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EU Data Protection

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Views on ECJ Right to Be Forgotten Ruling

In a May 13 landmark ruling, the European Court of Justice held that data subjects in the European Union have the right to compel Google Inc. and other Internet search engines to remove search results linking to websites containing personal information about them .

Bloomberg BNA Privacy & Security Law Report Senior Legal Editor Donald G. Aplin posed a series of questions to Patrick Van Eecke, partner and co-chair of the Privacy and Data Protection practice at DLA Piper in Brussels. Van Eecke has consulted for the European Commission, and before joining DLA Piper, he, among other things, served as information technology and Internet adviser to the Belgian minister of justice. Van Eecke is also a professor in European IT law, teaching at the University of Antwerp. He provided his insights June 3.

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BLOOMBERG BNA: Now that you've had a couple of weeks to analyze the European Court of Justice's May 13 right to be forgotten ruling in *Google Spain SL v. Agencia Española de Protección de Datos*, No. C-131/12 (E.C.J. May 13, 2014), and to mull over its implications, what do you think is the biggest business compliance challenge posed by the opinion?

VAN EECKE: Many people across Europe may wish to remove search results concerning them in the wake of the *Google Spain SL* decision. Search engines, but also other Internet services, could be flooded with requests to evaluate whether personal information available through their services is ''inadequate, irrelevant or no longer relevant.''

There is also a balance to be made with the public interest. According to the European Court of Justice's ruling, this balance may depend ''on the nature of the information in question and its sensitivity for the data subject's private life and on the interest of the public in having that information, an interest which may vary, in particular, according to the role played by the data subject in public life.'' However, the court does not say how the assessment is to be made in practice by businesses. Such assessments may prove to be complicated.

Not only is ''relevance'' highly subjective, but it also fluctuates over time. Not all information about someone becomes less relevant over time. For example, information concerning someone's conduct in the past may be considered no longer relevant, only to become relevant again if that conduct is repeated on a later date.

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If the search engine refuses to remove search result links, then the decision can be appealed before national data protection authorities or national courts. However, search engines could also refuse to make the assessment regarding the relevance of the data and forward many, or most, requests to data protection authorities or the national courts. The search engine could also systematically appeal decisions. This could mean additional delays in obtaining an order to remove search results, and this would limit the practical effectiveness of the court's ruling. The impact of the *Google Spain SL* decision for businesses will depend on its practical interpretation.

Google launched its Right to be Forgotten Request Procedure last week, in an attempt to meet the requirements of the Court of Justice . In order to evaluate the request, Google requires the applicant to: (a) provide the URL for each link appearing in a Google search for your name that you request to be removed; (b) explain, if not clear, why the linked page is about you; and (c) explain how this URL in search results is irrelevant, outdated or otherwise inappropriate. Google will then assess the request and ''attempt to balance the privacy rights of the individual with the public's right to know and distribute information.'' When evaluating the request, Google will look at whether the results include outdated information about you, as well as whether there's a public interest in the information—for example, information about financial scams, professional malpractice, criminal convictions or public conduct of government officials. Google states that this procedure and the form are still an initial effort and may be ''refined'' in the future.

BLOOMBERG BNA: In the age of big data processing and analytics, do you think the ECJ's focus on how the easy ''interconnectivity'' of data sets enables search engines to make formerly more difficult-to-connect personal data a threat to privacy demonstrates, to some extent, a failure to recognize the reality of how the Internet works— such as to make research useful, help ensure the information presented is credible and allow companies to monetize the process through things like targeted advertising?

VAN EECKE: One of the aims of European data protection law is to enable transparency for the data subject into the collection of personal information, in order to be able to exercise rights of access, rectification and to oppose certain forms of processing, such as processing for marketing purposes. The court ruled in the *Google Spain SL* case that search engines are allowed to create ''a detailed profile'' of an individual and are responsible as controllers of the personal data they index. The court ruled that data subjects may therefore direct requests to the search engine regarding this profile.

It should be noted that in the U.S., the Federal Trade Commission has recently issued a report in which it raises concerns about the collection of sensitive profile data about consumers by data brokers . Under European data protection law, data subjects have more rights with regards to such profiles about them. What is striking about the *Google Spain SL* decision is that it applies European data protection laws to Google Inc. based in the U.S. The court ruled that the establishment of Google's subsidiary in Spain, which is engaged in selling advertising services to Spanish businesses, was sufficient to apply European data protection law. This results in a very wide territorial scope of application of European data protection law, since many businesses offering services over the Internet could also be found to fall under its scope of application. The fact that Google was held to be a ''controller'' of personal data is significant, since other Internet services using third-party data sources could also be found to have similar responsibilities as a controller, as opposed to being mere processors. The *Google Spain SL* decision could have broad consequences for Internet services using personal data obtained from third parties.

BLOOMBERG BNA: Do you think that the creation of a case-by-case balancing test between data subject privacy and legitimate interests of Internet users is a realistic, or is more detailed guidance required? Can it be a workable standard for search engines faced with the prospect of hiring hundreds of new workers just to process initial requests from data subjects and for generally under-resourced data protection authorities considering appeals?

VAN EECKE: Companies receiving many right to be forgotten requests will have to create internal guidelines to handle such requests. Since the criteria surrounding the concept of relevance are vague and sub-

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jective, companies may face significant hurdles in designing a workable process.

The practical interpretation of the *Google Spain SL* decision by national data protection authorities and before local courts will be key in determining how the balance between privacy rights and other legitimate interests, including the right to access information, to conduct a business and the freedom of expression is to be done in practice. We could also see proceedings against national governments before the European Court of Human Rights if the national courts or national data protection authorities do not provide an effective way to enforce the right to be forgotten. Finding the right balance may prove difficult for companies faced with many right to be forgotten requests. Google already received 12,000 requests since it launched its takedown service!

BLOOMBERG BNA: In strict terms, the ECJ ruling applies only to Google and similar search engines and only to the application of the Spanish statute with the right to be forgotten provision, but it clearly has real and implied implications beyond that. So how far do you think the ruling may go to sweep in not only search engines but other online businesses such as social media websites that compile and cross-reference personal information?

VAN EECKE: The *Google Spain SL* decision does not explicitly address the situation where people start sharing links that are omitted from a search result on social media sites such as Twitter. It is unclear whether the filtering of search results by Google would also need to operate on indexed public social media posts (as new links are posted). It is equally unclear whether the search functionality of social media sites, such as Twitter, would fall under the same criteria established by the court as for search engines.

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The *Google Spain SL* decision raises many practical questions with regard to other Internet services that remain largely unanswered at this time. Depending on its application, the judgment could have limited effectiveness, due to the many ways in which information can be surfaced, including through social media. Similarly, regarding news aggregators and search engines run by media companies, newspapers and other journalism outlets, it is unclear how the court's judgement should be interpreted. Such services could be regarded as falling under the journalism exemptions of data protection law, as interpreted in each member state. We will have to wait and see how the decision is interpreted before national courts.

BLOOMBERG BNA: Some have said that multinational companies may reconsider their willingness to do business in Europe, or at least may be more selective in evaluating the laws of a particular country—as many did when they relocated EU headquarters to Ireland over the last few years. Do you think concerns are well-founded over the potential broad extraterritorial scope of the ECJ's ruling and how little contact a multinational company might need with a particular EU member state to find itself subject to a particular right to be forgotten statutory provision?

VAN EECKE: The concerns are understandable, because the main factor that the court used to apply European data protection law was the establishment of Google's subsidiary on Spanish territory. This could lead some to believe that if an Internet service is not established in any European country, then the reasoning of the *Google Spain SL* decision would not apply. However, reading the court's decision, it is clear that the activity of selling advertising services to Spanish businesses through stable arrangements was an important factor in the court's decision.

It is unclear what the court would have ruled if such activities took place without a physical office or employees in Spain. Additionally, although not explicitly mentioned by the court, European data protection law can also be found to be applicable if the processing occurs through the use of equipment in a member state, such as servers in a data center. According to previous opinions of the Article 29 Working Party, the advisory body on the European Union Data Protection Directive (95/26/EC), such equipment can also include the use of cookies on a user's computer. Therefore, depending on the interpretation of the ruling, not having established offices in a European member state may not be enough to avoid the application of European data protection law.

BLOOMBERG BNA: The Article 29 Working Party of data protection officials from the 28 EU member states has said it will be discussing the ECJ ruling at its June plenary session, and the group's chairwoman has said the goal is to reach a harmonized response . Do you think that is a realistic goal given the differences in perceived willingness of various bloc members to be more favorable to business interests and ongoing arguments about deference by DPAs to each other brought to a head in the one-stop-shop discussions regarding the proposed data protection regulation?

VAN EECKE: The interpretation of the *Google Spain SL* decision will depend in large part on its interpretation by national data protection authorities. If the data protection authorities do not reach a harmonized response, the decision could be applied in an inconsistent manner in different European member states. This would have negative consequences for Internet companies offering services in Europe due to uncertainty regarding the uneven application of the decision.

BLOOMBERG BNA: Speaking of the European Commission's proposed data protection regulation—which contains the now-renamed right to erasure provision—do you believe Google and others affected by the ECJ right to be forgotten ruling might now rally to change the provision during negotiations between the Council of the European Union and the European Parliament?

VAN EECKE: The *Google Spain SL* decision changes the dynamic with regards to the prospects to change the proposed data protection regulation, because the right to erasure provision will be more firmly anchored as a consequence of the ruling.

Internet companies may want to have they voices heard now in discussions with regards to the right to erasure in light of the *Google Spain SL* decision, since the Council aims for adoption of the text before the end of the year.

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