Spolek pro ochranu osobních údajů

Comments on the EDPB's proposal of "Guidelines 5/2019 on the criteria of the Right to be Forgotten in the search engines cases under the GDPR (part 1)"

Prague, February 5, 2020

First, we would like to express our sincere thanks for the opportunity to provide comments on the EDPB's proposed Guidelines 5/2019 (hereinafter "the Guidelines"). Spolek pro ochranu osobních údajů (The Data Protection Association) is the largest organization bringing together DPOs and other professionals in the field of personal data protection in the Czech Republic.

We welcome the Guidelines provide controllers with the detailed guidance in such a key area as search engines are. We would like to provide few comments on the proposed "Guidelines:

1. Introduction

„Nevertheless, search engine providers are not exempt in a general manner from the duty to fully erase. In some cases, they will need to carry out actual and full erasure in their indexes or caches. For example, in the event where search engine providers would stop respecting robots.txt requests implemented by the original publisher, they would actually have a duty to fully erase the URL to the content, as opposed to delist which is mainly based on data subject's name."

We believe that the question of how much robots.txt files should be respected goes beyond the data protection law itself and is also affected by rules of civil law and rules of eCommerce Directive (including rules on the free speech – "press freedom"). Therefore, we would propose to choose a more comprehensive assessment for this issue, focusing not only on the personal data protection. Although we generally agree that robots.txt settings should be in most cases respected, we can imagine that in some cases the right to freedom of expression could prevail even in this context. This may be the case, for example, of information about the persecution of opposition politicians spread by the totalitarian regime, where respecting the ban on indexing in any situation should not prevail over the interest in freedom of expression. Of particular importance is then the context perspective (the nature and type of processing regarding the potential rights of data subjects exercised), which should be given special consideration.

2. 1.1 Ground 1: The Right to request delisting when the personal data are no longer necessary in relation to the search engine provider's processing (Article 17.1.a)

In general, we would like to emphasize that the application of the erasure rights according to Article 17/1/a of GDPR should be limited only to cases where the provider of search engine is specifically asked to forget the information about the data subject (in the sense of "right to be

forgotten" rather than general "right to erasure") - of course, assuming that the search engine regularly updates its databases to reflect changes in the source pages. As was correctly stated in the opinion: "*this processing is notably carried out for the purposes of making information more easily accessible for internet users"*. This purpose of processing will be fulfilled as long as the information is accessible on the source webpage. We therefore believe that in the case of search engines it is more appropriate to use the right to erasure in the way similar to right to object according Article 17/1/c (in its broad sense, as defined in the Google Spain Decision of CJEU). This is important for assessing the question since when processing carried out by provider of search engine should be considered unlawful.

We would also welcome the EDPB opinion on the situation when the notification of the examples given in this point (e.g., if the condition "*information had to be published on the internet for a number of years to meet a legal obligation and remained online longer than the time limit specified by the legislation is met)"* would be made not by data subject himself but by a third party.

3. 1.4 Ground 4: The Right to request delisting when the personal data have been unlawfully processed (Article 17.1.d)

„In cases where a search engine provider is not able to demonstrate a legal basis for its processing, a delisting request may fall under the scope of art 17.1.d GDPR, as the processing of personal data in such cases must be considered unlawful. Nonetheless, it must be reminded that in case of unlawfulness of the original processing, the data subject remains entitled to request delisting under Article 17.1.c GDPR."

We would welcome an explanation of this remark. We believe, that the search engine will usually be able to generally demonstrate the legal basis for its processing already by reference that the information is publicly available on the source webpage (and possibly that the search engine acts according to the robots.txt rules). Of course, after objection made by data subject, particular situation should be taken into account in order to find the right balance between the rights of data subjects and the right to information (see ground 3 remark in "Guidelines"). Moreover, disabling the crawler may (does) not automatically lead to the end of indexing as we have to take into account the existence of multiply back links to the page concerned. The more important (or used) the page is, the more likely is the existence of a subsequent indexing.

4. 1.5 Ground 5: The Right to request delisting when the personal data have to be erased for compliance with a legal obligation (Article 17.1.e)

„Compliance with a legal obligation may result from an injunction, an express request by national or EU law for being under a "legal obligation to erase" or the mere breach by the data controller of the retention period. For illustrative purposes, the retention period of data is set by a text but would not be complied with (but this hypothesis mainly concerns public files). This case could maybe encompass the hypothesis of non-anonymized or identifying data available in open data."

We are of the opinion that this example may be considered neither clear nor appropriately chosen. First of all, a legal obligation within the meaning of Article 17/1/e of the GDPR must apply to the controller directly, i.e. to the search engine provider in our case. This part of the sentence: "*the retention period of data is set by a text but would not be complied with*" needs more detailed clarification. From our point of view it is not entirely clear whether it relates to

the duties of the search engine provider as the data controller or rather it concerns the obligations of the original controller of content on the website. We would really appreciate the further clarification.

We must also add that the importance of correctness of website indexing is increasing in relation to the processing of children's personal data (or other sensitive data) in the context of information society services, which is also mentioned in Guidelines (see Section 2).

We are grateful for the opportunity to provide the above-mentioned comments on the Guidelines.

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