

Response to EDPB guidelines on calculation of administrative fines under GDPR

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Insurance Europe welcomes the possibility to comment on the European Data Protection Board's (EDPB) draft guidelines on the calculation of administrative fines under the General Data Protection Regulation (GDPR). The aim of these Guidelines is to create a harmonised basis from which the calculation of administrative fines in individual cases can be made by national supervisory authorities. The EDPB draft guidelines provide more detail on the factors taken into account for the calculation: however, they do not make the level of fines more predictable.

It is emphasised throughout the draft guidelines that the final amount of the fine depends on all the circumstances of the case. Fixed amounts can be established at the discretion of the supervisory authority, taking into account – inter alia – the social and economic circumstances of that particular member state, in relation to the seriousness of the infringement as construed by Article 83(2)(a), (b) and (g) GDPR.

While the objective of the guidelines is to provide a level of harmonisation, Insurance Europe wishes to stress the importance of taking into account the local social and economic factors as one of the key criteria for calculating a fine. This will ensure that the final amount of the calculated fine meets the requirements of effectiveness, dissuasiveness and proportionality, as required by Article 83(1) GDPR.

The EDPB guidelines also say that group turnover should be relevant for the calculation of the fine instead of an individual undertaking's turnover only if the parent company exercises decisive influence over its subsidiary. This principle is consistent with antitrust law and follows the general tradition of EU law on sanctions that has been already established by other EU legal acts. However, it may raise questions of definitions of undertaking and turnover. Supervisory authorities must therefore ensure that the fine is proportionate both to the gravity of the infringement and to the size of the undertaking to which the infringing entity belongs (to take account of the corresponding turnover).

In accordance with competition law, the relevant product market and the relevant geographic market to which the infringement directly or indirectly relates should be used to determine the amount of a fine. 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 Articles 73 and 74 of the Solvency II Directive.

According to Article 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. 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.

Additionally, according to page 36 paragraph 138 of the Guidelines, the turnover within the meaning of Article 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 Article 13 (1) of Directive 2013/34/EU). For insurance companies, insurance premiums shall be included in the revenue (page 36 footnote 62).

Pursuant to Article 4 of Regulation (EC) No 1606/2002 (IAS Regulation) publicly traded companies, which are obliged to prepare consolidated financial statements, are required to do so in accordance with international accounting standards (IFRS) ¹.

In this context, it is especially important with regard to insurance companies that 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.

Commission Regulation (EU) 2021/2036 of 19 November 2021² adopted IFRS 17 and incorporated the standard into European law. 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.

IFRS 17 states that the information on insurance revenue (first line of the profit and loss statement) shall not include amounts the insurer is obligated to pay the policyholder regardless of whether the insured event occurs (eg the so-called investment component). These amounts that represent the investment of the policyholder (eg the savings component of an endowment life insurance) must be excluded from the revenues in the profit and loss account.

Through 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 reporting by insurers and companies from other sectors.³ The investment component is comparable to the customer's investment 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) must present these amounts separately to enable their easy identification for each fiscal year.⁴

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 national provisions based on the EU-Accounting Directive/Insurance Accounts Directive) amounts that the policyholders are entitled to should not be used to determine the starting point for the calculation of fines.

1 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>

2 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>

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

4 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

For the purpose of determining the revenue of insurance companies, footnote 62 of the EDPB draft guidelines 04/2022 currently seems to exclusively focus on the paid insurance premiums. It is, therefore, imperative to complement the footnote. This would prevent contradictions with the explicit requirements of IFRS 17 and 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 would be accomplished.

The industry proposes 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 minus the amount 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 GAAP based on the Directive 91/674/EEC⁵ : insurance premiums minus 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, paragraph 130 of the guidelines could be complemented as follows:

If the undertaking is subject to the obligation within the meaning of Article 21 et seq. of Directive 2013/34/EU and must prepare consolidated annual financial statements (including the consolidated annual financial statements as required by Article 4 or as allowed by Article 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.

Finally, the EDPB refers in point 58 to categories of personal data outside the scope of Articles 9 and 10 whose disclosure can create immediate damages or distress to the data subject. Among the examples referred, the EDPB mentions the national identification number. In this regard, it should be noted that there are member states where the national identification number is publicly available to ensure the security of business transactions and the correct identification of natural persons conducting business activities. The EDPB is, therefore, encouraged to remove such reference to avoid possible misunderstandings and further reflect national circumstances.

⁵ Council Directive 91/674/EEC of 19 December 1991 on the annual accounts and consolidated accounts of insurance undertakings