A TEST FOR DATA PROTECTION RIGHTS EFFECTIVENESS: CHARTING THE FUTURE OF THE ‘RIGHT TO BE FORGOTTEN’ UNDER EUROPEAN LAW.

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I. INTRODUCTION: LIVING IN A WORLD THAT FORGETS NOTHING

The last two decades have borne witness to the unstoppable rise of the Internet and other information and communication technologies that have gradually introduced changes in social life. It is commonly understood that this implies rethinking the law of effectiveness in a “2.0 world.” The law must regulate part of this new environment and should give answers to current issues resulting from the worldwide web’s architecture. In a wide range of new 2.0 threats, the issue of continuity of the information on the Internet stands out. The web records everything and forgets nothing. In other words, “with the help of widespread technology, forgetting has become the exception, and remembering the default,” and this reality has arisen in the European public debate as a legal issue.

II. THE REACTION OF EUROPEAN DATA PROTECTION AGENCIES

European Data Protection Agencies in France, Italy, Spain, and the European Commission (“EC”) have reacted against the challenges that digital memory and search

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2 See generally DERECHO Y REDES SOCIALES 19–21 (Artemi Rallo Lombarte & Ricard Martínez Martínez ed., 2010).


engines create for individuals’ rights, especially to data protection and online reputation. Normally the so called “right to be forgotten” has been understood as a right bound to data protection principles, which tries to protect private information and turn public information private at a certain time by no longer allowing third parties to access such information. Thus the right to be forgotten appears as a guarantee against prejudice that data owners could face in instances where their personal data was diffused throughout the Internet without duration limits.

The role of the French Data Protection Agency — the Commission nationale de l’informatique et des libertés (CNIL) — is especially interesting because it was a pioneer in recognizing the right to be forgotten — droit à l’oubli — in accordance with data protection principles. It implied that personal data must be processed fairly and lawfully and collected for specified, explicit, and legitimate purposes. They must also be accurate and, where necessary, kept up to date. At the end of the twentieth century the CNIL noticed the problem, and in 2009 it even recognized the fundamental and constitutional nature of the right to be forgotten, noting that the law must implement and guarantee the idea of a second or third chance into our digital spaces, as it does in reality.

In a similar vein, the Italian Data Protection Agency — Garante per la Protezione dei Dati Personal (GPDP) — has recognized that the right to be forgotten — diritto all'oblio — involves the right to cancel personal data when it is no longer useful for the purpose for which it was processed. To be precise, the GPDP recognized its existence based on article 11 of the Codice in materia di protezione dei dati personali (Italian Data Protection Law), which contains the data quality principle.

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8 30ÈME RAPPORT D’ACTIVITÉ 29 (CNIL ed., 2009).
9 See also JONATHAN L. ZITTRAIN, THE FUTURE OF THE INTERNET, AND HOW TO STOP IT, 228–29 (2008).
11 “Art. 11. Modalità del trattamento e requisiti dei dati [...] b) raccolti e registrati per scopi determinati, espliciti e legittimi, ed utilizzati in altre operazioni del trattamento in termini compatibili con tali scopi.”
Although later than the French and Italian counterparts, the Spanish Data Protection Agency — Agencia Española de Protección de Datos (AEPD) — has also recognized the right to be forgotten based on data protection principles, specifically on data quality, collection limitation, and purpose specification principles. However, the AEPD has been a pioneer by extending and defining the right to be forgotten, and providing that a citizen who neither has the status of a public personality nor is the subject of a news event of public relevance still has the right to react and correct the unlawful inclusion of his personal data on the Internet. The negative effects of disclosure are multiplied for private citizens due to the fact that search engines provide a greater extent of the information. The AEPD maintains that individuals have both the right to delete personal data published without the data owner’s consent and the right to object to data processing performed by search engines, even when it is about public or legitimate information such as official journals of the government, if that information does not have a current public relevance.

III. TOWARDS MORE EFFECTIVE DATA PROTECTION IN EUROPE: THE REFORM OF DIRECTIVE 95/46/EC

European Union institutions have placed the right to be forgotten into the political agenda as one of the most important challenges that the Internet and the 2.0 world represent for privacy and data protection rights. Peter Hustinx, the European Data Protection Supervisor and one of the most powerful voices on the subject in Europe, says that “an interesting example [of the need to provide more effective protection of personal data] is the right to require that personal data are deleted or transferred to another provider – often referred to as the ‘right to be forgotten’ or the ‘right to data

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Article 11.b of the Codice in materia di protezione dei dati personali. In English words the personal data may only be collected and recorded for specific, explicit and legitimate purpose. Obviously, when that disappears the treatment is no longer justified.


portability’ – which might be particularly useful in the context of social networks or other online services.”

Maybe for this reason, the Council of the European Union praised the effort to revise the rules on data protection, specifically encouraging the EC to define and explore the introduction of the right to be forgotten as a pioneer legal instrument. As a result, the EC recently focused on the subject of the right to be forgotten in a Communication titled “A comprehensive approach on personal data protection in the European Union.” In this text, the EC noted “the importance of improving means of exercising the rights of access, rectification, erasure and blocking of data, and of clarifying the [right to be forgotten],” which in the same text is defined as “the right of individuals to have their data no longer processed and deleted when they are no longer needed for legitimate purposes.” Thus data portability and the right to be forgotten would be a cornerstone of the new European approach.

The EC also launched a public consultation from November 4, 2012 to January 15, 2011 in order to obtain different points of view on the EC’s ideas — as highlighted in the Communication — on how to address the new challenges for personal data protection. Some of these contributions are particularly noteworthy.

The AEPD defended the existence of the right to be forgotten in some provisions of Directive 95/64/EC, primarily on data quality and collection limitation principles — articles 7.a) and 6.1.c) — and was in favor of recognizing both the right of deleting, blocking, or correcting inaccurate data contained on the Internet and the right to object to unauthorized search engines’ treatment of personal data. Less ambitious was the contribution of the German federal government, which proposed a clear distinction between the terms “right to be forgotten” and “right of deletion,” suggesting that the former has a wider content than the latter. Similarly, the Belgian Data Protection Authority held that the new data protection framework must seek a balance between the

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19 See Contribution of the German Federal Government to the EC consultation, 2011, available at http://bit.ly/q2jklU. (The German Federal Government has been “very interested in the idea of an ‘expiry date for data’ but again technical implementation seems to be a great challenge”).
limitation of storage terms, the right to be forgotten, and the need to maintain personal data with a historic, scientific, or statistic purpose.\textsuperscript{20}

However, skepticism about the recognition of the right to be forgotten comes mainly from the United Kingdom. Specifically, the Information Commissioner's Office (ICO) stated that “it is important that the Commission is clear about the extent to which this right [to be forgotten] can be effective in practice, as it could have a very limited application.”\textsuperscript{21}

\textbf{IV. CONCLUSION}

One of the most important challenges that the Internet and the 2.0 world involve in relation to reputation, privacy, and data protection is the unlimited nature of digital memory. In response, the European Data Protection Agencies started recognizing the right to be forgotten in accordance with data protection principles. Moreover, it seems that the EC is going to include the right to be forgotten in the reform of Directive 95/46/EC. Now, we can only wait for the requirements, and the limits, of this new right to be put in place, and time will tell if they can be effective in practice.

\textsuperscript{20} See Contribution of the Belgian Data Protection Authority to the EC consultation, 2011, available at http://bit.ly/pINtNI. (More specifically, historical and cultural data are protected under freedom of information and for this reason must be transferred to archives dedicated to historical research and “should be encouraged and treated as a valid way to retain data beyond their operational utility date”).