

### *Facebook and its EU users – Applicability of the EU data protection law to US based SNS*

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# Overview

- Facebook
- Safe Harbor
- Transfer of data
- Applicability of the national data protection law (art. 4.1 DPD)
- Cookies
- Enforceability
- Conclusion



# Facebook

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# The most popular SNS in Europe

“... online communication platforms which enable individuals to join or create networks of like-minded users.”

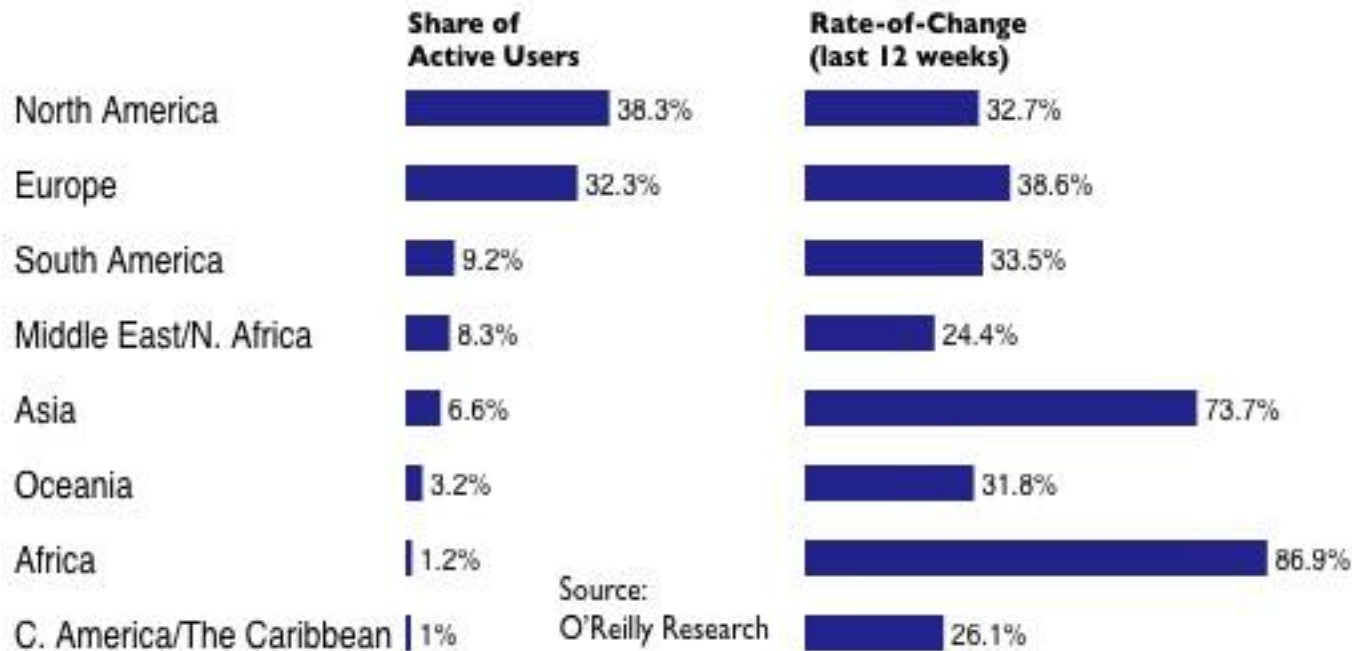


- in all European countries:



# Facebook - number of active users

- More than 250 million active users



# Facebook - member of Safe Harbor Program

“We participate in the EU Safe Harbor Privacy Framework as set forth by the United States Department of Commerce.”



# Safe Harbor Program

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# Safe Harbor Program - origins

- Transfer of data from EU to other countries which do not guarantee an adequate level of protection is prohibited
- Art. 25.6 DPD allows for transfers of data to third countries under a presumption of adequacy of protection for data





# Safe Harbor Program

## RESULT:

- possibility to transfer data from Europe to US companies participating in the program
- protection of data in the US by the adequate principles
- enforcement conducted in the United States (as opposed to Europe)

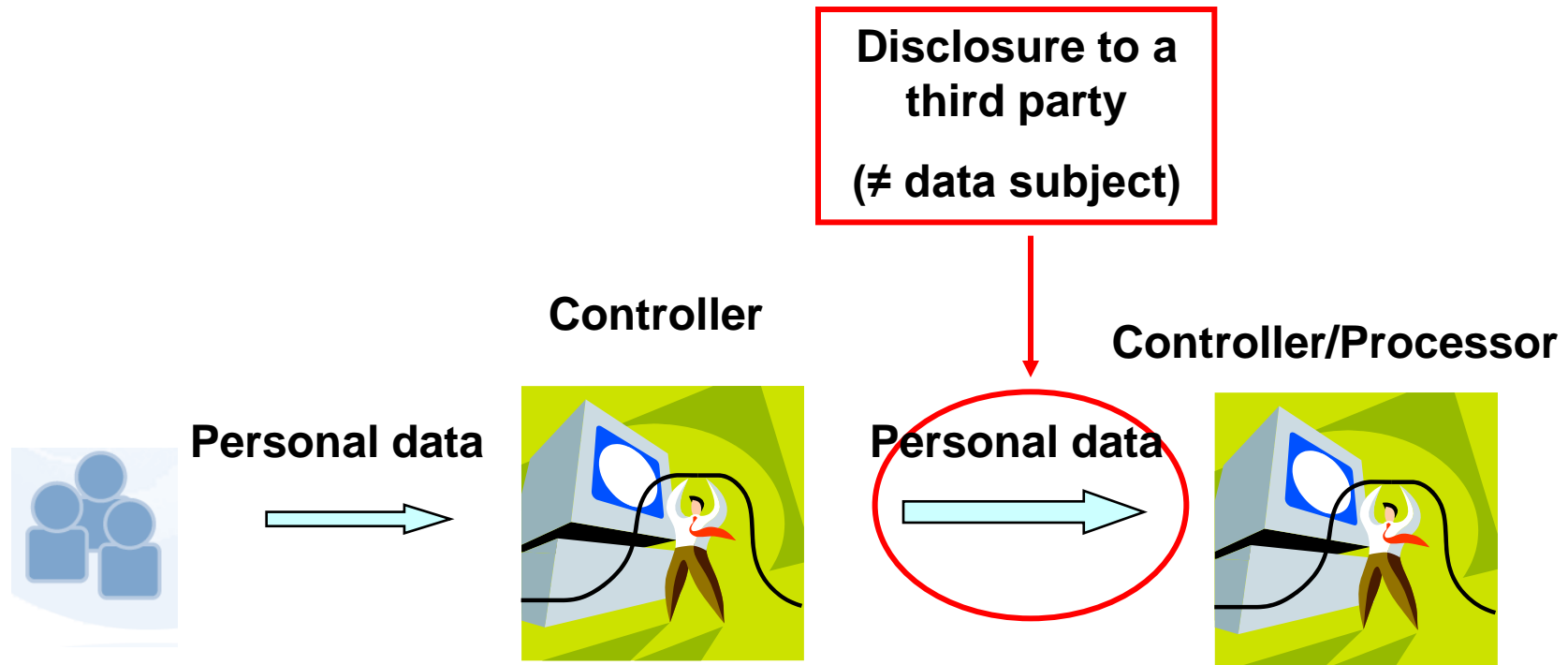


# Transfer of data to third countries

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# Transfer of personal data

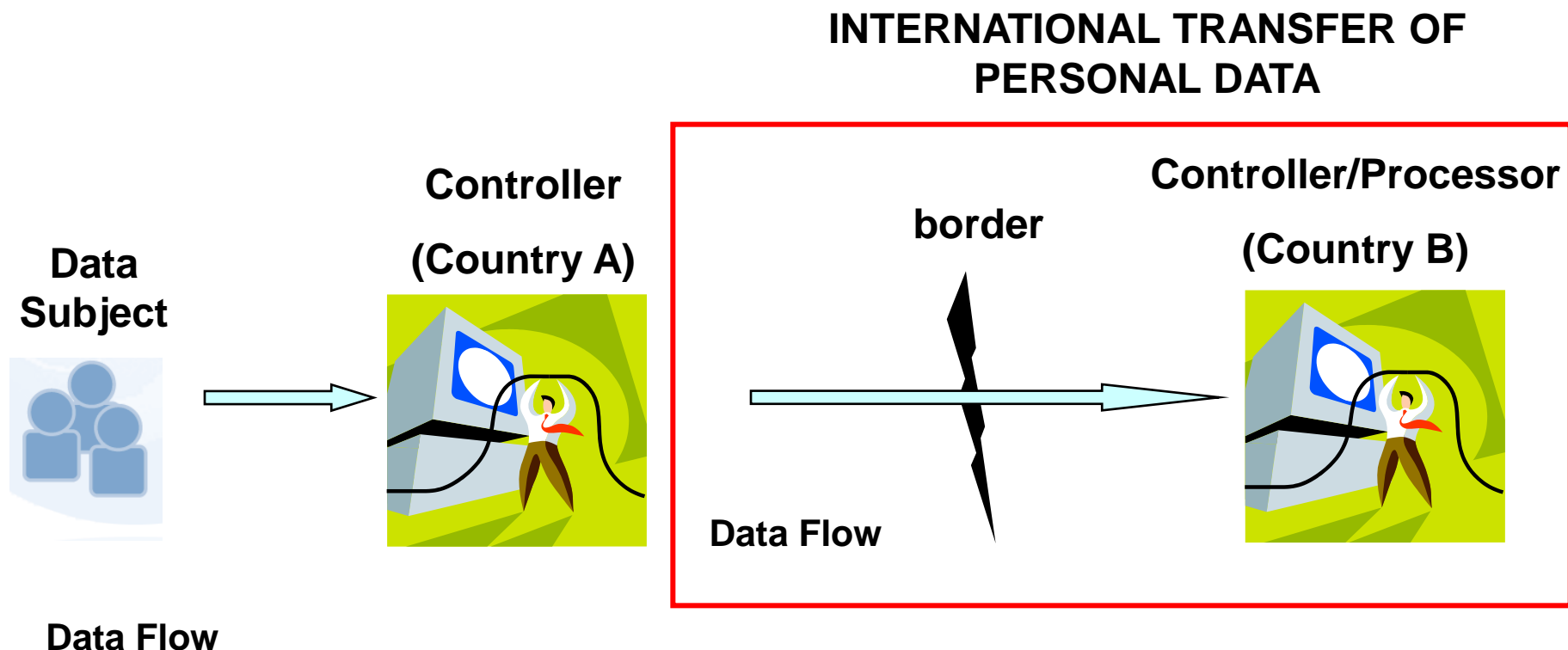


Source: Fanny Coudert,  
International Transfers of Personal Data, 07.04.2008

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# *International transfer of personal data*



Source: Fanny Coudert,  
International Transfers of Personal Data, 07.04.2008

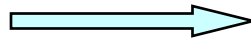


# Facebook: Disclosure from the data subject to the controller

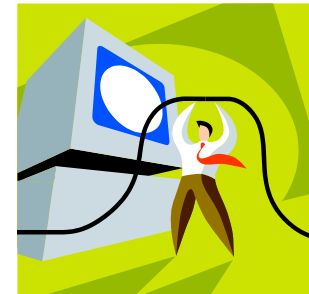
Data Subject



Personal data



Controller



**This is not a a transfer of personal data**

Source: Fanny Coudert,  
International Transfers of Personal Data, 07.04.2008

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# Interim Conclusion #1

Subscription to Safe Harbor does not imply a commitment to compliance with the EU law!



Only a commitment to compliance with the US voluntary program!



# Art. 4. 1 DPD

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## Art. 4.1 (c )DPD -The specific choice of law rule

- Application of the national provisions to the processing of personal data
- where the controller is not established on Community territory and,
- for purposes of processing personal data makes use of equipment, automated or otherwise,
- situated on the territory of the said Member State





# What is equipment?

- at the disposal of the controller for the processing of personal data
- does not have to be a full control
- the controller determines which data are collected, stored, transferred, altered etc., in which way and for which purpose



# Cookies

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# Application of EU data protection law to non-EU based websites

- the national law of the Member State where the user's personal computer is located applies
- to the collection of his personal data
- by placing cookies  
on his hard disk.



# Art. 4.1 (c )DPD - Consequences:

- Protection of EU users when dealing with any website using cookies
- Requirement to comply with each national data protection law of every Member State when the website's users are located
- For Facebook: a necessity to comply with all national data protection laws of 27 MS



# Art. 4.1 (c ) DPD - Criticism:

- Not pragmatic, impossible burden

on the other hand

- Standard requirement in an off-line setting



# Application of EU data protection law to SNS:

- The provisions of the DPD apply to SNS providers in most cases
- even if their headquarters are located outside of the EEA.



# Limits of the cookie solution:

- Art. 5.3 e-Privacy Directive
- storage of information in the terminal equipment of a user
- is **only allowed** on condition that the user
- is provided with clear and comprehensive information
- and is offered the right to refuse such processing by the data controller



# Paradoxically...

- The user can refuse a cookie in a belief that he's protecting his own privacy
- through that, he deprives himself of the protection granted by the provision of art. 4. 1(c )





# Interim Conclusion #2

The protection spread over user  
by art. 4.1 (c ) is uncertain!



User can remove the protection  
shield of his national data protection  
law when refusing installation of cookies!



# Enforceability

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# More problems with art. 4.1 (c ) - enforceability

Application of the national data protection law

≠

Enforcement of the judgment



# More problems with art. 4.1 (c ) - enforceability

- The objective: to ensure that individuals receive protection of their national data protection laws
- necessary
- makes sense
- a reasonable degree of enforceability having regard to the cross-frontier situation involved



# Enforceability problems:

- Very unlikely
- undermining of the general respect for data protection law
- a violation of international law



# Interim Conclusion #3

Enforcement of a judgment  
based on national data protection  
law of a user, through  
art. 4.1 (c )DPD  
is uncertain!



# Conclusion

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# Final conclusion - Safe Harbor

- No EU controller
- No transfer of data
- Facebook's participation in the Program does not imply compliance with the EU data protection law





# Final conclusion - cookie provision

- Many weaknesses:
  - Too heavy burden
  - Weak chances of enforcement
  - Protection can be eliminated by unaware users
- No legal certainty, no guarantee of protection



# THANK YOU FOR YOUR ATTENTION!

## QUESTIONS?

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