

Co-operation and consistency between supervisory authorities



At a glance



In cases of cross-border processing in the EU, the European Commission proposed a one-stop shop whereby the supervisory authority for the main establishment of the controller in the EU, would be the sole authority for monitoring and ensuring compliance by that controller throughout the EU. In the face of strong opposition, that has been watered down.

There will now be a lead authority in cases of multiple establishments or cross-border processing in the EU, which will be the supervisory authority for the main establishment, but supervisory authorities in other countries where that controller is established, or where data subjects are substantially affected, or authorities to whom a complaint has been made, can be involved in cases, and the lead authority must co-operate with them. Non-leading authorities can also handle purely local cases involving a cross-border controller.



To do list



If you carry out activities within just a single Member State - (as is still true for the majority of businesses), the lead authority system is irrelevant and the dispute mechanism is only likely to affect you if a relevant proposed Code of Conduct or Certification System is delayed or opposed by the EDPB.



If you carry out activities in two or more member states, find out who your lead authority might be (taking into account the Article 29 Working Party's guidance on lead authorities) and engage with that authority in the run up to implementation by for example accessing training and guidance it makes available.



Degree of change

Commentary

Lead Authority Competence

If a controller or processor carries out ‘cross-border processing’ either through multiple establishments in the EU or even with only a single establishment, the supervisory authority for the main or single establishment acts as lead authority in respect of that cross-border processing.

The Article 29 Working Party adopted guidelines for identifying a lead supervisory authority. Where an organisation has multiple establishments, the lead authority is determined by where the decisions regarding the purposes and manner of the processing in question takes place – whilst this may be the place of central administration of the organisation, if decisions are actually taken in another establishment in the EU, the authority of that location is the lead authority. The guidelines recognise that there can be situations where more than one lead authority can be identified, i.e. in cases where a multinational company decides to have separate decision making centres, in different countries, for different processing activities.

In relation to joint controllers, the Article 29 Working Party guidance suggests that in order to benefit from the one-stop-shop mechanism, joint controllers should designate one establishment which has the power to implement decisions about processing with respect to all of the joint controllers. There may, in practice, be considerable difficulty in giving power to one establishment in this way, meaning the concept of lead authority for joint controllers may be theoretical.

Likewise, while the GDPR also offers the one-stop-shop mechanism, processors that provide services to multiple controllers will not benefit from the one-stop-shop as the lead authority will be the lead authority for each controller.

The guidelines also state that “the GDPR does not permit ‘forum shopping’” – there must be an effective and real exercise of management activity in the member state identified as the organisation’s main establishment. Organisations should be able to demonstrate to supervisory authorities where decisions about data processing are actually taken and implemented, as they may be asked to evidence their position. The guidance notes that controllers without any establishment in the EU cannot benefit from the one-stop-shop mechanism – they must deal with local supervisory authorities in every Member State they are active in, through their local representative.

A national supervisory authority remains competent to exercise powers if a complaint is made to it or an infringement occurs on its territory and if the subject matter of the complaint or infringement relates only to an establishment on that territory or substantially affects data subjects only in that

State. The European Data Protection Board (“EDPB”) can give guidance on what is meant by “*substantially*” affecting data subjects in more than one Member State. The Article 29 Working Party guidance referenced above contains guidance on the meaning of ‘substantially affects’.

Such local cases have to be notified to the lead authority which has three weeks to decide whether to intervene (taking into account whether there is an establishment in the other state) and then apply the co-operation procedure. Non-lead authorities can propose decisions to the lead authority.

If the lead authority does not intervene, the local authority handles the case using, where necessary, the mutual assistance and joint investigation powers.

Co-operation Procedure

The lead authority has to co-operate with other “concerned” supervisory authorities. They have to exchange information and try to reach consensus.

The lead authority has to provide information to the other supervisory authorities and it can seek mutual assistance from them and conduct joint investigations with them on their territories. The lead authority must submit a draft decision to concerned authorities without delay and they have four weeks in which to object. There can be another round of submitting draft decisions with a two week objection period. If the lead authority does not wish to follow the views of concerned authorities it must submit to the consistency procedure supervised by the EDPB.

There are detailed rules about which supervisory authority should take the formal decision and notify the controller, but the lead authority has the duty to ensure that, pursuant to a formal decision, compliance action is taken by a controller in all its establishments.

A lead authority can exceptionally, however, take urgent temporary action without waiting to complete the consistency process.

The lead authority system has a number of apparent weaknesses and could be undermined where non-lead authorities are able to assert themselves on the grounds that data subjects in their jurisdictions are substantially affected by processing conducted by a controller whose main establishment is elsewhere; its success will rely to a large extent on consensus and good will between supervisory authorities.



Where can I find this?

Recitals 124-138 and Chapter VII, Sections 1 & 2

Mutual Assistance, Joint Operations & Consistency

Supervisory authorities are required to provide assistance to each other in the form of information or carrying out “*prior authorisations and consultations, inspections and investigations*”. The European Commission can specify forms and procedures for mutual assistance.

Supervisory authorities can conduct joint investigation and enforcement operations. A supervisory authority has a right to be included in such operations if a controller has an establishment on its territory or a significant number of its data subjects are likely to be substantially affected. If local law permits, a host supervisory authority can give formal investigatory powers to seconded staff. Supervisory authorities have conducted joint investigations under the existing law, so the GDPR in practice will probably just develop and strengthen these arrangements.

Where supervisory authorities take certain formal steps or disagree or wish for action to be taken by another supervisory authority, the GDPR provides for a consistency and dispute resolution mechanism. In its guidelines, the Article 29 Working Party emphasises cooperation between lead and concerned supervisory authorities to reach a mutually acceptable course of action, noting that the formal consistency mechanism should only be invoked where co-operation does not reach a mutually acceptable outcome.

The EDPB has to give opinions on various supervisory authority proposals, including the approval of binding corporate rules, certification criteria and codes of conduct. If the supervisory authority disagrees with an EDPB opinion, the matter goes to the dispute resolution procedure.

That procedure also applies to lead authority/concerned authority disputes. In all these cases, the EDPB takes a binding decision on the basis of a two-thirds majority vote. If there is no such majority, then after a delay, a simple majority will suffice. The supervisory authorities involved are bound to comply and formal decisions have to be issued in compliance with the EDPB decision.



Where can I find this?

Recitals 124-138 and Chapter VII, Sections 1 & 2