal ministries, customs offices, the offices of the Federal Police, and the mail and telecommunications sector.<sup>2</sup> According to Section 17 (1) of Germany's Data Protection Act (BDSG), the Federal Commissioner for Data Protection is also the joint representative in the EDPB. The Federal Commissioner for Data Protection and the DPAs of the Federal States meet on a regularly basis with the goal to protect fundamental data protection rights and to ensure consistent application of data protection laws, in particular the GDPR.<sup>3</sup>

## THE DETAILS OF THE CONCEPT

On 14 October 2019, the DSK published a concept for the calculation of fines for infringements of the GDPR committed by companies in the Federal Republic of Germany.<sup>4</sup> This concept is used for domestic infringements of the GDPR in Germany, but not in cross-border cases; it is neither binding on non-German DPAs, nor courts or the EDPB. Moreover, the concept is neither used for fining associations nor natural persons outside of their economic activity. The concept will be used until the EDPB has issued a European concept for the determination of fines pursuant to Article 70 (1) k) GDPR.

## THE CALCULATION

**Classifying the “undertaking” infringing GDPR provisions:** In a first step, the DSK proposes to classify a company into one of four categories from A to D on the basis of its global annual turnover as set forth in Article 83 (4) and (5) GDPR. In accordance with recital 150 of the GDPR, the DSK takes the view that the term

### CLASSIFICATION BY ANNUAL TURNOVER

A Micro	Annual turnover (daily in brackets)	B Small	Annual turnover (daily in brackets)	C Medium	Annual turnover (daily in brackets)	D Large	Annual turnover (daily in brackets)
A.I	€350,000 (972)	B.I	€ 3.5 million (9,722)	C.I	€11.25 million (31,250)	D.I	€62.5 million (173,611)
A.II	€1,050,000 (2,971)	B.II	€ 6.25 million (17,361)	C.II	€13.75 million (38,194)	D.II	€87.5 million (243,056)
A.III	€1.7 million (4,722)	B.III	€ 8.75 million (24,306)	C.III	€17.5 million (48,611)	D.III	€150 million (416,667)
				C.IV	€22.5 million (62,500)	D.IV	€250 million (694,444)
				C.V	€27.5 million (76,389)	D.V	€350 million (972,222)
				C.VI	€35 million (97,222)	D.VI	€450 million (1.25 million)
				C.VII	€45 million (125,000)	D.VII	Actual turnover used*

\* If the annual turnover is above €500 million, the percentage framework of two per cent or four percent of the annual turnover is to be taken as the upper limit, so that for each undertaking the calculation will be made based on the actual turnover.

undertaking is to be construed in the same way as it is construed in Article 101 and Article 102 of the Treaty of the Functioning European Union (TFEU) (functional undertaking). As a consequence, if a company belongs to a group, the revenue of such group will be taken as a basis for the calculation of the global annual turnover.<sup>5</sup>

Companies of category A (micro-sized) have a (group-wide) annual turnover of up to €2 million. Companies of category B (small-sized) have a (group-wide) annual turnover of more than €2 million up to €10 million. Companies of category C (medium-sized) have a (group-wide) annual turnover more than €10 million up to €50 million. Companies of category D (large-sized) have a (group-wide) annual turnover of more than €50 million. There are further subcategories within these four categories in order to categorise a company more precisely.

**Average annual turnover:** In a second step, the average annual turnover of the applicable category is to be determined for the calculation of the daily rate. Such average annual turnover is determined as follows:

**Determination of the daily rate:** In a third step, the DPA has to determine the daily rate by dividing the annual average turnover by 360 days (business year) as a basis for the calculation of the actual fine.

**Degree of severity:** In a fourth step, the actual infringement of the GDPR will be categorized into one of four degrees of severity (low, medium, serious, or very serious), taking into account all factors and circumstances of the individual case pursuant to Article 83 (2) GDPR. These include:

1. The nature, scope or purpose of the processing concerned as well as the number of data subjects affected and the level of damage suffered by them,
2. The intentional or negligent character of the infringement,
3. Any action taken by the controller or processor to mitigate the damage suffered by data subjects
4. The degree of responsibility of the controller or processor taking into account technical and organizational measures implemented by them pursuant to Articles 25 and 32 GDPR,
5. Any relevant previous infringements by the controller or processor,

SEVERITY MULTIPLIERS FOR DAILY RATE		
Degree of severity	Infringement pursuant to Article 83 (4) GDPR	Material infringement pursuant to Article 83 (5,6) GDPR
Low	1 to 2	1 to 4
Medium	2 to 4	4 to 8
Serious	4 to 6	8 to 12
Very serious	> 6	> 12

6. The degree of cooperation with the DPA, in order to remedy the infringement and mitigate the possible adverse effects of the infringement,
7. The categories of personal data affected by the infringement,
8. The manner in which the infringement became known to the supervisory authority, in particular whether, and if so to what extent, the controller or processor notified the infringement,
9. Where measures referred to in Article 58 (2) GDPR have previously been ordered against the controller or processor concerned with regard to the same subject-matter, compliance with those measures,
10. Adherence to approved codes of conduct pursuant to Article 40 GDPR or approved certification mechanisms pursuant to Article 42 GDPR; and
11. Any other aggravating or mitigating factor applicable to the circumstances of the case, such as financial benefits gained, or losses avoided, directly or indirectly, from the infringement.

Moreover, each degree of severity contains several multipliers that are applied to the daily rates.

**Adjustment in special circumstances:** In a last step, the amount determined pursuant to step 1 to 4 will be adjusted pursuant to Article 83 (2) GDPR to the extent any factors relevant for the determination have not been taken into account within the fourth step.

**LEGAL PROCEDURE OF APPLYING FINES**

The GDPR does not contain an administrative procedure on how to actually impose fines on companies for GDPR

infringements. Rather, the national rules apply. Pursuant to Section 41 (1) BDSG, the provisions of the Act on Regulatory Offences (*Gesetz über Ordnungswidrigkeiten*) (OWiG) apply to the imposition of fines by German DPAs.

**Fines pursuant to Section 30 OWiG:** Pursuant to Section 30 OWiG, it is possible to impose a fine on a company (i) if a member of a body of the company (Organ) (e.g., a member of the management) committed a criminal or administrative offence and (ii) an obligation of the company was infringed or the company was enriched through such offence. However, it would not be sufficient for the imposition of a fine pursuant to Section 30 OWiG if an employee of the company had committed such a criminal or administrative fine.

**Fines pursuant to Section 130 OWiG:** Pursuant to Section 130 OWiG it is possible to impose a fine on a company if (i) the owner of the company or a member of a body of the company (Organ) (e.g., a member the management) omitted a supervisory measure either intentionally or negligently and (ii) it came to an infringement which could have been prevented through proper supervisory control or which would have been at least significantly more difficult to be committed with proper controls. Accordingly, if an employee of a company commits an infringement, a fine could be imposed on the company pursuant to Section 130 OWiG only if the owner or member has infringed its supervisory obligations and it would have been at least significantly more difficult to commit such infringement through proper supervision.

## OBLIGATION TO INVESTIGATE

Pursuant to Section 46 (1) OWiG and Section 244 (2) of the German Code of Criminal Procedure (*Strafprozessordnung*) it is the obligation of the DPA to investigate *ex officio* all facts and evidence relevant to the decision. Accordingly, the DPA would have to collect the evidence that is required to demonstrate that the requirements of either Section 30 OWiG or Section 130 OWiG are fulfilled which is in general quite challenging. However, at the same time it is the obligation of the company to demonstrate its compliance with the GDPR (accountability), pursuant to Article 5 (2) GDPR. This should make it easier – compared to infringements of other laws – for DPAs to impose fines.

## CONCLUSION

The concept of the DSK will be to make decisions about fines by

German DPAs more transparent and also more comparable with other decisions. However, given the limited scope of the concept, which applies only to domestic cases with no cross-border effects, it is yet to be seen how often this concept will actually be applied by German DPAs. Moreover, it remains to be seen whether the EDPB adopts this concept, in total or in part, for its European guidelines pursuant to Article 70 (1) k) GDPR.

## AUTHORS

Dr. Moritz Hüscher is Partner, and Daniel Röhl an Associate at Covington & Burling LLP Germany.  
Emails: [MHuesch@cov.com](mailto:MHuesch@cov.com)  
[DRoell@cov.com](mailto:DRoell@cov.com)

## INFORMATION

PL&B has organised, together with Covington LLP, a conference on Germany's Data Protection Law: Trends, Opportunities & Conflicts. Date to be announced.  
See [www.privacylaws.com/germany](http://www.privacylaws.com/germany)

## REFERENCES

- 1 See [www.bfdi.bund.de/EN/BfDI/Office\\_Tasks/Tasks/Tasks-node.html](http://www.bfdi.bund.de/EN/BfDI/Office_Tasks/Tasks/Tasks-node.html) [13 June 2020].
- 2 See [www.datenschutzkonferenz-online.de/index.html](http://www.datenschutzkonferenz-online.de/index.html) [13 June 2020].
- 3 See [www.datenschutzkonferenz-online.de/media/ah/20191016\\_bu%C3%9Fgeldkonzept.pdf](http://www.datenschutzkonferenz-online.de/media/ah/20191016_bu%C3%9Fgeldkonzept.pdf) [13 June 2020].
- 4 Kühling/Buchner (Bergt), DS-GVO BDSG, 2nd Edition 2018, Art. 83, margin number 39 et seqq.

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stewart.dresner@privacylaws.com**EDITOR****Laura Linkomies**  
laura.linkomies@privacylaws.com**DEPUTY EDITOR****Tom Cooper**  
tom.cooper@privacylaws.com**ASIA-PACIFIC EDITOR****Professor Graham Greenleaf**  
graham@austlii.edu.au**REPORT SUBSCRIPTIONS****K'an Thomas**  
kan@privacylaws.com**CONTRIBUTORS****Dr. Katharine Kemp**  
UNSW, Australia**Dr. Moritz Hüsich and Daniel Röll**  
Covington & Burling LLP, Germany**Géraldine Proust**  
FEDMA, Belgium**Heikki Tolvanen**  
PrivacyAnt, Finland**Tim Van Canneyt**  
Fieldfisher, Belgium**Clarisse Girot**  
ABLI, Singapore**Johanna Pezechkian**  
Federal Public Service Finance, Belgium**Professor Danilo Doneda**  
IDP, Brazil**Winfried Tilanus**  
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**“ comment ”**

## GDPR turns two at the time of the coronavirus privacy dilemma.

The EU DPAs made it clear early on that the general GDPR principles of effectiveness, necessity, and proportionality must guide any measures adopted by Member States when processing personal data relating to the coronavirus epidemic. They are keen to enable governments' responses to the pandemic and subsequent recovery whilst continuing to protect citizens' personal data and privacy. At this toddler birthday, it can be said that the GDPR has had a huge impact but clearly much work remains to be done. Data breaches are still far too common, and the SME community has not fully embraced the regulation.

Slovenia has yet to bring the provisions into national legislation and is the last EU Member State to do so. Given the COVID-19 related priorities on parliamentary time, it is not known when the Bill will be debated. For other countries, much of the discussion now centres around fines – or the lack of large ones. This is partly due to the hoops that DPAs sometimes have to go through due to national legislation, as is the case in Ireland. It remains to be seen whether the fining procedure will be addressed in the EU's GDPR review, which has been delayed and is now promised for 24 June.

Covid-19 has caused delays not just in Slovenia, but also in Thailand (p.29), Brazil (p.30) and South Africa (p.29). All of these countries have postponed the coming into force of their data protection laws.

In this issue, we bring you a summary of contact tracing app developments in some EU countries (p.10), and an in-depth analysis of the law behind Australia's CovidSAFE app (p.1).

In the EU, there is not much progress regarding the e-Privacy proposal. There were mixed reactions from Member States on revised aspects on legitimate interests, and this, together with delays caused by the pandemic, means that the current presidency of the EU Council, Croatia, will roll over many unresolved issues to the next presidency, Germany, starting on 1 July.

Other noteworthy EU developments are a controversial fining decision from Belgium on DPOs (p.14), and another much debated decision, from the Netherlands DPA, on marketing and legitimate interests (p.1).

**Laura Linkomies, Editor**

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