

## ARTICLE 29 DATA PROTECTION WORKING PARTY

### 第29條個資保護工作小組



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### **Guidelines for identifying a controller or processor's lead supervisory authority** **關於識別控管者或受託運用者的主責監管機關之指引**

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This Working Party was set up under Article 29 of Directive 95/46/EC. It is an independent European advisory body on data protection and privacy. Its tasks are described in Article 30 of Directive 95/46/EC and Article 15 of Directive 2002/58/EC.

本工作小組係依據95/46/EC指令第29條設立，為歐洲資料保護與隱私之獨立諮詢機構。其任務規範於95/46/EC指令第30條及2002/58/EC指令第15條。

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## 1. Identifying a lead supervisory authority: the key concepts

### 識別主責監管機關：關鍵概念

#### 1.1 ‘Cross-border processing\* of personal data’

##### 「個人資料之跨境運用」

Identifying a lead supervisory authority is only relevant where a controller or processor is carrying out the cross-border processing of personal data. Article 4(23) of the General Data Protection Regulation (GDPR) defines ‘cross-border processing’ as either the:

識別主責監管機關僅在控管者或受託運用者執行個人資料之跨境運用時始相關聯。「一般資料保護規則」(GDPR)第4條第23款將「跨境運用」定義為：

- *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 the*

當控管者或受託運用者設置於一個以上成員國境內，而個人資料之運用發生於控管者或受託運用者位於歐盟境內一個以上成員國據點之活動範圍內；抑或

- *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.*

個人資料之運用發生於控管者或受託運用者位於歐盟境內之單一據點之活動範圍內，然該運用實質影響或可能實質影響位於一個以上成員國境內之當事人。

This means that where an organisation has establishments in France and Romania, for example, and the processing of personal data takes place in the context of their activities, then this will constitute cross-border processing.

此意味著，例如，若一個組織在法國和羅馬尼亞設有據點，且個人資料之運用是發生於該據點之活動範圍內，則將構成跨境運用。

\*譯註：我國個資法將個資之使用分為蒐集(collection)、處理(processing)、利用(use)等不同行為態樣，且有相應之適用要件，而GDPR對個資之蒐集、處理、利用任一行為，皆統稱為 processing。為與我國個資法中之「處理」有所區隔，本文因此將GDPR中的processing 譯為「運用」，processor 譯為「受託運用者」。

Alternatively, the organisation may only carry out processing activity in the context of its establishment in France. However, if the activity substantially affects – or is likely to substantially affect - data subjects in France and Romania then this will also constitute cross-border processing.

抑或，該組織僅在其位於法國據點的活動範圍內進行運用。然而，若該活動實質影響或可能實質影響 – 位於法國和羅馬尼亞之當事人，則亦將構成跨境運用。

### 1.1.1 ‘Substantially affects’

#### 「實質性影響」

The GDPR does not define ‘substantially’ or ‘affects’. The intention of the wording was to ensure that not all processing activity, with any effect and that takes place within the context of a single establishment, falls within the definition of ‘cross-border processing’.

GDPR並未就「實質性」或「影響」加以定義。此措辭之目的係為確保並非任何有影響且發生於某單一據點範圍內之所有運用活動皆落入「跨境運用」之定義。

The most relevant ordinary English meanings of ‘substantial’ include; ‘of ample or considerable amount or size; sizeable, fairly large’, or ‘having solid worth or value, of real significance; solid; weighty, important’ (Oxford English Dictionary).

與「實質性」最相關之一般英語含義包括：「足夠或相當之數量或大小；相當多的、相當大的」或「具有實質之價值或重要性；具有重要意義；實在的；重大的、重要的」（牛津英語詞典）。

The most relevant meaning of the verb ‘affect’ is ‘to influence’ or ‘to make a material impression on’. The related noun -‘effect’- means, amongst other things, ‘a result’ or ‘a consequence’ (Oxford English Dictionary). This suggests that for data processing to *affect* someone it must have some form of impact on them. Processing that does not have a substantial effect on individuals does not fall within the second part of the definition of ‘cross-border processing’. However, it would fall within the first part of the definition where the processing of personal data 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.

與「影響」此動詞最相關之含義為「影響力」或「留下深刻印象」。相關名詞 – 「影響」 – 之含義很多，其一為「結果」或「後果」（牛津英語詞典）。此意味者，對於影響某人之資料運用，該運用必須對該人產生某種形式之影響。對個人沒有實質性影響之運用不符合「跨境運用」定義中之第二部分。然而，當控管者或受託運用者設置於一個以上成員國境內，而個人資料之運用發生於控管者或受託運用者位於歐盟境內一個以

上成員國據點之活動範圍內，則該運用將符合定義的第一部分。

Processing can be brought within the second part of the definition if there is the likelihood of a substantial effect, not just an actual substantial effect. Note that ‘likely to’ does not mean that there is a remote possibility of a substantial effect. The substantial effect must be more likely than not. On the other hand, it also means that individuals do not have to be actually affected: the likelihood of a substantial effect is sufficient to bring the processing within the definition of ‘cross-border processing’.

只要存在實質性影響之可能性，而非實際上有實質性影響，運用即可屬於該定義中之第二部分。須注意者為，「可能」並非意味著存在實質性影響之微小可能性。實質性影響必須更接近可能。另一方面，此也意味著個人不須實際上受到影響：只要有實質性影響之可能性即足以使運用屬於「跨境運用」之定義範圍內。

The fact that a data processing operation may involve the processing of a number – even a large number – of individuals’ personal data, in a number of Member States, does not necessarily mean that the processing has, or is likely to have, a substantial effect. Processing that does not have a substantial effect does not constitute cross-border processing for the purposes of the second part of the definition, regardless of how many individuals it affects.

資料運用作業可能涉及在數個成員國中運用多個 – 甚至是大量 – 當事人個人資料之事實並不一定意味著運用具有或可能具有實質性之影響。就定義之第二部分而言，沒有實質性影響之運用即不構成跨境運用，無論有多少個人受其影響。

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:

監管機關將依據具體個案情況解釋「實質性影響」。我們將考量運用之背景、資料之類型、運用之目的以及下列因素，例如運用是否：

- causes, or is likely to cause, damage, loss or distress to individuals;  
造成或可能造成對當事人之損害、損失或痛苦；
- has, or is likely to have, an actual effect in terms of limiting rights or denying an opportunity;  
在限制權利或拒絕機會上具有或可能具有實際影響；
- affects, or is likely to affect individuals’ health, well-being or peace of mind;  
影響或可能影響個人之健康、福祉或平靜；

- affects, or is likely to affect, individuals' financial or economic status or circumstances;  
影響或可能影響個人之財務或經濟狀態或情況；
- leaves individuals open to discrimination or unfair treatment;  
使個人受到歧視或不公平待遇；
- involves the analysis of the special categories of personal or other intrusive data, particularly the personal data of children;  
涉及分析特殊類型之當事人資料或其他侵入性資料，尤其是兒童之個人資料；
- causes, or is likely to cause individuals to change their behaviour in a significant way;  
造成或可能造成個人以顯著之方式改變其行為；
- has unlikely, unanticipated or unwanted consequences for individuals;  
對個人產生不可能、未預期或不希望之後果；
- creates embarrassment or other negative outcomes, including reputational damage;  
or  
造成困窘或其他負面之結果，包括名譽受損；或
- involves the processing of a wide range of personal data.  
涉及運用廣泛之個人資料。

Ultimately, the test of 'substantial effect' is intended to ensure that supervisory authorities are only required to co-operate formally through the GDPR's consistency mechanism "*where a supervisory authority intends to adopt a measure intended to produce legal effects as regards processing operations which substantially affect a significant number of data subjects in several Member States*". (Recital 135)

最終，對「實質性影響」之檢驗旨在「當某監管機關有意就實質上影響數個成員國境內大量當事人之運用作業採取產生法律效果之措施時」（前言第135點），確保各監管機關透過GDPR一致性機制進行正式合作。

## 1.2 Lead supervisory authority.

### 主責監管機關

Put simply, a 'lead supervisory authority' is the authority with the primary responsibility for



dealing with a cross-border data processing activity, for example when a data subject makes a complaint about the processing of his or her personal data.

簡而言之，「主責監管機關」是主要負責處理跨境資料運用活動之機關，例如若當事人對其個人資料之運用提出申訴時。

The lead supervisory authority will coordinate any investigation, involving other ‘concerned’ supervisory authorities.

主責監管機關將協調任何涉及其他「有關」監管機關之調查。

Identifying the lead supervisory authority depends on determining the location of the controller’s ‘main establishment’ or ‘single establishment’ in the EU. Article 56 of the GDPR says that:

識別主責監管機關取決於確認控管者位於歐盟境內「主要據點」或「單一據點」之位置。GDPR第56條規定：

- *the supervisory authority of the main establishment or of the single establishment of the controller or processor shall be competent to act as lead supervisory authority for the cross-border processing carried out by that controller or processor in accordance with the [cooperation] procedure provided in Article 60.*

控管者或受託運用者之主要據點或單一據點的監管機關，為了第60條規定之（合作）程序，應足擔任該控管者或受託運用者之跨境運用行為的主責監管機關。

### 1.3 Main establishment.

#### 主要據點

Article 4(16) of the GDPR states that ‘main establishment’ means:

GDPR第4條第16款規定「主要據點」係指：

- *as regards a controller with establishments in more than one Member State, the place of its **central administration** in the Union, unless the **decisions on the purposes and means** of the processing of personal data are taken in another establishment of the controller in the Union and the latter establishment has the **power to have such decisions implemented**, in which case the establishment having taken such decisions is to be considered to be the main establishment;*

就於一個以上成員國設有據點之控管者而言，其位於歐盟境內之**中央管理機構**所在地，除非關於個人資料**運用之目的和方式**係由控管者位於歐盟的另一個據點所**決定**，且該後者據點**有權執行此決定**，於此種情況下，作出決定之據點應被視為**主要據點**；

- *as regards a processor with establishments in more than one Member State, the place of its central administration in the Union, or, if the processor has no central administration in the Union, the establishment of the processor in the Union where the main processing activities in the context of the activities of an establishment of the processor take place to the extent that the processor is subject to specific obligations under this Regulation;*

就於一個以上成員國設有據點之受託運用者而言，其位於歐盟境內之中央管理機構所在地，抑或，若受託運用者在歐盟境內並無中央管理機構時，則以受託運用者在歐盟境內主要運用活動發生之據點，且於該據點之活動範圍內受託運用者受本規則規定之特定義務所拘束。

## **2. Steps to identify the lead supervisory authority**

### **識別主責監管機關之步驟**

### **2.1 Identify the ‘main establishment’ for controllers**

#### **識別控管者之「主要據點」**

In order to establish where the main establishment is, it is firstly necessary to identify the central administration of the data controller in the EU, if any.<sup>1</sup> The approach implied in the GDPR is that the central administration in the EU is the place where decisions about the purposes and means of the processing of personal data are taken and this place has the power to have such decisions implemented.

為了確認主要據點之位置，首先必須識別資料控管者位於歐盟境內之中央管理機構(若有)。<sup>1</sup> GDPR之識別方法為，位於歐盟的中央管理機構係就運用個人資料之目的和方式作出決策之所在地，且該所在地有權力執行此決策。

The essence of the lead authority principle in the GDPR is that the supervision of cross-border processing should be led by only one supervisory authority in the EU. In cases where decisions relating to different cross-border processing activities are taken within the EU central administration, there will be a single lead supervisory authority for the various data processing activities carried out by the multinational company. However, there may be cases where an establishment other than the place of central administration makes autonomous decisions concerning the purposes and means of a specific processing activity. This means that there can be situations where more than one lead authority can be identified, i.e. in cases

<sup>1</sup> The GDPR is relevant for the EEA and will apply after its incorporation into the EEA Agreement. The GDPR is currently under scrutiny for incorporation, see <http://www.efta.int/eea-lex/32016R0679> GDPR與歐洲經濟區相關聯，並將在納入歐洲經濟區協議後適用。GDPR目前正在就此議題接受審查，請參閱<http://www.efta.int/eea-lex/32016R0679>



where a multinational company decides to have separate decision making centres, in different countries, for different processing activities.

GDPR的主責機關原則其本質在於跨境運用之監督應由歐盟內之單一監管機關領導。若由位於歐盟境內之中央管理機構執行各種跨境運用活動相關之決策，則該跨國公司執行的各種資料運用活動將只有一個單一主責監管機關。然而，由中央管理機構以外之據點就特定運用活動之目的和方式做出自主決策之情況亦可能存在。此意味著當跨國公司決定在不同國家就不同運用活動設置個別決策中心時，可能會有得識別多個主責機關之情形。

It is worth recalling, that where a multinational company centralises all the decisions relating to the purposes and means of processing activities in one of its establishments in the EU (and that establishment has the power to implement such decisions), only one lead supervisory authority will be identified for the multinational.

值得再次提醒者為，若一家跨國公司將和運用活動目的及方式相關之所有決策集中於位於歐盟境內的某一據點處理時(且該據點有權力執行此類決策)，則就該跨國公司而言，只會被有一個主責監管機關需認定。

In these situations it will be essential for companies to identify precisely where the decisions on purpose and means of processing are taken. Correct identification of the main establishment is in the interests of controllers and processors because it provides clarity in terms of which supervisory authority they have to deal with in respect of their various compliance duties under the GDPR. These may include, where relevant, designating a data protection officer or consulting for a risky processing activity that the controller cannot mitigate by reasonable means. The relevant provisions of the GDPR are intended to make these compliance tasks manageable.

於這些情況下，公司必須準確識別制訂與運用目的和方式相關決策之所在地。正確識別符合控管者和受託運用者之利益之主要據點，因為如此可使其釐清為符合GDPR下各種合規性義務時所應交涉之監管機關。這些相關情形可能包括指定個資保護長或當控管者無法透過合理方式減輕運用活動風險時之諮詢。GDPR相關規定旨在使這些合規性任務易於管理。

The examples below illustrate this:

以下示例說明此一概念：

Example 1: A food retailer has its headquarters (i.e. its ‘place of central administration’) in Rotterdam, Netherlands. It has establishments in various other EU countries, which are in contact with individuals there. All establishments make use of the same software to process consumers’ personal data for marketing purposes. All the decisions about the purposes and means of the processing of consumers’ personal data for marketing purposes are taken within its Rotterdam headquarters. This means that the company’s lead supervisory authority for this cross border processing activity is the Netherlands supervisory authority.

示例1：一食品零售商總部（即其「中央管理機構」）設置於荷蘭鹿特丹。該公司在歐盟其他國家設有據點，且由這些據點與在地當事人聯繫。基於行銷目的，所有據點皆使用相同軟體以運用消費者之個人資料。關於為行銷目的運用消費者個人資料之目的和方式的所有決策皆由鹿特丹總部執行。此意味著該公司跨境運用活動的主責監管機關係荷蘭監管機關。

Example 2: A bank has its corporate headquarters in Frankfurt, and all<sup>2</sup> its banking processing activities are organised from there, but its insurance department is located in Vienna. If the establishment in Vienna has the power to decide on all insurance data processing activity and to implement these decisions for the whole EU, then as foreseen in Art 4(16) of the GDPR, the Austrian supervisory authority would be the lead authority in respect of the cross border processing of personal data for insurance purposes, and the German authorities (Hessen supervisory authority) would supervise the processing of personal data for banking purposes, wherever the clients are located.<sup>3</sup>

示例2：一銀行的企業總部設置於法蘭克福，且所有<sup>2</sup>銀行運用活動皆由該總部組織策劃，但其保險部門設置於維也納。若位於維也納之據點有權決定整體歐盟所有保險資料之運用活動並執行這些決策，則正如GDPR第4條第1款所預見，奧地利監管機關將是為保險目的所為之跨境個人資料運用的主責監管機關。而德國當局（黑森州監管機關）將監督以銀行業務目的所為之個人資料運用，無論其客戶所在位置為何。<sup>3</sup>

<sup>2</sup> In the context of processing personal data for banking purposes, we recognise that there are many different processing activities involved in this. However, to simplify matters, we address all of them as a single purpose. The same is true of processing done for insurance purposes.

在為銀行目的運用個人資料之背景下，我們認識到此情形涉及許多不同之運用活動。然而，為了簡化問題，我們將這些運用皆視作單一目的。同樣之概念亦適用於為保險目的而進行之運用。

<sup>3</sup> It should be recalled also that the GDPR provides for the possibility of local oversight in specific cases. See Recital (127): “Each supervisory authority **not acting as the lead supervisory authority should be competent to handle local cases** where the controller or processor is established in more than one Member State, but the subject matter of the specific processing concerns **only processing carried out in a single Member State and involves only data subjects in that single Member State**, for example, where the subject matter concerns the processing of employees’ personal data in the specific employment context of a Member State.” This principle means that the supervision of HR data connected to local employment context could fall to several supervisory authorities.

另應記住，GDPR提供了在特定情況下進行當地監管之可能性。請參閱前言第127點：「每個**不做為主責監管機關之監管機關應有權處理**設置於一個以上成員國之控管者或受託運用者的**當地案件**，當具體運用

## 2.1.1 Criteria for identifying a controller's main establishment in cases where it is not the place of its central administration in the EU

### 當歐盟並非中央管理機構之所在地時，識別控管者主要據點之標準

Recital 36 of the GDPR is useful in clarifying the main factor that shall be used to determine a controller's main establishment if the criterion of the central administration does not apply. This involves identifying where the effective and real exercise of management activities, that determine the main decisions as to the purposes and means of processing through stable arrangements, takes place. Recital 36 also clarifies that “the presence and use of technical means and technologies for processing personal data or processing activities do not, in themselves, constitute a main establishment and are therefore not determining criteria for a main establishment”.

若中央管理機構之標準不適用，GDPR前言第36點有助於闡明決定控管者主要據點之主要因素。此涉及識別管理活動的有效和實際發生地，透過穩定安排，這些管理活動就運用之目的和方式做出了主要決策。前言第36點亦闡明「為運用個人資料或運用活動所存在或使用之技術方法和科技本身並不構成主要據點，因此不得作為決定主要據點之標準」。

The data controller itself identifies where its main establishment is and therefore which supervisory authority is its lead authority. However, this can be challenged by the respective supervisory authority concerned afterwards.

資料控管者自行識別其主要據點之所在地，進而識別何監管機關為其主責機關。然而，此決定在日後可能受到個別有關監管機關之挑戰。

The factors below are useful for determining the location of a controller's main establishment, according to the terms of the GDPR, in cases where it is not the location of its central administration in the EU.

依據GDPR之條款，若歐盟並非中央管理機構之所在地時，以下因素可協助決定控管者主要據點之所在地。

- Where are decisions about the purposes and means of the processing given final ‘sign off’?  
關於運用目的和方式之決策，最終「許可」所在地為何？
- Where are decisions about business activities that involve data processing made?

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之主題內容僅涉及在單一成員國境內進行之運用和僅涉及該單一成員國境內之當事人，例如，當主題內容涉及在某一成員國之特定僱傭運用員工之個人資料時。」此原則意味著對與當地僱傭環境相關人力資源資料之監督，可能隸屬於數個監管機關。

關於涉及資料運用之商業活動之決策所在地為何？

- Where does the power to have decisions implemented effectively lie?  
有效執行決策之權力所在地為何？
- Where is the Director (or Directors) with overall management responsibility for the cross border processing located?  
對跨境運用負有全面管理責任之董事（或董事們）所在地為何？
- Where is the controller or processor registered as a company, if in a single territory?  
若在單一領土內，控管者或受託運用者所註冊之公司所在地為何？

Note that this is not an exhaustive list. Other factors may be relevant depending on the controller or processing activity in question. If a supervisory authority has reasons to doubt that the establishment identified by the controller is in reality the main establishment for the purposes of the GDPR, it can – of course – require the controller to provide the additional information necessary for it to prove where its main establishment is located.

需注意此並非詳盡列舉之清單，還有其他因素亦可能相關，端視所涉及之控管者或運用活動而決定。若監管機關有理由懷疑控管者所識別之據點實際上是否為GDPR之主要據點，監管機關當然可要求控管者提供必要之額外資訊，以證明其主要據點之所在地。

### **2.1.2 Groups of undertakings**

#### **企業集團**

Where processing is carried out by a group of undertakings that has its headquarters in the EU, the establishment of the undertaking with overall control is presumed to be the decision-making centre relating to the processing of personal data, and will therefore be considered to be the main establishment for the group, except where decisions about the purposes and means of processing are taken by another establishment. The parent, or operational headquarters of the group of undertakings in the EU, is likely to be the main establishment, because that would be the place of its central administration.

若運用係由總部設立於歐盟境內之企業集團所為，且該控制整體企業之據點被認為是與個人資料運用相關之決策中心，則該據點將因此被視為係該集團之主要據點，除非與運用目的和方式相關之決策係由另一據點為之。位於歐盟境內企業集團之母公司或營運總部很有可能是主要據點，因其可能是中央管理機構之所在地。

The reference in the definition to the place of a controller's central administration works well for organisations that have a centralised decision-making headquarters and branch-type

structure. In such cases it is clear that the power to make decisions about cross-border data processing, and to have them carried out, lies within the company's headquarters. In such cases, determining the location of the main establishment – and therefore which supervisory authority is the lead supervisory authority - is straightforward. However, the decision system of group of companies could be more complex, giving independent making powers relating to cross border processing to different establishments. The criteria set out above should help groups of undertakings to identify their main establishment.

控管者中央管理機構所在地之定義的參考標準，對擁有集中式決策總部和分支機構結構的組織也很適用。於此種情況下，作出跨境資料運用決策並執行這些決策之權力很明顯地屬於企業總部。於此種情況下，確認主要據點之所在地 – 以及何監管機關因而成為主責監管機關 – 應為明確。然而，企業集團會賦予不同據點有關跨境運用之獨立決策權，因此決策系統可能更加複雜。上述標準應有助於企業集團識別其主要據點。

### 2.1.3 Joint data controllers

#### 共同資料控管者

The GDPR does not specifically deal with the issue of designating a lead authority where two or more controllers established in the EU jointly determine the purposes and means of processing – i.e. joint controllers. Article 26(1) and Recital 79 make it clear that in joint controller situations, the controllers shall in a transparent manner determine their respective responsibilities for compliance with their obligations under the Regulation. In order, therefore, to benefit from the one-stop-shop principle, the joint controllers should designate (among the establishments where decisions are taken) which establishment of the joint controllers will have the power to implement decisions about the processing with respect to all joint controllers. This establishment will then be considered to be the main establishment for the processing carried out in the joint controller situation. The arrangement of the joint controllers is without prejudice to the liability rules provided in the GDPR, in particular in Article 82(4).

當兩個或多個設立於歐盟境內之控管者共同決定運用目的和方式 – 即共同控管者時，GDPR並未特別就指定主責機關之議題進行處理。第26條第1項和前言第79點明確規定，於共同控管者之情況下，控管者應以透明之方式確認各自履行本規則義務之責任。因此，為了從一站式原則中受益，共同控管者應（從各決策據點中）指定何共同控管者之據點將有權執行所有共同控管者關於運用之決策。而該據點將被視為在共同控管者之情形下進行運用之主要據點。共同控管者之安排並不影響GDPR所規範之賠償責任，尤其是第82條第4項。

## 2.2 Borderline cases



## 爭議案件

There will be borderline and complex situations where it is difficult to identify the main establishment or to determine where decisions about data processing are taken. This might be the case where there is cross-border processing activity and the controller is established in several Member States, but there is no central administration in the EU and none of the EU establishments are taking decisions about the processing (i.e. decisions are taken exclusively outside of the EU).

也會有一些難以識別主要據點或確認關於資料運用之決策係於何處進行等具爭議性和複雜之情況出現。可能之情況為跨境運用活動，且控管者設立於數個成員國境內，但於歐盟並無中央管理機構，且位於歐盟之據點亦未就運用做出決策（即決策完全於歐盟境外為之）。

In the case above, the company carrying out cross border processing may be keen to be regulated by a lead authority to benefit from the one-stop-shop principle. However, the GDPR does not provide a solution for situations like this. In these circumstances, the company should designate the establishment that has the authority to implement decisions about the processing activity and to take liability for the processing, including having sufficient assets, as its main establishment. If the company does not designate a main establishment in this way, it will not be possible to designate a lead authority. Supervisory authorities will always be able to investigate further where this is appropriate.

在上述情況下，實施跨境運用之公司可能希望受到單一主責機關之監管，以便受益於一站式原則。然而，GDPR並未就此種情況提供解決方案。於此種情狀下，該公司應指定某一據點作為其主要據點，而該據點有權執行關於運用活動之決策，並對運用承擔責任，包括擁有足夠之資產，作為主要據點。若公司並未以此種方式指定主要據點，則無法指定主責機關。各監管機關將始終得酌情進一步調查。

The GDPR does not permit ‘forum shopping’. If a company claims to have its main establishment in one Member State, but no effective and real exercise of management activity or decision making over the processing of personal data takes place there, the relevant supervisory authorities (or ultimately EDPB) will decide which supervisory authority is the ‘lead’, using objective criteria and looking at the evidence. The process of determining where the main establishment is may require active inquiry and co-operation by the supervisory authorities. Conclusions cannot be based solely on statements by the organisation under review. The burden of proof ultimately falls on controllers and processors to demonstrate to the relevant supervisory authorities where the relevant processing decisions are taken and



where there is the power to implement such decisions. Effective records of data processing activity would help both organisations and supervisory authorities to determine the lead authority. The lead supervisory authority, or concerned authorities, can rebut the controller's analysis based on an objective examination of the relevant facts, requesting further information where required.

GDPR不允許「挑選主責機關」。若某公司聲稱其主要據點設置於某一個成員國境內，但於該據點並無採取有效和實際之管理活動或個人資料運用之決策，相關監管機關（或最終EDPB）將使用客觀標準並查看證據以決定何監管機關為「主責機關」。確認主要據點所在地之程序可能需要監管機關的積極調查與合作。所得結論不得僅基於受審查組織之陳述。控管者和受託運用者負有最終舉證責任，以向有關監管機關證明相關運用決策之發生地以及有權執行這些決策之所在地。有效之資料運用活動記錄將有助於組織和監管機關確認主責機關。主責監管機關或有關機關可依據對相關事實的客觀審查以駁回控管者之分析，並在必要時要求提供進一步資訊。

In some cases the relevant supervisory authorities will ask the controller to provide clear evidence, in line with any EDPB guidelines, of where its main establishment is, or where decisions about a particular data processing activity are taken. This evidence will be given due weight and the supervisory authorities involved will co-operate to decide which one of them will take the lead in investigations. Such cases will only be referred to the EDPB for a decision under Article 65(1)(b) where supervisory authorities have conflicting views in terms of identifying the lead supervisory authority. However, in most cases, we expect that the relevant supervisory authorities will be able to agree a mutually satisfactory course of action.

在某些情況下，相關監管機關將要求控管者依據EDPB指引提供其主要據點所在地或於何地做出某特定資料運用活動決策之明確證據。這些證據將被給予應有之重視，且相關監管機關將合作決定何機關將主導調查。此類案件僅有當監管機關在識別主責監管機關方面存在相互矛盾之觀點時，始得依據第65條第1項第b款之規定提交EDPB作出決定。然而，在大多數情況下，我們期待相關監管機關能夠達成一個相互滿意的行動方針。

## 2.3 Processor

### 受託運用者

The GDPR also offers the one-stop-shop system for the benefit of data processors that are subject to GDPR and have establishments in more than one Member State.

當該受託運用者於一個以上之成員國設置據點時，GDPR亦為受其規範之受託運用者之利益提供一站式系統。

Article 4(16)(b) of the GDPR states 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.

GDPR第4條第16款第b目規定，受託運用者之主要據點將是其位於歐盟境內之中央管理機構所在地，或若於歐盟並無中央管理機構，則是其位於歐盟之據點，且該據點為主要運用（受託運用者）活動發生之所在地。

However, according to Recital 36, in cases involving both controller and processor, the competent lead supervisory authority should be the lead supervisory authority for the controller. In this situation, the supervisory authority of the processor will be a ‘supervisory authority concerned’ and should participate in the cooperation procedure. This rule will only apply where the controller is established in the EU. In cases when controllers are subject to the GDPR on the basis of Art 3(2), they will not be subject to the one-stop-shop mechanism. A processor may provide services to multiple controllers located in different Member States – for example, a large cloud-service provider. In such cases, the lead supervisory authority will be the supervisory authority that is competent to act as lead for the controller. In effect, this means a processor may have to deal with multiple supervisory authorities.

然而，依據前言第36點，在同時涉及控管者和受託運用者之情況下，權責主責監管機關應係控管者之主責監管機關。在此情況下，受託運用者之監管機關將是「有關監管機關」，且應參與合作程序。此規則僅適用於當控管者設置於歐盟境內之情況。若控管者係基於第3條第2項而受GDPR所拘束，則將不適用一站式機制。受託運用者可能向位於不同成員國之多個控管者提供服務 – 例如，大型雲端服務提供商。於此種情況下，主責監管機關將是有能力主導控管者之監管機關。實際上，此意味著受託運用者可能必須與多個監管機關交涉。

### **3. Other relevant issues**

#### **其他相關問題**

#### **3.1 The role of the ‘supervisory authority concerned’**

##### **「有關監管機關」之角色**

GDPR Article 4(22) says that the:

GDPR第4條第22款規定：

*‘supervisory authority concerned’ means a supervisory authority which is concerned by the processing of personal data because: (a) the controller or processor is established on the territory of the Member State of that supervisory*

*authority; (b) data subjects residing in the Member State of that supervisory authority are substantially affected or likely to be substantially affected by the processing; or (c) a complaint has been lodged with that supervisory authority.*

「有關監管機關」係指與個人資料運用相關之監管機關，因：(a) 控管者或受託運用者設置於該監管機關所在成員國之領土上；(b) 居住於該監管機關所在成員國之當事人被該運用所實質影響或可能實質影響；或(c) 已向該監管機關提出申訴。

The concept of a concerned supervisory authority is meant to ensure that the ‘lead authority’ model does not prevent other supervisory authorities having a say in how a matter is dealt with when, for example, individuals residing outside the lead authority’s jurisdiction are substantially affected by a data processing activity. In terms of factor (a) above, the same considerations as for identifying a lead authority apply. Note that in (b) the data subject must merely reside in the Member State in question; he or she does not have to be a citizen of that state. It will generally be easy – in (c) to determine – as a matter of fact – whether a particular supervisory authority has received a complaint.

有關監管機關之概念旨在確保「主責機關」模式不會妨礙其他監管機關針對問題處理有表達意見的權利，例如，當資料運用活動實質影響到居住於主責機關管轄範圍以外之當事人時。就上述要素(a)而言，適用於與識別主責機關相同之考量要件。另應注意，在要素(b)中，當事人僅須位於相關成員國境內；而不須係該國家之公民。在要素(c)中確認某特定監管機關是否收到申訴之事實通常是很容易的。

Article 56, paragraphs (2) and (5) of the GDPR provide for a concerned supervisory authority to take a role in dealing with a case without being the lead supervisory authority. When a lead supervisory authority decides not to handle a case, the concerned supervisory authority that informed the lead shall handle it. This is in accordance with the procedures in Article 61 (Mutual assistance) and Article 62 (Joint operations of supervisory authorities) of the GDPR. This might be the case where a marketing company with its main establishment in Paris launches a product that only affects data subjects residing in Portugal. In such a case the French and Portuguese supervisory authorities might agree that it is appropriate for the Portuguese supervisory authority to take the lead in dealing with the matter. Supervisory authorities may request that data controllers provide input in terms of clarifying their corporate arrangements. Given that the processing activity has a purely local effect – i.e. on individuals in Portugal – the French and Portuguese supervisory authorities have the discretion to decide which supervisory authority should deal with the matter – in accordance

with Recital 127.

GDPR第56條第2項和第5項提供了有關監管機關在不作為主責監管機關之情況下處理案件時應扮演之角色。當主責監管機關決定不處理某案件時，先前通知主責機關之該有關監管機關應當予以處理。如此符合GDPR第61條（相互協助）和第62條（監管機關聯合作業）所規定之程序。可能之情況為，一間行銷公司在其位於巴黎之主要據點推出的產品僅影響居住於葡萄牙之當事人。於此情況下，法國和葡萄牙之監管機關可能會同意由葡萄牙監管機關就此事為主責機關較為合適。監管機關可要求資料控管者在澄清其公司安排方面提供意見。鑑於運用活動具有完全之地方性效果 – 即對葡萄牙之個人 – 法國和葡萄牙監管機關有權依據前言第127點決定由何監管機關處理此案件。

The GDPR requires lead and concerned supervisory authorities to co-operate, with due respect for each other's views, to ensure a matter is investigated and resolved to each authority's satisfaction – and with an effective remedy for data subjects. Supervisory authorities should endeavour to reach a mutually acceptable course of action. The formal consistency mechanism should only be invoked where co-operation does not reach a mutually acceptable outcome.

GDPR要求主責和有關監管機關於適當尊重彼此意見之情況下進行合作，以確保每個機關就案件之調查和結果皆為滿意，並為當事人提供有效之補償措施。監管機關應致力達成相互可接受之行動方案。只有在合作未能達到相互可接受結果之情況下，始得援引正式之一致性機制。

The mutual acceptance of decisions can apply to substantive conclusions, but also to the course of action decided upon, including enforcement activity (e.g. full investigation or an investigation with limited scope). It can also apply to a decision not to handle a case in accordance with GDPR, for example because of a formal policy of prioritisation, or because there are other concerned authorities as described above.

相互可接受之決定可適用於實質性之結論，但亦適用於決策之行動方案，包括執法活動（例如全面調查或有限範圍之調查）。其亦可適用於依據GDPR不處理案件之決定，例如因正式之優先權政策，或因存在如上所述之其他有關機關。

The development of consensus and good will between supervisory authorities is essential to the success of the GDPR's cooperation and consistency process.

監管機關之間建立共識和善意對於達成GDPR之合作和一致性程序至關重要。

### **3.2 Local processing.**

#### **在地運用**

Local data processing activity does not fall within the GDPR's cooperation and consistency provisions. Supervisory authorities will respect each other's competence to deal with local data processing activity on a local basis. Processing carried out by public authorities will always be dealt with on a 'local' basis too.

在地資料運用活動不屬於GDPR合作和一致性之規定範圍。監管機關將尊重彼此於當地處理在地資料運用活動之能力。公務機關所進行之運用也始終係於「在地」之基礎上處理之。

### **3.3 Companies not established within the EU.**

#### **非設置於歐盟境內之公司**

The GDPR's cooperation and consistency mechanism only applies to controllers with an establishment, or establishments, within the European Union. If the company does not have an establishment in the EU, the mere presence of a representative in a Member State does not trigger the one-stop-shop system. This means that controllers without any establishment in the EU must deal with local supervisory authorities in every Member State they are active in, through their local representative.

GDPR之合作和一致性機制僅適用於在歐盟境內設有一個或多個據點之控管者。若公司在歐盟境內沒有據點，僅於某一成員國設置代表並不會觸發一站式系統。此意味著並未於歐盟設置任何據點之控管者必須透過當地代表與位於其活動發生地每個成員國之當地監管機關進行交涉。

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2016年12月13日於布魯塞爾完成

*For the Working Party,*

*工作小組*

*The Chairwoman*

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主席

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## ANNEX - Questions to guide the identification of the lead supervisory authority

### 附錄 - 指導識別主責監管機關之提問

#### 1. Is the controller or processor carrying out the cross-border processing of personal data?

控管者或受託運用者是否進行跨境個人資料運用？

a. Yes, if:

是，若：

- the controller or processor is established in more than one Member State and  
控管者或受託運用者設置於一個以上成員國境內，且
- the processing of personal data takes place in the context of the activities of establishments in more than one Member State.  
個人資料之運用在一個以上成員國之據點之活動範圍內發生。

➤ In this case, go to section 2.

於此種情況下，請參閱第2項。

b. Yes, if:

是，若：

- the processing of personal data takes place in the context of the activities of a data controller or processor's single establishment in the Union, but:  
個人資料之運用是在資料控管者或受託運用者位於歐盟境內之單一據點之活動範圍內發生，但：
- substantially affects or is likely to substantially affect individuals in more than one Member State.  
實質影響或可能實質影響一個以上成員國境內之當事人。

➤ In this case, the lead authority is the authority for the controller or processor's single establishment in a single Member State. This must – by logic - be the controller or processor's main establishment because it is its only establishment.

於此種情況下，主責機關係控管者或受託運用者位於某單一成員國境內單一據點之機關。該據點必須 - 邏輯上 - 係控管者或受託運用者之主

要據點，因其是唯一之據點。

## 2. How to identify the ‘lead supervisory authority’

### 如何識別「主責監管機關」

#### a. In a case involving only a controller:

於僅涉及控管者之情況下：

- i. Identify the controller’s place of central administration in the EU;  
識別控管者位於歐盟境內之中央管理機構所在地；
- ii. The supervisory authority of the country where the place of central administration is located is the controller’s lead authority.  
中央管理機構所在國家之監管機關係控管者之主責機關。

However:

然而：

- iii. If decisions on the purposes and means of the processing are taken in another establishment in the EU, and that establishment has the power to implement those decisions, then the lead authority is the one located in the country where this establishment is.

若關於運用目的和方式之決策係由位於歐盟之另一個據點所進行，且該據點有權執行這些決策時，主責機關為位於該據點所在國家之監管機關。

#### b. In a case involving a controller and a processor:

於涉及控管者和受託運用者之情況下：

- i. Check if the controller is established in the EU and subject to the one-stop-shop system. If so,  
確認控管者是否設置於歐盟境內，並受一站式系統所拘束。如是，
- ii. Identify the lead supervisory authority of the controller. This authority will also be the lead supervisory authority for the processor.  
識別控管者之主責監管機關。該機關亦為受託運用者之主責監管機關。
- iii. The (non-lead) supervisory authority competent for the processor will be a ‘concerned authority’ – see 3 below.  
受託運用者之（非主責）權責監管機關將屬於「有關機關」－請參閱下

文第3項。

c. In a case involving only a processor:

於僅涉及受託運用者之情況下：

- i. Identify the processor's place of central administration in the EU;  
識別受託運用者位於歐盟境內之中央管理機構所在地；
- ii. If the processor has no central administration in the EU, identify the establishment in the EU where the main processing activities of the processor take place.

若受託運用者在歐盟並無中央管理機構，則識別受託運用者於歐盟主要運用活動發生之據點。

d. In a case involving joint controllers:

於涉及共同控管者之情況下：

- i. Check if the joint controllers are established in the EU.  
確認共同控管者是否設置於歐盟境內。
- ii. Designate among the establishments where decisions on the purposes and means of the processing are taken the establishment which has the power to implement these decisions with respect to all joint controllers. This establishment will then be considered to be the main establishment for the processing carried out by the joint controllers. The lead authority is the one located in the country where this establishment is.

於各據點間指定就運用目的和方式進行決策之據點，且該據點有權對所有共同控管者執行這些決策。該據點因而將被視為共同控管者進行運用之主要據點。主責機關即為該據點所在國家之監管機關。

3. Are there any 'concerned supervisory authorities'?

是否存在「有關監管機關」？

An authority is a 'concerned authority':

某機關屬於「有關機關」：

- when the controller or processor has an establishment on its territory, or:  
當控管者或受託運用者於其境內設置據點時，或
- when data subjects on its territory are substantially affected or likely to be

substantially affected by the processing, or:

當運用實質影響或可能實質影響於其境內之當事人時，或

- when a complaint is received by a particular authority.

當特定機關收到申訴案件。