

## The Rights of Data Subjects under the GDPR and Their Effectiveness In Protecting Consumer Rights to Privacy

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**Abstract:** The EU has recently passed a new law, the General Data Protection Regulation (GDPR),<sup>1</sup> which is considered to strengthen existing data protection legislation in the European Union. The choice of Regulation itself as a legal instrument makes the GDPR stronger than Directive as it guarantees a uniform and consistent implementation of rules thereby, consolidating the EU digital single market. The GDPR has introduced several novel rights for data subjects, which are designed to increase consumers' control over their personal data in the digital market: the right to data portability,<sup>2</sup> the right to withdraw consent<sup>3</sup> and the right to be forgotten.<sup>4</sup> This article thoroughly discusses each of these rights to evaluate their effectiveness in protecting consumer rights to privacy.

**Key words:** Data subjects, General Data Protection Regulation, consumer rights, rights to privacy, digital market, rights to data portability, rights to withdraw consent, rights to be forgotten, personal data

The right to data portability can be divided into two principles. The first principle entitles individuals to receive a copy of their personal information from data controllers.<sup>5</sup> Accordingly, this principle allows them to investigate whether their personal data are legally processed by the data controller or not. The second principle provides users with the right to ask the controller to transfer their personal data to another controller where it is technically possible.<sup>6</sup> For instance, Facebook users can transmit their data to Google without any barrier. Thus, these two principles can considerably contribute to strengthening individuals' control over their data. However, there are certain limitations of the right to data portability. In particular, it only applies to personal information that has been given to the data controller.<sup>7</sup> But it does not mean that the portable data are limited to the actual data provided by the users for subscribing such as name, nationality, age and e-mail address. Rather, it also includes personal data collected by tracking a user's activities such as search practices, browsing history and location data.<sup>8</sup> Nevertheless, where the controller creates particular data depending on the information provided by the users, such data including a user profile cannot be made portable.<sup>9</sup>

Another novel right introduced by the GDPR is the right to withdraw consent, which entitles the data subjects to revoke their consent at any time.<sup>10</sup> Before giving consent, the data subjects must be informed about their right to withdraw consent by the controllers, and it should be ensured that the data subjects can

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<sup>1</sup> The European Parliament and the Council Regulation (EU) 2016/679 of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) [2016] OJ L 119/1

<sup>2</sup> The GDPR (n4) Art.7 (3)

<sup>3</sup> Ibid Art.20

<sup>4</sup> Ibid Art.17

<sup>5</sup> Ibid Art. 20 (1)

<sup>6</sup> Ibid (2)

<sup>7</sup> 'Right to Data Portability' (*Information Commissioner's Office*) <<https://ico.org.uk/for-organisations/guide-to-data-protection/guide-to-the-general-data-protection-gdpr/individual-rights/right-to-data-portability/>> accessed 20 July 2020

<sup>8</sup> Ibid

<sup>9</sup> Ibid

<sup>10</sup> The GDPR (n4) Art.7 (3)

revoke their consent as easy as they have provided them.<sup>11</sup> However, the scope of its application is limited to the future processing activities of the controller meaning that it does not affect to the legality of the past processes made on the basis of this data before the revocation.<sup>12</sup> Article 7 does not clarify whether the revocation of consent requires the removal of the information as well or not.

The right to erasure originally comes from the DPD (as part of the right to access)<sup>13</sup> and *Google Spain* case, which allows the data subjects to gain from the controller the erasure of their personal information on the internet.<sup>14</sup> Since exercising this right involves conflict of different interests such as the data subject's right to personal data protection and internet user's right to freedom of expression, the ruling made in *Google Spain* case has caused a lot of controversies. In *Google Spain*, the ECJ held that the data subjects have a right to request data controllers including search engines to delete links to personal data concerning them from its list of results.<sup>15</sup> In order to strike a fair balance between conflicting interests, the ECJ took into account the type of information at issue, its sensitivity for the data subject's privacy and his role in public life.<sup>16</sup>

The GDPR has made a valuable contribution to the development of the right to erasure by making it an independent right under Article 17, by providing specific legitimate bases for its exercise<sup>17</sup> as well as exemptions for balancing conflict of interests.<sup>18</sup> Moreover, the right under Article 17 includes both the right to erasure and the right to be forgotten. Although these two terms can be used interchangeably, they are not identical at all. The right to erasure requires a data controller only to erase data, while the right to be forgotten also refers to the need for information to be removed "from all possible sources" in which it is available.<sup>19</sup> Article 17 (2) provides that where, the controller has shared particular personal information with third parties and this information is requested to be deleted, the controller must take all the reasonable actions such as technical measures and inform other controllers about the data subject's request of erasure.<sup>20</sup> This statement is also approved by the interpretation of the ECJ in *Google LLC v. CNIL* case, where French Data Protection Authority requested a preliminary ruling concerning the territorial scope of delisting request.<sup>21</sup> The ECJ held that under the current EU law, de-listing requests are required to be accomplished by a search engine operator only on EU versions of search engines but it also asserted that worldwide de-listing is not also prohibited.<sup>22</sup> Consequently, the ECJ found that if national authorities of Member States adopt an order requiring worldwide de-listing it would comply with the EU laws as far as individual's right to privacy is sufficiently balanced against other fundamental rights.<sup>23</sup>

The GDPR includes certain provisions aimed at regulating the protection of EU citizens' personal data outside the EU. The GDPR applies to the use of personal information 'in the context of the activities of an establishment of a controller or a processor in the EU regardless of whether the processing takes place in the EU or not'.<sup>24</sup> It means that if a company such as Google is based in the US and the processing of personal

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<sup>11</sup> *ibid*

<sup>12</sup> *ibid*

<sup>13</sup> The European Parliament and the Council Directive 95/46/EC 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 [1995] OJ L 281/31 Art.12

<sup>14</sup> Case C-131/12 *Google Spain SL, Google Inc. v Agencia Espanola de Datos (AEPD), Mario Costeja Gonzalez* [2014] ECLI-317

<sup>15</sup> *Ibid* para. 88

<sup>16</sup> *Ibid* para.81

<sup>17</sup> The GDPR (n 4) Art.17 (1)

<sup>18</sup> *Ibid* Art.17 (3)

<sup>19</sup> Eugenia Politou, EfthimiosAlepis and ConstantinosPatsakis 'Forgetting personal data and revoking consent under the GDPR: Challenges and Proposed Solutions' *Journal of Cybersecurity* (2018) 1 (20)

<sup>20</sup> The GDPR (n4) Art.17 (2)

<sup>21</sup> Case C-507/17 *Google v. CNIL* [2019] case in Harlan Grant Cohen 'International Decisions' *The American Journal of International Law* (2020) 114 (2)

<sup>22</sup> *ibid*

<sup>23</sup> *ibid*

<sup>24</sup> The GDPR (n4) Art. 3 (1)

data of the EU citizens takes place in the US through its establishment in the EU, the GDPR becomes applicable. Even more stringent principle is embodied in the Article 3 (2), which provides that even without an establishment in the EU, data controllers and processors can be subject to the GDPR if their processing practices concern the personal data of the EU citizens and are related to the supply of products and services to them,<sup>25</sup> or associated with the tracking of their behavior as long as behavior happens in the EU.<sup>26</sup> Online shopping businesses can be an ideal example of the service providers, which are subject to GDPR when they merely offer their services to customers from the Union and use their personal data.

Furthermore, one chapter of the GDPR is devoted to the regulations governing international transfers of personal data.<sup>27</sup> Accordingly, cross-border flows of data are comprehensively regulated by the GDPR. There are several principles designed to ensure the equal data protection in third parties. Two well-known principles are adequacy decision made by the EU Commission<sup>28</sup> and standard data protection clauses.<sup>29</sup> Under the adequacy decision principle, transfers of personal data can be carried out to the third country which is considered by the EU Commission that the country at issues guarantees a sufficient level of protection. As regards standard data protection clauses, a contract template is created by the EDPB, which must be employed by data controllers when they transfer data from the Union to the third country which do not benefit from adequacy decision.

Overall, the GDPR addresses many practical issues relating to the data protection that consumers frequently encounter in the digital market. As widely discussed above, stringent requirements for obtaining a valid consent have started to improve the quality of consent to personal data processing. For example, companies can no longer presume that pre-ticked boxes, silence and inactivity amount to a valid consent. However, one drawback of the consent principle of the GDPR is that although it is stricter than its predecessor Directive regarding “freely given” requirement of consent, it does not categorically forbid the collection of consent based on take-it-or-leave-it conditions. Moreover, effective principles concerning “specific” consent are included in legally non-binding guidelines or recitals which can undermine effective rules of the GDPR.

As regards the rights of data subjects, the right to data portability, the right to withdraw consent and the right to be forgotten enable data controllers to regain control over their personal data. However, the effectiveness of the right to be forgotten regarding worldwide de-referencing requests is yet to be seen. When it comes to the international transfers of personal data, it must be noted that the GDPR allows consumers to control their data even in third countries.

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<sup>25</sup> Ibid Art. 3 (2) (a)

<sup>26</sup> Ibid Art. 3 (2) (b)

<sup>27</sup> Ibid Chapter V

<sup>28</sup> Ibid Art.45

<sup>29</sup> Ibid Art.46 (2)(c)

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