Public Consultation

Comments to the guidelines 5/2019 on the criteria of the Right to be Forgotten in the search engines cases under the GDPR

Swedish Trade Federation

Swedish Trade Federation is a trade and retail organization that represent 10,000 small, medium and large companies with approximate 300,000 employees. Here follows our contribution to the consultation.

Summary

The Swedish Trade Federation welcome EDBP's effort to present guidelines on data related issues. It is important that we find a common interpretation among the member states within EU. It is also central that the implementation is harmonized. [1]The right to be forgotten has been hard to interpret and the preamble 65 and 66 are not giving businesses enough information on how to interpret the right. Neither does the actual provision of article 17 GPDR give any clear guidance. [2]

We also want to acknowledge that this paper focuses solely on processing personal data by search engines providers. This is important to stress since not all situations and interpretations would be suitable for other controllers.

General remarks

Retail and search engines are two active performers in the online trade environment. Search engines are often a way to find a certain retailer, product, brand or webpage. The retail sector work very closely with search engines, especially when it comes to advertisement and relationship with customers. The two actors share a lot of data, both non-personal data but also personal data, to be

[1] CJEU have acknowledged that this balancing exercise may result in variations between countries, depending on the weight afforded to each applicable right, including the right to privacy and the right to freedom of expression. **(GOOGLE LLC V CNIL (N 1), PARA 60)**

[2] CJEU noted that the right to erasure must be balanced against other fundamental rights, including freedom of information and matters of public interest. **(GOOGLE SPAIN SL AND GOOGLE INC. (N 4) [10] PARAS 92, 68, 91, 81, 97)**

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able to make the online experience more efficient and suitable for the purpose.

Guidelines that effect the search engine will therefor get an big impact on retailers as well.

General remarks on the guidelines

Art 17 states that the data subject has a right to be forgotten and that the controller need to erase personal data concerning the data subject, if this is brought forward as a request to the controller. In order to be able to show a DPA or the Data Subject itself that this request has been handled by the controller some personal data need to be processed. Delisting requests are therefore not equal with personal data being completely erased. Companies that comply with GDPR need to be able to prove their correctness, buy being able to show proofs. In these cases, it is very important that the data subjects name and request can be registered in a system, if the information later will be needed in the production of evidence. To sum up, the guidance from the EDPB should not restrict the possibility for businesses to collect and process personal data that is necessary to demonstrate compliance.

Another important aspect is that the CJEU emphasised that the right to protection of personal data is not absolute and must be considered in relation to its function in society and be balanced against other fundamental rights, in accordance with the principle of proportionality. [3]

Out-of-date and not updated data

The guidance on erasure because of outdated data needs to be improved and clearer. The examples are not easy to understand in practice. For example; the terminology *obviously inaccurate* could be hard for a business to understand and in many situations, they would probably need more information and data to be able to make an adequate decision. Because of lack of clear definitions, we risk diverge interpretations and adventure the principle of legal security.

ePrivacy and the Right to be Forgotten

The second legal ground to request delisting is when a data subject withdraws consent. Since there are often consent collected according to the ePrivacy directive thru tracking devices, and the GDPR art 6, this could be problematic in practice. The guidance does not explain

[3] (GOOGLE LLC V CNIL (N 1), PARA 60)

how the *right to be forgotten and withdraw of consent* is compatible with the ePrivacy directive. It is not unlikely that a user wants the website to still be efficiently working (functional cookies) even though they want to withdraw their consent for the processing of personal data for a certain purpose and hence want to use the right to be forgotten. The guidance does not answer to situations where consent for processing personal data according to GDPR is withdrawn, and what then will happen to all the data being processed thru the tracking devices.

Withdraw consent
In the last paragraph in the guidance on the chapter concerning withdraw consent, it is stated that if a data subject would withdraw his or her consent on a particular webpage, the original publisher of that web page should inform search engine providers about that. An original publisher could in these situations be a retailer. How far the obligation of informing goes is not defined. If it means that the original publisher must make sure that the search engine actually is taking actions, it is way to far reaching. If it means that information should be given to all search engines it will also mean a heavy administrative burden for the webpage. Does the webpage then have to ask the data subject if they want to be forgotten both on the webpage and at search engines? It is to go too far to make that assumption.

This opinion has been decided by the Head of Public Affairs, Mats Hedenström. The rapporteur has been policy expert and EU lawyer Sofia Stigmar. Jolanda Girzl, policy expert, has also participated in the final proceedings.

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