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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) **[First reading]**
- The right to be forgotten and the Google judgment - Orientation debate

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 builds on 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 Google judgment¹ of 13 May 2014 extends 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.

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

2. At its meetings of 10-11 July and 11-12 September 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 said judgment.
3. 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. Obviously 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.
4. The rights set out in Article 17 of the draft regulation are not absolute but, rather, must be weighed against competing rights and interests. 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”².

² EU CJ, judgment of 13 May 2014, Case C-131/12, para. 81.

5. According to the judgment, when deciding upon a request for erasure (in case of a search engine, delisting) of certain data, the controller will therefore have to assess, apart from the other conditions, the rights and interests that affect its own interest (i.e. in relation to the purpose of the processing in question), and other rights and interests, not in the least the public interest in the availability of the data. This public interest can, for those controllers who can avail themselves of this fundamental right, be linked to the freedom of expression in its different forms (freedom of the press, freedom of political criticism, etc.). 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”.
6. Even though Article 11 of the Charter enshrines the freedom of expression and the EU legislator is obviously required to respect this fundamental right, the exercise of this right is mainly regulated by national law. Indeed the regulation of the freedom of expression differs among different Member States. The draft General Data Protection Regulation (Article 80), like the 1995 Data Protection Directive, obliges Member States to ensure that their law "reconcile the right to the protection of personal data pursuant to this Regulation with the right to freedom of expression, including the processing of personal data for journalistic purposes and the purposes of artistic or literary expression".
7. During the discussions at technical level, 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 in particular where the latter is a search engine. Indeed it has been argued that safeguarding freedom of expression is not the typical purpose of the activity of a search engine, which is rather of a commercial nature, although credibility does constitute an important asset; Therefore, it is likely that the freedom of expression will play little role in the decision-making process of search engines regarding a request for erasure.

8. The Commission proposal also requires controllers to "inform third parties which are processing such data, that a data subject requests them to erase (...) that personal data" (Article 17(2)). Such duty to inform is necessary because the controller which initially published these data online, for example an (online) journal, may take a different view of the balancing of the data subject's rights and the freedom of expression, including the interest/right of the public to have access to this information than search engine which has granted a request for erasure regarding the publication of certain personal data. The notification would therefore enable the initial controller to take action in order to represent its interest in the availability of the information against the request for erasure of the data subject.
9. *In the light of the above, delegations are invited to discuss the relationship between the right to be forgotten and the freedom of expression.*
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