

WP244 ANNEX II – Frequently Asked Questions

What is a lead supervisory authority?

In the GDPR, the general rule is that the supervision of cross-border processing activity, or involving citizens of, more than one EU country, is led by only one supervisory authority, called the Lead supervisory authority. This is known as the One Stop Shop principle.

A lead supervisory authority is the body with the primary responsibility for dealing with *a cross-border processing* activity, for example when a company carrying out processing activity in several Member States is being investigated.

The lead authority will coordinate operations involving supervisory authorities concerned, in accordance with Articles 60-62 of the Regulation (e.g. one stop shop, mutual assistance, and joint operations). It will submit any draft decision to those supervisory authorities with an interest in the matter.

What is cross-border processing?

The lead supervisory authority mechanism is only triggered in the context of cross-border processing. Therefore it is necessary to identify whether any cross-border processing is being carried out.

According to Article 4(23) of the Regulation ‘cross-border processing’ means either the:

- processing of personal data which takes place in the context of the activities of establishments in more than one Member State of a controller or processor in the Union where the controller or processor is established in more than one Member State; or
- processing of personal data which takes place in the context of the activities of a single establishment of a controller or processor in the Union but which substantially affects or is likely to substantially affect data subjects in more than one Member State.

What does ‘substantially affect’ mean?

The regulation does not define ‘substantially affect’.

Supervisory Authorities will interpret ‘substantially affects’ on a case by case basis. We will take into account the context of the processing, the type of data, the purpose of the processing and factors such as whether the processing:

- causes, or is likely to cause, damage, loss or distress to individuals;
- has, or is likely to have, an actual effect in terms of limiting rights or denying an opportunity;
- affects, or is likely to affect individuals’ health, well-being or peace of mind;
- affects, or is likely to affect individuals’ financial or economic status or circumstances;
- leaves individuals open to discrimination or unfair treatment;
- involves the analysis of the special categories of personal or other intrusive data, particularly the personal data of children;
- causes, or is likely to cause, individuals to change their behaviour in a significant way;
- has unlikely, unanticipated or unwanted consequences for individuals;

- creates embarrassment or other negative outcomes, including reputational harm, or
- involves the processing of a wide range of personal data.

How is the lead supervisory authority for Controller identified?

Once it has been determined that the processing in question is cross-border processing, then the lead supervisory authority must be identified.

According to Article 56 of the Regulation, the supervisory authority of the country where the main establishment of the organisation is based will be the lead authority.

Where an organization has a single establishment in the EU, but the processing substantially affects or is likely to substantially affect data subjects in more than one Member State, the lead supervisory authority is the supervisory authority of the place of that single establishment.

Where an organisation has several establishments in the EU, the principle is that the main establishment is the place of the central administration of that organisation. However, if another establishment takes the decisions about the purposes and means of the processing - and has the power to have such decisions implemented – then that becomes the main establishment. It is up to data controllers to establish clearly where decisions on the purposes and means of personal data processing activities are being made.

As an illustration, if a company carries out one or several cross-border processing activities and decisions concerning all the cross-border processing are taken within the EU central place of administration, there will be one single lead supervisory authority for all the cross-border processing activity. This will be the supervisory authority of the place of the company's central administration.

However, if a company carries out several cross-border processing activities and the decisions on the means and purposes of processing are taken in different establishments, there will be more than one lead supervisory authority. These will be the authorities of the place of the establishments taking the decisions on the respective cross-border processing activities. To fully benefit from the one stop shop mechanism with a single lead supervisory authority for all cross-border processing, companies should consider organising decision-making powers in respect of personal data processing activities in a single location.

What criteria are used to identify the Controller's lead supervisory authority?

The factors below are useful for determining the location of a controller's main establishment:

- Does it have a single establishment in the EU?

If so, and if the processing substantially affects or is likely to substantially affect data subjects in more than one Member State, the lead supervisory authority is the supervisory authority of the place of that single establishment.

- Does it have an EU headquarters?
 - o If so, what is its role and are decisions about the purposes and means of the processing taken within this establishment and does this establishment have the power to implement decisions concerning the processing activity?

- If not, are there other establishments where:
 - decisions about business activities that involve data processing are made?
 - the power to have decisions implemented effectively lie?
 - the Director (or Directors) with overall management responsibility for the cross-border processing activity is located?
 - the controller or processor is registered as a company, if in a single territory?

How is the lead supervisory authority for processors identified?

The Regulation also allows data processors that are subject to Regulation, and have establishments in more than one Member State, to benefit from the one-stop-shop system.

Article 4(16)(b) provides that the processor's main establishment will be the place of the central administration of the processor in the EU or, if there is no central administration in the EU, the establishment in the EU where the main processing (processor) activities take place.

However, according to Recital 36, in cases involving both controller and processor, the competent lead supervisory authority will be the one for the controller. In this situation, the supervisory authority of the processor is considered a 'supervisory authority concerned' and should participate in the cooperation procedure.