

# Position Paper

## Sanctions under the GDPR – The German DPA’s concept on fines

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### Bitkom Position on the DSK’s concept on fines<sup>1</sup>

On 14 October 2019, the German Data Protection Conference (Datenschutzkonferenz – DSK) published its concept on fines for sanctions under the GDPR. The concept is intended to contribute to the standardisation of practice for German Data Protection Authorities until the European Data Protection Board publishes Guidelines for the application and setting of fines under the GDPR.

While we are welcoming the work of the DSK with the aim of standardising supervisory practice in Germany we consider an adaptation of the concept to be necessary. Some of the considerations overextend the provisions of the GDPR and are therefore neither suitable for a German, nor a European concept on fines. We urge the EDPB to include the following considerations for the upcoming Draft of a European concept.

### Initial situation

There is still a lot of legal uncertainty regarding the implementation of the GDPR. Sanctions and fines, which can be imposed for GDPR infringements, are not handled uniformly in the EU. The German Data Protection Conference (Datenschutzkonferenz - DSK) recently published its binding concept on fines for the German market, which is intended to ensure a harmonized approach for the 17 German Data Protection Authorities and which is based on the turnover of the company concerned.

### Bitkom assessment

The DSK’s concept on fines contradicts the GDPR and raises constitutional questions: The turnover-centric concept contradicts the provisions and assessments of the GDPR, which provide that the turnover of the company should limit the maximum fines, not its lower limit. Our aim is an EU-wide approach to the implementation and also enforcement of the GDPR, which needs to be consistent and appropriate and include

<sup>1</sup> The full Position Paper is available in German:

<https://www.bitkom.org/Bitkom/Publikationen/Stellungnahme-Bussgeldkonzept-Datenschutzkonferenz>

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harmonized interpretation of its rules. Only then will we be able to fulfil the vision of the Digital Single Market.

### Core Aspects

#### Ensuring proportionality

The enforcement of the GDPR by means of sanctions (including, inter alia, fines) must be proportionate. This must also be strictly observed as a principle of administrative action and be a central part of any concept on fines.

#### Turnover

The GDPR introduced a new approach to sanction with regard to the high amounts of fines – but it does not provide for a fining system that is centred on a companies' annual turnover as the main criterion. Many other factors have to be taken into account when calculating fines: Article 83 para 2 GDPR is very clear in that regard.

The proposed consideration of turnover as the starting point for the calculation of a fine leads to an inconsistency in the assessment of serious offences committed by small enterprises and small infringements by larger companies.

#### Individual assessment

The catalogue of sanctions provided for in the GDPR is thwarted by the proposed rigid 5-step test if the DSK's concept on fines. In particular, the cooperation of the companies concerned should be included in the calculation.

Bitkom represents more than 2,700 companies of the digital economy, including 1,900 direct members. Through IT- and communication services alone, our members generate a domestic annual turnover of 190 billion Euros, including 50 billion Euros in exports. The members of Bitkom employ more than 2 million people in Germany. Among these members are 1,000 small and medium-sized businesses, over 500 startups and almost all global players. They offer a wide range of software technologies, IT-services, and telecommunications or internet services, produce hardware and consumer electronics, operate in the digital media sector or are in other ways affiliated with the digital economy. 80 percent of the members' headquarters are located in Germany with an additional 8 percent both in the EU and the USA, as well as 4 percent in other regions of the world. Bitkom promotes the digital transformation of the German economy, as well as of German society at large, enabling citizens to benefit from digitalisation. A strong European digital policy and a fully integrated digital single market are at the heart of Bitkom's concerns, as well as establishing Germany as a key driver of digital change in Europe and globally.