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Κανονιστικές και Κοινωνικές Διαστάσεις της Κοινωνίας της Πληροφορίας

EU's Data Protection Reform and the right to be forgotten – A legal response to a technological challenge?

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Ευρωπαϊκή Ένωση
Ευρωπαϊκό Κοινωνικό Ταμείο



ΥΠΟΥΡΓΕΙΟ ΠΑΙΔΕΙΑΣ & ΘΡΗΣΚΕΥΜΑΤΩΝ, ΠΟΛΙΤΙΣΜΟΥ & ΑΘΛΗΤΙΣΜΟΥ
ΕΙΔΙΚΗ ΥΠΗΡΕΣΙΑ ΔΙΑΧΕΙΡΙΣΗΣ

Με τη συγχρηματοδότηση της Ελλάδας και της Ευρωπαϊκής Ένωσης



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A new context?

- ✦ Since the adoption of the European Data Protection Directive in 1995 we have experienced dramatic technological changes
- ✦ Cloud computing, online social networks, search engines
- ✦ Data deluge / Data tsunami (digital information in zettabytes) combined with accessibility, durability and comprehensiveness of digital information
- ✦ Time, location and distance has little or no impact on the availability and accessibility of information



Time for change?

- ✚ Has the Data Protection Directive been efficient ?
- ✚ The Data Protection Directive required at least “some maintenance”, if only because of the fact that it was conceived and adopted before the explosion of the Internet
- ✚ Is the Draft Data Protection Regulation an adequate and efficient response to technological challenges?
- ✚ Overview
 - Efficiency of the legislation in force and the impact of PETs on the enforcement of data protection rules
 - Focus on right to be forgotten as a comprehensive set of existing and new rules, of legal measures and technical steps to better cope with privacy risks



Privacy by law and the limits of the Directive....

- ✿ The EU's Data Protection Directive: a milestone in the history of personal data protection with worldwide impact and influence.
- ✿ Technological challenges as well challenges resulting from social and political changes and choices, new perceptions of communication, interaction and privacy : the application of data protection rules is becoming at least more difficult .
- ✿ The present array of norms fails to shield users from risks and harms not easily remedied on an Internet of infinite memory.
- ✿ A robust, future-proof set of rules was (still is) required.



Is Law enough?

Privacy by technology and PETS

✦ *Privacy Enhancing Technologies*

- to reduce the risk of contravening privacy principles and legislation,
- to minimize the amount of personal data
- to provide individuals with control over their personal information

✦ Limited use/limited success

✦ limited by technological advances in privacy-invasive technologies and practices

✦ Not compulsory

✦ Not widely adopted

✦ More holistic approach: emphasis on the effort to address privacy concerns in all stages of systems development



From PETs to Privacy by Design

- ✦ *New tools, concepts and principles*
- ✦ Privacy by Design: privacy and data protection embedded throughout the entire life cycle of technologies, from the early design stage to their deployment, use and ultimate disposal
- ✦ Issues to be clarified
 - integration into technological artifacts,
 - evaluation of its cost and effectiveness
 - impacts and implications for individuals, systems and organizations are open to discussion

Right to be forgotten

- ✚ Necessity to enrich the fundamental data protection principles with specific rights
- ✚ Introduction of an expressis verbis “right to be forgotten”
 - Claim of an individual to have certain data deleted so that third persons can no longer trace them,
 - “Right not to see one’s past coming back forever” (Pizzetti) or
 - “Right to silence on past events in life that are no longer occurring”
- ✚ Common denominator in theory: a significant interest in not being confronted with elements of her past and especially with data that are no more relevant for decisions or views (*discrimination element of privacy and data protection*)



Disappearance of forgetfulness

- ✦ A new age of “perfect remembering” allowing ...to “google the Past”
- ✦ Disappearance of forgetfulness : Perpetual “*disappearance of disappearance*”
- ✦ Change of paradigm:Memory as a rule
- ✦ Information is available from here to the eternity..
- ✦ ...allowing analysis in totally different contexts

Multilevel Asymmetry of Memory and Power

- ✚ Asymmetry of memory leads to asymmetry of power
- ✚ Institutional memory: asymmetry refers not only to the gathering/keeping of information by “big controllers” (public authorities, search engines, online social network and/or application providers, advertising networks
- ✚and social memory:Users in WEB 2.0 environment are playing, at least potentially, a “central role in the collection, processing and distribution” of personal data
- ✚ Users generate/produce content on themselves and others (digital traces and shadows)



Impacts of perpetual and perfect remembering

- ✦ *“God forgives and forgets but the Web never does” (V. Reding)*
- ✦ Perfect remembering affects the right /claim of individuals to live and act without leaving permanent digital traces or digital shadows
- ✦ Perfect remembering interferes with the right of individuals right to informational self-determination, the right to control the use of her own information
- ✦ Due to the persistency of information and the absence of forgetting individuals are steadily confronted with their past. No “Forgive and Forget” ?
- ✦ Serious reputation risks and damages
- ✦ Chilling effect: self-censorship and (digital but not only) abstinence from activities



The Draft Data Protection Regulation

- ✦ Seeking for a normative mechanism/tool, capable of forcing data controllers to respect and to fulfil in practice a right to be forgotten.
- ✦ Erasure/Abstention from further dissemination if
 - they are no longer necessary in relation to the purposes for which they were collected or otherwise processed,
 - their processing does not comply with the data protection framework,
 - the data subject withdraws her consent or objects to the processing



A modest re-affirmation of existing rights – Or a new right?

- ✦ The "right to be forgotten" is basically a re-affirmation and strengthening of already existing obligations (no longer than necessary) and rights (right to object, to rectify, erasure, block)
- ✦ Individuals should give no effort or insistence: Controllers are required to carry out erasure without delay
- ✦ Reversion of proof concerning the erasure of data.
- ✦ Interrelation/Synergy with new rules referring to explicit obligations and accountability for data controllers, data portability, and data breach notification in order to ensure more effective protection for data subjects

Right to be forgotten- a complicate right

- ✚ A right to be respected / invoked by whom or against whom: the issue of “who is the data controller” in OSN/ blogosphere/ mirror pages/ cloud computing?
- ✚ A right to be respected by other individuals - the case of household exception – A solution through the “classical means” of the right to personality (image etc.)
- ✚ Restricted foreseeability with reference to future uses/ usefulness of data
- ✚ Rights/Interests/Legal obligations of other persons

Restrictions and conflicts

- ✚ Tension between individual privacy, public interest or other individual rights and interests
- ✚ Right not to be confronted with the past and the requirements for preserving collective/historical memory
- ✚ Tension between forgetfulness and free speech (First Amendment [German criminals v. Wikipedia case (US)/ Spanish DPA v. Google)
- ✚ A new clash between European and American conceptions of the proper balance between privacy and free speech
- ✚ Free speech as excuse of extensive data retention through ONS and search engines?
- ✚ Less open Internet or less profiling/advertising?
- ✚ *“Europeans have a long tradition of declaring abstract privacy rights in theory that they fail to enforce in practice” (Rosen, 2012)*



Technological element

- ✦ Legal instruments are essential, but not self implementing and not sufficient
- ✦ Additional value: All reasonable steps, including technical measures to inform third parties, which are processing such data, that a data subject requests them to erase any links to, or copy or replication of that personal data
- ✦ Responsibility for third party publications that the controller has authorised



Forgetfulness by design

- ✦ Reputation bankruptcy every ten years (Zittrain)
- ✦ Mechanism to delete records that have escaped control: Automated and manual control
- ✦ “Expiration date” (Mayer –Schoenberger), a “self-destruct” mechanism? The “timer” in the hands of individual or the data controller?
- ✦ A mechanism to track and delete all instances of a record or a document?
- ✦ Digital Privacy Rights Management?
- ✦ Deletion Managers: tools that can automate the process of deleting records by identifying and interacting with the parties keeping personal information
 - “Google Dashboard: delete selected records
 - Web 2.0 . Suicide Machine: erase records/profiles from multiple social networking sites
- ✦ Useful but still embryonic proposals and tools



Conclusion: a matter of choice?

- ✦ A social value : just as the umbrella right of informational privacy - constitutes a democratic prerequisite for participation to societal life and public discourse, free from social disgust, disgrace, public or private surveillance
- ✦ A really combined approach: Legal measures need to be backed up by technical measures while these technical measures need strong support from the law in order to be deployed
- ✦ A serving role for technology
- ✦ Forgetfulness by design: a matter of choice and compromises :Choice not to know? Or to know less?To allow less knowing?Choice to refrain from knowing?