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## Google's Dead End, or: on Street View and the Right to Data Protection

### An analysis of Google Street View's compatibility with EU data protection law

*May a company photograph the daily lives of people all over the world, store those photos, and publish them on the internet? This article assesses which obligations Google has to fulfil in order to respect the European data protection rules. The focus lies on three questions. First, which data processed for the Street View service are personal data? Second, does Google have a legitimate ground for processing personal data? Third, does Google comply with its transparency obligations and does it respect the rights of the data subjects, specifically their right to information?*

#### I. Introduction

Why need a room with a view when the world with a view is within hand's reach? The concept of Google Street View is dazzlingly simple, as is the case with most good ideas. Take the roadmap of the world and allow people to zoom in, so that they may walk down Broadway, stop at Abbey Road's zebra crossing and drive down Route 66 in one day. All it takes to achieve this dream is a car with a circulating camera, or more specifically, several cars with several circulating cameras.<sup>1</sup> Such techniques are of common use for smaller applications, such as virtual tour guides in museums.<sup>2</sup> The idea for Street View is perhaps more dazzling in bluntness than in originality, allowing for a virtual tour around the world. Still, Google has habituated projects larger than life as a company ethic, making the world's information available (Google Books, YouTube), easily accessible (Google Search), understandable (Google translate), and visible (Google Street View, Google Earth).<sup>3</sup> Obstacles are of course inherent with projects larger than life, specifically legal problems, since law has a tendency to preserve rather than to change.

Street View was launched in May 2007 and allows users 360° horizontal and 290° vertical panoramic street level views.<sup>4</sup> It's different from Google Earth, which makes it possible to zoom in on the earth from a bird's view perspective. With Street View, one sees the world through the eyes of the virtual person Pegman (not to be confused with Pacman). Street View allows for zooming in on specific details, for the identification of a rare flower or the

face of a man leaving a strip club.<sup>5</sup> One may also click on a direction in the street and encourage Pegman to take a nice walk. Street View is active in every continent and although the 'Western' countries appear to be on the top of Google's wish list, in time, the whole world may be engulfed by it.<sup>6</sup> Biker tracks and ski slopes are covered by bikes and snow mobiles.<sup>7</sup>

The article focuses on the right to data protection, thus leaving aside the right to privacy as embodied in article 8 of the European Convention of Human Rights.<sup>8</sup> The Data Protection Directive sets out the principles of fair and lawful processing of personal data.<sup>9</sup> The first question that arises under this Directive in relation to Google Street View is: which data processed for the Street View service are personal data? Second, does Google have a legitimate ground for processing personal data? Third, does Google comply with its transparency obligations and does it respect the rights of the data subjects, specifically their right to information? These questions are discussed below. The conclusion is that Street View is difficult to reconcile with the requirements of the Directive.

#### II. Applicability of the Data Protection Directive

##### 1. Key Terms of the Data Protection Directive

The applicability of the Data Protection Directive is triggered when "personal data" are "processed" under the authority of the "controller" of the personal data. Personal data are defined very broadly as "any information relating to an identified or identifiable natural person ('data subject'); an identifiable person is one who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his physical, physiological, mental, economic, cultural or social identity".<sup>10</sup> The main advisory European body in the field of data protection is the Article 29 Working Party. The Working Party has elaborated on four elements of the definition of personal data: "any information", "relating to", "an identified or identifiable" and "natural person".<sup>11</sup> The information in question might be kept in any form to be relevant for the Directive. Information may relate to a person either qua "content", such as medical records, qua "purpose", if it

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1 Anguelov D et al. (2010) Google Street View: Capturing the World at Street Level. IEEE Computer Society, Computer. June 2010 (Vol. 43, No. 6) p. 32-38.

2 See for example: Louvre, Online Tours, [www.louvre.fr/en/visites-en-ligne](http://www.louvre.fr/en/visites-en-ligne). All web addresses mentioned in the footnotes were accessed on 18 July 2012.

3 YouTube, [www.youtube.com](http://www.youtube.com); Google Translate, [www.translate.google.com](http://www.translate.google.com); Google Earth, [www.earth.google.com](http://www.earth.google.com); Google Labs Mars, [www.google.com/mars](http://www.google.com/mars). See also Google Mobile, Google Sky Map (beta), [www.google.com/mobile/skymap](http://www.google.com/mobile/skymap).

4 Williams M, Google Maps, Behind the scenes, [www.google.com/intl/en\\_us/help/maps/streetview/behind-the-scenes.html](http://www.google.com/intl/en_us/help/maps/streetview/behind-the-scenes.html).

5 Schroeder S, Top 15 Google Street View sightings. Mashable. 31 May 2007, <http://mashable.com/2007/05/31/top-15-google-street-view-sightings>.

6 Google Maps, Where are our vehicles currently driving?, <http://maps.google.com/help/maps/streetview/learn/where-is-street-view.html>.

7 Google Maps, Cars, Trikes & More, <http://maps.google.com/help/maps/streetview/technology/cars-trikes.html>.

8 The article doesn't discuss the collection of Wi Fi data by Google. The right to the commercial use of one's image also falls outside the scope of the article.

9 Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ L 281/31, 23 November 1995).

10 Article 2(a) of the Data Protection Directive.

11 Article 29 Working Party, Opinion 4/2007 on the concept of personal data (WP 136). 20 June 2007.

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is used to evaluate or influence personal behaviour, or qua "result", if the consequence is that a person might be treated or looked upon differently.<sup>12</sup> Personal data may either be directly identifiable, such as a name, or indirectly, such as a telephone number.<sup>13</sup> To determine whether a person is identifiable, all the means likely reasonably to be used either by the controller or by any other person to identify a person should be taken into account.<sup>14</sup>

The Directive distinguishes non-sensitive data from sensitive data. The latter are data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, trade union membership, and data concerning health and sex life. For the processing of sensitive data there is a stricter regime than for non-sensitive data.<sup>15</sup>

The concept of data processing is defined very broadly as any operation or set of operations which is performed upon personal data, whether or not by automatic means, such as collection, recording, organisation, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, blocking, erasure or destruction.<sup>16</sup> In short, almost everything that can be done with personal data falls within this definition.

The Directive defines the "data controller" as anybody who alone or jointly with others determines the purposes and means of the processing of personal data. On him lie all the obligations under the Directive.<sup>17</sup> The "data subject" is the person whose personal data are processed.<sup>18</sup>

### 2. Street View and Personal Data

Does Google process personal data for Street View? For the purposes of this article, the processing of the Street View photos is divided in three stages. First Google takes photos that may include personal data. Second, Google stores the photos in a database. Third, Google publishes photos that may include personal data.

In the first phase, Google takes photos that may include personal data. Techniques used to capture sound and image data relating to natural persons, fall under the scope of the Directive.<sup>19</sup> Hence, photos with people fall under the scope of the Directive. Although the processing of personal data is not the goal of Street View, it is inherent to an online mapping service.<sup>20</sup>

In the second phase, Google stores photos that may include directly identifiable information, such as an individual's face. In those cases, it processes personal data. However, during the second phase, Google erases most directly identifiable information.

We have developed cutting-edge face and license plate blurring technology that is applied to all Street View images. This means that if one of our images contains an identifiable face (for example, that of a passer-by on the pavement) or an identifiable license plate, our technology will blur it automatically, meaning that the individual or the vehicle cannot be identified.<sup>21</sup>

Google, a company with face recognition software at its disposal,<sup>22</sup> keeps the unblurred photos for up to one year. Google says it needs to keep the photos to improve the anonymisation process and to "to build better maps products".<sup>23</sup> But the Directive requires personal data to be deleted when they are no longer necessary for the purpose for which the data were collected or for which they are further processed.<sup>24</sup> Members of the Working Party have asked Google to limit the period it keeps the unblurred photos to six months.<sup>25</sup> To a large extent the technological possibilities determine what is necessary in this case. This information is however not publicly available. Therefore, no definite answer to the question whether a shorter retention period would be possible can be given here.

In the third phase, Google publishes photos on its Street View service, after blurring people's faces and license plates. The question is whether the blurring of faces is enough to avoid the applicability of the Directive. Furthermore, the blurring sometimes fails. The Swiss federal Supreme Court points out that a success rate of 99% would still lead to the publication of 200,000 insufficiently blurred photos in Switzerland alone.<sup>26</sup>

### 3. Identified and Identifiable Natural Persons

Photos of people make them identifiable, not only with regard to their faces but also with regard to their exceptional height, clothes, hair colour, physical handicaps or any other characteristics.<sup>27</sup> Photos of people with a blurred face can constitute indirectly identifiable information, for example when they are entering their own home. Different data put together (neighbourhood, colour of a car and a man seen knocking on a door) might paint a detailed picture (for example a man secretly visiting his ex-girlfriend's house) and can also constitute indirectly identifiable information.<sup>28</sup> Hence, the ele-

12 Idem, p. 10.

13 Idem, p. 12-13.

14 Recital 26 of the Data Protection Directive.

15 Article 8.1 of the Data Protection Directive. This article uses the phrase 'sensitive data', while the Directive speaks of 'special categories of personal data'.

16 Article 2(b) of the Data Protection Directive.

17 Article 2(e) of the Data Protection Directive.

18 Article 2(a) of the Data Protection Directive.

19 Recital 14 of the Data Protection Directive.

20 Commission for the Protection of Privacy Belgium (2010) Aanbeveling uit eigen beweging inzake Mobile Mapping [Recommendation on Mobile Mapping], 05/2010, 15 December 2010, [www.privacycommission.be/sites/privacycommission/files/documents/aanbeveling\\_05\\_2010\\_0.pdf](http://www.privacycommission.be/sites/privacycommission/files/documents/aanbeveling_05_2010_0.pdf), par. 20.

21 Google Maps, Privacy, [http://maps.google.co.uk/intl/en\\_uk/help/maps/streetview/privacy.html](http://maps.google.co.uk/intl/en_uk/help/maps/streetview/privacy.html).

22 Rao L, Google Acquires Facial Recognition Software Company PittPatt, Techcrunch, 22 July 2011, <http://techcrunch.com/2011/07/22/google-acquires-facial-recognition-software-company-pittpatt/>; Google+, Making photo tagging easier with Find My Face, 8 December 2011, <https://plus.google.com/101560853443212199687/posts/VV45vuvFq4>.

23 Notification of Google Street View to the Dutch Data Protection Authority, [www.cbppweb.nl/asp/ORDetail.asp?moid=808084898f&refer=true&theme=purple](http://www.cbppweb.nl/asp/ORDetail.asp?moid=808084898f&refer=true&theme=purple); Fleischer P, Navigating Europe's Streets, Google European Public Policy Blog, 7 October 2009, <http://googlepoli.cyeurope.blogspot.com/2009/10/navigating-europes-streets.html>.

24 Article 6.1(e) of the Data Protection Directive.

25 EDRI, Article 29: Reduce The Storing Period Of Google Street View's Images. 10 March 2010, [www.edri.org/edriagram/number8.5/article-29-wp-google-street-view](http://www.edri.org/edriagram/number8.5/article-29-wp-google-street-view).

26 The Court accepts a success rate of 99% if certain conditions are met. Swiss Federal Supreme Court, Urteil vom 31 Mai 2012, 1C\_230/2011, [http://jump.cgi.bger.ch/cgi-bin/JumpCGI?id=31.05.2012\\_1C\\_230/2011](http://jump.cgi.bger.ch/cgi-bin/JumpCGI?id=31.05.2012_1C_230/2011), par. 10.6 - 10.7.

27 Article 29 Working Party, Opinion 4/2007 on the concept of personal data (WP 136). 20 June 2007, example 19.

28 Idem, p. 13.

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ments of “identified” or “identifiable” are often satisfied with regard to the photos shown on Google Street View. Furthermore, the information relates to a “natural person” since it relates to the people walking, driving or standing in the streets. Nevertheless, Google’s Global Privacy Counsel suggests on his private blog that a person should not be regarded as identifiable if the face is not visible.<sup>29</sup>

Can a person be considered to be identifiable, even if you cannot see their face? In pragmatic terms, and in privacy law terms, I think not. The fact is that a person may be identifiable to someone who already knows them, on the basis of their clothes (e.g., wearing a red coat), plus context (in front of a particular building), but they wouldn’t be “identifiable” to anyone in general.<sup>30</sup>

However, the Directive says that “to determine whether a person is identifiable, account should be taken of all the means likely reasonably to be used either by the controller or by any other person to identify the said person.”<sup>31</sup> It is correct that most people with blurred faces will not be identifiable in most cases by most of the people. Still, some people might be identifiable, due to their unique qualities, such as celebrity status or remarkable body features. Moreover, many people with blurred faces will be identifiable by some of their close ones.<sup>32</sup> To refer to the quote attributed to Abraham Lincoln: “you cannot identify all the people all the time, but you can identify some of the people all the time and all of the people some of the time.”<sup>33</sup> The Swiss Data Protection Commissioner has said: “In outlying districts, where there are far fewer people on the streets, the simple blurring of faces is no longer sufficient to conceal identities.”<sup>34</sup>

### 4. Street View and Sensitive Data

The photos shown on Street View may also include sensitive data, such as data referring to race (with regard to the colour of the skin), religion (when walking out of a mosque), or sexual preferences (when walking out of a gay-bar).<sup>35</sup> In its notification to the Dutch Data Protection Authority, Google confirms processing sensitive

data for the original unblurred photos for its Street View service, both with regard to race and ethnicity and with regard to health related information.<sup>36</sup> According to the notification, Google processes the photos (personal data) to use them in anonymised form for Street View.<sup>37</sup> It seems that Google only regards the photos as personal data before the faces are blurred.

A relevant question with regard to Street View is whether houses could be seen as personal data. The matter is contentious. Some lower national judges have decided that photos of a house aren’t personal data.<sup>38</sup> On the other hand, the Swiss Federal Supreme Court has decided that houses can constitute personal data.<sup>39</sup> (Switzerland is not a member state of the European Union, but its data protection act uses essentially the same definition of personal data as the Directive.<sup>40</sup>) A full discussion of the status of houses as personal data falls outside the scope of this article.

### 5. Conclusion

Google processes personal data when it collects, records, organizes, stores, adapts or alters photos showing people. As far as the blurred photos contain personal data, Google discloses personal data to the public by publishing the photos on the internet.<sup>41</sup> Google is the controller as it determines the goal and the means of the processing, since it determines the techniques for processing and publication. In sum, Google processes personal data for Street View. In principle, the Directive applies.

## III. Legitimate Purpose

### 1. The Legitimate Purpose in the Data Protection Directive

The Directive requires that personal data are processed on a legitimate basis as laid down by law and offers six possibilities to comply with this requirement. Three of these may be relevant for Google Street View. First, a processor may process personal data if “the data subject has unambiguously given his consent”.<sup>42</sup> Consent is defined as “any freely given specific and informed indication of his wishes by which the data subject signifies his agreement to personal data relating to him being processed.”<sup>43</sup> Consent can be given implicitly, but according to the Working Party, doing nothing can almost never be construed as unambiguous consent. Consent should be freely given, so consent given under pressure is not valid. As consent also has to be specific, consent “to use personal data for commercial purposes” would not be

<sup>29</sup> The statements on this blog should not be attributed to Google: “Since I work as Google’s Global Privacy Counsel, I need to point out that these ruminations are mine, not Google’s. Please don’t attribute them to Google, because they’re just my views, and many people at Google may hold different views on the same topics.” <http://peterfleischer.blogspot.com>.

<sup>30</sup> Fleischer P, Can you “identify” the person walking down the street?, Peter Fleischer: Privacy...?, 23 October 2007, <http://peterfleischer.blogspot.com/2007/10/can-you-identify-person-walking-down.html>.

<sup>31</sup> Recital 26 of the Data Protection Directive.

<sup>32</sup> Article 29 Working Party, Opinion 4/2007 on the concept of personal data (WP 136). 20 June 2007, p. 21.

<sup>33</sup> It’s doubtful whether Lincoln ever said this (*Parker D B, A New Look at “You Can Fool All of the People”, For The People, A Newsletter of the Abraham Lincoln Association*, <http://abrahamlincolnassociation.org/newsletters/7-3.pdf>).

<sup>34</sup> Federal Data Protection and Information Commissioner, Street View: FDPIC takes Google to the Federal Administrative Court, [www.edoeb.admin.ch/dokumentation/00438/00465/01676/01683/index.html?lang=en](http://www.edoeb.admin.ch/dokumentation/00438/00465/01676/01683/index.html?lang=en). The Swiss Federal Supreme Court later used the same reasoning (Swiss Federal Supreme Court, Urteil vom 31 Mai 2012, 1C\_230/2011, [http://jump.cgi.bger.ch/cgi-bin/jumpCGI?id=31.05.2012\\_1C\\_230/2011](http://jump.cgi.bger.ch/cgi-bin/jumpCGI?id=31.05.2012_1C_230/2011), par. 6.2).

<sup>35</sup> See Commission for the Protection of Privacy Belgium (2010) Aanbeveling uit eigen beweging inzake Mobile Mapping [Recommendation on Mobile Mapping], 05/2010, 15 December 2010, [www.privacycommissieon.bel.sites/privacycommissieon/files/documents/aanbeveling\\_05\\_2010\\_0.pdf](http://www.privacycommissieon.bel.sites/privacycommissieon/files/documents/aanbeveling_05_2010_0.pdf), par. 6.

<sup>36</sup> Notification of Google Street View to the Dutch Data Protection Authority, [www.cbpreweb.nl/asp/ORDetail.asp?moid=808084898f&refer=true&theme=purple](http://www.cbpreweb.nl/asp/ORDetail.asp?moid=808084898f&refer=true&theme=purple).

<sup>37</sup> See about anonymous data: Article 29 Working Party, Opinion 4/2007 on the concept of personal data (WP 136). 20 June 2007, p. 18-21.

<sup>38</sup> See for example the Summary proceedings judge of Rotterdam (Rechtbank Rotterdam 5 January 2010, nr. 329762/HA RK 09-91, par. 4.5).

<sup>39</sup> Swiss Federal Supreme Court, Urteil vom 31 Mai 2012, 1C\_230/2011, URL: [http://jump.cgi.bger.ch/cgi-bin/jumpCGI?id=31.05.2012\\_1C\\_230/2011](http://jump.cgi.bger.ch/cgi-bin/jumpCGI?id=31.05.2012_1C_230/2011), par. 10.6.4.

<sup>40</sup> Article 3(a) of the Federal Act of 19 June 1992 on Data Protection. English translation available at [www.admin.ch/ch/le/fr/c235\\_1.html](http://www.admin.ch/ch/le/fr/c235_1.html).

<sup>41</sup> See also ECJ 6 November 2003, Case C-101/01, “Bodil Lindqvist” par. 24-27.

<sup>42</sup> Article 7(a) of the Data Protection Directive.

<sup>43</sup> Article 2(h) of the Data Protection Directive.

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acceptable for instance. Finally consent has to be informed.<sup>44</sup>

Second, data processing is allowed if it is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller or in a third party to whom the data are disclosed.<sup>45</sup>

Third, under the so called "balancing provision", data processing is allowed when the "processing is necessary for the purposes of the legitimate interests pursued by the controller or by the third party or parties to whom the data are disclosed, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject (...)".<sup>46</sup> The Directive grants data subjects the right to object to data processing "on compelling legitimate grounds", if a processor relies on the balancing provision.<sup>47</sup> When balancing the interests of the controller and the data subject, it has to be taken into account that the right to privacy and data protection are fundamental rights.<sup>48</sup> Relevant questions are whether the processing of data is proportional to the specified purpose and whether there is another way of pursuing the purpose. The balancing provision is notoriously vague, and not all legislators and data protection authorities interpret it in the same way.<sup>49</sup>

The Directive provides for a separate regime for the processing of sensitive data, such as data revealing racial or ethnic origin, political opinions, religious beliefs, and data concerning health or sex life. In principle, the processing of such sensitive data is prohibited. This prohibition can only be lifted if certain specified conditions are met. The two conditions that could be relevant for Street View can be summarized as follows. First, the prohibition can be lifted if the data subject has given his "explicit consent" to the processing of those data.<sup>50</sup> Second, processing is allowed if it relates to data that are manifestly made public by the data subject.<sup>51</sup>

### 2. Consent

Can Google rely on one of the grounds to legitimize data processing for Street View? Google processes both ordinary and sensitive personal data for its Street View ser-

vice. In principle the data subject's consent may be a legitimate ground for both the processing of ordinary and sensitive personal data. While data subjects have not consented explicitly to their data being processed, they might have done so implicitly. According to the American "reasonable expectation of privacy" doctrine, one may not reasonably expect full privacy when walking on the street. "Street View contains imagery that is no different from what you might see driving or walking down the street."<sup>52</sup> But Google also writes:

In the US, there's a long and noble tradition of "public spaces," where people don't have the same expectations of privacy as they do in their homes. (...) In other parts of the world local laws and customs are more protective of individuals' right to privacy in public spaces, and therefore they have a more limited concept of the right to take and publish photos of people in public places.<sup>53</sup>

In Europe the "reasonable expectation of privacy" doctrine is much less influential. Sometimes people have a right to privacy in public.<sup>54</sup> In principle the Directive applies when photos that contain personal data are published on the Internet, also when they are taken in public.<sup>55</sup>

To invoke the consent of the data subject as the ground for data processing, it must either be unambiguous when it relates to ordinary personal data or explicit when it relates to sensitive data. An opt-out system that consists of blurring one's face if Google failed to blur it is not enough to construe unambiguous consent.

The concept of implicit consent when walking in public might also relate to another legitimate ground under the Directive for the processing of sensitive data, namely that personal data have been manifestly made public by the data subject. Although some people may have manifestly made public their (sensitive) personal data, it is unlikely that all people on the street have done so. Kotschy writes in another context: "Making information public' requires a deliberate act by the data subject, disclosing the data to the public. Video-surveillance can therefore not be justified by the fact that the data subjects 'showed themselves in public.'"<sup>56</sup>

### 3. Public Interest

Is Street View necessary for the performance of a task carried out in the public interest? Street View has enriched the public life and might be said to be of such importance that it serves the public interest. However, this does probably not fulfil the requirements for a successful invocation of this legitimisation of the processing of personal data. This ground is primarily invoked by governmental organisations that serve the public interest. It may either relate to governmental organisations

44 Article 29 Working Party, Opinion 15/2011 on the definition of consent (WP 187), 13 July 2011, p. 12.

45 Article 7(e) of the Data Protection Directive.

46 Article 7(f) of the Data Protection Directive. The official English version of the Directive says "for" ("the interests for fundamental rights"). The Directive says "or" in other languages. Therefore it is assumed here that "for" should be read as "or". See *Korff D* (2005), *Data Protection Laws in the European Union*, The Direct Marketing Association, New York 2005, p. 68, footnote 19.

47 Article 14(a) of the Data Protection Directive.

48 ECJ 24 November 2011, Joined cases C-468 and C-469/10, "ASNEF", par. 40.

49 See about a wrong implementation of article 7(f) in Spain: ECJ 24 November 2011, Joined cases C-468 and C-469/10, "ASNEF", par. 40. See also *Korff D* (2010) *Comparative study on different approaches to new privacy challenges*, in particular in the light of technological developments, Working Paper 2.0. 20 January 2010, [http://ec.europa.eu/jst/ico/policies/privacy/docs/studies/new\\_privacy\\_challenges/final\\_report\\_working\\_paper\\_2\\_en.pdf](http://ec.europa.eu/jst/ico/policies/privacy/docs/studies/new_privacy_challenges/final_report_working_paper_2_en.pdf), p. 72.

50 Article 8.2(a) of the Data Protection Directive. Some Member States require extra safeguards in their national laws, even when specific consent is obtained (European Commission, *Analysis and impact study on the implementation of Directive EC 95/46 in Member States*, p. 12. The Analysis is attached to the European Commission, *First report on the implementation of the Data Protection Directive (95/46/EC)*, 15 March 2003, COM/2003/265 final).

51 Article 8 of the Data Protection Directive.

52 Google Maps Privacy. [http://maps.google.com/intl/en\\_us/help/maps/streetview/privacy.html](http://maps.google.com/intl/en_us/help/maps/streetview/privacy.html).

53 *Fleischer P*, Street View and Privacy. Google Lat Long Blog. 24 September 2007, <http://google-latlong.blogspot.com/2007/09/street-view-and-privacy.html>.

54 ECtHR, 24 June 2004, application no. 59320/00, *Caroline Von Hannover v. Germany*, par. 50.

55 See ECJ 6 November 2003, Case C-101/01, "Bodil Lindqvist", par. 24-27.

56 *Kotschy W* (2010) Directive 95/46/EC – Data Protection Directive, in *Büllesbach A et al. (eds.), Concise European IT Law*, Kluwer Law International, Alphen aan den Rijn, p. 62 (*Kotschy* 2010).

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performing a public task or to private companies that fulfil privatized governmental tasks.<sup>57</sup> Neither is the case with regard to Street View.

### 4. Balancing Provision

Finally the balancing provision allows data processing of non-sensitive personal data when it is necessary for the legitimate interests of the controller, unless these interests are overridden by the interests of the data subjects with regard to data protection and privacy. A legitimate business interest or a fundamental right of the data controller would be examples of a legitimate interest that might override the fundamental rights of the data subject.<sup>58</sup> Google has a legitimate interest in processing personal data, but the question is whether the fundamental rights of the data subjects should override this interest.<sup>59</sup>

To answer this question, the interests of the two parties must be balanced. This weighing of interests must be done on a case-by-case basis, and all circumstances should be taken into account.<sup>60</sup> A fundamental right of the data controller would be an example of a legitimate interest that could override the fundamental rights of the data subject.<sup>61</sup> When balancing the different interests, all circumstances have to be taken into account. The processing of personal data, photos showing people, is inherent to an online mapping service and it would be very hard to obtain prior consent of all people filmed for Street View.<sup>62</sup> Google blurs most faces and number plates, and offers people the possibility to request blurring of a whole house or car.<sup>63</sup>

Can Google rely on the balancing provision for Street View? The Belgian Privacy Commission says that the balancing provision could be a legitimate ground for services such as Street View.<sup>64</sup> The Greek Data Protection Authority published a decision on an online mapping service comparable to Street View. In principle the company can rely on a legitimate business interest, as a particular expression of the fundamental right to the free development of personality as laid down in the Greek Constitution.<sup>65</sup> According to the English Information Commissioner's Office, consent is not needed for Street View, which seems to imply that it regards the balancing

provision as a sufficient basis.<sup>66</sup> The Hungarian Data Protection Authority allowed Street View under certain conditions, although the then-current Data Protection Act didn't contain a balancing provision.<sup>67</sup>

Many national authorities asked Google to implement extra measures to protect the rights of the data subjects. In Austria for instance, Google has to blur photos of private properties that a pedestrian wouldn't be able to see, such as private gardens behind a fence.<sup>68</sup> The Czech Data Protection Authority only accepted the balancing provision as a legitimate ground for Street View after Google made some amendments, such as lowering the height of the camera on the cars.<sup>69</sup> The Federal Supreme Court of Switzerland also required Google to lower the camera.<sup>70</sup>

German data protection authorities accepted the balancing provision only under stringent conditions.<sup>71</sup> They required Google to implement a system that lets people opt out their house so it would be blurred before publication on Street View.<sup>72</sup> This opt-out system concerns the right to object. The opt-out system is one of the relevant conditions for the outcome of the balancing test. In 2010, a German court ruled that Street View did not violate the rights of a woman who was afraid a photo of her house might be published on Street View. However, the Data Protection Directive did not play a big role in the case.<sup>73</sup> In 2011, Google decided not to continue adding new photos to Street View in Germany, which shows images of 20 cities.<sup>74</sup>

Many data protection authorities require extra safeguards for sensitive data. In Austria for instance, Google

57 *Kuner C* (2007) European data protection law: corporate compliance and regulation. Oxford University Press, Oxford, p. 244 (*Kuner* 2007).

58 Legitimate business interest: recital 30 of the Data Protection Directive; conflicting fundamental rights: ECJ 6 November 2003, Case C-101/01, "Bodil Lindqvist" par. 90; *Kotschy* 2010, p. 58.

59 See ECJ 24 November 2011, Joined cases C-468 and C-469/10, "ASNEF", par. 38.

60 See *Kotschy* 2010, p. 58; *Kuner* 2007, p. 244.

61 ECJ 6 November 2003, Case C-101/01 (*Bodil Lindqvist*) par. 90; *Kotschy* 2010, p. 58.

62 *Fleischer P*, Navigating Europe's Streets, Google European Public Policy Blog, 7 October 2009, <http://googlepolicyeurope.blogspot.com/2009/10/navigating-europes-streets.html>.

63 Google Maps Privacy. [http://maps.google.com/intl/en\\_us/help/maps/streetview/privacy.html](http://maps.google.com/intl/en_us/help/maps/streetview/privacy.html).

64 Commission for the Protection of Privacy Belgium (2010) Aanbeveling uit eigen beweging inzake Mobile Mapping [Recommendation on Mobile Mapping], 05/2010, 15 December 2010, [www.privacycommission.bel.sites/privacycommission/files/documents/aanbeveling\\_05\\_2010\\_0.pdf](http://www.privacycommission.bel.sites/privacycommission/files/documents/aanbeveling_05_2010_0.pdf), par. 17-20.

65 Greek Data Protection Authority, Decision 91/2009, 29 December 2009, [www.dpa.gr/pls/portal/docs/page/apdpx/english\\_index/decision\\_s/decision%2091-2009.pdf](http://www.dpa.gr/pls/portal/docs/page/apdpx/english_index/decision_s/decision%2091-2009.pdf). See also: Greek Data Protection Authority Press Release, Three-dimensional navigation of the streets of Greek cities (Google Street View, kapou.gr), [www.dpa.gr/pls/portal/url/item/6d3e61806dff589fe040a8c07c241d4f](http://www.dpa.gr/pls/portal/url/item/6d3e61806dff589fe040a8c07c241d4f).

66 Information Commissioner's Office (2009) Letter regarding Privacy International's complaint about Google Street View, 30 March 2009, [www.ico.gov.uk/upload/documents/library/data\\_protection/notices/response\\_to\\_pi\\_complaint\\_v1.pdf](http://www.ico.gov.uk/upload/documents/library/data_protection/notices/response_to_pi_complaint_v1.pdf).

67 *Liber A*, Commissioner Approved the Street View Service by Google, DataPrivacy.hu, 8 July 2011, [www.dataprivacy.hu/archives/628?lang=en](http://www.dataprivacy.hu/archives/628?lang=en). See for an English translation of the (then current) data protection act: [www.dataprivacy.eu/pmwiki/pmwiki.php?n=Main.HU](http://www.dataprivacy.eu/pmwiki/pmwiki.php?n=Main.HU), and of the new act (in effect since 2012): [www.naih.hu/files/ActCXIIof2011\\_mod\\_2012\\_05\\_09.pdf](http://www.naih.hu/files/ActCXIIof2011_mod_2012_05_09.pdf).

68 Austrian Data Protection Commission, Recent Developments regarding Google Street View, [www.dsk.gv.at/site/6733/default.aspx](http://www.dsk.gv.at/site/6733/default.aspx).

69 Czech Office for Personal Data Protection, Annual Report 2010, p. 29-30, and Press Release 23 May 2011, [www.uoou.cz/files/rep\\_2010.pdf](http://www.uoou.cz/files/rep_2010.pdf) and [www.uoou.cz/uoou.aspx?menu=125&submenu=614&loc=792&lang=en](http://www.uoou.cz/uoou.aspx?menu=125&submenu=614&loc=792&lang=en).

70 Swiss Federal Supreme Court, Urteil vom 31 Mai 2012, 1C\_230/2011, [http://jump.cgi.bger.ch/cgi-bin/JumpCGI?id=31.05.2012\\_1C\\_230/2011](http://jump.cgi.bger.ch/cgi-bin/JumpCGI?id=31.05.2012_1C_230/2011), par. 10.6.4.

71 See about Google Street View and German law: *Forgo N, Krügel T & Müllenbach K*, Zur datenschutz- und persönlichkeitsrechtlichen Zulässigkeit von Google Street View, Computer und Recht, 2010, vol. 26, no 9, p. 616-624 (*Forgo/Krügel/Müllenbach*, CR 2010, 616); *Spiecker I*, Datenschutzrechtliche Fragen und Antworten in Bezug auf Panorama-Abbildungen im Internet, Computer und Recht, 2010, vol. 26, no 5, p. 311-318 (*Spiecker*, CR 2012, 311); *Ernst, S*, Google Street View: Urheber- und persönlichkeitsrechtliche Fragen zum Straßenpanorama, Computer und Recht, 2010, vol. 26, no 3, p. 178-184 (*Ernst*, CR 2010, 178).

72 *Schaar P*, Street View: Online even in Germany soon?, The Federal Commissioner of Data Protection blog, 10 August 2010, [www.bfdi.bund.de/EN/PublicRelations/SpeechesAndInterviews/blog/GoogleStreetview20100810.html?nn=1269676](http://www.bfdi.bund.de/EN/PublicRelations/SpeechesAndInterviews/blog/GoogleStreetview20100810.html?nn=1269676).

73 LG Berlin, Beschl. v. 13.9.2010 - 37 O 363/10; KG, Beschl. v. 25.10.2010 - 10 W 127/10. See also: *Fariar C* (2011) Berlin court rules Google Street View is legal in Germany. Deutsche Welle, [www.dw-world.de/dw/article/0,,14929074,00.html](http://www.dw-world.de/dw/article/0,,14929074,00.html).

74 Hamburgischen Beauftragten für Datenschutz und Informationsfreiheit, Keine weiteren Veröffentlichungen von Bildern in Google Street View, Press release 11 April 2011, [www.datenschutz-hamburg.defnews/detail/article/dies-ist-ein-pressebeitrag2-copy-3.html?tx\\_ttnews%5B%5B%5D=160&cHash=ed9af9132a9387c95fd43f6391e99736](http://www.datenschutz-hamburg.defnews/detail/article/dies-ist-ein-pressebeitrag2-copy-3.html?tx_ttnews%5B%5B%5D=160&cHash=ed9af9132a9387c95fd43f6391e99736).

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is required to blur not only the face but also the whole body of people on photos of sensitive places such as churches or hospitals.<sup>75</sup> The Greek data protection authority requires extra measures to minimise the processing of sensitive data, for example when taking photos of brothels or churches.<sup>76</sup> The Federal Supreme Court of Switzerland ruled that Google has to anonymise people completely in photos of places such as schools, hospitals or prisons, even if Google has to do so manually.<sup>77</sup>

### 5. Conclusion

The following conclusions can be drawn. The processing of sensitive data for Street View is difficult to reconcile with the Directive, because Google doesn't obtain explicit consent of the people it photographs. Data protection authorities tend to accept that Google can rely on the balancing provision for the processing of non-sensitive data for Street View. But many authorities have demanded extra safeguards from Google before it can rely on the balancing provision.

## IV. Transparency Principle and the Rights of the Data Subject

### 1. The Transparency Principle in the Data Protection Directive

Data processing should take place in a transparent manner. This is one of the key principles of data protection regulation.<sup>78</sup> In order for data processing to be fair the data subject has to be aware data concerning him are being processed. The controller should at least provide information regarding his identity and the purposes of the processing. More information should be given when this is necessary to guarantee fair processing, having regard to the specific circumstances in which the data are collected. Some examples of this type of information are the recipients or categories of recipients of the data, the existence of the right of access and the right to rectify data. The information needs to be clear and precise. The Directive provides for an exemption from the information duty where the provision of information "proves impossible or would involve a disproportionate effort". In such cases Member States must provide appropriate safeguards.<sup>79</sup>

### 2. The Transparency Principle and Street View

Does Google Street View comply with the transparency principle? In an opinion regarding video surveillance, the Working Party said: "Data subjects should be

informed in line with Article 10 and 11 of the Directive. They should be aware of the fact that video surveillance is in operation (...); they should be informed in a detailed manner as to the places monitored."<sup>80</sup> Street View does not concern continuous filming, so it is not fully comparable with video surveillance.<sup>81</sup> Still, it is questionable whether the data subject is adequately informed about data processing. Many people do not know that they are on Street View. Google does publish on a website where it will be filming in a certain period.

This information shows a sample of the areas in which our cars are currently operating. We try to make sure the information is accurate and kept up to date, but because of factors outside our control (weather, road closures, etc), it is always possible that our cars may not be operating, or be operating in areas that are not listed. In these circumstances, we'll try to update the list as soon as we can. Please also be aware that where the list specifies a particular city, this may include smaller cities and towns that are within driving distance.<sup>82</sup>

The user may click on a country and see in which areas Google is planning to photo in the near future. However, a possibility for individuals to check Google Street View to see whether they might be or have been filmed may not suffice to comply with the Directive's transparency requirements. Moreover, the data specified on the website is not very specific. It may be possible to provide more information without a disproportionate effort. For instance, authorities from the Czech Republic, Greece and Switzerland require Google to inform the public about filming through the press as well.<sup>83</sup>

### 3. The Rights of the Data Subject in the Data Protection Directive

The data subject has several rights that a data controller must respect. Some of these rights are meant to ensure transparency. First, the data subject has the right to obtain confirmation from the controller as to whether or not his data are being processed; information regarding the purposes of the processing; the categories of data concerned; and the recipients or categories of recipients to whom the data are disclosed. Second, the data subject has the right to obtain from the controller as appropriate the rectification, erasure or blocking of data the processing of which does not comply with the provisions of the Directive, in particular because of the incomplete or inaccurate nature of the data.<sup>84</sup> Third, a data subject has a general right to object on compelling legitimate grounds to the processing of his data. Where there is a

75 Austrian Data Protection Commission, Recent Developments regarding Google Street View, [www.dsk.gv.at/site/6733/default.aspx](http://www.dsk.gv.at/site/6733/default.aspx).

76 Greek Data Protection Authority, Decision 91/2009, 29 December 2009, [www.dpa.gr/pls/portal/docs/page/apdpx/english\\_index/decision/decision%2091-2009.pdf](http://www.dpa.gr/pls/portal/docs/page/apdpx/english_index/decision/decision%2091-2009.pdf). See also: Greek Data Protection Authority Press Release, Three-dimensional navigation of the streets of Greek cities (Google Street View, kapou.gr), [www.dpa.gr/pls/portal/url/item/6d3e61806dff589fe040a8c07c241df4](http://www.dpa.gr/pls/portal/url/item/6d3e61806dff589fe040a8c07c241df4).

77 Swiss Federal Supreme Court, *Urt. v. 31.5.2012 – 1C\_230/2011*, [http://jumpcgi.bger.ch/cgi-bin/jumpCGI?id=31.05.2012\\_1C\\_230/2011](http://jumpcgi.bger.ch/cgi-bin/jumpCGI?id=31.05.2012_1C_230/2011).

78 Gutwirth S & De Hert P (2006) Privacy, data protection and law enforcement. Opacity of the individual and transparency of power, in Claes E, Duff A & Gutwirth S (eds), *Privacy and the criminal law*. Intersentia, Antwerp, pp. 61–104.

79 Article 11 of the Data Protection Directive.

80 Article 29 Working Party, Opinion 4/2004 on the processing of personal data by means of video surveillance (WP89), 11 February 2004, p. 22.

81 See also: Information Commissioner's Office (2009) Letter regarding Privacy International's complaint about Google Street View, 30 March 2009, [www.ico.gov.uk/uploads/documents/library/data\\_protection/notes/response\\_to\\_pi\\_complaint\\_v1.pdf](http://www.ico.gov.uk/uploads/documents/library/data_protection/notes/response_to_pi_complaint_v1.pdf).

82 Google Maps, Where is Street View available?, [www.google.com/intl/en\\_us/help/maps/streetview/where-is-street-view.html](http://www.google.com/intl/en_us/help/maps/streetview/where-is-street-view.html).

83 Czech Office for Personal Data Protection, Annual Report 2010, p. 29–30, and Press Release 23 May 2011, [www.uoou.cz/files/rep\\_2010.pdf](http://www.uoou.cz/files/rep_2010.pdf) and [www.uoou.cz/uoou.aspx?menu=125&submenu=614&loc=792&lang=en](http://www.uoou.cz/uoou.aspx?menu=125&submenu=614&loc=792&lang=en), Greek Data Protection Authority, Decision 91/2009, 29 December 2009, [www.dpa.gr/pls/portal/docs/page/apdpx/english\\_index/decisions/decision%2091-2009.pdf](http://www.dpa.gr/pls/portal/docs/page/apdpx/english_index/decisions/decision%2091-2009.pdf), Swiss Federal Supreme Court, *Urt. v. 31.5.2012 – 1C\_230/2011*, [http://jumpcgi.bger.ch/cgi-bin/jumpCGI?id=31.05.2012\\_1C\\_230/2011](http://jumpcgi.bger.ch/cgi-bin/jumpCGI?id=31.05.2012_1C_230/2011).

84 Article 12(a) and 12(b) of the Data Protection Directive.



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justified objection, the processing may no longer involve those data.<sup>85</sup>

### 4. The Rights of the Data Subject and Street View

Does Google comply with the requirements regarding the rights of the data subject? People have a right to object to data processing on compelling legitimate grounds. Google offers this possibility without asking people to explain the compelling grounds for their objections.<sup>86</sup>

If our detectors missed something, you can easily let us know. We provide easily accessible tools allowing users to request further blurring of any image that features the user, their family, their car or their home. In addition to the automatic blurring of faces and license plates, we will blur the entire car, house, or person when a user makes this request for additional blurring. Users can also request the removal of images that feature inappropriate content (for example: nudity or violence).<sup>87</sup>

People can also request Google to "permanently blur" a photo in its database, also when the published version is blurred already.<sup>88</sup> In Germany, people can request their house to be blurred before the photo is published. About 250.000 people households from the 20 cities on Street View made such a request.<sup>89</sup>

While Google offers people the right to object, many people might not know whether and where their image is contained in Street View. It might be near their house or their working place, but they might also be filmed during their holiday, a weekend out or a visit to a distant family member. This diminishes the value of the possibility to erase images from Street View.

### 5. Conclusion

To conclude, Google complies reasonably well with the requirements regarding the rights of the data subject. But it could do better with regards to transparency. Several national authorities have required Google to take

extra measures to inform the public where it would be filming, for instance by notification in the press.

### V. Concluding Remarks

This article described how the European Data Protection Directive applies to Google Street View. The description was illustrated with decisions of national data protection authorities. The article focused on three questions. First, which data processed for Street View are personal data? Google processes personal data when it makes photos that include people. Google keeps these photos for up to one year. Google makes an effort to blur faces and licence plates and allows people to request further erasure of data such as their house. But this is insufficient to avoid the applicability of the Directive to the published photos, as people may still be identifiable. As Google is the controller of the personal data, it has to comply with the Directive. This article focused on two requirements of the Directive: the legitimate ground for processing and the transparency obligations in relation to the right of the data subjects to information.

There are only two possible grounds to legitimise data processing for Street View: the unambiguous consent of the data subject and the balancing provision. The Directive prohibits processing of sensitive data unless certain requirements are satisfied. In Google's case this prohibition could only be lifted if the data subject has given his explicit consent. Though Google offers people the possibility to opt out of Street View, this is not sufficient for unambiguous or explicit consent. This leaves the balancing provision as the only possible legitimate ground for data processing. This provision only applies to non-sensitive data. It allows data processing when it is necessary for the legitimate interests of the controller, unless the fundamental rights of the data subjects should prevail. The interests of Google and the data subjects must be balanced. Many authorities have demanded extra safeguards from Google before it could rely on the balancing provision. The processing of sensitive data for Street View is difficult to reconcile with the Directive.

Finally, the article assessed whether Google lives up to its duties under the transparency principle and its duty to respect the rights of the data subject. In order for data processing to be fair the data subject has to be aware that data concerning him are being processed. The controller must provide clear, precise and comprehensive information. Furthermore, the data subject has several rights, such as the right to consult data, to request corrections and to object to processing in certain circumstances. Google complies reasonably well with the requirements regarding the rights of the data subject. But it could do a better job informing people they might be photographed. Several national authorities have required Google to take extra measures to inform the public, for instance by notification in the press. In conclusion, several aspects of Google's Street View service are difficult to reconcile with the Directive's requirements.

<sup>85</sup> Article 14(a) of the Data Protection Directive. The Directive requires Member States to grant this right at least when data are processed by a public authority or in the public interest, or when the processing is based on the balancing provision.

<sup>86</sup> In Austria for instance, the Data Protection Commission explicitly required Google to do so (Recent Developments regarding Google Street View, [www.dsk.gv.at/site/6733/default.aspx](http://www.dsk.gv.at/site/6733/default.aspx)).

<sup>87</sup> Google Maps Privacy. [http://maps.google.com/intl/en\\_us/help/maps/streetview/privacy.html](http://maps.google.com/intl/en_us/help/maps/streetview/privacy.html).

<sup>88</sup> Fleischer P, Navigating Europe's Streets, Google European Public Policy Blog, 7 October 2009, <http://googlepolicyeurope.blogspot.com/2009/10/navigating-europes-streets.html>.

<sup>89</sup> In 2010, 244,237 out of 8,458,084 households requested to have their house blurred before the photos were published (Türk A, How many German households have opted-out of Street View? Google European Public Policy Blog, 21 October 2010, <http://googlepolicyeurope.blogspot.com/2010/10/how-many-german-households-have-opted.html>).