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NOTE

From: Spanish delegation

To: Delegations

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Subject: Proposal for a Regulation of the European Parliament and of the Council
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)
- Chapters III and VIII

Delegations will find in Annex the position of the Spanish delegation in relation to Article 17 of
General Data Protection Regulation.

The Spanish position regarding art. 17 is determined by the contents of the Ruling of the European Court of Justice in the “Google case”. This Ruling refers to the current legislation, which will be eventually replaced by the draft Regulation, and it might be argued that it has no effects on the current discussions of the draft Regulation, and that the legislative power is not subject to the judiciary. However, the Ruling is crucial because the European Court of Justice not only bases it on secondary law (Directive 95/46/CE), but it also applies and interprets the Charter of Fundamental Rights of the EU (arts. 7 and 8, and partially 11). Due to its privileged position in the architecture of the European legal system, the Charter must determine future legislative action in the European Union. Therefore, the CLEU acted in this case as a “constitutional court”, and this decision is relevant for the elaboration of secondary law.

1. All references to the “right to be forgotten”, in both recitals and articles, should be deleted

(a) The inclusion of a “right to be forgotten” in art. 17 of the Commission Proposal was perfectly coherent with a situation in which it was unclear whether the activities developed by search engines could be considered as data processing and, if so, whether they act as controllers, processors or mere intermediaries.

(b) The Ruling of the Google case has clarified that:

- Search engines process personal data and they do it as controllers (e.g., paragraphs 35-38, 40 and 83 of the ruling)
- Existing data protection law applies to their activity
- In particular, *“Article 12(b) and subparagraph (a) of the first paragraph of Article 14 of Directive 95/46 are to be interpreted as meaning that, in order to comply with the rights laid down in those provisions and in so far as the conditions laid down by those provisions are in fact satisfied, the operator of a search engine is obliged to remove from the list of results displayed following a search made on the basis of a person’s name links to web pages(…)”*

(c) In short, search engines have to apply data protection law like any other controller, without any specificity or particular requirement. The Court does not recognize a new or separate “right to be forgotten”, but only the applicability of the classical rights to erasure and to object

(d) Maintaining the present wording (“right to be forgotten and to erasure”) is not necessary, in as much as there is nothing such as a right to be forgotten differentiated from the right to erasure and to object. It may also lead to confusion and generate false expectations among data subjects, that might assume that there is a new right whose effects might go beyond the right to erasure.

SECOND.- Art. 17.2a should be deleted if it is intended to address issues related to the activity of search engines.

(a) Art. 17.2a implies a shift in focus with regard to the original art. 17.2 contained in the Commission Proposal. The present version requests controllers that have made data public and that are obliged to delete data upon request of a data subject to inform other controllers of the fact that the data subject requests them to delete links to, or copies of, that information. In the Proposal, the wording was different and the purpose was apparently to establish a “right to be forgotten” independent from the right to erasure.

The present version is not applicable to search engines. They don’t “make the personal data public”. This data were made public by the editors of the webs whose contents are processed by the search engine and the search engine simply presents them in a different way. Search engines don’t process information which has not been made public by web masters.

(b) In any case, and if the paragraph pursues other purposes, references to “links” should also be deleted. If the controller that made the information public erases that that information all links to it will become automatically useless.

THIRD.- Web editors are not entitled to participate in the process of assessment of delisting requests nor affected by its results.

(a) The Ruling draws a clear distinction between the processing of data carried out by the original web editor and the processing carried out by the search engine. They are independent processing operations, with different controllers (e.g., paragraph 86) and different purposes and legal basis. More important, their impact on the rights of citizens is also different. In the case of processing carried out by search engines, the impact is particularly serious by virtue of the universal dissemination and accessibility that search engines offer.

(b) The Court specifically recognizes that while “the processing by the publisher of a web page consisting in the publication of information relating to an individual may, in some circumstances, be carried out ‘solely for journalistic purposes’ and thus benefit, by virtue of Article 9 of Directive 95/46, from derogations from the requirements laid down by the directive” that does not appear to be the case with regard to the processing carried out by the operator of a search engine. It may therefore happen that data subjects may successfully exercise their rights against a search engine, but not against the editor of the original web page

(c) According to the Court the rights and interests at stake, apart from those of data subjects, are:

- The legitimate interest (economic interest) of the controller (search engine) does not fully justify the serious interference of the search engine activity on the citizen’s right to data protection.

- The legitimate interest of Internet users to access to the information through the search engine, which is related to article 11 of the Charter, with regard to the “*freedom to receive and impart information and ideas without interference by public authority (...)*”.

(d) The ruling establishes that in general, the right to data protection and the right to privacy overrun the Internet user interest of accessing to information. However, that balance may depend, “*in specific cases, 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.*”

(e) The impact of the exercise of erasure and objection rights and of delisting decisions on the freedom of expression, including freedom of information, is, therefore, very limited, for a number of reasons:

-Delisting of links on the results page of a search engine applies only to cases where the search is made using the name of an individual as search terms.

-Information is not deleted from the indexes of the search engine and may be recovered using other search terms different from a personal name (i.e.: topic, date, author, web page,...).

-Information is not deleted in the original web site.

-Delisting exclusively affects information which is not of interest for the general public.

-In exceptional cases where results containing information of interest for the public is delisted because of reasons related to its special sensitivity for the private life of the affected data subject, the impact is still limited (on account of the accessibility of the information following other search criteria and on the original web site) and the strictly necessary to safeguard the rights of the data subject.

(f) Editors of original web pages play no role within the assessment procedure, also for different reasons:

- The assessment of the different rights and interests corresponds to the search engine in its role as data controller of a processing operation which is different and independent from processing operations carried out by web publishers.

- Participation of web editors in delisting decisions would only be necessary and acceptable if they could adduce that their rights or interests are affected.

- The CJUE limits the content of the assessment required to make decisions to the rights of data subject and the interest of the general public in having access to the information via the search engine. Web editors are not taken into consideration.

- There is nothing such as a “right to be indexed” or a “legitimate interest” in being indexed. Search engines are not bound to editors by contractual conditions. Search engines collect the information, and present it to their users in response to queries, according to their own criteria, priorities and policies. Editors cannot request search engines to be indexed or that results concerning information they have uploaded is displayed in a specific manner or position. As far as we know, there are no precedents of legal actions of editors requesting compensation for not being indexed or for being treated in an “unfair” way by search engines.

(g) Consequently, the participation of editors in the process would not be supported by the defense of a right or a legitimate interest. However, it cannot be excluded that, exceptionally and in specific cases, search engines may be obliged to consult editors in order to obtain additional information that may be necessary in order to properly carry out the assessment of the circumstances of the case.

(h) Additionally, making it compulsory for search engines to contact editors as a rule in the assessment of all requests they receive would imply an excessive burden and could unnecessarily slow down the procedure.

FOURTH.- The establishment of special mechanisms aimed at ensuring the proper implementation of a “right to be forgotten” is not necessary and might be counterproductive.

(a) The so called “right to be forgotten” is just the exercise of the rights to erasure and to object vis à vis search engines. As such, the procedures to assess the circumstances of each request and the supervision of the conduct of the controllers should be the same that are generally used.

(b) As web editors cannot adduce any right nor any legitimate interest in the assessment of the rights and interests at stake, there is no reason to devise mechanisms that may allow for those rights to be taken into consideration.

(c) The implementation of these rights may be monitored by DPAs in the same way that they supervise the activity of any data controller. This supervision is not necessarily the consequence of a complaint and may be exercised in procedures started “ex officio” by DPAs.