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Right to Forget 'Unworkable,' U.K. Parliament Report Says

by Ali Qassim

The U.K. government should continue to push for excluding the right to be forgotten principle in the proposed European Union data protection regulation, because it is "misguided in principle and unworkable in practice," according to a July 30 **report** by the U.K. House of Lords' Home Affairs, Health and Education EU Subcommittee.

The subcommittee also expressed its disagreement with a recent EU court ruling that supported the right to be forgotten principle.

"While the report carries no direct legal weight, its strongly-worded critiques reflect growing unease in the U.K." over the right to be forgotten, Bridget Treacy, managing partner and head of the U.K. Privacy and Cybersecurity Practice at Hunton & Williams LLP, in London, told Bloomberg BNA Aug. 1.

Whether the report will have meaningful influence may become clearer when negotiations resume later this year on the proposed data protection regulation to replace the EU Data Protection Directive (95/46/EC), she said.

Eduardo Ustaran, a partner at Hogan Lovells International LLP, in London, told Bloomberg BNA July 31 that the U.K. government "has consistently been skeptical about the merits" of the right to be forgotten principle "because of its potentially disproportionate effect on the information economy."

Ustaran, who is a member of the advisory board for Bloomberg BNA's Privacy and Security Law Report said there is "an uncertain period of debate during which political calls for greater privacy controls will need to be balanced against the reality of data globalisation."

Proposed Data Protection Regulation

"The expression, 'right to be forgotten is misleading," Subcommittee Chairman Baroness Usha Prashar said in statement announcing the report's release. "Information can be made more difficult to access, but it does not just disappear," she said.

It is important that any future EU regulation "does not attempt to give individuals rights which are unenforceable," she said.

The subcommittee published its report after a hearing with testimony from the Information Commissioner's Office, Google Inc., privacy attorneys and the U.K. Justice and Civil Liberties Minister Simon Hughes (**13 PVLR 1244, 7/14/14**).

At the hearing, Hughes testified that the U.K. government is against the inclusion of a right to be forgotten principle in the proposed EU data protection regulation, which was approved by the European Parliament March 12 (**13 PVLR 444, 3/17/14**).

The **amended version of the regulation** approved by the European Parliament changed the right to be forgotten to a "right to erasure" of personal data. That language is cited in the subcommittee report.

There is debate among the 28 EU member states represented on the European Council that is reviewing the proposed regulation about whether it should even contain the right to be forgotten principle (**13 PVLR 1244, 7/14/14**).

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Eduardo Ustaran, Partner,
Hogan Lovells International LLP, London

Disagreement With EU Court Ruling

The subcommittee also said it disagreed with the European Court of Justice (ECJ) May 13 **ruling** that EU data subjects have the right to require Google Inc. and other Internet search engines to remove results linking to websites containing personal information about them (**13 PVLR 857, 5/19/14**).

The subcommittee said the assumption by EU officials that the ruling by the ECJ, the EU's top court, required inclusion of the right to be forgotten principle in the data protection regulation was a "profound error."

Although it is the task of the ECJ to interpret the law, the responsibility "to make the law" for the future is in the hands of the European Council and the European Parliament, the report said.

"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," the report said.

The U.K. government, alongside other EU member states, must "insist on text which does away with any right allowing a data subject to remove links to information which is accurate and lawfully available," it said.

Affect on Small Search Engines

The subcommittee said the ECJ's judgment is "unworkable" because it failed to take into account the effect the ruling will have on smaller search engines.

Even by the standards of a global corporation the size of Google, the report said the burden is "massive," the report said.

Unlike Google, smaller organizations are unlikely to have the resources to process, on a case-by-case basis, the thousands of removal requests they are likely to receive, the report said.

This lack of resources could mean smaller search engines might end up automatically withdrawing links to any material to which a data subject has objected, it said. That move "would effectively allow any individual an uncontested right of censorship," the report said.

The subcommittee also questioned whether search engines should be allowed to handle the task of deciding whether to delete information under the individual privacy versus public right to know balancing test set by the ECJ.

The subcommittee said the ECJ test provided only "vague, ambiguous and unhelpful" criteria for that decision.

Some witnesses at the subcommittee hearing expressed concern about allowing commercial organizations to make the judgment, according to the report.

Are Search Engines Data Controllers?

The ECJ's conclusions about the right to be forgotten and the obligations of search engines were based on the court's reasoning that search engines should be considered data controllers. Under EU law, a data controller is a person or company that determines the purposes for which and the manner in which personal data are processed.

According to the subcommittee, several witnesses at its hearing argued that search engines shouldn't be classed as data controllers and therefore shouldn't be regulated as "owners" of linked data.

The report said that if search engines are data controllers, then so could it be implied that users of search engines are also controllers.

The subcommittee urged the U.K. government to push for an amendment to the proposed data protection regulation to clarify that the term "data controller" doesn't include ordinary users of search engines.

The subcommittee report makes no mention of social media platforms. Some legal analysts say that the ECJ ruling may affect the obligations of social networks operating in the EU (**see related report**).