THE CONCEPT OF ESTABLISHMENT AND DATA PROTECTION LAW:
RETHINKING ESTABLISHMENT

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(Version accepted and peer-reviewed)

Abstract

The regulatory success of the concept of establishment results from its multifaceted nature. The concept provides the regulator with a versatile tool, able to adapt its meaning to the specific policy principles of the area of law in which it is used. This article analyses the data protection concept of establishment and examines the extent to which the new Data Protection Regulation perpetuates the status quo. It demonstrates how the CJEU has modernised the establishment notion with its landmark rulings, Google Spain and Weltimmo, and how these judgments have helped the term “establishment” make a legislative transition from the old Data Protection Directive to the new Data Protection Regulation. An analysis of the revised data protection concept of establishment on objective, territorial and subjective grounds shows that conditions now exist to support a higher degree of formality in the formulation of the constituent elements of establishment. As this concept remains substantial in essence, for establishment still requires both a certain structure through which (minimal) activity is conducted, future developments should be cautious in allowing the legal reach of the establishment to extend further, in particular, beyond its objective limits.

Key words: establishment; digital single market; data protection law; applicable law; art. 3(1) General Data Protection Regulation; art. 4(1)(a) Data Protection Directive; CJEU Weltimmo judgment; CJEU Google Spain judgment; stable arrangements; real and effective activity; data processing.

I Introduction

The concept of establishment is essential to the applicability of European data protection law. It is the key element upon which the European data protective regime hinges. Art. 3(1) of the new General Data Protection Regulation, which will repeal the Data Protection Directive in May 2018, keeps an establishment of the controller (the person under whose authority data processing is effected) as the relevant connecting factor.1 This provision reads “[t]he Regulation applies to the processing of personal data in the context of the activities of an establishment of a controller […] in the Union”. Similarly, Article 4(1)(a) of the 1995 Data Protection Directive provides for the application of the implementing law of the Member State “where the processing is

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carried out in the context of the activities of an establishment of the controller on the territory of the Member State".2

The CJEU has been very strict in upholding individuals’ fundamental rights to privacy and data protection.3 This has sometimes required the adoption of innovative approaches that have expanded key legislative provisions of the old Data Protection Directive.4 The CJEU has recently elaborated on the data protection concept of establishment in *Google Spain* (2014) and in *Weltimmo* (2015).5 By modernising the conceptual framework of the establishment notion, these landmark judgements have played a key role in bridging two legislative frameworks, that of the Data Protection Directive, an instrument adopted in the pre-digital era (and made of provisions “necessarily relatively general”),6 and that of the Data Protection Regulation, which purports to align itself with the development of the digital single market.7

This article analyses the data protection concept of establishment. It explains how the CJEU has helped the term “establishment” make its transition from art. 4(1)(a) of the old Directive to art. 3(1) of the new Regulation. For this purpose, the data protection concept of establishment is examined from four perspectives. The first discusses the legislative concept of establishment and provides the basis for the subsequent analysis (II). The second studies the CJEU judicial concept of establishment as it results from *Google Spain* and *Weltimmo* (III). The third examines legal policy implications of the positive concept of establishment using a three-stage test (IV) against which the revised data protection notion of establishment is assessed on objective, territorial and subjective grounds (V). This assessment demonstrates that, although the data protection concept of establishment remains substantial (i.e. non-formal) in essence, conditions for a more formalistic formulation of its objective and territorial elements now exist. To conclude, the fourth perspective proposes normative limits to the concept of establishment that future developments should not exceed (VI).

II The legislative concept of establishment

A Legislative history

Early beginnings of international legislative instruments on privacy and data protection law, such as the 1980 Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, did not generally include applicable law rules among their provisions, nor did they routinely use the term “establishment”.8

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3 For a comprehensive analysis see Hijmans, *The European Union as Guardian of Internet Privacy* (Springer, 2016), pp. 185-262.
5 Respectively, Case C-131/12, Google Spain SL and Google Inc. *v* Agencia Española de Protección de Datos (AEPD) and Mario Costeja González, EU:C:2014:317, and Case C-230/14, Weltimmo s.r.o. *v* Nemzeti Adatvédelmi és Információszabadság Hatóság, EU:C:2015:639.
6 As stated in *Bodil Lindvist* (Case C-101/01) [2003] E.C.R. I-12992, para 83.
It would appear that, at that time, the Convention’s drafters were primarily concerned with setting standards of protection of a substantial nature rather than introducing complex choice-of-law rules.9 The 1980 OECD Privacy Guidelines, another pioneering instrument which deals with privacy and data processing, did not include applicable law rules either. Furthermore, the Explanatory Memorandum accompanying the document made it explicit that the Guidelines did not seek to address choice-of-law issues, leaving the regulation of such aspects to the Member States.10

At a national level, however, the term “establishment” and its regulatory role varied significantly. As the fundamental right to data protection was emancipating itself from the more classical right to privacy, both the 1980 Convention and the OECD Guidelines coexisted with an amalgamation of newly codified privacy and data protection laws.11 Of the national laws which included specific choice-of-law rules among their provisions, only some referred to the establishment of the controller as the relevant connecting factor, whilst others used the location of the relevant file.12

A higher level of sophistication was attained with the Data Protection Directive. At the time of its adoption, in 1995, art. 4(1) represented the first European choice-of-law rule to determine the applicable law to controllers’ processing of personal data.13 This provision is worded unilaterally rather than bilaterally, that is to say, it does not seek to determine which legal regime applies to the processing of personal data globally, but rather to establish when the European protective legislation applies to processing activities (and when it does not).14 Within this framework, the controller’s establishment plays a crucial role. Depending on its location, two main regulatory scenarios emerge from art. 4(1). Firstly, where there is an establishment of the controller in a Member State, in the context of the activities of which data processing is carried out, paragraph (a) ensures the application of the law of that Member State. Secondly, if a controller does not have an establishment in the European Union, yet they make use of equipment in a Member State, paragraph (c) provides for the application of the law of the Member State where the equipment is located.

The equivalent choice-of-law rule in the new Data Protection Regulation, art. 3, follows a similar structure. This provision also distinguishes establishment cases, which are regulated in paragraph (1), from non-establishment cases, which are

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10 As stated in para 74: “[W]hich system of law should govern specific issues (choice of law). The discussion of different strategies and proposed principles has confirmed the view that at the present stage, with the advent of such rapid changes in technology, and given the non-binding nature of the Guidelines, no attempt should be made to put forward specific, detailed solutions. Difficulties are bound to arise with respect to both the choice of a theoretically sound regulatory model and the need for additional experience about the implications of solutions which in themselves are possible”. http://www.oecd.org/sti/economy/oecdguidelinesontheprotectionofprivacyandtransborderflowsofpersonaldataln#top.
considered in paragraph (2). For establishment cases, paragraph (1) maintains an establishment of the controller in the Union, in the context of the activities of which processing is carried out, as the element which triggers the applicability of the Regulation. For non-establishment cases, however, paragraph (2) introduces a completely new rule based on a “targeting” approach, which seems to be inspired by consumer law developments.15 The new rule in art. 3(2) ensures the application of the Regulation 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 and 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”.

**B Establishment and relevant establishment**

The term “establishment” is not formally included in the list of definitions in art. 4 of the Data Protection Regulation –though this provision now incorporates the new term “main establishment”.16 Art. 3(1) only refers to the application of the Regulation to a “processing of personal data carried out in the context of the activities of an establishment of a controller […] in the Union”. This has to be read in conjunction with Recital 22, which clarifies that establishment implies “the effective and real exercise of activity through stable arrangements”.

These elements of the establishment –processing carried out in the context of, effective and real activity, and stable arrangements– serve different functions. The stable arrangement factor and the activity requirement (in Recital 22) describe constituent features of the notion of establishment, since they serve the purpose of identifying when a specific resource can be classified as an establishment rather than as something else –i.e. a non-establishment. In contrast, the phrase “processing of personal data carried out in the context of the activities of an establishment of a controller” plays no role in determining whether an establishment exists. Instead, it qualifies an establishment of the controller as the relevant establishment, for the purpose of the choice-of-law rule in art. 3(1). In other words, a controller may have an establishment in the European Union (i.e. stable arrangements through which effective and real activity is conducted) that is not a relevant establishment (as processing cannot be linked to its activities).17

It has to be noticed that this way of framing the notion of establishment is not new to the Data Protection Regulation. On the contrary, art. 3(1) and Recital 22 of the Regulation reproduce the definitional framework of establishment, as it appears in art. 4(1)(a) and Recital 19 of the Data Protection Directive. In fact, the clear alignment of

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16 Art. 4(16)(a) defines “main establishment” as the controller’s central administration in the Union. It has to be noted that this concept, in principle, is not meant to play any role in the applicable law rule in art. 3(1), which this paper discusses (i.e. for the purpose of deciding whether the Regulation applies to a specific processing of data). Instead, as it is later discussed, this concept is used to allocate (administrative) jurisdiction to the national supervisory authority in multiple-establishment cases (where the controller has several establishments within the Union).
these provisions suggests the legislator’s willingness to ensure the continuity of the concept of establishment. Firstly, as to the rule determining the applicability of European data protection law, art. 3(1) of the Regulation and art. 4(1)(a) of the Directive use the same connecting factor based on an establishment of the controller (i.e. processing carried out in the context of the activities of an establishment of the controller). Secondly, as to the definition of establishment, Recital 22 of the Regulation and Recital 19 of the Directive describe it on identical terms (i.e. establishment implies the effective and real exercise of activity through stable arrangements). Therefore, the establishment notion in the Directive also distinguishes its constituent elements in Recital 19 (the stable arrangement factor and the activity requirement) from the processing component in art. 4(1)(a), which qualifies the establishment as the “relevant” establishment.

This approach to the data protection establishment has been criticised for its complexity.18 It introduces a two-stage analysis which requires verifying whether the controller has an establishment, and then, whether processing occurs in the context of the activities of such an establishment. This may create a false sense of territoriality. A singular feature of the rule in art. 3(1) of the Regulation—and that of art. 4(1)(a) of the Directive—is that the term “establishment”, which tends to represent a direct and undisputed application of the principle of territoriality, may also be used to capture processing activities conducted abroad by non-EU controllers.19

European data protection law does not formally adhere to the country of origin principle, a principle which relies on the application of the law of the country where the trader is established (as opposed to where it has an establishment).20 Instead, European data protection law applies to the processing of personal data that any controller, EU-based or non-EU based, develops in the context of the activities of an establishment in Europe. This rule was adopted to prevent controllers from circumventing EU law by transferring their main seat or their processing to a non-Member State.21 Moreover, as the matter currently stands, such an establishment of the controller in Europe does not need to play any role at all in the data processing

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18 In particular, for the regulatory gap resulting from the partial alignment of the concept of establishment under paras (a) and (c) of art. 4(1) of the Directive, see Moerel, “The Long arm of EU data protection law: Does the Data Protection Directive apply to processing of personal data of EU citizens by websites worldwide?”, International Data Privacy Law (2011), 28-46, at 35-36. Also, in the context of the cloud computing sector, see Kuan Hon, Hörnle and Millard, “Data Protection Jurisdiction and Cloud Computing – When are Cloud Users and Providers Subject to EU Data Protection Law? The Cloud of Unknowing, Part 3”, 26 International Review of Law, Computers & Technology (2012).


21 See Moerel, “Back to the basics”, at 95.
itself (provided that the processing is found to be inextricably connected to its activities).22

This ability of the data protection establishment to capture both conduct within the Internal Market and conduct originating from abroad provides the interpreter with a versatile regulatory tool. However, it also introduces an additional layer of complexity to the concept of establishment which may compromise legal certainty.

III The judicial concept of establishment

A Deconstructing establishment

The CJEU has played a crucial role in interpreting the data protection concept of establishment. This has helped provide a clear(er) framework for individuals and controllers, especially given the conceptual discrepancies that the notion of establishment has presented at national level.23 Relying on its teleological method of interpretation and to ensure an effective protection of individuals’ rights to privacy and data protection, the CJEU stated in Google Spain that the concept of establishment could not be interpreted restrictively.24 The same was confirmed in the CJEU’s lesser-known case, Weltimmo.25

The company Weltimmo was an e-service provider formally registered in Slovakia, where it conducted no activity. It operated two property selling websites concerning property located in Hungary and also had a representative in Hungary. Through its websites, the Slovakian company offered listing services to owners of Hungarian properties, the advertisers. The conditions under which these services were provided required the advertisers to self-register their properties online on the company’s websites. This required the registration of the advertisers’ personal details, such as their names and addresses. The company, Weltimmo, would publish the listed properties free of charge for an initial one-month trial period, after which the advertisers would be automatically upgraded to a paid membership system. Notwithstanding the fact that most advertisers contacted the company with delisting requests before the end of the free trial period, Weltimmo did not process them. On the contrary, it invoiced the advertisers with the relevant fee at the end of the expiry date and, following their refusal to pay, it reported their personal details to debt collection agencies. As (individual) advertisers perceived these actions as unlawful processing of their personal data, they lodged complaints to their local data protection authority in Hungary. This authority imposed the maximum fine under Hungarian data protection law on the Slovakian company, a fine that the company challenged, arguing that the applicable law was not the law of Hungary but of Slovakia. The case reached

24 Case C-131/12, Google Spain, para 53.
the Supreme Court in Hungary, which referred several questions to the CJEU on the interpretation of art. 4(1)(a) of the Directive.26

This provided the CJEU with an opportunity to clarify the concept of establishment in a data protection context. The Court supported the interpretation that Weltimmo had an establishment in Hungary. Notably, the Court integrated Recital 19 directly into art. 4(1)(a), and rephrased the rule in art. 4(1)(a) so that its application required the controller to exercise through stable arrangements in that Member State, a real and effective activity […] in the context of which that processing is carried out”.27 This wording has to be welcomed. It favours a direct approach to the notion of the relevant establishment by using the following three elements: a structure factor (stable arrangements); an activity requirement (real and effective); and a processing component (which occurs in the context of such an activity). It is important to notice that, as the Data Protection Regulation reproduces the Directive’s definitional framework of the establishment notion, the Court’s approach in Weltimmo is also relevant under the Regulation.

B Stable arrangements

The term “stable arrangements” is not expressly defined in the Data Protection Directive; nor is it in the Data Protection Regulation. All that Recital 19 of the Directive states is that the legal form of the establishment is not a conclusive factor.28 Similarly, Recital 22 of the Regulation reads that the legal form of the “arrangements, through a branch or a subsidiary with a legal personality, is not the determining factor in that respect”. Relying on its teleological method of interpretation, the CJEU in Weltimmo proposed that “the presence of only one representative can, in some circumstances, suffice to constitute stable arrangements if that representative acts with a sufficient degree of stability through the presence of the necessary equipment for the provision of the specific services concerned in the Member State in question”.29 Under a literal approach, this suggests that, for a specific resource to be characterised as “stable arrangements”, it must contain three distinctive features, namely: equipment; which is sufficiently stable; and is necessary for the provision of the relevant service.

The term “equipment” is not explicitly defined in the Data Protection Directive; nor is it in the Data Protection Regulation. The Article 29 Working Party, however, did address it for the purpose of the rule in art. 4(1)(c) Directive. In its 2002 Opinion, it referred to servers, terminals and computers as equipment.30 Moreover, in a latter document, the Article 29 group of experts stated that “equipment” was equivalent to

26 The referring court also enquired about the interpretation of art. 28 of the Directive on the jurisdiction of the national supervisory authority. This is beyond the scope of this paper, which focuses on the interpretation of the applicable law rule.
27 Para 41 and final ruling, Case C-230/14, Weltimmo.
28 Recital 19 reads “simply a branch or a subsidiary with a legal personality, is not a determining factor in this respect”.
29 Para 30, Case C-230/14, Weltimmo.
This led to a “broad interpretation of the criterion, which included human and/or technical intermediaries, such as surveys and inquiries”.

Admittedly, such a broad interpretation of equipment is not particularly useful for the purpose of the data protection choice-of-law rule. The general consensus is that the mere presence of equipment does not constitute establishment, nor does it trigger the applicability of European data protection law. Something else is required. The CJEU in Weltimmo has proposed conditions that equipment should satisfy in order for it to be classified as stable arrangements. In particular, following Advocate General Cruz Villalón’s Opinion, the CJEU has adopted a flexible interpretation of the notion of stable arrangements which seems to place an emphasis on the “sufficient stability” and the “necessity” element of the specific resource. Under this approach, it would appear that the assessment of whether a specific resource constitutes “stable arrangements” would depend, to a great extent, on whether it enables the trader to provide the relevant service adequately and independently. In other words, this higher level of precision would suggest the introduction of a purposive approach to the concept of stable arrangements, whereby an analysis of the specific resource does not merely (or primarily) look at its nature or components, but rather at its ability to contribute to the provision of the relevant service effectively.

C Activity

As to the term “activity”, Recital 19 of the Directive approaches it in a qualitative manner, requiring it to be “effective and real”. Recital 22 of the Regulation requires the same. Notably, the CJEU, in Weltimmo, has also stated that “‘establishment’ within the meaning of Directive 95/46, extends to any […] activity—even a minimal one”. This is an important development. It introduces a quantitative approach to the notion of activity, according to which, purely formal resources (i.e. those which completely lack in activity) prevent the notion of establishment. The CJEU, however, has set a low threshold for the definition of activity, stating that a situation of minimal activity is sufficient. Such a low threshold facilitates the satisfaction of the activity requirement and, thus, benefits the formation of the establishment.

31 Pointing out that the term equipment in the English language version of the Directive had been expressed in other EU languages as “means”; see Article 29 Working Party, “Opinion 8/2010 on applicable law”, at. 20.
34 It has to be noted, however, that the CJEU judgment and Advocate General Cruz Villalón’s Opinion (Opinion issued on Case C-230/14, Weltimmo, EU:C:2014:340) differ on the following aspect. Whereas Advocate General refers to “human and technical resources”, the CJEU leaves the nature of the resource unqualified and simply refers to the “necessary equipment”; compare para 30 of the EJC judgment, which reads “a sufficient degree of stability through the presence of the necessary equipment for the provision of the specific services concerned” to para 72 of Advocate General’s Opinion, which states that “a sufficient degree of stability though the presence of the human and technical resources necessary for the provision of the specific services concerned”.
35 Recital 22: “Establishment implies the effective and real exercise of activity…”.
36 Paras 31, 41 and final ruling, Case C-230/14, Weltimmo.
In *Weltimmo*, the Court acknowledged that the Slovakian company ran property-dealing websites concerning properties in Hungary. It also noticed that Weltimmo’s websites were written in Hungarian. According to the Court, these elements were evidence that the Slovakian company pursued real and effective activity in Hungary. This shows that the Court endorses a factual analysis of the activity requirement for the purpose of verifying the second condition of establishment (i.e. real and effective activity). Paragraph 41 confirms this and includes a reference to the distinct notion of directing activities. Here, the CJEU proposes that “directing activities” can be taken into account, factually, in order to decide whether the requirement for real and effective activity is verified.

The Court has interpreted the concept of directing activity in its consumer case law. In particular, the recast Brussels Regulation (Regulation 1215/2012) uses this concept in art. 17(1)(c) to determine the application of the consumer protective rules on jurisdiction in civil and commercial matters. These rules facilitate consumers’ access to justice by allowing them to bring proceedings to the court of their domicile in a Member State against companies directing their activities to that Member State. In the leading CJEU case *Pammer and Hotel Alpenhof*, the Court proposed a non-exhaustive list of factors from which “it may be concluded that the trader’s activity is directed to the Member State of the consumer’s domicile”. It also made it explicit that mere accessibility to the trader’s website in States other than that in which the trader is established is not sufficient to conclude that the trader is directing its activities towards these States.

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37 Case C-230/14, *Weltimmo*, para 32.
38 “It must, therefore, be held that that company pursues a real and effective activity in Hungary”, Case C-230/14, *Weltimmo*, para 32.
39 The Court states that in order to determine whether the requirements in art. 4(1)(a) are verified “the referring court may, in particular, take account of the fact (i) that the activity of the controller in respect of that processing, in the context of which that processing takes place, consists of the running of property dealing websites concerning properties situated in the territory of that Member State and written in that Member State’s language and that it is, as a consequence, mainly or entirely directed to that Member State”, C-230/14, *Weltimmo*, para 41.
42 See *Pammer and Hotel Alpenhof* (Cases C-585/08 & C-144/09) [2010] E.C.R. I-12527, para 93: “the international nature of the activity, mention of itineraries from other Member States for going to the place where the trader is established, use of a language or a currency other than the language or currency generally used in the Member State in which the trader is established with the possibility of making and confirming the reservation in that other language, mention of telephone numbers with an international code, outlay of expenditure on an internet referencing service in order to facilitate access to the trader’s site or that of its intermediary by consumers domiciled in other Member States, use of a top-level domain name other than that of the Member State in which the trader is established, and mention of an international clientele composed of customers domiciled in various Member States. It is for the national courts to ascertain whether such evidence exists”.
43 The CJEU also clarified that it is required that the trader has declared its intentions to establish commercial relations with consumers from one or more other Member States; see Cases C-585/08 & C-144/09, *Pammer and Hotel Alpenhof*, paras 69 and 75.
Nothing suggests that the Court is aiming for a strict alignment of the consumer law concept of directing activities and the data protection notion of establishment. These are different concepts. Firstly, directing activities is not a formal requirement of the concept of establishment. That is to say, it remains possible for real and effective activity to occur at a specific place (thereby satisfying the second condition of the data protection concept of establishment), without the trader directing its activities to that place under Pammer’s legal concept. Secondly, the factual nature of the activity element and its low threshold make the concept of real and effective activity broader in scope than the legal concept of directing activities. Therefore, it can be concluded that directing activities to a Member State may increase the chances of having an establishment in that Member State (as it helps to satisfy the second element of the establishment), yet it does not automatically imply establishment. The CJEU has recently confirmed this in its 2016 *Amazon* judgement.

**D Processing**

Data processing is an essential element of the definitional framework of the establishment concept. It is what turns an establishment of the controller into the relevant establishment. Article 4(1)(a) reads that data processing has to occur “in the context of the activities of an establishment”. Similarly, art. 3(1) of the Regulation requires the processing to be carried out “in the context of the activities of an establishment of the controller […] in the Union”. Therefore, without data processing, neither art. 4(1)(a) of the Directive nor art. 3(1) of the Regulation apply.

Processing is defined broadly as any set of operations involving “collection, recording, organization, storage, […] dissemination or otherwise making available”. This definition is not particularly controversial. More important is the CJEU’s assertion in *Google Spain* that the effective location of the controller’s processing is irrelevant for the purpose of the application of the choice-of-law rule. This has now been explicitly codified in Art. 3(1) of the Regulation, which ensures the application of the Regulation to the processing carried out in the context of the activities of an establishment of the controller in the Union “regardless of whether the processing takes place in the Union or not”.

The *Google Spain* judgment has been the subject of much commentary. In this case, the CJEU supported the interpretation of Google Inc., a US-based company, as being established at the place of its subsidiary in Spain, under art. 4(1)(a) of the Data Protection Directive. This was premised on the understanding that Google Inc.’s data processing was inextricably linked to the activities of its subsidiary (Google Spain), and thus was carried out in the context of the activities of such an establishment. According to the CJEU, which, on this point, followed Advocate General Jääskinen, the interpretation of the phrase “inextricable link” had to take into account the

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44 Commenting on such an alignment, see Brkan, “Data Protection and European Private International Law”, *European University Institute, Working Papers*, RSCAS2015/40, at 15 and 33.
46 Art. 2(b) of the Directive and Article 4(2) of the Regulation.
47 An overview of academic papers on *Google Spain* can be found at http://www.cambridge-code.org/googlespain.html (compiled by Julia Powles and Rebekah Larsen).
controller’s business model. The CJEU, therefore, took the view that the advertising activities of Google’s subsidiary in Spain were the means of rendering the search engine economically profitable and thus confirmed that Google Inc.’s processing was inextricably linked to Google Spain’s commercial activities in Spain.

The CJEU in Google Spain justified its interpretation on teleological grounds, to ensure an effective and complete protection of individuals. It has been suggested that the Court’s approach implicitly relies upon the effects principle. This principle, which has been developed in the context of antitrust law, justifies the application of national law to activities outside the territory of the State, when such activities produce effects within the State. The CJEU maintains that it is justifiable to make a foreign controller accountable under European data protection law through its subsidiary in a Member State, when the processing activities that it carries out may have a substantial impact (i.e. effect) on data subjects’ rights to privacy and to data protection in Europe, provided that the commercial activities of such an establishment in Europe supports the parent company by making its processing profitable. Evidently, the CJEU’s ruling may not benefit the interests of non EU-controllers such as Google Inc. and other companies operating similar business models. However, as it has been argued, a different solution would have created an unfair competitive advantage for non-EU controllers who intensively process users’ personal data through their commercial establishments in Europe, compared to EU controllers who solely rely on European resources to process users’ data.

And so, for the purpose of the data protection notion of establishment, the processing component has two key features. These refer to its delocalised nature (that the processing effective location is irrelevant), and its mobile essence (which considers the possibility of the processing being legally attributed to a different establishment).

E Summary

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48 Advocate General Jääskinen, Opinion issued on Case C-131/12, Google Spain, EU:C:2013:424, para 67; also Case C-131/12, Google Spain, paras 55-57.
49 Case C-131/12, Google Spain, para 56.
52 See Svantesson, “The extraterritoriality of EU Data Privacy Law”, at 82 and 85, who reviews this principle and proposes that European data protection law in Article 4 of the Directive and in Article 3 of the Regulation fall within the effects doctrine.
53 See Alsenoy and Koekoek, “Internet and jurisdiction after Google Spain”, at 110; and also Svantesson, “Extraterritoriality and targeting in EU data privacy law”, at 229-230. Particularly relevant for its similarities with Google Spain is the CJEU judgment in Dyestuffs, where the Court decides that the non-EU parent company had decisively influenced the conduct of its subsidiaries in the EU and is thus accountable under European competition law, see Imperial Chemical Industries v Commission (Case 48/69) [1972] E.C.R. 619, paras 125-146.
54 Which may decide, after the Google Spain judgement, to limit the commercial activities of their subsidiaries in Europe or to amend their business model (and make users pay for their services), see Sancho, “Developing Search Engine Law”, at 376.
55 See Alsenoy and Koekoek, “Internet and jurisdiction after Google Spain”, at 110.
Both Weltimmo and Google Spain have contributed to enhancing legal certainty by proposing a clearer and more precise conceptual framework for establishment. The data protection notion of establishment now requires: stable arrangements (defined as equipment sufficiently stable and enabling for the provision of the specific service); activity, which has to be real and effective (qualitatively) though may be minimal (quantitatively); and, data processing, which includes both a delocalised nature (where its effective location is irrelevant) and a mobile essence (as it may be legally attributed to the activities of a different establishment). Moreover, the CJEU has confirmed that mere access to a website which directs its activities to a Member State does not constitute establishment, and that the subjects’ nationality plays no role for the purpose of the establishment. The CJEU has also clarified that additional factors such as the presence of a representative and the concept of directing activities can be taken into account factually. This suggests that such additional factors can help determine the legal requirements for establishment (stable arrangements, activity, processing), though they lack, in principle, the ability to substitute any of them.

IV Legal policy considerations

A Establishment or establishments?

European legislative terms are uniform in meaning (autonomous) and independent of the national law of the court deciding the dispute. However, no single definition of the term “establishment” exists. As Advocate General Cruz Villalón stressed in his Opinion regarding the Weltimmo case, different areas of EU Law place a different emphasis on the definition of establishment. This is due to the fact that the meaning of establishment aligns with the particular principles and objectives pursued in the specific regulatory sector in which the term is being used. The following two cases illustrate how the CJEU’s teleological method of interpretation ensures this alignment. As discussed above, in Google Spain, the CJEU held that a US-based company was established at the place of its subsidiary in a Member State (under art. 4(1)(a) of the Data Protection Directive), as the processing it carried out was inextricably linked to the activities of that subsidiary. In contrast, the Court in Schotte confirmed that only under specific circumstances may a company’s subsidiary in a Member State constitute an establishment of that company in that Member State (when determining the competent court to decide a dispute in civil and commercial matters under art. 7(5) of the Brussels Regulation recast). Whereas in Google Spain the objective of ensuring an effective and complete protection of individuals’ fundamental rights to data protection and privacy justified a broad interpretation of the term “establishment”,

56 Para 76, Case C-191/15, Amazon.
58 Para 41, Case C-230/14, Weltimmo.
59 For a normative approach to the EJC model of reasoning, see Conway, The limits of legal reasoning and the European Court of Justice (CUP, 2012), pp. 1-51.
60 Para 31, Opinion issued on Case C-230/14, Weltimmo.
61 Case C-131/12, Google Spain, paras 55-57.
in Schotte, the objective of avoiding a multiplication of the bases of jurisdiction under the Brussels Regulation framework supported a stricter interpretation of the term.63

Generally, the high degree of predictability of the concept of establishment explains why it is commonly used as the element triggering the applicability of a rule (or set of rules) to companies and individuals acting in a professional capacity.64 Examples of this include: art. 3(1) of the Data Protection Regulation, which uses an establishment of the controller (in the context of the activities of which processing is carried out); art. 44 of the Value Add Tax Directive, which refers to the fixed establishment;65 and art. 3(2) of the Regulation on insolvency proceedings (recast) which permits the opening of territorial proceedings in the courts of the Member State where the debtor has an establishment.66 By contrast, concepts such as domicile, habitual residence and, to a lesser extent, nationality, may also apply to companies and professionals.67 For example, art. 4 of the recast Brussels Regulation determines the applicability of its jurisdictional rules to defendant companies domiciled in a Member State.68 Also, both the Rome I Regulation (on the law applicable to contractual obligations) and the Rome II Regulation (on the law applicable to non-contractual obligations) refer to the habitual residence of companies.69

The CJEU has also elaborated the concept of establishment within the meaning of the freedom of establishment under art. 49 TFEU. As interpreted in Factortame,}

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63 Respectively, Case C-131/12, Google Spain, para 53; and Case 33/78, Somafer SA v Saar-Ferngas AG, EU:C:1978:205, paras 5-7.
65 Directive 2006/112/EC [2006] OJ L347/1. Article 44 reads “[t]he place of supply of services to a taxable person acting as such shall be the place where that person has established his business. However, if those services are provided to a fixed establishment of the taxable person located in a place other than the place where he has established his business, the place of supply of those services shall be the place where that fixed establishment is located”. This has been interpreted as the “permanent presence of both the human and technical resources necessary for the provision of those services” (Case 168/84, Gunter Berkholtz v Finanzamt Hamburg-Mitte-Alstadt (Case 168/84) [1985] E.C.R. 02251, para 19); a concept which the Court has reformulated as requiring “a sufficient degree of permanence and a structure adequate, in terms of human and technical resources, to supply the services in question on an independent basis” (Case C-605/12, Welmory sp. z o.o. v Dyrektor Izby Skarbowej w Gdańsku, EU:C:2014:2298, para 58).
66 Establishment is defined as “any place of operations where a debtor carries out or has carried out in the 3-month period prior to the request to open main insolvency proceedings a non-transitory economic activity with human means and assets” in art. 2(10) Regulation (EU) 2015/848 on insolvency proceedings (recast) [2015] OJ L 141/19. This has been interpreted as “the presence of a structure consisting of a minimum level of organisation and a degree of stability necessary for the purpose of pursuing an economic activity”, Interedil Srl, in liquidation v Fallimento Interedil Srl and Intesa Gestione Crediti SpA (Case C-396/09) [2011] E.C.R. I-09915, para 64.
68 Defined autonomously as the place at which a company has its “(a) statutory seat; (b) central administration; (c) principal place of business” in art. 63.
69 Defined as the place where the company has its central administration or where an individual acting in a professional capacity has its principal place of business, in art. 19 of Regulation (EC) 593/2008 on the law applicable to contractual obligations (Rome I) [2008] OJ L 177/6; and art. 23 of the Regulation (EC) 864/2007 on the law applicable to non-contractual obligations (Rome II) [2007] OJ L 199/40.
establishment involves “the actual pursuit of an economic activity through a fixed establishment in another Member State for an indefinite period”. The Treaty provisions consider two forms of establishment for companies, namely, primary establishment, which includes the right to set up and transfer the company’s seat, and secondary establishment, which refers to the right to set up agencies, branches or subsidiaries. Additionally, in Cadbury’s Schweppes, the CJEU has clarified the territorial reach of the establishment, stating that establishment presupposes an element of permanency in the host Member State and the pursuit of genuine economic activity there.

However, the previous test for establishment, under art. 49 TFEU, does not apply to the issue of interpreting whether an individual company is established in the Member State of origin. This is left to national company law. Article 54 of the TFEU, which determines the beneficiaries of the freedom of establishment, states that these are companies formed in accordance with the law of a Member State and which have their registered office, central administration or principal place of business within the Union. As interpreted by the CJEU, art. 54 does not deal with the issue of whether an individual company is established in the Member State of origin.

The role that the establishment notion plays in company law is thus complex. On the one hand, Member States are free to determine the nationality of their companies, as per Daily Mail and Cartesio. Furthermore, in the Centros judgment, the CJEU has confirmed that EU law does not prevent companies from choosing where to incorporate themselves in the European Union, nor does it impose a requirement of substantial connection with the country chosen for such incorporation. On the other hand, the exercise of the freedom of establishment under art. 49 TFEU does introduce some limits to national company law. A company validly formed in a Member State (which endorses the incorporation theory) and transfers its real seat to another Member State (which follows the real seat theory), has to be recognised in the latter as a company validly formed in the Member State of origin, as interpreted in Überseering. And finally, a national system following the real seat theory cannot prevent its companies from changing their applicable law when they transfer their seat to another Member State, as interpreted in Überseering.

B A three-stage test for establishment

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71 In Cadbury Schweppes and Cadbury Schweppes Overseas (Case C-196/04) [2006] I-07995, para 54.
74 Centros Ltd contra Erhvervs- og Selskabsstyrelsen (Case C-212/97) [1999] E.C.R. I-01459.
The following three-stage test is a proposed solution to dealing with the diversity of the concept of establishment. It considers the attributes that are required of a specific resource in order for it to be categorised as an establishment. The first stage examines the objective elements of the establishment, namely, the elements that try to differentiate whether a specific resource constitutes an establishment rather than something else (i.e. a non-establishment). The second stage considers the territorial elements of the establishment and thus focuses on the location of the objective elements of the establishment. The third stage addresses the subjective elements of the establishment and analyses whether the relevant resource has to present itself in a specific legal form.

(i) Stage One. Which objective elements are typically used to determine when specific resources constitute establishments or non-establishments?

Establishment may be defined by structure elements alone. Structure elements consider both the quality and the type of the structure required. The quality of the structure refers to the attributes that the relevant resource has to satisfy, i.e. permanent, fixed, stable, etc. As to the type of structure required, a typology does not exist. Generally, establishment implies a traceable physical representation. It is also possible, however, that structure requirements are merely referring to legal elements such as formal registration, as in the Centros case.

Establishment may also imply the combination of both structure elements and activity requirements. This combination occurs when the regulator requires that activity is effectively conducted through a given structure. The CJEU jurisprudence on the definition of establishment for the purposes of 49 TFEU follows this approach, as evidenced in Factortame and Cadbury’s Schweppes. Similarly, both structure and activity elements are required in Recital 22 of the Data Protection Regulation (and Recital 19 of the Data Protection Directive), which specifies that establishment implies both effective and real exercise of activity and stable arrangements.

It is to be noted that when both structure elements and activity requirements define establishment objectively, the former often plays a role in facilitating the latter. This is not surprising, as a structure usually allows a specific activity to be conducted through it. Therefore, when combined together, it is unlikely that the structure element of the establishment is of a purely legal nature (such as formal registration). In other words, an approach to the concept of establishment which considers structure elements alone is likely to signify a more abstract and formalistic representation of the establishment. In contrast, an approach which combines both structure elements and activity requirements will favour a substantial representation of the establishment.

76 For instance, establishment in art. 49 TFEU requires an element of permanency, as confirmed in Factortame and Cadbury; the Value Added Tax Directive, refers to the fixed establishment (as discussed above in note 61); data protection law requires that the arrangements are stable (Recital 22 of the Regulation, Recital 19 of the Directive).

77 See Bogdan, “Websites, establishment and private international law”, at 100-102; and Maier, “How Has the Law Attempted to…”, at 160. This is also implied on the definition of stable arrangements proposed by Advocate General Cruz Villalón, in his Opinion issued on Case C-230/14, Weltimmo.

78 For a recent study on the legislative efforts in fighting letterbox companies, see Sørensen, “The fight against letterbox companies in the Internal Market”, 52 CML Rev (2015), 85–118, at 110-116.
(ii) Stage Two. Where do the objective elements of the establishment have to be geographically located?

The treatment of the following two scenarios is different depending on whether establishment is defined objectively through structure elements alone or through a combination of structure elements and activity requirements.

If the relevant system defines establishment through structure elements alone, the structure elements would have to be located in the country where the establishment is deemed to exist. For example, if a company maintains that it is established at the place where it is formally registered, this will have to be verified against the legal system under which it claims to be registered.

However, should the regulatory system use both structure and activity, the assessment of the territorial element may be more complicated. The following two cases demonstrate how the outcome may differ depending on whether the regulator makes territorial requirements explicit.

The first case involves the CJEU's interpretation of the freedom of establishment under art. 49 TFEU. In Cadbury's Schweppes, the CJEU stated that establishment “presupposes actual establishment of the company concerned in the host Member State and the pursuit of genuine economic activity there”. Establishment, in this sense, involves a degree of permanency in the host State and also the pursuit of a genuine activity in that place.

More difficult, however, is the second type of case, where the regulator uses a definition of establishment which embraces both structure and activity without explicitly stating the location of each. This raises the question as to whether the formation of the establishment requires both structure and activity to occur within the territory of the same Member State. Two interpretations are possible here. Firstly, it can be argued that legal coherence demands that structure and activity coincide geographically when establishment is objectively defined by both these elements. As a matter of legal policy, a legal system making both structure and activity constituent factors of the notion of establishment favours a substantial representation of it. This, in principle, gives rise to an expectation that (at least some) activity occurs where the structure element is located. It could also be argued, however, that constraining the concept of establishment in this way is unnecessary and creates other potential difficulties, especially when the activity spreads across borders, as will be discussed later.

(iii) Stage Three. Is there a requirement for the objective elements of the establishment to have a specific legal form?

The subjective elements of the establishment explore, in particular, the relationship between the (parent) company and its establishment. Often, the legislator determines whether establishment requires the company to own or control a relevant structure in a specific manner, and will elaborate on the nature of the control (i.e. legal

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79 Case C-196/04, Cadbury Schweppes, para 54 (italics added for emphasis).
or economic). Depending on the specific area of the law, the principle of appearance to third parties may also play a role in delineating establishment subjectively.80

V Analysis

All things considered, it seems appropriate to distinguish between a formal and a substantial (i.e. non-formal) regulatory approach to the notion of establishment. The degree of formality may vary depending on whether it refers to objective, territorial or subjective elements of the establishment. Therefore, the definition of establishment may be objectively formal, if it refers to structure elements alone (e.g. a legal requirement of formal registration); it may be territorially formal, if solely the location of structure elements matters; or it may be subjectively formal, if the legal form of the establishment is taken into account (so that it does not reach different legal persons). Conversely, the concept of establishment may be objectively substantial, if both structure and activity are mandatory elements of the definition; it may be territorially substantial, if both these elements have to coincide geographically; or it may be subjectively substantial, if the legal form of the establishment is not a determining factor. The following paragraphs analyse the revised data protection concept of establishment against this background.

A Objective elements

Data protection law makes it explicit that the concept of establishment requires both structure (i.e. stable arrangements) and activity. This has been a constant requirement in data protection law. It was first stated in Recital 19 of the 1995 Directive and later reproduced in Recital 22 of the 2016 Regulation. In this connection, it is not surprising that the CJEU confirmed this aspect of establishment in *Weltimmo*.81 Remarkably, the Court also clarified that a minimal amount of activity is sufficient.82 As discussed earlier, this is an important clarification. It implies that a situation completely lacking in activity (i.e. a scenario of mere structure) will, in principle, be incompatible with the data protection notion of establishment. It may therefore be concluded that the data protection concept of establishment adheres to a substantial regulatory model, objectively considered.

Without challenging the substantial nature of the data protection establishment, it is remarkable that the CJEU in *Weltimmo* has proposed an interpretation which tolerates a higher level of formality in the formulation of the objective elements of establishment. Firstly, as to the activity requirement, the Court has introduced a low threshold for activity according to which minimal activity is sufficient. Secondly, as to the structure factor, the CJEU has softened the notion of stable arrangements, which has been objectified as equipment, sufficiently stable and adequate for the provision of the relevant service. As proposed before, this supports a purposive approach to the notion of stable arrangements, whereby any analysis of the specific resource would

80 For instance, in the context of civil and commercial dispute resolution law, for the purpose of the application of the rule in art. 7(5) of the Brussels Regulation (recast), the CJEU stated in *Schotte* that establishment must appear to third parties as an easily discernible extension of the parent body (Case C-218/86, *Schotte*); see also Lehmann, “Jurisdiction over Establishment (Art 7(5)”, in Dickinson and Lein (Eds), The Brussels I Regulation Recast, at 177.
81 Para 41, Case C-230/14, *Weltimmo*.
82 Referring to “any […] activity –even a minimal one”, in para 41, Case C-230/14, *Weltimmo*.
need to consider whether it contributes to the provision of the relevant service effectively and adequately.

These are innovating developments. They derive from an important interpretative principle that the Court has introduced, which reads “both the degree of stability of the arrangements and the effective exercise of activities […] must be interpreted in light of the specific nature of the economic activities and the provision of services concerned”.83 This principle ensures a high degree of flexibility for the establishment concept and provides the legal basis for implementing future conceptual adjustments that the digital environment may impose on the notion of establishment.

To conclude on the regulatory model for establishment, the CJEU interpretation in Weltimmo suggests a move towards a more formalistic formulation of the objective elements of establishment. Without challenging its substantial nature at the objective level – for establishment still requires both structure and activity – these judicial developments do allow for a less substantial representation of establishment. The Court’s interpretation implies that a purely formal resource (completely lacking in activity) will not constitute establishment, whereas a quasi-formal resource (through which minimal activity is conducted) may now constitute establishment. This eases the formation of the establishment (as it helps to satisfy its objective requirements) and contributes to creating trust in the Internet by facilitating the application of this notion to companies operating online. It also ensures that all data subjects receive an equivalent level of protection (through the establishment), regardless of the size of the undertaking processing their data.84

B Territorial elements

The notion of establishment has a territorial dimension which looks at the location of the objective elements of the establishment, i.e. the stable arrangement factor and the activity requirement. The location of the data processing component is irrelevant, as the CJEU confirmed in Google Spain and art. 3(1) of the Regulation now codifies.85

In Weltimmo, the CJEU made it clear that the stable arrangement factor had to be located in the territory of a Member State.86 The Court also considered the territorial location of the activity requirement and stated that “in order to establish whether a company […] has an establishment in a Member State other than […] where it is registered, both the degree of stability of the arrangements and the effective exercise of activity in that other Member State” have to be considered.87 By explicitly locating the activity element in the territory of the Member State of the stable arrangements, the CJEU suggests that the concept of establishment requires that both the activity requirement and the structure factor coincide geographically in the territory of the same Member State. This interpretation would thus confirm the substantial nature of the data protection establishment, territorially considered.

83 Para 29, Case C-230/14, Weltimmo.
84 For a layered approach to data protection law, which considers the economic impact that European data protection law may have on small and medium enterprises, Svantesson, “A ‘layered approach’ to the extraterritorially of data privacy laws”, International Data Privacy Law (2013), 278-286.
85 Para 55, Case C-131/12, Google Spain.
86 This is explicitly stated in para 41 and in the final ruling, Case C-230/14, Weltimmo.
87 Para 29, Case C-230/14, Weltimmo (italics added for emphasis).
The CJEU in *Weltimmo*, however, did not explicitly address the territorial reach of the activity element (whether it can spread across borders). This can nevertheless be inferred from the CJEU’s reasoning. Firstly, the Court has made it clear that the objective definition of establishment requires only a minimum amount of activity—as discussed before, a purely formal resource does not constitute establishment. Secondly, as interpreted, the Court also requires that activity and structure coincide geographically. It might then be proposed that these two aspects support an interpretation of the activity element as capable of spreading across borders, so long as (minimum) activity is exercised at the location of the stable arrangements in a Member State. Therefore, without challenging the substantial essence of the establishment on a territorial level, this interpretation would allow for a certain degree of formality of the establishment by enhancing the borderless nature of the activity element.

The new Data Protection Regulation is meant to have a strong impact on the territorial dimension of the establishment. The Regulation rewrites the regulatory role that the establishment plays within the Internal Market.

Firstly, in single-establishment cases, “establishment” in art. 3(1) no longer identifies (i.e. selects) the national implementing law applicable to the controller’s processing. This differs from art. 4(1)(a) of the Directive, where the location of an establishment of the controller in a Member State determines the application of the law of that Member State. The uniform application of the Regulation in all Member States puts an end to the fragmented implementation of data protection law across Member States, and also reduces the opportunities for *forum shopping* that the Directive has created.88

Secondly, in multiple-establishment cases (where the data processing occurs in the context of the activities of several establishments of the same controller within the Union), the role that the establishment plays has also changed significantly. Art. 3(1) of the Regulation favours the application of one single law, the law of the Regulation, to all the processing activities that a controller carries out through its establishments in the Union. This contrasts with art. 4(1)(a) of the Directive, where controllers have to comply with several national laws in a distributive manner, namely, the law applicable to each relevant establishment within the Union.89 Moreover, the *One Stop Shop* mechanism that the Regulation introduces, a new channel by which jurisdiction is vested on the national supervisory authority of the main establishment, prevents the controller from being accountable to several national supervisory authorities. For this purpose, controller’s main establishment is defined in art. 4(16)(a) as the place of its central administration in the Union.90

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88 See Hert and Papakonstantinou, “The new General Data Protection Regulation”, at 182, who also state that the importance of choosing a regulation “as the legal instrument to bear the burden of regulating EU data protection law cannot be emphasized enough”.

89 Art. 4(1)(a) Directive reads: “[W]hen the same controller is established on the territory of several Member States, he must take the necessary measures to ensure that each of these establishments complies with the obligations laid down by the national law applicable”. Moerel refers to this as the cumulative application of data protection laws (see, “Back to the basics”, at 96).

90 Cooperation is ensured through the national authority of the main establishment, which becomes the leading supervisory authority, see art. 56(1) Regulation and Recital 124. In single-establishment
These improvements are much awaited as they ease the provision of services across borders and reduce controllers’ information costs within the Union.\(^{91}\) The adopted amendments benefit controllers by letting them set their terms under one single law, the law of the Regulation, whose provisions they are likely to be familiar with. Notably, this is achieved without compromising data subjects’ rights, as the applicability of the Regulation remains premised on an establishment of the controller in the context of the activities of which processing is carried out.

C Subjective elements

In regards to the subjective elements, it is not required that the controller and the establishment are the same legal person. Both Recital 22 of the Regulation and Recital 19 of the Directive make this explicit. Moreover, as interpreted in Google Spain, the processing component carried out by a non-EU controller abroad can be attributed to the commercial activities of its subsidiary in Europe, if inextricably connected to such activities. As already discussed, this aspect of the definition of data protection establishment illustrates the influence that the effects doctrine may have within this area of the law.

For the purpose of the present analysis, it is clear that the ability of data protection establishment to extend to different legal persons confirms the high degree of substantiality that this concept may have. Such an extensive interpretation of establishment implies that, in principle, any agent, representative, distribution network or subsidiary that a foreign controller uses in the European Union can eventually qualify as its “establishment”. Moreover, art. 27 of the Regulation (and art. 4(2) of the Directive) requires non-EU established controllers to nominate a representative in the European Union. This raises the question of whether such a broad approach to the subjective element of establishment may be used to justify an interpretation whereby, any representative in Europe of the controller, automatically becomes an “establishment” under the rule in art 3(1). This extension of the concept of establishment is not desirable. As interpreted in Weltimmo, only resources which enable the trader to provide the relevant service adequately and independently, should qualify as stable arrangements.

D Summary

The data protection concept of establishment maintains its adherence to a substantial model of representation at its different regulatory levels. Objectively, the CJEU in Weltimmo has confirmed that establishment requires both structure and activity, and that a situation completely lacking in activity (i.e. a scenario of mere structure) is, in principle, incompatible with the notion of establishment. Territorially, exercise of activity has to occur at the place of the stable arrangements in the Union. Subjectively, establishment can refer to the activities of controllers’ subsidiaries in Europe. Without challenging the substantial nature of the concept of establishment, this paper has

shown that conditions now exist to support a higher degree of formality in the formulation of the objective and territorial elements of establishment. On an objective level, the CJEU in Weltimmo has softened the requirements for establishment such that a quasi-formal resource (through which minimal activity is conducted) may also constitute an establishment. On a territorial level, the Weltimmo formula supports an interpretation of the activity element as borderless, provided that minimal activity occurs at the place of the stable arrangements in the Union.

VI Conclusion

The new Data Protection Regulation introduces significant changes to the status quo of the data protection establishment. Firstly, the uniform application of the Regulation puts an end to the fragmented implementation of European data protection law and, for the purpose of the applicable law rule in art. 3(1), it favours the emergence of a truly European establishment. Secondly, as the CJEU has interpreted, the establishment notion remains adhered to a substantial model of representation at its different regulatory levels, though it now tolerates a higher degree of formality.

The new establishment rebalances market integration and the protection of data subjects’ rights. On the one hand, it favours the provision of processing services by reducing controllers’ information costs within the Union, who no longer have to operate in a fragmented territory. On the other hand, it provides a precise framework in which to scrutinise controllers’ use of European resources, something that is likely to benefit data subjects by ensuring the application of European data protection law. The new formula eases the formation of the establishment and the export of European law for controllers operating quasi-formal resources in Europe (through which minimal activity is conducted). This represents a new extension of the notion of establishment, complementing its ability to capture processing operated abroad by non-EU controllers through their local establishments in Europe.

Future disputes will surely provide the CJEU with new opportunities to elaborate on the data protection concept of establishment. Whatever these developments may be, this concept, objectively addressed, should be cautious of extending it further by completely waiving the already softened structure element, for instance, by allowing it to become purely virtual. This paper has shown that the regulatory models for establishment define establishment using either structure elements alone (e.g. in company law) or a combination of both structure and activity elements (e.g. in data protection law). There is no evidence, however, that “establishment” has ever been consistently defined by activity elements alone. Therefore, and finally, it would appear that limits to the development of the data protection establishment categories in art. 3(1) of the Regulation would have to take into account the new non-establishment categories in art. 3(2).