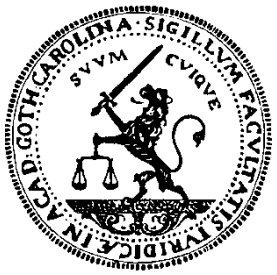

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Privacy is the New Black
A Study on the Right to be Forgotten in the EU

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Contents

Abstract

Digitalization has changed society in many ways. One of the results of the development of the online world is that people have formed the habit of sharing all sorts of information about themselves and others to everyone around them at all times. People have adapted to a society where they feel a compulsion to be repeatedly connected and represented on digital networks. However, individuals have started to grasp the fact that the Internet does not only have positive effects. The 'eternal memory' of the Internet has instead become a problem. As a result, people are now trying to regain the privacy they allowed the Internet to steal from them and individuals require removal of information they no longer want to be in the public's appreciation.

The legislators of the European Union (EU) have presented a proposal for a comprehensive reform of the 1995 data protection rules. The reformed rules are, amongst other things, trying to meet society's need to reclaim the function of forgetting. On 13 May 2014 the Court of Justice of the European Union (CJEU) ruled in Case C-131/12 *Google Spain v. AEPD and Mario Costeja González*. The judgement is of great significance for the EU data protection law and fundamental rights law within the EU. The CJEU recognized the 'Right to be Forgotten' and a right for individuals to remove links generated by Internet search engine operators. However, the Court's judgement left several important questions open and this resulted in a lot of academic commentary and a wide range of reactions. This thesis critically examines the current and upcoming legislation, case law and academic commentary concerning the 'Right to be Forgotten' and data privacy rights. It is established that the online privacy rights threatens other fundamental rights such as the freedom of expression. However, it is also found that regaining the function of forgetting is of equal importance. Hence, fundamental rights have to be weighed against each other and a balance between the fundamental rights present on the web must be found.

Sammanfattning

Digitaliseringen har ändrat samhället på många sätt. Idag delar människor med sig av all sorts information om sig själva och andra under nästan alla timmar på dygnet. Människor har anpassat sig till ett samhälle där de känner sig manade att hela tiden vara uppkopplade och representerade på internet. På senare tid har dock människor börjat inse att spridandet av information på internet kan ge oanade effekter. Internets ”eviga minnet” har resulterat i att information är för evigt tillgänglig och sökmotorer hjälper människor att snabbt och enkelt hitta information från hela världen. Som en reaktion på detta har många börjat kräva en rätt att få radera information som de inte längre vill att allmänheten ska ha tillgång till och människor vill nu ha tillbaka det privatliv som de lät internet stjäla från dem.

Europeiska Unionens (EU) lagstiftare har presenterat ett förslag till en omfattande reform av 1995 års lagstiftning avseende datasäkerhet och skydd för personuppgifter. Med den föreslagna lagtexten vill EUs lagstiftare bland annat uppfylla samhällets krav på att återfå möjligheten att bli bortglömd. I maj år 2014 avgjorde Europeiska Unionens domstol målet C-131/12 *Google Spain v. AEPD and Mario Costeja González*. Målet är av stor betydelse för EU lagstiftningen angående datasäkerhet och grundläggande rättigheter på internet. I målet kom domstolen fram till att medborgare i den Europeiska gemenskapen har en ”rätt att bli bortglömd” och en rätt att få länkar kopplade till sin person raderade från sökresultat på sökmotorer. Dessvärre lämnade domstolen många frågor öppna och det har resulterat i en mängd reaktioner och diskussioner angående prioriteringen av grundläggande rättigheter på internet. Den här uppsatsen är en kritisk granskning av nuvarande och kommande lagstiftning, praxis och doktrin angående ”rätten att bli bortglömd” och rätten till privatliv på internet. Det framgår av granskningen att den nya rätten att radera information på internet hotar andra grundläggande rättigheter, som till exempel yttrandefriheten. Många anser däremot att ”rätten att bli bortglömd” är minst lika viktig att skydda i och med internets nya påverkan på samhället. Därmed måste grundläggande rättigheter nu vägas emot varandra och lagstiftarna måste hitta en balans mellan de grundläggande rättigheterna som finns representerade på internet.

Foreword

I believe everyone regrets something. I certainly regret things I have said and done. I also regret some of the posts I have made on the Internet and I disapprove of certain data others have posted about me. Unfortunately, people's feeble remembering skills are no longer what they used to be. I have experienced the consequences of Internet's eternal and sometimes harmful memory and that is why I wanted to examine Internet's influence on humans in today's society and the legal attempts to take back people's privacy and chances of being forgotten.

Tora Krüll
Stockholm, May 2015

Abbreviations

EU	European Union
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
CJEU	Court of Justice of the European Union
CFREU	Charter of Fundamental Rights of the European Union
U.S	United States of America
TFEU	Treaty on the Functioning of the European Union

1. Introduction

1.1 Background

Retrieving and uploading information on the web are more or less automated operations nowadays, even when it comes to private matters exposed to the public. Internet-based technologies have forever changed the attitude towards raising knowledge, accessing information, forming relationships, managing data, relating to world events, reflecting upon history, imagining the future, and so on. With that, people's ideas of privacy have changed. Individuals upload all sorts of information about themselves on the web and for a large part of the European population sharing information online is more or less a part of their everyday life. With the development of online technologies, posting personal information on public sites has become a trend and today's history and the history of the future are now written in bytes. The information technologies on the web are shaping the narratives about us as a collective and as individuals.

Remembering as well as forgetting are functions of memory. Yet, with constant information sharing through information and communication technologies it is no longer possible to say that our memories are contained by the boundaries of our bodies and thus they are no longer fully manageable. Modern technology has altered memory by fundamentally changing how information is remembered, which information can be remembered and at what cost. The concern of forgetfulness is therefore an emerging issue and people have started to demand the control and ownership of their own data, including erasure of their presence on the web.[1] However, the technologies from which people are now requiring obliviousness are not designed to forget. On 13 May 2014 the Court of Justice of the European Union (hereinafter referred to as the CJEU) ruled in the Case C-131/12 '*Google Spain SL, Google Inc. v. Agencia Española de Protección de Datos, Mario Costeja González'* (hereinafter referred to as the Costeja-case) and provided guidance regarding the extent of protection for processing of personal data and the right to remove personal data from the web. The CJEU concluded that an Internet search engine operator is

[1] Ghezzi, A. Pereira, Â., Vesnić-Alujević, L., (n.d.) (2014). *The Ethics of Memory in a Digital Age: Interrogating the Right to be Forgotten*, pages 1-3.

responsible for the processing of personal data that it carries out and that individuals have a right to demand deletion of personal information that is no longer relevant or necessary.[2] The justification for information removal is found in humanity's faith in the capacity to change and improve and people's need not to be reduced to their past.[3]

Because of the decreasing trust in online technologies, the European Commission has introduced a comprehensive reform of the 1995 data protection rules.[4] The proposed reform accentuates even more than before the determining role of the individual's will when it comes to control over personal data. However, the proposed legislation and the findings in the Costeja-case have lead to a growing tension between the so-called 'Right to be Forgotten' and other fundamental rights such as the freedom of expression. The European Union (EU) strives for a fair balance between the legitimate interest of Internet users in having access to information and people's fundamental right to privacy.[5] Nonetheless, voices have been raised, stating that there is an unfair balance between the two rights that will lead to problems in practice when managing personal data while simultaneously protecting the freedom of expression and of the media.

1.2 Purpose and Research Questions

New legal problems arise when society depends more and more on online technologies. There is an emerging feeling of loss of control over online information that has lead to a demand for stronger privacy rights online. The focus of this thesis is to explore how the features of the digital present – that is usually seen as unmanageable and overwhelming when it comes to the pervasiveness, immediacy and volume of it – are affecting the concept of memory and informational self-determination. The objective is to examine the attempts made to ensure the concept of forgetting in the digital age. Additionally, the essay aim at forming an understanding

[2] Case C-131/12 *Google Spain SL and Google Inc. v Agencia Española de Protección de Datos (AEPD) and Mario Costeja González* (2014), paras. 88 and 92-94.
[3] Ghezzi 2014, page 90.
[4] 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, COM(2012) 11 final. 2012/0011(COD), pages 1-2.
[5] Case C-131/12, para. 81.

of the conflicts that arise when the growing need for the fundamental right to privacy challenges the fundamental right to freedom of expression. Hence, the thesis aims at offering a better understanding of the difficulties in relation to the conflict and balance between personal rights and public rights on the Internet.

The paper aim at answering the following questions:

1. In an era of Internet and constant information uploads, how is one to decide whether private rights or public rights are to be prioritized, and to what extent does the citizens of the European Union have a right to erase their presence on the web?
2. What is the definition of the 'Right to be Forgotten' and why do we need such a right?
3. What is the extent of the 'Right to be Forgotten' and what are the consequences of having such a right?
4. How will a 'Right to be Forgotten' online affect what ought to be remembered?
5. Is the right to be forgotten trumping other fundamental rights, such as the freedom of the media and the freedom of expression?
6. Is the need for privacy a new trend and if so, is that trend here to stay?

1.3 Delimitations

There are several private interests that are threatened by digitalisation and online technologies. However, this thesis will focus on the problems arising when people cannot control personal data relating to their reputation and identity. The essay does not examine the 'online-problems' regarding bank-details, phone numbers and private data that could be used to commit frauds. Likewise, the issues concerning 'revenge-porn' has been widely discussed in the media, however, this thesis will not cover that aspect of the right to personal data. Neither does the thesis touch upon the legal discussions regarding the access to the Internet as a human right. Moreover, there are a number of public rights present on the web that are an important part of the online platform and some of them will be briefly mentioned in this article, however, the paper will concentrate on issues regarding the threat to the freedom of expression.

This thesis focuses on the EU legislation on data protection and does not cover national legislation on the subject. Neither does the thesis look upon international treaties. A short comparison between European online privacy rights and the online privacy rights in the United States of America will be made. However, the thesis does not aim at resulting in a comparative analysis of the two jurisdictions. Finally, the legal analysis will reflect the author's own understanding and interpretation of relevant EU legislation and data protection rules.

1.4 Methodology and Material

This essay is constructed by a classical legal dogmatic methodology. The methodology is used from the view of clarifying, evaluating and interpreting the current legal framework, case law and norms in an effort to analyse the current and proposed legislation related to the subject matter of this thesis. The thesis critically examines and analyses the EU legislation, case law from the CJEU, as well as commission guidelines and official statements in order to shed light on the legal landscape regarding privacy rights on the web. The intention is to establish a foundation for the discussion concerning data privacy rules and the 'Right to be Forgotten' within the European Union and the potential need for stronger protection of online privacy.

The legal system of the EU is based on several layers of legal sources. Firstly, there is the Primary Legislation that sets out the general principles of law. In this thesis the Treaty of the Functioning of the European Union (TFEU), the Charter of Fundamental Rights of the European Union (CFREU) and the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) will be examined in relation to the presented purpose of the thesis. Next, there is the Secondary Legislation consisting of Regulations, Directives and Decisions. This thesis will primarily examine the Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data, and the 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 (the Proposal).

The assessment of the current and future legislation will be based on the whole *acuis communtaire;* Primary Law, Secondary Law and jurisprudence from the Court of Justice of the European Union (CJEU). The Case I have selected for this thesis will shed light on the practical application and interpretation of the EU legislation and related issues. Thus far, the CJEU has only ruled in one case concerning the 'Right to be Forgotten', hence, this is the only case that will be closely examined. In addition to the judgement of the CJEU, the opinion of the Advocate General will contribute to the study. Even though the Advocate General's opinion is not legally binding, the opinion shed light on the legal issue. The Advocate Generals opinions cover all aspects of the case and applicable law.

Legal and other doctrines are exclusively used with specific focus on data protection rights and the 'Right to be Forgotten'. The doctrine is used in order to give a clear view of the different components and opinions regarding the subject matter. The newspaper articles are used in order to give a broad presentation of the different opinions expressed after the judgement in the Costeja-case and the attitudes towards the Proposal. The authors of the articles are all acknowledge within the data field and the newspapers in which their opinions are expressed are recognized. The articles are not used to explain or justify the legislation within the EU, the opinions are simply presented to help the reader understand which points of views exists in regards to the 'Right to be Forgotten'.

1.5 Structure

This essay commences with an introduction of the troubles concerning the new dimension of privacy that is a result of the growing dependency on online technologies. Thereafter a presentation of the so-called 'Right to be Forgotten' is conducted, going into more depth of why there is such a right and how the right is enforced. Chapter three presents the technical advances and developments of digital online technologies, the concept of search engines and the responsibilities of online search engines. Chapter four studies the Costeja-case. The facts of the case and the judgement are summarised. Thereafter I look at different reactions to the judgement.

Chapter five focuses on both the current and future data privacy rights within the European Union. The rights are described, as is the role the rights could play and the impact they could have. Reactions to the Proposal and suggested alternatives to the 'Right to be Forgotten' are also presented. Moreover, a short comparison is made between the data privacy rights of the European Union and of the United States of America. Furthermore, some of the public rights present on the web and important benefits of the freedom of expression and of the media are presented in the last part of chapter five. In chapter six the harmful results of a digitalized society and the potential consequences of a comprehensive digital memory are studied. Additionally, the essential function of the freedom of expression is once more discussed and the chapter studies the balance between privacy rights and public rights online. In chapter seven the subject matter of the thesis is analysed and there is reasoning conducted on the basis of the thesis questions. Lastly, the article is summarized and the author's main conclusions of the study are presented.

2. A New Dimension of Privacy

Since the beginning of time, remembering has been the exception and forgetting the norm.[6] For thousands of years, humans have tried to improve their ability to remember and to increase the volume of information they can successfully store. Remembering helps people make the right choices and cope with everyday life.[7] With the World Wide Web came an era where forgetting was no longer an issue and hyper connectivity created a desire to make all of the past and present available.[8] It was around the year 2001 that Internet users started to realize that the Internet was not only a mean to receive information, but also a way to produce and share information. [9] Today, important aspects of life take place online and living without Internet places people at a significant disadvantage. People's 'online lives' and 'offline lives' are becoming inextricably linked and matters on the Internet now affect people's lives as a whole.[10] All sorts of information is posted, commented on, copied, edited, downloaded etc. and almost everything is vulnerable to a global scale exposure. The Internet and many Internet services allow and encourage interactivity. The public craze for interactivity has been the trend for some time now, however, people are starting to regret what they have disclosed or expressed on the web, or they no longer approve of the information that is linked to their name. It should be noted that it is the first time in history that spontaneous expression does not disappear; on the contrary, it is available to the public or to a specific part of the public forever, long after it was made. The 'eternity effect' of the Internet and its electronic memory combined with search engines can bring to surface the smallest pieces of information. The 'perfect memory' character of the web has proved to be a source of problems for individuals.[11] The expectation of forgetting and being forgotten is much diminished, or at least much more uncertain now. The result is a society that is trying hard to cope with a new scale to its past and present. Moreover, there is now an imbalance in the creation, adaptation and circulation of memory. Memory becomes something that is considered dangerous.[12] Another result of the interactivity online is that the difference between

[6] Mayer-Schönberger, Viktor (2009). *Delete*, page 2.
[7] Mayer-Schönberger 2009, page 22.
[8] Ghezzi 2014, pages 4 and 54.
[9] Mayer-Schönberger 2009, page 3.
[10] Bernal, Paul (2014). *Internet Privacy Rights: Rights to Protect Autonomy*, pages 2-4 and page 12.
[11] Ghezzi 2014, pages 84 and 87-89.
[12] Ghezzi 2014, pages 52-55.

private places and public places is increasingly blurred.[13] This has lead to a shift from an era driven by direct distribution to an era where people desire informational 'self-determination' and privacy. The role the Internet plays in our lives challenge nearly all aspects of our privacy.[14]

2.1 Definition of The Right to be Forgotten

The 'Right to be Forgotten' is a person's right to have their personal data erased and no longer processed when the data were voluntarily (or not) made available on the Internet and the data is no longer necessary in relation to the purposes to which the data are collected or processed. [15] In other words, it is a right to silence past events in life that are no longer occurring.[16] The right is applicable on situations where data subjects have withdrawn their consent for processing or in cases where the data subject object to the processing of data concerning him or her.[17] The primary aim of the 'Right to be Forgotten' has been to limit the use of personal data on the web and to offer data subjects a means to restore the balance of power between the users of information systems and the service providers.[18]

2.2 Background to the Oblivion Right

The question of why there is a need for an implementation of a 'Right to be Forgotten' has to be answered in order to fully understand the discussions following the introduction of such a right. Throughout history forgetting has been assumed to be bad. However, today, people live in an era where forgetting is the exception and remembering is considered as natural. The technologies containing our 'digital memories' are not designed to forget and this results in a transparency that could disturb and affect people's lives negatively. Today, the past seems to be constantly

[13] Ghezzi 2014, page 71.
[14] Bernal 2014, *Internet Privacy Rights: Rights to Protect Autonomy,* page 35.
[15] The Proposal, page 25.
[16] Ghezzi 2014, page 65.
[17] The Proposal, page 25.
[18] Ghezzi 2014, pages 35-36.

present and available.[19] In the near future, the amount of data exchanged and generated about a person will be enormous, further weakening the possibility for individuals to control their data and presence on the web. The 'digital footprint' people leave behind is no longer only personal information that they themselves decide to post, but what others decide to post about them as well. Furthermore, the way people decide to publish information online is often very different from the way information is distributed in the offline world and the social norms are considerably different online compared to offline.[20] Because of the 'eternity-effect' of the digital memory, the Internet preserves and is evidence of past errors, bad memories, photos and videos that people later want to deny.[21] This has lead to a desire to have full control over the personal data circulating on the web and a right to oblivion.

Oblivion has been present in legal norms for some time now, although, so far it has been founded on the idea of deserving a 'clean slate'.[22] In Sweden the right to a 'clean slate' can be said to exist in the legislation concerning defamation. The Swedish law forbids the spreading of rumours (whether they are true or not) about a person's past when he or she deserves an opportunity to start over without prejudice.[23] In France the 'Right to be Forgotten' (*droit à l'oubli*) has been acknowledged as a part of the principle of compassion. French legislators have regarded the right as a natural right, since it does not allow for a person's past to crush him by preventing him from reforming or by making him lose the feeling that he is free.[24] The 'Right to be Forgotten' has been recognised in the EU to some extent when it comes to regarding a criminal's past and as a part of the data protection regulation. The 'Right to be Forgotten' was initially linked to the elapsing of time, however, it is now presented as a part of the informational autonomy. Today, the 'Right to be Forgotten' is at the heart of an intense debate in the EU and the EU legislators are discussing a strengthening of the rule and the importance of a 'Right to be Forgotten' in the digital field. The Council of Europe authorities have expressed their concern when it comes to privacy issues on the web and with the development of information and

[19] Ghezzi 2014, page 84.
[20] Ghezzi 2014, pages 12-13.
[21] Ghezzi 2014, page 84.
[22] Ghezzi 2014, pages 1-3.
[23] Schultz, Mårten, Lindgren, Tove (2014). *S03E08: Mario Costeja Gonzáles.*
[24] Warby, Mark, Moreham, Nicole and Christie, Iain (2011). *The Law of Privacy and the Media*, page 159.

communication technologies a need for a larger scope of privacy protection has become apparent. The balance between individual self-determination and free distribution of information is now at stake.[25]

In 2012 the European Commission published a 'Proposal for a Regulation on the Protection of Individuals with Regard to Processing of Personal Data and on the Free Movement of Such Data (hereinafter referred to as the Proposal). The proposal includes the 'Right to be Forgotten' and aims at strengthening the right. The Commission has announced that the guiding principle for the amendment is that every individual is owner of his or her data and has the right to take it back from others that have processed it. This will be combined with an obligation for the parties processing the data to offer efficient solutions for deleting personal data on the web.[26]

2.3 The Right to be Forgotten in the Legal System

The 'Right to be Forgotten' forms an integral part of the data protection laws in the EU. It is a part of the body of EU law as well as national law.[27] The 'Right to be Forgotten' is given to all citizens of the EU, regardless of their nationality.[28] The Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (hereinafter referred to as the General Directive) accords the right to privacy and the respect to processing of personal data special importance, this is confirmed by Article 1(1) and recitals 2 and 10 in the Directive's preamble.[29] Article 12(b) of the General Directive states that the Member States shall guarantee every data subject the right to attain from a data controller, as appropriate, the modification, removal or blocking of data, the processing of which

[25] Ghezzi 2014, pages 82 and 87.
[26] Dörr, Dieter, Weaver, Russel L. (2012). *The Right to Privacy in the Light of Media Convergence: Perspectives from Three Continents*, page 26.
[27] Ghezzi 2014, page 35.
[28] Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, Recital 2.
[29] Case C-131/12, para. 58.

does not comply with the requirements of the General Directive, specifically because of incomplete or inaccurate data. Moreover, non-compliant nature of processing of personal data that is capable of presenting upon the data subject the right guaranteed by Article 12(b) may also result from non-observance of the other conditions of lawfulness that are inflicted by the directive upon the processing of personal data.[30] Thus, an individual can ask for removal of personal data from the web when the data is no longer necessary. However, the right to have data deleted is not an absolute right.[31] The assessment is to be done on a case-by-case basis and the right only applies when the data is no longer relevant or necessary for the original purposes for which the data was collected. The criteria used should relate to relevance, accuracy and adequacy (including time passed) and proportionality of the links, in relation to the purpose of the online processing.[32]

2.4 Effects and Controversies

While the right to privacy protects information that is not publicly known, the 'Right to be Forgotten' involves deleting information that at one stage was publicly known.[33] In practice, when a person affected requests a deletion of a search result, the search engine is obliged to delete the information if there are no legitimate grounds for preserving it. This means that an individual, whose personal data shows on a search result linking to other webpages when a search has been made on that individual's name has the right to request that those links are removed. The search engine will then have to assess the request based on the circumstances of that particular case. A request can be denied if there is an interest of the general public to have access to the material in question, especially if the individual is involved in public life. In the case of a rejection, the individual can complain to national data protection supervisory authorities or to a national court. The public authorities will be the final arbiters of the application of the 'Right to be Forgotten'.[34]

[30] Case C-131/12, para. 70.
[31] Ghezzi 2014, page 76.
[32] Case C-131/ 12, paras. 92-94.
[33] Floridi, Luciano (n.d) (2014). *Protection of Information and the Right to Privacy - A New Equilibrium?*, page 1.
[34] Case C-131/12, paras 77 and 99.

The ethical aspects of regulating erasure and rectification of personal data have resulted in controversies emerging about the 'Right to be Forgotten'. The 'Right to be Forgotten' has been criticized for clashing with other rights, in particular freedom of speech, and also for the new means of censorship the right brings.[35]
By concealing past facts and actions from public knowledge the 'Right to be Forgotten' ends up threatening the public's rights to information and expression. However, according to Ivan Szekely, expert in the multidisciplinary fields of data protection and freedom of information, the aim of the 'Right to be Forgotten' has primarily been "to limit the use of personal information in current data management in the environment of the practices arising in connection with the general advances in information technology, network connections, storage capacity, data analysis and network marketing, and to offer the data subject additional rights and means so as to restore the balance of power between the service providers and the users of information systems."[36] The aim has not been to prevent the preservation of the past nor to limit academic research. Furthermore, the original idea of the right is not to re-write the past or allow for someone to erase unpleasant memories from the past. The intention is instead to allow that someone's present is not ruined because of his or her past. The aim is to accentuate the determining role of people's wills. [37]

[35] Ghezzi 2014, pages 1-3.
[36] Ghezzi 2014, page 35.
[37] Ghezzi 2014, page 83.

3. Web-providers

The World Wide Web hypertext system is commonly seen as the application of the Internet that made it appealing to the masses. The system offered a way of organizing online information by linking it together. The World Wide Web implied more freedom for the Internet users as well as the contributors of the network. In the early 1990s the first crawler based search engine, a search engine using a piece of software known as a 'crawler' to analyse, access and index the World Wide Web automatically by trailing links from page to page, was developed. [38] The 'web crawlers' sweep and locate the content on web pages automatically and methodically.[39] Today, the crawler-based model is the standard model for search engine services and the leading crawler-based search engine is Google.[40]

According to Dr. Christopher Kuner, since the advent of the Internet "the free flow of information has become the life blood of the world economy."[41] Internet use is interactive and a part of everyday life where users themselves are the primary creators of data. Activities like using a mobile phone linked to the Internet and entering into dialogue with a particular website leave traces, whether its made consciously or not.[42] The collection and storage of personal information on the Internet is essential and all sorts of businesses, from social media sites to banks and search engines use the data.[43] Furthermore, an important characteristic of the Internet is its openness, meaning that anyone can at any time log on anywhere and thanks to search engines one can retrieve everything that has been placed on the Internet.[44] The globalised world today allows for the transfer of data to third countries, and it is now an important factor in everyday life. There are no borders online and data may be sent to and from all corners of the world thanks to cloud computing.[45] As stated in the preamble of the General Directive, data-processing systems are intended to serve man, however, with that

[38] Hoboken, van, Joris, (n.d.) (2012). *Search Engine Freedom: On the Implications of the Right to Freedom of Expression for the Legal Governance of Web Search Engines*, page 19.
[39] Case C-131/12, para. 43.
[40] Hoboken 2012, page 20.
[41] Kuner, Christopher (2003). *European Data Privacy Law and Online Business*, page. 1.
[42] Kenyon, Andrew, and Richardson, Megan (2006). *New Dimensions in Privacy Law*, pages 62-63.
[43] Ec.europa.eu, (2012). *European Commission – PRESS RELEASES – Press release – Commission proposes a comprehensive reform of data protection rules to increase users' control of their data and to cut costs for businesses.*
[44] Kenyon 2006, pages 62-63.
[45] Ec.europa.eu, (2012). *European Commission – PRESS RELEASES.*

comes both the responsibility to respect people's fundamental rights and freedoms, notably the right to privacy, and the duty to contribute to social and economic progress, trade expansion and individuals' well being.[46] Information and Communications Technology (ICT) companies like Facebook, Twitter and Google are the controllers of a huge amount of expression on the Internet and they have the power to balance freedom of expression against private interests when deciding whether and when to consent to requests to censor speech. On a day-to-day basis they respond to innumerable requests to take down content that is considered illegal or offensive.[47]

3.1 Web Search Engines

Computers are merely the most recent way of controlling collections and information. Largely, one could say that humans have always been searchers, and collecting documents and information has been done approximately as long as history itself has been recorded. The obvious predecessor to the web search engines is the library.[48] Search engines formed a new solution for the information environment that grew with the World Wide Web.[49] Joris van Hoboken, a Microsoft Research Fellow in the Information Law Institute at New York University, defines search engines as "an information retriever system for the public networked information environment."[50] Alexander Halavais, an associate Professor of Social Technologies, defines search engines as "an information retrieval system that allows for keyword searches of distributed digital text."[51] Generally speaking a search engine helps end-users find and efficiently retrieve information.[52] With the amount of information constantly growing on the Internet an instrument to help sort through the immense amount of information is vital and search engines has proved to be the simplest, clearest and most popular way to navigate on the Internet.[53] The activities of a search engine consists of providing content, which in turn consists in finding information placed or

[46] Directive 95/46/EC, Preamble 2.
[47] Floridi 2014, pages 63-64.
[48] Halavais, Alexander (2009). *Search Engine Society,* pages 11-12.
[49] Halavais 2009, page 14.
[50] Hoboken 2012, page 33.
[51] Halavais 2009, pages 5-6.
[52] Hoboken 2012, page 33.
[53] Bernal 2014, *Internet Privacy Rights: Rights to Protect Autonomy,* page 117.

published on the Internet by third parties, automatically indexing the information, storing it temporarily and making it available to Internet users in a particular order of preference.[54] On the one hand, Web search engines are complex systems of software, usually server-based, and made available for Internet users in their Web browser. On the other hand, search engines have a fairly exclusive link with the content layer. As a result, one can say that search engines consume and produce a certain 'content' of their own, that 'content' being information about information or meta-information. The search engine ends up playing an important role when it comes to the flow and control of knowledge, data, information etc. from all sorts of information and service providers online to the end user. The way in which the search engines chooses to select and rank results for the users can be regarded as an expression of a series of underlying judgements about the relevance of different kinds of information in relation to the relative importance of the supposed needs of the user. In order to fulfil its role as matchmaker the search engine has to make multiple choices about what is 'relevant' and select, rank and present the information accordingly. The search engine analyses the material on the web and its interpretation of the alleged information needs as expressed by the users' requests. This may result in an editorial character for the search engine.[55] Some even argue that online services such as Google will become 'global censors'.[56] Today, search engines are one of the most essential ways for information providers to influence the online audience.[57] Search media provide the ability to find information in the public networked information environment, which provides for access to sources of knowledge, information and ideas as well as to a variety of other service providers and e-commerce sites.[58]

3.2 Responsibilities

Search engines have the capability to display both legal and uncontroversial publications as well as illegal and controversial or allegedly harmful material. This has resulted in regulatory and legal pressure on search engines to implement various

[54] Case C-131/12, para. 21.
[55] Hoboken 2012, pages 47-49.
[56] Ghezzi 2014, page 17.
[57] Hoboken 2012, pages 47-49.
[58] Hoboken 2012, page 185.

measures in order to restrict access to content through the search engine's services. These measures vary and can range from removal of websites from the index and blocking of keywords to filtering of search results for search services in specific countries and monitoring of the index in search for illegal material.[59] In Europe, the General Directive provides a number of principles for data controllers to observe when processing data. The objective of these principles aim at protecting the rights of those about whom the data is collected and reflect decent business practices that contribute to consistent and effective data processing.[60] Consequently, a data subject has the right to send a complaint to the data controller if he or she is of the view that his or her data has been compromised. The data controller has a responsibility to handle all complaints satisfactory, if the controller does not fulfil its obligation the data subject can file a complaint to the national supervisory data protection authority.[61]

[59] Hoboken 2012, page 233.
[60] Ec.europa.eu, (2013). *Obligations of data controllers – Justice*.
[61] Ec.europa.eu, (2013). *Obligations of data controllers – Justice*.

4. Mario Costeja González

4.1 Background

In the year of 2010 a Spanish national resident, Mario Costeja González, lodged a complaint against a Spanish daily newspaper publisher, La Vanguardia, and Google Spain and Google Inc. Mr Costeja González was complaining about the fact that when an Internet user entered his name in the search engine of 'Google Search' (the Google group), he or she would access links to two pages of La Vanguardia's newspaper. Those two articles mentioned Mr Costeja González' name in a real-estate auction connected with attachment proceedings for the recovery of social security debts. Mr Costeja González requested that La Vanguardias' pages be removed or altered so that personal data relating to him no longer appeared, alternatively, that the data be protected by certain tools made available by search engines. Moreover, he also requested that Google Spain or Google Inc. be required to conceal or delete the personal data relating to him. Mr Costeja González argued that the attachment proceedings against him had been fully resolved and that reference to them was no longer relevant. The National Court (Agencia Española de Protección de Datos) rejected the complaint against La Vanguardia, stating that the publication of the information was legally justified and intended to give maximum publicity to the auction.[62] However, the complaint against Google Spain and Google Inc. was upheld. The National Court took the view that search engines have to delete data and prevent access to certain data when it compromises the fundamental right to data protection and the dignity of people in the broad sense, which could cover of the mere wish of a person concerned that such data not be known to third parties. Google Spain and Google Inc. both brought actions against the decision before the National High Court (Audencia National), claiming that the decision of the Agencia Española de Protección de Datos should be annulled. The National High Court stayed the proceedings and referred a series of questions to the CJEU for a preliminary ruling in order to resolve how the General Directive shall be interpreted in the context of Internet search engine technologies. The questions concerned three primary issues:

[62] Case C-131/12, paras. 14-16.

the territorial application of the General Directive, the concept of 'data controller' in the context of search engines and finally the 'right to be forgotten'.[63]

4.2 Reasoning of the CJEU

Firstly, the CJEU considered the question concerning the material scope of the General Directive. The CJEU argued that the activity of a search engine must be classified as 'processing' within the meaning of the General Directive, regardless of the fact that the search engine operator carries out the same operations when it comes to other categories of information and does not differentiate between the latter and personal data. It is not of importance that the data have already been published on the Internet and that the data are not altered by the search engine.[64] The search engine operator is the one to determine the means and purposes of the activities and consequently of the processing of personal data carried out within the framework of that activity and thus the search engine must be regarded as the 'controller' when it comes to that processing pursuant to Article 2(b) of the General Directive. The objective of the provision is to ensure effective and complete protection of data subjects through a broad definition of the 'controller' concept. It would be against the objective as well as the wording of Article 2(b) of the General Directive to exclude an operator of a search engine from the definition on the ground that it does not control the publications of personal data on the webpages of third parties.[65] The search engines enable the Internet users to establish a more or less complete profile of the data subject when they carry out their search on the basis of an individual's name. Thus, the search engine is liable for the significant affects to the rights to privacy and the protection of personal data and therefore they must ensure that the requirements of the General Directive are met so that the Directive may have full effect and an effective and complete protection of data subjects.[66]

Secondly, the CJEU considered the territorial scope of the General Directive. Regarding Google Inc. and Google Spain the Court concludes that Google Spain is a

[63] Case C-131/12, paras. 17-20.
[64] Case C-131/12, paras. 28-29.
[65] Case C-131/12, paras. 33-34.
[66] Case C-131/12, paras. 37-38.

subsidiary of Google Inc. on Spanish territory and thus, is an 'establishment' within the meaning of Article 4(1)(a) of the General Directive.[67] The CJEU concluded that "the processing of personal data for the purposes of the service of a search engine such as Google Search, which is operated by an undertaking that has its seat in a third State but has an establishment in a Member State, is carried out 'in the context of the activities' of that establishment if the latter is intended to promote and sell, in that Member State, advertising space offered by the search engine which serves to make the service offered by that engine profitable."[68] In circumstances like that the search engine and its establishments are inextricably connected and processing of personal data carried out for the purposes of the operation of the search engine shall not escape the guarantees and obligations laid down in the General Directive.[69]

Thirdly, the CJEU considered the extent of the responsibility of the operator of a search engine under the General Directive. The court specified that in the context of Article 6 of the General Directive, the controller must take every reasonable step in order to guarantee that data that does not meet the requirements of the General Directive are rectified or deleted.[70] Moreover, the CJEU stated that the application of Article 7(f) of the General Directive necessitates a balance of the conflicting rights and interests at hand, and account must be taken of the importance of the data subject's rights arising from Article 7 and 8 of the Charter of Fundamental Rights of the European Union (hereinafter referred to as the CFREU). This means that interests of the controller or parties from whom data are disclosed or third parties can be overridden by the data subject's interests of fundamental rights and freedoms. The data subject may additionally rely on the right in subparagraph (a) of the first paragraph of Article 14 of the General Directive, which gives the data subject the right to object at any time to the processing of data relating to him or her, except where national legislation provides otherwise. This allows for all the circumstances surrounding the data subject's situation to be taken into account in a more specific manner. The data subject can bring matters before the supervisory authority or the judicial authority when the data processor does not end processing of the personal

[67] Case C-131/12, para. 52.
[68] Case C-131/12, para. 55.
[69] Case C-131/12, paras. 56 and 58.
[70] Case C-131/12, para. 72.

data after a request by the data subject.[71] However the request cannot rely only on an economic interest to be justified. The data subject's fundamental rights, found in Article 7 and 8 CFREU, are the rights that should be weighed against an Internet user's possible interest in having access to the information. The Internet user's rights to information may vary, especially depending on the data subject's role in public life. Moreover, the CJEU reasoned that it is not of relevance that the web page published by a third party containing the actual information has not been ordered presupposing removal of the information and name simultaneously or previously as the search engine. Furthermore, the court considered that the processing by the publisher may at times be the result of a publication carried out 'solely for journalistic purposes' and thus benefit legality in accordance with Article 9 of the General Directive, however that does not appear to be the case when it comes to the processing by search engines. Consequently, the data subject ought to be able to request a search engine to remove personal information appearing on a list of results even though he or she cannot demand the publisher to remove the information.[72] Finally, a list with results makes the information much more accessible and the decisive role it may play in the dissemination of the person can constitute a more substantial interference with the data subject's right to privacy.[73]

Lastly, the CJEU considered the scope of the data subject's rights guaranteed by the General Directive. The Court reasoned that even if the information was at one point lawfully published it may at another point in time be incompatible, in accordance with Article 6 of the General Directive, when, considering all circumstances of the case, the information is now irrelevant, inadequate or excessive. Thus, the data may, in the course of time, become unnecessary in the light of the reasons why it was collected and processed and consequently no longer be compatible with the General Directive.[74]

[71] Case C-131/12, paras. 74-79.
[72] Case C-131/12, paras. 81-85.
[73] Case C-131/12, para. 87.
[74] Case C-131/12, paras. 93-94.

4.3 Judgement of the CJEU

The CJEU ruled on the right to be forgotten on May 13th 2014. In its decision the Court announced that there had in fact been an infringement of privacy rights in the case between Google and Mr. Costeja. The CJEU concluded that the activity of a search engine that consists of finding published information or information placed on the Internet by third parties, automatically indexing it, temporarily storing it and making it available online in accordance with a particular order of preference is classified 'processing of personal data' within meaning of Article 2(b) of the General Directive when that information includes personal data. Moreover, the search engine is essentially regarded as the 'controller' in respect to that processing within the meaning of Article 2(d) of the General Directive.[75] Furthermore, the CJEU interpreted Article 4(1)(a) of the General Directive as meaning that the processing of personal data, within the meaning of the provision, is in fact carried out in the context of the doings of an establishment of the controller on the territory of a Member State when the operator of the search engine sets up a subsidiary or branch that is intended to sell and promote advertising space offered by that engine in a Member State and adjusts its activities towards the inhabitants of a Member State.[76] Moreover, the CJEU concluded that the operator of a search engine is obliged to delete from the list of results presented, following a search made on the basis of a person's name, links to Internet pages, published by third parties and including information concerning that person, even in cases where the name or information is not previously or simultaneously removed from those webpages, and even when the publication itself on those pages is lawful.[77] Finally, the CJEU interpreted Article 12(b) and subparagraph (a) of the first paragraph of Article 14 of the General Directive, as meaning that, when evaluating the conditions for the application of those provisions, one has to inter alia examine if the data subject has a right to no longer be linked to the information in question relating to him personally and his name by a list of results presented after a search made on the basis of his name. It is not necessary that the inclusion of the information in question in the list cause prejudice to the data subject. Article 7 and 8 CFREU allows the data subject to request that private information no

[75] Case C-131/12, para. 41.
[76] Case C-131/12, para. 60.
[77] Case C-131/12, para. 88.

longer be made available to the general public and those rights override the economic interests of the operator of the search engine as well as the interests of the general public in having access to personal information upon a search relating to a data subject's name. Nonetheless, if the information appeared as the role played by the data subject in public life, interference with his fundamental rights is justified by the predominant interest of the general public in having access to the information in question.[78]

4.4 Advocate General's Opinion

Advocate General Niilo Jääskinen is of the opinion that search engines should not be considered responsible for the processing of web pages containing personal data. Jääskinen points out that the General Directive was adopted at a time when search engines was a new phenomena and that their development could not be foreseen by the European legislator.[79] In his opinion, a search engine should not be considered as a 'controller' and should not be responsible for the content provided on third party web pages. Also, Jääskinen is of the opinion that the search engine cannot fulfil the obligations set out in the General Directive.[80] Moreover, in his view, the General Directive does not establish a general 'Right to be Forgotten' and the right cannot be invoked against a search engine provider based on the General Directive, not even when the right is interpreted in accordance with the CFREU. The Advocate General argued that subjective preferences alone does not amount to convincing legitimate grounds for deleting personal data that the individual considers to be in conflict with his or her interests or harmful. Furthermore, Jääskinen admits that requiring blocking of access to web pages infringing intellectual property rights or displaying criminal information should be possible under national law.[81] However, to request search engines to suppress legitimate and legal information that is already in the public domain would result in an intrusion of the freedom of expression of the publisher of

[78] Case C-131/12, para. 99.
[79] Opinion of Advocate General Jääskinen in *Case C-131/12 Google Spain SL, Google Inc. v Agencia Espanola de Protección de Datos, Mario Costeja González.* Delivered, 25 June 2013. EU:C:2013:424. Paras. 27 and 78
[80] Opinion of Advocate General Jääskinen, para. 138.
[81] Opinion of Advocate General Jääskinen, paras. 108 and 135-136.

the web page and the freedom to conduct a business. Jääskinen believes that this would amount in censorship.[82]

4.5 Reactions to the Judgement

After the Costeja-ruling, Google announced that they would take measures to fulfil the decision of the CJEU. To that, Vivian Reding, member of the European Parliament, responded that "[it] is a good development that Google has announced that it will finally take the necessary measures to respect European law. It was about time since European data protection laws exist since 1995. It took the European Court of Justice (ECJ) to say so. The right to be forgotten and the right to free information are not foes but friends."[83] Vivian Reding has also stated that the court in the Costeja-case "made clear that journalistic work must not be touched; it is to be protected."[84] Robert Peston, BBC's economics editor, however, writes in an article for BBC News that by removing search results "Google is confirming the fears of many in the industry that the 'right to be forgotten' will be abused to curb freedom of expression and to suppress legitimate journalism that is in the public interest."[85] Moreover, James Ball, a data journalist, writes in an article for The Guardian that the decision could lead to large technology companies closing their European offices to escape the reach of the law and that the decision could have large implications when it comes to the world-spanning freedom of speech.[86] In another article for the same newspaper, Ball suggests that technology and culture will resolve the problem of privacy on the web and that it is an act of hubris to try to change the system of privacy on the Internet through law.[87] However, Julia Powels, a researcher in law and technology at the University of Cambridge, and Enrique Chaparro, an information security specialist and president of Fundación Vía Libre, states a different opinion in an article for the same newspaper. Julia Powles and Enrique Chaparro see the Costeja-case as just a small but critical battle on a broad terrain that concerns the struggle for our digital

[82] Opinion of Advocate General Jääskinen, paras. 133-134.
[83] Ec.europa.eu, (2014). *'Right to be forgotten' and online search engines ruling – Justice.*
[84] Fontanella-Khan, James, Paleit James, Pickard Jim (2014). *Google's removal of BBC article raises censorship fears*.
[85] Peston, Robert (2014). *Why has Google cast me into oblivion?*.
[86] Ball, James, (2014). *Costeja González and a memorable fight for the 'right to be forgotten'*.
[87] Ball, James, (2014). *Right to be Forgotten' ruling creates a quagmire for Google et al.*

identities. Powels and Chaparro points out that the rights against search engines does not exist to manipulate memory or abolish information, but to make it less noticeable, if justified, and fight the side-effect of modern time that has lead to information being globally, instantly and eternally accessible.[88] In an article for the Time magazine Lev Grossman writes that the CJEU has hit upon an indefinable truth about our way of living today. The definition of what is public has changed as well as the information environment. The Internet has lead to a relentless focus that does not fade or blur the past. Lev Grossman means that the judgement of the CJEU has reminded the world that technology can be adapted to the people and that people do not have to adjust themselves to technology.[89] Joshua Rozenberg, a British legal commentator, describes the CJEU's ruling as striking a fair balance. Rozenberg takes the position that the 'Right to be Forgotten' is not a super-right trumping freedom of expression. The Costeja-case does not mean that newspapers and other news organizations cannot write about people, nor does it mean that they have to remove stories they have written already.[90]

Google however, reacted by launching an online form for citizens, where said individuals could notify Google about search result links that they thought "irrelevant, outdated or otherwise objectionable."[91] Google received a large amount of requests to have links deleted. In the first four days after the ruling Google received more than 40 000 requests.[92] After one moth Google started to remove links, however they only removed links on its European domains.[93] This means that a search result on 'www.Google.com' will be different from the result on 'www.Google.se' if an individual has requested and been granted a deletion of the link. Moreover, Google only removes the search result when a certain name is searched for, not the search results for that material when another search-word is used, nor the search material as such. When a link has been removed Google's search result will include a message at the bottom of the page that reads: "Some results may have been removed under data protection law in Europe." Furthermore, notification will be sent to the publisher of

[88] Chaparro, Enrique, Powels, Julia, (2015). *How Google determined our right to be forgotten*.
[89] Grossman, Lev (2014). *You Have the Right to Be Forgotten*.
[90] Powels, Julia (2015). *Google says it acknowledges some people want 'right to be forgotten'*.
[91] Chaparro 2015.
[92] Bernal, Paul (2014). *Is Google undermining the 'right to be forgotten'?*.
[93] Chaparro 2015.

the article that has been removed from the search result.[94] The choice to only remove links on European domains was criticised by the European Commission and regulators from 28 European countries.[95] However, Google's executive chairman considered the ruling of the CJEU to be flawed and that the Court went too far in favour of privacy at the cost of the right to knowledge.[96] Nevertheless, Google insists that they are complying with the CJEU's ruling.[97]

Conclusively, it is clear from the reactions to the judgement that there is a tension between the right to privacy online and the right to freedom of speech. Mr Costeja González and many others have a desire to remove personal information from the web and eliminate their online presence. At the same time freedom of speech and the freedom of the media are important fundamental rights that are necessary for a democratic society. It is reasonable to argue that what is publicly known about a person should not only be decided by that one individual. Nonetheless, the Costeja-judgement gives the individual more possibilities to control and manage what the public is allowed to know. How strong this right will become is still unclear, however, in my opinion, it is obvious that the citizens of Europe are demanding more privacy.

[94] Bernal, Paul (2014). *Is Google undermining the 'right to be forgotten'?*.
[95] Chaparro 2015.
[96] Gibbs, Samuel (2014). *Eric Schmidt: Europe struck wrong balance on right to be forgotten*.
[97] Peston 2014.

5. Rights on the Internet

5.1 Privacy Rights on the Internet

Jon L. Mills, Professor of Law, defines privacy as the core of an individual's personal identity and personal freedom. Mills is of the opinion that when people agree to become a member of society they also assent to giving up some of their freedom and independence. The freedom that remain is, as a result, what constitutes the common notion of individual privacy.[98] In the 1970's the Parliament Assembly of the Council of Europe defined the right to privacy as "the right to live one's life with a minimum of interference."[99] Almost thirty years later, the Assembly added to that definition and stated that because of the new communication technologies that makes it easier to store and use personal data, the right to control one's personal data should be included in the definition of the right to privacy.[100] Originally, information privacy rights were focused on consent, now it is seen more as an individual's right to shape his or her participation in society.[101]

The right to a private life is in one way or another set out in most international human rights conventions.[102] There are numerous legal instruments on privacy-related rights in the EU. When it comes to privacy rights online it is provided in Article 8 of the European Convention on Human Rights (hereinafter ECHR) and Article 7 of the Charter of Fundamental Rights of the European Union (CFREU) that everyone has a right to respect for his or her family and private life, home and correspondence. Moreover, Article 8 CFREU provides a specific fundamental right to data protection.[103] Additionally, the General Directive regulates the lawful processing of personal data within the EU and a Proposal for a reform of the current rules has been presented by the European Commission to further strengthen the data protection rules in the EU. Furthermore, attempts to protect private rights on the Internet exist outside the EU as well, for example in the United States of America (hereinafter referred to as

[98] Mills, Jon L. (2008). *Privacy: the Lost Right*, page 13.
[99] Council of Europe Parliamentary Assembly, Resolution 428 (1970).
[100] Council of Europe Parliamentary Assembly, Resolution 1165 (1998).
[101] Mayer-Schönberger 2009, page 137.
[102] Bernal 2014, *Internet Privacy Rights: Rights to Protect Autonomy,* page 87.
[103] Lopez-Tarruella Martinez, Aurelio (2012). *Google and the Law: Empirical Approaches to Legal Aspects of Knowledge-Economy Business Models*, page 80.

the U.S) where individuals are protected against 'unreasonable searches and seizures'. However, compared to the U.S, privacy has reached an entirely different level in the EU.[104]

5.1.1 The Rules Today

5.1.1.1 A Fundamental Right

In Europe, data protection is regarded as a fundamental human right.[105] Data protection is explicitly mentioned as a fundamental right in numerous Member State constitutions. The legal status of data protection as a fundamental human right is essential to understanding the significance of the data protection rules in Europe.[106] The CFREU is the first general international catalogue of fundamental rights and freedoms that includes the right to data protection as an autonomous right, protected as such.[107] CFREU states that everyone has the right to personal data protection in all aspects of life, even one's life on the Internet.[108] Article 7 CFREU guarantees the right to respect for private and family life and Article 8 CFREU proclaims the right to the protection of personal data. In Article 8(2) CFREU it is specified that personal data shall be processed justly for specified purposes and on the basis of consent of the person concerned or on a basis of another legitimate ground laid down by law. All people of the European Union have the right of access to data concerning him or her and the right to have that data corrected.[109] Furthermore, the right to privacy is also guaranteed by Article 8 ECHR, and mentioned in the general principles of Community law. The European Court of Human Rights has derived the new dimension of privacy, protection of personal data, from Article 8 ECHR.[110] Moreover, the concept of private life in Article 8 ECHR is to be constructed broadly. Thus, private life does not only include the inner sphere of a person's existence, but social

[104] Dörr 2012, page 15.
[105] Kuner 2003, page 16.
[106] Kuner, Christopher (2007). *European Data Protection Law: Corporate Compliance and Regulation*, pages 18-19.
[107] Ghezzi 2014, page 86.
[108] Ec.europa.eu, (2012). *European Commission – PRESS RELEASES.*
[109] Case C-131/12, para. 69.
[110] Ghezzi 2014, page 86.

relationships and contracts to the outside world as well.[111] The approximation of the right to privacy must not result in any lessening of the protection they afford; on the contrary they must seek to ensure a high level of protection in the Community.[112] Additionally, Article 16 of the Treaty on the Functioning of the European Union (hereinafter referred to as TFEU) also explicitly recognizes the right to protection of personal data. Article 16 TFEU stipulates a legal basis for rules on data protection for all activities within the range of EU-law and it allows the adoption of rules relating to the protection of processing of personal data.[113]

In light of the fundamental rights set out in Article 7 and 8 of CFREU and Article 8 ECHR, a request that personal information shall no longer be made available to the general public is a right that overrides the economic rights of an Internet operator and also the interest of the general public in having access to that information. However, in the Costeja-case, the Court limited the right to have personal information on the web deleted by stating that the right is not applicable if, for particular reasons, the interference with a person's fundamental right is "justified by the preponderant interest of the general public in having, on account of its inclusion in the list of results, access to the information in question."[114]

5.1.1.2 The General Directive

In Europe, there has existed legislation on data protection since 1995. The data protection rules of the European Union protects the fundamental rights and freedoms of natural persons, and particularly the right to data protection, as well as the free flow of data.[115] The main instrument for EU data protection is the EU General Data Protection Directive. The General Directive offers a detailed legal regime for the protection of personal data.[116] Six main principles underlie the Directive: legitimacy, finality, transparency, proportionality, confidentiality and security and control.[117] Moreover, it is apparent from Article 1 and recital 10 in the preamble that the General

[111] Ehlers, Dirk, and Becker, U. (2007). *European Fundamental Rights and Freedoms*, page 70.
[112] Directive 95/46/EC, Preamble 10.
[113] The Proposal, page 5.
[114] Case C-131/12, para. 99.
[115] Ec.europa.eu, (2012). *European Commission – PRESS RELEASES.*
[116] Ghezzi 2014, page 86.
[117] Kuner 2003, page 17.

Directive seeks to guarantee a high level of protection of the fundamental rights and freedoms of natural persons, particularly their right to privacy, with respect to the processing of personal data.[118] The freedom to transfer personal data within the European Union without restrictions on data flow is important. However, it is not a requirement that Member States consent to transfers of personal data to countries outside of the European Union that does not have a satisfying level of data protection.[119]

5.1.1.2.1 Applicability

The General Directive provides a protection for the fundamental rights and freedoms of natural persons, particularly their right to privacy in respect to processing of their personal data.[120] The Directive applies when a 'processor' under the authority of a 'controller', processes 'personal data'.[121] The bodies or people that collect and manage personal data are referred to as 'data controllers'. For example, a medical practitioner is normally the controller of his or her patient's data and a company is the controller of its data on its employees and clients. A search engine is also defined as a controller under the General Directive. Essentially, all companies, partnerships and sole traders are possible data controllers. Personal data may be collected and processed for a large variety of legitimate purposes. Some legitimate reasons might be business transactions, job applications, joining clubs etc.[122] The term 'personal data' is interpreted expansively in Member State law as well as under the General Directive. 'Personal data' includes all data about a person, both indirect and direct information, and not only data concerning a person's personal life.[123] The data relating to the individual can be anything from a photo, a name, bank details, posts on social networks, an email address, a telephone number or medical information.[124] The data has to relate to an 'identifiable person', meaning that a set of data taken together that might make it possible to match a set of data to a certain person, or make identification of that person significantly easier, is to be considered as 'personal

[118] Case C-131/12, para. 66.
[119] Kuner 2007, page 89.
[120] Article 1(1) Directive 95/46/EC.
[121] Article 2(d) Directive 95/46/EC.
[122] Carey, Peter (2009). *Data Protection: A Practical Guide to UK and EU Law*, page 23.
[123] Carey 2009, page 18.
[124] Ec.europa.eu, (2012). *European Commission – PRESS RELEASES.*

data'.[125] All means likely to be used by a Controller or any other person to identify a person is to be taken into account when determining if a person is 'identifiable'.[126] Thus, even tough the data does not contain the name of a person, it would be considered as 'personal data' if, with reasonably effort, it could be possible to link a description to that specific person.[127] The reason why personal data is conceptualised very broadly is because it should not be linked to the idea of intimacy as in the common approach to privacy. By including *any* information to a natural person, the definition covers personal data, commercial data and published data.[128] As a result of this broad interpretation, data are usually assumed to be personal, except when it can be clearly shown that it would not be possible to tie the data to an identifiable person.[129]

Exemptions to the General Directive's applicability on processing of personal data are contemplated and the directive does not apply, for example, to individuals' processing personal data 'in the course of a household activity' or for 'purely personal purposes'. In other words, the data protection rules do not apply to individuals that only make use of personal data for their own domestic and entertaining purposes.[130] Thus, the right to informational self-determination is not absolute. Possible exceptions or limits to the individual's control over the data, deriving from overriding public or private interests, are to be taken into consideration.[131]

5.1.1.2.2 Purpose and Legitimacy

All processing of personal data must still comply with the principles concerning quality set out in Article 6 of the General Directive and with one of the principles for creating a legitimate data processing found in Article 7 of the General Directive.[132] One of the principles set out in Article 6 is the principle of purpose. The purpose principle specifies that personal data have to be processed for a determined,

[125] Kuner 2003, pages 50-51.
[126] Directive 95/46/EC, Recital 26.
[127] Kuner 2003, pages 50-51.
[128] Ghezzi 2014, pages 86-87.
[129] Kuner 2003, pages 50-51.
[130] Ghezzi 2014, page 71.
[131] Ghezzi 2014, page 87.
[132] *Österreichischer Rundfunk and Others* EU:C:2003:294, para. 65; Joined Cases C-468/10 and C-469/10 *ASNEF and FECEMD* EU:C:2011:777, para. 26; and Case C-342/12 *Worten*. EU:C:2013:355, para. 33.

transparent and legitimate purpose. This principle ensures that a controller does not keep personal information in a form that allows identification of the data subject for longer than is necessary for the purposes for which the personal information is processed. Once that purpose is fulfilled or the as soon as keeping the personal data is no longer necessary to achieve the purpose, the data should be anonymised or deleted.[133] The principle of legitimacy set out in Article 7, generally requires that the right to data protection be balanced against other people's interests in processing the data and that the processing is only conducted with a legal basis. Of importance when determining this is whether the data subject has the appropriate means available to protect his or her data interest and whether he or she has been given the appropriate information about the means and purposes of the data processing.[134] Article 7 of the General Directive provides six different circumstances where processing of personal data is legitimate. One of these principles must be fulfilled for the Member States to allow processing of personal data.[135] In most cases, the legal basis for processing of personal data will be found in Article 7(a) or 7(f).[136] Article 7(f) concerns processing that is in the legitimate interest of the data controller and is not outweighed by the data subject's fundamental rights and freedoms.[137] Under Article 7(f) there has to be a test of 'legitimate interest' or 'balancing of interests'. It is not enough that the data controller has a legitimate interest in processing the data, such interests are overridden by the individual's interest for fundamental rights and freedoms.[138]

5.1.1.2.3 Freedom of Expression and the Right to Object

Freedom of expression is not only strongly anchored in European human rights law, but is present in the General Directive as well. As will be shown below there are inevitable tension between data protection and the freedom of expression and the boundaries between the two rights have been hard to define. However, there are attempts made to try to make the two rights coexist. Article 9 of the General Directive allows exceptions from "the processing of personal data carried out solely for journalistic purposes or the purpose of artistic or literary expression only if they are

[133] Ghezzi 2014, page 94.
[134] Kuner 2007, page 90.
[135] Kuner 2007, page 20.
[136] Kuner 2007, pages 299 and 305.
[137] Article 7(f) Directive 95/46/EC.
[138] Kuner 2007, page 245.

necessary to reconcile the right to privacy with the rules governing freedom of expression."[139] Moreover, the General Directive grants individuals the right to object to data processing in certain situations. Article 14(a) provides that data subjects shall be granted the right to, "at least in the cases referred to in Article 7 (e) and (f), to object at any time on compelling legitimate grounds relating to his particular situation to the processing of data relating to him, save where otherwise provided by national legislation. Where there is a justified objection, the processing instigated by the controller may no longer involve those data;"[140] The right to object is interpreted broadly.[141]

5.1.1.2.4 The Right to Erasure

As mentioned above, the right to erasure and blocking of data is a part of Article 12(b) of the General Directive. The removal or blocking of personal data is a way for the data subject to act against controllers or processors that do not comply with the protection rules set out in the General Directive, particularly if the data concern incomplete or inaccurate data.[142] The data subject may address the controller directly. The controller must then examine the request of deletion accordingly. If the controller does not grant the request, the data subject has the possibility to bring the matter before the supervisory authority or the judicial authority.[143]

5.1.2 The Rules Tomorrow

It is extremely difficult to construct laws for the Internet. The reasons are the speed of technological developments, the lack of speed of lawmakers, Internet's seemingly borderless nature, lawmaker's limited understanding of technology and the power of numerous lobby groups.[144] With the constantly growing use of the Internet, social networking sites, location-based services, cloud computing and smart cards, individuals all over the world end up leaving digital traces with every move they make. As a result, the laws and regulations implemented quickly need to be

[139] Article 9 Directive 95/46/EC.
[140] Article 14(a) Directive 95/46/EC.
[141] Kuner 2007, page 65.
[142] Ghezzi 2014, page 94.
[143] Case C-131/12, para 77.
[144] Bernal 2014, *Internet Privacy Rights: Rights to Protect Autonomy,* page 82.

modernized. The current rules in the EU were introduced at a time when several of today's online services and the challenges they bring for data safety did not yet exist. Moreover, a concern amongst Europeans is that there exists a risk that their personal data may be misused. As a result, there is now a need to modernize and reform the data protection rules in Europe.[145] Thus, the General Directive is currently under revision.[146]

5.1.2.1 The Proposal

In 2012, the European Commission published a 'Proposal for a Regulation of the European Parliament and of the Council on the Protection of Individuals with Regard to Processing of Personal Data and on the Free Movement of Such Data' (the Proposal) and a proposal for a 'Directive of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data by competent authorities for the purposes of prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and the free movement of such data'. The Proposal consists of a comprehensive reform of the 1995 data protection rules.[147] The proposal is based on Article 16 TFEU, which is the new legal basis for the adoption of data protection rules.[148]

A lot has changed with the way data is collected, assessed and used since 1995. Also, Member States of the European Union have implemented the rules from 1995 differently, resulting in divergences in enforcement. [149] In a special Eurobarometer published in 2011, it was concluded that 74 % of Europeans agree that personal data is increasingly a part of modern life, however, at the same time 70 % of Europeans are concerned that the personal data they share may be used for a purpose other than for which companies collected it and 75% of Europeans want to remove personal information on webpages whenever they decide to do so. As a result of individuals having a lack of trust in online services, the growth of the digital economy is

[145] The Proposal, page 1.
[146] Ghezzi 2014, page 86.
[147] The Proposal, pages 1-2.
[148] The Proposal, page 6.
[149] The Proposal, pages 1-2.

hindered.[150] Consequently, the European Commission proposes an update and modernisation of the principles of the General Directive in order to guarantee privacy rights in the future.[151] Viviane Reding promoted the proposition by saying that:

> "The protection of personal data is a fundamental right for all Europeans, but citizens do not always feel in full control of their personal data. My proposals will help build trust in online services because people will be better informed about their rights and in more control of their information. The reform will accomplish this while making life easier and less costly for businesses. A strong, clear and uniform legal framework at EU level will help to unleash the potential of the Digital Single Market and foster economic growth, innovation and job creation."[152]

The aim of the proposal is to update and modernise the data protection rules. The Commission's focus is mainly on strengthening the internal market of the EU, reinforcing individuals' rights, safeguarding a high level of data protection in all areas, ensuring proper enforcement of the rules, setting global data protection standards and simplifying international transfers of personal data. The Commission is trying to give Europeans more control over their personal data and facilitate the access to it. The Proposal is designed to ensure that individuals' personal information is protected, regardless of where it is sent, processed or stored, inside as well as outside the EU.[153] New and modernized data protection rules will, according to the European Commission, mean that individuals can be more confident about how personal data is treated, particularly online. The European Commission is trying to help increase the trust in online services in order for people to use new technologies more confidently and for individuals to have the ability to reap the benefits of the internal market.[154]

5.1.2.2 The Key Changes

The changes of the current legislation on data protection in the EU will improve personal data protection for individuals by reinforcing the 'Right to be Forgotten', a

[150] Report on the Special Eurobarometer 359: *Attitudes on Data Protection and Electronic Identity in the European Union* (2011), pages 1-2.
[151] Ec.europa.eu, (2012). *European Commission – PRESS RELEASES.*
[152] Ec.europa.eu, (2012). *European Commission – PRESS RELEASES.*
[153] Europa.eu, (2012). *Commission Européenne – COMMUNIQUES DE PRESSE.*
[154] The Proposal, pages 1-2 and Recital 6.

right that will help the citizens of the EU to better manage data protection risks online (see more below). Furthermore, when consent is a requirement for data processing, the consent will have to be given explicitly, rather than assumed, which is sometimes the case today. In addition, individuals will have easier access to their own data, have the ability to transfer personal data from one service provider to another more effortlessly and there will be more transparency about how personal data is handled with easy-to-understand-information. [155] Another key change will be the introduction of the principles 'privacy by design' and 'privacy by default' that will strengthen individuals' rights in a practical way by establishing data protection in products and services from the earliest stage of development by making controllers adopt internal policies, implement appropriate measures and introducing privacy-friendly default settings as a norm.[156] The privacy by design rule ensures that the requirements of the regulation are met and that the rights of the data subject are protected.[157] The European Parliament believes that a 'privacy by design' rule is an essential feature of any development that risks jeopardising the security of personal information and the public's trust in those who hold information about them.[158] The privacy by default rule ensure that data is not made accessible to an indefinite number of people and that the storage of data automatically comes to an end when the necessary time to achieve the announced purpose has passed. To fulfil this, the controller is obliged to implement appropriate technical and organisational measures and procedures.[159] Moreover, the responsibility and accountability for the processors of personal data will be increased. The reform requires organisations to notify individuals and relevant data protection authorities if data is unlawfully or accidentally destroyed, altered, lost accessed by or disclosed to unauthorized persons.[160] Also, if an individual's data has been breached or rules on data protection violated, the individual will be able to refer the case to the data protection authority in their country, even if their data has been processed by an organisation based outside the EU. The intention is to give Europeans

[155] Europa.eu, (2012). *Commission Européenne.*
[156] Article 23 of the Proposal and Recital 61.
[157] Article 23 of the Proposal.
[158] Resolution of the European Parliament on the on the Communication from the Commission to the European Parliament and the Council – *An area of freedom, security and justice serving the citizen,* para 85.
[159] Article 23 of the Proposal.
[160] Article 31 of the Proposal.

the assurance that their data is protected, no matter where it may be handled in the world.[161]

5.1.2.3 The Proposal on the 'Right to be Forgotten'

The proposal accentuates even more than before the determining role of the individual's will when it comes to the 'Right to be Forgotten'.[162] Article 17 of the Proposal gives the grounds on which the data subject have a right to ask for the removal of their data. The data subject have the right to demand deletion of their data if the data are no longer necessary in relation to the purposes for which they were collected or processed, if the data subject withdraws his or her consent or the consented period expires (when the processing of data is based on consent) or if the processing of data was not based on a vital interest, the public interest or the legitimate predominate interest of the data controller.[163] The argument behind the need of a 'Right to be Forgotten' is that it will help people to better manage their data protection risks online by enabling them to delete their data if there is no legitimate reason for preserving it.[164] According to the Commission, the 'Right to be Forgotten' needs to be clarified and updated for the digital age. The proposed 'Data Protection Regulation' aims at strengthening the principle and improving legal certainty.[165] Firstly, the proposed data protection Regulation sets out that no matter where the physical server of a data processor or controller is located, non-European companies must apply European rules when offering services to European consumers.[166] This assures that the 'Right to be Forgotten' does not become an empty shell by not applying to non-European companies and search engines. Secondly, the Commission has proposed a reversed burden of proof, making the company and not the individual responsible for proving that the data cannot be deleted because of its relevance. The data subject shall be entitled to object to processing of data relating to him or her, the data controller then have to prove that their legitimate interests for proceeding with the processing of the personal data may override the fundamental rights and freedoms

[161] Europa.eu, (2012). *Commission Européenne.*
[162] Ghezzi 2014, page 83.
[163] Article 17 of the Proposal.
[164] Ec.europa.eu, (2012). *European Commission – PRESS RELEASES.*
[165] The Proposal, pages 5 and 9.
[166] Article 3 of the Proposal.

or interests of the data subject.[167] This would make the 'Right to be Forgotten' more effective for individuals according to the Commission. Thirdly, the proposed Regulation forms an obligation for a controller that makes personal data public to take 'reasonable steps' to inform third parties that an individual wants data to be deleted. Article 17(2) of the Proposal extends the 'Right to be Forgotten' "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."[168] The European Parliament added to this and included, in its comprised text, an obligation for the controller in question to make sure that the personal data is erased as well as a right for individuals to delete personal data when a regulatory authority or court based in the EU has ruled final and absolute that the personal data must be removed. [169] The difference from the provision set out in Article 12(c) of the General Directive is that the duty to inform automatically ensues from an erasure without the data subject having to ask for it.[170] Fourthly, the proposed Regulation permits data protection authorities to impose fines when companies do not respect the rights of Europeans, such as the 'Right to be Forgotten'. Lastly, the proposed Data Protection Regulation specifies the reasons of public interest that would justify keeping data online and thus limiting the 'Right to be Forgotten'. The limitations include the exercise of the right of freedom of expression, cases in which data is processed for historical, statistical and scientific purposes and finally the interests of public health.[171] Data controllers have to delete the requested data if they cannot show compelling legitimate grounds that override the data subject's interests.[172] To conclude, by implementing the proposed Data Protection Regulation the EU would, according to the Commission,

[167] The Proposal, Recital 56.
[168] The Proposal, Recital 54.
[169] Draft European Parliament Legislative Resolution on the 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) (2012), Amendment 112.
[170] Ghezzi 2014, page 96.
[171] Article 17(3) of the Proposal.
[172] Artcle 19(1) of the Proposal.

achieve the right balance between the freedom of expression and the right to the protection of personal data.[173]

5.1.2.4 Reactions to the Oblivion Proposal

According to Andrew Hoskins, Article 17 of the Proposal fails to grasp the multi-directional medial pressures on the past, present and future. Hoskins believe that the proposal does not account for the fact that life today is lived through hyperconnectivity and not subject to the rules of decaying time. [174] Cécile de Terwagne, Professor in Law, finds the European legislation regarding the 'Right to be Forgotten' highly accentuates the determining role of the individual's will.[175] However, Cécile de Terwangne suggests that different actions could be used in addition to or instead of data deletion. These actions would, according to her, better respect the proportionality principle and could be a nuanced result of exercising the 'Right to be Forgotten'. For example the data could instead be anonymised so that the individual cannot be associated with the data. Another solution could be to restrict access to the data, de-referencing or de-indexing the data, supress links or link additional information to the data like a warning or the data subject's opinion.[176] Experts in the field have also expressed alternative solutions to the European 'Right to be Forgotten' that does not include any adoption of laws. Some suggest that changing the behaviour online will not be successfully done by any intervention by a government. Instead, they believe people will adapt themselves to the digital remembering and consciously disregard old facts and accept humanity's ever-changing nature. However, others believe that such a cognitive adjustment would fail because of humanity's deep-rooted management of memory and forgetting and some believe it would just take too long.[177] Moreover, a proposition to grant data subjects an automated 'Right to be Forgotten' has been made in different political, institutional and expert circles. The right would be automatic in the sense that the information would expire after a certain period of time without the data subject having to take action. Information would thus have an expiry date and there would not have to be an assessment on a case-by-case basis. The technical mechanisms would ensure that the

[173] The Proposal, Recital 139.
[174] Ghezzi 2014, page 55.
[175] Ghezzi 2014 page 83.
[176] Ghezzi 2014, pages 94-95.
[177] Mayer-Schönberger 2009, pages 154-155.

data storage automatically ends when the announced purposes have passed. [178] Users could select the expiration date and also change it.[179] Such a rule would be effective for fulfilling the desire to be forgotten. The rule is directed at those storing information and does not require individuals to sue for enforcement.[180] However it is clear that this cannot offer satisfying protection for the data subject in all circumstances.[181] The removal would not be the outcome of an individual's decisions, which requires a general rule with little room for interpretation. As a result the rule would not be very flexible or adaptable. Additionally, expiration dates cannot control the digital sharing and duplication of information.[182] One of the issues with expiry dates is also that information that could be important for society and ought to stay in the public sphere might be deleted.[183]

5.1.3 A Comparative Perspective

The U.S is particularly important in the context of online security since the key Internet companies, such as Google and Facebook, whose business have had great influence on the Internet environment, are based in the U.S. Data protection in the U.S is very different compared to that in the EU. There is no general data protection in the U.S for example, however there are specific protections set out in a series of laws for certain kinds of data.[184] Through interpretations the United State's Constitution has been understood as including a constitutional right to privacy, however that right seems to protect individuals against governmental actions, rather than private ones. In the Fourth Amendment it is set out that individuals are protected against 'unreasonable searches and seizures'. Still, the Fourth Amendment only limits threats to individual privacy from governmental action and not private action. [185] Thus, there is no federally codified general right to information privacy for individuals when it comes to information controlled by a body outside the federal

[178] Ghezzi 2014, pages 96-97.
[179] Mayer-Schönberger 2009, page 172.
[180] Mayer-Schönberger 2009, page 160.
[181] Ghezzi 2014, pages 96-97.
[182] Mayer-Schönberger 2009, page 182.
[183] Mayer-Schönberger 2009, pages 160-160.
[184] Bernal 2014, *Internet Privacy Rights: Rights to Protect Autonomy*, page 113.
[185] Dörr 2012, pages 10-15.

government.[186] The constitutional protections as well as tort protections have mostly been confirmed as inadequate to the task of protecting privacy in the online technology society.[187] In the U.S it is confirmed by case law that free speech will trump privacy in most cases, with certain exceptions of situations where there are no public debates.[188]

The legal system in the U.S has not responded as successfully to the personal privacy issues evolving from advancing technology.[189] The European legislation is farther along in most respects when it comes to protecting privacy. A large issue today, however, is that electronic communication methods are not limited to a single country. As a result of the quick information flow online and the web's ability to easily send data across borders, privacy threats are no longer limited to one nation's territory. Thus, even though one country deals with privacy concerns, privacy can never be completely safeguarded on a global scale if there are no international standards.[190] Though, it should be noted, that the drive by the EU has had some impact on privacy protection worldwide, making the protection slightly more uniform. The EU rules have been seen as a sort of 'golden standard' of data protections and countries have followed their standards (Hong Kong and Malaysia are two examples) and companies wanting to do Internet-related business in the EU have had to raise their standards.[191]

[186] Mayer-Schönberger 2009, page 136.
[187] Dörr 2012, pages 10-15.
[188] Dörr 2012, page 27.
[189] Dörr 2012, page 10.
[190] Dörr 2012, pages 26-28.
[191] Bernal 2014, *Internet Privacy Rights: Rights to Protect Autonomy,* pages 114-115.

5.2 Public Rights on the Internet

The existence of the press and the freedom to receive information and ideas freely is a public right that guarantees public debate and it is important for a functioning democratic society.[192] Communication with fellow human beings is an essential element of an individual's personality and thus freedom of expression is of great importance.[193] As a result, there are certain exemptions to the private rights on the Internet and the 'Right to be Forgotten'. These exceptions to private rights include the freedom of expression and of the media. The public role of an individual is an important aspect as well. The interests of the general public to have access to the information about a person justify the information's presence on the web.[194]

A right strongly anchored in European human rights law and also in the General Directive is the freedom of expression. Article 9 of the General Directive set forth exemptions from data protection only if it is necessary for the protection of freedom of expression. The law of each Member State must be evaluated in order to decide if any exceptions set out in Article 9 are required. In practice, this means that the law of each Member State shall be evaluated to conclude if any exceptions are necessary. However, national laws on data protection vary to a great extent.[195] The CFREU brings together the fundamental rights protected in the EU. The rights of the citizens of the EU were established at different times, in different ways and in different forms. Thus, the CFREU was created in order to clarify the rights of Europeans.[196] Article 11 CFREU provides a right to freedom of expression and information to everyone. The right "include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers."[197] Furthermore, at the heart of the protection of fundamental rights in the EU is the ECHR.[198] Article 10 of the ECHR describes the freedom to obtain and communicate information and ideas as communicative actions that are protected. The right include

[192] Hoboken 2012, page 183.
[193] Ehlers 2007, page 97.
[194] The Proposal, Recital 53.
[195] Kuner 2007, pages 76, 84-85.
[196] Ec.europa.eu, (2013). *EU Charter of Fundamental Rights – Justice.*
[197] Article 11 of the Charter of Fundamental Rights of the European Union 2000/C 364/1.
[198] Hoboken 2012, page 60.

the right to transmit information freely and the right to use communicative means. [199] The right to freedom of expression stated in Article 10 ECHR is generally interpreted as covering all forms of expression, any medium and any content. The right even includes content that may offend, disturb or shock any sector of the population. Freedom of expression is not limited to ideas that are favourably received or deemed to be inoffensive. The right is considered as elementary because without it there would not exist an effective defence of fundamental freedoms.[200] Nonetheless, it is worth mentioning that there are exceptions to the right to freedom of expression set out in Article 10(2) ECHR. The exception refers, amongst other interests, to 'the protection of the reputation or right of others'.[201]

There are usually three main justifications for the freedom of expression. There is the argument from democracy, the argument from truth and the argument from self-fulfilment or autonomy.[202] Because of the importance of informed citizens in a democratic society and people's independence, the end-user's freedom to receive information and ideas freely is of great significance. The functioning of the press, including the press' functioning on the web, as a public watchdog and as a platform for debate about matters of public concern informs strong protection of the press. The freedom to produce and select information and ideas guarantee an uninhibited, wide-open and healthy public debate.[203] It is clear that Article 10 ECHR also protects the publication of search results by a publicly accessible search engine as the search engine produces information itself, or more specifically, the search engine produce information about information.[204]

[199] Hoboken 2012, pages 182-183.
[200] Ehlers 2007, pages 97-98.
[201] Article 10(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocols No. 11 and No.4.
[202] Hoboken 2012, page 54.
[203] Hoboken 2012, pages 182-183.
[204] Hoboken 2012, pages 196-197.

6. Data Vulnerability

Search engines can bring to the surface the slightest piece of information about an individual, separated from its initial context. The Internet makes past characteristics eternally present, the result of which can be harmful and troubles can succeed. Search engines, like Google, collect information from several different contexts and they remove the data from its initial circles and make it difficult to control. Moreover, as a result of the 'eternity effect' of the Internet combined with the efficiency of search engines online, the slightest piece of information can be brought to surface. Because of the Internet's 'unlimited memory' characteristics become eternally present and this can be harmful in a lot of different ways. It is not only information posted by others that can be problematic, it is also information once personally posted on the web. Because of search engines, information becomes accessible outside the initial circle and in a time when it is no longer relevant and this can be harmful for the individual.[205] Also, however true information about a person is, to publicise personal information undermines people's privacy and threatens their equality with others as well as their social standing.[206] The issue of data vulnerability implies that there is a large interest in keeping personal data secure, and therefore a strong interest in deleting that data.

6.1 The Virtue of Forgetting

While it seems that historically it was an honour to be remembered, today people are aiming at the opposite. With the help of widespread technology, remembering has become the default, and forgetting the exception.[207] The permanence of the Internet is a large concern to a lot of people and it is rare that individuals do not have something about themselves that he or she wants to remove from the web.[208] The generation that has grown up with technology have novel views about information access. These individuals freely share copyrighted material and are willing to post immense amounts of personal information on numerous social network sites. Much of the

[205] Ghezzi 2014, pages 84 and 87.
[206] Lever, Annabelle (2012) *On Privacy*, page 34.
[207] Mayer-Schönberger 2009, page 2.
[208] Ball 2014, '*Right to be Forgotten' ruling creates a quagmire for Google et al'*.

information provided by people on the web is available for anyone who cares to look.[209] Yet, no one is immune to error. As a result, published information might not always give an accurate or relevant picture of the person in question. [210]

Publicising personal information about someone is often justified by the moral failings of a person.[211] Sometimes there is no other way to challenge damaging forms of hypocrisy, prejudice and manipulation, than outing those involved. Nonetheless, even if someone has broken the law, it is not always justified to publish such behaviour or report it in a way that makes it widely known, making the individual to a subject of peculation and discussion. The violation of laws can be more of a result of momentary distraction, mental confusion, depression or despair. Thus, even if the behaviour is illegal, the justification of publicity depends on personal or professional responsibilities and the alternatives before a person, more than the legal status of the behaviour alone.[212] The 'Right to be Forgotten' gives individuals a chance to be different from oneself, in other words, a right to be different from the ones we were before.[213] The past made present and present made future jeopardises the certainty and security of chronology of decay and the healthy aspect of forgetting and being forgotten.[214] In this sense, the right to be forgotten can be seen as an element of informational self-determination. It is the right to force someone to forget what he or she once knew, because it is no longer appropriate to know it.[215] The type of information that should be addressed by the 'Right to be Forgotten' from an identity perspective is information that has become out-dated, de-contextualised or distorted and through which an inaccurate representation of the person's identity is presented to the public. Moreover, the objective of the right is often to erase public information and prevent its further disclosure, not to conceal private information from public acquaintances.[216] Julia Powles and Enrique Chaparro points out that the idea of protecting personal rights against search engines is not to influence memory or eradicate information, but to make it less noticeable when that is reasonable and to

[209] Moore, Adam D. (2010). *Privacy Rights: Moral and Legal Foundations*, page 175.
[210] Moore, 2010, page 139.
[211] Lever 2012, page 34.
[212] Lever 2012, page 39.
[213] Ghezzi 2014, page 4.
[214] Ghezzi 2014, page 55.
[215] Ghezzi 2014, page 84.
[216] Ghezzi 2014, pages 70-71

battle the excessive results of the modern phenomenon that information is always, instantly, globally and eternally accessible. The Internet is extremely different from the human brain when it comes to memory. Remembering and forgetting are messy and complex human processes where the mind layer, reconstruct, sediment and contextualise. The Internet on the other hand does not forget, which threatens people's own rightful sovereignty over their life stories, personal narratives, communications and even people's memories.[217]

6.2 Society's Tool

Freedom of speech and expression is essential for the discovery of truth and it is a way to have a check on power. By having the government's actions studied by a free press and a healthy exchange of ideas those in power are less likely to abuse their authority. Additionally, if or when someone in power abuses it, the press have the ability to expose the wrong and force corrective actions. Free speech and expression are important for the public life in the sense that one has the right to be informed about a wide range of dispute, issues and policies. It is a necessity for an open society and democracy.[218] Freedom of speech promotes toleration, autonomy and diversity.[219] Without freedom of speech society would lose some of its democratic control and the sense of security in knowing what is happening around us. The Internet is quick and facilitates communication and the publishing and accessing of information. Additionally, the Internet makes the range of information receivers broader.[220] Furthermore, the Internet's comprehensive memory is advantageous for society and individuals in the sense that memory helps people remember ideas and capture moments that bring them fulfilment and joy when looking at them later. Memory also helps society by preventing people from making the same dangerous and costly mistakes twice. Learning from history requires a collective ability to remember.[221]

[217] Chaparro 2015.
[218] Moore, 2010, pages 137-139.
[219] Moore, 2010, page 142.
[220] Hick, S., Halpin, E. and Hoskins, E. (2000) *Human Rights and the Internet*, pages 66-67.
[221] Mayer-Schönberger 2009, page 10.

6.3 The Tilt of the Scale

Individual freedoms are valuable, however, so is the social value of information and public debate that justify the distribution of information.[222] Private rights, as well as freedom of speech, promote toleration, autonomy and diversity as individuals grow and experiment with new ways of living.[223] According to Christopher Kuner there is no fundamental conflict between freedom of expression and data protection, however there must be a balance between the two rights and the accomplishment of the balance depends on the use of basic principles such as the facts of a particular case and proportionality.[224] In the Costeja-case the CJEU had to decide how to balance the fundamental right to privacy and the freedom of expression. In the end Mr Costeja González and the 'Right to be Forgotten' won the balancing test. Some claim that this use of the 'Right to be Forgotten' may endanger the media freedom. To this Vivian Reding, member of the European Parliament, has responded that there has to be attempts made to strike the right balance in order to protect both rights. Reding means that the CJEU has given directions on how to find the balance and that there are clear limitations to the 'Right to be Forgotten'.[225]

As mentioned above, the freedom of expression and rights of data protection need not be seen as fundamentally contradictory, nevertheless, it seems like there have not been given sufficient consideration to the boundaries between the two rights in the EU.[226] There is indeed no *a priori* hierarchy when it comes to human rights. This means that giving one right a systematic priority over another cannot solve a case of a conflict of rights. The conflict must instead be solved through a balancing test. When it comes to the 'Right to be Forgotten' there are some characteristics of the right that will tilt the scale. As soon as time has passed and the newsworthiness of the information no longer justifies re-disclosure of the information, the 'Right to be Forgotten' outweighs the right to information. However, this does not apply if the information concerns a public figure or if there is an historical interest in the data, if that is the case, the right to information will override. Moreover, the aspect of the

[222] Floridi 2014, page 2.
[223] Moore, 2010, page 142.
[224] Kuner 2007, page 87.
[225] Ec.europa.eu, (2014). *'Right to be forgotten' and online search engines ruling.*
[226] Kuner 2007, page 85.

freedom of the press weighs more when taking into consideration that the role of the press is to act as a watchdog. However, the freedom of expression weighs less when it comes to the aspect of holding archives. If there is no longer a feature of newsworthiness to the information and the information is only documented, the right to privacy will outweigh the freedom of the press.[227] This constant tilt of the scale is problematic in the sense that it endangers the foreseeability of the rights. Furthermore, one also has to take into consideration that the balance of fundamental rights on the web is not necessarily the same as when it comes to classical offline formats.

[227] Ghezzi 2014, pages 90-93.

7. Analysis

7.1 The Tattoo

When data is lost, it is considered a huge failure. The online technologies were created to fulfil the desire of remembering and it is reasonable to argue that today the dream of never forgetting has finally come true; once something is posted online it will be there forever. The remembering function of the Internet is important when it comes to history and business. However, constant digital remembering confuses identities by including traces and actions that no longer belong to the identity a person want to be connected to or want to represent. What we post on the Internet becomes a sort of tattoo that is etched onto ourselves and it is hard and burdensome to remove. As have clearly been settled above, today's online technologies have changed our everyday life and concept of access to information. Digital information is easily transported and reproduced and it may be duplicated on websites that are out of an individual's control. Compared to offline, finding information online is made without much of an effort. Entering someone's name in a search engine can lead to an array of links to information that can be interpreted and everyone can add information to the web. The 'easy findability' of personal information that search engines provide makes it hard for individuals to maintain an overview of the amount of people that are accessing the information and it may reach unintended audiences. Moreover, online information is often taken out of its context – especially when the information is presented on search results made by online search engines, like Google – and runs the risk of being misinterpreted. Additionally, self-presentation partially ends up being in the hands of others when personal data is not only published by the individuals themselves, but by other people as well. As a result, people have discovered that there is a value in having privacy and the ability to control personal data.

Privacy is in many ways about control over what is known about us and by whom. In order to influence what happens to individuals online, what is seen on the web and which decisions are made about people, individuals have to have means to protect their data. This protection should give individuals the power to control how personal data is used, how information about them is gathered and who can access the information. Moreover, forgetting plays an essential role in human decision-making

and having the option to move on from past behaviours is important. Forgetting is not only an individual behaviour, society also forgets. Through societal forgetting and erasing of external memories, society accepts that human beings evolve over time and have the ability to learn from past experiences and correct their behaviour.

7.1.1 Regrets

Communication in analogue times was oral and if people said or did something they would later regret, they could pretend that it was just a misunderstanding and hope for the best, the best being that the incident was later forgotten. However, digital copying and sharing has eliminated people's restricted ability to recall information. Now digital copies are perfect replicas of the original data and forgetting is hard. Search engines are a great example of a type of operator that maintains a near perfect memory and they are not reluctant to use their informational power. They remember what the human brain has long forgotten. Mario Costeja González, for example, wanted to be forgotten. He had gone through some tough times and went through a part of his life he had (presumably) left behind and all he wanted was to move on and forget about that misstep. More importantly, he did not want others to judge him for something that happened a long time ago. However, the Internet remembered what Mr Costeja González wanted to forget. The public auction and information about Mr Costeja González' security debts had been catalogued by search engines and archived by web crawlers. I am not of the opinion that there was anything wrong with posting the information about Mr Costeja González' real estate auction to begin with. 'La Vanguardia' definitely had a legitimate reason for wanting to draw attention to the auction and making it public knowledge. Moreover, it is of importance for the public to know if someone has economical troubles. However, the case is not about Mr Costeja González' auction. It is about something much more important. It is about the significance of forgetting and the possible result of our society becoming unforgiving because it is unforgetting. Giving people a right to not let the past affect their present and future is, in my opinion an important fundamental right, especially in today's society where feeble remembering skills are no longer a problem. Everyone makes mistakes. The CJEU took this into consideration in the Costeja-case and confirmed the importance of the fundamental right to privacy and the 'Right to be Forgotten'.

The Costeja-case concerned out-dated information legally posted by a newspaper. However, that is not the only kind of data existing on the web that individuals want to delete. Another issue with online information is that, unlike the data Mr Costeja González wanted Google to remove, a large amount of information concerning people's lives are disclose by individuals themselves. Today's society encourages people to upload pictures, comment on online data and share information about their personal lives. In the strict sense, they bear the responsibility for the results of their revelations. Nonetheless, because of search engines, information becomes accessible outside its initial context. Additionally, search engines provide a new and more efficient memory that stores everything and makes information available at all times. This results in a society that never forgives because it never forgets. Humanity's ability to evolve over time is thus compromised. It is true that individuals will probably not make the same mistakes when they are well reminded of the consequences of their missteps. Nevertheless, the reminding quality of the web also hinders people from moving on and starting again from a clean slate. Consequently, search engines remove the positive effects of the passing of time. The brain's way of navigating through life is lost when technology takes its place. As a result, people now crave privacy and the ability to make others forget.

7.1.2 The Antidote

In its basic form, informational privacy rights give individuals the ability to decide if they want to share information or not. The 'Right to be Forgotten' is a basic and practical right available to everyone within the EU. The right gives individuals the possibility to take back control over what was once publicly known and to decide if they want personal data to stay in the public's appreciation or not. The 'Right to be Forgotten' should be seen as a means to new beginnings and self-definition. It prevents the past from conditioning the present and future in an excessive manner by allowing people to remove personal data. In this sense the right is an important legal instrument for both re- and de-construction of one's identity and for exercising better control over one's individuality. In this regard the right would serve as a protection from harm. The right prevents discrimination and unnecessary judgements of people.

To argue for a right to oblivion from the perspective of privacy and personal identity reinforces and widens the applicability of the 'Right to be Forgotten', covering other situations that it could otherwise not cover. Today, the 'Right to be Forgotten' is regulated in Article 12(b) of the General Directive. In my opinion the right to delete personal data is direct and simple. It clarifies what is important and adjusts the balance of power over rights of data and its use by helping individuals to control personal information available on the web that is out-dated, incorrect or embarrassing. The EU legislators have recognised the desire amongst EU citizens to have more privacy and a means to control personal data. Thus, the EU legislator presented the Proposal that aims at making the 'Right to be Forgotten' even stronger than it is today in order to help individuals manage data protection risks online. Article 17 of the Proposal give the citizens of the EU more control over their personal data by facilitating the deletion of personal data that is no longer legitimate for processors to keep and by improving legal certainty. The Costeja-judgement is a harbinger of the future EU data protection rules and addresses the same basic issues, namely the difficulty of limiting access to data on the Internet. In the Costeja-case the information was, according to the CJEU, no longer relevant since there was no predominant interest of the general public in having access to the information. Thus, if an individual can prove that there is no legitimate interest for anyone else to gain certain knowledge through personal data about him or her, he or she has the right to have that data removed. The CJEU made it clear that the question whether information is relevant or not must be examined on a case-by-case basis, however the Court did not give further guidelines concerning the 'relevance-test'. The judgement increase the urgency to complete and enact the Proposal and provide the legislators of the EU with the opportunity to further specify the 'Right to be Forgotten'.

Worth remembering is that people do not always desire the deletion of the data, but the erasure of the link that lets search engines select that data when combing the web. In that sense the information is still available for the public, it is only the 'meta-information' created by search engines that will be removed. Google has announced that they will fulfil the EU requirements and remove search results presenting links to personal data if an individual files a requested, thereby erasing some of its comprehensive memory and deleting some of its 'meta-information'. This brings individuals one step closer to regulating their self-definition. Also, the proposal

clarifies that when a controller or processor offers services within the EU, the EU legislation applies, no matter where the controller is located. However, as mentioned above, when it comes to search engines such as Google, the information will still be accessible on the search engine's domains outside the EU and the EU cannot prevent duplication of information. The EU legislation does not secure the 'Right to be Forgotten' globally. It was made clear after the Costeja-case that search results removed from the European domains will still be available on the domain 'www.Google.com'. This prevents the full effect of the 'Right to be Forgotten'. Since the EU is so far ahead when it comes to protecting personal information online, people can turn to countries outside the EU that does not have the same protection and find personal data about others that the EU legislators have allowed EU citizens to remove. For example, people can collect data in countries like the U.S where the individual do not have a right to delete information controlled by a body outside the federal government. Moreover, since Google does not erase the actual data, only the link and individual identifier of the personal data, the information can still be found on the web, hindering the effect of having a right to remove access to personal information. Furthermore, a text will show at the bottom of the page on the European domain if someone has been granted a deletion of a search result on Google. The text may give the 'searcher' reason to suspect that a person wants to hide something and it might encourage them to keep looking, maybe even try the webpage 'www.Google.com' to see if they can find the 'missing' information. I am not saying that Google is doing something wrong when enlightening the 'searcher' that there has been a conflict of interests concerning information about a person, on the contrary this prevents the public from 'missing out' on information that could be important. However, it is reasonable to argue that the text eliminates some of the effects of having a 'Right to be Forgotten'. The fact that someone is trying to hide something might form suspicion. Nonetheless, I believe that once the right to delete personal data is used more frequently it will become a natural part of forming society and people will not care about the text showing on search results.

Furthermore, the Proposal includes the principles of 'privacy by default' and 'privacy by design' that are enacted in order to support individuals' control over personal data by obliging controllers to enforce a more secure processing of personal data by implementing technical and organisational measures and procedures at the earliest

stage of the processing. This will lead to a sounder treatment of personal information as data is handled cautiously from an early stage and it puts additional pressure on the controllers to handle data more carefully. In my opinion, to put pressure on controllers to reform their way of handling information is important in order to effectively change the attitude towards personal data. If controllers are forced to adapt to a society where privacy and control over data are important for the individual they may finally change their approach towards personal information and 'privacy-friendly sharing' of information on the Internet might finally become the norm. As a result, privacy would not only depend on the legislation, but also be a natural part of everyday life, as controllers would change the way they process information from an early stage. This is, according to me, the best method to change the attitude towards personal integrity online. I truly believe that individuals will gain more control over their personal data and their personal integrity if controllers and processors are obliged to implement a technical structure based on consent where no more information is collected than needed, information is not kept longer than necessary and information is not used for anything other than for the purposes it was collected. Moreover, the implementation of a 'privacy by design' would mean that controllers as well as individuals would not have to attend to the consequences of personal data being in the public sphere after it had already happened, instead the issue might be solved at an earlier stage. This would increase the trust in online technologies. However, the principles of 'privacy by design' and privacy by default' will be costly for Internet businesses to implement and some businesses might try to take shortcuts or object. Nonetheless, that is the price they have to pay to fulfil society's need to regain privacy.

7.1.3 Side Effects

Some data experts are worried that the development of stronger privacy rights online and the 'Right to be Forgotten' will result in businesses leaving the EU. Moreover, some are of the opinion that blocking and deleting information online can be seen as an instrument for censorship and a threat to freedom of expression and the right to information. Many criticise the 'Right to be Forgotten' for its potential restrictions on fundamental rights and its progress towards becoming a potential 'super-right'. Also, in the future, one main instrument to understand the past will be today's personal

data. Hence, allowing deletion of data will result in future generations knowing less about our generation than it could. The thing society has craved for generations, eternal memory, will be deterred. However, satisfying the curiosity of future generations would be at the cost of infringing the rights of present generations.

7.1.3.1 Super-right

The 'Right to be Forgotten' is not an absolute right, however, it seems like the right is turning into a 'super-right', trumping other fundamental rights and freedoms. The new reversed burden of proof set out by the proposal makes the company and not the individual responsible for proving why personal data should not be deleted. This puts the individual in a much stronger position in a potential conflict. The right clearly gives individuals more than a say in what should be known about them. Thus, it seems like there is not much a controller based in the EU can do if a person, that is not a public figure, requests the removal of personal data. And even if they would object they have a large burden to bear when proving why the information is significant enough to remain in the public's appreciation. The right largely affects the controller and threatens the controller's freedom to conduct business. It is reasonable to fear that large technology companies will close their European offices when increased pressure is put on them to fulfil the obligations set out in the General Directive. This will affect the European online-market negatively. The 'Right to be Forgotten' can thus be said to be a fierce right that undermines other interests. However, one can hope that other countries will try to increase the privacy protection for individuals as well, making other markets just as demanding as the EU market.

Furthermore, with the growing protection of personal data and individuals' increasing means to control what is available on the web one could argue that the 'Right to be Forgotten' will trump several fundamental rights and suppress legitimate journalism that is in the public's interest. The CJEU made it clear in its judgement in the Costeja-case that fundamental rights justified by the predominant interest of the general public in having access to the information in question should not be affected by people's right to remove personal data. However, right now it seems like it is hard to prove that there is a public interest, especially as the 'Right to be Forgotten' grows stronger.

Yet, there are still some fundamental interests that prevents the 'Right to be Forgotten' from becoming a 'super-right'.

7.1.3.2 Censorship

The result of search engines being the simplest, clearest and most popular way to navigate on the web and sort through information is that search engines end up governing what people find online. In this sense a search engine is a sort of 'global censor'. However, the way search engines facilitate information retrieval is, in my opinion, more important than the fact that some information gain less priority on a search result. The ones to blame for the censoring effect of search engines are the people allowing search engines to be their only way of information retrieval. If people would not allow Google to decide which data they base their values on, the concern of them having a censoring skill would not be an issue.

A more troubling issue when it comes to online-censorship is the potential censorship-qualities of the 'Right to be Forgotten'. The fact that people themselves have the ability to decide which information is for the public's eye or not makes the 'Right to be Forgotten' a type of 'censorship-right'. The notice and take down procedure on the web is a matter between the data subject and the search engine service provider. This results in a type of censoring of the published content that the publisher does not have a say in. Also, the right to delete data could act like a sort of restriction to information retrieval or a way to rewrite or erase history. If people themselves have the ability to decide what others know about them they are in a sense censoring the truth when removing accurate information about themselves. The openness of a society, where people have the means to easily gain any information they need or desire in order to make the right decisions will be damaged if information is removed from the public's informational range. It also gives individuals a power to decide how they want others to think of them and they can create a 'fake-personality'. However, even though I believe society will become increasingly dependant on technology, there are still ways to discover the necessary qualities about a person without depending on what is presented on a list of search results, an Internet page or an old article. For people to have the ability to present themselves as they are today, and not the way they were some years ago have to be

weighed against people's need to know everything about everyone. People do not need to know everything someone has been part of before to make an accurate judgement of that person today. To know what that person wants to represent today and in the future ought to be enough for society to move in the right direction. Hence, it is reasonable to argue that the right to remove online-information is not about censorship; it is about the control of data. Letting people control others' perception of their personality and what is said about them is not something new. However, before, people depended on others to forget and on the fact that the word could not reach beyond a controllable crowd. Unfortunately, people cannot depend on that today. Thus, the 'Right to be Forgotten' is simply 'taking back' the social norms that existed before technologies remembered everything.

Some might argue that information will be censored about important public figures that people ought to have the ability to know everything about since they have to rely on them. However, one has to remember that the 'Right to be Forgotten' is not the same for celebrities and politicians and it is not impossible to object to the removal of data. As soon as the public interest weighs more than the individual's interest the 'Right to be Forgotten' will not be applicable. Furthermore, the 'Right to be Forgotten' will only affect what ought to be remembered about individuals' integrity and details about the past. The right will not act as a censor of the faults society has made as a whole, and thus it will not affect important parts of history that ought to be remembered in order for society to keep growing.

7.1.3.3 Suppression

Remembering is more than just saving information to our memory. It is just as much about having the ability to retrieve that information later and at will. Search engines and the Internet have provided society with a tool that facilitated this, making remembering skills and the dissemination of information more superior than ever before. In this sense digital memory facilitates the sharing of ideas and truths that helps make a strong democratic society. Freedom of expression and freedom of the media are extremely important for maintaining a check on power and it acts as a public watchdog and as a platform for debate. Matters of public concern have to be exposed in order to promote autonomy and diversity.

When individuals have the right to remove information about themselves, they end up hindering others from gaining knowledge about them or a certain incident they were part of in the progress. In other words, the ‘Right to be Forgotten’ helps conceal past actions and facts from public knowledge. In this regard the right suppresses the fundamental right of knowledge. Additionally, it is an intrusion of the freedom of expression of the publisher of the web page. When individuals gain the ability to remove articles, or links to articles, they are offered a way to actively supress the freedom of the media, freedom of expression and the right to receive information that is of general interest. Those freedoms are, in my opinion, what has made our society so successful. By having a check on power and a way of knowing the truth about those around us, society can adapt and evolve. The ‘Right to be Forgotten’ will in a sense limit the spreading of truths and ideas and constraint society’s progress. It is important to keep in mind that remembering mistakes makes us do better in the future and people have to have a sense of what was before, what is now and what will be.

Delisting of search results limits the publisher’s freedom of expression, since it makes it more difficult to find the original publication. The Advocate General in the Costeja-case warned that supressing links and information would entail an intrusion of the freedom of expression. Moreover, he also argued that that the delisting of search results intervene with the search engines’ right to conduct a business. Nonetheless, in my opinion, it is apparent that the EU legislators are not actively trying to reduce the freedom of expression or the freedom to conduct a business, they are simply attempting to fulfil society’s different needs and struggling to adapt to new trends. The aim of having a ‘Right to be Forgotten’ has not been to limit other fundamental rights and freedoms. The original idea of having a ‘Right to be Forgotten’ is obviously not to re-write the past or hinder the positive effects of having a democratic society. On the contrary, the EU legislators are trying to make society into an even safer environment than it is today. Moreover, allowing deletion of a link on search results, as was allowed for Mr Costeja González, will not result in society not being able to find that information at all. The data will still be available on the web, it will only be harder to find. In this sense, the ‘Right to be Forgotten’ will only influence the ease with which people collect information today. Moreover, the search result will only be deleted in regard to the name of the person that has requested the deletion. If

the data concerned another person as well, the data will appear on a search inquiry on that name. This solution does not eliminate information entirely.

It should be noted that it has proved difficult to make appropriate laws for the Internet. The Proposal has been under discussion for quite some time now and the European Parliament has been delayed several times. The Internet is a large and uncontrollable network in many ways. Hence, it is hard not to step on any toes when trying to regain something that has been lost in this large spider web: the function of forgetting. Moreover, it might also be the case that the legislation will not affect other fundamental rights as much as people fear. It is reasonable to argue that vast digital memories will have the effect that people become more cautious about what they say. Thus, what people do in the present may be influenced by the risks the future might bring. Hopefully, people will realize that it is not about the quantity of information, but about the quality of the information. In this sense it will not only be the legislation that affects what ought to be remembered, it will be the fact that people adjust to the networked world when they discover the complications posting might bring. In this sense, the freedom of expression will not be affected. Additionally, I am of the opinion that privacy is important for the freedom of speech. Vulnerable people are in need of privacy if they are to be brave enough to raise their voice. Being able to express views and opinions online with the confident of knowing that one can be private might help the 'little' people. In this sense privacy is not the enemy of freedom of speech, but its ally.

7.2 The New Black

7.2.1 The Global Memory

As remembering is no longer hard or costly, people are no longer forced to choose what to remember. All information anyone wants will be available even if the human brain temporarily forgets. Remembering is now easier than forgetting. This is, as have been argued above, not always a good thing. Digital remembering challenges the importance of forgetting, threatens individuality and exposes humanity to a possibly overwhelming human over-reaction. As more information is constantly added to

people's digital memory, people get confused as their decision-making is overloaded with information that they would be better off forgetting. Moreover, identity building is now taking place in social interactions on the web and the past is no longer the past, it is instead an everlasting present. As the positive effects of privacy are eliminated by the qualities of the web, legislators in the EU has reacted and realized that there is a value in reviving our capacity to forget. People do not want to live in a society where they cannot control what people know about them and where mistakes are brought up years after they were made. Today, entering a person's name in a search engine lead to a presentation of a range of information on which people make judgements about others. This has lead to a need, not only to erase data, but also to take back what were once a natural part of human life: anonymisation and privacy. Privacy is definitely a growing demand amongst people and its is, in my opinion, obvious that as a result of information being constantly in the public's appreciation, privacy is now a rare thing. Hence, one might argue that having privacy is the 'new black'. However, I would rather argue that it is the concept of the 'Right to be Forgotten' that is the new trend. The idea of having the possibility to go against everything the web stands for – access – is tempting and having the possibility to once more gain control over one's individuality is appealing. As the citizens of the EU gain the ability and option to delete personal data and remove it from the public sphere they also feel safer and in more control. This concept is what I believe is the new big trend.

The European proposal for a 'Right to be Forgotten' symbolises the new resentment of the post-scarcity age and the increasing need for means of erasure and being forgotten. In order to satisfy society's need for privacy, data should not be held unless there is a strong reason to hold it and the holders would have to justify keeping the data. The assumption should be deletion rather than retention. This requires a right to delete information on the web. Having the right to achieve oblivion fulfils the need to have control and autonomy. However, there are people, one of them James Ball, that are of the opinion that it is an act of hubris to try to change the system of privacy on the Internet through law. One of the issues brought up is that of the limits of the EU law. The European legislation cannot protect their citizens on a global scale. For example, the information about Mr Costeja González is no longer part of the list of results on Google's European domain, however, the data will still appear on the search results made on 'www.Google.com'. This hinders the development of a

reliable ‘Right to be Forgotten’ since people, if they have a strong desire or interest in finding information about another person, can still find information outside the reach of the EU legislation. Furthermore, the data protection in Europe is further along than other countries’ legislation. In the U.S for example, data privacy is not as well protected as in the EU. In other words, people do not have a right to protect their personal data to the same extent in the U.S and if information is accessible through ‘www.Google.com’ there is, in most cases, not enough legal grounds for the person to control that data. Also, the gap between the European privacy protection and U.S privacy rights will probably never be entirely bridged. Thus, attempts to give individuals a stronger privacy protection in Europe through legislation will not be sufficient since the same protection is not given outside the EU. Nonetheless, one can hope that the growing trend and EU’s attempts to make a change will trigger other countries around the world to implement the same rules.

7.2.2 Striking the Right Balance

The Internet has most definitely been enormously beneficial in many ways. The benefits are not only the practical advantages gained from it, but also the help it has provided for philosophical and fundamental freedoms. Thanks to the functions of the Internet, information and opinions travel quickly to large audiences and this helps safeguarding democracy. Those benefits should certainly not be put at risk because of hypothetical threats to people’s individuality. However, the issues are not only hypothetical any more. There are growing concerns about the fact that people loose their trust in online technologies and are affected by previous actions and misunderstandings that are no longer relevant.

In my opinion, the ‘Right to be Forgotten’ is not only a right to erase data, but also a right to anonymisation and privacy. In the technological society privatization is lost amongst all the other fundamental rights that circulate. There is no *a* priori when it comes to fundamental rights, however, this does not mean that one fundamental right should be allowed to overpower another. The human race has indeed strived for better ways to remember and by facilitating remembrance and the way knowledge is spread society has evolved quickly. People are no longer limited by geography or slow

communication means. The freedom of knowledge and of information has been a great part of making society into a better place and as more and more people gain this right society evolves all over the globe. Nonetheless, the concerns brought by the new definition of memory and memory's new abilities are just as real as the concerns of suppression around the world. Even if the freedom of speech is a way to have a check on power and helps communicate opinions, ideas and faults, it should not support an override of the value of the right to privacy. The press does not need to be extended to intrusions into the private lives of ordinary citizens in order to protect fundamental interests. As mentioned above, one has to evaluate and identify the expression and privacy interests currently at stake when conflicts arise, while bearing in mind that if the freedom to publish does not depend on literary, moral or political merit, the right to privacy is not only for the righteous, uninteresting or sensible. When time has passed there is no newsworthiness of a situation or someone's wrongdoing, except when the situation concerns a public figure or something with historical value. Moreover, if the publications or information is not available for the means of working as a 'watchdog' for society there is no democratic interest that outweighs the interests of an individual. There is a difference between held data and published expression. The other side of the coin is that the 'Right to be Forgotten' should not gain too much power over what is known, as this would turn the right into a 'super right', trumping the interests of others. This would endanger society's instrument to learn from past mistakes, control democracy and protect other fundamental rights. Instead, the right to be forgotten ought to go hand in hand with the protection of freedom of speech, as well as the freedom of information and of the press. In today's Internet era there is no possible way to say that one right should be prioritized. In my opinion however, the right to freedom of speech is already widely protected on the Internet and enforcing more privacy rights will not be about restricting that right but to try to balance the scale so that the right to individuality gains just as much weight as the freedom of speech has today.

Since neither the right to privacy, nor the right to freedom of expression are absolute, it all comes down to a balance-test in the end. Striking the right balance will benefit individuals as well as media, businesses and governments. However, the balance must be carefully reconsidered now that technical developments have changed the way people gather information and take part of personal data. The balancing of the rights

must be struck based on the case at hand. Hence, a test on a case-by-case basis must be conducted, taking all circumstances into account. Even though the CJEU stated in the Costeja-case that no other fundamental interests should be affected, the Court did not refer to the detailed case law of the European Court of Human Rights on the balancing of freedom of expression and privacy. Likewise, the CJEU did not enhance the demands of the freedom of expression sufficiently in the Costeja-case. The CJEU did not mention the right to freedom of expression or the right to conduct a business in regard to the search engine or original publishers of data. The Court did say that in some circumstances the public's interest outweigh the data subject's rights. However, the Court never said what that interest might be. The Court did not really give any sufficient guidelines when it comes to determining the balance between the two rights. There are no indications on when data is no longer 'relevant' or 'necessary'. For example, is the elapse of ten years enough to make data irrelevant, or is ten months long enough? A hypothetical problem that might arise is that a person about whom data is deleted, later becomes a public person and that the deleted information might have a value for the general public later in time. However, this cannot be foreseen and there is no way to know if the information will matter at a later stage.

The fact that the CJEU did not provide any detailed key points for the resolving of the complex balancing situations is troubling as this does not provide any foreseeability. Moreover, the CJEU confirmed, to the Advocate General's disappointment, that a search engine operator should be defined as a controller regarding the processing of personal data. As a result the CJEU has assigned search engines the complex task of balancing fundamental rights. It is reasonable to argue that in difficult cases, a search engine is not the most appropriate party to preform a balancing test of the fundamental rights at stake. The examination of a certain case cannot take too long and the information might have to be deleted without looking exceedingly close at every single case. When people realise how to regain privacy they will demand deletion of data and the workload for controllers will increase dramatically. After the Costeja-case, Google had several thousand requests after just four days. The growing privacy trend will most certainly lead to an unmanageable number of delisting requests, which might result in search engine operators automatically removing search results, as the workload will be immense. Moreover, it seems the threshold for invoking the right is low, and thus, it may be applied in a wide range of situations,

making it hard to narrow down in which situations the right applies. This will interfere with the freedom of expression of those communicating on the Internet, as the balancing-test will not be properly conducted and some requests might be passed without the controller looking closely enough at the circumstances of the case. Moreover, there is no real transparency when it comes to the decisions. There is no way to know for sure which results have been delisted, hence people do not know the extent of interference of their fundamental freedoms and they have no way to object. However, in my opinion, a 'relevance-test' is still the only way to go about deciding if information is to be kept in the public's appreciation or not, even though some of the tests might not be thoroughly determined. Losing some valuable information might be a cost worth paying for the re-establishment of a 'human remembrance' where forgetting is part of the equation.

Conclusively, more guidelines need to be set in order to make the balancing-test more foreseeable. The CJEU failed to sufficiently detail the application of the balancing-test in the Costeja-case. How to apply the 'Right to be Forgotten' and deal with rapidly changing webpages have to be further discussed. At the moment, the balancing of the scale depends on: the right to forget one's past wrongdoings, newsworthiness, historical value and the person's public role. However, different circumstances call for different solutions and in the most difficult cases it is reasonable to argue that it would be best if data protection authorities would conduct the 'balancing-test' between the right to privacy and the freedom of expression, and not private companies. It is simply not suitable that private companies make complex decisions concerning the priorities of fundamental rights. Such a task is difficult even for data protection authorities, courts and academics. The balancing test will have to be conducted all the time in all circumstances in order to live up to society's demands and this will with certainty prove to be difficult. Having a governmental control or at least involve data authorities to some extent will be necessary in order to avoid situations where cases are not properly examined and one right ends up trumping other.

7.2.3 Alternatives

Some of those who do not believe in the attempts to manage the new privacy-trend through legislation have come up with alternative solutions. Firstly, one opinion is that technology and culture will resolve the problem of privacy on the web. Generally, it seems the overall suitability of privacy rights online to protect people against digital remembering is unclear. It is reasonable to argue that the rights are difficult to enact, have a doubtful effectiveness and cannot provide any insurance against the uncertain future. Moreover, the success of the Proposal depends not only on the legal system's capacity to enforce the rules, it also depends on people's willingness to take action against those processing the information. Nonetheless, it is reasonable to argue, that the proposed alternative solution, to wait for a cognitive adjustment, seems likely to take too long. It is not possible to fast-track evolutionary adaptation.

Secondly, a commonly expressed alternative is that of expiration dates. In my opinion this is the most appropriate alternative to legislating online-privacy rights. It may be sufficient enough to reverse the move towards eternal memory and restore humanity's capacity to forget. Letting people decide how long information they post should be available to the public would enable forgetting. The problem, however, is that it is close to impossible to know for sure what one might want to remember in the future. Another issue is also that the expiration date will not hinder the duplication of information and thus others will still be able to manage other people's personal data without them having the power to stop it. Nonetheless, to introduce expiration dates will at least make people reflect on how long they want the information to be stored.

Thirdly, another solution that has not been mentioned above might be to treat personal data as a property right. However, property rights do not capture the nature of the link between the person and his or her personal data. Unlike other property rights, personal data is something that is not separate from the individual, something owned, bought or sold. On the contrary, personal data is a part of an 'extended-self'. A lot of the value of personal data is in the context of the individual. Also, it is reasonable to argue that the connection between a person and conventional property is weaker than the connection between a person and his or her personal data.

While all the alternative suggestions hold some assurance and offer insight into the complication of the problem society face, none of the strategies offer a silver bullet. I believe that the online technologies has forced a need for more privacy and as a result of people realising that what they post online will hunt them forever, the need for a 'Right to be Forgotten' is here to stay. Hence, constructing a stronger legislation that fulfils the needs of the citizens is important. With the help of online accessibility and digitalisation of information, the conception of what is publicly known has changed. People will continue to fight against the eternal memory function of the Internet as the danger of online information distribution does not lie in the loss of control over information, but in the tarnishing of reputations the information could lead to. I believe the desire for privacy and the concept of the 'Right to be Forgotten' is not only a passing trend, it is here to stay and it will increase as more and more people want to follow that trend. The 'Right to be Forgotten', supported by the right to identity, will present a stronger foundation and justification through which to achieve an enhanced and fairer balance with other competing interests in the future. One can hope, that the once active dynamic quality of human remembering through which society functioned, will not be forgotten.

8. Summary and Conclusion

Previous generations relied on far less information than the current one. Retrieving information from digital memory is cheaper, quicker and to a large extent much easier than before. On the other hand, with the help of digital technologies information is easily duplicated, archived and it quickly ends up in the hands of a widespread audience. With the new online technology, the past is constantly made present and the past becomes more of an on-going present. The Costeja-case demonstrates a number of important things. Most importantly, it is now clear that the public's right to information, that at one stage was legally published, may later in time be outweighed by private rights, the result of which is that the information should no longer be distributed. What someone has disclosed or what he or she did at one part of his or her life they do not necessarily want to be reminded of forever and now they have been granted the right to make that go into oblivion.

I believe the making of personalities and identities are the product of both memory and oblivion and there are cases where information ought to be deleted from the web because it is no longer relevant. For example, if an individual committed a petty crime at the age of eighteen and he or she has long since cleaned up their act and reformed, they could make the case that their search history should be removed if, at the age of thirty, it can be found that their search history is preventing them from attaining a job. It is a matter of debate, however in my opinion, the argument of someone in that situation having a right to be forgotten is strong. In this regard, creating memory holes is not that harmful.

The loss of individual privacy is a fundamental challenge and it has to be taken seriously. Privacy is a person's right to decide and control his or her personal information. I can understand why people are striving for privacy in this society that constantly forces us to be part of the public sphere. However, the right must not jeopardise other fundamental rights, such as the freedom of speech. The balance between the two rights must be tested on a case-by-case basis based on the newsworthiness and relevance of the information, historical value of the data and the person's public role. If the 'Right to be Forgotten' wins the battle between the 'conflict of interests' with freedom of expression it is well suited for having single

actions, statements or events forgotten. The ‘Right to be Forgotten’ provides individuals with a chance to defend their privacy and self-determination. The ‘Right to be Forgotten’ covers the right to change one’s mind, the right to not be forever reminded of one’s past and letting it jeopardise the future, the right to have data deleted and the right to refuse de-contextualisation of data mainly by combating Internet search engines. These aspects of the ‘Right to be Forgotten’ are protected by law in the European Union, based on the right to privacy and individuality.

The European proposal for a ‘Right to be Forgotten’ symbolises a new resentment of the post-scarcity age and the increasing need for information-erasure and being forgotten. The Costeja-case also provides a strong affirmation of the data protection rights for individuals. However, the CJEU fails to specify the way forward, which will likely be problematic for search engine operators and other data controllers. It is troubling that the CJEU assigned the task to balance fundamental rights to search engine operators and private companies. Hence, the most accurate way to implement the ‘Right to be Forgotten’ in practice must be found. Nonetheless, the ‘Right to be Forgotten’, supported by the right to identity, will present a stronger foundation and justification through which to achieve an enhanced and fairer balance with other competing interests. This right could become, not only a right to erase data, but also a right to anonymisation and privacy. In my opinion the right should not be seen as a ‘super-right’, but a right that is trying to satisfy an on-going and growing trend. It all comes down to protecting people by letting them influence who can access personal data and how easy that access should be.

Also, it is worth remembering that the concern of privacy is not only about the Internet, it is about our lives as a whole. The privacy trend emerges as a result of the unnatural nature of online activities. The global scale of the web is hard to control and adapt to. However once people understand that the problem is not that there is a problem but that the problem is too big, society can start working together to regain the balance human remembrance once provided. When data does not exist it is not vulnerable and cannot affect the individual. I suggest resetting the balance and making forgetting a bit easier again; introducing forgetting into people’s daily routine and going from eternal memory to forgetting over time. Unfortunately there are no easy answers to how this will be done. It may have to be done with the help of a

combination of expiry dates, a change in attitude and new legislation. However, most importantly, an international approach is required. Moreover, the most important aspect of all is that the citizens of the world has to be made aware from an early stage that good information is preferable to an overload of information. Striking the right balance between fundamental rights on the Internet and making sure one right does not supress the other will take a lot of work and the progress will not be flawless, however, it has to be done in order to meet society's new demands.

Conclusively, taking down information regardless of its source will threaten fundamental rights, such as the freedom of expression. However, people are in need of means to delete personal data in order to gain trust in online technologies and to feel that they have the ability to influence their self-determination. In effect, there is a constant tip of the scale when it comes to the fundamental right on the Internet. Thus, the right balance and appropriate guidelines need to be found. Adapting to society's need by implementing new legislation is in my opinion a step in the right direction. The 'Right to be Forgotten', supported by the right to identity, will present a stronger foundation and justification through which to achieve an enhanced and fairer balance with other competing interests. I believe the concept of the 'Right to be Forgotten' is the 'new black' and the trend is here to stay. Hence, changes in the management of personal information have to be made in order to make individuals feel safe in the digital and global world we live in. Society has caused the end of forgetting, and it is up to us to reverse the change.

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