

Google, the House of Lords and the timing of the EU Data Protection Regulation

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(LONDON) Could the European Court of Justice’s May 13, 2014 Google Spain decision delay the adoption of the EU Data Protection Regulation?

In the **Google Spain “Right to be Forgotten”** case, the ECJ held that Google must remove links to a newspaper article containing properly published information about a Spanish individual on the basis that the information is no longer relevant. The Google Spain decision has given a much sharper focus to the discussion about the Right to be Forgotten that may soon be adopted as part of the *new Data Protection Regulation* that is expected to be passed sometime in 2015. With the advent of the Google Spain decision, an issue that was on the sideline for most businesses – and which was expected by some to be quietly dropped from the draft Data Protection Regulation – has become a hot political issue. The Right to be Forgotten as interpreted by the ECJ has garnered international attention, deepened the UK/continental EU divide, and ultimately could delay the adoption of a final form of the Data Protection Regulation.

The Google Spain case has been controversial for various reasons. The decision takes an expansive approach to the long-arm reach of EU data protection law. It holds search engine providers liable to comply with removal requests even when the information in the search results is true, was originally published legally and can continue to be made available by the original website. The decision makes the search engine provider the initial arbiter of whether the individual’s right to have his or her information removed from publically available search results is outweighed by the public’s interest in access to that information. (For a pithy analysis of the “public record” aspects of the case, see John Gapper’s “Google should not erase the web’s memory” published in the Financial Times.)

Google started implementing the ruling almost immediately, but only with respect to search results obtained through the use of its country-specific versions of its search engine, such as **www.google.es** or **www.google.co.uk**. The EU-specific search engine results notify users when some results have been omitted due to EU’s Right to be Forgotten. (See the Telegraph’s ongoing list of the stories it has published that have been deleted from Google.co.uk’s search results to get a flavor of the sort of search results that have been deleted.) However, the “generic” version of **Google (www.google.com)**, which is also the default version for users in the US, does not omit the banned results.

Google has been engaged in an ongoing dialogue with EU data protection authorities regarding Google's implementation of the Google Spain ruling. According to some media reports, EU officials have complained that Google is implementing the ruling too broadly, allegedly to make a political point, while other commentators have noted that the ruling give Google very few reference points for performing the balancing-of-rights that is required by the ruling. Perhaps more interestingly, some EU officials want Google to apply the Right to be Forgotten globally (including for google.com results) and without noting that any search results have been omitted (to prevent any negative inferences being drawn by the public based on notice that something has been deleted). If the EU prevails with regard to removing personal data globally and without notice that the search results contain omissions, critics who are concerned about distortions of the public record and censorship at the regional level will have an even stronger case. Of course, if truly global censorship becomes legally required by the EU, it seems likely that non-EU governments and organizations will enter the dialogue with a bit more energy – but even more vigorous international debate does not guarantee that the EU would be persuaded to change its views.

The ongoing public debate about the potentially global reach of the Right to be Forgotten is significant enough that it could potentially delay agreement on the final wording of the Data Protection Regulation. Recently, an important committee of the UK's House of Lords issued a report deeply critical of the Google Spain decision and the Right to be Forgotten as enshrined in the draft Data Protection Directive. Additionally, the UK's Minister of Justice, Simon Hughes, has stated publically that the UK will seek to have the Right to be Forgotten removed from the draft Data Protection Regulation. The impact of the UK's stance (and the efforts of other Right to be Forgotten critics) on the timing of the adoption of the Regulation remains to be seen. In the meantime, search companies will continue to grapple with compliance with the Google Spain decision. Other companies that deal with EU personal data should tune in as the EU Parliament's next session gets underway and we move inevitably closer to a final Data Protection Regulation.

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National Law Review, Volume IV, Number 231

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