

THE RIGHT TO BE FORGOTTEN AND ITS POSSIBLE IMPLICATIONS FOR IRISH DATA PROTECTION LAW

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Introduction

This blogpost will discuss the development of the Right to be Forgotten and the possible changes it could bring to existing Irish data protection law. It will look at the developments of this right in relation to its recognition by the ECJ in the seminal case of *Google Spain SL and another v Agencia Española de Protección de Datos (AEPD) and another*,¹ and furthermore will analyse its existence under Article 17 of the proposed General Data Protection Regulation [hereinafter GDPR],² which is planned to be brought into force in early 2016. These developments will subsequently be examined so as to better understand the way in which they might affect existing data protection law in Ireland. I intend also to analyse the case of *McKeogh v John Doe*,³ a case decided before either of the recent developments occurred. The decision of Peart J in this case will be critically analysed to assess whether the recent European developments would mandate a different decision. I will conclude by illustrating how *McKeogh* might offer a higher or lower level of data protection to individuals than *Google Spain* or the GDPR. This will depend on how the judgment is interpreted and applied in subsequent cases. The statutory right to be forgotten under Article 17 of the GDPR is to be welcomed as it will obviate much of the uncertainty surrounding issues of personal privacy and proportionality within Irish data protection law following *McKeogh*.

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¹ Case C-131/12, [2014] QB 1022.

² Article 17, Commission Proposal for a Regulation of the European Parliament and 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), 25 January 2012.

³ [2012] IEHC 95.

I. ECJ Recognition of the Right to be Forgotten

In 2010, Mario Costeja Gonzales, a Spanish citizen, lodged a complaint to the national data protection authority, the Agencia Española de Protección de Datos [hereinafter the AEPD.] A Google search of his name led to a newspaper article that provided the auction notice of a former property of his. This property had had to be auctioned to pay off social security debts. He argued that this information was now irrelevant as the auction proceedings had been settled 12 years previously. Gonzales requested that the newspaper remove the page relating to him, and that Google remove this data from search results of his name. When brought before the Spanish Court it was referred to the ECJ.

The court held, amongst other things, that in certain circumstances, a right existed to ask for the removal of links containing personal information from search engines. This right has come to be known as the right to be forgotten. Whilst the ECJ recognized this right, the court stressed that it was not absolute. Information would only be removed if it was inaccurate, inadequate, irrelevant or excessive, and it had to be balanced with the right to freedom of expression and would be evaluated on a case by case basis.⁴ Accordingly, The Working Party has provided a list of de-listing criteria whilst re-affirming that this list is not exhaustive and no single criterion is determinative.⁵ In the immediate case the ECJ ruled in favour of Mr Gonzales. His data protection rights prevailed over the economic interests of the search engine to provide information.⁶

II. General Data Protection Regulation

In *Google Spain*, the ECJ based their decision on the existing right to erasure under the 1995 Data Protection Directive, which permitted, “as appropriate the rectification, erasure or blocking of data the processing of which does not comply with the provisions of this Directive, in particular because of the incomplete or inaccurate nature of the data.”⁷ It has been argued that as the internet was only beginning in 1995, 95/46/EC did not anticipate the

⁴ [2014] QB 1022.

⁵ Article 29 Data Protection Working Party, “Guidelines on the implementation of the Court of Justice of the European Union Judgment on “Google Spain and Inc. v Agencia Española de Protección de datos (AEPD) and Mario Costeja González” C-131/12” 14/EN WP 225, at 12.

⁶ [2014] QB 1022.

⁷ EU Directive 95/46/EC Article 12 (b).

exponential development of the Internet over the following twenty years, particularly in relation to the indefinite retention of personal data online.⁸ This unanticipated development necessitates the comprehensive upgrading and modernisation of European data protection law. This is the objective of the GDPR, and within this, a number of changes to the right to be forgotten are proposed.

The right to be forgotten is no longer implicit in the right to erasure but is a statutory right in of itself. It places a number of positive obligations on the data controllers, whereas under the previous directive, the obligation was on the Member States. For example, data controllers are to take “all reasonable steps” to ensure that all third party publishers of data are aware that the data subject has requested the erasure of their personal data. If a data controller authorises a third party publication, even inadvertently through their failure to inform third parties of the requested erasure of information, they shall be held responsible.⁹ Furthermore, the GDPR establishes clear penalties for failure to adhere to these obligations, with a maximum penalty for an enterprise of 2% of global turnover.¹⁰ The right to be forgotten under the new directive is also commended as being more capable of striking a balance with competing rights and interests. This is due to the fact that the Directive states that the principle of proportionality shall be applied between the right to erasure and the right to freedom of expression, the public interest etc. In contrast, the 1995 Directive was “silent implying that data protection could rank above freedom of the media”.¹¹

III. Changes to Irish Data Protection Law

The Data Protection Act 1998 is the principle Irish statute dealing with data protection, the implementation of the 1995 Directive achieved through the Data Protection (Amendment) Act 2003. The right to erasure is affirmed under Section 6 of the consolidated Acts. Unlike the 1995 Directive, the GDPR once effective is binding on all member states and does not require

⁸ Simon Weschler, “The Right to Remember: The European Convention of Human Rights and the Right to be Forgotten” (2015) 49 *Columbia Journal of Law and Social Problems* 135, at 136.

⁹ Article 17(3) GDPR.

¹⁰ Article 69(6) GDPR.

¹¹ Europa Factsheet on the Right to be Forgotten Ruling < http://ec.europa.eu/justice/data-protection/files/factsheets/factsheet_data_protection_en.pdf > (visited 6 March 2016).

statutory implementation for it to have domestic effect.¹² This is expected to happen in early 2016.

The GDPR has been criticized for placing its enforcement largely in the hands of the data controllers, i.e. the search engines. Whilst a dissatisfied data subject can appeal the data controller's decision to a Court, it is difficult to contest Google's denial of requests to take down links. This difficulty is compounded by the fact that the process of evaluating deletion requests that Google uses is unknown to the public.¹³ It is submitted that this criticism is overstated. The GDPR provides the right to lodge a complaint with a supervisory authority.¹⁴ It also provides the right to a judicial remedy against a supervisory authority.¹⁵ In this sense, domestic data protection law will be largely unchanged by the commencement of the new regulation as the same remedial action will be available as before.¹⁶

The main change the GDPR will bring to Irish data protection law is in relation to the right to be forgotten. This right will now be textually explicit under Article 17, which clearly states that "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".¹⁷ Under current legislation, the right is only implicit in the right to erasure as established in *Google Spain*.

A criticism levelled at the right to be forgotten is that there is a degree of vagueness attached to it. Existing ECJ jurisprudence does little to clarify what constitutes inadequate, inaccurate, irrelevant or excessive.¹⁸ It is submitted that this is a more compelling criticism of the right to be forgotten than the enforcement argument. However, introduction of the GDPR will provide a clear statutory basis for this right- article 17.

A. Case Law

No case has yet arisen where the Irish courts have deemed it necessary to affirm the right to be forgotten in Ireland. As previously mentioned, the GDPR is set to be brought into force in early 2016, yet it will not apply for another two years following this.¹⁹ This means the right to be forgotten

¹² Article 91 GDPR.

¹³ Weschler, note 8, at 138.

¹⁴ Article 73 GDPR.

¹⁵ Article 74 GDPR.

¹⁶ See Data Protection (Amendment) Act, 2003, s (11).

¹⁷ Article 17.1 GDPR.

¹⁸ Weschler, note 8, 143.

¹⁹ Article 91 GDPR.

could still possibly be affirmed on the basis of the ECJ ruling as opposed to the new regulation. However, it is contended that the case of *McKeogh v John Doe*²⁰ could suggest a difference in opinion between the High Court and the ECJ towards the right to be forgotten.

In *McKeogh*, the plaintiff was mistakenly identified by the first defendant (user name Daithii4u) as another person who did not pay his taxi fare. This fare evasion was recorded by the taxi driver, uploaded to YouTube and various social media platforms, and the resulting court proceedings were reported by a number of Irish newspapers who in turn also named the Plaintiff. Peart J heard and accepted the ex parte application for the removal of the original video footage from the Internet. The issue for him to decide on was whether a similar Order be brought against the newspapers reporting on the Court proceedings.

The plaintiff submitted that he enjoyed rights to privacy under both the Constitution and the ECHR, as well as the Right to an Effective Remedy. The reporting of these proceedings infringed these rights. His identification did not serve the public interest as he was a private citizen. Peart J denied the relief sought, stating that the Supreme Court had previously affirmed that the administration of justice took priority over the right to anonymity in court proceedings as an extension of the right to privacy. Peart J's judgement is of relevance to the right to be forgotten as he stated his agreement with McCracken J in *Re Ansbacher (Cayman) Ltd and others*,²¹ where McCracken J said, "I have no hesitation whatever in saying that the right to have justice administered in public far exceeds any right to privacy, confidentiality or a good name."²²

In relation to the right to be forgotten, this judgement leaves us with more questions than answers. In some ways, it is arguably more protective of data subjects than the *Google Spain* decision or the proposed GDPR. 95% of the original footage was removed from the various online platforms it was available on.²³ All of these platforms could be held as "data controllers" by EU standards. Yet under these standards, erasure does not constitute removal of the original material from the Internet, but removal of this material from the search results of a data subject's name. This is the exact argument Aidan Forde makes against the right to be forgotten in its current form. Decisions following *Google Spain* will be at best a limited tool in making information more difficult to access. They will not "wipe the

²⁰ [2012] IEHC 95.

²¹ [2002] IEHC 27, [2002] 2 IR 517.

²² *Ibid.*, 532.

²³ [2012] IEHC 95, at [3].

information from the virtual slate.”²⁴ A preferable and less onerous measure would be to delete the original web content.²⁵ This measure is largely what was adopted by the High Court in this instance.

In contrast, this judgement could easily lead to less protection for plaintiffs depending on the circumstances. It affirms that a hierarchy of rights exist and that the administration of justice in public is valued higher than anonymity in court proceedings. Neither the Constitution nor the ECHR makes any such affirmation. Taken at face value, this claim also seems irreconcilable with the GDPR. Where could the proportionality principle fit in if the court simply places a higher value on the public administration of justice than the right to privacy?

Whether this judgement is taken as protecting plaintiffs or not, neither perception is compatible with either the right to be forgotten as established in *Google Spain*, or the right to be forgotten under Article 17 of the GDPR.

Conclusion

This article has discussed the right to be forgotten through its recognition by the ECJ in *Google Spain* and its proposed statutory establishment under Article 17 of the GDPR. It has been submitted that this right will be the principal substantive change to existing Irish data protection law when it is brought into force and replaces the 1995 Data Protection Directive. While no case has arisen to test the right to be forgotten in the Irish courts, the earlier judgement of *McKeogh v John Doe* would suggest that the Irish courts current stance on the right to be forgotten is vastly different to the proposed right. It could also produce widely disparate results depending on individual judicial interpretation. It is submitted that application of the GDPR will produce a greater degree of certainty in Irish data protection law. This certainty is preferable to the existing environment which could produce polarising results depending on individual judicial opinions.

²⁴ Aidan Forde, “Implications of the Right To Be Forgotten” (2015) 18 *Tulane Journal of Technology and Intellectual Property* 83, at 107.

²⁵ *Ibid.*, at 110.