

DATA PRIVACY—UK ENFORCEMENT APPROACH: AN UPDATE FOR PE FIRMS

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Weil

On 18 March 2024, the UK data privacy regulator, the Information Commissioner's Office ("**ICO**"), published its new data protection fining guidance, available [here](#).

For private equity (PE) firms, this both provides a timely reminder of parental liability under the UK GDPR and a useful insight into how the ICO will calculate any fines imposed, which will prove useful when considering the likely quantum of any data privacy red flags issues that have been identified as part of a due diligence exercise. It also highlights the importance of data privacy due diligence and remediating any UK GDPR compliance gaps pre- or (as soon as possible) post-completion. Our key takeaways are set out below.

UK GDPR FINES AND PARENTAL LIABILITY

- **UK GDPR fines levied on infringing portfolio companies may be calculated as a proportion of the annual worldwide turnover of the PE firm if they form part of the same undertaking.** Given the Irish Data Protection Commissioner and the European Data Protection Board decision in September 2021 to apply the parental liability doctrine to calculate WhatsApp Ireland's fine €225m by reference to the global revenues of its parent company, this isn't necessarily "new" news, but it is helpful confirmation that the ICO will also apply UK competition law concepts of "undertaking" and principles in the context of the UK GDPR.
- **This will only apply if the PE firm exercises "decisive influence" over portfolio companies – but if a PE firm owns all of the shares in the portfolio company then this is presumed.** PE firms and portfolio companies will be part of the same "undertaking" where the PE firm exercises "decisive influence". Whether this is present will be determined by the factual circumstances, but relevant factors may include the level of shareholding a PE firm has in the portfolio company, the representation it has on the portfolio company's board, and any other evidence of a PE firm's influence over the portfolio's company's operations. However, if the PE firm owns all (or nearly all) of the voting shares in a portfolio company, "decisive influence" is presumed. While this presumption may be rebutted, the burden is on the PE firm to do so. This is a timely reminder to PE firms to consider whether a group structure or PE investment would create or has created an "undertaking" and, where applicable, any strategies or ways to limit potential for a finding of "decisive influence".
- **PE firms could also be jointly and severally liable for UK GDPR fines imposed on portfolio companies.** The guidance confirms that the ICO may also hold a parent company jointly and severally liable for the payment of a fine imposed on an organisation over which the parent company has decisive influence.

HOW A FINE WILL BE CALCULATED BY THE ICO

Step 1 – Assessment of the seriousness of the infringement:

The ICO will first categorise the infringement into one of three degrees of seriousness - lower, medium and high – and calculate a starting point for the fine based on a percentage of the maximum fine under the UK GDPR (which is £17.5 million or 4% of turnover). For lower degree of seriousness infringements, the ICO will use a starting point of between 0% - 10% of the maximum fine, for medium degree, 10-20%, and for high degree, 20% - 100%. So, as an example, for infringements that have a medium degree of seriousness, the starting point for any fines is £870,000 - 1.74 million or, for undertakings, if higher, 0.2 – 0.4% of turnover.

Step 2 – Where the infringing organisation forms part of an undertaking, accounting for turnover:

Next, where the infringing organisation is part of an undertaking, the ICO has also stated that it will take into account the size of the undertaking when deciding the starting point for the fine. In short, the lower the turnover, the greater the adjustment, e.g. for medium enterprises where turnover is up to £50-100 million, the starting point may be adjusted by between 10-20%, but for large undertakings where annual turnover exceeds £435 million, no adjustment will be made – as the starting point under Step 1 will be based on turnover and so any adjustment will already be taken into account. The ICO sets out tables in the guidance detailing the percentage range adjustments based on the turnover.

Step 3 – Calculation of the starting point:

The ICO will then calculate the starting point using the outcomes of Step 1 and Step 2.

Example 1: Starting point is based on fixed amount

Step 1: The ICO provides an example of an undertaking committing an infringement with a medium degree of seriousness (so the starting point is 10-20% of the maximum fine). In this case, the ICO decides 16% is appropriate.

Step 2: The undertaking's turnover is £30 million. This means an adjustment for turnover can be made. Per the tables in the ICO guidance, any adjustment for turnover may be between 2-10%. In this case, the ICO decides 5% is appropriate.

Step 3: The starting point calculation is: the maximum amount (fixed amount) x adjustment for seriousness x adjustment for turnover, i.e. £17.5 million x 16% x 5% = £140,000. This means £140,000 is the starting point for the fine, which the ICO may further adjust upwards or downwards under Step 4 and/or 5 below.

Example 2: Starting point is based on turnover

Step 1: The ICO also provides an example of an undertaking committing an infringement with a high degree of seriousness (so the starting point is 20-80% of the maximum fine). In this case, the ICO decides 40% is appropriate. This means that, where there are no other adjustments, the starting point is either £7 million or 1.6% of turnover, whichever is higher

Step 2: The undertaking's turnover is £800 million. As the starting point under Step 1 will therefore be based on turnover, and its turnover exceeds the threshold of £435 million, no adjustment for turnover is made, as this will already have been taken into account.

Step 3: The starting point calculation is turnover x maximum amount (%) x adjustment for seriousness, i.e. £800 million x 4% x 40% = £12.8 million (so 1.6% of turnover). This means £12.8 million is the starting point for the fine, which the ICO may further adjust upwards or downwards under Step 4 and/or 5 below.

Step 4 – Adjustment for aggravating and mitigating factors:

The ICO will then take into account any relevant aggravating or mitigating factors, such as action taken to mitigate any damage to individuals, how the ICO were made aware of the infringement, the size and resources of the organisation, the degree of co-operation with the ICO, amongst others.

Step 5 – Adjustment to ensure the fine is effective, proportionate and dissuasive:

In line with Article 83 UK GDPR, any fine must be effective, proportionate and dissuasive. It is worth noting that the guidance makes it clear the dissuasive element has two aims – to act as a specific deterrent to the infringing organisation from committing the same breach, but also a general deterrent to others from committing that breach.

FOR MORE INFORMATION

If you would like more information about the topics raised in this briefing, please speak to your regular contact at Weil or to any of the authors listed below.



BARRY FISHLEY

+44 20 7903 1410
barry.fishley@weil.com



CHLOE KITE

+44 20 7903 1206
chloe.kite@weil.com

WEIL.COM

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