Dear clients and business partners,

The “Right to be Forgotten” ruling (C-131/12) by the European Court of Justice (ECJ) reflects an emerging trend to ensure that personal data on the Internet is not perpetually available in search results. The consequences for (Swiss) companies bear particular testimony to the charged nature of the ruling. One question arises in this connection is which companies will be required to delete personal data under what concrete conditions. A further compelling question is whether companies themselves can also invoke the “right to be forgotten”. The analysis presented in the current Legal News shows that the ruling could by all means have further-reaching ramifications in Switzerland than in the EU.

Thus, it seems advisable for companies to address the ruling from two perspectives so that they can take any necessary (protective) measures.

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A “right to be forgotten” for companies?

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1 Background

1.1 An infringement of fundamental rights

The Internet and its powerful search engines give information ubiquity. Personal data is pooled together into a list of results fully accessible to anybody, anywhere. Such provided results could lead to a potential breach of data privacy and personal rights. In each individual case, these rights have to be weighed against possible opposing fundamental rights, such as the right of expression of opinion and freedom of information.

1.2 Ruling of the ECJ

On 13 May 2014, the European Court of Justice unexpectedly issued a ruling binding on all member states (C-131/12) where Google as search engine operator has been qualified as controller of the data presented in search results and, as such, about its responsibility for any processing performed by it on data published on the Internet by third parties.

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In 2010, a Spanish citizen had filed a complaint requesting that Google Spain SL, Google Inc. and others be instructed to delete from their search results all personal data relating to an announcement for real-estate auction organized following attachment proceedings for the recovery of social security debts dating from 1998. The ECJ upheld the complaint and fundamentally ruled that search engine operators will be required to remove information on individuals from their search results, in case the personal rights of the affected person overweight the public interest in such information. They will be requested to erase links and information referring to personal data.

1.3 EU Directive

Art. 12b and Art. 14 para. 1a of EU Directive 95/46/EC state the legal basis of the ruling. A search engine operator is deemed to be collecting and processing data within the meaning of the above data privacy directive if it automatically, continually and systematically searches for data published on the internet, selects, saves, organises and stores this data, as well as forwards and enables the availability of data to users.

2. Legal position in Switzerland

The ECJ ruling does not apply directly to Switzerland as a non-EU member. Nonetheless, Swiss data privacy regulations are largely in line with the pertinent EU legislation. Art. 15 and Art. 12 para. 1a of the Data Protection Act (DPA) are the relevant applicable provisions in Switzerland. These articles refer to the principles of processing Art. 4, 5 para. 1 and 7 para. 1 DPA. According to Art. 15 para. 1 DPA, actions relating to the protection of privacy are governed by Art. 28, 28a and 28l of the Swiss Civil Code (CC). Such actions may be brought against all those causing the infringement – and hence against an internet service operator (Art. 28 CC).
It seems reasonable to assume that rulings handed down in Switzerland will also be along the lines of EU legal practice. A case in point is the Swiss Federal Court ruling SA-792/2011 of 14 January 2013 affirming a media company’s liability for readers’ comments on its online portal. Following the ECJ ruling, Google set up a corresponding online form on its “.ch” domain.

3. Evaluation
Under the ECJ ruling, requests for the deletion of a specific person’s data can be submitted directly to the internet service operator. The latter will then examine whether the requesting person has a right that the information in question should no longer be linked to his name by a list of results. Such a procedure is not above criticism. It raises the question as to whether a search engine operator is in a position to independently weigh up the various interests involved. Furthermore, a submission for the deletion of personal data only partly complies with the “right to be forgotten”. Claimants are required to submit requests to each individual search engine operator, which is likely to produce different outcomes and therefore the data in question remaining accessible on at least one other search engine.

It is also debatable whether the relevant data needs to be erased from search results in EU domains only or in all domains in which the search engine operates. The current practice emerging among search engine operators of only removing information from EU domains, assuming it can be left on the “.com” domain could give rise to further discussion.

4. Implications for Swiss companies
4.1 Need for action
It is undisputed that all search engine operators with subsidiaries in the EU are directly affected by the ruling, regardless of whether the respective data processing is actually performed at the location of a subsidiary. The ruling affects not only usual search engine operators, but all service providers offering search functions and lists of results. It is a logical step to arrive at this broader interpretation classifying as data controller all companies that aggregate and provide public information on individuals.

For this reason and given the direction that the relevant Swiss court rulings are taking, Swiss companies that aggregate and provide information are advised to clarify the legal position and take any steps required under the ECJ ruling.

Ultimately, the ruling provides individuals a direct right to demand the data-processing companies to delete personal data on the internet or at least in search results.

4.2 Privacy options for legal entities?
In contrast with the EU Directive, Swiss data privacy legislation also protects the personality and fundamental rights of companies – i.e. affected legal persons/entities – in relation to which data is being processed. From this point of view, in Switzerland the ECJ ruling could be extended to accord companies (and not only natural persons) the right to demand the erasure of data relating to them. The actual chances of a company successfully enforcing such a demand must be assessed from a legal perspective in each individual case.

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