The right to be forgotten from a EU and U.S. perspective

Introduction

On 13 May 2014, the Court of Justice of the European Union ("CJEU" or "Court") ruled that an EU citizen has a "right to be forgotten" under the EU's 1995 Data Protection Directive 95/46/EC ("Directive"), which requires data controllers, such as Google Inc. and other search engines, to comply with user requests to delete links to outdated or inaccurate data about themselves. This is a landmark decision in several respects. First, the Court exercised jurisdiction over Google Inc.—a U.S. company—through the activity of its Spanish subsidiary. This means that data controllers based outside of the EU will now have to comply with the ruling if they or any of their subsidiaries process EU citizen data in any EU Member States. Second, the ruling highlights the stark differences in data privacy and protection law that exists outside the EU, such as in the United States. Google Inc.'s implementation of new policies to comply with the ruling will reveal the broader global implications of the decision.

Background

In 1998, a Spanish newspaper ("La Vanguardia") published two separate announcements for a real-estate auction connected to attachment proceedings for Mr. Costeja González's social security debts. When Mr. Costeja González ran a Google search for his name years later, he found results that linked to those same newspaper announcements. In March 2010, Mr. Costeja González filed a complaint with the Spanish data protection agency ("AEPD") seeking to compel La Vanguardia to remove or alter the personal data relating to him. He also lodged a complaint against Google Spain and Google Inc. to remove the personal data that appeared in those search results under his name, stating that the attachment proceedings had been fully resolved for a number of years and that reference to them was no longer relevant.

In his complaints, Mr. Costeja González claimed that he had the "right to be forgotten" under the Directive, which had been incorporated into Spanish Law in 1999. In its 30 July 2010 decision, the AEPD denied Mr. Costeja González's request to have the newspaper notices amended, finding that publication concerning the auction itself was legally justified. Nonetheless, the agency compelled Google Spain and Google Inc. to remove the contested links. The AEPD decided that search engine operators like Google Spain and Google Inc. were obligated to process personal data in compliance with the country's data protection legislation.

Google Spain and Google Inc. brought separate claims challenging the AEPD's order to the Spanish High Court. The Spanish High Court then stayed the proceedings and referred the case to the CJEU for a preliminary ruling.

CJEU's Decision

The CJEU's decision addressed how Member States are supposed to interpret the territorial scope of the Directive in light of a Spanish citizen's request to remove information from a search engine's results.

To determine how to interpret the Directive in these circumstances, the Court considered the following three issues: (1) whether the Directive applied to search engines; (2) whether the Directive applied to Google Inc. and Google Spain, where the company's data processing server was in the United States; and

(3) whether an individual has the right to request that his personal data be removed from search engine results even when a third party has lawfully published that information.

Answering all three questions in the affirmative, the Court concluded the following:

Google, and any other search engine like it, is a "controller" for purposes of the Directive. The CJEU noted that "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' within the meaning of [the Directive] when that information contains personal data."[1] In addition, the Court briefly noted that while Article 9 of the Directive carves out an exception for freedom of expression when processors publish personal information "solely for journalistic purposes,"[2] search engines do not fall within that category.

The Directive applies to both Google Inc. and Google Spain. Although Google Inc. argued that the actual "processing" happened on its servers located outside the jurisdiction of the EU, the Court disagreed. The Court held that Google Inc. and Google Spain were inextricably linked because Google Spain's provision of advertising space on the search results page made the search engine profitable.

Individuals have a right to be forgotten. The CJEU found that Articles 6, 12(b) and 14 of the Directive entitle an individual to the removal of inaccurate, inadequate, irrelevant, or excessive personal data.[3]

In addition to the above, the CJEU ruling established a standard for Google Inc. to assess individual requests to remove their personal data from search results. As a rule, an individual's fundamental right to request removal override the search engine operator's economic interest and the general public's interest in access to that information. The Court stated, however, that the search engine may deny those removal requests for specific reasons, "such as the role played by the data subject in public life" or where "the interference with [the individual's] fundamental rights is justified by the preponderant interest of the general public in having, on account of its inclusion in the list of results, access to the information in question."[4] The Court did not elaborate, nor give an exhaustive list as to what factors a search engine must consider in making its decision to remove or retain a link to an individual's personal data.

Nevertheless, in implementing this balancing test, the Court emphasized that the Directive's essential aim is first and foremost the protection of the individual. While Google Inc. and other search engines will have to implement the Court's test on a case-by-case basis, we now have a general standard for how these data controllers are to make their decisions.

U.S. Perspective

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[1] Paragraph 21 of the CJEU decision.

[2] Paragraph 85 of the CJEU decision.

[3] See Paragraph 92. Article 6 requires that data is relevant, accurate, up-to-date, and retained for no longer than necessary. Article 12(b) provides that a data subject may obtain the rectification, erasure, or blocking of data that does not comply with the Directive. Finally, Article 14 gives data subjects the right to object "on compelling legitimate grounds" to the processing of their personal data.

[4] Paragraph 100.4 of the CJEU decision.

The EU and the United States approach the issue of data protection and privacy in very different ways. As illustrated by the Directive, the EU has created an omnibus mechanism designed to ensure the protection of data and privacy for its citizens as a matter of right. Like other directives of the European Parliament and the European Council, the Directive mandates EU Member States to enact national legislation that complies with its provisions, and countries have established national data protection agencies that enforce their domestic legislation. The United States, on the other hand, operates under a system of sector-specific data protection laws, such as the Children's Online Privacy Protection Act and the Health Insurance Portability and Accountability Act.

It is unlikely that search engines and third-party intermediaries will be subject to legislation similar to the Directive in the United States for two reasons. First, the "right to be forgotten" arguably contravenes the United States' First Amendment protection on free speech. Although Article 9 of the Directive carves out exemptions for freedom of expression, it is narrowly constructed as "the processing of personal data carried out solely for journalistic purposes or the purpose of artistic or literary expression only if they are necessary to reconcile the right to privacy with the rules governing freedom of expression" and the CJEU has refused to characterize Google Inc.'s search results as protected under EU freedom of expression. Conversely, it is likely that U.S. courts would consider Internet search results "speech" protected by the First Amendment. In March 2014, the U.S. District Court for the Southern District of New York concluded that search engines are entitled to free speech protection because they exercise editorial judgment.[5] Second, a section of a federal statute otherwise known as the Communications Decency Act, 47 U.S.C. § 230, provides immunity to search engines and other Internet access providers from any liability for linking to others' content.

Future Implications

As of July 2014, Google Inc. has begun to comply with the CJEU decision by creating a form that allows individuals to request the removal of their personal information from Google Inc.'s search results in the local domains. Over 70,000 requests have been filed so far. In addition, for all proper name searches within local domains of EU Member States (*e.g.*, "google.es" or "google.co.uk"), Google Inc. has added the phrase, "Some results have been removed under data protection law in Europe" at the bottom of the search results page.

Notably, however, full search results are still available in other non-EU jurisdictions, and within the EU, users can still use "google.com" to obtain results that are otherwise removed in the EU domains. Moreover, Google Inc.'s new policy of informing original sources, such as news publications, when it has stopped linking to content has resulted in successful efforts by those sources to prevent the removal of the content from the search results listing.

As Google Inc. and other search engine operators continue to implement new policies to comply with the CJEU's order, additional concerns may come to light. For now, many are watching to see whether and

[5] See Zhang v. Baidu.com, Inc., No. 11 Civ. 3388 (JMF), 2014 WL 1282730 (S.D.N.Y. Mar. 28, 2014). The court dismissed the plaintiffs' complaint against a Chinese search engine for unlawfully blocking search results in the United States for articles and other information concerning “the Democracy movement in China” on the grounds that the First Amendment protects the search engine's "speech" in making judgements—albeit via an algorithm—about what to produce in its results.

how the Court will extend its jurisdiction over servers located wholly outside of the EU to protect Member States' citizens under the Directive.

In addition, the EU Legislature is currently discussing a reform of the current data protection law. It is intended to replace the current Directive with a new EU Data Protection Regulation. This EU Data Protection Regulation would apply in all Member States without any further implementation. It is unclear whether, or in which form, such Data Protection Regulation will take effect. However, based on the current draft of the EU Data Protection Regulation, it seems very likely that the provisions regarding data protection law in Europe will become even stricter in the future.