

Editorial

While the academic and professional world is still dealing with the implications of the previous cases by the European Court of Justice, the Court has issued yet another revolutionary judgement. The exact meaning and consequences of the *Schrems v. Facebook* case have yet to become clear, but what is sure that it will be one of the landmark cases in the history of data protection. When EdpL held its kick-off event, we already invited Max Schrems to discuss the then pending case and the possible implications of it. We had Paul Nemitz and Hielke Hijmans, among others, to react on his talk. Although the discussants and the audience disagreed on many points, they agreed that this was the ECJ's chance, after the *Google v. Spain* case, to adopt yet another ground breaking decision. And so it did. After the judgement, the safe harbour agreement with the United States is wavering.

Case C-362/14 has made clear that whilst the Court of Justice alone has jurisdiction to declare an EU act invalid, where a claim is lodged with the national supervisory authorities they may, even where the Commission has adopted a decision finding that a third country affords an adequate level of protection of personal data, examine whether the transfer of a person's data to the third country complies with the requirements of the EU legislation on the protection of that data and, in the same way as the person concerned, bring the matter before the national courts, in order that the national courts make a reference for a preliminary ruling for the purpose of examination of that decision's validity. In particular, the Court held that national security, public interest and law enforcement requirements of the United States prevail over the safe harbour scheme, so that United States undertakings are bound to disregard, without limitation, the protective rules laid down by that scheme where they conflict with such requirements. The United States safe harbour scheme thus enables interference, by United States public authorities, with the fundamental rights of persons, and the Commission decision does not refer either to the existence, in the United States, of rules intended to limit any such interference or to the existence of effective legal protection against the interference.

EdpL calls for quality papers on the topic of this judgement and its implications; we want to devote a special edition of EdpL to the *Schrems* case early next year. This issue of EdpL is already the third, and it still deals with the previous case by the ECJ: the *Google v. Spain* case. The previous edition already contained a contribution by Stefan Kulk and Frederik Zuiderveen Borgesius on this topic. It explained that since the *Google Spain* judgment of the Court of Justice of the European Union, Europeans have, under certain conditions, the right to have search results for their name delisted. The paper examined how the *Google Spain* judgment had been applied in the Netherlands. Since the *Google Spain* judgment, Dutch courts have decided on two cases regarding delisting requests. In both cases, the Dutch courts considered freedom of expression aspects of delisting more thoroughly than the Court of Justice. However, the effect of the *Google Spain* judgment on freedom of expression is difficult to assess, Stefan and Frederik ar-

gued, as search engine operators decide about most delisting requests without disclosing much about their decisions. We received many positive reactions about that contribution and decided to assemble further articles on this topic for a special issue.

The third edition of EdpL contains three articles on the right to be forgotten from various perspectives. The article by Stephen Allen interrogates the nature and scope of the right to erasure through the lens of the CJEU's decision in *Google Spain/Google Inc v AEPD/González*. It examines the reasoning adopted by the Advocate-General and the CJEU in this case as a means of assessing the interpretative techniques used by lawyers and decision-makers to resolve the normative conflicts that arise in privacy/expression disputes. It harnesses Koskeniemi's work on the structure of legal argumentation for the purpose of analysing rights reasoning in the context of EU Data Protection law. And it explores the significance of the symbiotic relationship between privacy rights and expression rights with a view to providing the basis for achieving meaningful normative co-ordination in concrete cases.

The paper by Kieron O'Hara and Nigel Shadbolt examines the recent *Google Spain* ruling establishing a right to de-indexing based on existing rights to data protection. This ruling has had a divisive effect on the relations between the EU and the US, so Kieron and Nigel hold, but their article argues that we should understand the right to de-indexing in the context of: (i) moves to improve communication with data subjects and support subjects' autonomy, particularly within the notice and consent regime; (ii) understanding the role of obscurity of information, and undermining the current binary assumption that information is either public or not; and (iii) moves to improve the quality of search engines' output. If we do this, the authors argue, the right to be de-indexed (and possibly other types of 'right to be forgotten') could become a point of contact between the EU and US privacy regimes, not a point of conflict.

Finally, Mei Ning Yan takes a Chinese perspective on this topic. Her paper first maps the development of the right to be forgotten in the EU and explains how the concept was transformed to the right to delisting in *Google Spain*. It then gives an overview of legal protection of online privacy and personal data in the PRC and examines in particular whether search engines are required to remove or block search results that invade privacy. It further studies measures, legislative or otherwise, introduced by the Chinese authorities in the past few years to enhance both privacy and personal data protection, and assesses whether such measures endorse the rights to erasure or delisting. It then surveys several lawsuits concerning requests by individuals for search engines to remove or block their private facts in search results and ascertains how PRC courts have in practice already recognised the right to delisting. The last part of this paper details why the right to be forgotten remains remote for the Chinese people, and how prevailing political and cultural factors constitute stumbling blocks in the protection of this right.

Furthermore, the third edition of EdpL contains several country reports. The general theme is yet another important decision by the ECJ, namely the case on the Data

Retention Directive. Most countries are still struggling with the question of how to interpret the ruling and how to implement it in their national legislation. Countries have adopted very diverse approaches to recognizing the new standards as developed by the European Court of Justice. This issue contains country reports from Belgium, Bulgaria, Germany, Slovakia, Sweden and the United Kingdom. In addition, two case notes are included in this edition by Neal Cohen and Tijmen Wisman. Finally, two book reviews by Alexander Dix and Andra Giurgiu are provided. We hope you enjoy reading the third edition of the European Data Protection Law Review!

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