



## **Defining the Right to be Forgotten.**

### **A Comparative Analysis between the EU and the US**

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## **Abstract**

Recently, the right to be forgotten has been placed in the spotlight in light of the recent CJEU Google Spain-Costeja case. Its emergence has reopened a discussion on what the place of data protection is in the broader debate on privacy versus freedom of speech, as well as how personal data should be approached by all stakeholders affected by it.

This paper will first establish whether a general and theoretical ideal definition of the right to be forgotten which would go beyond jurisdictions is possible, intended to represent a starting point for the implementation or interpretation of this right by any government or court. Using scholarly work, it will identify the main elements of the right seeking a harmonization of views, without questioning the necessity or the legitimacy of such endeavor.

After presenting how the concept has evolved throughout history, this paper carries out a detailed evaluation of how the two major jurisdictions, the EU and the US, are dealing with the right to be forgotten, emphasizing the major differences in terms of ideology and legal structure. It shows that the right to be forgotten was not a new concept for neither EU nor US. Furthermore, by analyzing the American legal and ideological system, it proves that the US is compatible with the right to be forgotten as it was approached by the EU in the Google Spain-Costeja case.

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## **Introduction**

On 13th May 2013, the Court of Justice of the European Union (CJEU) rendered a historic decision for the understanding of privacy. By interpreting broadly the Data Protection Directive, the Court decided that individuals have a right to be forgotten with regards to information that is no longer relevant about them, opening the gate for the admission of multiple other such extensive interpretation of the Directive. Its ruling challenged the already existing debate about identifying the adequate balance between privacy, freedom of speech and information, and freedom to conduct a business, not only in the EU, but all across the world. It stirred a passionate discussion on what the right to be forgotten truly is, what the consequences for the EU are, and whether it could be implemented in the United States, leading to a multitude of different theories and notion often susceptible of creating confusion.

In this context, this paper will establish whether a general and theoretical ideal definition of the right to be forgotten which would go beyond jurisdictions is possible. Its analysis will focus on the two main jurisdictions, the EU and the US, describing the notion as it was defined by the EU, then questioning the current narrative that the right to be forgotten is not compatible with the US. Moreover, it will also show how this debate on the existence and implementation of the right to be forgotten plugs into the broader debate on how much privacy should be regulated, respectively how information should be seen, illustrating potential effects of a paradigm shift that would occur.

This paper is not focused on whether a right to be forgotten should exist or not in the first place. Rather, it is focused on assessing the impact that the CJEU Google Spain-Costeja case had on the

process of defining the notion, including an evaluation of the EU and US case law. In fact, the argumentation circumvented the questioning of the necessity and legitimacy of the right to be forgotten, without denying at any point that that particular topic may still be open for discussion.

The first chapter seeks to offer a theoretical ideal definition of the right to be forgotten, which would be later used by any government that considers recognizing the right. Using scholarly work, it will first differentiate the right to be forgotten from other similar concepts that sometimes are used interchangeably. Then, it will proceed into analyzing different definitions provided by scholars, offering in the end an ideal theoretical definition to be used as a starting point in any attempt to implement it in practice.

The second chapter introduces the reader in the origins and evolution of the right to be forgotten, focusing initially on Europe. Countries such as Germany, Italy, Spain, or France are presented as the *parents* of notion, which has been used by local and national courts in different forms and for different purposes for decades. It then continues with the case of Argentina, pointing out the main features of a pioneer case that revolutionized the field of data protection in Latin America even before the CJEU ruling.

The third chapter exposes the way in which the European Union regulates and treats the right to be forgotten. It begins with a presentation of the evolution of the debate on data protection and privacy in the EU and what the status quo is. Next, it will assess whether the EU legislative framework had already encompassed a right to be forgotten when the CJEU Google Spain-Costeja decision was rendered, in the context of the arguments offered by the Advocate General, the Working Party, and the CJEU. This chapter continues with an iteration of the facts and holding of the case, illustrating the effects it had on the legislative framework existing at that

time. In the last part, several arguments are built in order to highlight the significant relevance of the decision.

The fourth chapter focuses on the US perspective, starting with a general overview of how society sees the issue of privacy and data protection. It then explores different facets of the right to be forgotten as it had been observed by courts and legislators, proving that the right to be forgotten has long time been present in the US, but in an incipient, undeveloped form. Having that established, the analysis goes further with a twofold investigation on whether the current legal and ideological American system would allow the adoption of the EU approach of the right to be forgotten. The conclusions of this chapter lay out not only the possibility for that to happen, but also the readiness of the US public to accept the change.

Regarding the timeliness of this paper, its readiness cannot be contested. Firstly, negotiations for a new EU regulatory framework on data protection have been on-going for more than two years already<sup>1</sup>, a consensus being hard to reach given the sensitivity of some of the aspects involved. Secondly, new international policies have been enacted in the past few years<sup>2</sup> as a consequence of a growing interest for protection of privacy. Thirdly, nowadays everybody takes a stance regarding privacy: NGOs, international organizations, private companies, individuals, media, and governments have become involved in the general debate on privacy, freedom of speech, and access to information, sometimes as decision-makers, other as mere passive agents.

<sup>1</sup> Warwick Ashford, 'Where next for the new EU data protection regulation?' (computerweekly.com 2014) <<http://www.computerweekly.com/feature/Where-next-for-the-new-EU-data-protection-regulation>> accessed 26 March 2015.

<sup>2</sup> A unanimous UN General Assembly Resolution on the Privacy in the Digital Age. Normann Witzleb, David Lindsay, Moira Paterson, Sharon Rodrick, 'Emerging Challenges in Privacy Law: Comparative Perspectives (Review)' [2015] Computer Law and Security Review 157, 1.

Moreover, the importance of the subject is paramount in today's society, which describes a world of the online that often takes over the real life, bringing new challenges to the relationship between rights, individuals, companies, and states. Furthermore, the worldwide impact of discussing it stems from the nature of Internet itself. Its content can be accessed from everywhere at any moment, making any move one makes and the information used significantly more powerful in terms of reach and repercussions.

Finally, the added value of this paper is reflected by its ambitious self-declared goal: to define the right to be forgotten in a comprehensive and well-structured manner, in order to obtain a useful definition. This definition could be used as a starting point for everybody interested in both the analysis as well as the implementation of the right to be forgotten. Moreover, its usefulness may derive from the elaborate answers offered to some of the most important questions scholars ask nowadays, such as the US capability to have a right to be forgotten as the one in the EU. Lastly, the comparative approach, focused on the two main jurisdictions, EU and US, constitute an accurate reflection of the ideological clashes that have been observed in their evolution, exploring potential ways of reconciling some the most pregnant differences when it comes to the implementation of the right to be forgotten.

# **Chapter 1. An Ideal Theoretical Framework for the Right to be Forgotten**

Defining a concept may not be the easiest thing to do, especially when that concept is not only new, but also complex. It is certainly even harder when there is no consensus between scholars on what it should include or even whether it should exist in the first place. This first chapter will try to produce a theoretical ideal definition of the right to be forgotten, which may constitute a starting point for any jurisdiction considering implementing it. This definition should be straightforward and clean, but at the same time elaborate and far reaching, portraying a notion that could exist independently of legislation to define it.

The comprehensive theoretical analysis of what the right to be forgotten is will be performed by analyzing scholarly work, whose approach often overcome jurisdictional barriers and thus are not limited to specific pieces of legislation which may easily change, but rather on principles.

After exposing the context in which this right has emerged, it will explore different related or intertwined notions that have been used in connection or under the umbrella of the right to be forgotten. Afterwards, this paper will critically investigate several approaches proposed by scholars in defining the notion. Finally, it will expose a definition proposed by this paper, which will encompass aspects taken from the previously-analyzed scholarly work.

## **1.1 Origins and Development of the Right to be Forgotten**

The right to be forgotten emerged in a world of change and progress in all aspects of humankind existence. The latest decades have been most strikingly marked by the invention and rapidly

ascension of new technological devices, as well as the expansion of Internet<sup>3</sup>. These new technologies have significantly challenged the thinking and reactions of people, both in the society at large as well as in the particular sphere of law, requiring a prompt and strong response.

As a consequence, radically new concepts such as electronic surveillance<sup>4</sup>, virtual property<sup>5</sup>, virtual currency<sup>6</sup> and the existence of virtual personas have emerged. Moreover, new debates such as the liability of ISPs<sup>7</sup>, the efficacy in protecting human rights online<sup>8</sup> in the context of the clash between the right to privacy and freedom of expression<sup>9</sup>, the access to Internet as a human right<sup>10</sup> have been born, either replacing classical ones completely, or reshaping old ones. From the society's perspective, the right to be forgotten represents a natural step further in a rapidly digitalizing era that brings upon new challenges that change the way people perceive the world they live in.

From the perspective of the individuals, this matter became of utter importance for two main reasons. *Firstly*, as for the greatest majority of those living in the developed countries<sup>11</sup>, being

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<sup>3</sup> "Social networking (has become) a mainstream activity" – Zia Akhtar, ' Malicious Communications, media platforms and legal sanctions' [2014] Computer and Telecommunications Law Review.

<sup>4</sup> David Lyon, *The Electronic Eye: The Rise of Surveillance Society - Computers and Social Control in Context* (1st, Polity Press, 1994).

<sup>5</sup> Joshua Fairfield , 'Virtual Property' [2005] Boston University Law Review 1047.

<[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=807966](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=807966)> accessed 12 March 2015.

<sup>6</sup> Benjamin Guttmann, *The Bitcoin Bible: All you need to know about bitcoins* (1st, BoD – Books on Demand, 2013).

<sup>7</sup> William J. Cook, 'Liability of Internet Service Providers' [1996] 12(3) The computer law and security report: CLSR; the bi-monthly report on computer security and the law governing information technology and computer use, 150-156.

<sup>8</sup> Jorge Pérez, Enrique Badía, 'The debate on privacy and security over the network: regulation and markets' (2012)

<[http://www.publicpolicy.telefonica.com/blogs/wp-content/uploads/2011/01/net\\_privacy.pdf](http://www.publicpolicy.telefonica.com/blogs/wp-content/uploads/2011/01/net_privacy.pdf)> accessed 11 March 2015.

<sup>9</sup> Nathaniel Swigger, 'The Online Citizen: Is Social Media Changing Citizens' Beliefs About Democratic Values?' [2013] Political Behaviour 589

<sup>10</sup> In his argumentation, the author even makes an analogy between the right to access Internet and the right to education. Michael Karanicolas, 'Understanding the Internet as a Human Right' [2012], Canadian Journal of Law and Technology, 6.

<sup>11</sup> According to Internet World Stats, in June 2014, the penetration rate of Internet in North America was 87.7%, while in Europe it was 70.5%. Internet World Stats <<http://www.internetworkworldstats.com/stats.htm>> accessed 12 March 2015.

present online has changed from a benefit, to a must, or even an obligation<sup>12</sup>. Online platforms have created functionalities that have soon become irreplaceable. A Facebook profile<sup>13</sup>, a blog or a list of preferences on YouTube have rapidly turned into indispensable elements of users' lives. Their online profiles have become *part of their persona*<sup>14</sup>, which is something significantly hard to give up on, not only because of the freedom of identity and expression, but also because of the need to stay competitive on the social market<sup>15</sup>, where people build virtual identities<sup>16</sup> to sell themselves to other people<sup>17</sup>. Furthermore, being present online brings people invaluable benefits, such as significantly higher accessibility to jobs and career opportunities or easier access to knowledge and information. Given the importance of these benefits for the users and for the society overall, no burden can be placed on users to voluntarily accept to opt-out from the online environment just to escape privacy threats. Rather, online presence should be accepted as a given of the twenty-first century, and thus approached accordingly, in a constructive manner.

Secondly, people are forced to live in a Big Data society<sup>18</sup> that goes even beyond the online world. As Governments choose to use more and more modern technologies in accomplishing their duties, citizens are forced to adhere to their policies and to live with their consequences. By

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<sup>12</sup> It is a benefit for the multiple advantages it brings, such as permanent connection to news and updates from friends, or access to online books and articles. It has become a must, as enjoying from all these benefits is a necessity in order to remain competitive on the jobs market. It has become an obligation for those who work on digital marketing or PR.

<sup>13</sup> Mitja D. Back, Juliane M. Stopfer, 'Facebook Profiles Reflect Actual Personality, Not Self-Idealization' [2010] Psychological Science.

<sup>14</sup> Joan Morris DiMicco, David R. Millen, 'Identity management: multiple presentations of self in facebook' [e.g. 2005] GROUP '07 Proceedings of the 2007 international ACM conference on Supporting group work 383.

<sup>15</sup> Brian Solis, Deirdre K. Breakenridge, *Putting the Public Back in Public Relations: How Social Media Is Reinventing the Aging Business of PR* (1st, FT Press, 2009).

<sup>16</sup> Craig Ross, Emily S. Orr, Mia Sisic, Jaime M. Arseneault, Mary G. Simmering, R. Robert Orr, 'Personality and motivations associated with Facebook use' [2009] Computers in Human Behavior 578.

<sup>17</sup> Joseph B. Walther, Brandon Van Der Heide, Sang-Yeon Kim, David Westerman, Stephanie Tom Tong, 'The Role of Friends' Appearance and Behavior on Evaluations of Individuals on Facebook: Are We Known by the Company We Keep?' [2008] Human Communication Research 28.

<sup>18</sup> In the sense that more and more industries are using big data for business purposes: "Big data refers to the idea that society can do things with a large body of data that that weren't possible when working with smaller amounts." The economist, 'The backlash against big data' (economist.com 2014) <<http://www.economist.com/blogs/economist-explains/2014/04/economist-explains-10>> accessed 20 April 2014. See also Linda Frederiksen, 'Big Data here: Big Data' [2012] Washington State University Vancouver.

being citizen or at least living in a particular country, a person implicitly agrees to give up on his or her privacy<sup>19</sup>, even outside the online world. Such instances are when people become part of governmental databases containing personal information<sup>20</sup>, when they are object of workplace surveillance<sup>21</sup>, or when they have no choice but to be monitored on the streets on a daily basis<sup>22</sup>.

This is something from which they cannot opt-out.

In this context, the rise of a right to be forgotten does not come as a surprise. It has been conceived as a natural reaction to the new challenges posed to maintaining an adequate balance between different interests: consumers' rights versus businesses' rights; individuals' rights versus governments' rights; Internet users' rights versus ISP's rights. Governments and courts together have reacted promptly trying to find solutions to these newly born problems, sometimes successfully, but frequently lacking a clear direction and awareness of what is actually happening, and what the implications are. This led to several other problems such as a lack of uniformity in courts' decisions, different, even contrasting views adopted by States, and a general lack of predictability for both companies and users.

<sup>19</sup> There are several limitations to privacy that have been accepted as legitimate. Considering it as an absolute right would lead to unfortunate consequences. See Raymond Wacks, *Privacy and Media Freedom* (1st, Oxford University Press, Oxford 2013) 25.

<sup>20</sup> This might be the case in the US, if such a measure was to be adopted: Julia Angwin, 'U.S. Terrorism Agency to Tap a Vast Database of Citizens' (wsj.com 2012). <<http://www.wsj.com/articles/SB10001424127887324478304578171623040640006>> accessed 12 February 2015

<sup>21</sup> Serge Gutwirth, Ronald Leenes, Paul de Hert, Yves Poulet, *European Data Protection: Coming of Age* (1st, Springer, 2013) 35-37.

<sup>22</sup> Of high relevance is the example of UK, which installed surveillance cameras everywhere and has, according to survey, 1 camera for every 11 people living there: David Barrett, 'One surveillance camera for every 11 people in Britain, says CCTV survey' (telegraph.co.uk 2013) <<http://www.telegraph.co.uk/technology/10172298/One-surveillance-camera-for-every-11-people-in-Britain-says-CCTV-survey.html>> accessed 10 February 2015.

## 1.2 A Theoretical Definition of the Right to be Forgotten

In order to define the right to be forgotten as it is known and used, some clarifications need to be made with regards to the concepts that have been used repeatedly in regulations, in scholars' work and in the press, and that are associated with this right.

### 1.2.1 Oblivion, Deletion, Forgetfulness. Is there any difference?

On the one hand, some<sup>23</sup> have used notions such as *right to forget*, *right to erasure*, *right to delete*, *right to oblivion* or *right to social forgetfulness*<sup>24</sup> as well as the currently observed *right to be forgotten* as synonyms, often using them interchangeably. In some cases, this terminological choice was made on purpose, the authors being fully aware of the implications. In others, however, they simply ignored that other potentially overlapping notions might exist as well.

On the other hand, others have been consistent in using some of these terms to express specific, different concepts, acknowledging that some differences do exist and must thus be recognized. Precisely, **Bernal** analyzes the difference between the right to be forgotten and the right to delete, proposing the latter as a conceptual solution to reflect the way in which society should view personal data on the Internet nowadays, instead of the current right to be forgotten. A right to delete should be the corollary of a shift in paradigm in how society sees privacy nowadays. In his opinion, the right to be forgotten represents only “a version of the idea of the right to delete”<sup>25</sup>, further identifying several distinctions between them. A first difference stems from the

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<sup>23</sup> Cécile de Terwagne, 'Internet Privacy and the Right to be Forgotten/Right to Oblivion' [2012] Revista de internet, derecho y política 109, who suggests as early as the title that these two rights are the same; Napoleon Xanthoulis, 'Conceptualizing a right to oblivion in the digital world: A human-rights based approach' [2012] UCL research essay 16; Ovidiu Vermesa, Peter Friess, *Internet of things – Global Technological and Social Trends* (1st, River Publisher, 2011) 79; see also Aurelia Tamo, Damian George, 'Oblivion, Erasure and Forgetting in the Digital Age' [2014] JIPITEC 71.

<sup>24</sup> Jean-Francois Blanchette, Deborah G. Johnson, 'Data Retention and the Panoptic Society: The Social Benefits of Forgetfulness' [2002] The Information Society 33.

<sup>25</sup> Paul Bernal, 'A Right to Delete?' [2011] European Journal of Law and Technology 1.

name itself: the aim of the right to delete is “not to allow people to erase or edit their history, but to control the data that is held about them”<sup>26</sup>, which would shift the focus from the erasure specific to the right to be forgotten to control. He then analyzes the involvement of a third party as second differentiating factor: while a right to be forgotten implies that control is left to a third party who is asked by the information owner to remove the data, in the case of a right to delete it is the owner himself who exercises his direct right to control the data.

The problem with this definition is that (a) it seems a bit artificial, being hard to see how the use of the term *right to delete* implies only control and not erasure, as the author suggest through his literal analysis, and (b) it ignores completely other notions equally often used. However, his attempt to offer a theoretical ground for this use of terminology should be welcomed and adequately appreciated. It is striking that he does not mention, at any point, the other concepts mentioned, or whether there is any difference between, for instance, the right to delete and the right to erasure, which at a first glance seem to be identical, given their literal meanings<sup>27</sup>.

Other scholars propose different approaches. De Terwangne criticizes the proposal of the authors of the new Regulation to eliminate the “right to be forgotten part” from the title of Article 17. She argues that the “right to be forgotten should not be reduced to a right to erasure”<sup>28</sup>. Although she does consider the right to be forgotten as being the same as the right to oblivion, as she states both at the beginning of this paper, as well as in others<sup>29</sup>, she does underline the difference between the right to be forgotten and the right to erasure. By analyzing the proposed regulations

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<sup>26</sup> ibid 6.

<sup>27</sup> They are considered synonyms on Thesaurus.com <<http://www.thesaurus.com/>> accessed 6 March 2015.

<sup>28</sup> Cécile de Terwangne, ‘The Right to be Forgotten and the Informational Autonomy in the Digital Environment’ [2013] Publications Office of the EU 26.

<sup>29</sup> de Terwangne (n 23) 1.

she concludes that while the right to erasure offers the data subject the right to limit and stop the unlawful use of his or her personal data, the right to be forgotten adds an extra layer of protection by offering two more ways to restrict personal data use: withdrawal of consent mentioned in Article 17 (1b), and objecting to processing of data from Article 17(1c).

Even if this approach does deserve credit for grounding this differentiation in the EU legislative framework, it does not take into account other jurisdictions and the way in which they used the notions, as well as the principles behind the notions and how they interact. This makes the distinction relevant only inside the EU and may lead to a lack of relevance if the legislative framework changes. Moreover, it also fails to offer any explanation with regards to why specifically the right to oblivion is the same right as the right to be forgotten.

It is another theory, however, that seems to offer the most compelling perspective. Besides its clarity and comprehensiveness, its relevance also emerges from the fact that it has been shortly after embraced by other scholars<sup>30</sup> as well. Concretely, its authors<sup>31</sup> have managed to efficiently clarify the terminological dilemma by delimitating the right of oblivion from the right to erasure. While the former is limited to potential harms caused to the “dignity, personality, reputation and identity”<sup>32</sup> of a person<sup>33</sup>, the latter has a much broader meaning, displaying the right of the data owner to control how third parties process it. Moreover, if the former arises from a need to protect the right to privacy, the latter is grounded rather on the need to “rebalance power between

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<sup>30</sup> Aurelia Tamo, Damian George, 'Oblivion, Erasure and Forgetting in the Digital Age' [2014] JIPITEC 71.

<sup>31</sup> Meg Leta Ambrose, Jef Ausloos, 'The right to be forgotten across the pond' [2013] Journal of Information Policy.

<sup>32</sup> *ibid* 14.

<sup>33</sup> Fact that is proven by its historical use – mostly in cases of severe (potential) defamation and breach of privacy of former convicts *ibid* 2.

data subjects and data processors”<sup>34</sup> by recognizing the data owner a right of ownership and thus control over his personal data. Lastly, it is also a difference in scope that supports this theory: the right to oblivion only concerns data that are no longer relevant, whilst the right to erasure covers not only this category, but also any other category of personal data that are covered by regulations. It is exactly this platform that constituted the basis for the definition chosen to work with by this paper, based on another author’s conception on forgiveness<sup>35</sup>, as explained in the next part.

This approach has the huge advantage of being extensive in scope, using solid arguments specifically linked to EU regulation, but also broad enough to be able to constitute the premises for a universal, non-strictly-continental based perspective. It will be, consequently, the terminology with which this paper will operate and which we propose as a solution to clarify the terminological divergences that certainly exist nowadays.

### **1.2.2 A Myriad of Definitions Proposed by Scholars. Which One to Choose?**

With regards to the definition offered to the right to be forgotten, there is no simple answer. Several legal scholars attempted to analyze the scope and the content of the right by either connecting it to the EU or US perspectives or liaising it to the function it performs. This notion was not unfamiliar to scholars coming from other fields either, as in the case of social analysts, who offered legal scholars more content to work with in building their arguments<sup>36</sup>.

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<sup>34</sup> Tamo (n 30) 3.

<sup>35</sup> Specifically, it is Bert-Jaap Koops’ work that is acknowledged: Bert-Jaap Koops, ‘Forgetting Footprints, Shunning Shadows. A Critical Analysis of the “Right to Be Forgotten” in the Big Data practice’ [2012] Tilburg Law School Legal Studies Research Paper.

<sup>36</sup> It is the case of Bert-Jaap Koops who acknowledged the existence of a third layer of the right, which falls outside its legal scope, but which is useful in understanding the implications in the case of policy-making. *ibid* 26.

To offer both an authentic and a convenient definition, scholars tried to include as much content as possible, while admittedly being aware of different limitations.

A relevant example in that sense would firstly be de Terwangne's perspective, which identifies three dimensions of the right to be forgotten. Firstly, there is a "right to oblivion of the judicial past"<sup>37</sup>, as a main premise of the justice's rehabilitation system. This involves accepting to delete someone's criminal record after the lapse of time and is aimed at protecting that person's reputation and personality rights. It has also been established by case-law and admitted in several jurisdictions, such as Germany<sup>38</sup>, US<sup>39</sup>, or France<sup>40</sup>. Secondly, there is a "right to oblivion established by data protection legislation"<sup>41</sup>. This second layer defines the right that is mentioned and protected by data protection laws, giving the right to the data subject to see his information either deleted or anonymized once the purpose for which it has been collected was achieved. It is also accompanied by a *right to protest* every time personal data is processed, regardless of the method of processing. Thirdly, there is a right to oblivion in the case of data that are no longer relevant or, more specifically, that *expire*. This is the case that has been considered to be the most extended interpretation of the so-called right to oblivion, which would involve applying "an expiration date to the data without the need for a prior analysis on a case-by-case basis"<sup>42</sup>. The problem with this classification is that it is neither exhaustive, nor accurate. It does not offer a

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<sup>37</sup> de Terwangne (n 23) 10.9

<sup>38</sup> The right was justified by the interest of allowing convicted criminals to reintegrate in the society post-conviction. Their names were not to be mentioned in connection with the crime after they had served their sentence. The right was derived from a broad interpretation of the right to personality. See Lawrence Siry, Sandra Schmitz, 'A Right to Be Forgotten? - How Recent Developments in Germany May Affect the Internet Publishers in the US' [2012] European Journal of Law and Technology<ejlt.org/article/download/141/222> accessed 3 March 2015.

<sup>39</sup> Jean-Francois Blanchette, Deborah G. Johnson, 'Data Retention and the Panoptic Society: The Social Benefits of Forgetfulness' [2002] The Information Society 33.

<sup>40</sup> *le droit d'oubli* (the right of oblivion) - a right that allows a convicted criminal who has served his time and been rehabilitated to object to the publication of the facts of his conviction and incarceration. See Jeffrey Rosen, 'The Right to Be Forgotten' [2013] Stanford Law Review 88, 1.

<sup>41</sup> de Terwangne (n 23) 109.

<sup>42</sup> de Terwangne (n 23) 11.

theoretical, substantial framework, rather a circumstantial one: it does not cover situations such as granting the right to delete personal information posted by third parties that, although accurate when posted, is no longer relevant, which is exactly the case of the Costeja ruling<sup>43</sup>. Besides, the three categories often overlap, for instance, sometimes data that would normally belong to the first category may be protected by local data protection laws.

**Van Hoboken's** approach comprises three separate definitions of the notion. The first one, based on how the right to be forgotten is seen, recognized and implemented already, is similar to the first component analyzed by de Terwagne: several states already have a version of the right to be forgotten as they already restrict publishing information about the convicted criminals. The second one is much broader, and refers to cases when the right to be forgotten is or should be introduced as a reaction to “new forms of publicity and access to information facilitated by the Internet”<sup>44</sup>. The author does not proceed to explicitly describe its exact content; what he does do is to offer some examples and analyze them, expecting the reader to deduct the definition he is suggesting. Such an example would be the introduction of a new notion - “reputation bankruptcy” - in the context of the US Fair Credit Reporting Act<sup>45</sup> - as a reaction to new technological challenges. The third and final meaning is the one suggested in the new Data Protection Regulation by the European Commission, whose purpose is to “strengthen the already

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<sup>43</sup> The Costeja ruling expanded the scope of existing EU legislation, considering it includes the right to be forgotten which has not been formally recognized before. It would not be covered by the third category either, since that one goes as far as to claim, as the author clearly states, a right to automatic deletion, not a case-by-case analysis.

<sup>44</sup> Joris van Hoboken, 'The Proposed Right to be Forgotten Seen from the Perspective of our Right to Remember, Freedom of Expression Safeguards in a Converging Information Environment' [2013] Prepared for the EU Comissions, 4 <[http://www.law.nyu.edu/sites/default/files/upload\\_documents/VanHoboken\\_RightTo%20Be%20Forgotten\\_Manuscript\\_2013.pdf](http://www.law.nyu.edu/sites/default/files/upload_documents/VanHoboken_RightTo%20Be%20Forgotten_Manuscript_2013.pdf)> accessed 3 February 2015.

<sup>45</sup> For a discussion on the topic, see Jeffrey Rosen, 'The Web Means the End of Forgetting' (nytimes.com 2010) <<http://www.nytimes.com/2010/07/25/magazine/25privacy-t2.html?pagewanted=all>> accessed 11 February 2015.

existing obligations”<sup>46</sup> under data protection laws. Therefore, van Hoboken does not offer an exhaustive definition of the notion. He only underlines the inherent ambiguity of the term, as it is used at present.

A third and equally relevant definition was offered by **Jeffrey Rosen** in his paper analyzing specifically the right to be forgotten. He mentions three separate categories of situations that are, in Peter Fleischer’s view<sup>47</sup>, covered by the right to be forgotten, as defined by the European proposed legislation, in 2011. He then proceeds to analyzing them, showing the implications that each of them would have on how privacy is seen. The first category comprises the right of the data subject to control, notably to delete the information posted by himself or herself. This does not pose any problems in light of the recent events that led to the Google Spain case, as it is something that not only is acknowledged by the whole society as a right that must be respected, but also is effectively enforced through contractual provisions<sup>48</sup>.

A second category goes one step further, already involving third parties. Specifically, it revolves around the cases when the data subject posts something, and then someone else copies it or reposts it. The questions one may ask is, naturally, whether the data subject can further control that information, once it is being maneuvered by a third party. Although Rosen does not go into a substantial analysis of the issue, in order to see whether this is a legitimate layer of the right, it

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<sup>46</sup> This has also been declared by Vivianne Reding, the European Commissioner for Justice, Fundamental Rights and Citizenship, who also stated that “Internet users must have effective control of what they put online and be able to correct, withdraw, or delete it at all”, labeling this right for the first time as the “right to be forgotten”. See Steven C. Bennett, ‘The “Right to be forgotten”: reconciling EU and US perspectives’ [2012] Berkeley Journal of International Law.

<sup>47</sup> Peter Fleischer was, in March 2011, chief privacy counsel at Google. See Peter Fleischer, ‘Foggy thinking about the Right to Oblivion’ (2011) <<http://peterfleischer.blogspot.hu/2011/03/foggy-thinking-about-right-to-oblivion.html>> accessed 6 February 2015.

<sup>48</sup> This right is part of the policy that social media websites such as Facebook or Twitter apply with regards to their users, thus granting an automatic right to deletion. However, this has also stirred some controversies, as recent disclosures have shown that Facebook, for instance, does not erase in reality user deleted content from its servers. See Zack Whittaker, ‘Facebook does not erase user-deleted content’ (zdnet.com 2010) <<http://www.zdnet.com/article/facebook-does-not-erase-user-deleted-content/>> accessed 12 March 2015.

does analyze its compatibility with the European proposed regulation, explaining how this second component would be covered as well. Particularly, every time someone in this situation requires an Internet Service Provider (ISP) to delete his personal information, the ISP should “carry out the erasure without delay”, unless the retention of data is “necessary” to protect the freedom of expression<sup>49</sup>.

A third and last category concerns the most delicate type of situations: when a third party posts information relating to a certain individual, with or without his or her approval. In Rosen’s view, this would have been, as well, included in the definition proposed by the EU Regulation, but if so, its implications would be severe: if this truly was to be enforced, search engines, such as Google, would be transformed in “censors-in-chief for the EU, rather than neutral platforms”<sup>50</sup>. However, Rosen concluded that, fortunately, the extent to which this extended definition would be effectively implemented remained to be seen.

Focusing on the wording, **Rolf Weber** identifies a time element that leads to two essential dimensions of the right: a first one, the active part, which contains the right to forget, and a second one, the passive part, which regards the right to be forgotten. In his view, while the right to forget implicitly states the occurrence of an event in the past, the right to be forgotten ignores the time factor, allowing the data owner to ask for deletion of his data at any given point<sup>51</sup>.

A similar definition is the one used by **Rouvory**, although she proposes a different criterion: the relationship between the parties involved in the process of data processing. Rouvory’s definition also divides the right in two separate components – the *right to be forgotten* and the *right to*

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<sup>49</sup> Rosen (n 40) 3.

<sup>50</sup> Rosen (n 40) 5.

<sup>51</sup> Rolf H. Weber, 'The Right to be Forgotten: More than a Pandora's Box? ' [2011] JIPITEC 120.

*forget*. On one hand, the right to be forgotten is focused on the existence of third parties and their inherent duty to forget the information they have on the data owner; on the other hand, the right to forget is focused on the protection of the data owner himself against his own past, so that he would be able to forget it<sup>52</sup>. Though refreshing, this new angle is overly abstract, leaving too many questions unanswered, such as why third parties should be the ones carrying the burden of forgetting. A final, but most convincing explanation thus far is the one used by Koops. His view is also supported, though indirectly, by Ausloos's and Ambrose's perspective.

Koops finds two separate conceptualizations of the right to be forgotten. The first one concerns the right of the individual to have his information deleted in due time, but is not limited to that: the author mentions that the focus is on a “wider range of strategies that resemble the art of human forgetting”<sup>53</sup>. The emphasis is placed on the individual, this approach being built on the idea of control and information ownership. The second one, the so-called *clean slate*, recognizes a general principle that “outdated negative information should not be used against people”<sup>54</sup>, focusing on the society, and not on the individual. This is the part that covers what has already been accepted<sup>55</sup> by most of the societies in specific areas, such as criminal law (mostly in Europe, given the effects of the statute of limitations that impose a presumption of rehabilitation, but even in the US, where juvenile criminal records are often sealed) or bankruptcy law.

Though all these attempts to define the notion should be rightfully credited for seeking to offer a (somewhat) extensive and representative overview, none of them is complex enough to comprise

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<sup>52</sup> Antoinette Rouvory, Reinventer l'art d'oublier et de se faire oublier dans la société d'information? in Stephanie Lacour, *La sécurité de l'individu numérisée. Réflexions prospectives internationales* (1st, L'Harmattan, Paris 2009) 249-278.

<sup>53</sup> Koops (n 36) 6.

<sup>54</sup> Koops (n 36) 26.

<sup>55</sup> Blanchette (n 39) 33. The authors explain, mentioning bankruptcy law, juvenile crime records, and credit reporting, that US is generally known as a culture of second chances, giving examples of US policies that embody “forgetfulness” as a value.

all the components of the right to be forgotten. However, combining Koos' perspective with what the other scholars have argued, an ideal general definition can be established.

### **1.2.3 The Proposed Definition. A Starting Point for Any Regulation?**

The right to be forgotten should be understood broadly. Irrespective of the specific legal definitions, a theoretical definition should observe a set of elements that describe the essence of the right. It should be understood as the right of an individual to obtain, automatically or per request (1), deletion of personal information (2) that is no longer relevant or useful (3), which was posted by either the data owner himself, or a third party (4), even if the information was lawfully posted (5).

This ideal definition is in fact supported by Aurelia Tamo and Damian George's paper, who argue that the right to be forgotten is comprised of "the substantial right of oblivion and the rather procedural right to erasure derived from data protection"<sup>56</sup>. In an ideal world, when deciding to adopt the right to be forgotten, states should have this broad definition to start from, which they could adapt to their system of values as well as judicial systems. Even if this would lead to different perspectives, the underlying principles would be the same.

Nonetheless, the possibility to have a convergence in the attitude of states is in fact questioned by the existence of two fundamentally different approaches on privacy and data protection: the European Union's approach and the United States' approach. Whether this convergence would be thus possible will be scrutinized later in this paper.

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<sup>56</sup> Tamo (n 30) 71.

## **Chapter 2. Evolution of The Right to Be Forgotten**

Though the right to be forgotten became a central element of the debate over privacy versus free speech only in the last few years, given the intent of the European Commission to impose a new Data Protection Regulation, as well as the later ruling of the CJ EU in the Google Spain case, it is not a new concept.

Some writers link the notion directly to the French and Italian concepts of *oblivion*, but its origins are considered as dating way back in history, seeing it as “a concept born out of 19th-century French and German legal protections that once permitted honor-based dueling”<sup>57</sup>. Though the connection may be hard to see for outsiders, the explanation for this analogy lays in the view Europe has over privacy and personal data: the right to be forgotten is considered to be part of one’s right to personality, which encompasses aspects such as “dignity, honor, and the right to private life”<sup>58</sup>.

It comes as no surprise that countries such as France, Italy or Germany have had in their legislations a version of this right for years, creating the foundations for the notion to get developed and become the current right to be forgotten.

This chapter will further briefly analyze the evolution of this notion in Europe, focusing on national legislations. It will show that countries such as France, Italy, or Germany have been juggling with the concept for decades now, sometimes adopting versions of it, in different fields. It will then proceed to presenting the already well-known case of Argentina, a non-European

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<sup>57</sup> Tom Gara, ‘The Origins of the ‘Right to be Forgotten’: Sir, I Demand a Duel’ (wsj.com 2014) <<http://blogs.wsj.com/corporate-intelligence/2014/05/14/the-origins-of-the-right-to-be-forgotten-sir-i-demand-a-duel/>> accessed 20 March 2015.

<sup>58</sup> Weber (n 51).

country that has been confronted, in the past year, with a wave of lawsuits challenging society's perception on privacy and reputation.

## **2.1 The Right to Be Forgotten in Europe. The Beginnings of the Right?**

For decades, France has been treating the right to oblivion as a fundamental constitutive element of the data minimization principle<sup>59</sup>. France recognized for the first time implicitly<sup>60</sup> a right to oblivion (*droit d'oubli*), in the late 1970s, through its Article 40 of Law 78-17/1978<sup>61</sup>, which recognized the right of individuals to demand the erasure of personal data when the data is no longer relevant (the literal translation of *périmées*) and later included in the Criminal Code an effective way to enforce it<sup>62</sup>. The French right to oblivion was also used as a way to ensure rehabilitation as a component of justice, giving convicted prisoners who were considered to have been rehabilitated according to the law the right to later object to the publication of articles containing information about their crimes and sentence<sup>63</sup>. Moreover, the notion was adopted by the Banking sector as a right to numerical oblivion (*droit d'oubli numérique*), which comprises of the right to obtain deletion of one's personal information from databases after a reasonable period of time<sup>64</sup>.

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<sup>59</sup> Jean-Francois Blanchette, 'Not Just Left Alone, But Forgotten Too! The Case of French Law" [2006] Proceedings of the American Society for Information Science and Technology.

<sup>60</sup> The notion was not formally included in the French Data Protection Act of 1978: Fabrice Naftalski ; Guillaume Desgens-Pasanau, 'Projet de règlement européen sur la protection des données: ce qui va changer pour les professionnels' [2012] Revue Lamy Droit de l'Immateriel 71.

<sup>61</sup> The full articles reads "Toute personne physique justifiant de son identité peut exiger du responsable d'un traitement que soient, selon les cas, rectifiées, complétées, mises à jour, verrouillées ou effacées les données à caractère personnel la concernant, qui sont inexactes, incomplètes, équivoques, périmées, ou dont la collecte, l'utilisation, la communication ou la conservation est interdite".

<sup>62</sup> "Le fait de conserver des données à caractère personnel au-delà de la durée prévue par la loi ou le règlement, par la demande d'autorisation ou d'avis, ou par la déclaration préalable adressée à la Commission nationale de l'informatique et des libertés, est puni de cinq ans d'emprisonnement et de 300 000 euros d'amende, sauf si cette conservation est effectuée à des fins historiques, statistiques ou scientifiques dans les conditions prévues par la loi".

<sup>63</sup> Rosen (n 40) 1.

<sup>64</sup> Mario Viola de Azevedo Cunha, *Market Integration Through Data Protection* (1st, Springer, 2013) 89-90.

Although currently there is no explicit right to be forgotten in the French legislative framework, the society at large viewed it as an intrinsic part of the notion of privacy, and naturally, 2009 brought a legislative proposal aimed at regulating the right to be forgotten on the Internet. Though the proposal has still not been adopted, the implicit presence of the right to be forgotten in French legislative framework is also strengthened by the case law of French courts that have rapidly adopted the rationale of the Court of Justice in the Google case in their decisions<sup>65</sup>.

Progress has also been made in terms of soft law. The French Data Protection Agency (*Commission Nationale de l'informatique et des libertés*) has recognized the right to be forgotten as of crucial importance for the Internet, applying the principle first in the context of the “networked environment”, and then being extended to the virtual online world<sup>66</sup>. Additionally, more recently, a “Code of good practice on the right to be forgotten on social networks and search engines”<sup>67</sup> has been enacted, intended at strengthening user control over the information they post online.

Italy and Spain as well had already recognized a right to be forgotten. Italy’s “diritto all’oblio” was already mentioned in Italian case law in 1998, in a case judged by the Italian Supreme Court<sup>68</sup>. The Italian Data Protection Agency (*Garante per la protezione dei dati personali*<sup>69</sup>) used this in its later argumentation for a right to be forgotten, justifying it by invoking the

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<sup>65</sup> Owen Bowcott, Kim Willsher, 'Google's French arm faces daily €1,000 fines over links to defamatory article' ([theguardian.com 2014](http://www.theguardian.com/2014/nov/13/google-french-arm-fines-right-to-be-forgotten)) <<http://www.theguardian.com/media/2014/nov/13/google-french-arm-fines-right-to-be-forgotten>> accessed 15 March 2015.

<sup>66</sup> van Hoboken (n 44) 10.

<sup>67</sup> Secrétariat d'Etat \_à la Prospective et au Développement de l'économie numérique, 'Charte du droit à l'oubli dans les sites collaboratifs et les moteurs de recherche' ([huntonfiles.com](http://www.huntonfiles.com) 2010).

<[http://www.huntonfiles.com/files/webupload/PrivacyLaw\\_Charte\\_du\\_Droit.pdf](http://www.huntonfiles.com/files/webupload/PrivacyLaw_Charte_du_Droit.pdf)> accessed 14 March 2015.

<sup>68</sup> Italian Supreme Court [1998] 3679.

<sup>69</sup> Garante per la protezione dei dati personali <[http://www.garanteprivacy.it/home\\_en](http://www.garanteprivacy.it/home_en)> accessed 2 March 2015.

“character of the Internet, on which information can easily be found with search engines”<sup>70</sup>. The Agency issued two decisions, in 2005 and 2008, regarding online archiving. In the first one<sup>71</sup>, dealing with the retrieval of a decision of the Italian Antitrust Authority published online in 1996, issued against a company for misleading advertising, the Court stated that “access to decisions that have already achieved their purpose should be restricted”<sup>72</sup>. This was in line with the Italian principle forbidding the continuous publication of news concerning crimes that have been committed, unless there is a current public interest for that information to be published<sup>73</sup>. In the second one<sup>74</sup>, in a case involving Google Inc., the Data Protection Agency considered that, although when the publication occurred the public interest superseded the private one, making it legitimate, there are “no legitimate grounds for personal data in online archives being retrievable through external search engines”<sup>75</sup>. However, in practice, the Italian Court of Cassation stated in 2012 in a case involving the “il diritto all’oblio” in online newspapers<sup>76</sup> that search engines shall be seen as mere intermediaries, not having any obligation to remove links to contested web pages<sup>77</sup>, which represented a major step backwards in the debate on the introduction of the right to be forgotten.

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<sup>70</sup> van Hoboken (n 44) 9.

<sup>71</sup> Garante per la protezione dei dati personali, ‘Oblivion Rights’ ([garanteprivacy.it](http://www.garanteprivacy.it/web/guest/home/docweb/-/docweb-display/docweb/1336892) 2005) <<http://www.garanteprivacy.it/web/guest/home/docweb/-/docweb-display/docweb/1336892>> accessed 18 March 2015.

<sup>72</sup> Tamo (n 30) 81.

<sup>73</sup> Edward L. Carter, ‘Argentina’s right to be forgotten’ [2013] Emory International Law Review 4.

<sup>74</sup> Garante per la protezione dei dati personali, ‘Archivi storici on line dei quotidiani: accoglimento dell’opposizione dell’interessato alla reperibilità delle proprie generalità attraverso i motori di ricerca’ ([garanteprivacy.it](http://www.garanteprivacy.it/web/guest/home/docweb/-/docweb-display/docweb/1583162) 2008) <<http://www.garanteprivacy.it/web/guest/home/docweb/-/docweb-display/docweb/1583162>> accessed 19 March 2015.

<sup>75</sup> Tamo (n 30) 81.

<sup>76</sup> Italian Supreme Court [2012] 5525..

<[http://www.ilsole24ore.com/pdf2010/SoleOnLine5/\\_Oggetti\\_Correlati/Documenti/Norme%20e%20Tributi/2012/04/corte-cassazione-sentenza-5525-2012.pdf](http://www.ilsole24ore.com/pdf2010/SoleOnLine5/_Oggetti_Correlati/Documenti/Norme%20e%20Tributi/2012/04/corte-cassazione-sentenza-5525-2012.pdf)> accessed 18 March 2015.

<sup>77</sup> Tamo (n 30) 81.

Spain's version of the right, "el derecho al olvido"<sup>78</sup>, has been strongly advocated for, especially by the Spanish Data Protection Agency (AEPD). In 2011, Spain has introduced a new regulation enhancing the right to be forgotten, giving the Spanish Data Protection Agency the competence to evaluate complaints from citizens when they considered their privacy was being harmed. Faced with over 90 complaints from Spanish citizens, after unsuccessfully trying to convince the source of the content to take action, the Agency turned to Google asking them to stop indexing the information<sup>79</sup>. Naturally, Google contested its requests in Court, leading to the Supreme Spanish Court referring the three famous questions to the Court of Justice of the European Union (CJEU), thus laying the ground for the official birth of the right to be forgotten. Though backed by a large majority of the population, the introduction of such a right stirred an intense debate in the Spanish media<sup>80</sup>, anticipating the reaction over the CJEU's decision in the Google Spain case.

In Germany, a version of the right to be forgotten has been recognized as an extensive interpretation of the "right to personality", referring most often to the cases of convicted criminals whose reintegration prevails over the interest of the society to be informed about one's criminal history. The right is thus used mostly in connection with potential restrictions on mentioning again events that happened in the past, but does not interfere with the legality of the articles that have already been published, which remain available and, as a consequence, could

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<sup>78</sup> Rallo Lombarte, Artemi Telos, 'El derecho al olvido y su protección: a partir de la protección de datos' [2010] Cuadernos de comunicación e innovación 104 and Simón Castellano, 'El derecho al olvido en el universo 2.0' [2012] Textos Universitarios de Biblioteconomía i Documentació.

<sup>79</sup> Ambrose (n 31) 3.

<sup>80</sup> Elizabeth Flock, 'Should we have a right to be forgotten online?' (washingtonpost.com 2011) <http://www.washingtonpost.com/blogs/worldviews/post/should-we-have-a-right-to-be-forgotten-online/2011/04/20/AF2iOPCE\_blog.html> accessed 10 March 2015.

be found in the list of results displayed nowadays by search engines<sup>81</sup>. This clearly illustrates how courts have carefully balanced the losses caused by censorship of the press and the harms caused to individuals by publishing such sensitive information, in this case the latter prevailing as it is considered more impactful.

Additionally, the right has also been taken into consideration in issues related to the involvement in political movements (for example, during World War II or as a member of the ruling party in the former German Democratic Republic<sup>82</sup>), but the result has not been conclusive for the evolution of the right to be forgotten. The outcome is consistent with how the German society views personal data and privacy: in fact, although Germany has enacted several provisions in both private and criminal law to protect personal information belonging to its citizens<sup>83</sup>, it has always been reluctant to admitting a stronger protection of privacy vis-à-vis an imminent restriction of freedom of press. Despite the famous *Lebach*<sup>84</sup> decision of the Constitutional Court which prompted courts to reconsider their views and tried to find plausible interpretations of the right to be forgotten, the right is still present only in an incipient, dogmatic form, thus being unable to provide an answer to the challenges raised by the Spanish Supreme Court in analyzing the case of search engines.

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<sup>81</sup> van Hoboken (n 44) 3.

<sup>82</sup> Weber (n 51).

<sup>83</sup> The interpretation given by the Constitutional Court to the right to personality in Article 2(1) of the German Basic Law (GG) of 1949, as well as the interpretation of Courts to Article 823 (1) of the German Civil Code (BGB) represented the basis for personality protection in Germany. See Tamo (n 30).

<sup>84</sup> Federal Constitutional Court (Bundesverfassungsgericht) [1998] 131/96. A translated version of the decision which explored the right of individuals to personality and reputation can be found here

<<http://www.iuscomp.org/gla/judgments/tgcm/v980324.htm>> accessed 18 March 2015.

## **2.2. The Argentinian Story. The Case of an Outsider?**

Europe was not the only country to recognize, in a way or another, a form of the right to be forgotten. Argentina has been capturing world's spotlight for years following the recent litigation cases that revealed an intense clash between privacy and freedom of speech online, making some commentators<sup>85</sup> fear that Argentina is leading a battle to enforce a broad right to be forgotten. In the past few years, over two hundreds plaintiffs<sup>86</sup> such as models, actresses or athletes have filed lawsuits in Argentinian courts against Google and Yahoo, seeking removal of links from their search results.

This was also caused by the short-lived victory in the case of Virginia da Cunha, who won in the lower courts against the search engines, but lost it in the Court of Appeal in favor of the search engines. She alleged that whenever her name was searched with the Google and Yahoo search engine, the results (articles and photographs) were linking to several websites offering sexual content and pornographic services and escorts. According to her, the connections that the search engines were making were causing her material and moral damages, harming her right to personality, reputation, and privacy<sup>87</sup>.

Although the facts in this case were fundamentally different from the Google Spain case, the latter is mentioned and analyzed thoroughly in one of the judges voting to dismiss the da Cunha case in the Court of Appeal. Interestingly, she argues that, while search engines should not be

<sup>85</sup> Jeffrey Rosen is a fierce opponent of the right to be forgotten. See T.J.Raphael, 'Should We Have the 'Right to Be Forgotten' Online?' (<http://www.thetakeaway.org/story/should-we-have-right-be-forgotten-online/>) accessed 17 March 2015 or Rosen (n 40).

<sup>86</sup> Carter (n 73) 4.

<sup>87</sup> National Civil Court (Juez Nacional en lo Civil) [2009] 99.620/06. The argumentation used can be found in the original document of the complaint online <<http://www.diariojudicial.com/documentos/adjuntos/DJArchad junto17173.pdf>> accessed 18 March 2015.

held liable in this particular case, individuals should be granted a right to be forgotten, invoking the Italian legal rule according to which convicted criminals who have served their sentences and are considered rehabilitated have the right to demand not to be linked any more with their crimes through articles posted about it<sup>88</sup>. Furthermore, the relevance of this case is also justified by its ability to challenge both the public and private actors of the society, making them engage in a debate<sup>89</sup> about information ownership and press censorship.

Finally, though the da Cunha case ended up with a loss, it opened the gate for potential opposite decisions, for it reflects the great deal of uncertainty that the whole society is facing with regards to what privacy is and how it should be treated. Courts appear to be more willing to accept that some plaintiffs, for instance celebrities, have a right to control their reputation, which may be far from accepting the potential emergence of a right to be forgotten, but could be a starting point for it.

In light of this background, this paper will investigate in the next two chapters the position that two of the most important competing superpowers assumed on the right to be forgotten. The analysis of the EU and US legislative and case law framework will be coupled with an overview of the existing differences in terms of government policies, values seen as essential for the well-functioning of the society, and economic and political ideology. The analysis of these factors would help assess the outcome and diminish the risk of incurring losses by identifying potential complications that may arise in the implementation of the right.

<sup>88</sup> Carter (n 73) 3-4.

<sup>89</sup> See Marcelo Bellucci, 'La Corte falló a favor de los buscadores pero abrió la puerta al "derecho al olvido"' (Clarín.com 2014) <[http://www.clarin.com/sociedad/Corte-Fallo-buscadores-derecho\\_al\\_olvido\\_0\\_1238876159.html](http://www.clarin.com/sociedad/Corte-Fallo-buscadores-derecho_al_olvido_0_1238876159.html)> accessed 20 March 2015 or 'El derecho al olvido en Internet se deberá aplicar también en la Capital Federal' (lanacion.org 2014) <El derecho al olvido en Internet se deberá aplicar también en la Capital Federal> accessed 20 March 2015.

## **Chapter 3. The European Union Perspective**

The EU formally recognized privacy as a fundamental human right after the Second World War, when several countries started liberating themselves from the oppressive regimes led by the fascist and communist ideologies. The enactment of the European Convention on Human Rights (ECHR), as well as the adoption of the Universal Declaration of Human Rights (UDHR) at international level have prompted EU Member States to enact legislation in order to implement the principles these acts were proclaiming. Contrary to the US, that does not have privacy included in its Constitution, and not a horizontal regulation to protect it, the EU later formally recognized the right to privacy as an underlying, defining element of the common space it aims at creating. The Lisbon Treaty explicitly protects privacy as a fundamental right of EU citizens, and so does the EU Charter of Fundamental Rights (EUCFR) that goes even further and also establishes the right to protection of personal rights and freedom in the processing of data as fundamental rights. This structure represents the basis for the recognition of a right to be forgotten by the CJEU, in the already famous Google Spain-Costeja ruling.

One might ask why specifically Europe as opposed to the US was the jurisdiction to develop such a strong privacy-protective framework, given that for centuries it was the US that was defined as the biggest democracy protective of individual liberties. Nonetheless, the general sensitivity of European countries is grounded in their historic and cultural background, which has shaped their attitudes towards an over-stepping state or over-intruding private corporations. Their

past made them understand and cherish the value of privacy, having “recently seen the evil that flourishes when privacy is not protected”<sup>90</sup>.

This chapter will firstly offer an overview on the context in which privacy rules have developed in the EU, as a result of several technological advancements that challenged the legislation in place. It will then analyze both hard as well as soft law provisions, evaluating whether they might have contained implicitly a right to be forgotten as it was later defined by the Court of Justice.

The third part will introduce the facts, the procedural aspects, and the ruling of the CJEU in the Google Spain-Costeja case, exposing the most relevant elements for the development of the right to be forgotten that the Court introduced through its argumentation. After showing the effects of this decision, the next part of the analysis will show how the Google Spain-Costeja ruling challenged the previously established framework, and describe the solutions that the European legislators found in order to cope with the backlash from the market and the media.

Last but not least, this chapter will demonstrate the importance of the decision on a three-layer analysis, presenting arguments from a structural, substantial, and dogmatic perspective.

### **3.1 Evolution of the Framework. A Predictable Timeline?**

The emergence of the online environment, where more and more citizens were building virtual identities and a strong digital presence<sup>91</sup>, together with states’ often divergent regulatory

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<sup>90</sup> Theresa M. Payton, Theodore Claypoole, *Privacy in the Age of Big Data. Recognizing Threats, Defending Your Rights, and Protecting Your Family* (1st, Rowman & Littlefield, 2014) 232.

<sup>91</sup> “What we post on Internet becomes a kind of tattoo etched into ourselves, which is hard and cumbersome to remove” Norberto Nuno Gomes de Andrade, *Oblivion: The right to be different...from Oneself: Re-proposing the right to be forgotten* (1st, Palgrave Macmillan, 2014) 75.

reactions, have prompted the interference of the EU central bodies to ensure a minimum standardized regulation on the protection of personal data across the Union.

In that sense, **Directive 95/46/EC** (the so-called “Data Protection Directive”) on the protection of individuals with regard to the processing of personal data and on the free movement of such data, a landmark of the European Union framework, was conceived exactly as an acknowledgment of the need to adapt the EU framework to the technological challenges and social trends, while also safeguarding a functional and competitive internal market<sup>92</sup>. In order to attain this ambitious goal, the Directive instituted a number of broad objectives, such as ensuring an equivalent level of protection of the rights and freedoms of individuals with regards to the processing of personal data in all Member States in order to remove the obstacles to flows of personal data inside the common market (par. 9 Preamble of the Directive) without imposing to the Member States the manner in which these goals shall be reached<sup>93</sup>.

Whilst having the immense advantage of leaving Members States sufficient leeway to integrate the EU standards into their legislations and, broadly, their societies, it also has the inherent inevitable downside of giving too much flexibility to the states. This was later reflected in the responses they gave to future challenges their societies had to face, marking a diverging evolution of data protection in Europe.

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<sup>92</sup> Basic declared principle of the EU, one of the pillars of the EU: “The Union shall establish an internal market”, TEU, Article 3(3).

<sup>93</sup> Article 288 TFEU specifies that “A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods”. They are binding only on those Member States to whom they are addressed and are a more flexible instrument of EU than regulations. See Margot Horspool, Matthew Humphreys, *European Union Law* (1st, Oxford University Press, Oxford 2012) 104.

In this context, the EU efforts, such as the enactment of new Directives (e.g. the E-Commerce Directive in 2000<sup>94</sup> or the E-Privacy Directive in 2002<sup>95</sup>) came as little surprise. However, while managing to solve some of the problems that appeared, they also lead to a massive fragmentation of the EU regulatory structure regarding data protection. Moreover, there were still several aspects not covered by their provisions, which led to plentiful uncertainties regarding the scope of EU intervention and Member States' concrete role in protecting personal data. Such an uncertainty concerned the very premise of the CJEU Costeja case, which was whether the Directive's provisions, as they were formulated, allowed granting individuals an implicit right to erasure.

Inevitably, the late 2000s brought upon the acknowledgement that the existing framework could no longer cope with the fast-development of technology, including the advent of the omnipotent smartphones and gaining access to internet in almost every household in the West. The existing legislation soon became “unable to represent the realities of a world in which data has become a primary currency exchanged between consumers, businesses and organizations”<sup>96</sup>.

<sup>94</sup> Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce') <<http://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX:32000L0031>> accessed 17 March 2015.

<sup>95</sup> Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications) <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32002L0058:en:HTML>> accessed 17 March 2015.

<sup>96</sup> Chris Combemale, 'New data protection regulation should reflect marketing needs' ([theguardian.com](http://theguardian.com) 2012) <<http://www.theguardian.com/media-network/media-network-blog/2012/sep/24/data-protection-regulation-marketing-law>> accessed 14 March 2015.

In 2009, several authors<sup>97</sup> published papers aimed at raising awareness over the numerous potential gaps in the existing framework, mentioning for the first time in a European context notions such as right to oblivion or right to be forgotten, inspired by national case law<sup>98</sup>.

In 2010, in a press release<sup>99</sup>, the European Commission announced its intention to begin working on creating a “a new general legal framework for the protection of personal data in the European Union covering data processing operations in all sectors and policies in the European Union”<sup>100</sup>, following a meeting of the European Data Protection Authorities with the EU Commissioner for Justice, Fundamental Rights, and Citizenship, Viviane Reding.

As a reaction, in 2012, the European Commission enacted the proposed Data Protection Regulation (DPR), which aimed at harmonizing the differences existing between European countries<sup>101</sup>, while instituting a “comprehensive reform of the data protection rules”<sup>102</sup>. In a largely quoted<sup>103</sup> and analyzed declaration, Viviane Reding mentioned the right to be forgotten as an “important way to give people control over their data”, suggesting that the new framework was intended at rebalancing the positions between individuals and the market in favor of individuals. In spite of the explicit introduction of the right to be forgotten as a corollary of the

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<sup>97</sup> Viktor Mayer-Schönberger, *The Virtue of Forgetting in the Digital Age* (1st, Princeton University Press, 2011); Franz Werro, ‘The Right to Inform v. the Right to be Forgotten: A Transatlantic Clash’ [2009] *Haftungsrecht im Dritten Millenium = Liability in the Third Millenium* 285; analyzing the US and Swiss perceptions on data privacy, the latter argued that the two perspectives cannot be reconciled; both also referred to the right to be forgotten as a central element of this conceptual dispute.

<sup>98</sup> France, Italy, as mentioned before.

<sup>99</sup> European Commission, ‘Press release’ ([ec.europa.eu](http://ec.europa.eu) 2010)

<[http://ec.europa.eu/justice/policies/privacy/news/docs/pr\\_15\\_07\\_10\\_en.pdf](http://ec.europa.eu/justice/policies/privacy/news/docs/pr_15_07_10_en.pdf)> accessed 17 March 2015.

<sup>100</sup> Meg Leta Ambrose, ‘Speaking of forgetting: Analysis of possible non-EU responses to the right to be forgotten and speech exception’ [2014] *Telecommunications Policy* 800, 1.

<sup>101</sup> Simón Castellano, ‘El derecho al olvido en el universo 2.0’ [2012] *Textos Universitaris de Biblioteconomia i Documentació*.

<sup>102</sup> See European Commission, ‘Press release’ ([ec.europa.eu](http://ec.europa.eu) 2012) <[http://ec.europa.eu/rapid/press-release\\_SPEECH-12-26\\_en.htm](http://ec.europa.eu/rapid/press-release_SPEECH-12-26_en.htm)> accessed 18 March 2015.

<sup>103</sup> See Rosen (n 40) 1; Gregory Voss, ‘The right to be forgotten in the European Union: Enforcement in the Court of Justice and amendment to the proposed general Data Protection Regulation’ [2014] *Journal of Internet Law* 3.

protection offered to personal data, some scholars<sup>104</sup> argue that, at a closer look, this initial proposal was doing the opposite.

Specifically, the DPR draft was "reducing the meaning of informational self-determination to the point of no significance", while giving the "Information Industry a default entitlement to collect and further process personal data as a normative foundation and a rationale of data protection in Europe"<sup>105</sup>. On the other hand, others considered that the new draft would be able to protect data efficiently if a couple of potential problems would be solved<sup>106</sup>. Beyond these doctrinal divergences, the draft regulation, especially with regard to the explicit introduction of the right to be forgotten, has generally been acclaimed for its protective stance on individuals rights<sup>107</sup>, though criticized<sup>108</sup> for the effects on companies, which immediately launched a fierce lobbying offensive against the newly proposed data privacy law<sup>109</sup>. Overall, the draft has been considered as a step forward towards ensuring that citizens can regain control over their information: a "paradigm shift in privacy"<sup>110</sup>, as some would call it.

Soon after, the Parliament's Committee on Civil Liberties, Justice and Home Affairs adopted a compromise text<sup>111</sup> ('LIBE compromise text) proposing nearly four thousand amendments<sup>112</sup> to

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<sup>104</sup> Nadezhda Purtova, 'Default entitlements in personal data in the proposed Regulation: Informational self-determination off the table and back on again?' [2013] Computer Law and Security Review.

<sup>105</sup> ibid 2.

<sup>106</sup> Luke Danagher, 'An Assessment of the Draft Data Protection Regulation: Does it effectively protect Data?' [2012] European Journal of Law and Technology.

<sup>107</sup> "Individuals are getting more rights. The balance is tilting more to the individual versus the companies," said Françoise Gilbert, a lawyer in Palo Alto, Calif., who represents technology companies doing business in Europe. Somini Sengupta, 'Europe Weighs Tough Law on Online Privacy' (nytimes.com 2012) <[http://www.nytimes.com/2012/01/24/technology/europe-weighs-a-tough-law-on-online-privacy-and-user-data.html?\\_r=0](http://www.nytimes.com/2012/01/24/technology/europe-weighs-a-tough-law-on-online-privacy-and-user-data.html?_r=0)> accessed 2 March 2015.

<sup>108</sup> Combemale (n 96).

<sup>109</sup> Ella Ornstein, 'The Right to Be Forgotten': US Lobbyists Face Off with EU on Data Privacy Proposal' (spiegel.de 2012) <<http://www.spiegel.de/international/business/us-government-and-internet-giants-battle-eu-over-data-privacy-proposal-a-861773.html>> accessed 28 February 2015.

<sup>110</sup> Bernal (n 25) 5.

<sup>111</sup> Available at <[http://www.europarl.europa.eu/meetdocs/2009\\_2014/organes/libe/libe\\_20131021\\_1830.htm](http://www.europarl.europa.eu/meetdocs/2009_2014/organes/libe/libe_20131021_1830.htm)> accessed 23 March 2015.

the original version. Through the suggested changes, the LIBE version brought back into negotiations the “informational self-determination”<sup>113</sup> as a potential rationale of the new data protection framework, modifying some of the most controversial aspects of the Commission draft to favor the individual. Moreover, several elements from the text suggest a strengthening of the right to be forgotten in comparison with its earlier version<sup>114</sup>.

After two years of intense negotiations following lobby from both civil society as well as private entities, on March 2014 a new data protection regulatory structure has been voted by an overwhelming majority of the Members of the European Parliament<sup>115</sup>. The form approved seemed to be the one proposed by the LIBE committee, and, in order to become a Regulation, needed the approval of the Council of Ministers<sup>116</sup>, which has so far yet to come, but could be expected anytime in the near future.

Whether a new data privacy regulation will successfully manage to find and maintain an adequate balance between the interests of all the stakeholders involved and when it would effectively come into force remain to be seen. It will however certainly fail to fully satisfy all possible expectations, given the inevitable existing disparities between their holders.

<sup>112</sup> Cooper Mitchel-Rekrut, 'Search Engine Liability under the LIBE Data Regulation Proposal: Interpreting Third Party Responsibilities as Informed by Google Spain' [2014] Georgetown Journal of International Law, 3.

<sup>113</sup> The right to informational self-determination has been developed by the German Constitutional Court in 1983, in its famous Census decision. Bundesverfassungsgericht Federal ConstitutionalCourt (Bundesverfassungsgericht) [1983] 209/83 from Purtova (n 104) 2.

<sup>114</sup> Mitchel-Rekrut (n 112) 3.

<sup>115</sup> European Commission, 'Press release' ([ec.europa.eu/rapid/press-release\\_MEMO-14-186\\_en.htm](http://ec.europa.eu/rapid/press-release_MEMO-14-186_en.htm)) accessed 16 March 2015.

<sup>116</sup> Bird&Bird, 'Official draft of the new General Data Protection Regulation' ([twobirds.com 2014](http://www.twobirds.com/en/practice-areas/privacy-and-data-protection/eu-framework-revision)) <<http://www.twobirds.com/en/practice-areas/privacy-and-data-protection/eu-framework-revision>> accessed 16 March 2015.

### **3.2 The EU Legislative Framework. Was there a Right to Be Forgotten before?**

When Viviane Reding announced the introduction of the right to be forgotten as one of the main elements of the DPR draft<sup>117</sup>, she depicted the concept as being an expansion of the already existing privacy rights, suggesting that the Data protection Directive was already setting up the premises for the establishment of such a right.

Thus, the natural question that follows is whether the Data Protection Directive was already incorporating a right to be forgotten. The importance of this issue is paramount, given the role of the Directive as a benchmark in the process of harmonization at EU level, being slowly transposed in every Member State's legislation. Admitting the incorporation of such a right would place on States the burden of recognizing that individuals possess a right to be forgotten, thus demanding immediate rectification of legislation.

Specifically, two articles are of interest: Article 12(b) and Article 14. The former states that individuals must be granted the right to demand from data collectors “as appropriate the rectification, erasure or blocking of data the processing of which does not comply with the provisions of this Directive”, especially when the data is “incomplete” or inaccurate. Using a literal interpretation, several conclusions could be drawn.

Firstly, this right exists only with regards to data collectors: third parties or content providers should not be included. This is of significant relevance in the context of the discussion over propertization of information or informational autonomy. By admitting it as an exception, not as a rule, it basically denies the general existence of control over personal data. Secondly, the data

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<sup>117</sup> Being specifically named as one of the “four pillars” of the new Regulation, according to the press release. Mitchel-Rekrut (n 112) 3.

must be, though not limited to<sup>118</sup>, inaccurate or incomplete. This clearly takes out a great bulk of potential situations, such as Mr. Costeja's case, when the information published was both complete and accurate. If other criteria were to be considered, the results would be ambiguous and uncertain. Or, given that no other explicit criteria are mentioned explicitly in the article, any criteria could be considered as being covered, which would lead to a case by case interpretation. Thirdly, this applies to processing of data, which includes, but is not limited to their collection and storage<sup>119</sup>. It must thus be combined with the provisions of Article 6 (the necessity that the processing is "fair" and "lawful"), and Article 7 (criteria used to assess the legitimacy of data processing, such as consent and necessity of processing).

Article 14 states that individuals have the right 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" at least, but not limited to the cases mentioned in Article 7(e) and (f). This means that, firstly, the data owner must have "compelling legitimate grounds" to object, which contradicts the principle of information ownership some consider to be at the basis of the right to be forgotten. Secondly, it is unclear what "object" means and whether this has practical consequences such as the right to ask for deletion of data. Lastly, this rule is not imperative: Member States can provide otherwise, making this right to object inefficient in at least some cases.

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<sup>118</sup> Article 12 states "in particular because of the incomplete or inaccurate nature of the data" which suggests that others cases may be considered as well.

<sup>119</sup> Article 2 (b) states that "processing of personal data" ('processing') shall mean any operation or set of operations which is performed upon personal data, whether or not by automatic means, such as collection, recording, organization, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, blocking, erasure or destruction".

Moreover, as one author notices, the Directive suggests that “there is no duty to inform data subjects on which legitimate ground the processing is based”<sup>120</sup>. This is the case of the processing that is grounded on Article 14 of the Directive, notably when invoking the situations in Article 7(e) and (f). Consequently, not only that the data owner is the one carrying the burden of proof to show that the processing is illegitimate, but also that there is no obligation from the data collector to inform the data owner which are the concrete legitimate grounds on which the processing takes place, which might lead to a hilarious cat and mouse play.

Having this general broad framework, some states decided to stick to the limitations contained in the Directive, while other narrowed it when possible, like in the case of Article 14. Other Member States, such as the Italian, Spanish and French National Data Protection Agencies<sup>121</sup>, decided to go one step further, adopting a more protective legislative structure that explicitly recognized the existence of a right to be forgotten. In all cases, their attempts departed from these two articles, which admittedly does contain some, though weak version of a potential right of the individual to control his or her own data.

To conclude, pretending to have a clear cut answer to the question whether this right has existed before would be an aberration. This issue will always be surrounded by intrinsic uncertainties, which will always be impossible to clarify. This derives from the very nature of interpretation, which is not only subjective, but also uses different criteria and rules, depending on the type. What can be established, though, is that the right did exist, in an incipient form. It may not have

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<sup>120</sup> In order to invoke the right to object from Article 14, the data subject must prove that its case qualifies under the “compelling legitimate grounds” standard. If the objection proves to be justified, the data will no longer be processed. No justification is required until then from the data processor. Joris van Hoboken, ‘The Proposed Right to be Forgotten Seen from the Perspective of our Right to Remember, Freedom of Expression Safeguards in a Converging Information Environment’ [2013] Prepared for the EU Commission.

<sup>121</sup> van Hoboken (n 44).

been the fully fledged right to be forgotten, as analyzed today, as intended by the EU bodies, or as defined in this paper, but its form could be considered a basis for the right to be forgotten, both in terms of underlying principle, as well as in terms of implementation. Finally, this is what the CJEU considered too in the Google Spain-Costeja ruling. Nonetheless, given how little control it gives to the data owner, as explained previously, it can be definitely stated that this right cannot be considered as being a fully fledged right to be forgotten.

### **3.3 The Google Spain-Costeja Case. A Challenge of the existing framework?**

When the Spanish Supreme Court referred to the Court of Justice for answers, the right to be forgotten was still at an incipient stage in its development, though not completely new. As the outcome of the referral was unknown at that moment, important entities such as the Advocate General as well as representatives of several states, such as Spain, Greece, Italy, Austria or Poland, jumped in to offer their perspectives on how the Court should react. The outcome of the Court deliberation was at least controversial, as it was followed by a long and intense debate involving the most diverse categories of people, some questioning the reasoning of the Court, others criticizing it, while others fearing its natural implications. In order to expose and understand all these, one must start from the beginning, presenting the events that led to the three preliminary questions were addresses to the CJEU.

In 1998, Mr. Costeja-Gonzalez, a Spanish citizen, was unable to pay his social security debts and thus saw his house put up for auction. According to the Spanish legislation, every such auction had to be advertised through a local daily newspaper, in this case *La Vanguardia*. In the case of Mr. Costeja, the newspaper published a notice for a real-estate auction to recover his debts, where his name was mentioned. The article has been placed online together with the rest of the

newspaper's archives. The article remained online, being easily accessible using any of the search engines.

In 2010, he filed a complaint with the AEPD (Agencia Española de Protección de Datos<sup>122</sup>) in order to have the information removed from both *La Vanguardia*'s website and Google search engine. He explained that every time an Internet user types in his name on Google, the search engine displays links to two pages of *La Vanguardia* in which he is mentioned in this quality. He argues that since 12 years have passed since that auction, and the proceedings have been fully resolved, that reference to him is no longer relevant and should be removed.

As the newspaper refused to remove the content from its website, he turned to the AEPD and to Google Spain and Google Inc to have all the materials relating to that incident removed or concealed. The AEPD denied his request concerning *La Vanguardia*, considering that "the information in question had been lawfully published by the newspaper"<sup>123</sup>, but granted his request concerning Google Spain and Google Inc, that immediately sought to annul its decision by referring the case to the Spanish National High Court.

Faced with an unprecedented request, the Spanish High Court referred the case to the Court of Justice of the EU with three preliminary questions concerning the interpretation of the EU Data Protection Directive. These questions underline the main problems that may arise from admitting the existence of the right to be forgotten, and lead to a fervent debate on the European scene, both before and after the decision of the Court.

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<sup>122</sup> Agencia Española de Protección de datos

<<http://www.agpd.es/portalwebAGPD/CanalDelCiudadano/contacteciudadano/index-ides-idphp.php>> accessed 18 March 2015.

<sup>123</sup> Steven James, 'The right to privacy catches up with search engines: the unforgettable decision in Google Spain v AEPD' [2014] Computer and Telecommunications Law Review 130, 2.

The first question asked regarded the applicability of the European Directive to a US-based corporation (Google Inc.), directing the EU Court to analyze mainly the problem of the potential extraterritoriality of EU framework and, specifically, what qualifies as establishment under EU law. Though not directly linked to the right to be forgotten, the question does underline a major challenge caused by the globalization of businesses and the virtual world in a different, faster rhythm as opposed to the legislative framework of individual countries. The challenge to identify the norms applicable to entities operating on Internet lies at the heart of a broader debate, questioning the extent to which the external, governmental-created legislative and institutional framework should interfere with the online environment.<sup>124</sup>.

The second question asked concerned whether a search engine qualifies as a “data controller” under the definition offered by EU law. If the answer would be positive, search engines would have to face the same standards as the classically admitted “data controller” in terms of the way they operate with data and their users’ privacy, which would certainly have a significant impact on their business decisions.

The third question, the most important in light of the object of this paper, requested to assess whether individuals possess a right to be forgotten in light of the EU system in place at that time and, if the answer was positive, what its content would be, especially in relation to search engines, given the social function they perform which may, allegedly, supersede their selfish profit-oriented business interests.

<sup>124</sup> See a discussion about Exceptionalists and Non-Exceptionalists David G. Post, 'Governing Cyberspace' [2008] Santa Clara Computer & High Technology Law Journal 883.

The Court of Justice of the EU performed a detailed analysis of each of the questions raised, trying to ensure that both the purpose and spirit of the EU legislation, as well as the interests of all stakeholders involved, are carefully reflected and balanced. It also analyzed the opinions exposed by the parties, the Working Party, and the Advocate General (AG), who exposed a well-argued extensive advisory opinion<sup>125</sup> before the Court.

With regards to the **first question**, the Court considered that the Directive was directly applicable to Google Inc., in spite of being established in the US, taking into considerations several elements. Firstly, Google Spain was the local subsidiary of Google Inc., which made it an “establishment” as defined by the Directive, fact never contested by the parties. Secondly, the processing of data was realized “in the context of its activities”<sup>126</sup>, which was enough, according to the Court, for the data processing rules to apply, even if the establishment analyzed i.e. Google Spain was not carrying the processing itself. Lastly, the Court considered that although Google Spain had a sales purpose, thus being more advertising-oriented, all these activities undergone by Google Spain were “inextricably linked” to Google Inc.’s search engine, contributing directly to its profitability. Moreover, the ads and the search results were displayed on the same page, strengthening the conclusion that there is an inherent dependency between the advertising activities performed by Google Spain and the data processing performed by the search engine.

<sup>125</sup> *Google Spain SL, Google Inc.v. Agencia Española de Protección de Datos (AEPD), Mario Costeja González*. Court of Justice of the EU [2013] C-131/12. <<http://curia.europa.eu/juris/document/document.jsf?docid=138782&doclang=EN>> accessed 26 March 2015.

<sup>126</sup> Christopher Rees, Debbie Heywood, 'The ‘right to be forgotten’ or the ‘principle that has been remembered’' [2014] Computer Law and Security Review 574, 3.

Essentially, this indicates that search engines such as Google, Yahoo or Bing must respect data protection rules as long as they operate in Europe activities that are directly or indirectly connected to their main array of activities (i.e. processing of data), such as sales or advertising, even if they do not have other connection with the EU.

The **second question** sparked an interesting, though vehement debate between the AG and the Court. The AG adopted a position consistent with the general view before the CJEU ruling, aimed at proving that search engines are neither aware of the processing of persona data nor have they control over it, and as a consequence they cannot be considered data collectors.. He argued that the question whether a search engine should be considered to be a data collector shall be analyzed using the principle of necessity and proportionality, stretching out that the debate is only relevant as far as personal data is concerned, of which the data collector must be aware. In the case of search engines, the AG pointed out that search engines are not aware of the personal data processing in itself, rather having a mere statistical approach. Moreover, like the Working Party, he argued that it is not the search engines that have control over the processing of the content displayed, but the website-publishers.

The Court disagreed, offering an equally elaborate reasoning on why the notion of “controller” needed to be interpreted broadly in order to strike the right balance between all the rights involved. Article 2 of the Directive defines a “controller” as a person who “determines the purposes and means of the processing of personal data”. Contrary to website publishers, who are simple content providers, search engines contribute significantly to making the information more accessible than it would be otherwise, including through the search algorithms they implement. Furthermore, by displaying search results, search engines are capable of creating “detailed

profiles” of individuals based on the information they have access to and maneuver<sup>127</sup>, posing potential severe threats to their privacy.

The **last question** concerned directly the potential existence of a direct right to be forgotten under the current EU framework, specifically whether “the rights to erasure and blocking of data, provided for in Article 12(b), and the right to object, provided for in Article 14(a), of Directive 95/46, (...) confer on the data subject a right to address himself to a search engine service provider in order to prevent indexing of the information relating to him personally, published legally on third parties’ web pages”<sup>128</sup>. The question was, thus, whether an individual could demand a search engine to delete information legally posted and processed by third parties from the results of a search performed.

In the Advocate General’s view, that none of these grounds could justify a right to be forgotten: under Article 12(b), the right to erasure would exist *in particular* if the information was incomplete or inaccurate, which would not cover mere preferences or other, even legitimate reasons. Under Article 14(a), there should be “compelling legitimate grounds” to justify an objection from the data owner, which clearly indicates that such a demand must be strongly reasoned. Moreover, if the links published by the search engines respect the conditions imposed in the Directive (“adequacy, relevancy, proportionality, accuracy, completeness, set out in Articles 6(c) and (d) of the Directive”<sup>129</sup>), their deletion could not be granted, as it would affect the balance of intended between the right to information and the right to privacy. As he argues,

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<sup>127</sup> As explained by Allyson Haynes Stuart in her paper *Google Search Results: Buried if not forgotten*, search engines – primarily Google – use several algorithms to display the results in users’ searches, having almost complete control over the outcome. As the author proves, the results are constantly altered by Google’s direct intervention. Allyson Haynes Stuart, ‘Google Search Results: Buried if not forgotten’ [2014] Journal of Law and Technology 5.

<sup>128</sup> Opinion of Advocate General Jaaskinen, ‘Case C-131/12’ (2013)

<<http://curia.europa.eu/juris/document/document.jsf?docid=138782&doclang=EN>> accessed 16 March 2015 paragraph 138.

<sup>129</sup> *ibid* paragraph 98.

“[T]he Directive does not provide for a general right to be forgotten in the sense that a data subject is entitled to restrict or terminate dissemination of personal data that he considers to be harmful or contrary to his interest”<sup>130</sup>. Imposing such a role on the search engine, he argued, would affect the role of a search engine as an intermediary entity, imposing on him the burden of actively monitoring and controlling the data that it uses and displays in his search results. Moreover, the effects on both the users as well as on website publishers would be highly restrictive of rights, as the search engines might simply remove any information on request without performing a case-by-case analysis.

The Court took, however, a firm stance opposed to the AG’s position. Its position relied not only on the literal interpretation of the Data Protection Directive, but also on the EUCFR, namely Articles 7 (privacy) and 8 (data protection).

With regards to Article 12(b), the Court explained that data processing may conflict with the Directive not only when the data is incomplete and inaccurate, as the AG argued, but also in other circumstances, such as when the data would be “inadequate, irrelevant or excessive in relation to the purposes of the processing, that they are not kept up to date, or that they are kept for longer than is necessary unless they are required to be kept for historical, statistical or scientific purposes”<sup>131</sup>. Thus, even information that has initially been processed in a lawful manner, fully compliant with the standards imposed by the Directive, may become in time incompatible with the very same standards.

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<sup>130</sup> ibid paragraph 108.

<sup>131</sup> Google Spain SL, Google Inc.v. Agencia Española de Protección de Datos (AEPD), Mario Costeja González. Court of Justice of the EU [2013] C-131/12. <<http://curia.europa.eu/juris/document/document.jsf?docid=138782&doclang=EN>> accessed 26 March 2015 paragraph 92.

Additionally, by considering search engine as data collectors, the Court decided that users can approach them directly with requests to take down links that refer to information about them, even before approaching the website publishers themselves. Moreover, the Court exposes in its analysis a switch in burdens: there is an implicit presumption that keeping the link in the search results is incompatible with the Directive's purposes. This is possible because of the loophole that exists in the way in which Article 12(b) is formulated, which allows virtually every case to be considered as included in its scope.

Essentially, search engines should take users' requests and analyze each of them individually, being constrained to remove the links in all cases, *unless* a superior public interest overrides the interest of the individual. When and how this happens, it is the search engine's duty, according to the Court, to establish, which not only confers search engines a radically more active role in how information is perceived, but also makes the evaluation utterly subjective, in lack of clearly established standards<sup>132</sup>. As for the users, it is thus not even necessary "that the inclusion of the information in question in the list of results causes prejudice to the data subject" (par. 96), which means that they must only prove the link between him and the information posted, and not its potential harmful consequences as well.

In invoking the EUCFR Articles 7 and 8, the Court stated that the right to privacy and data protection should overcome, as a rule, other rights, such as the economic interest of the search engine or right of the public to access that piece of information. However, it did admit that

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<sup>132</sup> Since the only example given by the Court is the case when the person has a role in the public life of a society, thus being a "public person".

exceptions may be applicable, in cases when the interest of the public would prevail, for instance given the “role played by the data subject in public life” (par. 99).

Consequently, the Court established that users of search engines do have a right to be forgotten in light of the Data Protection Directive, by interpreting broadly its provisions and by invoking the general principles of human rights upheld by EU.

### **3.4 Importance of the CJEU ruling. Where to now?**

Several jurisdictions joggled with the notion for years now. Some have recognized it or at least some forms of it. Others have refused to adopt it, or simply denied its existence. However, this decision represents a turning point in how courts, legislators and legal scholars view the interactions between users and ISPs in the cyberspace, making the existence of this right impossible to deny anymore. Its importance is proven by several aspects, having a worldwide impact that transcends both the EU and American jurisdictions<sup>133</sup>.

From a **structural and strategic perspective**, the European Union is a major player in the world market: according to the European Commission<sup>134</sup>, at the end of 2014, it was the largest economy in the world and the world largest exporter of manufactured goods and services. Even with the ascension of the fast emerging markets of India, China or Brazil, it is still one of the

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<sup>133</sup> The CJEU decision already made other jurisdictions analyze a potential right to be forgotten, such as the Asia-Pacific region. Paul Lanois, 'Time to forget: EU privacy rules and the right to request the deletion of data on the Internet' [2014] Journal of Internet Law 20, 7; See also inmediahk.net, 'Hong Kongers Should Have the Right To Be Forgotten, Says HK Privacy Commissioner' (globalvoicesonline.org 2015) <<http://globalvoicesonline.org/2015/01/23/hong-kongers-should-have-the-right-to-be-forgotten-says-hk-privacy-commissioner/>> accessed 25 March 2015.

<sup>134</sup> European Commission, 'EU position in world trade' (ec.europa.eu 2013) <<http://ec.europa.eu/trade/policy/eu-position-in-world-trade/>> accessed 17 March 2015.

major political powers in the world, considered to be even the only real competitor for the US<sup>135</sup>, a “quiet superpower”<sup>136</sup>, thus having a significant impact in the process of globalization.

Its favorable strategic position allows it to exercise both direct, through its hard law, as well as indirect influence on internal and external companies operating also in the EU, and its influence is likely to grow even more if the TTIP will be signed<sup>137</sup>. Furthermore, especially because of its position, the EU represents a model for countries and unions aiming to acquire the same success in terms of level of wealth, growth and democratic principles<sup>138</sup>, which makes it even more influential on a large scale.

By giving a *formal recognition* to the right to be forgotten, the EU has done more than just forcing Google and other search engines to institute a special procedure to comply with the CJEU ruling: it has taken a strong position in favor of individual privacy and data ownership, imposing new standards of data protection to all the entities that operate in its internal market.

Moreover, this decision is important given the authority of the Court of Justice, which outranks national courts in several areas<sup>139</sup>., including data protection As research has shown<sup>140</sup>, the Court has proven to be an efficient mechanism used to enforce property rights of European and transnational actors, as well as to shape the policy choices of the Union. Consequently, the role

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<sup>135</sup> Andrew Moravcsik, 'Bipolar Order. Europe, the Second Superpower' [2010] Current History 91.

<sup>136</sup> Andrew Moravcsik, 'Europe: The quiet superpower' [2009] French Politics 403.

<sup>137</sup> See European Commission, 'Trade' ([ec.europa.eu](http://ec.europa.eu) 2015) <[http://ec.europa.eu/trade/index\\_en.htm](http://ec.europa.eu/trade/index_en.htm)> accessed 25 March 2015.

<sup>138</sup> Fraser Cameron, 'The European Union as a Model for Regional Integration' (cfr.org 2010).

<<http://www.cfr.org/world/european-union-model-regional-integration/p22935>> accessed 22 March, 2015.

<sup>139</sup> Wayne Ives, 'Court of Justice of the European Union' (civitas.org 2006)

<<http://www.civitas.org.uk/eufacts/download/IN.5.ECJ.pdf>> accessed 20 March 2015.

<sup>140</sup> Alec Stone Sweet, 'The European Court of Justice and the Judicialization of EU Governance' [2010] Faculty Scholarship Series.

of its case law in interpreting EU legislation and anticipate future regulatory changes cannot be denied.

Lastly, it has given Internet users a *direct tool* to protect their interests and reputation, every time the conditions set out in the ruling and in the Data Protection Directive are met, by simply referring their case to the search engine. No judicial authority needs to be approached, unless the search engine refuses unjustifiably to comply with the rules and take down the solicited links. This is possible because of the direct binding force of the Court of Justice of the European Union's rulings<sup>141</sup>, who is also the primary agent in interpreting EU legislation.

From a **substantial perspective**, there are two main reasons why this decision is important. Firstly, because it targeted the by far most used search engine in the world, with an 88.1% share of the search engines market in January 2015<sup>142</sup>. This decision led to an immense number of requests<sup>143</sup> to take down links from the search results, causing Google serious administrative burdens.

Secondly, the CJEU decision clarified some of the practical aspects of the implementation of the right, which were being debated for a while. It established the territorial parameters in which the right to be forgotten must be ensured, by defining what the relationship between the local subsidiary and the activities performed must be; it has settled the debate over whether search engines should be considered or not data collectors, concluding that the answer must be positive; it has interpreted the Data Protection Directive broadly, so that it could allow the functioning of

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<sup>141</sup> Gundega Mikelsone, 'The Binding Force of the Case Law of the Court of Justice of the European Union' [2013] Jurisprudence - Research Journal 469.

<sup>142</sup> StatCounter, 'Worldwide market share of leading search engines from January 2010 to January 201' (statista.com 2015) <<http://www.statista.com/statistics/216573/worldwide-market-share-of-search-engines/>> accessed 19 March 2015.

<sup>143</sup> Over 193.000 requests between May 2014 and January 2015, covering almost 704.000 urls. David Payne, 'Google, doctors, and the "right to be forgotten"' (bmj.com 2015) <<http://www.bmj.com/content/350/bmj.h27>> accessed 18 March 2015.

the right to be forgotten under the current legal framework of the EU; it has suggested clearly which should be the cases in which search engines have to remove the link (e.g. when the information is “no longer relevant”), and how their analysis should work (individual’s rights should supersede unless they identify a superior public interest, such as the public role of that person).

Lastly, from a **dogmatic perspective**, the ruling has helped significantly switch the balance of rights in favor of individuals. Stating that privacy should supersede freedom of information as a rule, and that individuals should be in control of their personal data, the decision led to paradigm shift in how society should regard and treat privacy. This represents a valuable addition to the debate<sup>144</sup> about whether personal data should be regarded as an exponent of the right to privacy, or the object of the right to property. In the former case, the core of data protection regulation would be translated in admitting a right of individuals to protection only in certain explicitly stated cases. The default would be that data collectors are allowed to collect data as a legitimate business activity, having to justify it only if requested by data owners. Individuals would not have thus the right to oppose collection of data if all conditions contained in regulations would be respected. The latter case would add an extra layer to the data ownership: individual would also be allowed to oppose data collection even if all requirements spelled out in laws are fulfilled, therefore being able to engage in economic activities concerning their data, e.g. selling their personal information for a certain price.

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<sup>144</sup> The broader debate about propertization of information recently became of interest for scholars, who started questioning how society views data and proposing new theories of what should be at the core of privacy regulation. See Orla Lynskey, ‘Deconstructing data protection: the “added value” of a right to data protection in the EU legal order’ [2014] International & Comparative Law Quarterly 569, who argues that there should be an explicit judicial recognition of the distinction between the right to data protection and the right to privacy, in the EU, Nadezhda Purtova, ‘Property rights in personal data: Learning from the American discourse’ [2009] Computer Law and Security Review 507, or Margaret Jane Radin, ‘A Comment on Information Propertization and its Legal Milieu’ [2006] Cleveland State Law Review.

Such a paradigm shift would imply that consent should no longer be only one of the mere causes of why data is collected and processed, but a very first precondition of data collection. Specifically, a data collector that respects all criteria set up by regulations does not need to ask for data owner's consent unless consent is one of these criteria. On the contrary, consent would become the triggering element of data collection if information would be considered property of individuals. This change in vision would have significant advantages for the consumers, as data collectors would always have to contact them to ask for their approval: consumers would not only receive control over their privacy, but would also become increasingly aware of privacy threats<sup>145</sup>, while also receiving more bargaining power in any negotiation conducted with data collectors<sup>146</sup>.

Although this would be in line with the user-protective general framework the EU has been implementing for years in opposition to the US, this shift has the ability to influence its American counterpart's vision on the issue. The reason for that lays in the borderless, easily-accessible character of Internet, leading to different treatments in different countries for the same online content or user, which makes a strong argument in favor of a potential harmonization of regulation. Irrespective of the outcome, it cannot be contested that such a major shift in view in Europe has influenced and will influence other societies too, at least by challenging the whole American society to engage in a "privacy versus free speech" debate<sup>147</sup>.

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<sup>145</sup> Natali Helberger, Lucie Guibault, Marco Loos, Chantal Mak, Lodewijk Pessers, Bart van der Sloot, *Digital Consumers and the law. Towards a Cohesive European Framework*. (1st, Wolters Kluwer Law & Business, The Netherlands 2013) 167-168.

<sup>146</sup> Daniel D. Barnhizer, 'Propertization Metaphores for Bargaining Power and Control of the Self in the Information Age' [2006] Legal Studies Research Paper Series 68.

<sup>147</sup> For instance, consumer groups in the US started lobbying for the importation of the right to be forgotten in the US. See Liam Tung, 'US consumer group asks Google to import Europe's right to be forgotten' (zdnet.com e.g. 2005) <<http://www.zdnet.com/article/us-consumer-group-asks-google-to-import-europees-right-to-be-forgotten/>> accessed 19 March 2015; others consider that the US society should "forget about it" – see Jeff John Roberts, 'The right to be forgotten from

## **Chapter 4. The United States Perspective**

Following the CJEU decision and the events that followed, as well as other privacy-related developments taking place worldwide<sup>148</sup>, the United States saw themselves caught in the middle of a massive campaign to address privacy matters. With the European Union having declared its intentions to enact “more effective and standardized data privacy laws across Europe”<sup>149</sup>, the US framework in place was being questioned<sup>150</sup>. The broader debate on where exactly one should draw the line between the right to privacy and the freedom of speech became pivotal for the understanding and appraisal of the right to be forgotten. While some have criticized the European approach, others have acclaimed its adequacy and thus lobbied for a similar strategy.

This chapter will answer a number of questions fundamental for the understanding on how the right to be forgotten could be transposed in the US legal framework, and thus whether it could later evolve into a unitary, homogenous, and borderless concept. After presenting a brief overview on how the American society sees privacy and personal data, and how they often clash with values central to their internal societal evolution, such as freedom of speech or freedom of the market, it will expose some of the main pieces of legislation that are of relevance for this paper.

By bringing up relevant examples from case law and legislation, it will seek to uncover a latent right to be forgotten buried in the legal framework for decades, often under a different name, or

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Google? Forget it, says U.S. crowd' (fortune.com 2015) <<http://fortune.com/2015/03/12/the-right-to-be-forgotten-from-google-forget-it-says-u-s-crowd/>> accessed 20 March 2015.

<sup>148</sup> 'Everyone is under surveillance now, says whistleblower Edward Snowden' (theguardian.com 2014) <<http://www.theguardian.com/world/2014/may/03/everyone-is-under-surveillance-now-says-whistleblower-edward-snowden>> accessed 15 March 2015.

<sup>149</sup> Ornstein (n 109).

<sup>150</sup> Dawinder Sidhu, 'We Don't Need a "Right to Be Forgotten." We Need a Right to Evolve.' (newrepublic.com 2014). <<http://www.newrepublic.com/article/120181/america-shouldnt-even-need-right-be-forgotten>> accessed 18 March 2015.

even unnamed. Next, this chapter will investigate the compatibility of a potential right to be forgotten as it was defined by the CJEU, with the American legal and ideological framework, arguing that a later adoption of this notion is likely to happen taking into consideration the current level of public support.

## **4.1 The general perspective on privacy and data protection. A fundamental clash with Europe?**

The US vision on privacy and personal data has long time been conflicting with the European view. While the general EU Member States' vision is focused on the individual and his rights, validating state intervention to ensure the protection of one's public persona<sup>151</sup>, the United States applies a market-focused strategy, with voluntary codes of conduct, creating a less centralized legislative framework, with subject-specific rules<sup>152</sup>, where the aim is to reduce intrusions by the state<sup>153</sup>. Europe considers personal data as an essential part of an individual's identity, being more prone to accepting a right to be forgotten, while the United States is known for having a wide preference for disclosure, often offering privacy less weight than to interests that are more "necessary to protect", such as national security<sup>154</sup>.

In this context, if there *is* or *could* be a right to be forgotten in the US represents a fundamental element of the debate on privacy versus free speech, specifically regarding the resolution of

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<sup>151</sup> James Daley, 'Information Age Catch 22: The Challenge of technology to cross-border disclosure & data privacy' [2011] Sedona Conference Journal 6.

<sup>152</sup> Joel R. Reidenberg, 'Resolving Conflicting International Data Privacy Rules in Cyberspace' [1999-2000] Stanford Law Review 1316.

<sup>153</sup> Daley (n 151) 6.

<sup>154</sup> The case of the mass surveillance conducted by the NSA, which has been largely analyzed by both scholars and media. See Joseph D. Mornin, 'NSA Metadata Collection and the Fourth Amendment' [2014] Berkeley Technology Law Journal 984 or Peter Margulies, 'The NSA in Global Perspective: Surveillance, Human Rights, and International Counterterrorism' [2014] Fordham Law Review 2136 or Ilina Georgieva, 'The Right to Privacy under Fire – Foreign Surveillance under the NSA and the GCHQ and Its Compatibility with Art. 17 ICCPR and Art. 8 ECHR' [2015] Utrecht Journal of International and European Law 104.

conflicts their clash might entail, as well as concerning limitations the state is empowered to impose on the right to privacy and how efficient it is in protecting its citizens' rights. Irrespective of the outcome of this debate<sup>155</sup>, there is one element that is clear: the official recognition of the right to be forgotten by its transatlantic neighbor has revealed deep flaws in the American society, causing harsh reactions on both sides<sup>156</sup>. These flaws will have to be addressed eventually, thus state and court intervention will be required. In this context, the implementation of an EU right to be forgotten might just be a valid solution. However, if it would lead to evolution or regress, only time could tell.

#### **4.2 The American Legislative Infrastructure. *Is there a right to be forgotten?***

It cannot be easily contested that the United States do not have a right to be forgotten<sup>157</sup>. At least, not in the same way European countries define it. It is, at the end of the day, the country that does not have a coherent, homogenous federal legal system of data and privacy protection, leaving consumers and users at the mercy of companies or federal states who decide to take measures to protect their citizens' privacy. US privacy protection is scattered and spread across a variety of state and federal laws that typically apply to specific groups of people<sup>158</sup>: it is a "patchwork series of laws"<sup>159</sup>. This inevitably leads to differences from state to state, and field to field, in terms of how the same legal problem may be solved.

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<sup>155</sup> Hayley Tsukayama, 'Right to be forgotten' highlights sharp divide on U.S., European attitudes toward privacy' (washingtonpost.com 2014) <<http://www.washingtonpost.com/blogs/the-switch/wp/2014/05/13/right-to-be-forgotten-highlights-sharp-divide-on-u-s-european-attitudes-toward-privacy/>> accessed 20 March 2015.

<sup>156</sup> For an overview on these reactions see Sidhu (n 150).

<sup>157</sup> As some authors conclude after analyzing the situation. See Karl S. Kronenberger, 'The tension between principles of "Sunshine Laws" and "The Right to be Forgotten": Trends in the treatment of personal information on the internet' [2014] Aspatore: Understanding Developments in Cyberspace Law 2.

<sup>158</sup> Victor Luckerson, 'Americans Will Never Have the Right to Be Forgotten' (time.com 2014). <<http://time.com/98554/right-to-be-forgotten/>> accessed 19 March 2015.

<sup>159</sup> According to Andy Sellars, a staff attorney for the Digital Media Law Project housed at Harvard University ibid.

Despite this lack of consistency and homogeneity, it is not a complete stranger to some variations of this right to be forgotten. US law has, in fact, a long-lasting experience with “legal forgiveness”<sup>160</sup>, a notion deeply impregnated in different layers of the legal system. It has a long tradition in advocating for individual privacy, early in history, at the end of the nineteenth century, when scholars explored the clash between threats posed by then modern devices such as telephone and photography to individuals’ privacy, advocating for the latter in an article that was going to become a cornerstone of the view on privacy<sup>161</sup>. A potential tort claim for the invasion of private life was also recognized directly by the Restatement of Torts, stating that “One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public”<sup>162</sup>.

Even case law showed courts support for at least the possibility of claims for privacy invasion based on harmful reference to out-of-date information<sup>163</sup>. Cases such as *Melvin v. Reid* (1931)<sup>164</sup> or *Briscoe v. Reader's Digest Association, Inc* (1971)<sup>165</sup> prove that American courts have been long pondering whether a right to be forgotten should be recognized, as their argumentation has highlighted the importance of forgiveness in one’s rehabilitation. Although both cases have been overruled in order to protect the freedom of expression protected by the First Amendment, the argumentation used by those courts remains a valid point in the broader debate. However,

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<sup>160</sup> Ambrose (n 31) 9.

<sup>161</sup> Samuel D. Warren and Louis D. Brandeis, 'The Right to Privacy' [1890] Harvard Law Review 193.

<sup>162</sup> Restatement of the Law, Second, Torts 1977 s 652(B).

<sup>163</sup> Bennett (n 46).

<sup>164</sup> In this case, a homemaker who used to work as a prostitute, was accused of murder. Although she was acquitted as the accusations proved to be unfounded, her trial was used as the main subject in a movie made after seven years, her name being used explicitly. The Court considered that the use of her name was inhibiting the process of rehabilitation, an essential element of the penal system. *Melvin v Reid* [1931] 112 285 (Call. App).

<sup>165</sup> In this case, the Court similarly said that rehabilitation may be hinged by the explicit referral to the plaintiff’s prior crimes. *Briscoe v Reader's Digest Association* [1971] 4 529 (Cal.3rd).

nowadays, US courts still reject privacy claims in the case of matters that are worth media's attention, unless some specific or exceptional circumstances occur that would justify exceptions.

Such circumstances may occur in criminal law, where reinvention is considered an important part of the rehabilitation process and is seen as prevailing against the right of the public to be informed. The existence of pardons and statute of limitations allow individuals that have served their sentence to move on, without having to bear the burden of their past mistakes<sup>166</sup>. By having their reputation<sup>167</sup> restored after enough time has lapsed to be considered as having learned their lesson, they can regain control over their lives and engage in productive activities that can add value to the society. Some states, such as Wisconsin<sup>168</sup> or New York<sup>169</sup>, even prohibit employers to deny employment for former convicts only based on them having a criminal record; others go even further and discuss the possibility to "postpone background checks until after the preliminary hiring decisions"<sup>170</sup>.

Protection of minors is considered to be another justified exception. California has implemented a law (so-called *Eraser Law*<sup>171</sup>) that is similar to the CJEU ruling, and allows minors to request

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<sup>166</sup> See Tyler T. Ochoa, 'The Puzzling Purposes of Statutes of Limitation' [1997] Santa Clara Law Digital Commons 452.

<sup>167</sup> For why reputation is an important element in people's lives and why it can be easily affected in the online environment, see Hassan Masum, Mark Tovey, *The Reputation Society. How Online Opinions are Reshaping the Offline World*. (1st, The MIT press, Cambridge, Massachusetts 2011).

<sup>168</sup> Article 111.321 states that "no employer, labor organization, employment agency, licensing agency, or other person may engage in any act of employment discrimination as specified in s. 111.322 against any individual on the basis of (...) arrest record, conviction record (...)" . Wisconsin Fair Employment Act 2000 s 111.321.

<sup>169</sup> Article 752, called "Unfair discrimination against persons previously convicted of one or more criminal offenses prohibited" states that "No application for any license or employment, and no employment or license held by an individual, to which the provisions of this article are applicable, shall be denied or acted upon adversely by reason of the individual's having been previously convicted of one or more criminal offenses (...) when such finding is based upon the fact that the individual has previously been convicted of one or more criminal offenses (...)." New York Correction Law 1995 s 752.

<sup>170</sup> Ambrose (n 31) 9; This is the case of the New Mexico Statute Annotated 2010 28(2-3B) or Hawaii Revised Statute 2010 s 378(2).

<sup>171</sup> Senate Bill No. 568 2013 s 336.

tech companies to delete their data<sup>172</sup>. Protection given in the case of juvenile criminals is also more stringent than in the case of adults, as it is considered that their rehabilitation has higher chances of being achieved<sup>173</sup>. Their criminal records are often sealed or expunged in most of the US states if a petition is filed<sup>174</sup>.

Bankruptcy law provisions are also incorporating the principle of "legal forgiveness", at least as far as individual debtors are concerned. Bankruptcy law "gives to the honest but unfortunate debtor who surrenders for distribution the property which he owns at the time of bankruptcy, a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt."<sup>175</sup> This opportunity given to individual debtors, coined as a "fresh start", has been an essential principle of the US bankruptcy system for more than seventy-five years<sup>176</sup>, being the explanation for the introduction of a Chapter 7 type of bankruptcy. Case law (for instance *In re Professional Sales Corp*<sup>177</sup>), as well as legislation (for instance the Bankruptcy Code<sup>178</sup>), show both how limitations on the bankruptcy stigma by prohibiting former

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<sup>172</sup> Victor Luckerson, 'Americans Will Never Have the Right to Be Forgotten' (time.com 2014) <<http://time.com/98554/right-to-be-forgotten/>> accessed 19 March 2015.

<sup>173</sup> Explaining why there is a separate judicial system for the juveniles. Anna Louise Simpson, 'Rehabilitation as the Justification of a Separate Juvenile Justice System' [1976] California Law Review 984.

<sup>174</sup> Aidan R. Gough, 'The Expungement of Adjudication Records of Juvenile and Adult Offenders: A Problem of Status' [1966] Washington University Law Review 147 or Walter E. Meyer, 'Rights and Rehabilitation in the Juvenile Courts' [1967] Columbia Law Review 281.

<sup>175</sup> Local Loan Co. v Hunt [1934], 292 234 (U.S.).

<sup>176</sup> Karen Gross, 'Preserving a fresh start for the individual debtor: the case for narrow construction of the consumer credit amendments' [1986] University of Pennsylvania Law Review 59.

<sup>177</sup> In this case, the court states that "the public interest is in successful rehabilitation of debtors", justifying this protection. *In Re Professional Sales Corp.* [1985] 56 B.R. 753 (N.D.II).

<sup>178</sup> US Bankruptcy Code 1974 s 11-5(II)(525) "Protection against discriminatory treatment" states that "a governmental unit may not deny, revoke, suspend, or refuse to renew a license, permit, charter, franchise, or other similar grant to, condition such a grant to, discriminate with respect to such a grant against, deny employment to, terminate the employment of, or discriminate with respect to employment against, a person that is or has been a debtor under this title or a bankrupt or a debtor under the Bankruptcy Act, or another person with whom such bankrupt or debtor has been associated, solely because such bankrupt or debtor is or has been a debtor under this title or a bankrupt or debtor under the Bankruptcy Act, has been insolvent before the commencement of the case under this title, or during the case but before the debtor is granted or denied a discharge, or has not paid a debt that is dischargeable in the case under this title or that was discharged under the Bankruptcy Act".

debtors to be discriminated against based on that status can be imposed, for the sake of offering an effective fresh start.

Another relevant example of field where dissemination of information about consumers is restricted is the field of credit reporting. The Fair Credit Reporting Act is a good example for this, as it generally limits the dissemination of financial information about consumers compiled by credit reporting agencies, with the exception of the cases when they have authorization to do so<sup>179</sup>. Case law shows that the Act is aimed at protecting consumers' reputation, preventing the spearheading of false information (*Treadway v. Gateway Chevrolet Oldsmobile Inc.*<sup>180</sup>) or illegitimate infringement on consumers' right to privacy (*In re Grand Jury Subpoena to Credit Bureau of Greater Harrisburg*<sup>181</sup>).

Some writers even argue that the US legal system already embeds a right to be forgotten visible in the real world, but that has not yet been adapted to the cyberspace. Joseph Steinberg, security expert and CEO of SecureMySocial, explains how missing a mortgage payment will not be displayed in your credit report after ten years, even if that particular information may be relevant. By law, that type of information is removed automatically<sup>182</sup>. The problem he identifies is that the advent of technology has not adapted to this requirement, allowing such information to still pop-up in search results, although it has been erased from credit reports – a situation similar to Mr. Costeja-Gonzalez, in Spain. The difference would be, thus, not that the US has a fundamentally different view on data protection compared to the EU, but that it has not taken yet

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<sup>179</sup> Kronenberger (n 157) 2.

<sup>180</sup> *Treadway v. Gateway Chevrolet, Oldsmobile Inc* [2004] 971 978 (Cir. 7th).

<sup>181</sup> *In Re Grand Jury Subpoena to Credit Bureau* [1984] 594 F.Supp. 229 (M.D.Pa.).

<sup>182</sup> Higinio Maycotte, 'America's 'Right to Be Forgotten' Fight Heats Up' (Forbes.com 2014)

<<http://www.forbes.com/sites/homaycotte/2014/09/30/americas-right-to-be-forgotten-fight-heats-up/>> accessed 13 March 2015.

the necessary steps to implement policies that already existed to the recent entities on the market which, by their actions, managed to challenge such already existing policies.

Lastly, one shall also mention the case of California, which has made progress in the last decades towards ensuring an adequate protection to the personal and private information of consumers. Its legislative efforts, such as the California Online Privacy Protection Act of 2003<sup>183</sup>, or the more recent amendments made to California's data breach law in 2013<sup>184</sup>, impose limitations for collection of information and information disclosure in the case of security breaches, although they still leave several aspects unregulated<sup>185</sup>. These laws, as well as other legislative initiatives, such as the California's "Online Eraser" Law for Minors which has entered into force as of 1<sup>st</sup> of January 2015 and has been vehemently contested<sup>186</sup>, represent a comparable, though still raw approach to the one adopted by the European counterparts.

Therefore, the right to be forgotten does exist in the US system: it may be present in a sketchy or fragmentary version, but the main idea is present. That may be explained because, as some authors<sup>187</sup> noticed, the concept of "forgive and forget" is considered an inherent part of the human nature<sup>188</sup> being thus legitimately included as a principle of the legal system. Its presence

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<sup>183</sup> Scott Allen, 'California Online Privacy Protection Act of 2003 — Good Practice, Bad Prece' (about.com 2014) <<http://entrepreneurs.about.com/od/internetmarketing/i/caprivacyact.htm>> accessed 13 March 2015.

<sup>184</sup> Updating its breach notification requirements and making it the first state to expand the definition of personal information to expressly include login credentials for online. Adnan Zulfiqar, 'California Expands Breach Notification Law to Cover Online Accounts' (hldataprotection.com 2013) .<<http://www.hldataprotection.com/2013/11/articles/cybersecurity-data-breaches/california-expands-breach-notification-law-to-cover-online-accounts/>> accessed 13 March 2015.

<sup>185</sup> See Kronenberger (n 157) 2.

<sup>186</sup> Thomas R. Burke, Deborah A. Adler, Ambika K. Doran, Tom Wyrwich, ' California's "Online Eraser" Law for Minors to Take Effect Jan. 1, 2015' (dwt.com 2014) <<http://www.dwt.com/Californias-Online-Eraser-Law-for-Minors-to-Take-Effect-Jan-1-2015-11-17-2014/>> accessed 18 March 2015.

<sup>187</sup> Bennett (n 46) 2.

<sup>188</sup> "Since the beginning of time, for us humans, forgetting has been the norm and remembering the exception", the author further arguing that the recent technological developments led to paradigm shift whose potential need for correction should at least be analyzed. Mayer-Schönberger (n 97) 2.

in many of the policy choices of the Americans, one of the fiercest advocates for human freedoms in the world, is thus rightfully justified.

### **4.3 A matter of compatibility. *Can the EU approach to the Right to Be Forgotten have a place in the US?***

The United States has been contemplating for years the impact and relevance of the “forgive and forget” principle and has sometimes even applied it when it considered necessary. As previously shown, the US society does have the premises for a right to be forgotten as it is in fact already recognizing an embryonic version of it in some cases. Having established that, another essential question needs to be asked: *can* there be a right to be forgotten similar to the one that the EU has been trying to implement?

To answer this question, two essential aspects need to be analyzed. Firstly, whether the legal structure currently in place would allow the implementation of a right to be forgotten. This would entail the analysis of the First Amendment and the Communications Decency Act. Secondly, whether values fundamental for the Americans, such as free speech and freedom of the market, are compatible with a potential right to be forgotten.

#### **4.3.1 The First Amendment and the Communication Decency Act**

A main problem lays in the inclusion of everything that is posted online under the “free speech” safe harbor, which is under the protection of the First Amendment. The First Amendment, which states that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances”,

represents a cornerstone of the American democracy and reflects the interest of the public<sup>189</sup> in receiving information necessary for informed self-government<sup>190</sup>, as well as the complementary interest of the press in feeding accurate and useful information to the public. Any attempt to restrict this freedom of speech may be seen as censorship<sup>191</sup>, leading to massive public outcry.

EU, on the contrary, sees online posting of information as processing of data, which makes it subject to several restrictions under the Data Protection Directive. Contrary to the US system where the premise is that individuals have a right to express themselves, and restrictions can be applied only in specific circumstances, the EU system is built on the premise that gathering and publishing of information can only be done under specific conditions (e.g. if there is a legitimate purpose, only as long as that purpose exists). Though the EU system protects free speech through Article 10(1) of the ECHR<sup>192</sup> and Article 11(1) of the EUCFR<sup>193</sup>, there its restriction is already accepted as being legitimate in several cases and thus accepted by its Member States, his means that while the EU system would easily allow the inclusion of extra conditions, such as the necessity of a continuous relevance of the information, the US system would need a much stronger argumentation to justify adding such a restriction, as it would basically represent not

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<sup>189</sup> As explained here Alan M. Katz, 'Government Information Leaks and the First Amendment' [1976] California Law Review 108.

<sup>190</sup> Beyond states' interest to have informed citizens in order to make informed democratic decisions, there is a question on whether citizens have a right to be informed. See Natalie Helberger, *Controlling access to content. Regulating Conditional Access in Digital Broadcasting* (1st, Kluwer Law International, The Netherlands 2005) 89. Talking about pay-TVs, the author states that the public generally does not have a right to access information: "The right of the public to be properly informed has to be read within the context of the task that the media have to perform".

<sup>191</sup> Matt Ford, 'Will Europe Censor This Article?' (theatlantic.com 2014)

<<http://www.theatlantic.com/international/archive/2014/05/europees-troubling-new-right-to-be-forgotten/370796/>> accessed 19 March 2015.

<sup>192</sup> This article states that "Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises." Article 10(2) mentions the possibility to have restrictions to the right unraveled in 10(1).

<sup>193</sup> This article states that "Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers".

only a justification for this restriction, but for an entire paradigm shift on how free speech and privacy collude.

Though it expanded its scope in time, the First Amendment protection was initially designed to cover the publication of government information concerning other people, such as court decisions, opinions, reports, summaries of what has happened in the past: basically, all public government document could ended up being published, with few exceptions, such as the social security numbers<sup>194</sup>. This is justified by the need for transparency from the governmental authorities and is seen as one of the main elements of the democratic system.

However, nowadays, the First Amendment's protection is mostly directed to cover the free speech of individuals and private entities on the market. Because of the nature of the work of search engines, it is now considered that the First Amendment also covers the compilation of results they offer (*Langdon v. Google*<sup>195</sup>): Google's description of the process it uses reveals “the inherent subjectivity in how results are compiled”<sup>196</sup>, using criteria such as quality, popularity or importance<sup>197</sup> in judging websites. For instance, algorithms such as PageRank™ determine websites’ popularity by evaluating how many other websites link to the analyzed website. Google search results would thus be opinion, not fact, which would confer it the First Amendment protection.

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<sup>194</sup> Kronenberger (n 157) 3.

<sup>195</sup> In this case, the court found that search results constitute speech under the First Amendment, and that Google, Yahoo and Microsoft are immune with regards to their editorial decisions regarding screening and deletion from their networks. See a thorough analysis here: Martin Samson, 'Christopher Langdon v. Google Inc., et al.' [2007] Internet Library of Law and Court Decisions.

<sup>196</sup> Haynes Stuart (n 127) 6.

<sup>197</sup> James Grimmelmann, 'Speech Engines' [2014] Minnesota Law Review 868.

Even if this protection would be justified by the subjective nature of its activity, the question is whether some sort of restriction should apply. The free speech under the First Amendment is not an absolute right<sup>198</sup>. Certain types of speech may be prohibited<sup>199</sup>, with some types of speech being more easily constrained than others<sup>200</sup>. An answer may be found in the case law. Some decisions have admitted that access to information can and should be restrained in some instances. In *US Department of Justice v. Reporters Committee for Freedom of the Press*, the Supreme Court admitted that the “compilation of otherwise hard-to-obtain information” that “would otherwise have surely been forgotten” would increase its accessibility, creating unwarranted threats to the “privacy interest in maintaining the practical obscurity of the information”<sup>201</sup>. In *Nixon v. Warner Communications, Inc.*, the Supreme Court underlined the burden courts have in ensuring that public access to information is not granted for “improper purposes”, for instance the gratification of private spite or the promotion of public scandal<sup>202</sup>. The same vision was shared by some scholars, who recognized that “even in the current age, when information is king, sometimes less access to information is the soundest policy choice”<sup>203</sup>.

All these prove that the American legal system is ready to accept a compromise between the right to access information and the freedom of speech, on one hand, and the right to privacy and preservation of a personal identity, on the other. The only requirement, thus, for a right to be

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<sup>198</sup> Bennett (n 46).

<sup>199</sup> “Restraints on free expression may be permitted for appropriate reasons” as “Speech often hurts”, invoking *Elrod v. Burns* [1976] 427 347 (U.S.). Geoffrey R. Stone, Louis M. Seidman, Cass R. Sunstein, Mark V. Tushnet, Pamela S. Karlan, *The First Amendment* (4th, Wolters Kluwer Law & Business, 2012) 3, 8.

<sup>200</sup> These articles analyze some areas in which the freedom of speech may be restricted. See Kathleen Ann Ruane, ‘Freedom of Speech and Press: Exceptions to the First Amendment’ [2014] CRS Report for Congress or Alan M. Katz, ‘Government Information Leaks and the First Amendment’ [1976] California Law Review 108.

<sup>201</sup> *DOJ v. Reporters Comm. for Free Press* [1989] 489 749 (U.S.).

<sup>202</sup> *Nixon v. Warner Communications, Inc.* [1978] 435 589 (U.S.).

<sup>203</sup> Daniel J. Solove, ‘The Virtues of Knowing Less: Justifying Privacy Protections against Disclosure’ [2003] Duke Law Journal 967.

forgotten to be accepted as legal under the First Amendment, would be a proper, thorough and convincing reasoning on why the interest to protect privacy should supersede the freedom of speech of search engines. This would not be something so hard to imagine, given that such arguments<sup>204</sup> already exist. Alternatively, the search results posted by search engines such as Google could start being considered as commercial speech, which would place them in an intermediate category that would require less constitutional protection<sup>205</sup>.

A second element of relevance for the purpose of this paper is represented by the **Communications Decency Act** (CDA), which offers a blanket immunity to Internet service providers from being held liable from the content posted by websites<sup>206</sup>. An impressive amount of case law has been developed around Section 230 of the CDA, providing a strong protection for interactive computer services such as search engines, as well as companies running websites that allow external posting of content (e.g. blog platforms like BlogSpot or WordPress). Under Section 230, they have immunity not only against monetary claims, but also as far as injunctive relief is concerned (*Noah v. AOL Time Warner, Inc.*<sup>207</sup>). In the context of a potential right to be forgotten, this is of significant importance: to enforce the right, an injunctive order would be needed from courts, seeking the removal of information from those websites that are considered to be infringing on individuals' rights. Or, not having this option on the table today from a legal perspective would make the recognition of a right to be forgotten meaningless in real life, depriving it of any true relevance and value.

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<sup>204</sup> See 'The U.S. Should Adopt The 'Right To Be Forgotten' Online' (intelligencesquaredus.org 2015) <<http://intelligencesquaredus.org/debates/upcoming-debates/item/1252-the-u-s-should-adopt-the-right-to-be-forgotten-online>> accessed 18 March 2015.

<sup>205</sup> Haynes Stuart (n 127) 9.

<sup>206</sup> Nicholas W. Bramble, 'Safe Harbors and the National Information Infrastructure' [2013] Hastings Law Journal 325.

<sup>207</sup> See Peter M. McCamman, 'Chatting up a Storm: Noah v. AOL Time Warner and Extending Federal Civil Rights Liability to Internet Chat Rooms' [2004] Journal of Communications Law and Technology Policy 199.

This technical obstacle might though be overcome by a simple change in the case law by the Supreme Court or a change in law by Congress, which would permit the existence of the right to be forgotten without having to affect the rest of the case law. Indeed, such a change might take time and a large amount of political capital and lobby in order to take place. Many Internet companies, search engines, and bloggers<sup>208</sup> would see their business model fundamentally affected by this change, which may prompt them to militate against it. However, some of them already<sup>209</sup> have to make radical business decisions in order to comply with the requirements imposed by the CJEU Google Spain-Costeja case, which has established an extraterritorial effect of EU obligations. In this context, adapting to similar changes that may occur in the American system might not be such a huge problem after all.

#### **4.3.2. Free Speech and Freedom of the Market**

The next relevant question would be whether the core values and principles in the US would support such changes aimed at integrating a stronger right to be forgotten in the legislative framework. In order to provide an accurate overview, two values will be analyzed: free speech and freedom of the market.

One of the major values of the American society is **free speech** and opposition to censorship. Though, as already explained, these values are not absolute and can suffer limitations, another aspect needs to be analyzed when discussing the potential censorship of search engine's "speech". The premise of those that argue for leaving Google's results untouched advocate for

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<sup>208</sup> The US government has been highly protective for IT giants such as Google or Yahoo, which would make the change even harder to happen - see for instance the support given on the lobby campaign led by Google at EU level: Maycotte (n 182).

<sup>209</sup> Google (and other search engines) created a mechanism to accept and handle users' requests to delete search results. Though Google, Bing and Yahoo apply the ruling only to the European versions of their websites, EU regulators are trying to expand its scope to .com domains as well in order to increase its efficiency. David Payne, 'Google, doctors, and the "right to be forgotten"' (bmj.com 2015) <<http://www.bmj.com/content/350/bmj.h27>> accessed 18 March 2015.

transparency and accuracy in terms of the information displayed<sup>210</sup>, as well as against the risk of giving too much power to search engines<sup>211</sup>, who would be responsible for defining the criteria based on which links should be removed.

There is, however, a major flaw in this line of reasoning: Google already intervenes to alter the outcome of searches. It is firstly free to create and modify algorithms based on which results are being displayed, which may take into consideration a large variety of filters. Moreover, by including popularity as a parameter, it creates a self-perpetuating vicious circle in which articles that are outrageous, scandalous, and that might fall in the category of articles to be analyzed for deletion under a right to be forgotten claim, would always show up on the first pages on a Google search, increasing the number of views even more.

Secondly, it is already intervening in some instances by editing the results their algorithms display. Google has admitted to intervene manually, by human interference, for purposes of security (e.g. removing pages that can compromise security or pages that contain credit card numbers<sup>212</sup>), for legal reasons (e.g. when copyright infringing material is displayed as a results<sup>213</sup>), to fight spam (e.g. with the use of “keyword stuffing”<sup>214</sup>) or simply when the algorithm makes mistakes.

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<sup>210</sup> After revealing that Google took down 5 pages following the RTBF, three of the Wikimedia (the non-profit group which runs the collaboratively edited encyclopaedia) executives declared that accurate, if out-dated, information should stay online, and should continue to be linked to by search providers such as Google. Alex Hern, 'Wikipedia swears to fight 'censorship' of 'right to be forgotten' ruling' ([theguardian.com 2014](http://www.theguardian.com/technology/2014/aug/06/wikipedia-censorship-right-to-be-forgotten-ruling)) <<http://www.theguardian.com/technology/2014/aug/06/wikipedia-censorship-right-to-be-forgotten-ruling>> accessed 19 March 2015.

<sup>211</sup> Such as Jeffrey Rosen. See Jeffrey Rosen, 'The Deciders: The Future of Privacy and Free Speech in the Age of Facebook and Google' [2012] Fordham Law Review 1524.

<sup>212</sup> Allyson Haynes Stuart, analyzing how Google search works, as explained on their website: <http://www.google.com/insidesearch/howsearchworks/>. Haynes Stuart (n 127) 6.

<sup>213</sup> David Goldman, 'Google kills 250,000 search links a week' (cnn.com 2012) <<http://money.cnn.com/2012/05/24/technology/google-search-copyright/>> accessed 16 March 2015.

Lastly, as statistics show, Google follows court orders to remove links only in some cases; in others, it manages to elude them by interpreting the scope and application of those orders using its own discretion<sup>215</sup>. In fact, statistics show that Google's rate of compliance with US requests to remove links has dropped from eighty-three percent in 2010 to forty-eight percent in 2012<sup>216</sup>. All these prove that Google is not by far the neutral entity that is perceived to be. In fact, it intervenes more than one would expect and maybe more than necessary, and in this context, one cannot help but wonder what real harm adding some external filters would cause, as long as they would broadly benefit individuals.

Furthermore, United States have been known as a **laissez-faire economy**<sup>217</sup>, that allows the market to self-regulate and where the state intervention happens only in extreme cases, as opposed to the European states, where the government has always had a hands-on approach on the economy, imposing regulations and protections for the weaker parts. This difference in perception could be noticed in, for instance, the existence and recourse to self-help in the US as the main method of debt recollection<sup>218</sup>, while in Europe this method is still at the beginning<sup>219</sup>. Another example, closer to the topic, is the lack of a federal unitary regulation aimed at clarifying the parameters under which personal data should be protected. The EU, on the other hand, has such a regulation since 1995, when the Data Protection Directive was enacted.

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<sup>214</sup> Allyson Haynes Stuart, analyzing how Google search works, as explained on their website: <http://www.google.com/insidesearch/howsearchworks/>. Haynes Stuart (n 127) 6.

<sup>215</sup> According to the United States Transparency Report analyzed in the article of Haynes Stuart (n 127) 13.

<sup>216</sup> Jane R. Bambauer, Derek E. Bambauer , 'Vanished' [2013] Virginia Journal of Law and Technology 13.

<sup>217</sup> Some authors analyzing this Sherryl Davis Kasper, *The Revival of Laissez-faire in American Macroeconomic Theory: A Case Study of the Pioneers* (1st, Edward Elgar Publishing, 2003) Barbara Fried, *The Progressive Assault on Laissez Faire: Robert Hale and the first law and economics movement* (1st, Harvard University Press, 2009).

<sup>218</sup> 'McLaughlin v Cohen' [1988] New York Law Journal, 1 <<http://law.justia.com/cases/federal/district-courts/FSupp/686/454/1362836/>> accessed 17 March 2014.

<sup>219</sup> Thomas Catan, 'Spain's Showy Debt Collectors Wear a Tux, Collect the Bucks' (wsj.com 2008) <Spain's Showy Debt Collectors Wear a Tux, Collect the Bucks> accessed 14 March 2015.

From this perspective, a right to be forgotten might be seen as incompatible with this set of values, and might be rejected by some groups. However, in reality, the US does not have such a free market approach as it may seem<sup>220</sup>. On the contrary, the market is being “suffocated by excessive and badly written regulation”<sup>221</sup>, exposing a tendency of state interventionism. This is somewhat consistent with the general public opinion that considers that there is too much regulation in the US, being afraid that “too much regulation undermines the free-enterprise system”<sup>222</sup>, vision that has been emphasized after the 2009 crisis.

#### **4.4 Embracing the Right to Be Forgotten. Would its implementation be truly feasible?**

The previous section has shown that the US legal framework does contain the required principles for a potential right to be forgotten similar to the European one. The question that follows is whether a potential change in either law or jurisprudence would be embraced and complied with by the general public. Though the US government and the US courts are the decision makers, in reality, it is the population that needs to endorse a paradigm shift in order for it to become effective.

For the contesters of the right to be forgotten, statistics might appear as a shock. A survey showed that sixty-one percent of Americans already believe that some version of the right to be forgotten is necessary; thirty-nine percent want a European-style blanket right to be forgotten, without restrictions; nearly half of respondents were concerned that "irrelevant" search results

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<sup>220</sup> Robert Kuttner, *The End of Laissez-Faire: National Purpose and the Global Economy After the Cold War* (1st, University of Pennsylvania Press, 1992): “A mixed economy does not mean a statist economy”.

<sup>221</sup> ‘Over-regulated America’ (economist.com 2012) <<http://www.economist.com/node/21547789>> accessed 18 March 201.

<sup>222</sup> Conclusion of a study conducted: Karlyn Bowman, 'The Public View of Regulation, Revisited' [2011] American Enterprise Institute for Public Policy Research <<http://www.aei.org/wp-content/uploads/2011/10/2011-REG-01-g.pdf>> accessed 8 March 2015.

can harm a person's reputation<sup>223</sup>. Although this survey was conducted on a small poll of people, its results seem to be consistent with how the broad population sees the issue.

Google's Transparency Report in 2014<sup>224</sup> shows that the number of requests to remove links coming from US citizens outnumbers the number of requests from European countries, while the numbers of take-down requests from the US increases each reporting period. This controversial results are incompatible with the general view that US is the fiercest enemy of censorship, while the EU prefers to protect privacy, exposing the current tension in the US society between preserving the reputation of watchdog of free speech and adapting to new technological challenges. Moreover, following the CJEU Google Spain ruling, consumer rights group Consumer Watchdog demanded Google to voluntarily implement the same right in the US<sup>225</sup>.

Additionally, American citizens' preoccupation with their privacy, especially in the online environment, has been exacerbated after the Snowden scandal. A 2014 report<sup>226</sup> examining Americans' privacy perceptions and behaviors found that 91% of adults in the survey "agree" or "strongly agree" that consumers have lost control over how personal information is collected and used by companies, while 88% of adults "agree" or "strongly agree" that it would be very difficult to remove inaccurate information about them online. Though these results may be

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<sup>223</sup> Daniel Humphries, 'U.S. Attitudes Toward the 'Right to Be Forgotten" [2014] Software Advice <<http://www.softwareadvice.com/security/industryview/right-to-be-forgotten-2014/>> accessed 8 March 2015.

<sup>224</sup> 'United States' [2013] Google Transparency Report <<http://www.google.com/transparencyreport/removals/government/US/>> accessed 17 March 2015.

<sup>225</sup> Liam Tung, 'US consumer group asks Google to import Europe's right to be forgotten' (zdnet.com e.g. 2005) <<http://www.zdnet.com/article/us-consumer-group-asks-google-to-import-europe-s-right-to-be-forgotten/>> accessed 19 March 2015.

<sup>226</sup> The research was conducted by the Pew Research Center. The summary of findings of this reports is available here: Mary Madden, 'Public Perceptions of Privacy and Security in the Post-Snowden Era' [2014] Pew Research CenterInternet, Science & Tech <<http://www.pewinternet.org/2014/11/12/public-privacy-perceptions/>>accessed 17 March 2015.

influenced by the strong emotional reactions caused by the NSA scandal<sup>227</sup>, they do expose a reasonably valid trend in the US society.

Under these circumstances, the idea of a right to be forgotten in the American space can no longer be considered a utopia. Not only that a change is possible at a legislative level, but it would likely be welcomed by a majority of the US citizens and companies. Clearly, its European equivalent will have a significant impact in shaping its form, and so will scholarly work and domestic input. However, how, when and in which direction exactly it will evolve, only time can tell.

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<sup>227</sup> Timothy Azarchs, 'Informational Privacy: lessong from across the Atlantic' [2014] Journal Of Constitutional Law 806.

## **Conclusions**

On 13th May 2013, the CJEU rendered a remarkable decision in the history of data protection. By formally recognizing the existence of the right to be forgotten in the EU legislative framework, it clarified the position the EU market should take vis-à-vis personal data and privacy, its effects being vital for the evolution of privacy regulations.

As this paper has shown, the right to be forgotten should be understood broadly, as comprising of several essential elements: the right of an individual to obtain, automatically or per request (1), deletion of personal information (2) that is no longer relevant or useful (3), which was posted by either the data owner himself, or a third party (4), even if the information was lawfully posted (5). This definition proposes to establish the basis for a future unitary approach of the right to be forgotten, as a starting point for legislators and courts when dealing with the notion.

Furthermore, this paper has proven that the US legislative and ideological framework is compatible with the manner in which the EU has addressed the existence of the right to be forgotten, which this paper illustrated in Chapter 3. Consequently, if some technical and structural obstacles are overcome, the transition towards a more pro-privacy legal framework, ready to adopt the right to be forgotten, could be feasible. Irrespective of the concrete shape that the right might take, its potential adoption would send a strong message highlighting the importance of data protection and privacy, potentially even more than the EU case did, making the large society reconsider its core values.

However, one element is clear. Unless a unitary approach to the existence and implementation of the right is adopted, the differences in vision between the US and EU societies will exacerbate, leading to both the intensification of already existing problems, as well as the emergence of new

ones. Implementation of laws may become not only inconsistent from one jurisdiction to another, but because of that, it would turn law into a territory of unpredictability and uncertainty. This would lead to unjustified differences in the way individuals and private entities are treated, decreasing the overall trust in the legal system. The market would also be harmed, as companies may be forced to take undesired measured in order to comply with the discrepancies (e.g. moving from one country to another).

Admittedly, several further questions could and maybe should be asked, such as whether a right to be forgotten should exist at all, whether a harmonization of legal perspectives would be desirable, or what the evolution of the right would be in the context of a general paradigm shift in how data protection and privacy are viewed. More time and research are needed in the following years in order to answer these questions and, specifically, assess the rightfulness of having a right to be forgotten. If, when, and how this right should and/or would be adopted is at the moment at governments' and courts' discretion. It is only later that the effects of the CJEU Google Spain-Costeja ruling will allow an adequate assessment of its rightfulness, and the further right to be forgotten's fate will be easier to appraise.

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