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EU Data Protection Framework

Reform of the EU Data Protection Directive: 'Right to Be Forgotten'—What Should Be Forgotten and How?



BY AXEL SPIES

I. Background

The European Commission ("EC") is currently working on an overhaul of EU Data Protection Directive 95/46/EC ("Directive") that will bring it in line with new technologies and the emergence of social networks. One of the central issues in this process is the introduction of a so-called "right to be forgotten." To this end, the EC published its proposals Nov. 4, 2010, under the heading "A comprehensive approach on personal data protection in the European Union." In a memorandum explaining these proposals, the EC characterized the "right to be forgotten" as "the right of individuals to have their data no longer processed and deleted when [it is] no longer needed for legitimate pur-

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poses."¹ A Nov. 11, 2010 EU press release explained: "People should be able to give their informed consent to the processing of their personal data, for example when surfing online, and should have the 'right to be forgotten' when their data is no longer needed or they want their data to be deleted."² Viviane Reding, the EU Commissioner of Justice and EC Vice President, speaking at the European Parliament March 16, mentioned the following somewhat narrower goal: "I want to explicitly clarify that people shall have the right—and not only the possibility—to withdraw their consent to data processing."³ She also said that the "burden of proof" should be on the data controllers, i.e., the companies that process personal data. "They must prove that they need to keep the data rather than individuals having to prove that collecting their data is not necessary," she added.⁴

There are various motives for such a step. The current EU law in this area is largely insufficient or too vague to be interpreted as a "right to be forgotten" that an individual could rely on. For instance, Sec. 3a of the Federal Data Protection Law (*Bundesdatenschutzgesetz*) in Germany stipulates that personal data are to be collected, or otherwise processed, using as little per-

¹ COM(2010) 609 final: A comprehensive approach on personal data protection in the European Union, Nov. 4, 2010, available at http://ec.europa.eu/justice/news/consulting_public/0006/com_2010_609_en.pdf.

² Press Release, European Union, European Commission sets out strategy to strengthen EU data protection rules (Nov. 4, 2010), available at <http://op.bna.com/pl.nsf/r?Open=kjon-8pkrcy>.

³ Jacob Aron, NewScientist, "A right to be forgotten online? Forget it," March 17, 2011, available at <http://www.newscientist.com/blogs/onepercent/2011/03/a-right-to-be-forgotten-forget.html>.

⁴ Laurence Norman, Dow Jones Newswires, "EU's Reding fleshes out proposed data privacy rules," March 17, 2011, available at <http://www.totaltele.com/view.aspx?ID=463322>.

sonal data as possible. This could mean that personal data that are no longer needed must be purged. Art. 6 (1)(c) of the Directive⁵ contains a principle of data economy, as it is sometimes called. According to this principle, stored personal data must be “adequate, relevant and not excessive in relation to the purposes for which they are processed.” However, both legal texts don’t provide for a concrete and enforceable right to demand a deletion of an individual’s personal data automatically after a certain time period and/or immediately at the request of the individual (the data subject). Moreover, who is responsible for the deletion and in which instances individuals have the right to demand that their files be purged are open questions.

Another open question is who will enforce such a right, to the extent it is granted. Reding explained during a “privacy platform” meeting in Brussels in March 2011 that EU-based data protection authorities (“DPAs”) should be given broader authority to enforce compliance—including this new right—also outside of Europe, which could include access to U.S.-based servers and databases abroad.⁶ This will probably be unacceptable to the United States and/or U.S.-based companies.

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Another hotly debated issue is whether an individual’s action is required to exercise this right. Peter Hustinx, the European Data Protection Supervisor (“EDPS”), prefers a concept of self-acting deletion of the personal information without any further action of the user. He stated in a Jan. 14 opinion: “A newly codified right to be forgotten would ensure the deletion of personal data or the prohibition to further use them, without a necessary action of the data subject, but at the condition that this data has been already stored for a certain amount of time. The data would in other words be attributed some sort of expiration date.”⁷ The impact of this opinion and the deletion concept remains to be seen. The EDPS is an independent supervisory authority whose primary objective is to ensure that European institutions and bodies respect the right to privacy and data protection when they process personal data and develop new policies. Although he has no particular authority to impose binding rules on the EU bodies, his opinion carries some weight.

By contrast, the Article 29 Working Party has been reluctant to acknowledge a right to be forgotten. The

⁵ Art. 6(1)(c) of the EU Data Protection Directive, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31995L0046:EN:HTML;O.J.L.281/40,11/23/1995:OfficeJournaloftheEuropeanCommunities>.

⁶ Tom Espiner, ZDNet UK, “Facebook and Google ‘must follow’ EU privacy rules,” March 17, 2011, available at <http://www.zdnet.co.uk/news/regulation/2011/03/17/facebook-and-google-must-follow-eu-privacy-rules-40092179/>.

⁷ Peter Hustinx, “A comprehensive approach on personal data protection in the European Union,” Jan. 14, 2011, available at <http://op.bna.com/pl.nsf/r?Open=byul-8pbt9b>.

Article 29 Working Party is an independent European working group dealing with matters related to personal data protection and privacy. It consists of the DPAs of the 27 EU Member States as well as the EDPS. The Working Party stated in a Jan. 14, 2011 open letter to the EC that “more elaboration of this right would indeed be necessary. It should be clearly explained what the added value of such a right would be over and above the existing rights, such as the right to have data deleted or the right to object, and in which context such a right would be most useful.”⁸

II. Potential for Conflict and Practical Problems

1) Spanish Case Pending

The potential for conflict of the “right to be forgotten” has already emerged in a dispute between the Spanish government and Google. In January 2011, Google refused to comply with a request from the Spanish DPA (“Agencia Española de Protección de Datos—AEPD”) to remove a total of approximately 90 links.⁹ Most of the links lead to newspaper articles and other public information that portrayed individual Spanish citizen complainants in an unfavorable manner. The Government of Spain backs the DPA’s notion to enforce a “right to be forgotten.” Google has argued that Spain’s request inflicts serious harm on its freedom of speech, and that removing links would violate the “objectivity” of the internet search. The case remains pending. Google is currently a party in several lawsuits related to the removal of these links under the “right to be forgotten” in Spain’s national court. On Feb. 22, 2011, the Spanish High Court issued an order to the parties Google and AEPD regarding whether the matter should be referred to the European Court of Justice (ECJ).¹⁰ Google has claimed in this proceeding that the AEPD has no jurisdiction over its web engine. The outcome of this legal battle is observed by other DPAs who are considering similar actions to be taken.

⁸ Article 29 Data Protection Working Party, open letter to Viviane Reding, EU Justice Commissioner, Jan. 14, 2011, available at http://ec.europa.eu/justice/policies/privacy/docs/wpdocs/others/2011_01_14_letter_artwp_vp_reding_commission_communication_approach_dp_en.pdf.

⁹ Blanca Escribano, Datonomy blog, “Preliminary ruling on the right to be forgotten may be requested by Spanish Courts,” March 7, 2011, <http://blogs.olswang.com/datonomy/2011/03/07/preliminary-ruling-on-the-right-to-be-forgotten-may-be-requested-by-spanish-courts-the-google-case/>. Also see AEPD Decision Procedimiento n.: TD/00814/2007, Recurso de Reposición N RR/00238/2008, available at http://www.agpd.es/portaleswebAGPD/resoluciones/recursos/reposicion/rr_sobre_tutela_de_derechos/common/pdfs/REPOSICION-TD-00814-2007_Resolucion-de-fecha-31-07-2008_Art-ii-culo-17-LOPD.pdf.

¹⁰ La Audiencia Nacional planteará sus dudas sobre ‘links’ a la Justicia europea, Feb. 25, 2011, available at <http://www.elmundo.es/elmundo/2011/02/25/navegante/1298656667.html>.

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2) Some Criticism

A “right to be forgotten” will face serious problems and practical obstacles:

- Some experts on data privacy legislation are of the opinion that the international and omnipresent nature of the internet means that any **regulations on this right imposed by the EU will have little or no impact on personal data processed elsewhere.**¹¹ For instance, significant differences exist between the European and the United States understanding of data privacy.¹² Data protection in the United States chiefly depends on whether the person concerned has a “reasonable expectation of privacy.” From a U.S. perspective, as many argue, whenever individuals release some of their personal information to the internet, they have no reasonable expectation of privacy. Since a broad and individually enforceable “right to be forgotten” would restrict companies’ use of personal information and hence their freedom of commercial speech protected under the First Amendment of the U.S. Constitution, U.S. companies will likely oppose it.¹³
- **The decentralized structure of the World Wide Web renders a legal “right to be forgotten” nearly unenforceable for any regulator.** Once an individual posts some personal information online, the data can easily be copied and widely distributed; deleting the original will do nothing to stop people from finding a copy elsewhere.
- If to “forget” an individual’s personal data means to delete it, then something common like **backup data on another server** could infringe on the new rules if the backup server or metadata of a file contain “forgotten” information.¹⁴
- It will be difficult to **explain this concept to the consumers** (data subjects) **appropriately** to avoid excessive expectations on their ends. Their experience is that in everyday life personal information

¹¹ Drew Benvie, Information Age, April 2011, “Hard to escape,” available at <http://content.yudu.com/Library/A1rvpg/InformationAgeMay201/resources/20.htm>.

¹² John Hendel, The Atlantic, “In Europe, a Right to Be Forgotten Trumps the Memory of the Internet,” Feb. 3, 2011, available at <http://www.theatlantic.com/technology/archive/2011/02/in-europe-a-right-to-be-forgotten-trumps-the-memory-of-the-internet/70643/>.

¹³ Paul Bernal, Informm’s Blog, “A right to be forgotten—or a right to delete?,” Oct. 7, 2011, available at <http://informm.wordpress.com/2011/10/07/a-right-to-be-forgotten-%E2%80%93-or-a-right-to-delete-part-1-paul-bernal/>.

¹⁴ Stephen Pritchard, Information Age, “How will the EU’s ‘right to forgotten’ work in practice?” April 18, 2011, available at <http://www.information-age.com/channels/information-management/features/1618963/how-will-the-eus-right-to-forgotten-work-in-practice.html>.

that is released cannot simply be recalled and deleted and may develop a life of its own, e.g. in the form of gossip, being combined with other information, or ending up in places where the information was not intended to go—one valuable experience that young people are making on sites such as Facebook.

- It is not clear whether the “right to be forgotten” will extend to an **organization’s internal database systems**. In their current form, the proposed amendments appear not to distinguish between public networks, such as social networks, and internal databases. This is another hotbed for conflicts with the industry, as businesses routinely rely on their internal customer database to perform even the most basic functions and to meet customer demands. Furthermore, government departments and agencies (such as law enforcement) and health care providers will probably push for broad exemptions from the “right to be forgotten,” as well as organizations such as banks, which will need to retain some information to be purged for compliance and tax purposes.¹⁵
- The “right to be forgotten” could also have a negative impact of almost epic proportions on **cross-border e-discovery** in U.S. litigation. In particular, the “right to be forgotten” could prevent the disclosure of personal data if and when the data sets must be deleted under the future EU privacy laws. For data controllers, there is the risk of facing serious sanctions for spoliation in the United States when a document or information that is required to be produced for discovery is purged under the proposed law. This conflict recently surfaced in the highly visible international intellectual property court cases *Apple v. Samsung*, of which there are more than a dozen pending in nine different countries. In these lawsuits Apple accuses its South Korean competitor of copying its technology, products and packaging design. So far, Apple’s efforts to obtain evidence from South Korean custodians have reportedly been largely unsuccessful because of the corporate retention laws and policies in South Korea that allegedly allow companies to preserve certain categories of e-mails only for as long as it takes to process them. According to Apple’s attorneys, Samsung did not even try to collect documents or to suspend its deletion policies in South Korea, an omission that may give rise to claims for spoliation in U.S. courts.¹⁶

III. Outlook

There are currently not sufficient details available from the European Union about the “right to be forgotten” to determine whether the EC’s efforts will be successful, although the EC’s **timetable** is ambitious: The EC will submit the proposals as legislation probably by

¹⁵ *Id.*

¹⁶ For an overview on the pending cases see <http://www.theverge.com/apple/2011/11/2/2533472/apple-vs-samsung>. Also see Robert Wilson, “In bitter battle of titans, Apple and Samsung, cross-border e-discovery dilemmas are starkly drawn,” Oct. 27, 2011, available at <http://aceds.org/news/articles> (registration required).

the end of this year or early next year; recent news suggests even by the **end of January 2012**.¹⁷ After the EC submits a legislative proposal, it will be referred to the European Parliament and Council (the body representing the national governments) for further deliberations. Therefore, the “right to be forgotten” is not expected to become enacted before mid-2012.

In spite of the time pressure on the EC to deliver its ambitious proposals, the **scope** of the “right to be forgotten” in the revised Directive remains unclear: even if it will be enacted, it will face some serious impediments as far as a coordinated enforcement in the EU or even beyond it is concerned. As already stated, there is some acknowledgement that even outside of social networks, an individual cannot always control who knew what about him. It probably needs to go hand-in-hand with educating, in particular, young people how to use social media responsibly. How the future EU legislation will evolve and what its shape will be still remains unclear. Referring to the proposal from last year, there are also some other legislative measures suggested to ensure a higher level of data privacy safeguards, in particular in social networks. One suggestion is that the users should explicitly “opt in” to allow data processing, as opposed to the current “opt-out” policy, although this approach is not very realistic.¹⁸ A probably more realistic goal is to provide a clear and properly explained guidance from the EC concerning how users can delete their personal information that is stored on a provider’s server. According to Reding’s spokesman Matthew Newman, privacy settings are often so complex that a typical user does not know how to use them. However, this obligation would be a far cry from the EC’s original broad concept.¹⁹

¹⁷ According to the German press, the January deadline was set during a meeting in Brussels for Nov. 7, 2012 between Ilse Aigner, German Federal Minister for Consumer Affairs, and Commissioner Reding: Modernisierung der EU-Datenschutzvorschriften.

¹⁸ Robert B. Fitzpatrick, Robert B. Fitzpatrick PLLC, “The European Union: The Right to be Forgotten,” Sept. 27, 2011, available at <http://robertfitzpatrick.blogspot.com/2011/09/european-union-right-to-be-forgotten.html>.

¹⁹ Leigh Phillips, “EU to force social network sites to enhance privacy,” March 26, 2011, available at <http://www.guardian.co.uk/media/2011/mar/16/eu-social-network-sites-privacy>.

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Even if a “right to be forgotten” will be adopted as part of the revised Directive, we don’t know how the EU Member States will interpret it. In any event, **more lawsuits and DPA proceedings** are likely to emerge, which may throw companies that do business in the United States and in Europe into a dilemma due to their diverging concepts of privacy on both sides of the Atlantic. Google is already the subject of a number of proceedings in Europe where individuals demand the deletion of their data. Various complaints to this end have already been filed against Facebook with the Irish Data Protection Commission (“DPC”). The DPC has been investigating the complaints since October.²⁰ The complainants accuse Facebook of holding on to data and passing them onto third parties that the user already had removed from his accounts. The outcome of the audit remains anyone’s guess, but all this activity sheds a light on the complexities of the “right to be forgotten” and contributes to the impression that social networks are just the tip of the iceberg of a larger debate, namely to what extent individuals should be allowed to recall their personal data or correct them if necessary and thus rewrite their digital history.

²⁰ Gerry Smith, Huffington Post, “Facebook’s Privacy Policy Under Scrutiny In Europe, Partly Because Students Complained,” Oct. 21, 2011, available at http://www.huffingtonpost.com/2011/10/21/facebook-privacy-policy-europe-student-complaints_n_1022988.html. Confirmed by Chloe Albanesius, PC Magazine, “Facebook Ireland Facing Audit Over Privacy, ‘Shadow Profiles,’” available at <http://www.pcmag.com/article2/0,2817,2395109,00.asp>.