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NOTE

From: Presidency

To: Working Group on Information Exchange and Data Protection (DAPIX)

Subject: Proposal for a regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation)

- Right to be forgotten and the Google judgment

1. One of the central planks of the Commission proposal for a General Data Protection Regulation is the right to be forgotten and to erasure in Article 17. This right is especially important on the Internet where the 'risk of harm posed by content and communications [...] to the exercise and enjoyment of human rights and freedoms, particularly the right to respect for private life, is certainly higher than that posed by the press'¹.

¹ ECHR, judgment of 16 July 2013, case of *Węgrzynowski and Smolczewski v. Poland*. See also para. 80. of ECJ judgment of 13 May 2014, *C-131/12 (Google)*

2. In addition to the right to erasure of personal data and the right to object to data processing operations, which already exist under the current Data Protection Directive (Articles 12 and 14), the Commission proposal purports to give the data subject the right to obtain from the controller "the abstention from further dissemination of such data" (Article 17(1)). In addition it requires controllers to "inform third parties which are processing such data, that a data subject requests them to erase any links to, or copy or replication of that personal data" (Article 17(2)). These proposals take into account the developments in the online environment. In the current Council draft this obligation has been somewhat qualified in Article 17(2a).
3. The Google judgment² sheds new light on the existing possibilities for data subjects on the basis of the existing Directive to exercise their rights to erasure of data and to object to personal data processing with regard to online controllers. The purpose of this note is, building on the Google judgment, to examine how the future legislation on the right to be forgotten and the right to erasure should be developed.
4. The Court has ruled that that Article 2(b) and (d) of Directive 95/46 are to be interpreted as meaning that, the activity of a search engine, consisting in finding information published or placed on the internet by third parties, indexing it automatically, storing it temporarily and, finally, making it available to internet users according to a particular order of preference, must be classified as 'processing of personal data' when that information contains personal data. Therefore, the operator of the search engine must be regarded as the 'controller' in respect of that processing. This means that, already under the current rules, a search engine is to be considered as a controller against whom a data subject can exercise rights, independently of any rights it may (wish to) exercise against the controller who initially published/processed certain data online.

² EU CJ, judgment of 13 May 2014, Case C-131/12.

5. At least the four following elements need to be further examined with regard to any future legislative decisions regarding the right to be forgotten: (1) the scope of the right, (2) the grounds on which this right can be exercised and (3) the need to balance this right with the freedom of expression, and (4) whether there is still a need to impose an effort obligation on initial controllers to inform second controllers of the request for erasure of data.
6. Furthermore, at a later stage it will be necessary to further examine the notion of “establishment” in the light of the Court’s judgment. Indeed, it must be assessed whether “secondary controllers” should underlie not only to the rule on the right to be forgotten, but also in general to all rules in the Regulation which refer to the controller in general. However, this question will not be addressed at this stage, and the present paper will only deal with the four aspects outlined above.

(1) the scope of the right

7. The Commission proposal for Article 17 referred to "personal data relating to them" (i.e. the data subjects) and the current version simply speaks of "personal data". Thus the scope of this right is not limited to personal data which have been initially disclosed or uploaded by the data subject, but also to personal data which have been disclosed by other persons. The data subject may always indeed exercise such right in respect of any personal data relating to him, whether or not he –or third parties have disclosed them. The facts at stake in the Google judgment clarify that this is also true for the right to erasure (and the right to object) under the current Data Protection Directive.
8. *Delegations are invited to reconsider the introduction of the words “relating to them” which appears to better clarify the scope of the exercise of rights by the data subject.*

(2) the grounds on which this right can be exercised

9. Under Article 12(b) of Directive 95/46 the right to erasure can be invoked whenever the processing does not comply with the provisions of that Directive, "in particular because of the incomplete or inaccurate nature of the data". The Court has underscored that this is not an exhaustive list and has recalled that all processing of personal data must comply with the principles relating to data quality and with one of the grounds for making data processing legitimate. The Court has also emphasised that there is no requirement that the data subject be able to demonstrate damage.
10. Article 17 of the draft Regulation lists the grounds on which the right to be forgotten and to erasure can be exercised.
11. The Commission proposal has already linked the right to be forgotten with the right to object to data processing (which is laid down in Article 19) by referring to the right to object to processing as one of the grounds for exercising the right to be forgotten.
12. The Council has limited the right to object to processing necessary for the purposes of the legitimate interests pursued by the controller. This makes it possible to exercise this right against search engines, but it is unclear whether it can also be invoked against providers of social media, where some may consider that the processing will in those cases mostly be based on a contract or consent. In case processing is based on consent, the data subject will of course have the possibility to withdraw its consent, as is also made clear by Article 17(1)(b). Where the data are no longer necessary in relation to a contract, this would be covered by Article 17(1)(a).

13. The Court has also clarified that initially lawful processing of accurate data may, in the course of time, become incompatible with the directive where those data are no longer necessary in the light of the purposes for which they were collected or processed. In practice this means that the data subject will have the possibility to obtain erasure of data where these appear to be inadequate, irrelevant or no longer relevant, or excessive in relation to those purposes and in the light of the time that has elapsed. Article 17(1)(a) which states the right to be forgotten and hence to erasure applies where ‘the data are no longer necessary in relation to the purposes for which they were collected or otherwise processed’, seems to partially encompass the latter part of the reasoning. Article 17(1)(d) (unlawful processing) covers the first part, as any processing which is *ab initio* inadequate or irrelevant to the processing is obviously unlawful. It is, however, not entirely clear whether the language of Article 17(1)(a) and (d) correctly captures the CJEU reasoning. In the case of search engines or other ‘second controllers’ the necessity test will have to be carried out with regard to the processing by that controller and not the initial processing by the ‘first controller’.
14. *The Presidency therefore invites delegations to express themselves as to whether the wording of paragraphs (a) and (d) of Article 17(1) should be amended, for example by adding ‘by that controller’.*

(3) the need to balance the right to protection of personal data with the freedom of expression and the interest to access to information

15. The Court also underlines that regarding processing necessary for the purposes of the legitimate interests pursued by the controller, as is the case for a search engine, a balancing of the opposing rights and interests concerned is required. Both the current Directive and the draft regulation clearly state that processing for legitimate grounds pursued by a controller cannot be a valid ground for processing where such interests are overridden by the interests or fundamental rights and freedoms of the data subject. Both also provide that the data subject has the right to object at any time to such processing on compelling legitimate grounds relating to his particular situation to the processing of data relating to him.

16. The Court, however, also acknowledged that because the exercise of the right to erasure (or of the right to object) could have effects upon the legitimate interest of internet users potentially interested in having access to that information, and that a fair balance should be sought in particular between that interest and the data subject's fundamental rights under Articles 7 and 8 of the Charter. The Court went on to state that "data subject's rights protected by those articles also override, as a general rule, that interest of internet users, that balance may however depend, in specific cases, on the nature of the information in question and its sensitivity for the data subject's private life and on the interest of the public in having that information, an interest which may vary, in particular, according to the role played by the data subject in public life".
17. The Court, however, restricted the possibility for a controller to avail himself of the 'derogation' for journalistic purposes to the controllers who initially published the information. It also makes it clear that the outcome of the balancing of the interests may be different for the initial publisher of the information than for the search engine ' given that, first, the legitimate interests justifying the processing may be different and, second, the consequences of the processing for the data subject, and in particular for his private life, are not necessarily the same'.
18. This reasoning gives rise to at least the two following questions. The first question concerns the articulation between the right to the protection of personal data with the right to freedom of expression, in particular whether the latter should be available only to (traditional) offline and online journalistic publishers or should it also extend to 'subsequent publishers' which facilitate the availability of this information. Article 16 TFEU will not allow to regulate this matter in detail in the Regulation and the latest Council text provides that Member State law shall reconcile the right to the protection of personal data with the right to freedom of expression (Article 80).
19. A second question, which had been raised by some delegations before the Google judgment, is whether the Regulation should establish an order in which the data subjects should address the controllers which are involved in the impugned publication/disclosure of his personal data.

20. Neither the Commission proposal nor the latest Presidency draft of the Regulation does provide such an order, but some Member States have in the past pleaded in favour of a gradual approach to the exercise of the right to be forgotten. Under such gradual approach the right to be forgotten and hence to erasure (and probably also the right to object to processing) would first have to be exercised against the initial controller which will, where appropriate, balance this right against freedom of expression and only in case the first controller no longer exists or is not subject to the jurisdiction of a Member State, against the 'second' controllers, such as search engines. In case the request against the first controller is successful, the data subject could also exercise his right against any second controller.
21. The advantage of such approach would have been that it provides more protection to the freedom of expression (and the access to information for internet users) as the data subject's right to erase data would have to be balanced against the freedom of expression.
22. Another approach would have been the possibility to interpret the right to be forgotten as “right to obscuring” of the data. The secondary controller (search engine) could, in this case, have acted upon the request for erasure through the “de-ranking” of results. Through the use of appropriate algorithms the search results concerning the data subject who had invoked the right to be forgotten (or to obscure the data) could be moved to subsequent pages in the search results, so as to hamper the finding of the person’s data.
23. However, the CJEU has rejected such an approach on the grounds that an effective and complete protection of data subjects could not be achieved if they had to obtain first the erasure of the information relating to them from the first controller (the publisher)s and only subsequently or in parallel request the second controller (the search engine) to erase the data. The Court refers to the ease with which information published on a website can be replicated on other sites and the fact that the persons responsible for its publication are not always subject to EU legislation.

24. *Delegations are invited:*

- *to confirm that it shall be for Member States to reconcile the right to the protection of personal data with the right to freedom of expression*
- *To confirm, in the light of previous discussions and the Google judgment, that the data subject has the choice to exercise their right to be forgotten and to erasure against any of the controllers involved, without regard to an order of controllers according to which these rights have to be exercised.*

(4) the need to impose an effort obligation on initial controllers to inform secondary controllers of erasure of data

25. Article 17(2a) of the current draft Regulation requires the controller who has made the personal data public and who is obliged to erase the data pursuant to a successful request for erasure by the data subject, to take reasonable steps to inform controllers that a data subject requests them to erase any links to, or copy or replication of that personal data. This draft paragraph, which is a qualified rewording of the original paragraph 2 of Article 17 of the Commission proposal, appears to have been drafted for a situation in which a data subject has successfully exercised its right to be forgotten against the first controller.

26. In the Google judgment, the Court has ruled that a data subject can exercise its right to erasure against search engines. The Court has also acknowledged that the right to object to data processing under Article 14 of Directive 95/46 may be invoked in order to have "the operator of [a] search engine to remove from the list of results displayed following a search made on the basis of a person's name links to web pages published by third parties containing information relating to that person"³.

³ Para. 82.

27. As the CJEU has thus acknowledged that also second controllers such as search engines are controllers in their own right against whom a data subject can exercise its right to erasure and to oppose processing, the question arises whether there is still a need paragraph 2a of Article 17. The considerable burden such an efforts obligation would put on the first controller may therefore not be justified, as there is a possibility of exercising the right to be forgotten directly against any ‘second controller’.
28. *Delegations are invited to indicate whether they see a need to maintain paragraph 2a of Article 17.*
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*Article 17****Right to be forgotten and to erasure⁴***

1. The (...) controller shall have the obligation to erase personal data without undue delay and the data subject shall have the right to obtain the erasure of personal data without undue delay where one of the following grounds applies:
 - (a) the data are no longer necessary in relation to the purposes for which they were collected or otherwise processed;

⁴ DE, EE, PT, SE, SI, FI and UK scrutiny reservation. EE, FR, NL, RO and SE reservation on the applicability to the public sector. Whereas some Member States have welcomed the proposal to introduce a right to be forgotten (AT, EE, FR, IE); other delegations were more sceptical as to the feasibility of introducing a right which would go beyond the right to obtain from the controller the erasure of one's own personal data (DE, DK, ES). The difficulties flowing from the household exception (UK), to apply such right to personal data posted on social media were highlighted (BE, DE, FR), but also the impossibility to apply such right to 'paper/offline' data was stressed (EE, LU, SI). Some delegations (DE, ES) also pointed to the possible externalities of such right when applied with fraudulent intent (e.g. when applying it to the financial sector). Several delegations referred to the challenge to make data subjects active in an online environment behave responsibly (DE, LU and UK) and queried whether the creation of such a right would not be counterproductive to the realisation of this challenge, by creating unreasonable expectations as to the possibilities of erasing data (DK, LU and UK). Some delegations thought that the right to be forgotten was rather an element of the right to privacy than part of data protection and should be balanced against the right to remember and access to information sources as part of the freedom of expression (DE, ES, LU, NL, SI, PT and UK). It was pointed out that the possibility for Member States to restrict the right to be forgotten under Article 21 where it interferes with the freedom of expression is not sufficient to allay all concerns in that regard as it would be difficult for controllers to make complex determinations about the balance with the freedom of expression, especially in view of the stiff sanctions provided in Article 79 (UK). In general several delegations (CZ, DE, FR) stressed the need for further examining the relationship between the right to be forgotten and other data protection rights. The Commission emphasised that its proposal was in no way meant to be a limitation of the freedom of expression. The inherent problems in enforcing such right in a globalised world outside the EU were cited as well as the possible consequences for the competitive position of EU companies linked thereto (BE, AT, LV, LU, NL, SE and SI).

- (b) the data subject withdraws consent on which the processing is based according to point (a) of Article 6(1) or point (a) of Article 9(2) and (...) there is no other legal ground for the processing of the data;
- (c) the data subject objects to the processing of personal data pursuant to Article 19(1) and there are no overriding legitimate grounds for the processing or the data subject objects to the processing of personal data pursuant to Article 19(2);
- (d) the data have been unlawfully processed⁵;
- (e) the data have to be erased for compliance with a legal obligation to which the controller is subject^{6 7}.

2. (...).

⁵ UK scrutiny reservation: this was overly broad.

⁶ RO scrutiny reservation.

⁷ DE pointed to the difficulties in determining who is the controller in respect of data who are copied/made available by other controllers (e.g. a search engine) than the initial controller (e.g. a newspaper). AT opined that the exercise of the right to be forgotten would have take place in a gradual approach, first against the initial controller and subsequently against the 'secondary' controllers. ES referred to the problem of initial controllers that have disappeared and thought that in such cases the right to be forgotten could immediately be exercised against the 'secondary controllers' ES suggested adding in paragraph 2: 'Where the controller who permitted access to the personal data has disappeared, ceased to exist or cannot be contacted by the data subject for other reasons, the data subject shall have the right to have other data controllers delete any link to copies or replications thereof'. The Commission, however, replied that the right to be forgotten could not be exercised against journals exercising freedom of expression. According to the Commission, the indexation of personal data by search engines is a processing activity not protected by the freedom of expression.

2a. *Where the controller⁸ (...) has made the personal data public⁹ and is obliged pursuant to paragraph 1 to erase the data, the controller, taking account of available technology and the cost of implementation¹⁰, shall take (...) reasonable steps¹¹, including technical measures, (...) to inform controllers¹² which are processing the data, that a data subject requests them to erase any links to, or copy or replication of that personal data¹³.*

⁸ BE, DE and SI queried whether this also covered controllers (e.g. a search engine) other than the initial controller (e.g. a newspaper).

⁹ ES prefers referring to 'expressly or tacitly allowing third parties access to'. IE thought it would be more realistic to oblige controllers to erase personal data which are under their control, or reasonably accessible to them in the ordinary course of business, i.e. within the control of those with whom they have contractual and business relations. BE, supported by IE and LU, also remarked that the E-Commerce Directive should be taken into account (e.g. through a reference in a recital) and asked whether this proposed liability did not violate the exemption for information society services provided in that Directive (Article 12 of Directive 2000/31/EC of 8 June 2000), but COM replied there was no contradiction. LU pointed to a risk of obliging controllers in an online context to monitor all data traffic, which would be contrary to the principle of data minimization and in breach with the prohibition in Article 15 of the E-Commerce Directive to monitor transmitted information.

¹⁰ Further to NL suggestion. This may hopefully also accommodate the DE concern that the reference to available technology could be read as implying an obligation to always use the latest technology;

¹¹ LU queried why the reference to all reasonable steps had not been inserted in paragraph 1 as well and SE, supported by DK, suggested clarifying it in a recital. COM replied that paragraph 1 expressed a results obligation whereas paragraph 2 was only an obligation to use one's best efforts. ES thought the term should rather be 'proportionate steps'. DE, ES and BG questioned the scope of this term. ES queried whether there was a duty on controllers to act proactively with a view to possible exercise of the right to be forgotten. DE warned against the 'chilling effect' such obligation might have on the exercise of the freedom of expression.

¹² BE, supported by ES and FR, suggested referring to 'known' controllers (or third parties).

¹³ BE and ES queried whether this was also possible for the offline world and BE suggested to clearly distinguish the obligations of controllers between the online and offline world. Several Member States (CZ, DE, LU, NL, PL, PT, SE and SI) had doubts on the enforceability of this rule.

3. Paragraphs 1 and 2a shall not apply¹⁴ to the extent that (...) processing of the personal data is necessary:
- a. for exercising the right of freedom of expression in accordance with Article 80¹⁵;
 - b. *for compliance with a legal obligation to process the personal data by Union or Member State law to which the controller is subject*¹⁶*or for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller*¹⁷;
 - c. for reasons of public interest in the area of public health in accordance with Article 81¹⁸;
 - ca. for purposes of social protection in accordance with Article 82a;
 - d. for historical, statistical and scientific (...) purposes in accordance with Articles 83a to 83c;

¹⁴ DE queried whether these exceptions also applied to the abstention from further dissemination of personal data. AT and DE pointed out that Article 6 contained an absolute obligation to erase data in the cases listed in that article and considered that it was therefore illogical to provide for exception in this paragraph.

¹⁵ DE and EE asked why this exception had not been extended to individuals using their own freedom of expression (e.g. an individual blogger).

¹⁶ In general DE thought it was a strange legal construct to lay down exceptions to EU obligations by reference to national law. DK and SI were also critical in this regard. UK thought there should be an exception for creditworthiness and credit scoring, which is needed to facilitate responsible lending, as well as for judicial proceedings. IT suggested inserting a reference to Article 21 (1).

¹⁷ AT scrutiny reservation.

¹⁸ DK queried whether this exception implied that a doctor could refuse to erase a patient's personal data notwithstanding an explicit request to that end from the latter. ES and DE indicated that this related to the more general question of how to resolve differences of view between the data subject and the data controller, especially in cases where the interests of third parties were at stake. PL asked what was the relation to Article 21.

e. (...)

f. (...)

g. for the establishment, exercise or defence of legal claims.

4. (...)

5. (...)
