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Samuel Portz

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htw saar – Hochschule für Technik und Wirtschaft des Saarlandes (University of Applied Sciences)
Fakultät für Ingenieurwissenschaften (School of Engineering)
STL – Systemtechniklabor (System Technology Lab)
Prof. Dr.-Ing. André Miede (andre.miede@htwsaar.de)
Goebenstraße 40
66117 Saarbrücken, Germany
http://stl.htwsaar.de

The Right to be Forgotten

Samuel Portz
htw saar – Hochschule für Technik und Wirtschaft des Saarlandes
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***Abstract*—The right to be forgotten is one part of the General Data Protection Regulation (GDPR) published in April 2016 by the European Union. This paper examines this right by showing first the main topics of the GDPR, the impact of a judgement of the court of the EU and how search engines had to handle it. Then it explains the right to be forgotten in detail and when it can be applied and when not. At last it will give an outlook on how to handle with the GDPR after its publication.**

I. Introduction

In April 2016 the European Parliament approved the new *General Data Protection Regulation* (GDPR) [1] repealing the old *Data Protection Directive* [2] from 1995. The GDPR includes many improvements for data protection which have to be applied by all members of the European Union. These improvement will strengthen the rights of the data subjects [1]. They include e.g. definitions who a data subject or data controller is, a right to transfer personal data, regulations for privacy policies and a right to be forgotten (RTBF).

This paper focus on the right to be forgotten as written down in the GDPR. This right allows people to request the erasure of personal data or links to data from search engines, web pages, blogs, etc. from a data controller if specific prerequisites met. First the paper gives an overview about the legal procedure and the content of the General Data Protection Regulation.

Second it give details about a Judgement of the Court (Grand Chamber) in 2014 which assign search engines more responsibilities as it says that they are *controller of data*. It also points out that the RTBF is already included in the Data Protection Directive 95/46.

The next chapter explains the search removal requests which could be conducted by European citizen due to this judgement and which guidelines Google has designed.

After that it will explain the right to be forgotten in the new GDRP. When does it apply and when not?

At last it provides a outlook what the Member States of the European Union have to do after the publication of the GDPR.

II. The General Data Protection Regulation

In January 2012 the European Commission published the proposal for a Regulation *on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation)* and a directive *on the protection of individuals with regard to the processing of personal data by competent authorities for the purposes of prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and the free movement of such data* [3], [4], [5]. The revision was necessary because the implementation of in force *Directive on the protection of individuals with regard to the processing of personal data and on the free movement of such data* [2] from 1995 developed to a widespread fragmentation between the members of the European Union. The GDPR was also a part of the *Digital Agenda for Europe* published 2010 by the European Commission [6]. The Digital Agenda contains 16 *Key Actions* and Key Action 4 is about reviewing the *data protection regulation framework* [6, p. 13].

The proposal was about to renew this framework by setting new principles regarding data processing, transparency, data minimisation and implementing stronger rights of a data subject. Additional some administrative and political framework should be build to ensure that violations against data protection rights will be pursued [3].

This chapter shows the procedure of the General Data Protection Regulation and gives a brief overview of it's content.

A. Legislative Procedure

As written down in the *Rules of Procedure* [7] after publication the legislative proposal had a first reading in the European Parliament [4]. After several debates in the council and the parliament in March 2014 the amendments to the first draft were adopted by a vote in the parliament [8]. It was planned to publish the regulation in the same year so that the implications could be adopted by 2015 for the completion of the Digital Single Market [9, para. 8].

But due to the judgement of the court (Grand Chamber) in the case Google Spain and Google vs. Agencia Española de Protección de Datos (AEDP) and Mario Costeja González [10] the final decision was delayed as the Grand Chamber referred to some topics that would be new ruled in the GDPR [11].

In September 2014 the committee decided to open inter institutional negotiations after 1st reading in the Parliament [4]. Two month after early negotiations for the second reading in February 2016 the Council published their position regarding the GDPR [12]. One week later were the second reading conducted followed another voting [13] and the European

[1] "[...] an identified or identifiable natural person ('data subject') [...] is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person" [1, Article 3 (1)]

Parliament approved the Council position at first reading without amendments [14].

The European Parliament signed the final act and published the GDPR in the Official Journal of the European Union on May 04, 2016 [15]. The member states of the European Union have to implement the GDPR during the following two year in national law.

B. Content of the GDPR

The General Data Protection Regulation contains new several new rulings. The most notable are the right to be forgotten which will be examined later on, the extend of the concept of personal data, the right to data portability, the right to know when your data has been hacked, clear and understandable privacy policies, stronger enforcement and fines for companies which are violating the rules [16], [17].

The concept of personal data defines what kind of data or data combinition is meant to be *personal data* so that someone becomes a *data subject*. It extends the previous definitions with terms for online and location identifiers as for *genetic data*, *biometric data* and *data concerning health* [1, Article 4 (1,13,14,15)]. The controller has to proof that the consent for storing the data was given [1, Article 7 (1)].

Data protection has to be considered by design and by default [1, Article 25]. Whenever a system, product or service is planned the conductor has to consider data appropriate protection measurements, technical and organisational, by default.

The right to data portability allows to receive the stored personal data from a controller[2] in a form that allows it easily to transfer it to another controller [1, Article 20].

When a personal data breach occurs with a high risk for the freedom of the data subject the controller has to inform the data subject unless the data was appropriate protected e.g by encryption or measurements were taken to make the risk no longer likely [1, Article 34]. The controller has also to inform the supervisory data protection authority [1, Article 33]. When the controller has disproportional effort to inform each data subject individually a public communication shall be conducted [1, Article 34 (3c)].

The controller have to present written declarations in "a manner which is clearly distinguishable from the other matters, in an intelligible and easily accessible form, using clear and plain language." [1, Article 7 (2)] when a data subject has to give consent. Especially in general terms and conditions data protection rulings are hard to interpret.

If a company violates data protection rulings it is possible to fine them up to 2% of the undertaking global annual turnover or 10.000.000€ whichever is higher. More severe violations could be fined up to 4% or 20.000.000€ [1, Article 83 (5,6)].

III. The Google Spain Case

On May 13, 2014 the Court of Justice of the European Union (CJEU) released a judgement regarding a request for a preliminary ruling by the Spanish Audiencia Nacional in a case between Google Spain and Google Inc. vs. Agencia Española de Protección de Datos (AEPD) and Mario Costeja Gonzàlez [10].

Reason for this preliminary ruling was a Spanish citizen who filed a complaint against Google Spain and Google Inc. (from now on Google) in 2010. [11], [18], [19] In the late 1990s the citizen had to auction his real estate due to debts he had to pay. A local newspaper published two articles on it's website about that incident. The citizen wanted to have the articles removed from the website. Also when people enter his name in the google search engine the links should no longer be displayed among the search results. His point of view was that the proceeding had been fully resolved.

The Spanish data protection agency (AEPD) decided that they newspaper article are legal and hasn't to be removed but it advised Google to remove or hide the search results. Google claimed against the decision and the AEPD supported the citizen with the lawsuit [11], [18]. The Spanish National High Court requested the CJEU for a preliminary ruling pointing out that the Directive 95/46 had to be interpreted. It wanted clarification about these questions: 1. What is the territorial application of the Directive? 2. Are search engines content provider? 3. Which scope has the right to erasure or to be forgotten?

The CJEU decided that Google Spain even if it is not conducting the index and search actions in Spain but selling advertisements for the Spanish domain www.google.es has to be considered as an settlement from Google Inc. This settlement is processing the personal data in the context of conduction it's business. That's why European law applies in this case [10, Para. 42-60].

Search engines are content provider as they 'collect', 'retrieve', 'record', 'organize', 'store', 'discloses' and 'make available' [10, Para. 28] systematically information on the internet [10, Para. 21-41].

The most important part towards the right to be forgotten was the answer to question No. three. The CJEU says "that even initially lawful processing of accurate data may, in the course of time, become incompatible with the directive where those data are no longer necessary in the light of the purposes for which they were collected or processed" [10, Para. 93]. Furthermore they say that each request for removal has to be decided individually. The related data should no longer occur when a search relating to the data subject's name was conducted [10, Para. 97].

IV. Search removal requests

In response to the judgement of the court Google, Yahoo and Bing established forms where people can request to block search results [20], [21], [22]. People have to provide several information. They have to tell their country of residence because only requests by residents from a member state of the European Union have the right to be forgotten and they must provide a document that proofs their identity. The URL[3]

[2] "'controller' means the [...] person[...] or other body which [..] determines the purposes and means of the processing of personal data ..." [1, Article 4 (7)]

[3] Unified Resource Locator

of the search results which they want to have deleted must be provided along with a description why the result should be removed. At last a signature must be provided and the search engines can proceed the request.

In 2014 Google established an advisory council to establish guidelines how removal requests should be assessed [23]. The council published some main criteria for assessing a delisting request [24]:

- **The data subject's role in public life:** Has the person a clear, a limited, a context specific or no discernible role in the public life? Depending on that has the weight of public interest to be decided. [24, Para. 4.1]
- **Nature of the information:** Are the information towards the private life of a person such as sexuality, personal finance or underage children? Are the information of public interest such as general, political or religious discourses, consumer protection, criminal activities or even historical record? [24, Para. 4.2]
- **Source:** Who or where are the information published? Government, serious journalistic publications or blogger with good reputation are reliable sources which can lead to a greater public interest to have the information still available. Publications with the consent of the data subject needn't be remove as the data subject could revoke it's consent. [24, Para. 4.3]
- **Time:** As stated by the CJEU the time is an important factor. When circumstances change and the referred information is no longer important enough to be listed in the search results. It also influences the subject's role in public life . [24, Para. 4.4]

From May 29, 2014 until July 2016 Google received more than 480.000 requests and a total of more than 1.600.000 URLs to delete. About 57% of the URls were removed with most of them from facebook.com (more than 13.000) [25].

When a removal request was declined the person can get back to it's local data protection authority to get the decision reviewed.

V. The Right to be Forgotten

The General Data Protection Regulation contains eleven chapters each containing several articles. Chapter III is about the "rights of the data subject" [1, p. 43] and is divided in five sections. Section 3 is headlined with "rectification and erasure" [1, p. 43] and contains the Article 17 "Right to erasure ('right to be forgotten')" [1, p. 43].

A. When can data be forgotten?

Paragraph 1 says that "The data subject shall have the right to obtain from the controller the erasure of personal data concerning him or her without undue delay and the controller shall have the obligation to erase personal data without undue delay where one of the following grounds applies:" [1, Article 17].

A data subject can request a controller to delete it's personal data and the controller has to erase it. The deletion does not have to be performed direct after the request but the controller should have reasons to delay it e.g. if the controller wants to check if one of the following reasons apply. These are:

"(a) the personal data are no longer necessary in relation to the purposes for which they were collected or otherwise processed;" [1, Article 17(1)]

"(b) the data subject withdraws consent on which the processing is based according to point (a) of Article 6(1), or point (a) of Article 9(2), and where there is no other legal ground for the processing;" [1, Article 17(1)]

[1, Article 6(1) point (a)] says that it is only lawfully to process personal data when it is necessary for some reasons or the data subject has given consent. [1, Article 9(2) point (a)] refers to given consent in storing special categories of personal data [4] which are generally not allowed to be stored. If none of the listed reasons apply the basis for processing the data is no longer given.

"(c) the data subject objects to the processing pursuant to Article 21(1) and there are no overriding legitimate grounds for the processing, or the data subject objects to the processing pursuant to Article 21(2);" [1, Article 17(1)]

[1, Article 21(1)] says that a person has the right to object in it's particular situation and if the controller has no reasons more important than the reasons of the data subject or the public it is no longer allowed to proceed the personal data. [1, Article 21(2)] refers to direct marketing using the personal data. A data subject is allowed at any time to object to such proceeding.

"(d) the personal data have been unlawfully processed;" [1, Article 17(1)]

The personal data was proceeded even if none of the points listed in [1, Article 6(1)] did ever apply.

"(e) the personal data have to be erased for compliance with a legal obligation in Union or Member State law to which the controller is subject;" [1, Article 17(1)]

"(f) the personal data have been collected in relation to the offer of information society services referred to in Article 8(1)." [1, Article 17(1)]

The "[...]child's consent in relation to information society services" [1, Article 8] says that processing data is lawfully if the child is older than 16 years old or it's parents or legal guardians gave consent.

If a controller published the personal data and has the obligation to delete it, it has to inform other data processing controllers about this obligation. The erasure have to include "[...] any links to, or copy or replication of, those personal data" [1, Article 17(2)].

B. When can data not be forgotten?

A controller can with "[...] taking account of available technology and the cost of implementation, [...] take reason-

[4] "[...] data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, or trade union membership, and the processing of genetic data, biometric data for the purpose of uniquely identifying a natural person, data concerning health or data concerning a natural person's sex life or sexual orientation [...]" [1, Article 9(1)]

able steps, including technical measures, to inform controllers which are processing the personal data [...]" [1, Article 17(2)] refuse to inform other controllers. The personal data it stores is still to be erased but there are no guidelines which amount of costs will exceed an appropriate budget. Technical measures are mostly connected to a budget. Big companies like Google or Facebook will have the necessary budget and know-how to implement the procedure technically and hire additional staff to handle with it. But small companies are also affected by the RTBF and depending on it's industry it will be more difficult to decide.

Even if any of the criteria in [1, Article 17(1)] apply it could still be possible that the personal data shall not be erased. The first possible reason is that it affects the freedom of expression and information [1, Article 17(3), point (a)] as written down in the Charter of Fundamental Rights [26, Article 11]. Referring to the Google Spain case the newspaper articles were legal but the links to the articles not.

Another reason not to erase is when the personal data is processed "for compliance with a legal obligation [...] or for [...] a task carried out in the public interest or in the exercise of official authority vested in the controller;" [1, Article 17(3), point (b)]. This could include the data of a citizens identification card or stored connection data at a telecommunication provider according to data preservation laws.

Third it is necessary "for reasons of public interest in the area of public health [...]" [1, Article 17(3), point (c)]. This includes occupational or preventive medicine, protection against cross-border threats and processing within the social health system.

If personal data should be stored "for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes" [1, Article 17(3), point (d)] and it can not be pseudonymizated the purpose for the storage can outweigh the interest of the individual.

The last reason is "for the establishment, exercise or defence of legal claims." [1, Article 17(3), point (e)]

C. Implications of the RTBF

The most difficult part to decide if it is legal to forget personal data according to [1, Article 6(1) point (a)] because it reflects the conclusion the CJEU made in the *Google Spain Case*. Each request a data subject makes must be decided individually. The GDPR does not provide guidelines to weight the criteria. Even that the *Advisory Council to Google on the Right to be Forgotten* [23] released its guidelines they refer to the Directive 95/46 [2] which will be repealed in 2018 when to new GDPR will be in force.

Companies which make personal data public will have to decide what appropriate technical and organisational measures are to inform other controllers. The fact that the criteria when to apply the right to be forgotten are not very concrete lead to further discussions [17], [18], [27] and different companies will probably have different implementations.

VI. Outlook

The member states of the European Union have two years after the publication to implement the ruling made in the General Data Protection Regulation fit into national law [28]. Each state must examine which national rulings are already conform with the GDPR and which has to be changed. After that period all national laws will be overlapped by the rulings of the DGPR.

Some legislative procedures had to be postponed as they had to wait for the publication of the GDPR e.g the ePrivacy Directive [29] as it will refer to the GDPR [17].

Also companies have to check which part of the GDPR applies to them. The data portability, right to be forgotten and notification of personal data breaches are only a few rulings. Data protection by design and default will force companies consider that at the beginning of new services or products. Even if it is was before the GDPR a good idea to consider it now companies are able to be sued if not and a product leads to personal data breaches.

Higher fines on violations of data protection shall move companies to invest more time and money on this topic. But they also could attract competitors to file a complaint at the local data protection authority.

VII. Summary

This paper showed the way of the General Data Protection Regulation (GDPR) through the legislative procedure and pointed out some of it's main features as data portability, how to handle data breaches and the increase in fines.

It gave a brief overview on the Judgment of the Court (Grand Chamber) of the European Union (CJEU) where a Spanish citizen obtained his right to be forgotten (RTBF) from Google. In this judgement the CJEU defines search engines as controller of personal data which assigns many obligations to companies like Google, Yahoo or Bing strengthen the right of European citizens.

The impacts of the judgement on Google and other search engines were shown and how they handle search removal request. The paper gave an overview of the procedure to conduct a request and provided some statistical facts on the amount of removal requests made to Google. It explained the guidelines Google had adopted to decide the individual removal requests.

After that it explained the right to be forgotten in detail. Which prerequisites have to be fulfilled to have the right. These were explained in detail. It showed which additional responsibilities a data controller have if it made the personal data public. Following this it pointed out when the RTBF shall not apply.

At last it provided an outlook what has to be done after publication of the GDPR by governments and also by companies.

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