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Our ref: 14974

03 October 2014

**GOVERNMENT RESPONSE TO THE HOUSE OF LORDS EUROPEAN UNION
COMMITTEE'S ENHANCED SCRUTINY OF THE EUROPEAN COURT OF
JUSTICE JUDGMENT IN THE GOOGLE SPAIN CASE AND ITS IMPLICATIONS
FOR THE ONGOING NEGOTIATIONS FOR A NEW DATA PROTECTION
FRAMEWORK**

Thank you for your report of the 30 July 2014 which sets out the conclusions and recommendations of the European Union Committee regarding the recent European Court of Justice judgment in the Google Spain case. The Government welcomes the enhanced scrutiny and would like to respond to each recommendation. The Committee's conclusions and recommendations are set out in bold text below, followed by the response of the Government on each point. I would also like to take this opportunity to update you on the latest negotiations on this matter in the Council of the EU.

- (i) **It is clear to us that neither the Directive, nor the Court's interpretation of the Directive, reflects the current state of communications service provisions, where global access to detailed personal information has become part of the way of life.**

It is widely recognised that EU data protection rules need to be updated to reflect the unprecedented technological change that has taken place in the intervening years since the existing Directive came into force. It is also clear that these changes and the new ways in which information is shared present real challenges in interpreting existing data protection rules. This is one of the key drivers behind why the European Commission brought forward proposals in 2012 for a new data protection framework.

The European Court of Justice judgment in the case of Google Spain focused on a narrow set of circumstances and did not consider the broader implications of its findings, such as how search engines would comply with the full suite of data protection obligations, not just the so called right to be forgotten provision. While it rightly should be one of the factors we consider

when negotiating and drafting new legislation in this area, it is also clear that it is open to the Council of the EU to arrive at a different decision and a different construction of the rules if it sees fit to do so.

The Government position in these negotiations is to deliver a proportionate framework that strikes the right balance between the protection of personal data and creating the right conditions for innovation and economic growth. In the digital age, both risks and rewards of sharing personal data are magnified and we need to make sure we strengthen privacy rights while providing for the free flow of data which contributes considerable economic and societal benefits. Therefore, we do not want to see obligations that would impose disproportionate or impractical burdens on business, particularly where they are unlikely to deliver real benefits to data subjects.

- (ii) **It is no longer reasonable or even possible for the right to privacy to allow data subjects a right to remove links to data which are accurate and lawfully available.**

It is clear that individuals do have the right to request deletion of their personal data where it is irrelevant, outdated or inappropriate. The judgment does not change that right but rather extends that obligation to search engines. Nevertheless, it is also clear from the existing legislation that there will be occasions when there will be a public interest in retaining that information. The judgment, in extending the definition of data controllers, presents some real challenges for search engines not least in deciding where the balance lies between privacy and the other competing rights, such as freedom of expression.

Therefore, I welcome the work currently being undertaken by the Article 29 Committee (the Committee of European Data Protection supervisors) to develop guidelines to support search engines in complying with the judgment.

- (iii) **We agree with the Government that the ‘right to be forgotten’ as it is in the Commission’s proposal, and a fortiori as proposed to be amended by the Parliament, must go. It is misguided in principle and unworkable in practice.**

The Government agrees that the current formulation of the ‘right to be forgotten’ provision in the proposed data protection Regulation (as drafted by the Commission) is poorly thought through and unworkable in practice. As I said in my evidence to the Committee, we need to be mindful of setting unrealistic expectations that cannot be delivered in practice. Data is disseminated across the internet at the touch of a button and we are working with other Member States in the Council to negotiate for a more proportionate and balanced framework that does not place disproportionate or impractical burdens on business.

- (iv) **We recommend that the Government should ensure that the definition of “data controller” in the new Regulation is amended to clarify that the term does not include ordinary users of search engines.**

The Government completely agrees that the definition of a ‘data controller’ in the proposed Regulation needs to be clarified to make sure that the term does not include ordinary users of search engines. It would be wholly unworkable, if not impossible, to expect ordinary users of search engines to comply with all the obligations that data controllers must meet in the proposed Regulation. We are clear that this is not the intention of either the European Commission or the desire of other member states in the Council. Nevertheless, we will negotiate to make sure that ordinary users are not caught by the proposed Regulation.

- (v) **There are strong arguments for saying that search engines should not be classed as data controllers. We find them compelling.**

The legal conclusion in the judgment that Google is a data controller was not particularly surprising, at least in isolation. Controllers bear heavier burdens under the Directive than processors. That is because they generally decide whether to process personal data in the first place and then how to do so.

However, it has always been clear that it is not a precondition to being a controller that a person must have sole responsibility for deciding on the purposes and means of the processing. They can do so alone and they can do so jointly with others.

The fact that search engines are in one sense simply an intermediary for searches initiated by others does not preclude them from being controllers. However, even if we conclude that search engines are data controllers we need to be clear about what are the practical obligations in the Directive. I consider that providing rights that are not deliverable in practice will only serve to weaken data protections standards and detract from the robust application of other rights and obligations in the framework of the Directive.

It is also clear that the Google judgment focused on a narrow set of facts in arriving at its findings and did not consider the broader implications of the judgment. For example, the Court did not address the important issue of the feasibility of Google (and search engines more generally) complying with the other obligations under the Directive. There are certain provisions, such as information to the data subject and rights of access, where it will be at best disproportionately burdensome, and at worst impossible with which to comply. While the Google judgment is one factor for consideration in drafting the future legislation, the Government is also clear that it is entirely open to the Council of the EU to arrive at a different decision which better reflects the realities of the digital age.

- (vi) **We further recommend that the Government should preserve in their stated intention of ensuring that the Regulation no longer includes any provision on the lines of the Commission's 'right to be forgotten' or the European Parliament's 'right to erasure'.**

The Government does not support the 'right to be forgotten' as proposed by the European Commission. It is not technologically possible to remove all traces of data uploaded on the internet. While the proposed right does not significantly depart from the existing rights and obligations under the current Directive, the title risks giving rise to unrealistic expectations for data subjects that they have an unfettered right to have their personal data deleted which does not exist in practice. Furthermore, a new obligation to inform other controllers to whom the data has been disclosed may be impractical and costly.

However, despite our reservations about the title and some of the substance of this provision, it is clear that the majority of Member States are in favour of this measure, albeit they want to see certain revisions to the text that will make the rights and obligations more practical. It is also a red line for the Commission who have been particularly vocal about its inclusion.

Therefore, we will continue to make representations at the technical working group level as to why the Commission draft proposals are impractical but as a contingency measure we will work with others to negotiate for a text that is more practical. For example, the obligation to inform other controllers who the data has been disclosed to of a request for deletion only requires that 'reasonable steps' are taken to comply. We consider that the burden of this obligation could be further reduced by only applying to 'known controllers' as has been suggested by other Member State delegations during negotiations on this measure. In the digital age where information is disseminated widely at the touch of a button we need to make sure that obligations are realistic and we consider this additional wording complements the 'reasonable steps' threshold in relation to this obligation.

Latest negotiations in the Council

Since the European Court of Justice arrived at its judgment in the Google Spain case earlier this year, the issue and the linked question of how this should influence the current negotiations has been discussed at the technical working group in the Council of the EU.

The Italian Presidency in its proposals to revise the right to be forgotten in the proposed data protection Regulation has sought to import the findings of the Google Spain judgment. However, there has been strong resistance from the majority of member states in taking such an approach, not least because there is an acknowledgment that the findings of the Court did not consider the wider implications of the judgment. It has been discussed since the beginning of September to what extent the judgment can be incorporated into the legislation. Discussion on the topic has included the question of balancing privacy rights with freedom of expression. More discussion on the judgment is still needed at a technical level as at this stage there is no foundation for an agreement on the table.

A number of member states questioned how Google (and search engines more generally) could realistically comply with all the obligations that are imposed on data controllers within the Directive. The judgment found that, as a general rule, the balance should be weighted in favour of the privacy of the individual, but many Member States have again questioned whether we should simply import this finding into the proposed Regulation or whether we should look at this balancing exercise afresh.

The Government position continues to be that we need to strike the right balance between the protection of personal data and creating the right conditions for innovation and economic growth. In this regard, we do not want to see legislation that imposes disproportionate burdens. We will work with other Member States to make sure that if this provision is to be included in the final text we will make sure any obligations are proportionate and achievable.

I am copying this letter to Sir William Cash MP, Chairman of the European Scrutiny Committee; Les Saunders (Cabinet Office); and Patricia Zimmermann, Departmental Scrutiny Co-ordinator.

*As in,
Yours sincerely*

SIMON HUGHES

