

EU PROPOSALS ON THE RIGHT TO BE FORGOTTEN

The following document contains (I.) the relevant provisions from the European Commission proposal; and (II.) the changes proposed in the European Parliament LIBE Committee draft report (“Albrecht revisions”) versus the Commission proposal.

I. Commission Proposal, 25 January 2012

Article 17 Right to be forgotten and to erasure

1. The data subject shall have the right to obtain from the controller the erasure of personal data relating to them and the abstention from further dissemination of such data, especially in relation to personal data which are made available by the data subject while he or she was a child, where one of the following grounds applies:

- (a) the data are no longer necessary in relation to the purposes for which they were collected or otherwise processed;
- (b) the data subject withdraws consent on which the processing is based according to point (a) of Article 6(1), or when the storage period consented to has expired, and where there is no other legal ground for the processing of the data;
- (c) the data subject objects to the processing of personal data pursuant to Article 19;
- (d) the processing of the data does not comply with this Regulation for other reasons.

2. Where the controller referred to in paragraph 1 has made the personal data public, it shall take all reasonable steps, including technical measures, in relation to data for the publication of which the controller is responsible, 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. Where the controller has authorised a third party publication of personal data, the controller shall be considered responsible for that publication.

3. The controller shall carry out the erasure without delay, except to the extent that the retention of the personal data is necessary:

- (a) for exercising the right of freedom of expression in accordance with Article 80;
- (b) for reasons of public interest in the area of public health in accordance with Article 81;
- (c) for historical, statistical and scientific research purposes in accordance with Article 83;
- (d) for compliance with a legal obligation to retain the personal data by Union or Member State law to which the controller is subject; Member State laws shall meet an objective of public interest, respect the essence of the right to the protection of personal data and be proportionate to the legitimate aim pursued;
- (e) in the cases referred to in paragraph 4.

4. Instead of erasure, the controller shall restrict processing of personal data where:

- (a) their accuracy is contested by the data subject, for a period enabling the controller to verify the accuracy of the data;
- (b) the controller no longer needs the personal data for the accomplishment of its task but they have to be maintained for purposes of proof;
- (c) the processing is unlawful and the data subject opposes their erasure and requests the restriction of their use instead;
- (d) the data subject requests to transmit the personal data into another automated processing system in accordance with Article 18(2).

5. Personal data referred to in paragraph 4 may, with the exception of storage, only be processed for purposes of proof, or with the data subject's consent, or for the protection of the rights of another natural or legal person or for an objective of public interest.

6. Where processing of personal data is restricted pursuant to paragraph 4, the controller shall inform the data subject before lifting the restriction on processing.

7. The controller shall implement mechanisms to ensure that the time limits established for the erasure of

personal data and/or for a periodic review of the need for the storage of the data are observed.

8. Where the erasure is carried out, the controller shall not otherwise process such personal data.

9. The Commission shall be empowered to adopt delegated acts in accordance with Article 86 for the purpose of further specifying:

- (a) the criteria and requirements for the application of paragraph 1 for specific sectors and in specific data processing situations;
- (b) the conditions for deleting links, copies or replications of personal data from publicly available communication services as referred to in paragraph 2;
- (c) the criteria and conditions for restricting the processing of personal data referred to in paragraph 4.

Recitals 53 and 54

(53) Any person should have the right to have personal data concerning them rectified and a 'right to be forgotten' where the retention of such data is not in compliance with this Regulation. In particular, data subjects should have the right that their personal data are erased and no longer processed, where the data are no longer necessary in relation to the purposes for which the data are collected or otherwise processed, where data subjects have withdrawn their consent for processing or where they object to the processing of personal data concerning them or where the processing of their personal data otherwise does not comply with this Regulation. This right is particularly relevant, when the data subject has given their consent as a child, when not being fully aware of the risks involved by the processing, and later wants to remove such personal data especially on the Internet. However, the further retention of the data should be allowed where it is necessary for historical, statistical and scientific research purposes, for reasons of public interest in the area of public health, for exercising the right of freedom of expression, when required by law or where there is a reason to restrict the processing of the data instead of erasing them.

(54) To strengthen the 'right to be forgotten' in the online environment, the right to erasure should also be extended in such a way that a controller who has made the personal data public should be obliged to inform third parties which are processing such data that a data subject requests them to erase any links to, or copies or replications of that personal data. To ensure this information, the controller should take all reasonable steps, including technical measures, in relation to data for the publication of which the controller is responsible. In relation to a third party publication of personal data, the controller should be considered responsible for the publication, where the controller has authorised the publication by the third party.

II. Redline of the LIBE draft report ("Albrecht revisions"), 16 January 2013, versus the Commission proposal * **Red indicates deletions**, **blue indicates additions**, *italics are used for justifications*

Article 17 Right to be forgotten and to erasure

1. The data subject shall have the right to obtain from the controller the erasure of personal data relating to them and the abstention from further dissemination of such data, **especially in relation to personal data which are made available by the data subject while he or she was a child**, where one of the following grounds applies:

[Justification: The right to erasure applies to all data subjects equally. The deleted text could have been read to imply that for adults there are limitations to this right.]

- (a) the data are no longer necessary in relation to the purposes for which they were collected or otherwise processed;
- (b) the data subject withdraws consent on which the processing is based according to point (a) of Article 6(1), or when the storage period consented to has expired, and where there is no other legal ground for the processing of the data;
- (c) the data subject objects to the processing of personal data pursuant to Article 19;
- (d) the processing of the data does not comply with this Regulation for other reasons.

2. Where the controller referred to in paragraph 1 has **transferred or** made the personal data public **without a justification based on Article 6(1)**, **it shall take all reasonable steps, including technical measures, in relation to data for the publication of which the controller is responsible, 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. Where the controller has authorised a third party publication of personal data, the controller shall be considered responsible for that publication. It shall take all necessary steps to have the data erased, without prejudice to Article 77.~~

[Justification: The right to erasure and the right to rectification remain important for data subjects, as more and more information are disclosed which can have significant impacts. However, if a publication of personal data took place based on legal grounds as referred to in Article 6(1), a "right to be forgotten" is neither realistic nor legitimate. See related amendment to Article 17(2a) and Recital 54. This does not imply that third parties can further process published personal data if there is no legal ground for them to do so.]

2a. (New) Any measures for erasure of published personal data shall respect the right to freedom of expression, as referred to in Article 80.

[Justification: It should be made clear that the right to be forgotten needs to be balanced with the right to freedom of expression. See related amendment to Article 17(2), Recital 54.]

3. The controller shall carry out the erasure without delay, except to the extent that the retention of the personal data is necessary:

- (a) for exercising the right of freedom of expression in accordance with Article 80;
- (b) for reasons of public interest in the area of public health in accordance with Article 81;
- (c) for historical, statistical and scientific research purposes in accordance with Article 83;
- (d) for compliance with a legal obligation to retain the personal data by Union or Member State law to which the controller is subject; Member State laws shall meet an objective of public interest, respect the essence of the right to the protection of personal data and be proportionate to the legitimate aim pursued;
- (e) in the cases referred to in paragraph 4.

4. Instead of erasure, the controller shall restrict processing of personal data in such a way that it is not subject to the normal data access and processing operations of the controller and can not be changed anymore, where:

- (a) their accuracy is contested by the data subject, for a period enabling the controller to verify the accuracy of the data;
- (b) the controller no longer needs the personal data for the accomplishment of its task but they have to be maintained for purposes of proof;
- (c) the processing is unlawful and the data subject opposes their erasure and requests the restriction of their use instead;
- (d) the data subject requests to transmit the personal data into another automated processing system in accordance with Article ~~18(2)~~ 15(2) and 2a.

[Justification: Consequential amendment based on the merging of Articles 15 and 18.]

5. Personal data referred to in paragraph 4 may, with the exception of storage, only be processed for purposes of proof, or with the data subject's consent, or for the protection of the rights of another natural or legal person or for ~~an objective of public interest~~ compliance with a legal obligation to process the personal data by the Union or national law to which the controller is subject.

[Justification: Any public interest must be laid down in law in order to create a legal obligation for the data controller to outweigh the right to erasure of the data subject.]

6. Where processing of personal data is restricted pursuant to paragraph 4, the controller shall inform the data subject before lifting the restriction on processing.

7. The controller shall implement mechanisms to ensure that the time limits established for the erasure of personal data and/or for a periodic review of the need for the storage of the data are observed.

8. Where the erasure is carried out, the controller shall not otherwise process such personal data.

9. The Commission shall be empowered to adopt, after requesting an opinion of the European Data Protection Board, delegated acts in accordance with Article 86 for the purpose of further specifying:

[Justification: Consequential amendment based on the new and stricter "right to be forgotten" in Article

17(2).]

- (a) the criteria and requirements for the application of paragraph 1 for specific sectors and in specific data processing situations;
- (b) the conditions for deleting ~~links, copies or replications of~~ personal data from publicly available communication services as referred to in paragraph 2;
- (c) the criteria and conditions for restricting the processing of personal data referred to in paragraph 4.

[Justification: In the case of published data, the original data controller shall only be obliged to inform those third parties which it can reasonably expect to be further processing the data and also inform the data subject about them. This also allows for the data subject to contact them directly and request from them to inform further third parties and it also gives the data subject a fuller understanding of the spreading of his/her personal data. It is important to maintain the inclusion of third parties that only process data without publishing it, in order to also cover companies that "scrape" personal data from public sources for further internal processing, such as credit rating, direct marketing, etc. It should be made clear that the right to be forgotten needs to be balanced with the right to freedom of expression. The exceptions in paragraph 3 are only a duplication of the general limitations in Article 21 and do not add any value here.]

Recitals 53 and 54

(53) Any person should have the right to have personal data concerning them rectified and a 'right to erasure and be forgotten' where the retention of such data is not in compliance with this Regulation. In particular, data subjects should have the right that their personal data are erased and no longer processed, where the data are no longer necessary in relation to the purposes for which the data are collected or otherwise processed, where data subjects have withdrawn their consent for processing or where they object to the processing of personal data concerning them or where the processing of their personal data otherwise does not comply with this Regulation. ~~This right is particularly relevant, when the data subject has given their consent as a child, when not being fully aware of the risks involved by the processing, and later wants to remove such personal data especially on the Internet.~~ However, the further retention of the data should be allowed where it is necessary for historical, statistical and scientific research purposes, for reasons of public interest in the area of public health, for exercising the right of freedom of expression, when required by law or where there is a reason to restrict the processing of the data instead of erasing them.

[Justification: As the rights being accorded to all citizens in this recital are comprehensive, there appears to be little specific value to demand "particular" attention for children. The text proposed by the Commission could have the effect of implying a less than comprehensive protection for adults. Furthermore, there are already special requirements for the validity of consent from children to the processing of their data. In this regard, the deleted text would be a mere duplication. See related Recital 29 and Article 8(1).]

(54) To strengthen the 'right to erasure and be forgotten' in the online environment, the right to erasure should also be extended in such a way that a controller who has made the personal data public without legal justification should be obliged to ~~inform third parties which are processing such data that a data subject requests them to erase any links to, or copies or replications of that personal data. To ensure this information, the controller should take all reasonable steps, including technical measures, in relation to data for the publication of which the controller is responsible. In relation to a third party publication of personal data, the controller should be considered responsible for the publication, where the controller has authorised the publication by the third party~~ take all necessary steps to have the data erased, but without prejudice to the right of the data subject to claim compensation.

[Justification: The right to erasure and the right to rectification remain important for data subjects, as more and more information is disclosed which can have a significant impact. However, if a publication of personal data took place based on legal grounds, as referred to in Article 6(1) of this Regulation, a "right to be forgotten" is neither realistic nor legitimate. See related amendments to Articles 17(2) and 17(2a). This does not imply that third parties can further process published personal data if there is no legal ground for them to do so.]
