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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. At its meeting of 10-11 July 2014 the DAPIX Working Party examined the provisions of the General Data Protection Regulation concerning the right to be forgotten and to erasure, and in particular Article 17, in the light of the principles set out by the Court of Justice of the European Union in the “Google Spain” judgment¹.

¹ EUCJ, judgment of 13 May 2014, Case C-131/12.

2. In particular, on the basis of document 11289/14, the Presidency asked delegations to consider, in the light of the aforementioned judgment, the following issues: (1) the scope of the right, (2) the grounds on which this right can be exercised, (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.
3. In the light of the outcome of that debate, the Presidency would like to assess whether Article 17 of the proposal, in its current compromise wording, needs to be amended or integrated as a consequence of the “Google Spain” judgment.
4. The “right to be forgotten” is exercised according to Article 17 by a request to erase data which is “no longer necessary in relation to the purposes for which they were collected or otherwise processed”. According to the principles set out in the Google Spain judgment, these rights may be exercised by the data subject against any controller, regardless of whether this data was obtained directly from the data subject or from another controller, regardless of the purpose of the processing carried out by the controller and regardless of the fact that the data subject has previously exercised its right against another controller, be it a “first” or a “second” controller.
5. As such, the draft regulation already contains provisions adequately describing the right of the data subject as well as the possible actions to ensure the effectiveness of the right.
6. The notion of controller, already under the existing legal framework, has been deemed sufficient by the Court to encompass also 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. Hence, no further specification is needed in this respect as the scope of the current draft regulation seems at the same time sufficiently precise but flexible enough to ensure adaptability to possible future technological development.

7. The rights set out in Article 17 of the draft regulation are not absolute but, rather, must be weighed against competing rights and interests.
8. In its judgment the Court 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. 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, 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".
9. Discussions at the DAPIX meeting have shown that a majority of delegations considers the terms of this balancing act to be set out with sufficient clarity in the draft text of the regulation, and in particular in the listing of exceptions to the application of Article 17 paragraphs 1 and 2 as provided for in paragraph 3 of the same Article. Furthermore, reference has been made to future guidelines in this field to be discussed and approved by the Article 29 Committee and by the future European Data Protection Board.

10. However, regardless of how this balancing act will have to be carried out in each concrete case, the Presidency considers, further to these discussions, that the provision in Article 17 (3) lett. a) could benefit from further clarification. Indeed, when deciding upon a request of the data subject for erasure (in case of a search engine, delisting) of certain data, the controller is called to perform an assessment of the rights and interests that affect its own interest (i.e. in relation to the purpose of the processing in question), the fulfilment of the conditions for erasure in accordance with Article 17 (1), and also other rights and interests, potentially comprising the freedom of the press and the public interest in the availability of the data. This public interest can be linked to freedom of expression in its different forms (freedom of the press, freedom of political criticism, etc., the regulation of which may also differ among different Member States). According to Article 11 of the Charter the freedom of expression also includes the “freedom to hold opinions and to receive [...] information and ideas without interference by public authority and regardless of frontiers”.
11. In view of the often commercial nature of the processing at hand (as is the case for the controller in the Google Spain judgment), the consideration of the public interest in the availability of the personal data must be stressed in the decision-making process. At the DAPIX meeting of 10-11 July 2014 some delegations have referred to the risk that the freedom of expression, and the interest of the public at large to have access to information may end up being ‘underweighted’ in the balancing process by the controller. Indeed the publication of personal data by search engines or by other ‘secondary’ controllers normally does not fall under the freedom of expression.
12. In this respect, one important element is the obligation on the controller (in accordance with Article 17 paragraph 2a) to inform other controllers of the data of the request (within the limits set out in the provision). This may also serve the purpose to enable other controllers, including the initial publishers of the information, which could also perform processing for different purposes, to assess the decision by which the request to erasure was granted and, if needed, take steps to ensure that their rights, including potentially the freedom of expression, and interests are duly considered.

13. Erasure can be requested not only via a direct request of the data subject to a private controller, but also from a supervisory authority or judicial authority, which would take such decision “following the appraisal of the conditions for the application of Article 12(b) and subparagraph (a) of the first paragraph of Article 14 of Directive 95/46 which is to be carried out when a request such as that at issue in the main proceedings is lodged with it” (paragraph (81) of the Google Spain judgment). The decision taken by the controller on the basis of a direct request by the data subject cannot be different in nature or purpose than the one taken by the data protection or judicial authority in a similar case. At any rate the data subject has the right to lodge a complaint or initiate court proceedings against the decision taken by the controller.
14. The Presidency would like to propose to delegations to complement the wording in Article 17 (3), lett. a) as follows (in bold):
- “3. Paragraphs 1 and 2a shall not apply to the extent that processing of the personal data is necessary:
- a. for exercising the right of freedom of expression, **including the freedom to receive and impart information and ideas without interference by public authority and regardless of frontiers and taking due account of the public interest to the availability of data also in relation to the personal quality of the data subject**, in accordance with Article 80;
15. The Presidency thinks that this could be accompanied by recitals on the right to be forgotten and the freedom of expression, and the interest of the public to availability of information, in particular relating to internet search results, which could highlight some of the criteria to be used, such as the public status of other personal qualities of the data subject concerned. A possible wording for these recitals, modelled on the basis of the current recitals (53) and (54), is set out in the Annex.
16. Delegations are invited to consider the above proposal, with a view to agreeing on a compromise wording for Article 17.

53) A natural person should have the right to have personal data concerning them rectified and a 'right to be forgotten' where the retention of such data is not in compliance with this Regulation. In particular, data subjects should have the right that their personal data are erased and no longer processed, where the data are no longer necessary in relation to the purposes for which the data are collected or otherwise processed, where data subjects have withdrawn their consent for processing or where they object to the processing of personal data concerning them or where the processing of their personal data otherwise does not comply with this Regulation. This right is in particular relevant, when the data subject has given their consent as a child, when not being fully aware of the risks involved by the processing, and later wants to remove such personal data especially on the Internet. (...)

53a) Inasmuch as the removal of links from the list of internet search results could, depending on the information at issue, have effects upon the legitimate interest of internet users potentially interested in having access to that information, 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. Whilst the data subject's rights protected by those articles should override, as a general rule, the interest of internet users, that balance may in specific cases depend 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 access to that information, an interest which may vary, in particular, according to the role played by the data subject in public life.

54) To strengthen the 'right to be forgotten' in the online environment, the right to erasure should also be extended in such a way that a controller who has made the personal data public **and is obliged to erase the data** should be obliged to inform the controllers which are processing such data that a data subject requests **the controller** to erase any links to, or copies or replications of that personal data. To ensure this information, the controller should take reasonable steps, taking into account available technology and the means available to the controller, including technical measures, in relation to data for the publication of which the controller is responsible. **This information should also allow other controllers to assess whether the erasure would be contrary to the public interest in the availability of the data for reasons of freedom of expression, freedom of the press, historical, statistical or scientific purposes.**

54aa)²~~However~~**the right to be forgotten should be balanced with other fundamental rights. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others. This may lead to the result that the personal data has to be maintained** *for exercising the right of freedom of expression, when required by law, for **archiving purposes in the public interest or for** *historical, statistical and scientific (...) purposes, for reasons of public interest in the area of public health or social protection, or for the establishment, exercise or defence of legal claims.**

In order to exercise the right to be forgotten, the data subject may address his request to the controller without prior involvement of a public authority, such as a supervisory or judicial authority, without prejudice to the right of the data subject to lodge a complaint or initiate court proceedings against the decision taken by the controller. In these cases it should be the responsibility of the controller to apply the balance between the interest of the data subject and the other interests set out in this Regulation.

² This part is moved from the last part of recital 53.

Article 17

Right to be forgotten and to erasure³

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 concerning him or her 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;
 - (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;

³ 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).

- (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 processed⁴;
- (e) the data have to be erased for compliance with a legal obligation to which the controller is subject^{5 6}.

2. (...).

⁴ UK scrutiny reservation: this was overly broad.

⁵ RO scrutiny reservation.

⁶ 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 controller⁷ (...) has made the personal data public⁸ and is obliged pursuant to paragraph 1 to erase the data, the controller, taking account of available technology and the cost of implementation⁹, shall take (...) reasonable steps¹⁰, including technical measures, (...) to inform controllers¹¹ which are processing the data, that a data subject requests **the controller** to erase any links to, or copy or replication of that personal data¹².*

⁷ BE, DE and SI queried whether this also covered controllers (e.g. a search engine) other than the initial controller (e.g. a newspaper).

⁸ 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.

⁹ 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;

¹⁰ 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.

¹¹ BE, supported by ES and FR, suggested referring to 'known' controllers (or third parties).

¹² 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 apply¹³ to the extent that (...) processing of the personal data is necessary:

- a. for exercising the right of freedom of expression (...) ¹⁴, **including the freedom to receive and impart information and ideas without interference by public authority and regardless of frontiers and taking due account of the public interest to the availability of data also in relation to the personal quality of the data subject,** 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 controller¹⁷;
- c. for reasons of public interest in the area of public health in accordance with Article 81¹⁸;

¹³ 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.

¹⁴ DE and EE asked why this exception had not been extended to individuals using their own freedom of expression (e.g. an individual blogger).

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.

- ca. for purposes of social protection in accordance with Article 82a;
- d. for archiving purposes in the public interest or for historical, statistical and scientific (...) purposes in accordance with Articles 83a to 83d;
- e. (...)
- f. (...)
- g. for the establishment, exercise or defence of legal claims.

4. (...)

5. (...)
