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Cross border exchanges of data

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The setting

- Data flow globally
- In contrast: legal regulations centred territorially
- Problem from an european perspective: safeguarding the high level of european data protection in third-party countries
- Only personal data – not anonymized/encrypted data

Data Protection Directive

- Application of the DPD: Notion of establishment decisive – where is data processing etc. carried out?
- The Facebook cases:
 - Early German (administrative law) courts refused to acknowledge German (and European) jurisdiction as data processing has been carried out in California
 - ECJ in Google Spain case: sufficient that a subsidiary is fostering data processing activities, even by solely marketing advertising
 - Thus: extending the DPD application beyond just technical roots (server location etc. does not matter)

The (upcoming) General Data Protection Regulation

- Introducing minimal contact doctrine – sufficient:
- Art. 3(2) GDPR: “This Regulation applies to the processing of personal data of data subjects who are in the Union by a controller or processor not established in the Union, where the processing activities are related to:
 - (a) the offering of goods or services, irrespective of whether a payment of the data subject is required, to such data subjects in the Union;or
 - (b) the monitoring of their behaviour as far as their behaviour takes place within the Union”

Requirements for Transfer of Data outside the EU

- Acknowledged jurisdictions (EU-Commission)
- Standard contract clauses
- „Safe harbour“ contracts between EU and third countries (cf. Next slide)
- Standard contract rules
- Binding corporate rules (however: not third parties who cannot be bound)
- In future (GDPR): compliance with codes (self-regulation) acknowledged by data protection authorities

Adequacy of data protection and fundamental rights

- ECJ on the Safe Harbour contract of the EU and the US
 - Based on EU fundamental constitutional rights
 - Adequacy has to be ensured by efficient guarantees and enforcement mechanisms – self-certification not sufficient
- Consequences for other tools in order to justify transfer of data to third party countries – standard contract clauses already under attack
 - EU-cloud as a solution?