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INTRODUCTION

On forgetting, deleting, de-listing and starting afresh!

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Much has been written on the so-called ‘right to be forgotten’ since the European Commission’s announcement in 2010. This flow of academic (and non-academic) writing increased with the European Commission’s inclusion of ‘the right to be forgotten’ in its ‘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). The inclusion of a reference to ‘the right to be forgotten’ led to extensive writing on this ‘new’ (or arguably ‘old’) right to have some aspects/details of personal information deleted or forgotten.

Initially, the writing could be categorised into two main camps. One camp argued that in this day and age, where data follow us everywhere, it is even more important than in pre-internet life to be able, as an individual, to choose which information about us is relevant and which is not. Most proponents in this camp either followed the argumentation put forth by Mayer-Schönberger in *Delete: The Virtue of Forgetting in the Digital Age* (2009); or sought to find a legal home to the new ‘right’, either in data protection or in personality rights.¹

The second camp, took a freedom of expression/censorship stance and argued that the effect of choosing what personal information is left available (online) would amount to censorship: information selection would be tantamount to suppressing information from the public. This suppression of information would clamp down, at times have a chilling effect, on the right to freedom of speech.²

Neither camp alone was/is satisfactory. The collection of articles in this special issue was born in an attempt to understand this ‘right to be forgotten’ in a broader context. The concept of ‘starting afresh’, leaving behind one’s past, trying to build another life, another set of experiences was not born with the internet. We are all familiar with national laws allowing for a fresh start. Perhaps the most familiar are the provisions in criminal law allowing for the ‘deletion’ of certain crimes or contraventions from one’s criminal record after a period of time has elapsed; or even the non-recording at all of the criminal behaviour in a criminal record. These provisions allow convicted persons to start afresh, take a different turn in life, forgetful of the past.

Often what determines whether one can start afresh is the set of circumstances, their gravity, their impact on other people in society, one’s own status, role and responsibility in society and the impact that this ‘forgetting’ may have on the rights and duties of others. Had the Commission thought out all of these aspects when including a reference to the ‘right to be forgotten’ in its proposal for a General Data Protection Regulation

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became, to some extent, the question we sought an answer to in the contributions found in this special issue.

In trying to find answers, we looked at practices in Italy (the contribution of Biasiotti and Faro), Germany (Kodde), the Netherlands (Verheij) and the United Kingdom (de Mars and O'Callaghan), dealing with requests from individuals to have information about them 'deleted' or otherwise forgotten. Drawing inspiration from constitutional provisions, where they exist (e.g. in Italy and in Germany); from data protection law (in particular in Italy, Germany and the Netherlands); or through other private law provisions, courts in the four jurisdictions have been creative in coming up with remedies for individuals wanting some form of personal information about them deleted. Would a specific 'right to be forgotten' improve the current practices? Here, all authors concur that the name alone of 'right to be forgotten' would not add much, what would help would be the identification of clear remedies that may be helpful and may increase legal certainty for the individual. The balancing activities that courts have been carrying out, taking in account circumstances, gravity, and impact on other people in society, need to be articulated in any introduction of this right to be forgotten.

The next set of contributions in this collection reflect upon the impact that organised and allowed 'forgetting' may have on the rights and duties of others. From a historian's perspective (contribution of De Baets), any provision allowing for a right to be forgotten needs to include provisions protecting the historical record, another process of negotiation that thus far may have been left in the hands of courts, e.g. in decisions by courts on the publication of private information posthumously; or in specific legislative provisions, e.g. in the non-recording of criminal activities in a criminal record. From an administrative law perspective (Klingenberg) a right to be forgotten seems to run counter to all the duties 'to not forget' that encompass administrative law. In Klingenberg's opinion, any introduction of the right to be forgotten needs to consider, or perhaps include, an exemption for the duties provided for in administrative law (e.g. the keeping of records for archiving purposes; the keeping of records on individuals for the provision of social benefits, and so on). From a private law perspective (see Tjong Tijn Tai), one needs more than a 'catchy' name for rights and respective remedies to be effective in private law. All three contributions concur that 'a right to be forgotten' may have wide ranging effects that seem not to be addressed in law or in proposals put forth. Even if the choice to start afresh may be laudable, the process of what needs to be remembered and what can be forgotten and under what terms needs to be managed, taking into account the rights of others and duties towards others.

At various points, when our project seemed to be taking longer than expected, we feared that this 'right to be forgotten' would disappear in the long European legislative process. While it did disappear from one of the numerous drafts that followed from discussions on the proposal in Council, we need not have feared. The judgment of the Court of Justice of the European Union (CJEU) in May 2014, C-131/12 *Google Spain SL and Google Inc. v Agencia Española de Protección de Datos (AEPD) and Mario Costeja González*, even if not a 'right to be forgotten' judgment at all, helped the return of the 'right to be forgotten' to the text agreed in principle by the three institutions in the trilogue.

The CJEU decision in *Google Spain* brought in another dimension to the reflections on forgetting and remembering in a world where quick access to information depends on linking, listing and ranking by search engines: de-listing/de-linking works as a temporary form of forgetting and a detour for remembering in the digital age. What we mean by this is that one can argue that what the CJEU asked for in the Google case was that Google de-lists the link to the newspaper archive where information about Mr Costeja

González is readily available. The information on Mr Costeja González's past remained there, what changed is that we are no longer introduced to Mr Costeja González's past every time we use a search engine to find his name. While we have a temporary forgetting of Mr Costeja González's past, historians, researchers, administrative authorities can still find the information, albeit in a slower process perhaps: a *retour* for the reconstruction of memory.

One can argue perhaps that seen from this perspective, this judgment (even if it is not actually a 'right to be forgotten' judgment) reconciles the concerns from supporters and critics of the right to be forgotten at the start of the right to be forgotten debates. This judgment can be seen as a very positive development seen from the perspective of the right to develop one's personality: temporary amnesia allows for the building of new memories, and new dimensions of one's personality. Ensuring that temporary amnesia is only but a detour for memory, also means that every person can have a 'richer' history of oneself recorded: the temporary amnesia giving space for the creation of more selves (or more profiles, in today's online realities). The judgment also respects concerns on censorship and limitations on the freedom of expression: information protected by other rights (e.g. rights of the press to publish records of legal proceedings, etc.) remain intact.

There are advantages in having a project that took a long time to come to harbour: one advantage is that there is now more clarity on some aspects (e.g. what could a fundamental right to be forgotten look like (Gstrein 2016)) and better articulated doubts on other aspects than when the project started.

On clarity, while the final text of the Regulation is not yet completely finalised, the available draft text (28 January 2016), uses the phrase 'the right to be forgotten' in Recitals 53, 54 and 125 and Article 17. However, it seems that this phrase is being used interchangeably with the phrase 'right to erasure'. Recital 53 tries to address some of the doubts in the contributions in this special issue, and notes

This right is in particular relevant, when the data subject has given his or her consent as a child, when not being fully aware of the risks involved by the processing, and later wants to remove such personal data especially on the Internet. The data subject should be able to exercise this right notwithstanding the fact that he or she is no longer a child. However, the further retention of the data should be lawful where it is necessary, for exercising the right of freedom of expression and information, for compliance with a legal obligation, for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller, for reasons of public interest in the area of public health, for archiving purposes in the public interest, or scientific and historical research purposes or statistical purposes or for the establishment, exercise or defence of legal claims.

Article 17 is vaguer in its articulation and hence how the Regulation will work out in practice is unfortunately still unclear.

On better articulated doubts: the criticism and resistance that followed from the Google Spain judgment, especially arguing that decisions on de-linking are being left in the hands of Google and that there are no clear rules managing the different rights involved, became clearer and are to some extent still unresolved. Yet what started off as a 'European madness' is spreading gently with the latest judgment, now in Japan: a court in Saitama in December 2015 has recognised the 'right to be forgotten' – the first ruling of its kind in Japan – in a case filed by a man asking that Google Inc. removes links to three-year-old news reports of his arrest in connection to child prostitution and pornography (Kyodo 2016).

Notwithstanding the terminology used in future legislation – erasure, de-listing, forgetting – there is a common core that remains: each one of us can start afresh as long as the set

of circumstances, their gravity and the impact this ‘forgetting’ may have on the rights and duties of others are clearly articulated . . . and that technology can be used to support this re-defined wish to start afresh.

Notes

1. See, for example, Werro (2009); Ambrose and Ausloos (2013); Bernal (2011); and Weber (2011).
2. See, for example, McNealy (2012); and Bennett (2012).

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