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Client Alert Commentary

Latham & Watkins Privacy & Cyber Practice

27 April 2023 | Number 3100

CJEU Advocate General Rejects Strict Liability for GDPR Fines

The CJEU's final ruling could subject companies to direct GDPR enforcement by DPAs notwithstanding national procedural rules, but may rule against strict liability under the GDPR.

On 27 April 2023 Advocate General of the Court of Justice of the European Union (CJEU) Campos Sánchez-Bordona delivered an opinion in which he approved direct enforcement of the General Data Protection Regulation (GDPR) against companies but rejected a broader concept of "strict liability" for alleged GDPR violations.

The opinion was issued in relation to a new landmark case (C-807/21) in which the CJEU will determine whether organisations face strict liability for violating the GDPR, or whether data protection authorities (DPAs) must prove relevant misconduct of an individual within the organisation before imposing fines. The Advocate General's opinion, though not binding on the CJEU, carries considerable weight because courts often follow such opinions.

The case involves a German corporation contesting a €14.5 million fine which the Berlin Commissioner for Data Protection and Freedom of Information (Berlin DPA) imposed in 2019.[1] If the CJEU adopts a strict liability approach under Article 83 GDPR, companies could face considerable liability risks for GDPR violations. In particular, DPAs would face fewer barriers to imposing substantial fines on companies.

Background

In September 2019, the Berlin DPA imposed a €14.5 million fine against a German company for alleged violations of GDPR requirements related to data deletion and privacy by design and by default. In its fine notice, the Berlin DPA did not state whether the alleged shortcomings resulted from a relevant manager's or other employees' culpable behaviour. Rather, it followed a "strict liability" approach and imposed the fine directly on the company without establishing a culpable act of a manager or an employee of the company. This approach is not in line with the German administrative offences law (Ordnungswidrigkeitengesetz — OWiG), which requires authorities to prove misconduct of a manager or lack of supervision (Sections 130, 30 OWiG).

German DPAs and their joint coordination board, the Conference of the German Federal and the State Data Protection Supervisory Authorities (DSK), hold that such requirements under the OWiG do not apply to the imposition of fines under the GDPR. In the DSK's view, this ability to impose GDPR fines free of the procedural rules and safeguards of the OWiG is "a facilitation intended by the European legislator". The

German DPAs believe they only need to prove an attributable objective breach of GDPR obligations to impose a fine directly on the company — notwithstanding national procedural laws that may set a different threshold for corporate culpability and liability. This approach goes beyond the (already far-reaching) fine liability concept under EU antitrust law and CJEU case law, which requires a culpable act by a representative of the accused enterprise.[2]

The Berlin District Court (DC) did not follow the approach that the German DPAs and the DSK suggested. Rather, it declared the fine notice invalid due to significant violations of German national procedural laws[3]. In particular, the DC held that the Berlin DPA's position violates the principle of culpability, the principle of legality and, importantly, the general principle of the legality of penalties provided in Article 49(1) Charter of Fundamental Rights of the European Union (CFR). Additionally, in the DC's view, the penalty notice that the DPAs issued did not specify the charged offense in sufficient detail.

In the appeal of the DC's decision that the Berlin public prosecutor initiated on behalf of the Berlin DPA, the appeals court submitted two questions to the CJEU for a preliminary ruling on the interpretation of Article 83 GDPR:

1. Can DPAs impose GDPR fines directly on companies, potentially in the same way as under EU antitrust law, meaning that the DPAs do not need to prove a manager's misconduct?

2. If so, can GDPR fines only be imposed on companies if culpable activity of the company is established (i.e., intentional or negligent violation by the company)? Alternatively, is an objective breach of the GDPR attributable to the company, in principle, sufficient for the company to be fined?

Procedural Framework for Imposing GDPR Fines

To justify their proposed position on liability, the DPAs argue that the GDPR sanctioning system follows the liability approach under EU antitrust laws. In this regard, they refer to Recital (150)(3) GDPR which states: "Where administrative fines are imposed on an undertaking, an undertaking should be understood to be an undertaking in accordance with Articles 101 and 102 TFEU for those purposes".

However, the DPAs' position is open to challenge, and the Advocate General did not support the DPA's reliance on a strict liability concept in this context. The European Data Protection Board (EDPB) also supports this interpretation in its Guidelines 04/2022 on the calculation of administrative fines under the GDPR (Guidelines). The EDPB states, amongst other things, that the DPAs need to consider "local administrative and judicial laws appliable to them" when imposing fines on companies under Article 83 GDPR. For more details on the Guidelines, see this Latham blog post.

Therefore, the DPAs' position on strict corporate liability is not supported by the GDPR's wording or intent. Equally, the fact that Recital (150)(3) GDPR refers to antitrust rules regarding the amount of fines against undertakings does not strongly support the DPA's position (referring as it does to the amount of a fine rather than the basis or preconditions for issuing such a fine), as the Advocate General confirmed. Moreover, according to CJEU case law,[4] recitals cannot override the wording of a regulation's main provisions.

Outcome and Potential Implications

The Advocate General concluded in his opinion that DPAs may impose fines directly on companies for alleged GDPR violations. In relation to strict liability, the Advocate General considers that the GDPR excludes a strict liability approach, primarily on the basis that Article 83 GDPR requires an intentional or

negligent violation by a manager or employee of the company. Further, violations by employees can only be attributed to the company if there was lack of supervision.[5] The Advocate General opines that the GDPR sanctions regime should generally be applied consistently across EU Member States, resulting in a pan-European regime based on subjective liability (i.e., intent or negligence) rather than strict liability. This approach does not leave room for DPAs to sanction companies regardless of proof of culpability in individual Member States.

The Advocate General's opinion is not binding on the CJEU, although in the majority of cases, the courts follow such opinions. Generally, a decision from the Grand Chamber of the CJEU can be expected several months after the Advocate General's opinion. If the CJEU follows the Advocate General's approach, companies may be subject to direct GDPR enforcement by DPAs, notwithstanding applicable national procedural rules. However, companies should have an arguable defence against DPAs seeking to impose fines on a strict liability basis.

If the CJEU ultimately rules in the Berlin DPA's favour in spite of the Advocate General's opinion, it could potentially set a new supranational sanctions regime for the GDPR based on strict corporate liability. Such a newly established regime would presumably not take into account applicable national procedural rules that may establish a higher threshold for corporate culpability. This interpretation would not be in line with fundamental procedural and defendant rights (e.g., Articles 47 and 49 CFR) and corresponding rules under the German constitutional legal framework. In any case, a strict liability concept would most likely make it more complex, unpredictable, and costly for organizations to defend against GDPR fines. These potential implications of a strict liability approach would not be limited to Germany and could become relevant for GDPR fine proceedings across the EU.

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Endnotes

[1] Latham & Watkins represents the defendant company in these CJEU proceedings. The views and positions expressed in this Client Alert are solely those of Latham & Watkins and not those of the defendant company.

[2] CJEU, ruling of 16 February 2017, C-95/15 P — *Paraffinwachs.*

[3] Ruling of 18 February 2021, 526 OWi LG) 212 Js-OWi 1/20 (1/20), 526 OWiG LG 1/20.

[4] CJEU, ruling of 19 June 2014, C-345/13 — *Karen Miller Fashion.*

[5] Advocate General opinion of 27 April 2023, C-807/21, paragraph 59.