

DSK Datenschutzkonferenz

[Data Protection Conference]

**Conference of independent data protection supervisory authorities
of the Federal Government and Federal States**

14 October 2019

**Concept of the independent data protection supervisory authorities
of the Federal Government and Federal States
on the
setting of administrative fines in proceedings against undertakings**

I. Introduction

On 25 May 2018, the European Data Protection Board (EDPB), in its first plenary meeting in accordance with its task under Article 70(1) (k) of the GDPR, confirmed the guidelines on the application and setting of administrative fines within the meaning of Regulation (EU) 2016/679 of the Article 29 Working Party of 3 October 2017 (WP 253). These guidelines stipulate in particular the uniform interpretation of the provisions of Art. 83 GDPR and outline a uniform concept for the principles governing the setting of administrative fines. However, the guidelines are not exhaustive and the specification of the methodology for setting fines has been reserved for later EDPB guidelines.

The concept concerns the setting of administrative fines in proceedings against undertakings within the scope of application of the General Data Protection Regulation (GDPR). In particular, it does not apply to administrative fines imposed on associations or natural persons outside of their economic activities. The concept is also not binding for cross-border cases or for other EU data protection supervisory authorities. Furthermore, it is not binding with regard to the setting of administrative fines by courts.

The independent data protection supervisory authorities of the Federal Government and Federal States may at any time decide to repeal, amend or extend their concept with effect for the future. The concept will also lose its validity as soon as the EDPB has adopted its final guidelines on the methodology for setting administrative fines.

II. Penalty Concept

The independent data protection supervisory authorities of the Federal Government and Federal States are of the opinion that, in a modern corporate sanctions law with substantial maximum administrative fines, which at the same time is directed at a variety of undertakings of different sizes, the

turnover of an undertaking is a suitable, appropriate and fair jurisdictional basis for ensuring effectiveness, proportionality and deterrence.

Against this background, administrative fines are imposed in proceedings against undertakings in five steps. First, the undertaking concerned is assigned to a size class (1.), then the average annual turnover of the respective subgroup of the size class is determined (2.), then a basic economic value is determined (3.), this basic economic value is multiplied by a factor dependent upon the gravity of the circumstances of the infringement (4.) and, finally, the value determined under 4. is then adjusted on the basis of the circumstances relating to the infringer as well as other circumstances that have not yet been taken into account (5.).

This procedure guarantees a comprehensible, transparent and case-by-case method of setting administrative fines.

1. Categorisation of undertakings according to size classes

The undertaking concerned is assigned to one of four size classes (A to D) on the basis of its size (Table 1).

The size classes are based on the total worldwide turnover of the undertakings in the previous year (cf. Art. 83 (4) to (6) GDPR) and are subdivided into micro, small and medium-sized enterprises (SMEs) as well as large enterprises. According to Recital 150 of the GDPR, the term 'undertaking' within the meaning of Articles 101 and 102 TFEU (so-called functional definition of an undertaking) applies.

The size of the SMEs in terms of the previous year's turnover is fundamentally based on the Commission's Recommendation of 6 May 2003 (2003/361/EC).

The size classes are again subdivided into subgroups (A.I to A.III, B.I to B.III, C.I to C.VII, D.I to D.VII) for a more concrete classification of the undertakings.

Micro enterprises as well as small and medium-sized enterprises (SMEs)						Large enterprises	
A		B		C		D	
Micro enterprises:		Small enterprises:		Medium-sized enterprises:			
Annual turnover up to € 2 million		Annual turnover over € 2 million up to € 10 million		Annual turnover over €10 million up to € 50 million		Annual turnover over € 50 million	
A.I	Annual turnover up to € 700,000	B.I	Annual turnover over € 2 million to up to € 5 million	C.I	Annual turnover over € 10 million up to € 12.5 million	D.I	Annual turnover over € 50 million up to € 75 million
A.II	Annual turnover over € 700,000 to € 1.4 million	B.II	Annual turnover over € 5 million up to 7.5 million	C.II	Annual turnover over € 12.5 million up to € 15 million	D.II	Annual turnover over € 75 million to up to € 100 million

A.III	Annual turnover over € 1.4 million up to € 2 million	B.III	Annual turnover over € 7.5 million up to € 10 million	C.III	Annual turnover over € 15 million up to € 20 million	D.III	Annual turnover over € 100 million up to € 200 million
				C.IV	Annual turnover over € 20 million up to € 25 million	D.IV	Annual turnover over € 200 million up to € 300 million
				C.V	Annual turnover over € 25 million up to € 30 million	D.V	Annual turnover over € 300 million up to € 400 million
				C.VI	Annual turnover over € 30 million up to € 40 million	D.VII	Annual turnover over € 500 million

(Table 1)

2. Determination of the average annual turnover of the respective subgroup of the size class

The average annual turnover of the subgroup in which the undertaking is classified is then determined (Table 2). This step serves to illustrate the determination of the basic economic value based on this (3.).

Micro enterprises as well as small and medium-sized enterprises (SMEs)				Large enterprises			
A		B		C		D	
A.I	€ 350,000	B.I	€ 3.5 million	C.I	€ 11.25 million	D.I	€ 62.5 million
A.II	€ 1,050,000	B.II	€ 6.25 million	C.II	€ 13.75 million	D.II	€ 87.5 million
A.III	€ 1.7 million	B.III	€ 8.75 million	C.III	€ 17.5 million	D.III	€ 150 million
				C.IV	€ 22.5 million	D.IV	€ 250 million
				C.V	€ 27.5 million	D.V	€ 350 million
				C.VI	€ 35 million	D.VI	€ 450 million
				C.VII	€ 45 million	D.VII	Concrete annual turnover*

(Table 2)

* As of an annual turnover in excess of € 500 million, the percentage fine of 2% or 4% of the annual turnover is taken as the maximum limit, which means that the calculation for the respective undertaking is based on the actual turnover.

3. Determination of the basic economic value

In order to determine the basic economic value, the average annual turnover of the subgroup in which the undertaking has been classified is divided by 360 (days) and thus an average daily rate that is rounded up to the pre-decimal place is calculated (Table 3).

Micro enterprises as well as small and medium-sized enterprises (SMEs)				Large enterprises			
A		B		C		D	
A.I	€ 972	B.I	€ 9,722	C.I	€ 31,250	D.I	€ 173,611
A.II	€ 2,917	B.II	€ 17,361	C.II	€ 38,194	D.II	€ 243,056
A.III	€4,722	B.III	€ 24,306	C.III	€ 48,611	D.III	€ 416,667
				C.IV	€ 62,500	D.IV	€ 694,444
				C.V	€ 76,389	D.V	€ 972,222
				C.VI	€ 97,222	D.VI	€ 1.25 million
				C.VII	€ 125,000	D.VII	Concrete daily rate*

(Table 3)

* As of an annual turnover in excess of € 500 million, the percentage fine of 2% or 4% of the annual turnover is taken as the maximum limit, which means that the calculation for the respective undertaking is based on the actual turnover.

4. Multiplication of the basic value according to the severity of the infringement

After this, the infringement is then classified according to severity as being minor, medium, severe or very severe based on the specific circumstances of the individual case (cf. Art. 83 (2) sentence 2 GDPR).

For this purpose, in accordance with Table 4 below and taking into account the circumstances of the individual case, the severity of the alleged infringement and the respective factor by which the basic value is multiplied are determined on the basis of the catalogue of criteria in Art. 83 (2) GDPR. With regard to the different frameworks for the administrative fines, different factors must be selected for formal infringements (Art. 83 (4) GDPR) and material infringements (Art. 83 (5), (6) GDPR). When choosing the multiplication factor for a very serious infringement, one must bear in mind that the administrative fine limit for the individual case is not exceeded.

Severity of the infringement	Factor for formal infringements pursuant to Art. 83 (4) GDPR	Factor for material infringements pursuant to Art. 83 (5), (6) GDPR
Minor	1 to 2	1 to 4
Medium	2 to 4	4 to 8
Severe	4 to 6	8 to 12
Very severe	6 <	12 <

(Table 4)

5. Adjustment of the basic value on the basis of all other circumstances for and against the party concerned

The amount calculated under 4. is adjusted on the basis of all circumstances speaking for and against the party concerned, insofar as these have not yet been taken into account under 4. This includes, in particular, all circumstances relating to the infringer (cf. catalogue of criteria in Art. 83 (2) GDPR) as well as any other circumstances, such as a long duration of the proceedings or the undertaking's imminent insolvency.