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The enforcement of right to be forgotten at the EU level by using search engines

Master Thesis

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I hereby declare that I am the sole author
of this Master Thesis and it has not been
presented to any other university for
examination.

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Introduction

In this life, it is our right to forget and to be forgotten by others, as it is given to us by virtue. To that extent, the life seems so rosy, but what about the concept of forgetting when it comes to the usage of the Internet or the so-called the electronic world? Is it still carrying the same meaning and values? It is actually the topic of this thesis, the right to be forgotten by the electronic usage, and to be more specific, by the use of search engines. Since the concept is recently controversial and since by one click a very personal and big amount of information is available to the public, this makes us to know very small details about others and remember us every day about matters have been happened in the past.

Therefore, the right to be forgotten is a remedy of online data protection.¹ Me as human being has the right to handle my information and delete the ones I feel that they are not related to me anymore. In fact, this is what has been resulted of the judgment *C-131/12 in the CJEU* in 2014.² The decision was a shock to many, since Google was expected to win the case. However, court decided that Google has to act under the EU data protection. This judgment opened the window for new responsibilities to search engines,³ such as Yahoo, Google, and Bing. Now, search engines have a greater role to play with regard to the right to be forgotten. We may be able to call them the controller of the e-future as they handle very big amount of our personal information because they are not anymore neutral software systems that facilitate us to reach for the online database.

Thus, right to be forgotten drew a new formula in the online data protection law. The right to handle information and delete them may seem easy in the theory. However, when it comes to the practice, this right is very hard in the application as well as in the definition. The reason behind this refers to the fact that there is no international jurisdiction for the application of this right which must follow the international nature of the search engines, because search engines

¹ European Union Committee 2014. London, EU Data Protection law: a 'right to be forgotten'? The House of Lords 2014, p 5.

² Frantziou, E. Further Developments in the Right to be Forgotten: The European Court of Justice's Judgment in Case C-131/12, Google Spain, SL, Google Inc v Agencia Espanola de Proteccion de Datos. Human Rights Law Review 2014, p 761.

³ Brock,G. The Right to be Forgotten: Privacy and the Media in the Digital Age. London, University of Oxford 2016, p 1.

have no boundaries to their work. That is why, this thesis is focusing at the location of the European Union (EU) in order to follow the origin of the right to be forgotten and investigate to which extent the right is going to be applied beyond the EU, specifically in the home countries of the search engines.

Historically EU is highly concerned about the privacy rights. In this context, in situations in which there may be a conflict between privacy and freedom of expression, the EU takes the privacy very seriously.⁴ This drew a special nature for this union among other nations. The problem is not in the special feature of Europe, as a union and its supremacy on its member states, which is a role-played also to formulate this right and deeply connected issue to this thesis. The problem itself goes beyond Europe. In fact, the problematic issue is on how EU is able to protect its citizen's privacy rights in the meaning of the right to be forgotten in that complicated electronic society. This complicated society of search engines has no actual borders to what is under the sovereignty of EU.

In this regard, this thesis is important, as a legal approach for investigating the right to be forgotten in the usage of search engines. The importance of this thesis is derived from the importance of the online data protection law itself and our necessity to protect the personal data in this electronic open world. The purpose of this thesis is an attempt to better understanding for the privacy rights through modern eyes that see the world in a technical view. As far as we depend on search engines in order to access information, this may make us smarter, but on the other hand, the privacy rights may be breached. The unique feature of this thesis is that author will focus on the legal mechanisms of the protection of the right to be forgotten in the search engines, as one mean of exercising our privacy rights. This is important in order to evaluate the level of the enforcement for the right to be forgotten whether the EU is able to guarantee such a huge duty in the future or not. Thus, this thesis will answer many important questions, as a method for analyzing this thesis problem.

For example, the right to be forgotten as a concept may seem matching with the privacy rights but what about its conflicting with the freedom of expression and access to information? This question and more are going to be analyzed through this thesis. The main goal is achieving the hypothesis, which is formulated as follows: The EU privacy regulations do not guarantee an absolute protection for the right to be forgotten. The thesis is supported by research questions:

⁴ Hustinx P. EU Data Protection Law, The Review of Directive 95/46/EC and the Proposed General Data Protection Regulation. Europa 2014. <http://www.statewatch.org/news/2014/sep/eu-2014-09-edps-data-protection-article.pdf> (23. 11. 2016), p 2.

Why the right to be forgotten cannot be absolute? How the search engines can balance between the different liabilities? Should the EU loosen up its data protection system?

For that purpose, the question in the EU started to arise that whether the right to be forgotten is also applicable in the search engines. For instance, if a natural person has an information related to his personality, which may give a bad reputation about him on the market, where this information is occurred in a search engine, could the person request the search engine to remove them? If this is possible, what type of personal information can be removed? And who decide whether this information is sensitive personal or not? Furthermore, is one able to complain directly to the company of the search engine or he has to make a claim in court? And to which court? Finally, does the national court have sovereignty to remove information from its original website. These questions and more need an answer, if the EU will move into new paradigm, which is the using of the right to be forgotten in the online data protection, and specifically in the search engines.

The best suitable methodology approaches used in this thesis are the descriptive, qualitative and analytical approaches. The simultaneous using of these three approaches is very important for achieving the academic research. In the descriptive approach, the historic part of the right to be forgotten will be described, such as the origin of the right to be forgotten, as a way to find a comprehensive definition suits the rapid development in the online life, which is very useful for later analysis and deeply connected to this right application in the search engines. While in the analytical and qualitative approaches, the observation and analysis are the most important to follow the shift of the EU paradigm in dealing with the recent challenges that are resulted from the adoption of the right to be forgotten by making the search engines responsible for it. As the topic is new, the operation of research is not an easy job. It needs a modern mind of thinking that is matching with the hard norms of law.

The thesis has been divided into four parts, which includes introductory part where author is explained a little bit of historical background of the right to be forgotten. Here, the formulation and creation of this right is followed step by step, which is necessary to understand the nature of this right and give a comprehensive general view of what is the right to be forgotten.

Next, the second chapter goes through another part of the issue, which is the role of search engines. Here the author would stress that the usage of the right to be forgotten in the search engines is the most interesting part. In the subchapters, all challenges of the search engines such as not having boundaries and their responsibility to provide information for public are deeply ana-

lyzed, as a way to find the balance and argumentative discussion that are requested in the last chapter.

In third part of the thesis, the conduct of the creator of the right to be forgotten, which is the EU, is observed. This is because of the urgent need to understand the character of EU in order to know whether EU was proportional by making the adoption of the right to be forgotten and does EU really know the consequences of the adoption of this right? What about its relation to the principle of net neutrality and the double imposing on the search engines?

Finally, and before turning into the conclusion, the last chapter is the deepest section of this thesis. As the topic is understood correctly, the author pointed out the right recommendations and balances between right to be forgotten and other conflicted issues, which are reasons of hampering the absolute protection for the right to be forgotten. For example, find a balance between the right to be forgotten and freedom of expression through systematic and legal solutions.

1. The notion of the right to be forgotten

As the right to be forgotten is a new and complicated concept, it is not easy at all to find a theoretical ideal definition for it.⁵ This chapter seeks to identify the notion of the right to be forgotten, which is very important as a first step towards the next attempts in the analytical sections. The chapter will follow the origin of the right to be forgotten as well as the evaluation of this right. Here, the author is focused on the origin of this right in the EU at the first level. For instance, through the *Google Spain case*,⁶ and its impact among different nations, because all these aspects shall give at the end, a comprehensive general view for what is the right to be forgotten.⁷

Before turning to the origin of the right to be forgotten, it must be noticed that this right has no long history, specifically in the world of electronics. However, this right is rooted by old ancients, when one speaks about the real life. Even though by using different terms, the value of this right is the same. Therefore, there is a real necessity to understand the term of forgotten from different aspects, by different points of view, throughout different national laws, and differentiate the interchangeable terms.⁸

Back into the online world, as people need a special protection for handling the personal data on the internet, this led to introduce and adopt new international policies, which are important for improving a higher protection of the personal data. The reason beyond this changeable paradigm from the offline world into the online one in the adoption of the right to be forgotten plus to other recent rights as well, is following the rapid technological changes in recent years. This rapid technical changes requested a higher protection for the e-society, which is full of the personal information that are ranking between the most sensitive personal data and less sensitive personal issues.

⁵ Loana, S. Defining the right to be forgotten. A Comprehensive Analysis between the US and the EU. Central European University 2015, p 5.

⁶ CJEU 13.05.2014, C-131/12, *Google Spain and Google*.

⁷ Trstenjak, V., Weingerl, P. The Influence of Human Rights and Basic Rights in Private Law. Switzerland, Springer International Publishing 2016, p 54.

⁸ Ibid, p 5.

1.1. The origin of the right to be forgotten

A short overview in the origin of the right to be forgotten is given in this subchapter, because the action of remembering can be more painful in the digital life rather than the offline one. Andrew Feldmar expressed how painful is to lose the control over his personal information. He is arrested for taking drugs in 2006 as a result of his illegal addiction back to 1960. He is arrested for an action committed 30 years ago, even though he has not taken drugs since 1974. He thought his irrelevant addiction is forgotten by the society. However, he did not know that the search engine will remember the society about his drug abuse forever. By searching his name, his addiction will appear in the searching results by an article he wrote in 2001. In those words, he explained his pain; *“I should warn people that the electronic footprint you leave on the Net will be used against you,”* Mr. Feldmar said. *“It cannot be erased.”*⁹ The implication of remembering for long past and for longer we live is scary, as Catherine Davis said, a PTA co-president.¹⁰

Previously, the author discussed that right to be forgotten is not a new right in the offline meaning, mainly, in the field of law. Therefore, it is good here to give some examples from different national laws that shall prove this discussion. The French law is very good example here, as France is one of the EU member states. French law adopted a principle that so-called *le droit à l’oubli* or in English is the right to be forgotten.¹¹ The core idea of this right is partly similar to the core idea of the right to be forgotten but in the offline meaning, the *le droit à l’oubli* is actually implying the prohibition of publishing the criminal records when the criminal becomes rehabilitated.¹²

However, with regard to other national laws outside the EU, such as the United States, there has been also a case concerning the right to be forgotten. With regard to *Sedlmayr murder case*, this case also speaks about the criminal records and prevents the publication of the criminal history of the person who committed the crime, when he became rehabilitated. As a result of this rule, Wikipedia had a judgment from the national U.S. court in order to remove such personal

⁹ LIPTAK A. The Nation’s Borders, Now Guarded by the Net. Sidebar, THE NEW YORK TIMES 2007. <http://www.fosterquan.com/news/TheNationsBordersNowGuardedByTheNet.pdf> (18.01.2017).

¹⁰ Mayer-Schönberger, V. Delete: The Virtue of Forgetting in the Digital Age. United States, Princeton University Press 2010, pp 3-4.

¹¹ Code pénal 6.8.2004/2004-801.

¹² Jeffrey R. The Right to Be Forgotten. Stanford Law Review, Stanford University 2012. <http://www.stanfordlawreview.org/online/privacy-paradox/right-to-be-forgotten> (26. 09. 2016).

publications.¹³ Furthermore, there is also another successful application for the right to be forgotten in Argentina. Virginia Da Cunha sued Google and Yahoo in order to remove her photos from their searching results.¹⁴ Even though she consented to post those photos, she did not wish to make those photos very public and widely spread.¹⁵

Therefore, it is not correct to say that this right to be forgotten is a recent issue. It could be a new legal controversial issue in the online life, but it is rooted deeply in the history of different national laws. In addition, at the EU level, the right to be forgotten has been introduced in the old data protection directive in 1995 before that directive replaced into new regulation GDPR, the new general data protection regulation in 2016. Mainly in article 12 (b) stated as follow,

*“...as appropriate the rectification, erasure or blocking of data the processing of which does not comply with the provisions of this Directive, in particular because of the incomplete or inaccurate nature of the data.”*¹⁶

In accordance with this previous article, it was every member state liability to guarantee the right of individuals to request the correction of their personal information by the controller when the information is incomplete or inaccurate. Thus, the removing of personal data when it is incomplete or inaccurate is not a new issue, however the new issue is the assignment for using this right to the search engines, as to be considered as controllers. In fact, this legal point is important and well-explained in details by the European Court of Justice (ECJ) along with other important points. It is referred to the *Google-Spain Case C-131/12* in 2010.¹⁷ The national court used the preliminary ruling approach by referring questions to the ECJ in order to ask a better explanation and answer some questions.

¹³ BGH 10.11.2009, VI ZR 217/08, Sedlmayr murderer case.

¹⁴ Da Cunha v. Yahoo de Argentina SRL and Another, The supreme Court of Justice of Argentina, 561 AR (2010).

¹⁵ Shoor, E. Narrowing the Right to Be Forgotten: Why the European Union Needs to Amend the Proposed Data Protection Regulation. Brooklyn Journal of International Law 2014, 39(1), p 488.

¹⁶ 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. The directive has been replaced by Regulation (EU) 2016/679 of the European Parliament and of the Council 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, art. 12(b).

¹⁷ CJEU (2014), *supra* nota 6.

1.2. The Google-Spain case C-131/12

Before speaking about the referred questions to the ECJ by the Spanish court, the facts of the case need to be described because this case is really important and made a big change and improvement on the meaning of privacy rights.¹⁸ The case C-131/12 started when a complaint arose by a Spanish national Mr Costeja González against a national Spanish Newspaper *La Vanguardia* and against *Google Spain* and *Google Inc.* He complained that when anyone searches his name on Google, he will find an old information concerning him, about sixteen years ago, when he was suffering from bankruptcy. Many articles published in *La Vanguardia* about his social security debts still available until the time of this case, which hampered his freedom to do business because he got bad reputation in the market.¹⁹

The request of Mario Costeja González is to be forgotten by the web who never forgets. As the information about bankruptcy is not related to him anymore because he settled all the debts and economic issues lawfully, he asked the Google to delete this personal information, which is not useful for anyone, but rather harms him and breaches his privacy rights.²⁰

Therefore, the national court sent questions for the ECJ in order to ask the interpretation. In this regard, the court asked whether the data protection directive 1995²¹ applies for search engines,²² and if it does so, is Spain Google, as it is a branch from the original Google in United States, subjected under the EU rules?²³ Finally, does even a person have the right to request the right to be forgotten from search engines in order to remove his personal information?²⁴

The answer came by the search engines with regard to the three questions as following. First answer was search engines as controller cannot escape from their liability²⁵ to subject under the data protection directive 1995, because Google deals with the personal information as well as

¹⁸ Iglezakis, I. The Right To Be Forgotten in the Google Spain Case (case C-131/12): A Clear Victory for Data Protection or an Obstacle for the Internet? Aristotle University of Thessaloniki 2014, p 5.

¹⁹ CJEU (2014), *supra* nota 6, pp 14-15.

²⁰ Iglezakis (2014), *supra* nota 18, p 5.

²¹ European Parliament (1995), *supra* nota 16.

²² CJEU (2014), *supra* nota 6, p 42.

²³ CJEU (2014), *supra* nota 6, p 89.

²⁴ *Ibid*, p 21.

²⁵ European Commission. Factsheet on the “Right to be Forgotten” ruling (c-131/12).

http://ec.europa.eu/justice/data-protection/files/factsheets/factsheet_data_protection_en.pdf (29.09. 2016).

organizes them²⁶, which is matching with the scope of this directive.

Para 41 " „,first, the activity of a search engine consisting in finding information published or placed on the internet by third parties, indexing it automatically, storing it temporarily and, finally, making it available to internet users according to a particular order of preference must be classified as ‘processing of personal data’ within the meaning of Article 2(b) when that information contains personal data and, second, the operator of the search engine must be regarded as the ‘controller’ in respect of that processing, within the meaning of Article 2(d).”²⁷

In the second answer, the court said that Spain Google even though it is only a branch, which is located in an EU member state, the Spain Google still subjects to the EU law. The reason of having branch in EU is enough to make the case subject to the EU jurisdiction, regardless of its dealing with the EU citizens.²⁸

Para 60 " „,Article 4(1)(a) of Directive 95/46 is to be interpreted as meaning that processing of personal data is carried out in the context of the activities of an establishment of the controller on the territory of a Member State, within the meaning of that provision, when the operator of a search engine sets up in a Member State a branch or subsidiary which is intended to promote and sell advertising space offered by that engine and which orientates its activity towards the inhabitants of that Member State.”²⁹

Third and final answer has granted the individuals their right to be forgotten under certain situations. Thus, right to ask the removal of personal information by search engines is possible as far as it meets the requirements of being incomplete or inaccurate with the purpose of the directive. Here, the court expressly recognized that the right to be forgotten is not an absolute right, but rather it has to be balanced with other fundamental rights such as the freedom of access to information and the freedom of speech. Therefore, these rules, which have been reached by this case have to be taken into consideration the circumstances of each case and thus apply in case by case approach.³⁰

Para 70 " „, Article 12(b) of Directive 95/46 provides that Member States are to guarantee every data subject the right to obtain from the controller, as appropriate, the rectification, eras-

²⁶ Cofone, I. Google v. Spain: A Right To Be Forgotten? Journal of International and Comparative Law 2015, 15 (1), p 4.

²⁷ CJEU (2014), *supra* nota 6, p14.

²⁸ Cofone (2015), *supra* nota 26, p 4.

²⁹ CJEU (2014), *supra* nota 6, p 60.

³⁰ European Commission (2016), *supra* nota 25.

ure or blocking of data the processing of which does not comply with the provisions of Directive 95/46, in particular because of the incomplete or inaccurate nature of the data,,,it follows that non-compliant nature of the processing, which is capable of conferring upon the data subject the right guaranteed in Article 12(b) of the directive, may also arise from non-observance of the other conditions of lawfulness that are imposed by the directive upon the processing of personal data."³¹

It must be noticed that the state shall apply the proportionality test when it is considering the case.³² The justification by the search engines for not removing the information merely for commercial reason is impossible. However, they must rely on fundamental rights in order to find a justification.

As Google was founded three years after the directive was formulated and adopted,³³it has been hard at that time to know how the right to be forgotten can be applied with regard to the search engines. This case came and solved many questions, but also there are many other questions still not answered by the court. For example, the words of incomplete or inaccurate nature of the data are too broad, where court did not specify them.³⁴ In addition, the personal information under this case took another direction. Usually, the issue of personal information is concerning the starting point whether to publish the personal information or not. Here, the case is concerning the ending point whether to delete this published information or not. In other words, this case is opening the eyes on a new issue, which is the fate of personal information.

Furthermore, the judgment created a strong battle between the supporters of freedom of expression against the supporters of this right, who are struggling in order to strengthen the right of privacy and make it imposed to the maximum level as an absolute right. One question needs an answer after the *Google Spain case*. In fact, it is the territorial one.³⁵ How the EU can impose this right over a company which is not an EU one? If it could do so by claiming that the branch is located at its own territories, EU shall not be able to impose the right on the capital company, because it is not in the EU and also does not belong to EU nationals. On the other hand, one cannot deny that Google has very big impact everywhere and it is also affecting the EU nationals even though without having the physical branch on its own territories.

³¹ CJEU (2014), *supra* nota 6, p 70.

³² Iglezakis (2014), *supra* nota 18, p 7.

³³ European Union Committee (2014), *supra* nota 1, p 5.

³⁴ Cofone (2015), *supra* nota 26, p 6.

³⁵ Brock (2016), *supra* nota 3, p 2.

Last but not least, the court added new responsibilities over the search engines. Now, search engines are not acting as purely neutral engines, but they are controllers, which handle the information founded and also evaluate the given information before or after serving it. After the *Google Spain case*, search engines shall not think about the neutrality principle anymore, but now they must care more about the privacy of people by removing the links which are not suitable to their privacy.³⁶ The question is here, who is benefiting from this removal? What about the public interest in leaving this information available for the public under the necessity of freedom of speech in a democratic society? Some personal information must not be deleted under the right to be forgotten, as it expresses the freedom of speech.

To remove or delete other type of personal information, which does not harm the freedom of speech nor the right of access to information could be justified with regard to this matter. The justification could be that there are also other strong means to find this information, if the public interest is really caring about knowing a certain information. For example, through the social media as a strong mean, because the information itself is not removed from the internet, but the search engine removes the link which guides users to find the information. As a result, this removal is going to add more efforts in order to find the information in other ways, by other means, and to specific people not for the public, mainly, the people who are really wanting to know about the matter concerned.

In fact, what happened after the *Google Spain case*, the reaction of Google was really serious to cooperate in order to find the balance. It actually created an online application for complaining about the irrelevant personal information in accordance with the law says “incorrect, inadequate or misleading information”. However, Google received 218,427 requests for removing personal information, but only 35% of them have been taken into account and removed.³⁷

On the other hand, one must notice the brightening part of the story. After the *Google Spain case*, at least, every one of us can request the removal of his personal data when this information is inaccurate, irrelevant, or incomplete.³⁸ This implication has great shift toward the better future in this right, which resulted in the new regulation in 2016. However, the new regulation will be discussed later in the second chapter.

³⁶ Frantziou (2014), *supra nota* 2, p 761.

³⁷ Powels J., Chaparro E. How Google determined our right to be forgotten. The Guardian 2015. <https://www.theguardian.com/technology/2015/feb/18/the-right-be-forgotten-google-search> (10. November. 2016).

³⁸ Iglezakis (2014), *supra nota* 18, p 12.

1.3. A comprehensive definition of the right to be forgotten in the digital age

The right to be forgotten is a new legal figure that is formulated in Europe. In the opinion of Alicia Wattmeter, Europe as a continent is sometimes found to be caring too much about the privacy.³⁹ It is always searching for new ways and rules in order to enhance the privacy rights. In this context, the right to be forgotten as a concept is connecting to our identity. The forgetfulness means privacy but the right to be forgotten implies the granting of new opportunity to everyone who has learned from his mistakes in order to start over as new blank page toward the better life. Therefore, the right to be forgotten is the right of our identity.⁴⁰

In fact, it is the right to not make our personality misrepresented to the audience.⁴¹ However, it means the true picture given of us. It means to give the right information which is relevant for us in the present time. From that point of view, one could say that the right to be forgotten is not conflicting with the freedom of speech because the right to be forgotten shall provide the service of giving the correct and true information. Therefore, the right to be forgotten shall mean that the controller is responsible to deliver into our inner mind the right interpretation of the correct information in the present time. As the law shall give the right ruling to our life, right to be forgotten, as one of the human rights, and also one of the law's outcome, it shall be in line with the reform for our social traditions and old useless customs.

The definition so far seems well-interpreted. However, the definition still includes vague terms. The difference between the sensitive and the non-sensitive personal data, removal of data, data subject, and data controller still need better interpretation. Here in this section, all these vague terms shall be interpreted in a way to find a good final interpretation to what is the right to be forgotten.

In this regard, data subject is the person who is identified as a natural or legal person who could be identified by another legal or natural person, or controller directly or indirectly, by any mean of referencing to his personal data. In this regard, the personal data is the identification

³⁹ WITTMAYER A. Do Europeans really care more about privacy than Americans? The Global Magazine of News and Ideas, Foreign Policy (FP) 2013. <http://foreignpolicy.com/2013/06/11/do-europeans-really-care-more-about-privacy-than-americans/> (1. 12 .2016).

⁴⁰ Gutwirth, S., Pouillet, Y., Hert, P., Leenes, R. Computers, Privacy and Data Protection: an Element of Choice. Brussels, Springer Science & Business Media 2011, p 90.

⁴¹ Ibid, p 90.

number, location data, online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that person⁴² in accordance with the article 4 of the General data protection regulation (GDPR) of the EU.⁴³

The GDPR is the new regulation imposed on member states in order to unify the data protection regulations between different member states. However, even though the regulation is new and improved version of the old data protection directive in 1995, the vague terms and the problem of the given definition is still occurred in the interpretation itself. In fact, there are no hard norms tell what is the sensitive personal data. All what has been given is the principle of the unique identification. However, as the e-society is changeable and has quick development, the people view over things is also changeable. In other words, what means sensitive personal for me does not necessary means that sensitive for you. At the same way, what means sensitive personal for me today does not necessary means very sensitive personal for me tomorrow. Thus, the concept is so complicated, but if one shall give a definition, the definition must be broad to include everything in order to follow the changeable world of the electronic society.

However, turning to the concept of removal, the removal itself which exists in the right to be forgotten, does not mean only the deletion. As Prof. dr. Cécile de Terwangne argued, "*Individuals should not be reduced to their past. The right to be forgotten does not mean erasure of the information. It rather means to stop bringing back data from the past*".⁴⁴ To give better interpretation to what she said, she concludes that the distinction between the right to be forgotten and the right to erasure by the data subject is very important, because the right to be forgotten shall give higher protection for data subject than the right to erasure for data subject by the withdrawal of consent and the objection to processing.⁴⁵ According to what she said, the right to be forgotten is deeply connected to the right of self-determination. In her meaning, the right to be forgotten is not separate from the right to erase in the eyes of the authors of the regulation, even though the Article 17 of GDPR is entitled "Right to be forgotten and to erasure",⁴⁶ but it is healthy to draw the small distinction between the two concepts as to understand the effects resulted from each one.

⁴² Cunha, C., Manuela, M. Handbook of Research on Digital Crime. Cyberspace Security, and Information Assurance. United States of America, Information Science References 2014, p 154.

⁴³ Regulation (EU) 2016/679 Of The European Parliament and of the council (General Data Protection Regulation) 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, 27 April 2016, Art 4.

⁴⁴ Terwangne, C. The Right to be Forgotten and the Informational Autonomy in the Digital Environment. Publications Office of the EU 2013, 0 (0), p 1.

⁴⁵ Ibid, p 19.

⁴⁶ Ibid, p 26.

Finally, the meaning of data controller. In fact, finding a definition for who is the data controller shall not be a hard task. However, in this thesis, it is not the case, because the duty of finding the definition for the data controller is connecting to the duty of knowing whether the search engines are controller or not. This is specifically, after the adoption of the right to be forgotten, which gave new responsibilities for search engines in EU and beyond. The neutrality responsibility of search engines, plus to the international nature of the search engines, both factors are going to be discussed in the next chapters. However, the focus in this chapter is to find a comprehensive definition for what is the right to be forgotten by defending the collecting basic elements.

In accordance with the EU commission, the controllers are persons or entities which collect and process personal data.⁴⁷ Thus, the controller is any entity, whether private or public one, deals with the personal information. From the definition, one can derive the important duty of controller. In fact, they must control the personal information in a way that keeps them personal and do not expose them to the public. Therefore, they must comply with the data protection rules including the privacy rights and also the right to be forgotten. This means that the personal information must be kept only for a period needed under a legitimate reason.

The problem here is that the search engines do not collect the personal information from the data subjects themselves, but the duty of search engines such as Google is only to put links that reach the users to the information requested. To identify this, the author was looking for recent news in order to see what the EU concluded. It is because in 2013, after *Google-Spain case*, the doubt whether search engines shall be treated as controller was really big. At that time, the Advocate General opinion was not supporting the idea of giving the search engines the role of controller, even though he admitted that the way that the search engine handling the information constitutes "processing" of personal data.⁴⁸

In accordance with the GDPR, 'controller' means as follow: *"the natural or legal person, public authority, agency or other body which, alone or jointly with others, determines the purposes and means of the processing of personal data; where the purposes and means of such processing are determined by Union or Member State law, the controller or the specific criteria for*

⁴⁷ European Commission. Who can collect and process personal data? Data Protection. Entities collecting data 2016. http://ec.europa.eu/justice/data-protection/data-collection/index_en.htm (14. 11. 2016).

⁴⁸ Opinion of Advocate General Jääskinen 25.06.2013/ C- 131/12.

*its nomination may be provided for by Union or Member State law".*⁴⁹

Now coming to 2017, this recent news could be a better interpretation for the meaning of GDPR. In fact, the controller is not anymore required to be the processor of the personal data in order to be deemed as controller. However, it is enough only that the personal information is carried out by him in the context of the activities, even though the controller may not play the role of the processing. It must be noticed, that this conclusion came recently by the *Spanish Supreme Court* in the ruling of 14 March 2016⁵⁰. It declared that Google Spain had the status of co-controller of the personal data as being a branch of Google Inc. However, the sole controller was the Google Inc because it is the one who responsible for managing other branches and also determining the processing of personal data as well as the purpose of it.⁵¹

After all, one can conclude with a better interpretation for what is the right to be forgotten in accordance with this chapter. The right to be forgotten must be understood in a broad sense. It is hard to find one definition from one point of view. However, one could say that the definition must avoid the unambiguous. Therefore, one could say that the right to be forgotten is a personal right and one means of practicing the privacy rights. The right to be forgotten is the right granted for everyone as human being and data subject in order to have high protection over any information that could identify the personality by requesting the removal of this personal information. This request must be done in a form of complaint to the search engine, as it is the controller of this information. It must be noticed that the removal does not mean the deletion because this information will stay in the original website, but it will be removed in the searching results.

At the end of this chapter, it must be noticed that the right to be forgotten could not at any moment be considered as clear and comprehensive enough, because there are still vague elements in the definition of the right to be forgotten itself. For example, having clear definition for who is the data subject, shall give better meaning for what is the right to be forgotten. This includes the question whether the right to be forgotten shall also apply for the legal person. The answer of this question will be in the future by waiting for more cases requesting the preliminary ruling to ECJ.

In this regard, the definition must be elastic to follow the rapid changes of the online

⁴⁹ European Parliament (2016), *supra* nota 43, art 4.

⁵⁰ De Castro I. Spain - Spanish Supreme Court declares Google Inc. to be sole data controller. Articles, Dac beachcroft 2016. <http://dacbeachcroft.com/en/gb/articles/2016/april/spain-spanish-supreme-court-declares-google-inc-to-be-sole-data-controller> (14. 11. 2016).

⁵¹ *Ibid.*

technology. Now, the right to be forgotten is adopted as a task assigned to the search engines specifically. However, no one knows about the future.⁵² The new development of online technology may lead to different forms of the right to be forgotten,⁵³ i.e. adopt this right in other online platforms

⁵² Krzysztof I. The Right to be Forgotten and the Future of Open Data Projects. POLICY, Fundacja epanstwo 2016. <http://epf.org.pl/en/2016/10/24/the-right-to-be-forgotten-and-the-future-of-open-data-projects/> (17. 01.2017).

⁵³ Keller Daphne. The new, worse 'right to be forgotten', interpreted correctly, new legislation will protect users' rights and freedom of expression. Opinion, POLITICO 2016. <http://www.politico.eu/article/right-to-be-forgotten-google-defense-data-protection-privacy/> (17. 01.2017).

2. The right to be forgotten in search engines

This chapter is more specific to the nature of the right to be forgotten in the search engines rather than it is considered as a personal right, which shall be adopted everywhere. Therefore, the author will focus on the specific characters of the search engines that could distinguish them from any other internet programs and websites. The reason beyond this specialty is usually referring to the fact that the search engines have a duty to serve the information and make it available to the public under the principle, search neutrality.⁵⁴ This means that the search engines must conduct under neutral behaviour. They must provide the access to the information as a part of freedom of information and also be free of political, financial or social pressures.⁵⁵

Therefore, there is a double imposing on the search engines. They are carrying out the duty to not abuse their responsibility as being neutral. In addition, they are carrying out the obligation of respecting and implementing the right to be forgotten by deleting any personal information, which is not matching with the individual interests. The problem of two contrasting obligations,⁵⁶ which are imposed at the same time on the search engines is discussed and analysed by the author in this chapter. In particular, the objectives beyond each obligation and the balance between them. This is important in order to define how far the right to be forgotten can be used and when this right can be breached under certain legal justifications. Through searching on this point, the author is able to support her hypothesis; the EU privacy regulations do not guarantee an absolute protection for the right to be forgotten. In this subchapter, the level of protection that is provided by the EU regulations for the right to be forgotten is analyzed. The author is discussed the conflicting rules and regulations.

Furthermore, the chapter is identified the character of international nature of the search engines. Search engines, such as Google, they are known by their international nature and invading the world. The search engines have not only their impact and work at the EU level, but they

⁵⁴ Odlyzko A. Network neutrality, search neutrality, and the never-ending conflict between efficiency and fairness in markets. School of Mathematics and Digital Technology Center, University of Minnesota 2009. <http://www.dtc.umn.edu/~odlyzko/doc/net.neutrality.ps> (17. 01.2017).

⁵⁵ Georgieva, I. Search neutrality as a regulation principle for Internet search engines: A multidisciplinary approach. Hogeshcool Unviversiteit Brussel 2014, p 6.

⁵⁶ Miyashita, H. The “Right to be Forgotten” and Search Engine Liability. Vrije Universiteit Brussels 2016, 2 (1), p 7.

are expanding to cover all over the world. Therefore, EU is not the only affected continent by the search engines, as well as the EU is not the only authority, which imposing the law of search engines. In this context, the problem of the international nature, as well as the difficulty to find EU boundaries, whether technical or political ones for the search engines is analyzed by the author in this chapter.

The importance of this part of study is derived from the important role which the EU plays in the development and adoption of the right to be forgotten. One could say that EU is a leader and godfather for the creation of this right and also the implementation of it in the search engines. Therefore, the author is focused on the conflict of sovereignty as a result of adopting the right to be forgotten as a personal right in the EU.

2.1. The right of access to information and the principle of net-neutrality: The Double Responsibility

When one speaks about the search engines, two things come to mind. First, the huge amount of information provided by only one click in the search button. Second, Google, as one of the biggest companies in the domain and first competitor in the market of search engines.⁵⁷ Here, our analysis is focused on those two true assumptions in order to make the study much easier and more specific. Let us to take the procedures of writing of this thesis as example. When the author was searching for the information in regard with writing about the right to be forgotten, online search engines were the first choice to her. Namely, the author chose Google and Google Scholar for efficient search process as a way to find out the relevant books and articles. If the author did not turn to this online choice, the searching process would have been much harder and also less efficient. The fact beyond this is that the author and all other users of internet cannot find all websites that are wanted by remembering all the links without restoring to the search engines, such as Google, which is a leader search engine and most popular one.

Therefore, our interest to find the information is always tending into Google at the first level, and then to all other search engines. In fact, it is good to stress the importance of search

⁵⁷ Stuart, A. Google Search Results: Buried if not Forgotten. North Carolina Journal of law and Technology 2014, 15(3), p 472.

engines to facilitate the access to information.⁵⁸ They are the online window to the world and the online library to the knowledge. In this context, search engines are very important in order to filter out the information and deliver what is necessary and relevant for the users.⁵⁹ Otherwise, users of the internet cannot navigate themselves with the massive amount of information, which is provided in the online world. Thus, Google and other competitors play the role to arrange the big amount of information by storing them in accordance with every user need.⁶⁰ It must be noticed that the search engines must conduct in a neutral way in order to preserve the core idea of the internet world, which is the openness and the maintenance of this world as a small village.

Furthermore, the role of access to the information by search engines is not only a significant role provided by the interest of search engines themselves in order to be successful in the online market. The access to the information is a duty and obligation too, which is assigned to the search engines. It is obviously showed by the international community, the degree of pressure provided over the search engines, as one of the online service providers, who must conduct in respect with this right in natural manner. Numerous of the international instruments adopted the freedom of access to the information as a fundamental human right and one of the personal freedoms, as well.⁶¹

However, it is a matter of fact that this right has created dual contrasting obligations over the search engines. The international instruments, and namely the EU law, is imposing the obligation on the search engines in order to provide the results of searching in accordance with the neutrality behavior, and at the same time, it provides standards to the search engines on which of their results are the right results and which are the infringement ones.⁶² It must be noticed that the principle of net neutrality is a general obligation over the intermediaries, including the search engines, in order to behave in a neutral manner. In fact, the net neutrality means the open internet and the behavior of search engines on the non-discriminatory basis.⁶³

On the other hand, it means the right of users to have access for the service of search en-

⁵⁸ Christophe, J. Next Generation Search Engines: Advanced Models for Information Retrieval: Advanced Models for Information Retrieval. United States of America, IGI Global 2012, p 17.

⁵⁹ Tarakeswar, K., Kavitha, D. Search Engines: A Study. Journal of Computer Applications 2011, 4 (1), P 29.

⁶⁰ Renda, A. Searching for harm or harming search? A look at the European Commission's antitrust investigation against Google. Center for European Policy Studies 2015, p 4.

⁶¹ Sturges, P. Freedom of Access to information: A paradigm for the Information professions. IFLA Chapter commissioned for a book that was not published 2006, p 1.

⁶² Grimmelmann J. Some Skepticism About Search Neutrality. The Next Digital Decade: Essays on the Future of the Internet, TechFreedom 2010. <http://james.grimmelmann.net/essays/SearchNeutrality> (26.11. 2016).

⁶³ CAVE, M., Rocioni, P. Does Europe Need Network Neutrality Rules? International Journal of Communication 2007, 1 (1), p 670.

gines without favoring or blocking.⁶⁴ This seems hard and complicated to apply after the adoption of the right to be forgotten. It could be said that the principle of net neutrality took a different form after the adoption of this right. Before the assignment of the right to be forgotten, search engine was only a mere neutral intermediary, but now search engine has a liability and a general obligation to monitor the content of the hosted websites.⁶⁵

In other words, one can notice at first blush that the problem of the regulations, which are provided at the EU and international level are involving in the requesting of the search engines a number of complex obligations together.⁶⁶ In particular, they are requesting the neutrality, freedom, privacy, and right to be forgotten at the same time. All these concepts cannot match with each other without finding a real balance. For example, the adoption of the right to be forgotten and the assignment of this right to be handled by the search engines shall make the formula imbalanced. In fact, search engines are increasing their competences⁶⁷ by being responsible to handle complaints claimed by the right holders, as this right is not in the hands of the right holders themselves⁶⁸ nor their enemies. However, the right to be forgotten is treated by the intermediate between them. Thus, search engines are the only responsible for the right to be forgotten and the enforcement of this right is in their hands.

To make this issue clearer, one must give the following analysis. When the right to be forgotten is not obligated on the source of the information itself, namely the websites, this means that law is not criminalizing the information given. However, as a result of the adoption of removing the personal information, the net neutrality principle and the obligation imposed on all intermediaries in order to treat all data similarly and without discrimination⁶⁹ may be breached, when the search engines apply the right to be forgotten. Why? Because, when the relevant information is requested by the search button, the search engine will not deliver all relevant links. However, it will examine those websites and choose between them. It will give advantages for websites over others, and it will ignore some links which are not matching with the right to be forgotten. This action is the preference of one website over other rather than the prevention of

⁶⁴ Ibid, p 670.

⁶⁵ Cofone (2015), *supra* nota 26, p 8.

⁶⁶ Internet and the right to be forgotten: obligations of search engines.

<http://www.inscripta.fr/en/toutes/internet/moteurs-de-recherche-droit-a-loubli-google-spain/> (18.01.2017).

⁶⁷ Shankland S. Web founder: Europe's 'right to be forgotten' rule is dangerous. Cnet, Interactive Inc 2014. <https://www.cnet.com/news/web-founder-europes-right-to-be-forgotten-rule-is-dangerous/> (27. 11. 2016).

⁶⁸ Rodin D. There is no "Right to be Forgotten". The Huffington post, US edition 2015.

http://www.huffingtonpost.com/david-rodin/there-is-no-right-to-be-f_b_6645776.html (27.11. 2016).

⁶⁹ Incoming EU digital chief warns on 'right to be forgotten' ruling. Article. Financial Times, Google 2014. <https://www.ft.com/content/dad5315c-4d98-11e4-9683-00144feab7de> (17.01.2017).

the spreading procedure for unlawful information.⁷⁰

The previous analysis could be correct, if one will only focus on the definition of what is the net neutrality, as a sole principle and its matching with the freedom of access to the information. In accordance with Greenfield R, an IP policy manager, he said that the simple definition of net neutrality shall give a complicated result. In accordance with the Common Cause states website on their article "*Keep the Internet Free and Open!*", they stated as follows: "*Network neutrality is the principle that Internet users should be able to access any web content they choose and use any applications they choose, without restrictions or limitations imposed by their Internet service provider*".⁷¹ The given definition created many hard questions. However, there are few hardest ones with regard to our issue and its relation to the right to be forgotten. First, the question of who is the internet service provider? Does it include the search engine? And second, what did the definition mean by restrictions and limitations? Cannot the right to be forgotten consider as a limitation and restriction, which is imposed by the search engines against the users? How then this can be lawful and also a personal right as far as it is violating the net neutrality?

The answers for those questions will be given when one understands the principle of net neutrality as well as the freedom of access to the information in a broad sense and a flexible way. In this regard, it is true that the search engines are responsible to be neutral and being away from abusing this responsibility, but this does not mean to keep silent without any reaction over the violations of rights of people. The principle of net neutrality with regard to the search engines, implies the transparency and the non-discriminatory behavior in the searching process rather than the meaning of non-interference by not acting any reaction in case of the violating the rights of users. Thus, the net neutrality has a special meaning with regard to the search engines. In fact, it means that the manipulating in the search results is allowed, but not in every case. However, it is only allowed in accordance with limited legitimate justifications.⁷²

With regard to the freedom of expression, Article 10 (2) of the European convention of human rights (ECHR), "*The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security,*

⁷⁰ O'Hara, K., Shadbolt, N., Hall, W. A Pragmatic Approach to the Right to Be Forgotten. Global commission on internet governance 2016, 1 (26), p 15.

⁷¹ Greenfield R. The Net Neutrality Debate: The Basics. EDUCAUSE review, policy@ edu, 2016. <https://er.educause.edu/~media/files/article-downloads/erm0639.pdf> (27.11 .2016), p 83.

⁷² Georgieva (2015), *supra* nota 54, p 93.

*territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary".*⁷³

As an extension of the freedom of expression, the freedom of access to the information and its relation to the principle of net neutrality, is limited to what could be justified by the law. Therefore, this freedom and the obligation imposed on the search engines in order to act in a neutral manner are not absolute. The proportional discriminatory behavior by the search engines is under very limited justifications, which are provided by the law and thus may be legitimated.⁷⁴ In this context, one of these lawful justifications is the implementation of the right to be forgotten. It must be noticed that the search engines could discard some searching results⁷⁵ when these results are violating the right to be forgotten. The reason beyond this refers to the fact that the right to be forgotten is adopted under the EU in very restrictive way, specially under the new GDPR,⁷⁶ which prevails over the freedom of expression along with its means.

However, the non-EU authorities and namely the U.S do not really adopt the formula in that manner. The debate toward adopting the right to be forgotten as an absolute right is still going on.⁷⁷ However, the author will return back to this issue in the next two chapters. Now, on focusing at the EU level, the search engines are responsible to remove the links, which lead to the personal information, as it is subjected to the right to be forgotten. In order to be more specific in this issue, the personal information referred to here, means "the incorrect, inadequate or misleading information".

In order to prove this discussion from practical point of view, we must think again about the responsibility of the search engines under the freedom of access to the information. Search engines are responsible for providing the relevant information as a response to the search request. However, has anyone tried to think about the meaning of relevant information? As a matter of fact, this is very important point. We must know what does relevant information mean in

⁷³ Convention for the Protection of Human Rights and Fundamental Freedoms, 1950, art 10(2).

⁷⁴ Washington Hilton. The right to be forgotten and internet governance - legitimate concerns for the news industry. World Media Policy Forum 2015. <http://blog.wan-iffra.org/2015/05/27/the-right-to-be-forgotten-and-internet-governance-legitimate-concerns-for-the-news-indust> (18.01. 2017).

⁷⁵ Ibid, p 94.

⁷⁶ European Parliament (2016), *supra* nota 43, Art 17.

⁷⁷ Whitney G., Jordan C. The right to be forgotten and internet governance - legitimate concerns for the news industry. Defamation Removal, Internet defamation 2015. <http://www.defamationremovalattorneysblog.com/2015/07/google-united-states-eu-right-to-be-forgotten-strategies-for-removing-harmful-google-search-results/> (17. 01. 2017).

the world of the search engines? In fact, the "relevant" as a concept in the policies of the search engines is very broad and it is not simple as it seems. We must know what does the relevant information include? Does it also include the false matching information? The answer of this question will be known by finding a true definition of the meaning of "the relevant information" and its relation to the net neutrality principle.

Again, the author stresses the obligation of the search engines as being responsible for providing the open knowledge and discussion as far as they are relevant to the searching request. However, it must be noticed that when the search engine finds that one of the links which are provided in the searching process includes in its content incorrect, inadequate or misleading information, the search engine shall not consider that link as relevant.⁷⁸ The reason beyond this is that the relevant information must satisfy the need of the researcher in the right manner. In other words, the relevant information must provide for the users what is correct and matching with their request. In accordance with analysis, the false information is a type of the irrelevant information, which shall be ignored by the search engine in order to keep its reputation by being professional. Furthermore, the reputation is not the only problem, but providing false information can lead to other serious legal problems and liabilities, such as invoke the privacy rights and mislead the society. As a result of this, the search engine will be responsible and accountable for those incorrect results.⁷⁹

The previous analysis has cleared up the issue on the meaning of net neutrality in providing the relevant information. The author said that the net neutrality in the searching results must not express the private interests of the search engines, but the relevant information only. In accordance with the previous analysis, the idea of making the right to be forgotten as an absolute right can be justified in that sense. This is because the relevant information is only that which expresses the correct matching information and must not extend to what is incorrect, inadequate or misleading. Otherwise, the search engine company will lose its reputation and lead to harm the society by not providing the truth to the public.⁸⁰

It must be noticed that the neutrality searching policies, which are followed by the search engines are very important tools that would build up the trust with the users of any search engine company. Furthermore, the freedom of access to the information is not only a human right,

⁷⁸ Stuart (2014), *supra* nota 57, p 517.

⁷⁹ Smith, M. Search Engine Liability for Autocomplete Defamation: Combating the Power of Suggestion. *Journal of Law, Technology and Policy* 2013, 1 (2), p 317.

⁸⁰ *Ibid*, p 317.

which benefits the users in a democratic society and which could be violated by the right to be forgotten. However, this right is also one of the success factors of the search engine companies in order to keep their professionalism by being able to combat in the competition at the online market.⁸¹

Therefore, even though the right to be forgotten along with all other privacy rights will tighten and restrict the conduct of the search engines as being free and open to the maximum level, these restrictions are still healthy in the market, because search engines may still look for more and more freedom that can be given to them, but the competence given is also an advantage. In that sense, search engines may not abuse the responsibility, which are given to them by removing the harmful personal data, because simply they want to gain the trust of its users by showing them that they are caring about their privacy and that there is no danger for handling their personal information in the online software.⁸²

However, it must be noticed that the enforcement of the right to be forgotten by the search engines is a type of the interference which is only allowed to the public authority. Turning back into the previous article 10 (2) of ECHR, the justified limitations of freedom of access to the information are considered as actions of interferences which are only assigned to the public authority.⁸³ In other words, when the search engines are removing the personal data by preventing this information to reach the public, they are interfering in the right of people of access to the information and thus search engines are acting as a state.⁸⁴ However, as their behaviour in the action of interference is lawful and a duty too, under the right to be forgotten, the question here will arise, whether the EU handles search engines as a public authority? Or search engines are acting on behalf of the state?⁸⁵ It is clear that search engines are considered as private companies, but their important actions grant them higher duty, as they are acting on behalf of the public authorities.

In this context, one should focus on the core idea beyond the removing of the personal information with regard to the right to be forgotten. The removal by the search engines will not be

⁸¹ Sullivan D. How Google's New "Right To Be Forgotten" Form Works: An Explainer. Newsletter. Search Engine Land 2014. <http://searchengineland.com/google-right-to-be-forgotten-form-192837> (30. November. 2016).

⁸² Why data protection matters: Google privacy. <https://privacy.google.com/#> (17.01.2017).

⁸³ Convention for the Protection of Human Rights and Fundamental Freedoms, 1950, art 10(2).

⁸⁴ Koopmans, R., Zimmermann, A. Visibility and Communication Networks on the Internet: The Role of Search Engines and Hyperlinks. vrije Universiteit Amsterdam and Universität Bremen 2005, p 214.

⁸⁵ Wechsler, S. The Right to Remember: The European Convention on Human Rights and the Right to Be Forgotten. Columbia Journal of Law and Social Problems 2015, 49(1), 157.

absolute.⁸⁶ This means that even the fact says that the right to be forgotten is an absolute right, the remedy of removing the personal data could not be absolute. The idea beyond of making the information able to remove from the search engines is to make the access for this information harder. In other words, by turning back into the right of access to information, the mechanism of the work of the right to be forgotten does not make the removal of information radically from its sources. However, search engines are only able to remove the links of those sources.⁸⁷ Thus, this shall show that the person who is really looking for an information, he will be able to find and access to this information but with more efforts than are done by the ordinary person. Thus, the information will only be delivered to who has really urgent intention to find it, but not to all public audience.

In this regard, the search engines are not acting as they are states, which are preventing people of access to information, but they make the providing of particular information harder. As the search engines are not the original sources of the information nor the first controllers over this information, they only store the information for the public and also responsible to remove the links which lead for harmful personal data. It must be noticed that the search engines are only removing the information as a result of receiving complaints by the harmed people.⁸⁸ Furthermore, their investigations for the complaints are not easy and the cases do not always process into the investigation level. In many cases, the search engines do not take the complaints into their account when they are not matching with the freedom of expression and the right of people to know the truth. This implies that not every case could be accepted under the right to be forgotten. However, in certain and very limited situations the cases are accepted in accordance with the investigation events and the real circumstances of each case.⁸⁹

In accordance with this fact, one could argue that the search engines are acting in neutral way by the enforcement of the right to be forgotten. The supportive justifications for this argument could be derived from two premises. First, search engines do not discriminate between users. Everyone has the right to claim the removal of the personal information. Then, under the investigation, they could decide whether the complaint claimed was really genuine or not. If the

⁸⁶ European Commission (2016), *supra* nota 25.

⁸⁷ Manjoo F. Right to Be Forgotten' Online Could Spread. Personal tech, The New York Times 2015. https://www.nytimes.com/2015/08/06/technology/personaltech/right-to-be-forgotten-online-is-poised-to-spread.html?_r=0 (18. 01. 2017).

⁸⁸ P Druschel., Michael B., Rodica T. The right to be forgotten – between expectations and practice. Legal report, The European Network and Information Security Agency (ENISA) 2012. https://cispa.saarland/wp-content/uploads/2016/03/right_to_be_forgotten_112012.pdf (18. 01. 2017).

⁸⁹ Floridi, L. Protection of Information and the Right to Privacy - A New Equilibrium? Switzerland, Springer International Publisher 2014, p18.

complainant is not satisfied with the decision made, the complainant will be able to appeal the decision by judicial action into the national court.⁹⁰ Here, the appealing action is also another safeguard, which is granted by the state to the users in order to protect themselves in case of any abusive behaviour committed by the search engines.

The second neutral behavior by the search engines shall be referred to the fact that search engines are not removing the information in order to benefit their own interests. However, the intention of the removal procedure is to protect the harmed people of that publications upon their own request and complaints. In this regard, one cannot say that the search engines are removing the information in secrecy or they do not publish information. However, they disclose the information until they requested to remove it. In this issue, Google is a leader here. When Google removes an information as a result of the right to be forgotten, it always adds in the searching results that removal is occurred. In addition, it provides a copy of the complaint that is caused to the removal of this particular information.⁹¹

As a result of this, the removal itself will not affect the freedom of access to the information. Google overcame the issue of hampering the access to the information by providing the mechanism in adding for the searching results the information about the action of the removal, plus to the copy of the complaint which is caused that removal. These two steps are very necessary in order to help Google to defend itself as a neutral company, when it removes a particular information.⁹²

From another point of view, by adding the removal information, the search engine will grant indirect alert to the researcher about the action of removal in the searching results but without breaching the right to be forgotten.⁹³ By this way, the researcher, who has an urgent need to know about the removed information will receive an indirect notice by knowing that the results of the searching are incomplete. In that manner, the researcher will restore into other and different ways in order to find what he needs. To conclude this subchapter, it must be said that the search engine will help the harmed person to enforce the society in order to forget his issue, and at the same time, it provides what the public must know about the removed issue, and thus

⁹⁰ Munson L. Google's 'right to be forgotten' appeal – France says 'non!'. Naked Security, Award-winning computer security news 2015. <https://nakedsecurity.sophos.com/2015/09/23/googles-right-to-be-forgotten-appeal-france-says-non/> (30. 11. 2016).

⁹¹ Sullivan (2014), *supra* nota 81.

⁹² Smith (2013), *supra* nota 97, p 1039.

⁹³ Google ordered to remove links to 'right to be forgotten' removal stories. <https://www.theguardian.com/technology/2015/aug/20/google-ordered-to-remove-links-to-stories-about-right-to-be-forgotten-removals> (18.01.2017).

achieve the balance between the conflicted responsibilities and duties.

2.2. Search engines as global world: A difficulty to find EU boundaries

This subchapter is divided into two parts. Both parts are focused on the very important function and distinct character of the search engines. However, the first part is specifically focused on the understanding of the distinct nature of the search engine by being an intermediary. As the intermediary is any company providing service at distance by using electronic mean for a remuneration, where the individual requests of a recipient of services, this intermediary shall be excluded from certain liabilities.⁹⁴ On the other hand, second part is focused on the global nature of the search engine, as it is spreading the information all over the world. Therefore, the globalization of search engines would make it harder to decide the jurisdiction of the claims raised for the right to be forgotten.

In order to start the first part, one must start from very important point and also considers as a legal problem. In fact, one must know the answer whether the search engines are carrying out the general obligation to monitor the content they are dealing or not? And if they do so, why the EU law still considers them as intermediaries⁹⁵, at time where intermediaries do not have a general obligation to monitor any illegal content or even being liable for the information dealt as far as they are neutral and do not know about the infringement?

As the author described above in chapter one, ECJ in the *Google Spain case* considered the search engine as being liable for the right to be forgotten and the information dealt by the websites in the searching result.⁹⁶ By assigning for the search engines, a title of being the controller, controller means liable for the processing personal data and thus this shall grant the search engines other responsibilities which are not required by among other intermediaries.⁹⁷ Why these additional responsibilities are granted specifically for the search engines among others? Here we must know that a distinct character of search engines, probably the importance and

⁹⁴ The Limited Liability of Internet Intermediaries In the EU. <http://www.ilincnetwork.eu/wp-content/uploads/2015/08/3-LB-The-Limited-Liability-of-Internet-Intermediaries-in-the-EU-Update.docx.pdf> (29.12.2016).

⁹⁵ Mann., R., Seth, B. The Promise of Internet Intermediary Liability. *William and Mary Law Review* 2005, 47 (1), p 34.

⁹⁶ CJEU (2014), *supra* nota 6, p 80.

⁹⁷ Lee, E. Recognizing Rights in Real Time: The Role of Google in the EU Right to Be Forgotten. *University of California* 2016, 49 (1), p 1027.

global impact of the search engines are granted them this additional liability among others.

In the E-commerce directive 2000/31/EC (ECD), specifically in articles 12 to 14 are stated that the intermediaries are excluded from the liability for the information who offer mere conduit, caching and hosting.⁹⁸ However, in accordance with *Google v. Louis*, ECJ held that Article 14 must “*be interpreted as meaning that the rule laid down therein applies to an Internet referencing service provider in the case where that service provider has not played an active role of such a kind as to give it knowledge of, or control over, the data stored.*”⁹⁹ Therefore, by making a rational connection between the *Google v. Louis* case and the *Google Spain* case a good result will come out¹⁰⁰, because Google is a search engine, which is an active intermediary as well. The case held “*It is the search engine operator which determines the purposes and means of that activity and thus of the processing of personal data that it itself carries out within the framework of that activity and which must, consequently, be regarded as the ‘controller’ in respect of that processing*”.¹⁰¹

However, the problem is not solved rather than it is more complicated. The ECD lacks clarity because it does not grant liability for the active intermediaries. In fact, the intermediary is acting in accordance with the passive-reactive approach, where the intermediary is only obliged to intervene when it gains knowledge about an infringing activity because it does not have general obligation to monitor, but it must have notice and takedown procedure, when it gains knowledge about the infringement only.¹⁰² Most EU countries did not put any procedural safeguards to ensure that the notice and take down procedure is applied in accordance with the fundamental rights. For instance, freedom of expression and the principle of proportionality.¹⁰³

Why this information is important? In fact, through the previous analysis, the clear outcome was that the liability of search engines among other intermediaries is not clear. Furthermore, one could go further and say that the search engines do not have the clear duties assigned by clear law in order to follow them. Therefore, it is hard for the EU law to provide absolute protection for the right to be forgotten, while does not assign a clear formula for the search engines

⁹⁸ European Parliament and the Council, of 8 June 2000 Directive 2000/31/EC on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (‘Directive on electronic commerce’), OJ L 178 , 17 July 2000, art 12-14.

⁹⁹ CJEU 23.3.2010, C-236/08, *Google France SARL and Google Inc. v Louis Vuitton Malletier SA* , p 120.

¹⁰⁰ Sloot, B. Welcome to the Jungle: The Liability of Internet Intermediaries for Privacy Violations in Europe. *JIPITEC – Journal of Intellectual Property, Information Technology and E-Commerce Law* 2015, 6 (1), p 217.

¹⁰¹ CJEU (2014), *supra* nota 6, p 33.

¹⁰² Sloot (2015), *supra* nota 100, p 212.

¹⁰³ Horten M. *The Copyright Enforcement Enigma – Internet Politics and the ‘Telecoms Package’*. New York, Palgrave Macmillan 2011, pp 48-50.

in order to follow it.¹⁰⁴ In fact, at the time where the EU directives state that the search engines are not liable as far as being neutral intermediaries, the case studies, and more importantly, after *Google Spain cases*, show different outcomes than those traditional immunity regimes.

The problem is making the search engines responsible for the content they made accessible to the public. As the search engines have special duty for making links in accordance with article 21(2) of the ECD, few cases looked at the liability of search engines for those links.¹⁰⁵ In *Google v LVMH*, ECJ held that Google is a host, but not as a linking intermediary.¹⁰⁶ This would make the issue more complicated because search engines may infringe the privacy rights by providing the links rather than distributing and hosting such type of content directly.¹⁰⁷

On the other hand, it must be noticed that the commercial interest could play a role.¹⁰⁸ The intermediary is liable when it has a commercial interest gained in the infringement content.¹⁰⁹ However, the search engines may comply with the law and avoid any infringement by notice and takedown procedure. In this regard, when the intermediary knows about the infringement content, it can easily remove this content and thus not being liable anymore.¹¹⁰

However, the question still remains whether the right to be forgotten can apply this procedure and thus excludes the search engine from the liability raised by the breach of this right or not? In fact, the *Google Spain case* did not refer to the ECD in the case and even it did not link any connection between the case and the nature of the Google as an intermediary, which must have an immunity.¹¹¹ However, the case indirectly explained the future of right to be forgotten and its relationship to the notice and takedown procedure. It seems that this procedure is not working with the right to be forgotten, because Google is found guilty and liable for this right.¹¹² Furthermore, Google is sentenced to pay damages by many cases in the French and Spanish

¹⁰⁴ European Commission (2016), *supra* nota 25.

¹⁰⁵ Edwards, L. Role and Responsibility of Internet Intermediaries in the Field of Copyright and Related Rights. University of Strathclyde 2010, p 14.

¹⁰⁶ CJEU (2010), *supra* nota 99, p 106.

¹⁰⁷ OECD 2011. The Role of Internet Intermediaries in Advancing Public Policy Objectives. Paris, OECD Publishing, p 85.

¹⁰⁸ CJEU (2010), *supra* nota 106, p 4.

¹⁰⁹ First Council Directive 89/104/EEC of 21 December 1988 to approximate the laws of the Member States relating to trade marks, OJ 1988 No 1. L 040, 21.21.1988, art 5.

¹¹⁰ Keller D. Intermediary Liability and User Content Under European's New Data Protection Law, Inform blog. The Center for Internet and Society, Stanford Law School 2015. <http://cyberlaw.stanford.edu/blog/2015/10/intermediary-liability-and-user-content-under-europe's-new-data-protection-law> (29. 12. 2016).

¹¹¹ Ausloos, J., Kuczerawy, A. Noc Online Intermediaries Case Studies Series: European Union and Google Spain. Interdisciplinary Center for Law & ICT (ICRI) 2015, p 4.

¹¹² *Ibid*.

courts on the basis of the judgment of *Google Spain case*.¹¹³

This is not the one and only problem by considering the search engines as intermediary. However, the more complicated problem is the global nature of search engines. In fact, search engine as any other types of companies, it establishes its capital in any preferable country, which is considered the country of the origin. Later, the search engine starts to provide its services across nations and also it could have branches in some countries but not all countries. From this point, the problem is started, because search engines do not have their impact only where they have branches, but their impact is spreading the world.¹¹⁴

In this regard, let us take an assumption that Google, the American company, does not have a branch in Estonia. How the Estonian national who suffers from inaccurate links can claim his right to be forgotten, as being an EU national, who shall have an absolute protection from the Google company? In accordance to the *Google Spain case*, the EU protection is applicable only for the EU companies and any non-EU company as far as this company has branch in the concerned member state. The question is whether the Estonian national can claim in the Estonian courts against Google, when the company does not have a branch in Estonia? The question is so important for the future, because the technology is so rapid and any another new company, not Google, may invade the EU market and has an issue with the right to be forgotten, but it does not necessary have branches in all the EU countries.

In addition, another important question, which may be much more important and complicated is what about if the EU national lives beyond EU countries, how he can claim his protection under the right to be forgotten, as the search engine concerned is not an EU company and the EU national is also not located in his original state in order to claim that right? In fact, the issue is so complicated from all sides, because even by removing the links from one branch, other branches still have the links and thus when the EU national lives beyond EU or in a country where the search engine has no branch, this national cannot claim his right to be forgotten or even make the case subject to the EU law. Indeed, this issue is the second part of this subchapter. The issue is about the jurisdiction and its connection to the applicability of the right to be forgotten.

Consequently, the right to be forgotten cannot be considered as an absolute right for the

¹¹³ Peguera M. Right to be Forgotten: Google Sentenced to Pay Damages in Spain, Blog. Center for Internet and Society, Stanford Law School 2014. <http://cyberlaw.stanford.edu/blog/2014/10/right-be-forgotten-google-sentenced-pay-damages-spain> (25.12.2016).

¹¹⁴ Miyashita (2016), *supra* nota 56, p 10.

EU nationals, it must be noted that the EU law must build to their nationals an absolute protection in order to meet this absoluteness.¹¹⁵ In the article written by Alan Gewirth on the definition of the absolute right, he said as follow; "*A right is absolute when it cannot be overridden in any circumstances, so that it can never be justifiably infringed and it must be fulfilled without any exceptions*".¹¹⁶ Thus, by having such as the above circumstances and even more exceptions for the application of right to be forgotten, one could say that this right still young and the EU step to consider it as an absolute right is an early step, which it has been taken in a hurry.

More importantly is what has been said in the guideline on the implementation of the *Google Spain* case. The guideline spoke about the territorial effect of a delisting decision, and in order to be more specific, the quote is required from the guideline as follow; "*In order to give full effect to the data subject's rights as defined in the Court's ruling, de-listing decisions must be implemented in such a way that they guarantee the effective and complete protection of data subjects' rights and that EU law cannot be circumvented,, In practice, this means that in any case de-listing should also be effective on all relevant domains, including .com*".¹¹⁷

The key point here is that the delisting decision means that the EU ruling of the right to be forgotten could have an impact beyond Europe. As the guideline explained, the right to be forgotten will be effective even in the original search engine, which is usually not EU one.¹¹⁸ For instance, after the *Google Spain* case, US company found itself subject to the Spanish and EU law. In fact, this would be considered as a dangerous step and also a very complicated one because every member state in the international community has its own sovereignty that must be respected by other nations. If the member state of the international community wants other countries to respect its own sovereignty, this member state should also exchange this respect of the sovereignty of others. This is the Public International Law regimes that stated the principle of equal sovereignty and non-intervention principle.¹¹⁹ Thus, EU cannot enforce U.S or other countries to follow its own strict privacy rules beyond its borders. As deleting the links from Google.com could be interference in the internal affairs of the U.S, which is not reasonable nor propor-

¹¹⁵ M, Vijfvinkel. Technology and the Right to be Forgotten. Radboud University Nijmegen 2016, p 21.

¹¹⁶ Mavronicola, N. What is an 'absolute right'? Deciphering Absoluteness in the Context of Article 3 of the European Convention on Human Rights. Oxford University Press 2012, 12(4), p 729.

¹¹⁷ ARTICLE 29 Data Protection Working Party— Guidelines on the Implementation of the Court of Justice of the European Union Judgement on "Google Spain and Inc V. Agencia Espanola De proteccion De Datos(AEPD) And Mario Costeja Gonzalez" C-131/12, Belgium, 26.11.2014.

¹¹⁸ Shadbolt (2016), *supra* nota 70, p 5.

¹¹⁹ Alsenoy, B., Koekkoek, M. Internet and Jurisdiction after Google Spain: The Extra-Territorial Reach of the EU's "Right to be Forgotten". Leuven Centre of Global Governance Studies 2015, p 11.

tional to ask the U.S company to subject for this way of double jurisdictions.¹²⁰

It must be noticed, however, that article 4 (1) of the old directive 95/46, before the directive is replaced into the new GDPR¹²¹, had a good explanation for the scope of the application of the EU law in case of having an online issue, and thus it also provided the jurisdiction for extraterritorial claims, where the member state must apply its own national law. First, follow the law of capital of the controller. Second, even though the controller has no capital in a member state, it may be subject to the EU law by the virtue of Public International Law. Third and finally, the controller may be subjected to the EU law in case of using equipment that it is located in a member state.

"1. Each Member State shall apply the national provisions it adopts pursuant to this Directive to the processing of personal data where:

(a) the processing is carried out in the context of the activities of an establishment of the controller on the territory of the Member State; when the same controller is established on the territory of several Member States, he must take the necessary measures to ensure that each of these establishments complies with the obligations laid down by the national law applicable;

(b) the controller is not established on the Member State's territory, but in a place where its national law applies by virtue of international public law;

(c) the controller is not established on Community territory and, for purposes of processing personal data makes use of equipment, automated or otherwise, situated on the territory of the said Member State, unless such equipment is used only for purposes of transit through the territory of the Community."¹²²

On the other hand, because of the important role of the search engines and their global effect, the right to be forgotten cannot be effective without being global.¹²³ This means that if the case only limited its application for the Google of Spain, the judgment would be probably considered as meaningless, because the data subject will still suffer from the inaccurate personal information everywhere else beyond the EU borders or even inside the EU borders, as well. It must be noticed, that anyone can open different versions of Google within the same member state.

¹²⁰ Gidari A. The Right to Be Forgotten, Everywhere. Privacy Tracker. The International Association of Privacy Professionals 2014. <https://iapp.org/news/a/the-right-to-be-forgotten-everywhere/> (02. 01. 2017).

¹²¹ European Parliament (2016), *supra* nota 43, Art 17.

¹²² European Parliament (1995), *supra* nota 16.

¹²³ Lee (2016), *supra* nota 97, p 1061.

This shall make the removing of search results only for one version useless and not effective for the data subject, especially when this data subject has a work internationally and he needs his good reputation in everywhere, i.e. export trader or public figure.

In fact, author tried personally to use different versions of Google and that was easy and permitted inside the one member state. Thus, the member state does not block any other version within its borders, which shall make the issue much more complicated to be followed. As a result of this, again it seems that the adoption of the right to be forgotten could be an early step and very strict exercise for the privacy rights. The reason beyond this is that EU is not ready yet to control the global nature of this right and thus provide strong procedural safeguards for its enforcement.

Now, it could also be said that the right to be forgotten is beyond the control of the EU community. EU is not able yet to make the right to be forgotten globally applied and highly protected from all aspects. Even in the ECD,¹²⁴ the country of origin principle prevents any other member state to restrict the activities of the intermediary. It is the cross-border element, where the electronic commerce activities only have to comply with the laws of the country of establishment of the company.¹²⁵

Therefore, it is clearly showed that the right of every member state to apply its own rules within its own territories is very hard when the issue is concerning the internet usage and specifically the right to be forgotten, as new right. It must be noted that in the *Google Spain* case, ECJ decided to apply a principle that so-called the effect principle in order to determine the jurisdiction.¹²⁶ This principle does not follow the territorial principle nor the universality principle in order to be applied in the extraterritorial claims. However, this principle is permitting the state to regulate any legal issue that has indirect connect with its territory, but would affect within its territory. However, even this principle seems hard to be effective in the internet issues without a real cooperation between the international community as a whole in order to introduce clear and unified standards and guidelines for performing the privacy rights and more specifically, the right to be forgotten. In addition, another problem may be raised by applying the effect principle is referring to the global nature of the internet. As the internet has a global effect in everywhere,

¹²⁴ European Parliament and the Council, of 8 June 2000 Directive 2000/31/EC on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce'), OJ L 178 , 17 July 2000.

¹²⁵ Hellner, M. The country of origin principle in the E-commerce Directive: A conflict with conflict of laws. Riga, Riga graduate school of law 2003, p 6.

¹²⁶ Alsenoy, Koekkoek (2015), *supra* nota 119, p 6.

any state may easily claim this principle if the one would apply it for the internet matters.¹²⁷

In order to end this subchapter, the author would stress again that the right to be forgotten brought very complicated problems with regard to the jurisdiction. These problems are impossible to solve now, but will be solved with the practice of ECJ and also through the cooperation among the international community. These two practices are the most important for systematic development of the right to be forgotten in the search engines, because otherwise the right to be forgotten will not be as effective as it must be.

¹²⁷ Koekkoek (2015), *supra* nota 119, p 12.

3. European Union enforcement for the right to be forgotten

This chapter is very important, as a method that the author could use in order to reach for her conclusion. Indeed, it is very substantial part, because the author's topic is about the enforcement of the right to be forgotten at the EU level. Thus, the author must explain the nature of the EU region and how it works in practice. In this context, it must be noticed that the EU region has special nature among the international community, when it enforces its rules. There are specific principles and rules, which are unique and only applicable within the European Union.¹²⁸ EU cannot enforce those unique principles outside its region. However, by enforcing the right to be forgotten at the EU level, some of these principles will override with the equal sovereignty of other states in the international level, which are not a member of the EU.

In this chapter, the author will find out the specific characters of the European Union, which led the EU to come up with the so-called, the right to be forgotten. By understanding these characters, the author will be able to analyze the mechanisms of the enforcement of the right to be forgotten, and also predict the future of it. It must be noticed that this chapter is a combination between the background information that is about the formulation of the specialty of the EU, and the future of this specialty, as a sovereign association.¹²⁹ In this regard, the author will analyze step by step the processes of working of the EU, as a legal method that could clear up why EU needs the right to be forgotten and how it enforces this right among its member states. In fact, the questionable matter of this chapter is to understand the way that the EU thinks and acts, because those beliefs and actions are the reflection of finding out the conclusion of what are the mechanisms for the enforcement of the right to be forgotten and how the EU can provide the protection for it.

In this regard, the first subchapter is focused on the supremacy and primacy principles of the EU, as a first step to find out the reasons of formulating the EU power and competencies, which are used for enforcing any new rules and laws among its member states.¹³⁰ Then, the sec-

¹²⁸ Clerck-Sachsse, J., Kaczyński, P. The European Parliament – More powerful, less legitimate ? An outlook for the 7th term. *Entre for European Policy Studies* 2009, 1 (314), p 2.

¹²⁹ Lepsius, R. The European Union as a Sovereignty Association of a Special Nature. *Harvard Law School* 2000, 1 (7), p 1.

¹³⁰ Trstenjak, V. National Sovereignty and the Principle of Primacy in EU Law and Their Importance for the Mem-

ond subchapter is the second step. In fact, it is the study of the EU approach in protecting the privacy rights and the online data in particular. This subchapter helped the author to understand the way of how the EU thinks and believes in the privacy rights. Thus, it consequently has impact on the third subchapter too, as the last subchapter is about the new general data protection regulation (GDPR),¹³¹ which is the new regulation for the right to be forgotten. This new regulation is carrying out new provisions and developments, which are promising.¹³² However, it must be noticed that there are also legal matters in the new GDPR that complicate the enforcement of the right to be forgotten and may create battles on the issue outside and inside the EU.

3.1. The nature of supremacy in the European Union

EU is thinking locally, but is acting globally. Indeed, by those few words, the author will start this subchapter. The reason of choosing those words is that when the one stops on the enforcement of the right to be forgotten, the person will notice that this right is a reflection of the nature of the EU at time where this right has a global nature. In this regard, anyone can obviously conclude that the EU is thinking locally, by focusing on its internal regimes and needs. However, the action of the EU is a global action, because it enforces this right, as a personal and human right, which consequently will have an impact all over the world.¹³³ Therefore, this subchapter is a substantial part of the author's research process, as there is an urgent need for studying the internal rules of the EU, because the nature of the EU is highlighted the development of the right to be forgotten in the global sense.¹³⁴

First of all, one must study unique principles, which are resulted of having the EU system. The special nature of the EU, as a powerful collective body, is a reason of various special rights that are adopted and developed by the EU and within its borders. In this context, the EU system is built up on the principle of supremacy and the principle of primacy. These two principles are the methods, which the EU uses in order to enforce its law among member states. In this

ber States. University of Vienna 2013, 2 (4), pp 72 -73.

¹³¹ European Parliament (2016), *supra* nota 43.

¹³² Vijfinkel (2016), *supra* nota 115, p 58.

¹³³ Van B., Koekkoek M. The Territorial Reach of the “Right to be Forgotten”: Think Locally, but act Globally? News and comments on the EU law. European Law blog 2014. <http://europeanlawblog.eu/2014/08/18/the-territorial-reach-of-the-right-to-be-forgotten-think-locally-but-act-globally/> (5. 01. 2017).

¹³⁴ Bennet, C. The “Right to Be Forgotten”: Reconciling EU and US Perspectives. Berkeley Journal of International Law 2012, 30 (1), p 161.

context, those principles have a leading role to draw the legal framework of the EU system, and the terminology of the right to be forgotten specifically.¹³⁵ In accordance with *Flaminio Costa v E.N.E.L.*, every member state of the European Union shall give a part of its sovereignty to this EU union in order to achieve the purpose of integrity. This integrity between the different member states is coming only by finding the harmonization between different legal issues in every member states.¹³⁶

As a result of the primacy and supremacy principles, EU is granted a huge power and competencies in order to regulate different issues within its borders. Even the small details may be regulated by the EU law among its member states. However, it must be noticed that there is a difference between those two principles. Of course, this different does not insulate the two principles apart of each other rather than enhancing and strengthening the connection between them. Thus, this different is important in order to create the compatible relationship, which is the main reason for the competence of EU.

However, the small difference between the principle of primacy and the principle of supremacy is occurred in reality. Although, they are carrying out the same meaning in the Oriental Tradition, one cannot escape of this different now.¹³⁷ In fact, the supremacy means the above competence, which is reached by the *Flaminio Costa v E.N.E.L.* It means that the EU has a supremacy over every member state in order to regulate specific legal issues. Thus, it is the right granted to the EU in order to choose which matter needs a unification and thus regulate it. However, the primacy principle is the next step. Indeed, it means that supremacy rules, which is resulted by the recognition of the supremacy principle, are prevailing over any conflicted rule that may be occurred between the national law and the EU one. Thus, primacy means that in case where the national law is adopted after the EU law, the EU law shall still be prevailing over the national law, because of having primacy over it.¹³⁸

In this context, under any situation, the national law cannot conflict with the EU law, but the state has a duty to harmonize its national law with the EU law.¹³⁹ Therefore, the national lawmakers in every member states do not have an absolute space of freedom in order to formu-

¹³⁵ Trstenjak (2013), *supra* nota 130, pp 72 -73.

¹³⁶ CJEU 15.7.1964, Case 6-64, *Flaminio Costa v E.N.E.L.*, p 3.

¹³⁷ Avbelj, M. Supremacy or Primacy of EU Law—(Why) Does it Matter? *European Law Journal* 2011, 17(6), pp. 744–763.

¹³⁸ Shoor, E. Narrowing the Right to be Forgotten: Why the European Union Needs to Amend the Proposed Data Protection Regulation. *Brooklyn Journal of International Law* 2013, 39 (1), p 490.

¹³⁹ *Ibid*, pp. 744–763.

late their law and determine their issues. However, they are always subject to the EU directives, cases, and regulations. Even when the vague terms are faced by the national court, this court is obligated to ask the questions for clarification in accordance with the preliminary ruling approach.¹⁴⁰

In this regard, the preliminary ruling approach means the interpretation of any vagueness in the EU law, as every national court of every member state before judging for a court decision on any dispute is not only obligated to apply the national law correctly, but also it must make sure that its decision is not against the EU law. In case the national court feels that it may fail to do so, this national court can ask the help from the ECJ by asking for the interpretation and sending the matter questions, as the ECJ has a monopoly interpretation.¹⁴¹ In fact, it must be noticed that the right to be forgotten had a great development through this approach rather than the EU primary law itself, because no one cannot talk about this right without referring for the ECJ interpretations; such as in the *Google Spain* case. As it is mentioned previously, the interpretations of the ECJ through the preliminary ruling approach in the *Google Spain* case led the search engines to be responsible for the right to be forgotten, although search engines are secondary controllers, who do not process the information themselves from its primary source.¹⁴²

This is the impact of ECJ in the enforcement and application of the EU law. In the important rulings, ECJ improves the EU law and expands its application within the EU borders. Thus, it is necessary for every member state to return back for the conclusions and interpretations of any new ruling in order to apply the EU law in the correct manner. It is to say that the nature of supremacy in the EU has no one form. However, it means that EU law is prevailing over the national law in all forms. It must be noticed that even the principle of supremacy itself is developed through the ECJ.¹⁴³ As by every new legal order, this new order is obligated to every member state. However, in case of any conflict between the new legal order and the national law, national law must be adjusted in order to meet the differences that are occurred in the new legal order of the ECJ.

After all, by understanding the tools and system of EU, one can know how the EU impose control over its area. Moreover, one can conclude the answer of where the right to be for-

¹⁴⁰ Kirova, M. An Analysis of the Relationship between National Courts and the Court of Justice of the European Union – Shifting from Cooperation to Superiority. *Queen Political Review* 2014, p 1.

¹⁴¹ Lenz, C. The Role and Mechanism of the Preliminary Ruling Procedure. *Fordham International Law Journal* 1994, 18 (2), pp 389-409.

¹⁴² CJEU (2014), *supra* nota 6, p 20.

¹⁴³ CJEU (1964), *supra* nota 75, p 3.

gotten is came from? Or to be more specific, one can answer the important question of how the right to be forgotten is expanded geographically and legally in all member states? As the EU is seeking for the unification of its privacy rights and rules within the EU borders, the answer is undoubtedly referred not only for the strong belief in the privacy rights, which is historically and cultural built in the background of EU.¹⁴⁴ In fact, this historic and cultural belief in seeking for having a high protection for the privacy rights will be explained and analyzed in details in the next two subchapters. However, EU first purpose for the adoption of the right to be forgotten can also be referred for an economic reason.¹⁴⁵ How this happens? In fact, EU is seeking for having the free movement of persons, capital, services, and goods. In addition, EU prohibits any kind of restrictions that could be used in order to hamper the one of those four freedoms without having a legitimate and proportional justification. In this regard, the first priority and aim of the EU system are drawn by creating one single market that would face all challenges and differences between the member states.¹⁴⁶

By giving this point, the issue is more clear now. EU has also an economic reason behind the adoption of the right to be forgotten. In other words, the reason beyond the formulation and adoption of the right to be forgotten is not a sole humanitarian purpose. However, this right also came from believing in the commercial value of the online market as equally important as the actual offline market. Thus, EU has obvious attention toward making the online market free from obstacles as much as possible and equally for the achievements in the offline market.¹⁴⁷ It is the efforts of creating the one digital single market.¹⁴⁸ In this regard, EU believes that the personal data is the currency of the internet, where it needs for higher protection in order to make the environment of this market healthier and more comfortable. In addition, EU knows and realises the important impact of the right to be forgotten in the offline market as well. In this context, the restriction that would hamper the one single market may not necessary be an offline restriction. However, this restriction could be also an online one, because the right to be forgotten also empowers people to have more and greater control over their reputations and identities on the Inter-

¹⁴⁴ Hustinx (2014), *supra* nota 4, p 2.

¹⁴⁵ Rene, V. A vision of Responsible Research and Innovation. Forthcoming 2013, p 4.

¹⁴⁶ Shoor (2013), *supra* nota 138, p 487.

¹⁴⁷ Data flows – a fifth freedom for the internal market? Analysis. National board of Sweden, Utrikesdepartementet 2016.

<http://www.kommers.se/Documents/dokumentarkiv/publikationer/2016/Data%20flows%20%20A%20fifth%20freedom%20for%20the%20internal%20market.pdf> (23.01.2017).

¹⁴⁸ Digital Single Market for business and consumers. <https://ec.europa.eu/growth/singlemarket/digital/> (1.01.2017).

net, which shall facilitate their work between different member states.¹⁴⁹

Thus, in the light of the above analysis, EU as a region is full of power and competences. This power came by believing in the one single market, because the opportunity to achieve this market is coming through the control and unification among the individual member states. However, this power is not an absolute, but it must be balanced between the EU, as a collective power, and the national power of each member state, individually. In this regard, it must be noticed that the two powers of member state and the EU are granted by each other and they are not working otherwise. In this regard, by having the above two principles, the primacy and the supremacy principle, EU does also respect the national sovereignty and leave a space for each member state individually in order to control its national issues. However, every member state of the EU is free to regulate various internal issues, when these issues are not dealt by the EU law or the EU law leaves the space to do so.¹⁵⁰ This information is important, in order to understand the EU approach in dealing with the right to be forgotten, as it will be well explaining in the next last chapter.

Specifically, on this issue, one must turn to the right to be forgotten. In fact, the adoption of the right to be forgotten showed clearly the way of how the EU uses its power and competencies. First of all, in the era of the old data protection directive, the adoption and practical use of the right to be forgotten is created and expanded throughout EU borders. After the *Google Spain* case, EU used its competencies by the preliminary ruling approach and the legitimate using of the principle of primacy and supremacy. However, the right at that time was less resistive than today. Now EU wanted to extend its power and enhance the right to be forgotten, as a general application.¹⁵¹

In accordance with the article 288 of the primary source of the EU, the Treaty on the Functioning of the European Union (TEFU) states as follows;

“To exercise the Union’s competences, the institutions shall adopt regulations, directives, decisions, recommendations and opinions.

A regulation shall have general application. It shall be binding in its entirety and directly

¹⁴⁹ Hawthorn N. 10 things you need to know about the new EU data protection regulation. Security features. Computer World UK 2015. <http://www.computerworlduk.com/security/10-things-you-need-know-about-new-eu-data-protection-regulation-3610851/> (10. 01. 2017).

¹⁵⁰ O’Flaherty, M., Boillat, P. Handbook on European law relating to access to justice. Luxembourg, European Union Agency for Fundamental Rights and Council of Europe 2016, p 127.

¹⁵¹ Vijfvinkel (2016), *supra* nota 115, p 65.

applicable in all Member States.

A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.”¹⁵²

Therefore, EU formulated and adopted the new GDPR. In this regard, the right to be forgotten is more restrictive now. The reason beyond this is that GDPR makes the competence of EU more powerful by its ability to interfere in the national affairs, as every member state must follow this regulation directly and immediately.¹⁵³ Before in the old directive, the right to be forgotten was not clearly mentioned, but by the EU cases, it was an aim to achieve through the national law. However, there has not been a specific regulation, which would determine the used methods in order to achieve this determined purpose. In other words, every member state was obligated to achieve the right to be forgotten by its own national rules and regulations, but now there is specific regulation on this issue, where member states cannot apply their national law at all with regard to the right to be forgotten.¹⁵⁴ The adoption of the GDPR has a great impact over the development and enforcement of the right to be forgotten, which is analyzed in details in the next two subchapters.

In the connection with the previous analysis, the doctrine of the primacy in the EU law is important, because it is the way of examining and evaluating the nature of the enforcement of the right to be forgotten within the member states. Now, after the adoption of the right to be forgotten as a personal right, many legal issues raised practically as a result of making it one of the human rights. ECJ is granted the terminology of direct applicability and direct effect. As the supremacy and primacy of the EU are not absolute competencies as the *Flaminio Costa v E.N.E.L* judged. These principles are only, when the EU has an exclusive power by having a direct effect to confer rights on individuals and make them bound by every member state.¹⁵⁵

To make the issue clearer, now when the right to be forgotten is considered as one of the privacy rights, this right shall be granted by the power of the direct effect. This means that even individuals can rely on the application of the EU with regard to this matter. It must be noticed that individuals may claim the EU cases and the GDPR against the national law and in the na-

¹⁵² Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union of 13 December 2007, OJ 2012 No 1. C 326, 26.10. 2012, art 288.

¹⁵³ Hansen, M., Hopman, J., Leenes, R., Whitehouse, D. Privacy and Identity Management for Emerging services and Technologies. Netherlands: International Federation for Information processing 2014, p122.

¹⁵⁴ Doctrine of Supremacy of European Union. <http://www.lawteacher.net/freelawessays/administrative-law/doctrine-of-supremacy-of-european-union-administrative-law-essay.php> (10.01.2017).

¹⁵⁵ CJEU (1964), *supra* nota 136, p 7.

tional courts. The direct effect of the right to be forgotten must be granted in its both versions, vertical and horizontal direct effect. In the vertical direct effect, individuals can use the EU legislation, which includes the ECJ rulings in the right to be forgotten and the new GDPR against the national member state directly. While, in the horizontal direct effect the individuals can use EU legislation against another individual.¹⁵⁶

As a result of this, the use of supremacy in the right to be forgotten has created a challenge. The challenge is represented in the possibility of having unfair supremacy created by the adoption of the right to be forgotten over other rights. Mainly, the adoption of protective methods of the privacy rights over the protective methods of the freedom rights. In this regard, at this point one must notice a very important principle and one of the most used principles in the EU. This principle is used in every EU case, legislation, or action that is adopted by the EU. In fact, it is the principle of proportionality.¹⁵⁷ This principle is an examined method that EU uses in order to test whether the legal action that is done by its organs and norms is proportional or not. Therefore, the proportionality is a test, which is examined by the EU in all matters, steps, and processes. Even if the right to be forgotten is important and legitimate, when this right is used or protected in non-proportional sense and extent, the right to be forgotten will not be legitimated anymore.¹⁵⁸

To end this subchapter, one can conclude that the right to be forgotten is created and expanded by great control and competence of the EU, and this right cannot be enforced apart of the proportionality test. The proportionality means that the right to be forgotten must be only for what is necessary, proper, and suitable and does not extend beyond its necessity. For instance, the right to be forgotten shall not add additional unjustified efforts on the shoulders of search engines or breach the general interest in the freedom of speech. In this context, the unjustified efforts are prohibited in all means and for types of efforts, whether these efforts are economic or legal efforts. It must be noticed that the proportionality is the real evaluator that is used in order to balance the competence of the EU system with the national affairs.

Additionally, the supremacy must also be proportional and EU shall not interference in

¹⁵⁶ Direct effect and direct applicability, European Studies. Governance in a multi-level Europe, University of Portsmouth 2013, <http://hum.port.ac.uk/europeanstudieshub/learning/module-3-governance-in-a-multi-level-europe/direct-effect-and-direct-applicability/> (18. 02.2017).

¹⁵⁷ Zafir, G. Tracing the right to be forgotten in the short history of data protection law: The new clothes of an old right. Computers, Privacy and Data Protection Conference 2014, p 2.

¹⁵⁸ The impact of the Right to be forgotten on the interpretation of the EU Charter of Fundamental Rights. <http://www.law-right.com/the-impact-of-the-right-to-be-forgotten-on-the-interpretation-of-the-eu-charter-of-fundamental-rights/> (10.01. 2017).

the national affairs of countries that are outside the EU. It must be noticed that even though the countries may decide among them on the jurisdiction of transfer information, the right to be forgotten still an issue. In fact, each country does not violate the another country's sovereignty by merely "govern", as a result of each country gives a part of its sovereignty by entering to bind agreements with other countries. In other words, country may bind itself with obligations that are resulted by an international treaty.¹⁵⁹ However, the right to be forgotten is an individual agreement that is resulted by the EU unilaterally and thus does not have a clear jurisdiction, as it is described in the previous chapter.

3.2. The EU approach in protecting online data: right of privacy is highly concerned

The best way to start this subchapter is by proving that the online data protection is highly concerned in the EU system. In this regard, the data protection means the process to safeguard the important information. The safeguard of this information came by the protection for the right of use of this information and prevent it from loss or corruption.¹⁶⁰ At the primary level of the EU, one could notice the importance of the online data protection for the European Union. The article 16 of TFEU reads as follow;

"1. Everyone has the right to the protection of personal data concerning them.

2. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall lay down the rules relating to the protection of individuals with regard to the processing of personal data by Union institutions, bodies, offices and agencies, and by the Member States when carrying out activities which fall within the scope of Union law, and the rules relating to the free movement of such data. Compliance with these rules shall be subject to the control of independent authorities. The rules adopted on the basis of this Article shall be without prejudice to the specific rules laid down in Article 39 of the Treaty on European Union".¹⁶¹

The TFEU is not the only primary source that guarantee the protection of personal data. It could be argued that the EU has a strong guarantee for the enforcement of the privacy rights, es-

¹⁵⁹ Alo, E. EU Privy Protection: A Step Towards Global Privacy. Michigan State International Law Review 2014, 22 (3), p 1138.

¹⁶⁰ The EDRI members. An introduction to data protection. Brussels, European Digital Rights 2016, p 16.

¹⁶¹ Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union of 13 December 2007, OJ 2012 No 1. C 326, 26.10. 2012, art 288.

pecially the high protection for the online data, as an approach to balance between the modernization and the EU privacy concerns. In the given article 16 of TFEU, the law says "everyone", which means every natural person regardless to his nationality, whether EU national or not.¹⁶² This shall make the framework of the EU data protection system broad and strict at the same time. On the other hand, this is actually what made the EU unique and different than other nations. As in addition to the special concern by the EU system, as a collective body, for the data protection law, whether in its primary or the secondary sources, each individual member state from the 28 EU countries has its own data protection law plus to the stated obligations in the EU primary and secondary sources.¹⁶³

Here the author could ask her research question; should EU loosen up its data protection system? The answer undoubtedly needs a comparative study with a counterpart state. For instance, in comparison with the US system, as another leader in the development of human rights. EU system has a dominant position with regard to the privacy rights over the freedom of expression.¹⁶⁴ On the other hand, there is no single law at any level of the US system that is concerning the data protection. However, it is notably shown that US approach is drawn by providing the protection for the personal data through the focusing on each sector separately.¹⁶⁵ This shall increase the doubt on the issue, as whether the EU has the ideal approach for the data protection. In fact, there is a sustained fight in the issue and this is argued by *Christopher Kuner* argued as follows;

*"EU academics have criticized US law as reflecting a "civil rights" approach that only affords data privacy rights to its own citizens, whereas US commentators have argued that privacy protection in the EU is less effective than its status as a fundamental right would suggest."*¹⁶⁶

As a result of this comparison, one could conclude that the EU wants to enhance its privacy rights through enhancing its legal framework. However, Does EU really guarantee the en-

¹⁶² Boehm, F. A comparison between US and EU data protection legislation for law enforcement purposes. Study of LIBE committee 2015, p 11.

¹⁶³ European Commission. Protection of personal data. Justice, data protection 2016 <http://ec.europa.eu/justice/data-protection/> (24. 01.2017).

¹⁶⁴ Illak, A. Comprehensive Analysis of the Application of the Right to Be Forgotten in Relation to the Case C-131/12. Tallinn University of Technology 2015, p 57.

¹⁶⁵ Jolly L. Data protection in the United States: overview. USA, Practical Law 2016. <http://us.practicallaw.com/6-502-0467> (25. 01.2017).

¹⁶⁶ KUNER C. EU and US data privacy rights: six degrees of separation. Constitutional LAW, International & Comparative Law, Privacy 2014. <https://concurringopinions.com/archives/2014/06/eu-and-us-data-privacy-rights-six-degrees-of-separation.html> (25. 01.2016).

enforcement of this framework? The right to be forgotten could be a one mean that shows the importance of the privacy and data protection law for the EU. However, many argue that EU has very high level of the legal framework that cannot be exercised absolutely or fully controlled in the real life. In other words, the contention between different scholars is on the point that the EU may not meet the high level of norms in theory with the practical complicated technical life.¹⁶⁷

It must be noticed, as it is argued in the previous subchapter, EU knows the importance of the personal data as they are the currency of the internet. This sole economic reason is not the only reason for following this strict approach. However, there are furthermore another two historic and cultural factors that are equally important factors. The combination of those three factors has a great impact on the creation of the right to be forgotten and the transformation of this right from the directive to regulation.¹⁶⁸ As a matter of fact, EU as a region, suffered from various crises that are resulted together for the current tight privacy protection system. For instance, the Second World War built up the features of the privacy law. This is a result of the awful experience, which Europe does not want to see again.¹⁶⁹ In this context, privacy law is the protective approach, which protects citizens in the EU from any unjustified interference. In fact, this is exactly what Europe is looking for.

In this regard, it could be argued that there is a powerful enforcement for the online data protection, when the person does not loss the control over his personal information. The full control over the personal information is coming by having a full legal and technical mechanisms that are able to guarantee the setting for this personal information. In the Charter of Fundamental Rights of the European Union, article 7 stated as follows with regard to the right to respect for private and family life;

"Everyone has the right to respect for his or her private and family life, home and communications".¹⁷⁰

In accordance with this article, the right of privacy is not separated from the right to pro-

¹⁶⁷ Ibid.

¹⁶⁸ Prorok, C. The Right to be Forgotten” in the EU’s General Data Protection Regulation. Michigan Journal of International Law 2016, 37 (4), p 3.

¹⁶⁹Section Two: Privacy as Human rights.

https://www.dataprotection.ie/documents/teens/cspe%20resource%20booklet/Section_2_-_Privacy_as_a_Human_Right.pdf (26. 01.2017).

¹⁷⁰ Commission Regulation (EC) No 2000/C 364/01 of 18. December.2000 Charter of Fundamental Right of the European Union, OJ 2000 No 1. 25.06.2005, art 7.

tect the personal data, as the two rights are connected to each other.¹⁷¹ Article 8 stated as follows;

" 1. Everyone has the right to the protection of personal data concerning him or her.

2. Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified.

3- Compliance with these rules shall be subject to control by an independent authority."¹⁷²

More importantly, those articles are deeply connected to the right to be forgotten in the *Google Spain* case, because the interpretation for the old data directive was in the light of those two articles of the Charter of Fundamental Rights of the European Union.¹⁷³ Therefore, the right to be forgotten is closely related to the privacy right, as logically the violations of privacy caused by having new forms of publicity online. The right to be forgotten is one of the instances that is used to guarantee the data protection system¹⁷⁴ without a harmful breach for the freedom of expression.¹⁷⁵

Last but not least, the right to be forgotten could be considered as a high standard of the exercise of the privacy rights. However, this is not necessary meets the EU needs. *Vijfvinkel M* argued that the right to be forgotten may be costly and difficult practically. More importantly he argued that in some cases there is no longer an incentive to forget data, as it shall affect the business and user at the same time. For example, he argued that the storing and updating system is better because the right to be forgotten can take an excessive amount of time or effort to find, and then ask the removal for those data, especially in the search engines as they deal with very big data. In addition, from marketing view, search engine by removing the data by this right, search engines will be less accurate, which will affect the market campaign and thus profit of the company.¹⁷⁶ Furthermore, the right to be forgotten will open a new window for new processes and complaints. The question is whether the search engine

¹⁷¹ Fuster, G. *The Emergence of Personal Data Protection as a Fundamental Right of the EU*. Switzerland, Springer Science & Business 2014, p 244.

¹⁷² Commission Regulation (EC) No 2000/C 364/01 of 18. December.2000 Charter of Fundamental Right of the European Union, OJ 2000 No 1. 25.06.2005, art 8.

¹⁷³ CJEU (2014), *supra* nota 6, p 1.

¹⁷⁴ Alo (2014), *supra* nota 159, p 1127.

¹⁷⁵ Keller D. *The Final Draft of European's "Right to be Forgotten" Law*, Blog. The Final Draft of Europe's, The Center for Internet and Society at Stanford Law School 2014. <http://cyberlaw.stanford.edu/blog/2015/12/final-draft-europes-right-be-forgotten-law> (27.01.2017).

¹⁷⁶ Vijfvinkel (2016), *supra* nota 115, p 6.

will be able to handle with the big amount of personal data and whether it has the practical technologies to remove this information fairly within a reasonable cost and time?

3.3. The right to be forgotten in the GDPR 2016

In the light of the above analysis, the natural and the legal persons within the EU borders need for high protection regulation for their personal data that would encourage them in order to establish and engage in the economic life within the EU borders and by its both versions, the offline and online one. The GDPR is an effort of the EU system in order to find a solution for them. However, the question of this subchapter is whether the GDPR is a really practical solution?

The first observation regarding the GDPR is in the title itself. As it is mentioned previously, GDPR is the general data protection regulation, which is adopted recently. The matter issue is the word "regulation". Indeed, it has a great impact on the transformation of the data protection approach in the EU borders, because all national and EU rules with regard to the data protection will be replaced to the application of this regulation. The procedure of the new regulation is adopted in order to unify the law of data protection. However, there might be a big problem as a result of this unification, because all countries of the EU member states and companies, whether small, big, national, or foreign will be obligated to apply the same rules. Practically, this would be a restriction for some of the legal entities, because each country or legal entity may have its own preferences and background to deal with the privacy law. Therefore, even though the GDPR will include hard norms and will have an immediate effect on member states¹⁷⁷, this immediate application must meet the need for a soft regulation, which is broad and leeway enough in order to meet, on the other hand, the differences between member states.

As a matter of fact, article 17 of the GDPR has a great role to play in this issue, because it is the issue of the right to be forgotten. Article 17 itself does not mention the word "forget", but scholars conclude that the use of word "erasure" is replacement by the regulators for the right to be forgotten. Accordingly, the right to be forgotten when it is replaced to the right to erasure, the new name might be more clear and more supporter for the freedom of expression.¹⁷⁸ The word

¹⁷⁷ Allen & Overly 2016. International, The EU General Data Protection Regulation, Allen & Overly LLP 2016.

¹⁷⁸ Zafir (2014), *supra* nota 157, pp 4-5.

"forget" could be a mislead title in somehow, as some scholars argued, because the forget in this right is involving the personal data not their stories.¹⁷⁹ On other hands, the right to erasure is not matching with the online world, where the information into be fundamentally erasure is still under debate.¹⁸⁰

In this regard, article 17 needs a detail explanation for its paragraphs one by one.

The first paragraph says as follows:

"1. The data subject shall have the right to obtain from the controller the erasure of personal data concerning him or her without undue delay and the controller shall have the obligation to erase personal data without undue delay where one of the following grounds applies:

(a) the personal data are no longer necessary in relation to the purposes for which they were collected or otherwise processed;

(b) the data subject withdraws consent on which the processing is based according to point (a) of Article 6(1), or point (a) of Article 9(2), and where there is no other legal ground for the processing;

(c) the data subject objects to the processing pursuant to Article 21(1) and there are no overriding legitimate grounds for the processing, or the data subject objects to the processing pursuant to Article 21(2);

(d) the personal data have been unlawfully processed;

(e) the personal data have to be erased for compliance with a legal obligation in Union or Member State law to which the controller is subject;

(f) the personal data have been collected in relation to the offer of information society services referred to in Article 8(1)."¹⁸¹

It must be noticed that article 17 (1) is the right to restrict the processing.¹⁸² However, it has no word that is indicated for the inaccurate data, which is mentioned in the old directive.¹⁸³ In contrast, the regulator mentioned in this new regulation different types of personal data that

¹⁷⁹ Bernal, P. "The EU, the US and Right to be Forgotten", in *Reloading Data Protection*. New York, Springer 2014, p 75.

¹⁸⁰ Wardwell and Stevenson, G. Recovering erased digital evidence from CD-RW disk in a child exploitation investigation. *Digital Investigation* 2008, 5 (1), pp 6-9.

¹⁸¹ European Parliament (2016), *supra* nota 43, art 17(1).

¹⁸² Summary of Articles Contained in the GDPR. <http://www.eugdpr.org/articlesummaries.html> (31.01.2017).

¹⁸³ European Parliament (1995), *supra* nota art. 12(b).

can ask the removal from the data controller. Furthermore, it could be concluded from these types that the data subject may not only ask the removal for the personal data because of what has been agreed in the Google Spain case. Namely, the "incorrect, inadequate or misleading information".¹⁸⁴ However, the data controller is obligated to erase the information merely for respect of the data subject request, as to all data that has no longer necessary in relation to the purposes for which they were collected.¹⁸⁵

For this reason, the right to be forgotten under the new GDPR is very broad and does not subject to any phrase or a specific interpretation of the language, but the list of information, which can ask the removal is very open and can include more types of personal data in the future. This leeway in the article is very important and can have a great beneficial impact on the modernization of our age. In short, this article has succeeded to make a development for the right to be forgotten, because it is not strict in its language, but follows the rapid technical developments.

Now, the author is moved to the second paragraph, as a way to follow the development of the right to be forgotten in the eyes of the regulators of GDPR, which is stated as follow.

*"2. Where the controller has made the personal data public and is obliged pursuant to paragraph 1 to erase the personal data, the controller, taking account of available technology and the cost of implementation, shall take reasonable steps, including technical measures, to inform controllers which are processing the personal data that the data subject has requested the erasure by such controllers of any links to, or copy or replication of, those personal data."*¹⁸⁶

The paragraph is more controversial, because the regulator of the paragraph put many responsibilities on the controller without developing the concept of who is the controller. In this context, the article cannot be applied without going back for the interpretation of the ECJ in *Google- Spain* case.¹⁸⁷ On other hands, by following the judgement of this case, undoubtedly, it is well-known that search engines are controllers, but other websites such as the social media are still under doubt.¹⁸⁸ This shows a failure of the new GDPR in this area, because the definition of controller itself, as one of the fundamental elements of the right to be forgotten is not developed, as it is expected from the new GDPR.

¹⁸⁴ CJEU (2014), *supra* nota 6, p 70.

¹⁸⁵ Zafir (2014), *supra* nota 157, p 6.

¹⁸⁶ European Parliament (2016), *supra* nota 43, art 17 (b).

¹⁸⁷ Vijfvinkel (2016), *supra* nota 115, p 13.

¹⁸⁸ Prorok (2016), *supra* nota 168, p 3.

Similarly, important, the compellability of this paragraph by adding a general obligation over any controller who must take additional steps more than erasing the information when it is requested by the data subject. It must be noticed that the regulator linked between the right to erasure and the right to object that is stated in article 19.¹⁸⁹ To put it on another way, the regulator drew up the additional responsibility by the full responsibility to inform other controllers who are processing the data about the necessity for erasing this information, because of the objection of the data subject to retain this information about him. The problem is that the informing processes are held by the controller along with the costs and all carried technologies.¹⁹⁰ Conversely, in the practical current life, there is no technical solution to achieve this legal obligation by informing all third parties without having unreasonable effort added to the controller.¹⁹¹

In view of this fact, the third and last paragraph needs also for investigation. This paragraph provides as follows:

"3. Paragraphs 1 and 2 shall not apply to the extent that processing is necessary:

(a) for exercising the right of freedom of expression and information;

(b) for compliance with a legal obligation which requires processing by Union or Member State law to which the controller is subject or for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller;

(c) for reasons of public interest in the area of public health in accordance with points (h) and (i) of Article 9(2) as well as Article 9(3);

(d) for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes in accordance with Article 89(1) in so far as the right referred to in paragraph 1 is likely to render impossible or seriously impair the achievement of the objectives of that processing; or

(e) for the establishment, exercise or defense of legal claims."¹⁹²

Afterwards, this last article shows the important duty of the controller in order to balance

¹⁸⁹ Zafir (2014), *supra* nota 157, p 6.

¹⁹⁰ Maldoff G. Top 10 operational impacts of the GDPR: Part 6 - RTBF and data portability, The Privacy Advisor. Westin Research Center, IAPP 2016. <https://iapp.org/news/a/top-10-operational-impacts-of-the-gdpr-part-6-rtbf-and-data-portability/> (31. 01. 2017).

¹⁹¹ Alfaro, J., Navarro, G., Aldini, A., Martinelli, F., Suri, N. Data Privacy Management, and Security Assurance. Vienna, Springer International Publishing 2015, p 135.

¹⁹² European Parliament (2016), *supra* nota 43, art 17(3).

between the right to erasure and the freedom of expression. However, the way of balancing still under debate. The problem is not on the achievement of balance between the two rights within the EU borders. By way of contrast, the problem is occurred in the special nature of the EU privacy system, which is mentioned in the previous subchapter. To make it more clear, EU has different way of understanding for the freedom of expression than anywhere else.¹⁹³ In accordance with the *Joined Cases C-92/09 and C-93/09 Volker und Markus Schecke and Eifert*, the court stated that the right to the protection of personal data is not an absolute right, but must be considered in relation to how the procedure of erasure can benefit in the society.¹⁹⁴ However, the next chapter will discuss the balance process between the two rights in details.

Last but not least, the EU new movement for making the right to be forgotten in the online world is not yet fully foreseen. It must be noticed that the new regulation shall create the suitable environment for the application of the right to be forgotten. In this context, the recommendations would give a good solution for the problem of the creation of this environment. However, this is discussed in the next and last chapter. In contrast, now the answer for the proposed question at the binging of this subchapter with regard to whether the GDPR is the solution, cannot be given now before waiting the time to speak out on the issue. GDPR could be the solution, but it depends also on the interpretation for the article 17 in the future case law.

¹⁹³ Zafir (2014), *supra* nota 157, p 6.

¹⁹⁴ CJEU 6.3.2009, Case C- 92/09 and C- 93/09, *Volker und Markus Schecke and Eifert*, p 48.

4. Challenges and recommendations

The adoption of the right to be forgotten has made a different range of values suitable for new use and purpose. Long-established principles and human rights are transferred from the offline life into the online life. This transformation is good and necessary, because the e-society cannot be powerful without being systematic by rules. However, this is not always easy, and in many cases this is very complicated. The right to be forgotten is one of those rights that face various challenges, when it has been adopted in the online life. To be more specific, the overreaction of the world as a result of the assignment for the search engines on the liability for the right to be forgotten has created a number of new future risks built on this assignment.¹⁹⁵

After the solemn promise to find the high protection for the right to be forgotten, the challenges resulted from the processes of the enforcement of this right was hard. It is not easy to decide how far the right to be forgotten can be reached, because the question on the idealism balance between the freedom of speech and the right of privacy still unresolved. In this regard, this chapter is focused on two most important challenges that are facing the right to be forgotten. First of all, this right is not able to define its borders so far. As far as the nature of search engines is international, the right to be forgotten is an issue that does not only concern the EU member states, but all the world. This problem needs investigation. Therefore, in this chapter the elements of this problem are defined and it is tried to find recommendation that would improve the enforcement of the right to be forgotten.

The problem of the strict application of the privacy rights in the EU is equally important. The challenge of finding the balance between the freedom of speech and the right to be forgotten is not new, and it is not created by the adoption of the right to be forgotten.¹⁹⁶ Nonetheless, the adoption of the right to be forgotten had great impact on the privacy rights and their legal situation in comparing with the freedom of speech. Anyone may argue that the right to be forgotten is in favour of the right of privacy, because it enhances the personal data protection over the freedom of speech.

¹⁹⁵ Brock (2016), *supra nota* 3, p 2.

¹⁹⁶ Lee, E. The Right to Be Forgotten v. Free Speech. *Journal of Law and Policy For the Information Society* 2015, 12 (1), p 92.

In this regard, this chapter is a substantial method that could be used in order to conclude this thesis. It is the legal approach for criticisms and recommendations, which would help in reducing the future risks and disadvantages of the right to be forgotten. In this context, this chapter will expose the true evaluation for the right to be forgotten, through underlining the expectations of this right and compare it with the daily practice by enforcing it. Last but not least, this chapter is trying to search for alternative solutions and recommendations that would improve the methodology of enforcement of this right at the EU level.

4.1. A balance between freedom of expression and right of privacy

The best way to start this subchapter is by searching for comprehensive definitions for the elements of the title of this chapter. In this regard, before moving forward, there is an actual need to define the freedom of expression and the right of privacy in order to be able to find the balance between the two concepts. As a matter of fact, the ideal approach that shall be followed in order to determine the balance point between the two concepts is coming by having the best understanding of the nature and the legal consequences of each of them.

In the previous chapter, the author has analyzed the EU behavior towards the right of privacy. As it is mentioned previously, the right of privacy has special nature at the EU level. However, this specialty does not necessary mean that the EU regulations are against the freedom of speech or they do not satisfy this freedom's needs. In contrast to this fact, as the right of privacy has special character at the EU, the freedom of speech carries out a special character too.¹⁹⁷

In this regard, there is a valuable tool for interpreting the freedom of expression in the EU charter of fundamental rights. In fact, it gives a simple definition for this freedom in article 11 by stating, as follows;

"1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.

¹⁹⁷ Ibid, p 92.

2. *The freedom and pluralism of the media shall be respected.*¹⁹⁸

This simple definition is very good to highlight the basis points built up on the freedom of expression. However, when it comes to the practical life, this definition is not that easy in the application. In contrast, many challenges resulted from the new rapid complicated technologies, which are facing the freedom of expression and its ability to stand against any threat. In fact, it led for fighting with the EU concerns towards the achievement of high protection for the privacy rights.

In this regard, the right of privacy is the security and protection of the personal life. Through searching for the balance point between the freedom of expression and the right of privacy, the author noticed very good point. In fact, she noticed that the balance is only coming by providing the interaction and harmonisation between two important elements. Indeed, these elements are; the security and liberty. When the EU is able to find the balance between those two big concepts, the right of privacy and the freedom of expression could achieve the balance too. Therefore, this is stated in the EU law too, as it combined between the security and freedom in the same article, when the EU charter of fundamental rights spoke about the freedoms.

In accordance with this previous fact, article 6 stated as follows; *"Everyone has the right to liberty and security of person."*¹⁹⁹ It must be noticed that this article of combination between the liberty and security for finding the balance is followed directly by the important enhancement of the right of privacy. This is actually mentioned in the previous chapter, the right of privacy is the protection of private and family life.

Why this issue matters and is important in this thesis? In fact, the right to be forgotten is a new privacy right that after the adoption of it, number of commentaries in the US criticised and accused the EU approach, as against the freedom of speech.²⁰⁰ In this context, the freedom of speech is a fundamental human right that expresses the liberty and democracy of society. The problem of the implementation of the freedom of expression cannot be built without two important elements. First, the achievement of the actual freedom and liberty. Second, the right to

¹⁹⁸ European Commission (EC), 2012/C 326/02 of 26 October 2012 Charter of Fundamental Rights of the European Union, OJ C 326, 26.10.2012, art 11.

¹⁹⁹ European Commission (EC), 2012/C 326/02 of 26 October 2012 Charter of Fundamental Rights of the European Union, OJ C 326, 26.10.2012, art 6.

²⁰⁰ Kerr, J. What is a Search Engine ? e Simple Question the Court of Justice of the European Union Forgot to Ask and What It Means for the Future of the Right to be Forgotten. Chicago Journal of International Law 2016, 17 (1), p 22.

access information.²⁰¹ In fact, the main problem is that those two main elements are in conflict with the right to be forgotten, which shall add a restriction on the liberal democratic environment of any society.

Thus, the issue of debate between the freedom of expression and the right of privacy is not a general issue about those two big concepts. As the debate is very big and broad, it is extended to different levels and issues. For instance, the right to know and the historical memory can be included.²⁰² However, this thesis is specific to investigate only the related issues for the topic of this thesis. It is focused on the relationship between right to be forgotten as a new privacy right and the right to access for information, as a freedom of expression.

However, there is one another element can be common between the right to be forgotten and the freedom of expression. In fact, it could play the role and be a reason for determining the balance point between the freedom of speech and the right of privacy. This element is the achievement of the protection for the principle of general interest.²⁰³ Therefore, the general interest is a limitation for the personal internet of the right to be forgotten in a way to do not have an excessive use for this right.²⁰⁴

On other hand, the problem to find the general interest and thus achieve the balance is unresolved. The reason beyond this is the overmatching relationship between the right to be forgotten and the freedom of expression. To be more clear, the question of who has the right to ask the right to be forgotten is unresolved²⁰⁵ and thus this question hampers to find the balance between the right to be forgotten and the freedom of speech. In this context, it must be noticed that the right to be forgotten seems to be very personal, as it difficult to be able for application in the group multi personal issues. Indeed, this shall hamper the achievement of the right to be forgotten in order to be a group right in the application.

Thus, it is an individual right that could be functional only when the one wants to move his personal information individually. However, in the group issue, this right usually lose the game and fail to find the balance. For instance, if a photograph includes many persons, where one of them wants to remove this photo by his right to be forgotten and the another one wants to

²⁰¹ Illak (2015), *supra* nota 164, p 50.

²⁰² Brock (2016), *supra* nota 3, p 2.

²⁰³ Oetheimer, M. Freedom of Expression in Europe: Case-law Concerning Article 10 of the European Convention of Human Rights. France, Council of Europe 2007, p 85.

²⁰⁴ Vijfinkel (2016), *supra* nota 115, p 6.

²⁰⁵ Druschel (2017), *supra* nota 88.

keep it by his exercise of freedom of expression, the question will be about who will win the game? At the EU level, the enforcement of the right to be forgotten could win over the freedom of expression, because of the strict application for the privacy rights. However, if the one wants to make a comparative study and take another law into consideration, the freedom of expression could win the game, as one may expect this result in the US, as an example.

Obviously, the EU system has strict rules with regard to the personal rights. For instance, the freedom of expression itself has limitation above the limitation, which is provided by the right to be forgotten. In this way, the general interest on the eyes of the EU system has a special nature too. In fact, it must be noticed that the general interest at the EU level is always balancing with the personal interest. This way of balancing between the two interests is not a worldwide approach. However, in the US, for instance, the approach is different for balancing the right of privacy with the freedom of expression and one could even say that the approach is opposite.²⁰⁶ This could be proved by different range of examples. One of these examples, the hate of speech, which is a restriction on the freedom of expression at the EU level, that is not adopted as a restriction or limitation for the freedom of expression in the US law.²⁰⁷

On the other hand, the EU data protection regulation has a solution for search engines and their users for the right to be forgotten with regard to remember the freedom of expression.²⁰⁸ In particular, article 19 of the regulation, drew a framework for the usage of the right to be forgotten. In accordance with this fact, article 19 stated as follows;

*"The controller shall communicate any rectification or erasure of personal data or restriction of processing carried out in accordance with Article 16, Article 17(1) and Article 18 to each recipient to whom the personal data have been disclosed, unless this proves impossible or involves disproportionate effort. The controller shall inform the data subject about those recipients if the data subject requests it."*²⁰⁹

This article does not enhance the right to be forgotten, as to be an absolute right. However, it enhances the necessity for having always remedies under any harmful situation. In other words, search engines shall always look for solutions against any action that is threaten our personal right. For this purpose, the search engines may use the proportionality, which it is men-

²⁰⁶ Toobin J. The Solace of Oblivion in Europe, the right to be forgotten trumps the Internet. Annals of law, The New Yorker 2014. <http://www.newyorker.com/magazine/2014/09/29/solace-oblivion> (13. 02. 2017).

²⁰⁷ Lee (2015), *supra* nota 196, p 92

²⁰⁸ Free Word Centre 2016. United Kingdom, Policy Brief: The Right to be Forgotten 2016.

²⁰⁹ European Parliament (2016), *supra* nota 43, Art 19.

tioned in the previous chapter. In addition, they must balance between the personal and public interest. These two approaches are necessary in order to reach for solution in case of any threaten.

On other hand, article 19 of GDPR states that users of search engines have a legitimate right to ask for the removal of their personal information. However, it must be mentioned that the application of this removal must be done strictly and not easy to enforce the right to be forgotten. The court and the search engines rules are necessary to be followed in the application. In addition, this right is limited for natural persons, as it touches their dignity and honour, which the legal persons do not have it.²¹⁰

However, on the other hand, it could be argued that this strict application for the right to be forgotten is failed in the practice, as the right to be forgotten put the search engines in a position higher than what is expected from them. In fact, the search engines should not decide upon which information can be removed and which is not. The law must only determine the issue.²¹¹ Therefore, this has raised the question whether the information that is considered as personal must necessarily grant its holder the right to fully control them. In other words, if the personal information belongs to you, is it necessary that you have a full control to remove them? In this context, many scholars argue that there should not be a right, which gives the persons the ability to remove their personal information. Specifically, when this information is published by a third person and has a justification for it publications.²¹²

At the end, it could be concluded that the balance between the freedom of expression and the right of privacy is a complicated issue. However, this complex issue is more complicated after the adoption of the right to be forgotten in the online world. The reason beyond this is the urgent need to find the balance between the right to be forgotten and the freedom of expression, nonetheless it is difficult to achieve. The only justification that could reduce the tension between the right to be forgotten and the freedom of expression is coming by the fact that the search engines has no competence to remove the information from their original website. In contrast, the competence of search engine is limitation to make the searching process for this information much harder. This point could improve the balance target that is necessary between the right of

²¹⁰ Free Word Centre (2016), *supra* nota 208.

²¹¹ Right to Be Forgotten: Article 19 calls on Google and Data Protection Watchdogs to protect free speech. <https://www.article19.org/resources.php/resource/37733/en/right-to-be-forgotten:-article-19-calls-on-google-and-data-protection-watchdogs-to-protect-free-speech> (14.02.2017).

²¹² Free Word Centre (2016), *supra* nota 208.

privacy and the freedom of expression.²¹³

4.2. The international jurisdiction for the right to be forgotten

The starting point of this last subchapter is going to be on the issue of the international nature of the right to be forgotten. Why is this right that much international, even though our focus in this study is only limited in the EU borders? This is one of the biggest challenges that is facing the enforcement applicability of the right to be forgotten.

First of all, the international nature is not a special nature that is specific for the right to be forgotten. However, it must be noticed that the international nature that is characteristic for the whole world of internet. In this context, internet is an open global world, that has no tangible borders can be touched among its different platforms.²¹⁴ Thus, the globalization and international nature of internet are common challenges that face the application of law and find the right jurisdiction among international community.

In this context, the concept of extra territorial jurisdiction needs for identification, as the jurisdiction is the action of determination for the applicable law. On other hand, the extra territorial jurisdiction is the extra application for the national law in order to reach states that are not a part of this specific law. To be more specific, it must be noticed that the extra territorial jurisdiction in the right to be forgotten is an issue, because it is expected that the application of the right to be forgotten is going to reach states that are outside the EU member states and thus reaches countries that are beyond Europe.²¹⁵

Therefore, this issue is about the internet and jurisdiction. In fact, this is important issue, because the right to be forgotten, as a personal right is hard to follow the globalization, and consequently it is resulted for various types of restrictions that would hamper the efforts of EU in having full control over the right to be forgotten in a domestic level or in international level that is needed in order to make this right effective as much as possible. Consequently, this jurisdiction issue will hamper the enforcement of the right to be forgot and make it faces different ranges of challenges and legal consequences.

²¹³ Sullivan D. The Myths & Realities Of How The EU's New "Right To Be Forgotten" In Google Works, Article. Search Engine Land 2014. <http://searchengineland.com/eu-right-forgotten-191604> (14. 02. 2017).

²¹⁴ Brock (2016), *supra* nota 3, p 3.

²¹⁵ Alsenoy, Koekkoek (2015), *supra* nota 119, p 8.

What type of legal consequences that could arise as a result of the adoption of the right to be forgotten? Many legal consequences are explained in the previous chapters, but there is also another one consequence that needs for highlighting. Indeed, it is the issue of the law of evidence. As a result of exercise the right to be forgotten, the law of evidence will not be defined.²¹⁶ In other words, As *Viviane Reding* argued, the EU Justice Commissioner and Vice-President of the European Commission, it is the burden of proof issue. It is a matter of fact that the controllers, including the search engines, are carrying out this reasonability to prove that they are keeping the data for the law of evidence, rather than the users of search engines must prove that the collecting of their data is not necessary anymore.²¹⁷

In the exercise of the right to be forgotten, the law of evidence can be washed by removing the history of any person.²¹⁸ Even though the person may argue his right to be forgotten under the fact that this information is not needed anymore for legitimate purpose and thus no need to keep it, no one can expect the requirements of future by whether this information may be required in the judicial future for any person or not.²¹⁹

It is good to say that EU needs to solve the issue of jurisdiction. For instance, through the EU cooperation with the international community, and in particular the US, as the competitive leader for human rights in the area that could lead many member states of the international community to follow its approach. In this context, the cooperation is important as a method that would lead for making the right to be forgotten, as a universal right. This would easily overcome the complicated non-tangible borders among the different states of world. As a result, the right to be forgotten will be much effective and able to reach everywhere not only EU.

In this context, author believes that serious cooperation and negotiations between the EU organs and different states of the world are the next steps after the adoption of the right to be forgotten in order to enforce this right effectively. EU, as one of the most powerful unions in the world has too much power to put pressure over different states in order to recognise the right to be forgotten, as a methodical exercise of the right of privacy, which is the right to be lifted alone. For instance, EU can draft and invite other states of the international community in order ratify

²¹⁶ Anna Schimke, “Forgetting on the Internet”, Conference Report (2014), p 5.

²¹⁷ R, Viviane. Your data, your rights: Safeguarding your privacy in a connected world. European Commission 2011, p 2.

²¹⁸ Brammer H. The Law: The Right to be Forgotten, Research Note. Institute for Risk & Innovation, Annie Searle and associates LLC 2015. http://anniesearle.com/webservices/Documents/ResearchNotes/ASAResearchNote_2015-02_Brammer_RightToBeForgotten.pdf (17. 02. 2017).

²¹⁹ Benne (2012), *supra* nota 134, p 163.

international convention on the issue of enforcement the right to be forgotten.

However, the previous step is hard to achieve without finding the balance between the right to be forgotten and the freedom of expression, as it mentioned in the previous chapter. International community could put international strict guideline that must achieve in order to enforce this right. The strict conditions are only methods that could balance the privacy aspect of this right with the freedom of expression, and thus achieve the justice and the protective approach.

On the other hand, it is more important to stress the fact that EU needs for serious cooperation to gain the trust of the search engines, as they are the main actors on the enforcement of this right. There must be a strong legal mechanism that does not add non-proportional efforts over controllers of the search engines. Those strong legal mechanisms cannot be achieved without following the technical developments and the needs of the online market.

Yet, Google for instance, as the biggest company in the domain does not believe in the universality application of the right to be forgotten in the near future. In accordance with this fact, Peter Fleischer, the Google's Global Privacy Counsel said as follows: *"We believe that no one country should have the authority to control what content someone in a second country can access,"*.²²⁰ His words were a reaction of fight with France, because the latter wanted to enforce the right to be forgotten everywhere. This universal application was denied by Google, as it said that individual countries cannot determine the content of the whole world.²²¹ Thus, the EU cannot be a legitimately applicable, when it applies in the whole world.²²²

Thus, the right to be forgotten has two approaches that may be followed in regard with the jurisdiction issue. One can make assumption that the search engine may keep the application of this right locally within the EU member states. This assumption is easy to apply from a legal point of view. As the jurisdiction in accordance with the public international law, enhances the application for the principle of territory. In accordance with this principle, the right to be forgotten is only apply in accordance with the law of the state. If the national law recognizes the appli-

²²⁰ John P., Mello J. Google on Universal Right to Be Forgotten: Fuhgeddaboudit, Article. E-Commerce Times, E-commerce 2015. <http://www.ecommercetimes.com/story/82353.html> (17.02. 2017).

²²¹ Sterling G. Google Fights France To Prevent Globalization Of The Right-to-Be-Forgotten, Newsletters. Search Engine Land, SEO 2015. <http://searchengineland.com/google-fights-france-to-prevent-globalization-of-the-right-to-be-forgotten-226548> (17. 02. 2017).

²²² Meyer D. Google contests global 'right to be forgotten' order, Newsletters. Politico 2015. <http://www.politico.eu/article/google-challenges-global-right-to-be-forgotten-order/> (18. 02. 2017).

cation of this right, it will be applied within its borders only.²²³

In accordance with this previous fact, there is an urgent need to know how the law of jurisdiction is to be determined with regard to the online world. It must be noticed that due to the absence of universal standards for the online activities, the different national laws are always in conflict because of the jurisdiction.²²⁴ In the history of the determination for the jurisdiction over the online activities, in some cases, the law of actors in the online activity is to be applied, which is the principle of effect. However, in other cases, the territorial principle is applied, as the place of server or the infrastructure is going to be applied.²²⁵

With regard to the right to be forgotten, this problem is much complex, as EU applies its privacy law to every person that collects the personal data, regardless of its place of origin.²²⁶ This creates the tension in the international community, because of the external jurisdiction and the application of this right beyond EU.²²⁷ It must be noticed here, that the EU is following the contrast approach that is followed by the search engines. As it mentioned previously, the search engines want to make this right local as much as possible. On other hands, the EU approach seems to make this right universal and thus the high tension is a jurisdiction matter that is between the companies of search engines and other member states of the international community, namely the US as the state of origin for most of the search engines.

In accordance with article 3 of the GDPR, stated as follows;

“1. This Regulation applies to the processing of personal data in the context of the activities of an establishment of a controller or a processor in the Union, regardless of whether the processing takes place in the Union or not.

2. This Regulation applies to the processing of personal data of data subjects who are in the Union by a controller or processor not established in the Union, where the processing activities are related to:

(a) the offering of goods or services, irrespective of whether a payment of the data subject is re-

²²³ Van B., Koekkoek M (2014), *supra* nota 133.

²²⁴ Internet & Jurisdiction: What frameworks for cross-border online communities and services? <http://wsms1.intgovforum.org/content/no154-internet-jurisdiction-what-frameworks-cross-border-online-communities-and-services> (18.02.2017).

²²⁵ Reidenbreg, J. Technology and Internet Jurisdiction. University of Pennsylvania Law Review 2005, 153(1), p 1957.

²²⁶ Kuner, C. ‘Jurisdiction on the Internet : Part I’. International Journal of Law and Information Technology 2010, 18(2), pp 176- 193.

²²⁷ Taylor, M. Permissions and prohibitions in Data Protection Jurisdiction. Brussels Privacy HUB 2016, 2 (6), p1.

quired, to such data subjects in the Union;

(b) the monitoring of their behavior as far as their behavior takes place within the Union.

*3. This Regulation applies to the processing of personal data by a controller not established in the Union, but in a place where Member State law applies by virtue of public international law.*²²⁸

At the end, the aim of EU approach in making this right universally application is understandable, because the right to be forgotten needs to be fall out of all restriction in order to achieve the true purpose and impact for the EU's national, as a human. Thus, this right must not be able for application only in the EU, but it must expand the world in order to reach everywhere. Therefore, there is a great role can be added and performed by the local governments of member states. They can clearly define the limitation of the right to be forgotten, and build the local protection for this right through finding of the international consensus.²²⁹

²²⁸ European Parliament (2016), *supra* nota 43, art 3.

²²⁹ Keer (2016), *supra* nota 200, pp 241-244

Conclusion

In closing of this thesis, one cannot deny the important role of the EU in order to enhance the privacy rights and led the right to be forgotten in the search engines to the improvement direction. It is well-known that the right to be forgotten can solve many problems with regard to the issue of privacy. However, under the considerations of what has been achieved in the previous chapters, the hypothesis of this thesis is successfully achieved. The EU privacy regulations do not guarantee an absolute protection for the right to be forgotten. In this context, the reason for given such evaluation on the enforcement of the right to be forgotten refers for many facts resulted from this study.

First of all, the definition of the right to be forgotten is very complicated and it has no clear elements in the theory. This is important, because the right to be forgotten would have better application and enforcement in the search engines when it is well defined. However, even the GDPR, failed to do so, as the definition includes very hard terms that cannot be defined in clear way, because of the technical nature for the application of these elements and the human changeable behavior towards them, i.e. the sensitive data.

Furthermore, in the eyes of the EU, the legal situation of search engines is not clear and this fact is hampering the absolute protection for the right to be forgotten. Search engines are acting on behalf of the state in order to interference in the online EU content, nevertheless these companies are not EU ones and they have been considered as intermediaries, which shall not have a general obligation to monitor the content of the hosted websites. Here, the situation is different and the search engine has exemption with regard to the right to be forgotten.

In this context, there is an opportunity to answer the research question on how the search engines can balance between the different liabilities? The conflict and overlapping between the different duties of search engine make the enforcement of the right to be forgotten much harder. It has mentioned in the chapters that search engine is responsible to provide the free access to the information in accordance with the principle of net neutrality. In fact, this liability is mixed with the right to be forgotten.

As a recommendation to find the balance, it could be said that national courts must look for the issue case by case in order to avoid the unfair decisions. The process must be in respect with

the balance between the private interest of the data subject and the public interest of the society and other users as well. Furthermore, the functional testing method that is necessary to use in this situation is the proportionality test, which would not exceed what is proportional while removing the personal information. Finally, the flexibility understanding for the net-neutrality is very important. Neutrality does not mean to keep silent without any reaction over the violations of rights of people, because this principle implies the transparency and the non-discriminatory behavior in the searching process.

In order to support the previous fact, there is a need to stress that the right to be forgotten cannot be an absolute right. Why? The author is answered this second research question through giving the right definition of absoluteness. The absolute right means any right, which cannot override with any other rights at any situation. Undoubtedly, this is not the case with the right to be forgotten. This right clearly overrides with many other fundamental rights and principles, i.e. the freedom of speech, net neutrality, and the right to access for information. It is good to mention here that there is a duty to achieve the balance point between those conflicted rights. For instance, the author stressed the need for balance between the principles of security and liberty in the online society in order to achieve the balance between the freedom of expression and the right of privacy.

Further, the third challenge in having an absolute protection for the right to be forgotten is the international nature of the internet and the search engines. Indeed, the more importantly is the conflict relationship and the matching challenge between the international nature of the search engines and the personal nature of the right to be forgotten. Taking into consideration the results of this thesis, the right to be forgotten as a personal right is hard to apply in a global system that has no boundaries among its platforms. Here, the author noticed the nature of personality that is characterized by the right to be forgotten. This right is very personal and hard to apply for a group of persons. For instance, many persons took a photo together, one of them wants to keep it online and another one wants to delete it. Which right shall win over the another?

In accordance with this previous fact, with the right to be forgotten is also arising the jurisdiction challenge, as to which law is applicable. EU approach focuses on the Extra-territorial application for the GDPR in general and the effect principle of the right to be forgotten specifically, at time where the search engines do not want to apply this right in a global sense, but take into their consideration the law of each state with respect to the equal sovereignty.

In accordance with the previous chapter, should the EU loosen up its data protection sys-

tem? The answer is difficult and still not foreseen. The reason beyond this is that adoption of the right to be forgotten has advantages and disadvantages. In addition, its application is complicated as also saying that this right must only be applicable within the member borders is not logical to make the right to be forgotten effective as much as possible. The effective use of this right is achieved only by making it global as much as the international nature of search engines.

At the end, the author gave several recommendations in order to improve the enforcement of the right to be forgotten. Indeed, the cooperation with the intentional community and U.S in particular is quite important, as a way to make this right universal and applicable everywhere.

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