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GDPR fines - lessons from competition law

Although the EU General Data Protection Regulation (the **"GDPR"**)[1] entered into force on 25 May 2018, and the obligations under the GDPR have since taken effect, there remain significant uncertainties as regards enforcement. In particular, the application of the GDPR's fining provisions – arguably the key concern for companies commercially – raises several issues, both in terms of the interpretation of the relevant GDPR provisions, and their operation in practice.

This article seeks to shed some light on the potential reach of the GDPR fining provisions within corporate group structures and other commercial arrangements by exploring relevant EU competition law principles and policy considerations. By understanding how related concepts under EU competition law have been interpreted and applied in practice, it is possible to postulate how these may be deployed within the GDPR context.

Fines under the GDPR

Article 83 GDPR provides the legal basis for the imposition of fines for breaches of the GDPR. Companies may be fined up to €10 or €20 million or, in the case of an "*undertaking*", up to 2 per cent. or 4 per cent. of the "*total worldwide annual turnover*" of the preceding financial year, in respect of certain breaches of obligations under the GDPR.[2]

The fining regime prior to the GDPR under Directive 95/46/EC was left to individual EU Member States to determine. In the United Kingdom, for example, the relevant data protection authority, the Information Commissioner's Office (the "**ICO**"), had issued statutory guidance under the Data Protection Act 1998 about the issuing of monetary penalties. The Data Protection (Monetary Penalties) (Maximum Penalty and Notices) Regulations 2010 prescribed that the amount of any penalty determined by the ICO must not exceed £500,000. Importantly, there was no reference to an "*undertaking*" or "*total worldwide turnover*" when calculating fines under the prior regime in the United Kingdom.

In contrast, the GDPR now clearly envisages that "*undertakings*" will be fined up to 2 per cent. or 4 per cent. (as the case may be, depending upon the nature of the GDPR breach) of "*total worldwide annual turnover*". Logically, therefore, the enforcement provisions of the GDPR give rise to two key questions:

1. What is an "*undertaking*" for GDPR purposes; and
2. How to calculate "*total worldwide turnover*" under Article 83 GDPR.

1. What is an "*undertaking*" for GDPR purposes?

In terms of the first question, the GDPR does not seek to define an "*undertaking*" for enforcement purposes. Rather, Recital 150 GDPR expressly provides that EU competition law principles should be used to delineate the concept of an "*undertaking*", as follows:

*"Where administrative fines are imposed on an undertaking, an undertaking should be understood to be an undertaking in accordance with Articles 101 and 102 [Treaty on the Functioning of the European Union (**"TFEU"**)] for those purposes."*[3]

1 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) [2016] OJ L 199.

2 Articles 83(4) and (5) GDPR.

3 Recital 150 GDPR.

EU competition law as an aid to interpretation

Both Articles 101 and 102 TFEU expressly impose obligations on "*undertakings*": at a high level, Article 101 TFEU prohibits undertakings from entering into restrictive agreements/arrangements and Article 102 TFEU prohibits an undertaking from abusing a dominant position. However, in order to determine what precisely constitutes an "*undertaking*" for these purposes, it is necessary to look beyond the provisions of the Treaty and consider the jurisprudence of the Court of Justice of the European Union (the General Court or the Court of Justice, as the case may be) (the **"CJEU"**), as well as the decisions of the European Commission (the **"Commission"**).

Broadly, the CJEU has held that *"an undertaking encompasses every entity engaged in an economic activity regardless of the legal status of the entity and the way in which it is financed."*[4] The offering of goods or services on a given market is an economic activity.[5] EU competition law, therefore, adopts a functional approach to the determination of an "*undertaking*", recognising that companies may perform both economic and non-economic activities (the latter usually being the exercise of some public function) and such classification must therefore be performed for each activity separately.[6]

Further, the CJEU and the Commission have expanded the scope of what (or even who) may be considered an *"undertaking"* through the 'single economic entity' doctrine and the inter-related concept of 'exercise of decisive influence'. It is established law that *"when a company **exercises decisive influence** over another company they form a **single economic entity** and, hence, are part of the same **undertaking**."* (emphasis added)[7] for competition law purposes. In other words, the concepts of "*undertaking*", "*single economic entity*" and "*exercise of decisive influence*" are linked inextricably.

4 Judgment of 23 April 1991 in *Höfner and Elser v Macrotron GmbH*, C-41/90, EU:C:1991:161, paragraph 21.

5 Judgment of 12 September 2000 in *Pavlov and Others v Stichting Pensioenfonds Medische Specialisten*, C-180-98 to C-184/98, EU:C:2000:428.

6 Judgment of 19 February 2002 in *Wouters v Algemene Raad van de Nederlandse Orde van Advocaten*, C-309/99, EU:C:2002:98; and Judgment of 1 July 2008 in *MOTOE v Elliniko Dimosio*, C-49/07, EU:C:2008:376.

7 Commission, 'Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements' OJ [2011] C/11/1; see also: Judgment of 24 October 1996 in *Viho Europe BV v Commission*, C-73/95 P, EU:C:1996:405.

Clearly all companies within the same corporate group could be considered to satisfy the legal test to form a "*single economic entity*" and therefore considered to form one "*undertaking*", irrespective of legal status. In such circumstances, the turnover of the entire corporate group is potentially relevant to the calculation of any fine under the GDPR.

However, the legal test used to determine an "*undertaking*" has potentially much more far-reaching consequences. As set out in further detail below, given the functional approach adopted by EU competition law, the CJEU and the Commission will look beyond the form of any corporate structure to the underlying arrangements when determining who is able to exercise decisive influence – for example, in the context of (often complex) financial structures established to invest in certain businesses. Moreover, these concepts can also be applied across *different* corporate groups in the context of a joint venture scenario.

The *"exercise of decisive influence"* under competition law

Under EU competition law, the Commission is able to attribute liability to a parent company in respect of anti-competitive activity by a subsidiary if it is able to demonstrate that the parent company exercised so-called *"decisive influence"* over the infringing subsidiary. In this context, the CJEU has held that *"the conduct of a subsidiary can be imputed to its parent company, in particular where, although it has separate legal personality, that **subsidiary does not decide independently upon its own conduct** on the market, **but carries out**, in all material respects, **the instructions given to it by the parent** company, regard being had in particular to the **economic, organisational and legal links** between those two legal entities".* (emphasis added)[8]

Essentially, therefore, the concept of *"decisive influence"* represents a test of control: the *"exercise of decisive influence"* by one entity over another entity entails that the latter entity does not enjoy real autonomy in determining its commercial policy on the market.

Under EU competition law, decisive influence can be presumed (and therefore liability attributed) where a parent company has a 100% shareholding in the relevant subsidiary, with the burden of proof resting on the parent company to prove that it did not exercise such decisive influence. This legal presumption of

8 Judgment of 10 September 2009 in *Akzo Nobel NV and Others v Commission*, C-97/08 P, EU:C:2009:536.

decisive influence of a parent company over the conduct of its wholly owned subsidiary is rebuttable: in practice, however, it is rarely rebutted successfully.

Further, the CJEU has recently held that where a parent is able to exercise all of the voting rights associated with a subsidiary's shares, particularly where this is in combination with a "*very high*" majority stake in the subsidiary's share capital, such a parent is in a similar position to a parent of a wholly owned subsidiary, and there is a legal presumption that that parent is able to determine the economic and commercial strategy of the subsidiary.[9]

The CJEU has been reluctant to provide an exhaustive list of the factors which determine whether a subsidiary is able to determine its conduct on a market independently (in cases where the legal presumption does not apply); rather, account must be taken of all of the relevant factors relating to the "*economic, organisational and legal links*" between the parent and the subsidiary.[10] In the same recent case, the CJEU endorsed the following "*objective factors*" identified by the Commission as evidencing the exercise of decisive influence:

- The power to appoint the members of the various boards of directors of the subsidiary;
- The power to call shareholder meetings and to propose the revocation of directors or of entire boards of directors;
- The parent's actual level of representation on the subsidiary's board of directors;
- The management powers of the parent's representatives on the board of directors;
- The important role played by the parent on the committees established by the subsidiary;
- The receipt of regular updates and monthly reports by those directors found to represent the parent;
- The measures taken to ensure continuation of decisive control following an initial public offering of shares in the subsidiary; and
- Evidence of behaviour typical of an industrial owner.

Further, it appears that the GDPR itself anticipates this kind of analysis. Recital 37 GDPR, which concerns the concept of "*controlling*" and "*controlled*" undertakings in the context of groups of undertakings, states as follows:

"whereby the controlling undertaking should be the undertaking which can exert a dominant influence over the other undertakings by virtue, for example, of ownership, financial participation or the rules which govern it [...]"

Though termed as "*dominant influence*", the consideration of ownership, financial participation and governance suggests an analysis similar to that of decisive influence under EU competition law, and indeed bears parallels to the Commission's "*objective factors*" above. It is therefore prudent to assume that the consideration of the undertaking for fining purposes under the GDPR will draw heavily upon the analysis under EU competition law in respect of decisive influence, as described above.

It is important also to note the above considerations would apply *mutatis mutandis* to (often complex) investment structures, which may involve multiple layers of funds and intermediary companies. EU competition law will look through such structures when determining whether such investment companies are able to exert decisive influence over their respective investments – as set out above, both the level of shareholdings and the control of voting rights could be especially relevant to such an analysis. In particular, claiming to be a 'pure financial investor' is not in itself a defence, although such an argument could potentially be deployed to rebut the presumption of decisive influence. The Commission's "*objective factors*" (identified above) represent a useful benchmark for assessing the extent to which decisive influence may actually be exercised over investment entities.

Finally, it should be noted that joint venture parents can be considered part of a single economic entity together with the joint venture - and therefore part of the same "*undertaking*" - for the purposes of attributing liability to pay the fine for anti-competitive activity by the joint venture. This would include deadlock (50:50) joint ventures, where each parent exercises "*decisive influence*" over the joint venture. It could also include a minority parent, where such parent exercises decisive influence, as a result of voting/veto rights etc.

Accordingly, where both joint venture parents are considered to exercise decisive influence over the joint venture, under the doctrine of parental liability, they may be held liable to pay any fines under competition law on a joint and several basis, together with the joint venture itself. Moreover, the joint venture parents' respective global turnovers would be considered in terms of the application of the legal maximum to any fines that may be imposed (see further below).

9 Judgment of 12 July 2018 in *The Goldman Sachs Group, Inc. v Commission*, T-419/14, EU:T:2018:445 (now on appeal to the Court of Justice, C-595/18 P).

10 Judgment of 14 September 2016 in *Ori Martin and SLM v Commission*, C-490/15 P, EU:C:2016:678; and *The Goldman Sachs Group, Inc. v Commission*.

2. The calculation of "*total worldwide turnover*" for GDPR purposes

The GDPR does not set out how turnover should be identified for the purposes of Article 83 GDPR: it does not therefore provide any guidance as to how the respective legal maximums of 2% and 4% of total worldwide turnover should be applied. Further, although pursuant to Article 70(1)(k) GDPR the European Data Protection Board must provide guidelines for supervisory authorities concerning the setting of administrative fines pursuant to Article 83 GDPR, no such guidelines have yet been published.[11]

In contrast, the Data Protection (Charges and Information) Regulations 2018 (the **"Data Regulations"**)[12] provide for the calculation of charges that may be imposed by the ICO in respect of the processing of personal data by data controllers pursuant to the Data Protection Act 2018 (the **"Data Protection Act"**). Interestingly, such charges are determined in relation to turnover, and the Data Regulations contain a definition of turnover at Regulation 1(2):

(a) in relation to a company, [turnover] has the meaning given in section 474[13] of the Companies Act 2006,

[...]

(c) in relation to any other case, [turnover] means the amounts derived by the data controller from the provision of goods and services falling within the data controller's ordinary activities, after deduction of—

(i) trade discounts,

(ii) value added tax, and

(iii) any other taxes based on the amounts so derived.

The Data Regulations are not stated to apply to fines imposed under Article 83 GDPR. However, the ICO does have at its disposal the definition of turnover under the Data Regulations, alongside a similar definition of turnover under the Companies Act 2006 (though turnover in the latter respect is *not* limited to the company's "*ordinary activities*" as under the Data Regulations).

It is also possible to draw further parallels with competition law, given that fining policy based upon global turnover is a familiar concept in EU competition law: for example, under both Article 101 and Article 102 TFEU the legal maximum for fines imposed by the Commission is fixed at 10 per cent. of global turnover of the relevant "*undertaking*".[14] This is notwithstanding the fact that there is no direct read-across from the fining methodology used by the Commission in respect of Articles 101/102 TFEU to the GDPR, as EU competition fines seek to capture the effect of the anti-competitive conduct on the market concerned rather than look at turnover *per se*. For example, in respect of cartels, the fines are based upon the value of sales relating to the 'cartelised product' rather than global turnover.

In contrast, however, there is a considerable amount of guidance at EU level in terms of how to identify the relevant turnover in respect of merger control. In our view, as the methodology set out by the Commission relating to the calculation of turnover under the EU Merger Regulation is almost identical to the definition used in the Data Regulations, it represents the best proxy for these purposes, thereby providing useful instruction for the potential application of Article 83 GDPR.

Such an approach is reinforced by the fact that the calculation of turnover for infringement of Articles 101/102 TFEU by the UK competition authority – the Competition and Markets Authority (the "**CMA**") – *is* precisely defined by UK statute[15] and in terms identical to the calculation of turnover under the EU Merger Regulation. For example, for most undertakings,[16] turnover will be calculated with reference to the amounts derived by the undertaking from the sale/provision of products/services falling within the undertaking's ordinary activities and after deduction of sales rebates, VAT and other taxes directly related to turnover. Again, the definition is strikingly similar to that under the Data Regulations.

Accordingly, particularly given the fact that enforcement action for GDPR infringements will be pursued by national supervisory authorities – the ICO in the United Kingdom – it would not seem inappropriate for the ICO to follow the CMA methodology in this regard, in line with subsidiarity principles.

11 The Article 29 Data Protection Working Party published guidelines in October 2017 which, unfortunately, did not provide guidance on how to calculate turnover under the GDPR: *'Guidelines on the application and setting of administrative fines for the purposes of the Regulation 2016/679'* (3 October 2017).

12 SI 2018/480.

13 Defined as: "[...] *in relation to a company, [turnover] means the amounts derived from the provision of goods and services , after deduction of– (a) trade discounts, (b) value added tax, and (c) any other taxes based on the amounts so derived.*"

14 Article 23(2), Council Regulation 1/2003/EC of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L 1 .

15 The Competition Act 1998 (Determination of Turnover for Penalties) Order 2000, SI 2000/309.

16 SI 2000/309 refers to *"non-credit/financial institutions or insurance undertakings"* in this context.

Final thoughts as regards GDPR application...

At the time of writing, therefore, Article 83 GDPR remains largely untested. Moreover, although the Secretary of State is empowered, under section 159 of the Data Protection Act, to determine what is or is not an "*undertaking*", how an undertaking's "*turnover*" is to be calculated and whether a period is or is not a "*financial year*" for the purposes of Article 83 GDPR, no such provision has been made to date. However, as set out in this article, EU competition law can be seen as offering at least some of the answers to the key questions arising from the enforcement provisions of the GDPR. Given the absence of any definitive guidance from the European Data Protection Board and the potential read-across of the definition of turnover under the Data Regulations to Article 83 GDPR, it would not be surprising if the ICO were to reflect EU competition law principles and policy considerations in its decisional practice going forward.

Accordingly, for the reasons explored above, the level of the potential fines that could be imposed under the GDPR's fining provisions present far-reaching implications for companies globally. Affected companies should consider how decisive influence may be exercised in their corporate structure, and consider a 'worst case' scenario where *all* relevant turnover is considered in the calculation of any fine for GDPR infringements.

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