



University of St.Gallen

# Data Protection in CH and EU

Right to be forgotten &  
Right to data portability

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# Overview

- Right to be forgotten
  - case: Google Spain v Mario Costeja
  - RTBF in the GDPR
  - RTBF in the revised Federal Act on Data Protection
- Right to data portability
  - example: bitsabout.me
  - RTDP in the GDPR
  - RTDP in the revised Federal Act on Data Protection



# Right to be forgotten

- Google Spain v Mario Costeja
  - 1998: auction notice in a newspaper
  - later: digital version of the newspaper online
  - later: auction notice in Google's search results
  - 2009: contact with the publisher
  - 2010: contact with Google
  - 2010: complaint with the AEPD (Agencia Española de Protección de Datos)
  - decision of the AEPD: Google has to withdraw the data from their index and to render future access to them impossible
  - Google brings appeals before the national court
  - questions from the national court to the court of justice of the European Union
  - 2014: judgement of the court of justice of the European Union

# Right to be forgotten

Judgement of the court of justice of the European Union in the case of Google v Mario Costeja ([C-131/12](#)), paragraph 62:

“...the operator of a search engine is obliged to remove from the list of results displayed following a search made on the basis of a person’s name links to web pages, published by third parties and containing information relating to that person, also in a case where that name or information is not erased beforehand or simultaneously from those web pages, and even, as the case may be, when its publication in itself on those pages is lawful”

## Article 17 GDPR — Right to erasure (‘right to be forgotten’)

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).

# Right to be forgotten

## Important questions

- When does the right to be forgotten apply?
- How does the right to be forgotten apply to data collected from children?
- Is it necessary to tell other organisations about the erasure of personal data?
- Is it necessary to erase personal data from backup systems?
- When does the right to be forgotten not apply?
- Is it possible to refuse to comply with a request for other reasons?

# Right to be forgotten

- Right to be forgotten in the revised Federal Act on Data Protection
- Article 28 (Rechtsansprüche) E-DSG

<sup>2</sup> Klagen zum Schutz der Persönlichkeit richten sich nach den Artikeln 28, 28a sowie 28g–28l des Zivilgesetzbuchs. Die klagende Partei kann insbesondere verlangen, dass:

- a. eine bestimmte Datenbearbeitung verboten wird;
  - b. eine bestimmte Bekanntgabe von Personendaten an Dritte untersagt wird;
  - c. Personendaten gelöscht oder vernichtet werden.
- [Botschaft DSG](#), p. 7077: “Dieses Recht auf Löschung entspricht im Bereich des Datenschutzes dem «Recht auf Vergessenwerden»”.



# Right to data portability

- example: bitsabout.me ([bitsabout.me/en/about](https://bitsabout.me/en/about))

BITSAABOUT. 



In the past data sovereignty was a utopia, because control over personal data was exercised solely by few large data companies that have no interest in sharing their competitive advantage. When the General Data Protection Regulation (GDPR) came into force in 2018, it greatly expanded the rights that EU citizens have with respect to their personal data. Among other things, users now have the right to a copy of their data and must be asked for their consent before their data is being used.

## Article 20 GDPR — Right to data portability

1. The data subject shall have the right to receive the personal data concerning him or her, which he or she has provided to a controller, in a structured, commonly used and machine-readable format and have the right to transmit those data to another controller without hindrance from the controller to which the personal data have been provided, where:
  - (a) the processing is based on consent pursuant to point (a) of Article 6(1) or point (a) of Article 9(2) or on a contract pursuant to point (b) of Article 6(1); and
  - (b) the processing is carried out by automated means.
2. In exercising his or her right to data portability pursuant to paragraph 1, the data subject shall have the right to have the personal data transmitted directly from one controller to another, where technically feasible.
3. The exercise of the right referred to in paragraph 1 of this Article shall be without prejudice to Article 17. That right shall not apply to processing necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller.
4. The right referred to in paragraph 1 shall not adversely affect the rights and freedoms of others.

# Right to data portability

## Right to data portability in the revised Federal Act on Data Protection

- [Botschaft DSG](#), p. 6985: “Der Bundesrat zieht es vor, die Ergebnisse der Erfahrungen innerhalb der Europäischen Union abzuwarten, bevor die Einführung eines Rechts auf Datenportabilität in Betracht gezogen wird.”
- no RTDP in the draft for a revised Federal Act on Data Protection
- parliament: Art. 25a — Recht auf Datenherausgabe und -übertragung

# Right to data portability

## Art. 25a revDSG — Recht auf Datenherausgabe und -übertragung

<sup>1</sup> Jede Person kann vom Verantwortlichen kostenlos die Herausgabe ihrer Personendaten, die sie ihm bekanntgegeben hat, in einem gängigen elektronischen Format verlangen, wenn:

- a. der Verantwortliche die Daten automatisiert bearbeitet; und
- b. die Daten mit der Einwilligung der betroffenen Person oder in unmittelbarem Zusammenhang mit dem Abschluss oder der Abwicklung eines Vertrages zwischen dem Verantwortlichen und der betroffenen Person bearbeitet werden.

<sup>2</sup> Die betroffene Person kann zudem vom Verantwortlichen verlangen, dass er ihre Personendaten einem anderen Verantwortlichen überträgt, wenn die Voraussetzungen gemäss Absatz 1 erfüllt sind und dies keinen unverhältnismässigen Aufwand erfordert.

<sup>3</sup> Der Bundesrat kann Ausnahmen von der Kostenlosigkeit vorsehen, namentlich wenn der Aufwand unverhältnismässig gross ist.

# Right to data portability

## Art. 25b revDSG — Einschränkungen des Rechts auf Datenherausgabe und -übertragung

1 Der Verantwortliche kann die Herausgabe und Übertragung der Personendaten aus den in Artikel 24 Absätze 1 und 2 aufgeführten Gründen\* verweigern, einschränken oder aufschieben.

2 Der Verantwortliche muss angeben, weshalb er die Herausgabe oder Übertragung verweigert, einschränkt oder aufschiebt.

\* Gründe für Verweigerung in Art. 24 Abs. 1 und 2: Gesetz sieht Verweigerung vor, überwiegende Interessen Dritter, Auskunftsbegehren ist offensichtlich unbegründet, überwiegende Interessen des Verantwortlichen

# Thank you!