

The new GDPR catalogue of fines – It's getting serious!

INTRODUCTION

It is general knowledge that the GDPR became directly applicable on May 25, 2018, but there is one thing that has not really sunk in since then: The often cited framework of fines in Art. 83 GDPR, which provides for anti-trust-like fines of up to 4 per cent of global sales, has not yet been fully exhausted in Germany.

While a few heavy fines in other E.U. countries have caused a stir (such as EUR 204 million for British Airways in the U.K. or EUR 50 million for Google in France), the German fines have remained virtually unchanged in comparison to the days of the old BDSG. Since May 25, 2018, Baden-Württemberg has been at the top nationally with a total of seven fines averaging EUR 27,000.00, while Saarland was at the bottom of the list with three fines at an average of EUR 197.00. The fine of EUR 195,407.00 levied by the Berlin Data Protection Agency against Delivery Hero has gone off, for the first time, in a different direction and has formed the blueprint for the future handling of fines, which means that it will now get serious indeed.

THE NEW CATALOGUE OF FINES

For months, the German Data Protection Authorities have been working more or less quietly and behind closed doors within the framework of the Conference of the Independent Federal and State Data Protection Authorities (DSK) on a uniform fine model which had already been approved by the majority in the summer and, following increasing pressure, was published in excerpts on October 14, 2019 (vgl. [datenschutzkonferenz-online.de](https://www.datenschutzkonferenz-online.de)). And this catalogue is no laughing matter:

The starting point is a sales-oriented daily rate, that is, an amount equivalent to **annual total sales divided by 360 (days)**, which is then **multiplied** according to the seriousness of the violation and finally determined by taking into account additional subjective (culpability) and objective (preventive measures) aspects. Specifically, the calculation is based on the following four steps:

- (i) **Daily rate** = annual sales (category) ÷ 360
- (ii) **Factor** = „minor x 1-4“ to „very severe x 12-14,4“ (formel/material violations)
- (iii) Modification of the factor according to **duration, nature, number**
- (iv) **Culpability**: such as conditional intent (+25 %), (no) TOMs (+/-25 %), nature (x 200/300 %, etc.), Cooperation with the regulatory authority or self-indictment (each -25 %)

This results in fine corridors for companies with an annual turnover of EUR 90 billion, for instance, starting at EUR 250 million or for those will an annual turnover of EUR 90 million starting at about EUR 250,000. Just to provide some perspective: Germany's 100 largest companies' turnover ranges between about EUR 7 billion to EUR 230 billion and the stated figures form only the starting point for further (drastic) increases, given the multipliers in steps 2 to 4.

ADVICE FOR PRACTITIONERS

This is a bitter pill to swallow, and conversations with individual members of the Data Protection Authorities have confirmed that the authorities are taking this very seriously. The impacts on businesses are easy to describe.

- First: Those who have not yet taken data protection seriously (enough), are well advised to start doing so. One-and-a-half years of practical experience in the implementation of GDPR compliance concepts (works agreements, consent declarations, HR processes, etc.) have shown that this can be done quite quickly in the individual case and – depending on the baseline position – can also be completed with just a few adjustments.
- Second: Should the worst case occur, legal defense is often meaningful and promising. Our years of experience in comparable proceedings in matters involving misdemeanors and criminal charges, such as in connection with illegal lease of employees or in case of misclassification issues have shown that it is often possible to achieve quite a lot. A catalogue of fines that lacks transparency provides even more to go on.

In any event, one thing is clear: After pretty much exactly one-and-a-half years, the “honeymoon” is over.

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