The right to be forgotten in the Draft Data Protection Regulation

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Conference, 28 ottobre 2014

The rationale of the right to be forgotten

Commissione Reding

- The right to be forgotten should enable "European citizens, particularly teenagers, to be in control of their own identity online." (Commissione Reding)
- data subjects have "a 'right to be forgotten' where the retention of such data is not in compliance with this Regulation" (explanatory memorandum)
- a development of the right to erasure (as established by Article 12 (b) of the 1995 Data Protection Directive) needed to cope with the Internet

Does the right to be forgotten maintain its promises?

WHat are the sources

- Art. 17 (A very long and convoluted text)
- All norms establishing when processing is allowed or forbidden
- Art. 4(5) and (6) (Controllers and processors)
- Art. 2 (3) (Application of e-commerce immunities to data protection

The scope of the right

It addresses:

- (a) the processing concerns data that are no longer necessary "for the purpose for which they were collected or processed": violations of purpose limitation
- (b) consent has been withdrawn or the storage period consented to has expired, consent providing the only legal basis for the processing: consent withdrawn or expired prior to the erasure request/after it
- (c) the data subject validly objects to the processing,
- (d) the processing violates the directive on any other ground.

All and only the processings whose continuation would be unlawful? The same as the old Article 12 of the Directive?

Particular cases

- processing has no legal ground: before the removal request, or as consequence of it
- special case: processing necessary for legitimate interests pursued by the controller but these interest are overridden by the interests of the data subject.
- special case: do the conditions for a successful objection obtain?

Exceptions to the right to be forgotten

- (a) the exercise of freedom of expression, according to Article 80,
- (b) public health, according to Article 81,
- (c) historical, statistical and scientific research, according to Article 83,
- (d) compliance with legal obligations established by Union law or State law.

Are these real exceptions? Would the corresponding processings be attackable through the right to be forgotten if the exceptions where not there?
Do the exceptions pre-empt the termination of illegal processings?

The content of exceptions

Do the exceptions cover all cases when the processing is allowed?

- if the publication for the purpose of free expression/information allowed in the absence of national laws?
- are t "reasons of public interest in the area of public health", as an exception to the right to be forgotten in the health domain?

In conclusion, all "exceptions" to the right to E&BF seems to concern processings that are based on a persisting legitimate legal ground, independent of the data subject's consent, and are therefore lawful. The right to E&BF could not be used to attack these processings, regardless of the exceptions,

The content of the right to E&BF

- power to obtain an injunction to terminate the processing (whose continuation would be unlawful): no mere liability right (art 7)
- controller's subjection to an administrative sanction for failing to comply with a justified termination request by the data subject: up to 500,000 EUR, or in case of an enterprise up to 1 % of its annual worldwide turnov

A double sanction for unjustified refusal (since the right attacks unlawful processings): 1) for unlawful processing; 2) for violation the right to E&BF
What about he case when the erasure request is made by withdrawing consent to the processing or presenting a justified objection: a double punishment for a single violation?

Initial, pre-existent and subsequent unlawfulness

- Unlawfulness as original sin
- pre-existing non-initial unlawfulness, as a consequence of withdrawal of consent or supervened unbalance
- subsequent unlawfuless, as a consequence of the very exercise of the right to E&BF

Alternative obligations

"the controller shall restrict processing of personal data":

- (a) the contested accuracy of the data is to be determined,
- (b) the data are to be maintained just for the purpose of proof,
- (c) the data subject opposes erasure and requests restricted use,
- d) the data subject requests the transmission of the data into another computer system.

Is it true that under all such condition the controller can only restrict the processing, or has he the choice to restrict or terminate it?

What is a restriction? 17(5)

When a processing is restricted the controller should ensure that the data "is not subject to the normal data access and processing operations and cannot be changed anymore".

- is a restriction any limitation of processing?
- why should any limitation of processing have this implications?
- is this rather a definition of what a restriction is, to the exclusion of other limitations?

Obligation to inform third parties, 17 (2)

The controller who has made the data public should inform the third parties who "are processing the data". When should the third parties be informed

- about any removal request by a data subject, even unfounded?
- about justified removal requests?
- about the effective removal of the information?

Why should the controller identify the third parties who have downloaded the data?

Intermediaries and freedom of expression

- (a) to what extent the on-line distribution of personal data is legitimate, even when it goes against the interests, or in any case the will, of the data subject (freedom of expression v. data protection)
- (b) to what extent an intermediary hosting or communicating personal data posted by their users can be responsible for the publication of such data or for failing to comply with removal requests.

Are they addressed:

- nothing on the first issue
- two rules on the second: Article 17, which identifies controllers as counterparts of the right to be forgotten and Article 1, which extends provider's immunities, stated in Articles 12-15 of the eCommerce Directive, to violations of data protection.

Are providers controllers?

Google-Spain

- Yes, whenever they process a data set they know might include personal data

Issues

- Also when the user-uploader has requested storage and indexation?
- From what time (only after knowing that the personal data at issue is on the platform?
- Can a provider use the e-commerce exemption to avoid liabilities for failure to comply with removal request? Does the request give the provider knowledge of the illegal material?

The Parliament

The controller who "has made the data public without a justification based on Article 6.1" is required to "take all reasonable steps to have the data erased, including by third parties",

- When should the justification exist? When the data is first published or as long as it is publicly available?
- what if the data is downloaded when the data could be legitimately published but it is distributed at later time by the third party?
- what if the data is downloaded when the data could no longer be legitimately published?

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Restriction

When a processing is to be restricted (rather than terminated) the controller should ensure that the data " is not subject to the normal data access and processing operations and cannot be changed anymore".

- does this complement the definition of what a restriction is?
- is this an additional obligation?

Conclusions

incremental changes with regard to Article 12 of the directive (right to erasure

- some good points (outside of 17): power to withdraw consent, inversion of the burden of proof in justified objections, right to obtain a copy of the data

Unclear provisions

- obligation to inform providers who have made the data public, or “take all reasonable steps to have the data erased”
- redundant/confusing exceptions
- the unspecified idea of a "restriction"

What about the publishing of data online

No definite answer to most questions

- when are providers controllers?
- what extent a provider-controller can profit of the eCommerce immunities
- what happens if they fail to comply with a removal request concerning user-generated data?

Could an aswer be given?

Thanks for your attention!!
The slides and a revision of the paper can be downloaded from:
http://giovannisartor.net/works-in-progress/