Available online at www.sciencedirect.com

ScienceDirect

www.compseconline.com/publications/prodclaw.htm

Computer Law & Security Review

The right to be forgotten in the light of the consent of the data subject

Cesare Bartolini *, *Lawrence Siry* *

University of Luxembourg, Luxembourg

Keywords:
Data protection
General data protection reform
Consent

ABSTRACT

Recently, the Court of Justice of the European Union issued decision C-131/12, which was considered a major breakthrough in Internet data protection. The general public welcomed this decision as an actualization of the controversial "right to be forgotten", which was introduced in the initial draft for a new regulation on data protection and repeatedly amended, due to objections by various Member States and major companies involved in massive processing of personal data. This paper attempts to delve into the content of that decision and examine if it indeed involves the right to be forgotten, if such a right exists at all, and to what extent it can be stated and enforced.

1. Introduction

In May 2014, the Court of Justice of the European Union (CJEU) issued a decision[1] which has been regarded as the enforcement of the right to be forgotten in the scope of the European Data Protection Directive (DPD). Although the decision of *Google Spain SL, Google Inc. v Agencia Española de Protección de Datos, Mario Costeja González* does not explicitly mention a right to be forgotten, privacy advocates as well as the European Commission have stated that the CJEU did not create a new right, but simply applied the right to be forgotten, which was already present (although not explicitly mentioned) in the existing legal framework.[2]

This statement seems quite provocative and oversimplified. Preliminarily, it should be observed that a right to be forgotten is not mentioned in the current DPD provisions, yet it has been statutorily introduced in the proposed General Data Protection Regulation (GDPR). The GDPR comes from the evolution of the DPD interpretation in the light of technological developments since its adoption in 1995. However, whether the right to be forgotten is just the interpretational evolution of the principles that are within the DPD, or it represents a *quid pluris* in the law, is debatable. In other words, could a judge really enforce the right to be forgotten under the current legislation? Or is the statement that the CJEU affirmed the right to be forgotten just an exaggeration?

Indeed, there has been a significant evolution in the interpretation of data protection legislation. The DPD provisions concerning the right to rectification[3] and the right to object[4] have been interpreted extensively and grouped under a general category of the rights of the data subject (DS) over his or her

* *Corresponding authors*. Interdisciplinary Centre for Security, Reliability and Trust, Université du Luxembourg, Weicker Building, 4, rue Alphonse Weicker, L-2721 Luxembourg, Luxembourg.
E-mail addresses: cesare.bartolini@uni.lu (C. Bartolini); lawrence.siry@uni.lu (L. Siry).
http://dx.doi.org/10.1016/j.clsr.2016.01.005

[1] European Court of Justice, *Decision C-131/12, ECLI:EU:C:2014:317.*, 2014, http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62012CJ0131.
[2] See Section 6 *infra*.
[3] Article 6(1), subparagraph d, Directive 95/46/EC.
[4] Article 14, Directive 95/46/EC.

data[5] because these rights are not a novelty introduced by the DPD, but stem from the already-existing principles that form the basis of data protection in Europe. On the other hand, however, the "right to be forgotten and to erasure", as it is being introduced by the reform, has its own provisions and regime which are not yet in force. The Court is probably applying an evolutive interpretation of existing principles, but stating that it has officially introduced the right to be forgotten is perhaps too much, especially considering that (as will be detailed in Section 6.2) the content of the decision appears to differ from that of the right to be forgotten.

Perhaps the *Google Spain* case can be better seen as a development in the interpretation of the DPD provisions concerning consent. Existing EU law does not provide the "right to be forgotten", but those provisions may still offer a basis to enforce it.

In general, the processing of personal data requires that the DS agrees by giving his or her informed consent. Additionally, the GDPR introduces the right to be forgotten, which requires the controller to erase the personal data. Both consent and the erasure request are based on the intent of the DS. On one side, giving one's consent is the door that opens up the lawfulness of the processing of personal data; on the other side, the willingness to be forgotten (in the terms of the GDPR) is the lock that makes further processing unlawful. At a first glance, one could say that exercising the right to be forgotten is an operation that is inverse to giving consent: essentially, a *withdrawal of consent*. This seems to be a much more reasonable ground to affirm a right to be forgotten, due to the complex juridical nature of consent which opens it to different interpretations. In other words, if the right to be forgotten already exists between the lines of the DPD, it might be in the shape of a withdrawal of consent.

The matter, however, is very delicate, because the DPD is unclear whether it is possible to withdraw, or revoke, one's consent once it has been freely given. And even if that were possible, there is no provision explaining what happens when the consent is withdrawn or revoked.

In addition to that, some provisions within the DPD confer on the DS the right to object to the processing of personal data. While there is clearly a connection between the right to object and the right to withdraw consent, it is arguable whether they are actually the same right. If they are not, and the right to be forgotten is not based on the withdrawal of consent, then maybe it can be found as an application of the right to object.

This paper delves into the judicial concepts of consent and the right to object, looking for similarities and differences in comparison to the right to be forgotten, to discover whether the seeds of such a right can be found in either of these legal concepts.

According to the analysis in the following, the short answer is no. It does not seem possible to infer the right to be forgotten, as it is formulated in the current draft of the GDPR, from the right to object, nor from a more generic withdrawal of consent. In other words, we argue that since no right to be forgotten exists, the Google Spain decision (which does not mention the right to be forgotten) addresses the matter from a different perspective. Also, the content of the decision does not match the obligations provisioned in Art. 17 of the GDPR (as explained in Section 6.1). If this analysis is correct, then the CJEU must rely on something else to issue the decision; and that could be the right to object instead.

In the following, Section 2 gives an introduction to the legal concept of consent, describing its nature and doctrinal analysis in both Civil Law and Common Law systems. Section 3 compares the concept of consent in data protection against the right to object stated in the DPD and in Member State laws to determine whether the right to object can be used as a basis to assert that a right to be forgotten exists under current legislation. After arguing that the right to object is not the equivalent of withdrawal of consent, Section 4 tries to find a generalized right to withdraw consent among the provisions of the DPD. There does not appear to be any generalized means of withdrawing consent, but Member States are free to introduce it. Could such a right be considered equivalent to the right to be forgotten? Again, the analysis suggests that the two rights are not the same.

Then, Section 5 analyzes the reform proposal, trying to outline the right to be forgotten in the GDPR, its relationship with the withdrawal of consent, and the controversial problems related to it. Finally, Section 6 runs through the details of the Google Spain decision and, based on the previous analysis, tries to determine whether the statements about it enforcing the right to be forgotten can be maintained, or the decision is asserting something different.

2. Consent-based processing

Consent is crucial in data protection legislation, at any level. The focus of this section is an analysis of consent under a legal point of view, especially in the light of the protection of personal data.

2.1. *Data protection and consent*

When the DPD[6] was adopted in 1995, it represented an evolution in the concept of personal data and the means to enforce

[5] There are actually two different classifications for the various provisions of the DPD. Some early comments (Dag Elgesem, "The Structure of Rights in Directive 95/46/EC on the Protection of Individuals with Regard to the Processing of Personal Data and the Free Movement of Such Data," *Ethics and Information Technology* 1, no. 4 (1999): 283–93) tended to interpret the various rights of the DS separately depending on their *purpose*, regarding the provisions as being structured into several *layers*. The first layer concerns the quality of the data, whereas a separate layer concerns the legitimacy of the processing, including the right to object. This classification is still being followed by some sources (*Handbook on European Data Protection Law*, European Union Agency for Fundamental Rights, 2014). Other commentators (Fred H. Cate, "The EU Data Protection Directive, Information Privacy, and the Public Interest," *Iowa Law Review* 80, no. 3 (1995): 431–43) have embraced a different interpretation according to which the Directive confers upon the DS the right to exercise a control over his or her personal data, a right which is further detailed into a set of specific powers. The latter classification appears to have been welcomed in the draft Regulation, where all rights pertaining to the DS are provisioned under Chapter III "Rights of the data subject".

[6] Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data.