



HOUSE OF LORDS

European Union Committee

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2nd Report of Session 2014–15

# **EU Data Protection law: a ‘right to be forgotten’?**

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Evidence is published online at <http://www.parliament.uk/right-to-be-forgotten> and available for inspection at the Parliamentary Archives (020 7219 5314)

References in footnotes are as follows:

Q refers to a question in oral evidence.

Witness names without a question reference refer to written evidence.



# EU Data Protection law: a ‘right to be forgotten’?

## CHAPTER 1: INTRODUCTION

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### Introduction

1. The so-called ‘right to be forgotten’, as it is generally but misleadingly known, is a remedy available under data protection law, enabling a data subject to obtain from the data controller the erasure of links to data which the data subject regards as prejudicial to him or her. It is a right which, in the European Union, derives from the 1995 Data Protection Directive (the Directive).<sup>1</sup> That Directive was given effect in the United Kingdom by the Data Protection Act 1998.
2. Google was founded in 1998, three years after the adoption of the Directive. In the twenty years since the Directive was negotiated, the technology in the collection, storing and availability of data has changed out of all recognition, and the Directive is now generally admitted to be in need of radical revision.<sup>2</sup> In January 2012 the Commission put forward proposals for a new data protection package,<sup>3</sup> and this came to our Sub-Committee on Home Affairs, Health and Education<sup>4</sup> for examination in the course of our normal scrutiny of draft EU legislation. The negotiations on the new Data Protection Regulation and Directive are continuing, and so therefore is our scrutiny.
3. On 13 May 2014 the Grand Chamber of the Court of Justice of the European Union delivered a judgment<sup>5</sup> interpreting Article 12 of the 1995 Directive, as it applies to data on the web accessible through a search engine. This judgment is having far-reaching consequences. Since the proposed new Data Protection Regulation contains provisions which would provide an even wider ‘right to be forgotten,’ we thought it useful as part of our scrutiny to re-consider those provisions in the light of the judgment, and in particular to advise the Government on the line it should take in the course of the

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<sup>1</sup> *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* (the 1995 Directive). This was complemented in 2008 by *Council Framework Decision 2008/977/JHA on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters* (the Framework Decision).

<sup>2</sup> See e.g. the Commission’s summary in the Explanatory Memorandum for its new proposals: “During the consultations on the *comprehensive* approach, a large majority of stakeholders agreed that the general principles remain valid but that there is a need to adapt the current framework in order to better respond to challenges posed by the rapid development of new technologies (particularly online) and increasing globalisation.”

<sup>3</sup> *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) (COM 2012/11 final, Council Document 5853/12), and *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* (COM 2012/10 final, Council Document 5833/12).

<sup>4</sup> The members of the Sub-Committee are listed in Appendix 1.

<sup>5</sup> *Google Spain SL, Google Inc. v Agencia Española de Protección de Datos, Mario Costeja González* (Case C-131/12, 13 May 2014).

negotiations. We accordingly carried out a brief inquiry. We did not issue a call for written evidence, but we received from Google, the defendants in the proceedings, a very helpful oral briefing. This had to be off-the-record because it related to a large number of ongoing legal proceedings. In public evidence sessions we received oral evidence from the witnesses listed in Appendix 2. We also received two pieces of written evidence. To all our witnesses we are most grateful.

### The wider context

4. The Court of Justice's ruling deals with distinct legal issues which we explain fully in the next chapter. The ruling does however illustrate how important it is not to consider these issues in isolation; they raise broader considerations. As always in the field of data protection, there are the competing claims of the right to privacy and the right freely to give and impart information. The right to privacy, emphasised by the Court, is highly prized, and rightly so; yet, as Rt Hon Simon Hughes MP, the Minister for Justice and Civil Liberties, said to us, we do not want to close down access to information in the EU that is open to the rest of the world.<sup>6</sup> Professor Luciano Floridi<sup>7</sup> warned us against attempting to place these rights in some sort of hierarchical order: "one is better off by saying that it depends on specific instances, contexts and practices, and there is no useful, general way of establishing a priori what comes first and what comes later, but only intelligent and wise discernment".<sup>8</sup>
5. When considering this particular aspect of data protection law we have been conscious, as we have throughout our ongoing scrutiny of the data protection package, of the degree to which modern technology has eroded the privacy of data subjects. Once information is lawfully in the public domain it is impossible to compel its removal, and very little can be done to prevent it spreading. Where there is information about individuals which they would prefer not to be widely known, they are wholly reliant on those who know the information not to make it public, or to publicise it further.
6. Data controllers have legal powers and obligations under the general law, and more specifically under the Directive and its implementing legislation. So do search engines, irrespective of whether or not they are properly classed as data controllers. They deal with a vast volume of personal data, and they make it immeasurably easier to locate such data. This is greatly to the benefit of their users. Usually it is also to the benefit of data subjects, or at least not to their disadvantage. But there are times when, leaving aside all legal considerations, a sense of social responsibility, even of trust, leads to the conclusion that data should not be publicised, and access to data should not be made easier. This is an ethical dimension which may in future need a further code of ethics, and which seems to be ignored by people who too often pay scant regard to the feelings of those concerned, and the consequences for them, when they publish information which may be of interest to the public, but which there is no public interest in publishing.

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<sup>6</sup> [Q 34](#) (Simon Hughes MP)

<sup>7</sup> Professor of Philosophy and Ethics of Information, Oxford Internet Institute, University of Oxford. Professor Floridi has been appointed as an external and independent member of the Advisory Council set up by Google to help in their implementation of the Court's judgment.

<sup>8</sup> Written evidence from Prof Floridi ([TRF0004](#))

## CHAPTER 2: THE JUDGMENT OF THE COURT OF JUSTICE

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### The factual background

7. In March 2010 a Spanish national, Mr Costeja González, complained to the Spanish National Data Protection Agency (AEPD) that when his name was entered in the Google search engine the entries which first appeared were pages of the Barcelona newspaper *La Vanguardia* of 19 January and 9 March 1998 with an announcement mentioning a property of which he was joint owner in connection with attachment proceedings for the recovery of social security debts. He requested, first, that *La Vanguardia* be required either to remove or alter those pages so that the personal data relating to him no longer appeared, and secondly that Google should be required to remove or conceal the personal data relating to him so that they ceased to be included in the search results. He stated that the attachment proceedings had been fully resolved for a number of years and that reference to them was now entirely irrelevant.
8. This raises a point which we think worth emphasising. If information is inaccurate or incomplete, the data subject has a right to obtain from the data controller its rectification or erasure.<sup>9</sup> If information, though accurate, is on a website in breach of the criminal law—an example might be child pornography—the data controller has an obligation to remove the link to it. The same applies to data on a website which are defamatory or contravene civil rights; search engines constantly receive, and act on, requests to remove data which are allegedly in breach of copyright. In this case there was no suggestion that the information was inaccurate; and far from being illegal, the publication of the information by *La Vanguardia* took place on the order of the Spanish Ministry of Labour and Social Affairs and was intended to give maximum publicity to the auction in order to secure as many bidders as possible. This case, and our inquiry, are concerned only with data which are lawfully on a website but which the data subject would prefer not to be easily available through a link to his or her name on a search engine.
9. The AEPD rejected the complaint in so far as it related to *La Vanguardia*. However the complaint against Google was upheld. The AEPD considered that operators of search engines are subject to data protection legislation given that they carry out data processing for which they are responsible and act as intermediaries in the information society. Google took the matter to the Audiencia Nacional (the Spanish High Court), which referred to the Court of Justice three questions on the interpretation of the Directive for preliminary ruling.

### First question referred for preliminary ruling: territorial scope of the Directive

10. The first question asked whether the territorial scope of the Directive extended to the activities of Google in Spain. Advocate General Jääskinen<sup>10</sup>

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<sup>9</sup> Directive, Article 6.1(d)

<sup>10</sup> The Advocate General of the Court of Justice, like those in many Continental judicial systems, is an officer of the same standing as the judges but whose task is to issue to the Court an independent Opinion of his own on the issues, which the Court usually follows, though it not obliged to do so.

advised that it did, and the Court followed his advice.<sup>11</sup> The reach of EU data protection legislation therefore extends to cover not only organisations in the EU but also those outside the EU which have operations in the EU—even where, as in the case of Google Spain SL, those operations do not include the processing of data. This was described by Morrison & Foerster, a global law firm with one of the largest privacy and data security practices in the world, as “a very broad interpretation of the Directive’s territorial reach [which] has little basis in the current wording of Article 4.1”.<sup>12</sup> We can see that this may raise problems for a global corporation like Google which operates in many jurisdictions outside the EU as well as within the EU, but it does not seem to us to cause difficulties for United Kingdom data protection law.

### Second question: Is a search engine a data controller?

11. In its second question the Spanish court sought a ruling on whether Google’s activities as an internet search engine provider made them a “controller” of personal data on web pages published by third parties. The difficulty here, as the Advocate General pointed out, is that:

“When the Directive was adopted the World Wide Web had barely become a reality, and search engines were at their nascent stage. The provisions of the Directive simply do not take into account the fact that enormous masses of decentrally hosted electronic documents and files are accessible from anywhere on the globe and that their contents can be copied and analysed and disseminated by parties having no relation whatsoever to their authors or those who have uploaded them onto a host server connected to the internet.”<sup>13</sup>

12. A “controller” is defined by Article 2(d) of the Directive as “the natural or legal person ... which alone or jointly with others determines the purposes and means of the processing of personal data”. The Advocate General and the Court therefore had to decide whether that definition, drafted without any thought being given to search engines, could be stretched to include them. The Advocate General thought not. He argued that:

“the general scheme of the Directive ... and the individual obligations it imposes on the controller are based on the idea of *responsibility of the controller* over the *personal* data processed in the sense that the *controller* is aware of the existence of a certain defined category of information amounting to personal data and the controller processes this data with some intention which relates to their processing *as personal data*.”<sup>14</sup>

13. The Court however differed. The judges thought:

“it would be contrary not only to the clear wording of that provision [Article 2(d)] but also to its objective—which is to ensure, through a broad definition of the concept of ‘controller’, effective and complete protection of data subjects—to exclude the operator of a search engine

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<sup>11</sup> Advocate General’s Opinion, paragraph 68; judgment of the Court, paragraph 60.

<sup>12</sup> Written evidence from Morrison & Foerster ([TRF0005](#))

<sup>13</sup> Opinion, paragraph 78

<sup>14</sup> Opinion, paragraph 82. Advocate General’s italics

from that definition on the ground that it does not exercise control over the personal data published on the web pages of third parties.”<sup>15</sup>

The Court therefore ruled that the operator of a search engine must be regarded as the “controller” of the personal data processed by the search engine.<sup>16</sup>

### Third question: the right to be forgotten

14. If the Court had followed the Advocate General’s Opinion on the second question, the third question on the right to be forgotten would not have arisen, since the right to obtain rectification or erasure of data is available only as against the data controller.<sup>17</sup> But since the Court decided Google should be treated as a data controller, the third question had to be answered. It was summarised by the Court as asking whether the relevant provisions of the Directive should be interpreted “as enabling the data subject to require the operator of a search engine to remove from the list of results displayed following a search made on the basis of his name links to web pages published lawfully by third parties and containing true information relating to him, on the ground that that information may be prejudicial to him or that he wishes it to be ‘forgotten’ after a certain time.”

### *How is information ‘forgotten’?*

15. The expression ‘right to be forgotten’ is misleading. Information cannot be deliberately “forgotten”. It cannot be “consigned to oblivion” (the expression used by the Spanish court in its request for a preliminary ruling).<sup>18</sup> The pages of *La Vanguardia* still exist in hard copy, and can immediately be accessed electronically by typing in the name of the co-owner of the property which was being auctioned. The information may have been published in other newspapers. It may well still be in the records of the Spanish courts and the Spanish ministry. It will, in theory, have become more difficult to find since those pages will no longer appear from a Google search for the name of the complainant, Mr Costeja González; in fact it is more prominent than ever since it appears on a large number of reports linked to the Court’s judgment which, of course, do appear when his name is entered. It will also be accessible through search engines, like google.com, which are not territorially subject to the Court’s judgment. From the point of view of the data subject, the right to be forgotten is at best a right to make information less easily accessible; at worst, it may achieve the opposite of what was desired.
16. The Minister described the expression as “an inaccurate and unhelpful gloss on what happened. There is no right to be forgotten.”<sup>19</sup> All our other witnesses who addressed the issue agreed.

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<sup>15</sup> Judgment, paragraph 34

<sup>16</sup> Judgment, paragraph 41

<sup>17</sup> Directive, Article 12, opening words

<sup>18</sup> The reference of course was in Spanish, where the relevant part of the reference reads: “o desea que sea olvidada”. The English translation by the Court is perhaps more colourful than accurate.

<sup>19</sup> [Q 28](#) (Simon Hughes MP)

*The answer of Advocate General Jääskinen*

17. Since he had concluded that Google were not a data controller, the Advocate General considered the third question otiose. He did however answer it in case the Court differed from him on the second question, as it did. He concluded that neither the Directive itself, nor the data protection guarantees enshrined in Article 8 of the European Convention on Human Rights and Article 7 of the Charter of Fundamental Rights (which is in substance identical), provided the data subject with a 'right to be forgotten'.<sup>20</sup> He added, in our view very pertinently:

"I would also discourage the Court from concluding that these conflicting interests could satisfactorily be balanced in individual cases on a case-by-case basis, with the judgment to be left to the internet search engine service provider. Such 'notice and take down procedures', if required by the Court, are likely either to lead to the automatic withdrawal of links to any objected contents or to an unmanageable number of requests handled by the most popular and important internet search engine service providers. ... internet search engine service providers should not be saddled with such an obligation. This would entail an interference with the freedom of expression of the publisher of the web page, who would not enjoy adequate legal protection in such a situation, any unregulated 'notice and take down procedure' being a private matter between the data subject and the search engine service provider. It would amount to the censoring of his published content by a private party."<sup>21</sup>

*The ruling of the Court of Justice*

18. Article 6 of the Directive sets out the principles governing the collection and processing of data which the data controller must comply with.

**Box 1: Article 6 of the Directive**

1. Member States shall provide that personal data must be:
- (a) processed fairly and lawfully
  - (b) collected for specified, explicit and legitimate purposes and not further processed in a way incompatible with those purposes. Further processing of data for historical, statistical or scientific purposes shall not be considered as incompatible provided that Member States provide appropriate safeguards;
  - (c) adequate, relevant and not excessive in relation to the purposes for which they are collected and/or further processed;
  - (d) accurate and, where necessary, kept up to date; every reasonable step must be taken to ensure that data which are inaccurate or incomplete, having regard to the purposes for which they were collected or for which they are further processed, are erased or rectified;
  - (e) kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which the data were

<sup>20</sup> Opinion, paragraphs 111, 136

<sup>21</sup> Opinion, paragraphs 133–134

collected or for which they are further processed. Member States shall lay down appropriate safeguards for personal data stored for longer periods for historical, statistical or scientific use.

2. It shall be for the controller to ensure that paragraph 1 is complied with.

19. Article 12 provides that: “Member States shall guarantee every data subject the right to obtain from the controller ... (b) as appropriate the rectification, erasure or blocking of data the processing of which does not comply with the provisions of this Directive, in particular because of the incomplete or inaccurate nature of the data”. The words “incomplete or inaccurate” are a reference back to the requirement in Article 6(1)(d) that the data controller should erase or rectify data “which are inaccurate or incomplete”. There was no suggestion in the case before the Court that the data were either inaccurate or incomplete. But the Court, fastening on the words “in particular”, held that the right to have data erased also extended to data which breached the requirement of Article 6(1)(c) that they should be “adequate, relevant and not excessive”.<sup>22</sup> The critical passage reads as follows:

**Box 2: Paragraph 94 of the judgment of the Court**

Therefore, if it is found, following a request by the data subject pursuant to Article 12(b) of Directive 95/46, that the inclusion in the list of results displayed following a search made on the basis of his name of the links to web pages published lawfully by third parties and containing true information relating to him personally is, at this point in time, incompatible with Article 6(1)(c) to (e) of the directive because that information appears, having regard to all the circumstances of the case, to be inadequate, irrelevant or no longer relevant, or excessive in relation to the purposes of the processing at issue carried out by the operator of the search engine, the information and links concerned in the list of results must be erased.

*The need for prejudice to the data subject*

20. Comments that we have seen suggest that the ‘right to be forgotten’ is widely thought to depend on a requirement that the information disclosed by the search engine must be prejudicial to the data subject, or at least must be thought by him to be prejudicial. The Spanish court’s third question asked the Court of Justice to rule whether it was enough for the data subject to believe “that such information should not be known to internet users when he considers that it might be prejudicial to him”.<sup>23</sup> The Court ruled that “it is not necessary in order to find such a right that the inclusion of the information in question in the list of results causes prejudice to the data subject.” There is therefore a right to have information erased even if it is not in fact prejudicial to the data subject, nor even thought by him to be prejudicial; it is enough that the information “appears ... to be inadequate, irrelevant ... or excessive”.

<sup>22</sup> Judgment, paragraph 92

<sup>23</sup> Judgment, paragraph 20

*The qualification: an exception for “particular reasons”*

21. The Court held that the right of the data subject to have information erased overrides “as a rule” the economic interest of the operator of the search engine but also the public interest in accessing the information by searching for the data subject’s name.<sup>24</sup> The words “as a rule” introduce an important qualification: “However, that would not be the case if it appeared, for particular reasons, such as the role played by the data subject in public life, that the interference with his fundamental rights is justified by the preponderant interest of the general public in having, on account of inclusion in the list of results, access to the information in question.”
22. We quoted in paragraph 17 the Advocate General’s view that internet search engine service providers should not be saddled with the obligation of having to assess an unmanageable number of requests on a case by case basis. The consequence of the Court’s ruling is that, not only will search engines have to assess such requests as against the requirements of the Directive, they will also, in every case in which they decide that the withdrawal of a link to a page is *prima facie* justified, have further to assess, against unknown criteria, whether there are “particular reasons, such as the role played by the data subject in public life” why the link should nevertheless not be withdrawn.

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<sup>24</sup> Judgment, paragraph 97

## CHAPTER 3: THE CONSEQUENCES OF THE JUDGMENT

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### The task of the Committee

23. It is not for this Committee to decide whether the judgment of the Court of Justice is correct as a matter of law. The interpretation of the Directive is the task of the courts, and ultimately of the Court of Justice. It is however very much the task of the Committee to consider the consequences of this judgment and whether, following this judgment, the law on data protection continues to achieve a fair balance between the competing fundamental rights of privacy, and of the freedom to seek and impart accurate information lawfully acquired.
24. We also have to consider how far it is practical for search engines to comply with this judgment, or to do so without disproportionate expense. A judgment which cannot be complied with brings the law into disrepute.
25. Since, fortuitously, this judgment has been given at a time when the EU law on data protection is in the course of radical revision, this is an opportune moment to consider the issues raised by this case, and in particular whether there should continue to be a 'right to be forgotten' and if so, how broad it should be.

### Should a search engine be classed as a data controller?

26. Under the current Directive, this is an all-important question, since if a search engine is not a data controller the data subject has no rights against it under Article 12. The Court has ruled that it is. We asked our witnesses whether this should continue to be the case.
27. Chris Scott, a partner at Schillings who advises businesses and prominent individuals on protecting their privacy, told us that Google was rightly classed as a data controller: "Google does not merely passively deliver information; Google sculpts the results." Jim Killock, the Executive Director of Open Rights Group, a civil society organisation that works on digital and free-speech issues from the citizen's point of view, said that it "seemed fair" for Google to be classed as a data controller given that it has offices in the EU and processes the data of EU citizens.<sup>25</sup> Neil Cameron, a management consultant advising legal firms on IT issues, thought not, and agreed with the Advocate General's Opinion.<sup>26</sup> Professor Floridi said he agreed "only partially" with the Court's ruling. He felt the definition of "data controller" was so wide and inclusive that it could not fail to support the Court's ruling, but he too preferred the view of the Advocate General.<sup>27</sup>
28. We received evidence from Steve Wood, the Head of Policy Delivery at the Information Commissioner's Office (ICO). He said firmly that the ICO agreed with the Court's ruling:

"It was a position we had reached ourselves, and we were hopeful that the court was going to reach that position ... we did not agree with the

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<sup>25</sup> Q 2 (Chris Scott and Jim Killock)

<sup>26</sup> Q 2 (Neil Cameron)

<sup>27</sup> Written evidence from Prof Floridi (TRF0004)

analogy of a search engine as a mere conduit, if you like, of the information just passing through it. Given the level of interaction a search engine has and the interest it takes using algorithms when it is interacting with personal information and spidering the internet, we felt that the way in which the court advanced that issue was correct.”<sup>28</sup>

29. We also received evidence from Rt Hon Simon Hughes MP, the Minister for Justice and Civil Liberties. He believed that the Court was right to class search engines as data controllers “because they are the gateway to the systems; they generally decide whether to process personal data in the first place.” He added: “it is not a precondition to being a controller that you have sole responsibility for deciding on either the means of processing or the purpose of processing ... The fact that you are only an intermediary—you are the gateway into the system—does not mean you are not a controller.”<sup>29</sup>
30. In fact, if the European Parliament has its way, for the purposes of the right to be forgotten it will become irrelevant whether or not a search engine is a data controller. On 12 March 2014 the European Parliament adopted its final version of 207 proposed amendments to the Commission text of the draft Regulation. Amendment 112, one of many amendments proposed to Article 17, would result in the data subject having a ‘right to erasure’ (as they prefer to call it), not just against data controllers but against third parties. The opening words of Article 17 would read as follows.

**Box 3: European Parliament draft of opening words of Article 17 of the new Regulation (emphasis in the original)**

The data subject shall have the right to obtain from the controller the erasure of personal data relating to them and the abstention from further dissemination of such data, **and to obtain from third parties the erasure of any links to, or copy or replication of, that data** where one of the following grounds applies: [and there follows a list of five grounds].

**Can the judgment in practice be complied with?**

31. Google are the search engine directly concerned in the litigation before the Court of Justice, but the Court’s ruling will of course be binding on all search engines, large and small. Google are by far the largest search engine in Europe in terms of market share, and likely to be the recipients of the majority of requests for removal of links. They have supplied us with statistics which show the magnitude of the task they face.
32. At our request, Google sent us on 9 July 2014 a note with the statistics for the requests they had received to the end of June, then the most recent date available.

**Box 4: Statistics from Google**

Google’s webform went live on 30 May 2014, 17 days after the Court’s judgment. In the first 24 hours they received 12,000 requests (European totals), and in the first four days approximately 40,000.

<sup>28</sup> [Q 13](#) (Steve Wood)

<sup>29</sup> [Q 29](#) (Simon Hughes MP)

Up to 30 June 2014 they had received more than 70,000 removal requests with an average of 3.8 URLs per request, a total of over a quarter of a million. The top five countries were:	
France	14,086
Germany	12,678
United Kingdom	8,497
Spain	6,176
Italy	5,934
By 9 July 2014 the level of requests was approximately 1,000 per day across Europe.	

33. The requests received in June alone mean that Google's staff have to review over a quarter of a million URLs to see whether the information appears to be "inadequate, irrelevant or no longer relevant, or excessive in relation to the purposes of the processing" carried out by them. If their initial view is that these criteria are satisfied, they have to make the further value judgment to assess whether it appears "for particular reasons, such as the role played by the data subject in public life, that the interference with his fundamental rights is justified by the preponderant interest of the general public in having, on account of inclusion in the list of results, access to the information in question."
34. Even by the standards of a global corporation the size of Google, this is a massive burden. In response to the question whether it was in practice possible for Google to comply with this ruling, Professor Floridi gave an unequivocal "Yes ... Feasibility is not the real issue here."<sup>30</sup> His view is particularly persuasive given that he is a member of the Advisory Council appointed by Google to advise on their implementation of the judgment.
35. Plainly smaller search engines would not necessarily be able to comply with this judgment as easily as Google if they receive a large number of requests. They might, as the Advocate General warned,<sup>31</sup> automatically withdraw links to any material objected to because they would not have the resources to examine requests on a case by case basis. This would effectively allow any individual an uncontested right of censorship.
36. There is a further question, whether it is right that the judgment on issues such as this should be left to Google and other search engines. Neil Cameron thought not: he did not trust Google's judgment.<sup>32</sup> Jim Killock was "deeply uncomfortable" about leaving such judgments to commercial enterprises.<sup>33</sup> Morrison & Foerster made the point that, self-evidently, a request to Google which they comply with will not cause information to be removed from Bing.com, Yahoo.com or Ask.com. Individuals would have to make the same request to each search engine separately, and different search engines might

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<sup>30</sup> Written evidence from Prof Floridi ([TRF0004](#))

<sup>31</sup> Opinion, paragraph 133

<sup>32</sup> [Q 6](#) (Neil Cameron)

<sup>33</sup> [Q 4](#) (Jim Killock)

well reach different conclusions.<sup>34</sup> Particular data which could no longer be found on one search engine might still be easy to find on another.

37. Ministers have been consistent in their views. On 22 November 2012 the then Minister described the right to be forgotten as “unworkable”.<sup>35</sup> In his oral evidence to us Simon Hughes said: “Anything that is impractical, impossible and undeliverable is a nonsense, and we should not countenance it.”<sup>36</sup>

### **How would the judgment affect the Information Commissioner and other European data protection regulators?**

38. Up to the end of June more than 12% of the requests received by Google originated in the United Kingdom. It is impossible to tell what proportion of these Google may decide to refuse on the ground that the data are not, in their view, “inadequate, irrelevant or excessive”, or that they fall within the Court’s exception for “particular reasons”. It is however easy to see that there are potentially a very substantial number of cases where a dissatisfied data subject may wish to take the matter further. If so, the first port of call will be the Information Commissioner’s Office. We asked Mr Wood whether the ICO would be able to cope with this. He agreed that this would be a serious addition to their workload; it was something they were concerned about, and they were “doing some modelling in the office to work out what the impact could be. Will we have to have a little specialist team of complaints officers who become skilled in dealing with these complaints? How many cases might be challenged and appealed on, which then means that we have to defend ourselves in the courts as well? There are potential financial implications for our office.”<sup>37</sup>

39. Referring to this evidence, the Minister said:

“You have heard from the Information Commissioner’s Office: there is inevitably going to be additional work going in their direction, because there may well be challenges to the decisions Google make. There may also be more tribunal appeals, so we are very conscious in the Ministry of Justice that suddenly a whole new work stream may open up as a result of the judgment, and has started to open up already.”<sup>38</sup>

### **How would the judgment affect other data controllers?**

40. Morrison & Foerster pointed out that “the Court’s finding that search engines are data controllers ... has broad implications. The Court appears to be suggesting that any company that aggregates publicly available data is a data controller.”<sup>39</sup>
41. The logic leads to further absurdities. If search engines are data controllers, so logically are users of search engines. The Advocate General said: “The

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<sup>34</sup> Written evidence from Morrison & Foerster ([TRF0005](#))

<sup>35</sup> Letter of 22 November 2012 from Helen Grant MP, Parliamentary Under-Secretary of State for Justice, to Lord Boswell, Chairman of the European Union Select Committee.

<sup>36</sup> [Q 38](#) (Simon Hughes MP)

<sup>37</sup> [Q 19](#) (Steve Wood)

<sup>38</sup> [Q 28](#) (Simon Hughes MP)

<sup>39</sup> Written evidence from Morrison & Foerster ([TRF0005](#))

finding of the Article 29 Working Party<sup>40</sup> according to which 'users of the search engine service could strictly speaking also be considered as controllers' reveals the irrational nature of the blind literal interpretation of the Directive in the context of the internet. The Court should not accept an interpretation which makes a controller of processing of personal data published on the internet of virtually everybody owning a smartphone or a tablet or a laptop computer."<sup>41</sup>

42. The Minister made an additional point:

"There is another reason why it will not work as well, which is that there is a new obligation to inform all other data controllers. We are not just talking about huge companies like Google. I am a data controller, registered under the Act, as a Member of Parliament ... There are data controllers on a global scale and there are little data controllers."<sup>42</sup>

### The economic impact of the judgment

43. The Minister told us that the economic impact on UK businesses of the draft Regulation, if enacted in its current form, could be as high as £360 million, of which up to £290 million would be the impact on small and medium enterprises (SMEs). He did not give a figure for the impact of the provision on the 'right to be forgotten', and we doubt whether it is possible to estimate this with any accuracy. What is beyond doubt is that it will be substantial, all the more so following the judgment of the Court. We are particularly concerned about the impact on SMEs. Jennie Sumpster, Senior Associate, Schillings, said that it would be a necessity for organisations and companies in the future, even at the start-up phase, to incorporate 'privacy by design' and to bear in mind what impact the technology and business methods they employ will have on the privacy of individuals.<sup>43</sup> We fear this might result in many SMEs not getting beyond the start-up phase.
44. Nor will the impact be confined to business. Morrison & Foerster told us that "the Court's decision will require search engines, Data Protection Authorities and Courts to divert considerable resources to respond to myriad requests that have been and will be received".<sup>44</sup>

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<sup>40</sup> The Working Party of representatives of the national data protection authorities of the Member States, set up under Article 29 of the 1995 Directive.

<sup>41</sup> Opinion of the Advocate General, paragraph 81

<sup>42</sup> [Q 38](#) (Simon Hughes MP)

<sup>43</sup> [Q 6](#) (Jennie Sumpster)

<sup>44</sup> Written evidence from Morrison & Foerster ([TRF0005](#))

## CHAPTER 4: SHOULD THERE CONTINUE TO BE A 'RIGHT TO BE FORGOTTEN'?

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### The Commission's view

45. The Commissioner who in 2012 had primary responsibility for data protection was Vice-President Viviane Reding, then Commissioner for Justice (now Viviane Reding MEP). In a speech in Munich on 22 January 2012, just before the new data protection package was launched, she said:

#### Box 5: Speech by Vice-President Viviane Reding, 22 January 2012

Another important way to give people control over their data: the right to be forgotten. I want to explicitly clarify that people shall have the right—and not only the 'possibility'—to withdraw their consent to the processing of the personal data they have given out themselves. The Internet has an almost unlimited search and memory capacity. So even tiny scraps of personal information can have a huge impact, even years after they were shared or made public. The right to be forgotten will build on already existing rules to better cope with privacy risks online. ... If an individual no longer wants his personal data to be processed or stored by a data controller, and if there is no legitimate reason for keeping it, the data should be removed from their system.

46. The Commissioner continued to hold these views, as is evident from her speech to the European Parliament on 11 March 2014.<sup>45</sup> Yet it seems that the Commission as a whole thought otherwise. Their Observations to the Court of Justice were summarised by the Court as follows.

#### Box 6: Paragraph 90 of the judgment of the Court

Google Spain, Google Inc., the Polish Government and the Commission submit in this regard that Article 12(b) and subparagraph (a) of the first paragraph of Article 14 of Directive 95/46 confer rights upon data subjects only if the processing in question is incompatible with the directive or on compelling legitimate grounds relating to their particular situation, and not merely because they consider that that processing may be prejudicial to them or they wish that the data being processed sink into oblivion.

47. We sought to clarify precisely what it was that the Commission proposed as an answer to the third question referred to the Court. The Commission Observations had already been made public as a result of a freedom of information request, and were therefore made available to us. The answer proposed by the Commission reads as follows.

#### Box 7: Answer proposed by the Commission to the third question

The right to rectification, erasure or blocking of data granted by Article 12(b) of Directive 95/46/EC applies where the processing of the data does not comply with the provisions of the Directive at the time when the data subject submits his request, from which it follows that this right does not confer on

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<sup>45</sup> Available at: <http://www.europarl.europa.eu/sides/getDoc.do?type=CRE&reference=20140311&secondRef=ITEM-013&language=EN&ring=A7-2013-0402>

the data subject an absolute right, as against the provider of a search engine on the internet, to prevent the indexing or storage in the “cache” memory of personal data concerning him published on the internet simply because he believes that this may be prejudicial to him, or because he wishes the information to be consigned to oblivion.<sup>46</sup>

48. If the Commission now take this view on the construction of Article 12 of the 1995 Directive, logically they should no longer support Article 17 of the proposed Regulation, either in their own wording, or *a fortiori* as amended by the European Parliament.

### The view of the Information Commissioner

49. David Smith, the Deputy Commissioner and Director of Data Protection at the ICO, posted a blog on 20 May 2014, a week after the judgment was delivered, welcoming it.
50. Mr Wood pointed out to us that the Information Commissioner, unlike most of his European colleagues, regulates not just data protection but also freedom of information, and is therefore perhaps well placed to balance the conflicting interests.<sup>47</sup> He agreed that the term ‘right to be forgotten’ was “quite a loaded term”, and preferred “a right of erasure, which is more what the European Parliament is focused on”.<sup>48</sup>
51. Although Mr Wood said, more than once, that the ICO supported “the concept behind the right to be forgotten,” his support was so hedged about with qualifications that it seemed to us that he was doubtful whether he thought it workable in practice. He said that there were outstanding issues on which the ICO was taking legal advice, such as whether a judgment binding on a .co.uk search engine might also be binding on a .com search engine,<sup>49</sup> and although he thought it was possible for the ruling to operate in practice, he agreed that the judgment “certainly poses practical difficulties for search engines in general”.<sup>50</sup> Unprompted, he said:

“Our concern is that the practical aspects work for individuals, so we do not want to set expectations which cannot be met. Going beyond the idea of a search engine, if information is so proliferated on the internet, how would it be practical to remove all that information? As a regulator, we only want to enforce things in a way where we can achieve the end results ... we would say to the Government, “Let’s think about ways to make this practical and workable”.<sup>51</sup>

### The view of the Government

52. We rather doubt whether the Government believe there are “ways to make this practical and workable”. Their position, as given to us by the Minister, could not be clearer:

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<sup>46</sup> Translation from the French. The original observations were in Spanish.

<sup>47</sup> [Q 15](#) (Steve Wood)

<sup>48</sup> [QQ 14, 21](#) (Steve Wood)

<sup>49</sup> [Q 14](#) (Steve Wood)

<sup>50</sup> [Q 16](#) (Steve Wood)

<sup>51</sup> [Q 21](#) (Steve Wood)

“The UK would not want what is currently in the draft, which is the right to be forgotten, to remain as part of that proposal. We want it to be removed. We think it is the wrong position. I do not think, both as an individual and a Minister, we want the law to develop in the way that is implied by this judgment, which is that you close down access to information in the EU that is open in the rest of the world.”<sup>52</sup>

53. Later he added:

“the Government does not support the right to be forgotten as it is currently proposed by the European Commission ... It is currently in their draft; we oppose that and we have made that clear in the negotiation ... we are not going to shift our view in negotiations that the right to be forgotten must go. We are very clear about that and we are going to argue the case both in terms of the wrongness of the principle—because we believe in freedom of information, and transmission of it—and the impracticality of the practice.”<sup>53</sup>

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<sup>52</sup> [Q 34](#) (Simon Hughes MP)

<sup>53</sup> [Q 38](#) (Simon Hughes MP)

## CHAPTER 5: THE VIEWS OF THE COMMITTEE

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### The impact of the judgment

54. In the early 1990s, when the World Wide Web was in its infancy and Google not even in gestation, it may have seemed reasonable to include in the first EU data protection legislation a right for the data subject labelled 'The right to be forgotten'. Developments in the subsequent twenty years have made clear that the right is as elusive as the name is misleading. It is unfortunate that the Court of Justice should have attempted to interpret that provision in disregard of those developments.
55. We agree with Professor Floridi that the Court "could and should have interpreted the Directive much more stringently, concluding that a link to some legally available information does not process the information in question." Given that the Court has ruled that a search engine does fall within the definition of "data controller" in the current Directive, that definition must be amended in the draft Regulation to accord with reality. In particular, the possibility of ordinary users of search engines falling within that definition must be eradicated.
56. We cannot say that it is impossible for Google to comply with the judgment, because they are attempting to do so, and Professor Floridi, for instance, believes they can. But in our view the judgment is unworkable. It ignores the effect on smaller search engines which, unlike Google, may not have the resources to consider individually large numbers of requests for the deletion of links. It is wrong in principle to leave to search engines the task of deciding many thousands of individual cases against criteria as vague as "particular reasons, such as the role played by the data subject in public life". We emphasise again the likelihood that different search engines would come to different and conflicting conclusions on a request for deletion of links.

### Future negotiations on the data protection package

57. On 3 July 2014 the Italian Presidency<sup>54</sup> circulated to the Working Group on Information Exchange and Data Protection (DAPIX) a note entitled 'Right to be forgotten and the Google judgment'<sup>55</sup> which states: "The purpose of this note is, building on the Google judgment, to examine how the future legislation on the right to be forgotten and the right to erasure should be developed." The note proceeds on the assumption that Article 17 will continue to form part of the draft Regulation, but canvasses the views of Member States on whether minor changes need to be made in the light of the judgment.
58. The Presidency seem to assume that the law as set out by the Court in its interpretation of the Directive must continue to be the law as stated in the draft Regulation. We believe this is a profound error. The task of the Court is to interpret the current law. It is for the Council and the European Parliament, as legislators, to make the law for the future. If, as we believe, the current law as interpreted by the Court is a bad law, it is for the legislators to replace it with a better law. It is significant that a large number of

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<sup>54</sup> Italy holds the rotating Presidency of the European Union from 1 July to 31 December 2014.

<sup>55</sup> Council document 11289/14.

reservations have been entered against the latest draft text of Article 17 by many Member States, for a great variety of reasons.

59. The Italian Presidency have said they hope to finish the negotiations by the end of this year, but there seems little likelihood of that. The Minister told us that the Latvians, who take over the Presidency in January 2015, would like to get it completed in the first part of that year. By then three years will have passed since the original Commission proposal, and we too would welcome a conclusion of the negotiations, but not if the text is a compromise retaining all the worst elements. The Government, and governments of other Member States with similar views, must insist on a text which does away with any right allowing a data subject to remove links to information which is accurate and lawfully available.

### **Conclusions and recommendations**

60. **It is clear to us that neither the 1995 Directive, nor the Court's interpretation of the Directive, reflects the current state of communications service provision, where global access to detailed personal information has become part of the way of life.**
61. **It is no longer reasonable or even possible for the right to privacy to allow data subjects a right to remove links to data which are accurate and lawfully available.**
62. **We agree with the Government that the 'right to be forgotten' as it is in the Commission's proposal, and *a fortiori* as proposed to be amended by the Parliament, must go. It is misguided in principle and unworkable in practice.**
63. **We recommend that the Government should ensure that the definition of "data controller" in the new Regulation is amended to clarify that the term does not include ordinary users of search engines. (Paragraphs 42 and 55)**
64. **There are strong arguments for saying that search engines should not be classed as data controllers. We find them compelling.**
65. **We further recommend that the Government should persevere in their stated intention of ensuring that the Regulation no longer includes any provision on the lines of the Commission's 'right to be forgotten' or the European Parliament's 'right to erasure'.**
66. We make this report for the information of the House. We continue to keep the draft Data Protection Regulation and Directive under scrutiny.

## APPENDIX 1: LIST OF MEMBERS AND DECLARATIONS OF INTEREST

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### Members

Baroness Benjamin  
 Lord Blencathra  
 Viscount Bridgeman  
 Lord Faulkner of Worcester  
 Lord Jay of Ewelme  
 Lord Judd  
 Baroness Prashar (Chairman)  
 Lord Morris of Handsworth  
 Lord Sharkey  
 The Earl of Stair  
 Lord Tomlinson  
 Lord Wasserman

### Declarations of interest

Baroness Benjamin  
*No relevant interests declared*

Lord Blencathra  
*No relevant interests declared*

Viscount Bridgeman  
*No relevant interests declared*

Lord Faulkner of Worcester  
*Chairman, Alderney Gambling Control Commission 2014*

Lord Jay of Ewelme  
*Trustee, Thomson Reuters Founders Share Company*

Lord Judd  
*Member, Advisory Board of the London School of Economics Centre for the Study of Human Rights*

Baroness Prashar  
*No relevant interests declared*

Lord Morris of Handsworth  
*No relevant interests declared*

Lord Sharkey  
*Previous colleague in her former employment of Ms Verity Harding, Public Policy Manager, Google UK*

The Earl of Stair  
*No relevant interests declared*

Lord Tomlinson  
*No relevant interests declared*

Lord Wasserman  
*No relevant interests declared*

The report was approved by the Chairman of the EU Select Committee, Lord Boswell of Aynho, as authorised under paragraph 11.54 of the Companion to the Standing Orders and Guide to the Proceedings of the House of Lords.

A full list of Members’ interests can be found in the Register of Lords Interests <http://www.publications.parliament.uk/pa/ld/ldreg.htm>

## **APPENDIX 2: LIST OF WITNESSES**

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Evidence is published online at <http://www.parliament.uk/right-to-be-forgotten> and available for inspection at the Parliamentary Archives (020 7219 5314)

Representatives of Google gave the Committee a briefing which, because it related to a number of ongoing legal proceedings, was off the record.

Evidence received by the Committee is listed below in chronological order of oral evidence session and in alphabetical order. Those witnesses marked with \* gave oral evidence and did not submit any written evidence. All other witnesses submitted written evidence only.

### **Oral evidence in chronological order**

- \* Neil Cameron, Director, Neil Cameron Consulting Group, Jim Killock, Executive Director, Open Rights Group, Chris Scott, Partner, Schillings and Jennie Sumpster, Senior Associate, Schillings [QQ 1–12](#)
- \* Steve Wood, Head of Policy Delivery, Office of the Information Commissioner [QQ 13–26](#)
- \* Rt Hon Simon Hughes MP, Minister for Justice and Civil Liberties, Simon James, Deputy Director, Information Rights and Devolution, Ministry of Justice and Tim Jewell, Head of Information and Human Rights Law, Ministry of Justice [QQ 27–45](#)

### **Alphabetical list of all witnesses**

- \* Neil Cameron, Director, Neil Cameron Consulting Group (QQ 1–12)  
Professor Luciano Floridi, Professor of Philosophy and the Ethics of Information, Oxford Internet Institute, University of Oxford [TRF0004](#)
- \* Rt Hon Simon Hughes MP, Minister for Justice and Civil Liberties, Ministry of Justice
- \* Simon James, Deputy Director, Information Rights and Devolution, Ministry of Justice (QQ 27–45)
- \* Tim Jewell, Head of Information and Human Rights Law, Ministry of Justice (QQ 27–45)
- \* Jim Killock, Executive Director, Open Rights Group (QQ 1–12)  
Morrison & Foerster (UK) LLP [TRF0005](#)
- \* Chris Scott, Partner, Schillings (QQ 1–12)
- \* Jennie Sumpster, Senior Associate, Schillings (QQ 1–12)
- \* Steve Wood, Head of Policy Delivery, Office of the Information Commissioner (QQ 13–26)