EU, Google In Power Struggle Over 'Right To Be Forgotten'

By Allison Grande

Law360, New York (July 30, 2014, 7:18 PM ET) -- European privacy regulators are already criticizing Google Inc. and other search engines for their implementation of this spring's controversial decision giving consumers the "right to be forgotten" on the sites, a sign the two sides are headed for a potentially yearslong battle over how to balance users' privacy with the public's right to know certain information.

While data protection authorities had previously praised Google for quickly launching a form to enable users to request the deletion of search results, recent questions posed and concerns raised by regulators demonstrated the difficulty that the two sides are likely to have with agreeing on how requests should be handled, according to attorneys.

At a meeting in Brussels on Thursday, a coalition of the bloc's regulators known as the Article 29 Working Party peppered Google, Microsoft Corp. and Yahoo Inc. with more than two dozen questions about their implementation of the European Court of Justice's surprising May ruling requiring search engines to honor users' requests to scrub links to objectionable content.

Since the high court's ruling, the search engines have taken steps to comply, such as making public a form that users can fill out to request that results that are "inadequate, irrelevant or no longer relevant, or excessive in relation to the purposes for which they were processed" be taken down.

Google, which was at the center of the deletion dispute brought by a Spanish citizen that promoted the high court’s May ruling, told the working party during the meeting that it has so far received 91,000 deletion requests covering some 328,000 links, and that it has removed a little more than 50 percent of the links in question, said Craig A. Newman, managing partner of Richards Kibbe & Orbe LLP.

"This is the first indication of just how broadly Google might be interpreting the EU high court's mandate and the scale of the so-called right to be forgotten," Newman said.

The regulators' feedback to the compliance efforts so far demonstrates that the already tricky task of implementing the ruling will be further complicated by fundamental disagreements over the best way to ensure that users' data deletion requests are being properly honored, attorneys say.

"The regulators have already expressed some unhappiness about how the right to be forgotten is being implemented currently," said Phil Lee, a partner in Field Fisher Waterhouse LLP's privacy and information law group. "The problem with the judgment is that in trying to remove some of the powerful role that search engines play on the Internet, it's actually elevated the power of search engines by making them judge and jury of data deletion requests."
In inviting the search engines to Thursday's meeting, the working party said that the feedback they received from the companies would help them with their efforts to finalize guidelines by the fall on how to handle complaints from users who contest refusals by search engines to remove links to personal content the users allege is embarrassing or inappropriate.

"The forms are not the problem, the discretion in assessing the merits of the take-down requests and ensuring consistency of approach between search engines are," said Karen Bromberg, the head of Cohen & Gresser LLP's intellectual property and technology group. "Therefore, implementation of the ruling is already proving to be unwieldy."

Besides providing insight into the company's approach, Google's data deletion figures also lend weight to the regulators' desire to ensure that search engines are implementing the high court's ruling in a way that they perceive to be reasonable, attorneys say.

"If search engines continue to get this volume of requests and a significant number of users are not happy with the results, it will be the authorities around the EU that are already fairly short on resources that will get these complicated cases," Lee said.

Given the importance of ensuring that deletion requests are resolved satisfactorily at the outset, the Article 29 Working Party raised several issues about potentially troubling applications of the ruling in the 26 questions they asked the search engines to answer both at the meeting and in writing by the end of July.

One of the regulators' primary concerns centered on the legal basis that search engines have for notifying website publishers that a link to their content is going to be delisted from search results. The criticism was at least partially inspired by the uproar that ensued after the Guardian and the British Broadcasting Corp. reported that they had been told by Google that several of their articles would be hidden from certain Google search results in the EU as a result of deletion requests that Google had received.

"The problem with notifying the publisher is that you end up with the Streisand effect of growing attention to the fact that the data subject has requested the erasure of the hyperlink, which is contrary to the purpose of the right to be forgotten," said McGuireWoods LLP partner Paul Van den Bulck, who is based in Brussels.

Another alarm raised by the regulators was over whether search engines are intending to remove the results only from EU domains or from all domains on a global basis. To date, the results that Google has removed from the EU version of its search engine have been available on versions of the search engine that do not have an EU footprint.

"If EU regulators push for a more expansive interpretation of the ruling to cover non-EU search results — which was not expressed in the EU high court's opinion — that opens a Pandora's box in terms of broader censorship of the Web," Newman said.

The regulators also expressed particular interest in what safeguards the search engines have put in place to safeguard data that the search engines wouldn't have previously collected but is now required to verify requesters' identity, Van den Bulck noted.

The guidelines on the topic that the working party is expected to release in September, which won't be binding but will cause search engines to give serious thought to how they are fielding and responding to deletion requests, are expected to further fuel the dispute between the two sides, attorneys say.

"Because they represent the views of all the bloc's data protection authorities, it would be better for search engines or any other actor to respect the guidelines, but they can also be challenged in court if a company doesn't agree with the decision of a national data protection authority that rules on a data subject's challenge," Van den Bulck said.
Lee likened the brewing dispute between search engines and regulators to the difficulties with implementing new rules in 2011 that required website operators that target the EU market to obtain active and informed consent from users before placing a cookie or similar technologies for storing information on their websites.

"In my mind, I think the right to be forgotten is this year's cookie consent," Lee said. "It's an example of a law that is well-intentioned but has some pretty challenging consequences."

At the outset of implementing the cookies directive, regulators and companies sparred over how prominent the notice must be and how consent should be obtained. But more than three years later, a balance has been achieved that allows companies to continue to serve cookies while providing consumers with more information about their existence, an outcome that may also be in the cards for the right to be forgotten debate, according to attorneys.

"There will be a dialogue and some type of compromise that will allow users to exercise their right but will also take into consideration that, given the nature of the Internet, search results can never really be forgotten," Lee said.

--Editing by Katherine Rautenberg and Philip Shea.