

The right to be forgotten

An analysis of the CJEU's Google Spain judgment

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Abstract— The CJEU recently recognized (*González v. Google* (case C 131/12)) a “right to be forgotten” concerning Internet search engine results. This paper analyses some issues raised by this decision regarding to the application of data protection Directive 95/46/EC to search engines.

Keywords- Directive 95/46/EC, search engines, data protection, right to be forgotten

I. INTRODUCTION

Mr Costeja González, a Spanish national resident in Spain, filled a complaint with Spanish Data Protection Agency (AEPD in the Spanish acronym) against La Vanguardia Ediciones SL, owner of a daily newspaper with a large circulation, La Vanguardia, and against Google Spain and Google Inc [1].

La Vanguardia had published, on the 19th January and 9th March 1998, an announcement mentioning a real-estate auction connected with attachment proceedings for the recovery of Mr Costeja González's social security debts in accordance with an order issued by the Spanish Ministry of Labour and Social Affairs [2].

Nevertheless the events dated from 1998, the links to La Vanguardia's pages mentioning real-estate auction were displayed when Mr Costeja González's name search was undertaken on the Google search engine (Google Search) [2].

Mr Costeja González, claiming that the information provided was irrelevant, as the financial difficulties had been solved, wanted to eliminate that information from the internet [1].

Therefore, he requested La Vanguardia to remove it from the website or alter those pages or to use certain tools provided by search engines so that the personal data relating to him no longer appeared [3].

Seeking the removal of the information from Google's search results, he requested Google Spain or Google Inc. to remove or conceal the personal data relating to him [3].

Mr Costeja González lost the case against La Vanguardia as AEPD considered that the information was true and lawfully published [4].

Instead, the complaints against Google and its Spanish subsidiary, Google Spain, were sustained as AEPD considered that operators of search engines are subject to data protection

legislation as the activity of a search engine in finding information on the internet, indexing it, storing it temporarily and making it available to the public in the form of search results is “processing of personal data” for which they are liable and act as intermediaries in the information society [5].

AEPD upheld that under data protection legislation operators of search engines had the obligation to protect personal data of persons who do not desire that certain personal data information, which is published on third parties' websites, to be linked to them, be located, indexed and made available to internet users for an unlimited period.

Under this approach, was recognized that the mere desire of an individual to have a link to personal information about him removed from Google search results when the tracing and spreading of the data may compromise the fundamental right to data protection and the dignity in the broad sense it was encompassed by data protection framework [6].

AEPD also sustained that this obligation should be fulfilled by operators of search engines without it being necessary to erase the data or information from the website where they are lawfully published [6].

Thus, Google was requested to take “the necessary measures to remove the data from its index and to render the future access to the information impossible” [4].

Google and Google Spain appealed against that decision before the *Audiencia Nacional* (National High Court of Spain).

The national court, bearing in mind that at the centre of this dispute is the applicability of Directive 95/46 to Google, has submitted the case to the CJEU.

The Spanish Court underlined that, as the Directive 95/46/CE is previous to the breakthrough of internet and the role of search engine in locating data and information, there is no rule regarding the activity of search engine, raising doubts concerning the existence and extension of an obligation of operator of search engines to follow the data protection framework [7].

II. THE JUDGMENT

The TCEU had to address three major issues in order to decide that EU Directive 95/46 applies to Google.

A. Google as a content provider processing personal and a Controller

Firstly, it depended on whether Google could be considered a content provider processing personal data in the sense of Directive¹.

The Court considered that the data found, indexed and stored by search engines and made available to their users include information relating to identified or identifiable natural persons is 'personal data' within the meaning of Article 2(a) of that directive [8].²

The Court also sustained that the operations performed by the operator of the search engine in search of the information which is published, such as, collecting data which it subsequently 'retrieves', 'records' and 'organises' within the framework of its indexing programmes, 'stores' on its servers makes available' to its users in the form of lists of search results are referred to expressly and unconditionally in Article 2(b) of Directive 95/46, regardless of the fact, underlined by Google Spain and Google Inc., that those data have already

¹ Article 2(b) of Directive 95/46 defines "processing of personal data" as "any operation or set of operations which is performed upon personal data, whether or not by automatic means, such as collection, recording, organisation, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, blocking, erasure or destruction". The CJEU reminded that in the Case C-101/01 Lindqvist, EU:C:2003:596, paragraph 25, the operation of loading personal data on an internet page was considered to be such 'processing' within the meaning of Article 2(b) of Directive 95/46. This decision, nevertheless, regards to the first of three situations relating to personal data that according to the Advocate General should be distinguished. The first is the publishing of elements of personal data on any web page on the internet. The second concerns the search results that direct the internet user to the source web page provided by the internet search engines. The third, considered a more invisible operation, occurs when, by performing a search using an internet search engine, the personal data of the internet user are automatically transferred to the internet search engine service provider. See Google Spain SL v. Agencia Española de Protección de Datos (AEPD), Case C-131/12 ECLI:EU:C:2014:317, paragraph 26 and Opinion of Advocate General Jääskinen delivered on 25 June 2013, Case C 131/12 Google Spain SL Google Inc. v Agencia Española de Protección de Datos (AEPD) Mario Costeja González, ECLI:EU:C:2013:424, paragraphs 3 and 4.

² Article 2(a) of the Directive, according to which personal data means "any information relating to an identified or identifiable natural person". The concept of personal data is given a wide definition in the Directive, as it has been sustained by the Article 29 Data Protection Working Party. Article 29 Data Protection Working Party considers a better option not to restrict the interpretation of the definition of personal data, advising National Data Protection Supervisory Authorities to endorse a definition that "is wide enough so that it can anticipate evolutions and catch all "shadow zones" within its scope, while making legitimate use of the flexibility contained in the Directive". See Article 29 Data Protection Working Party, Opinion 4/2007 on the concept of personal data (WP136), p. 5, available at http://ec.europa.eu/justice/policies/privacy/docs/wpdocs/2007/wp136_en.pdf. This wide interpretation has been sustained by the CJEU in the Case C-101/01 Lindqvist, o.c., paragraphs 24-27. See also Joined Cases C-465/00, C-138/01 and C-139/01 Österreichischer Rundfunk and Others ECLI:EU:C:2003:294, paragraph 64; Case C-73/07 Satakunnan Markkinapörssi and Satamedia, ECLI:EU:C:2008:727, paragraphs 35-37; Case C-461/10 Bonnier Audio and Others, ECLI:EU:C:2012:219, paragraph 93; and Joined Cases C-92/09 and C-93/09 Volker und Markus Schecke and Eifert, ECLI:EU:C:2010:662, paragraphs 23, 55 and 56.

been published on the internet and are not altered by the search engine.³

The Court held that Google was a content provider processing data, in the sense Article 2(b) of Directive 95/46 [9].

Secondly, the CJEU had to assess if Google was a data controller in respect of the processing of personal data that is carried out by its search engine.

Nevertheless Google claimed that the operator of a search engine cannot be regarded as a 'controller' in respect of that processing as it has no knowledge of those data and does not exercise control it, the CJEU upheld that Google was a data controller.

The Court stated that since the search engine operator determines the purposes and means of the processing of personal data it must be regarded as a 'controller' in the sense of Article 2(d) [10].

The Court argued that it would be contrary to the clear wording of Article 2(d) but also to its purpose - ensuring an effective and complete protection of data - to exclude the operator of a search engine from the broad definition of controller sustained by the CJEU on the ground that it does not exercise control over the personal data published on the web pages of third parties [11].

Regarding the distinction of the processing of personal data carried out in the context of the activity of a search engine from that carried out by publishers of websites, consisting in loading those data on an internet page, the Court underlined the crucial role of search engines in the dissemination of those data on the basis of an individual's name through users, even those who who would not have found it on the original web page.

The Court also mentioned that organisation and aggregation of information published on the internet performed by search engines provided to users the access to a structured overview of the information relating to that individual, and thus to a more or less detailed profile of the data subject [12].

The Court concluded, consequently, that the activity of a search engine is liable to affect significantly, and more acutely, when compared with that of the publishers of websites, the fundamental rights to privacy and to the protection of personal data. This reasoning allowed the Court to sustain that the operator of the search engine active must obey the requirements of Directive 95/46 so that the complete protection of data subjects, in particular of their right to privacy, may actually be achieved [13].

The fact that publishers of websites have the option of indicating to operators of search engines that they wish specific

³ The Court followed the reasoning sustained in its judgement Satakunnan Markkinapörssi and Satamedia Case C-73/07, EU: C:2008:727, paragraphs 48 and 49. A general derogation from the application of Directive 95/46 in such a case would largely deprive the directive of its effect. The Court also referred that the operations encompassed by the definition contained in Article 2(b) of Directive 95/46 in any way require that the personal data be altered, beside naturally the referred alteration. See Google Spain SL v. Agencia Española de Protección de Datos (AEPD), Case C-131/12, o.c., paragraph 30.

information published on their site to be wholly or partially excluded from the search engines automatic was considered irrelevant for the case.

The Court sustained that even when publishers fail that indication, it will not release the operator of a search engine from its responsibility for the processing of personal data carried out in the context of the engine's activity [14].

The Court goes further and underlines that, even if that option for publishers of websites were to mean that they determine the means of that processing jointly with that operator, this finding would not remove any of the latter's responsibility as Article 2(d) of Directive 95/46 explicitly envisages that that determination may be made "*alone or jointly with others*" [15].

Therefore, Article 2(b) and (d) of Directive 95/46 according to CJEU are to be interpreted as meaning that, 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) [16].

It is important to notice that the Advocate General Jääskinen has reached the opposite conclusion, sustaining that in its role as a search engine provider, Google was a data processor rather than a controller, because it has no responsibility for the personal data⁴.

⁴ In support of this, Advocate General quotes Article 29 Data Protection Working Party, Opinion 1/2008 on data protection issues related to search engine (WP148), p. 14, footnote 17, available at http://ec.europa.eu/justice/policies/privacy/docs/wpdocs/2008/wp148_en.pdf, according to which "*users of the search engine service could strictly speaking also be considered as controllers*" encompassing under this "*blind literal interpretation*" of the Directive virtually everybody owning an electronic device connected to internet. Such a wide interpretation cannot be rationally sustained. See Opinion of Advocate General Jääskinen delivered on 25 June 2013, Case C 131/12 Google Spain SL Google Inc. v Agencia Española de Protección de Datos (AEPD) Mario Costeja González, o.c., paragraph 81. The Advocate General, *ibidem*, paragraph 83, also mentioned that, as stated by the Article 29 Data Protection Working Party, Opinion 1/2010 on the concepts of "controller" and "processor" (W169), p. 9, available at http://ec.europa.eu/justice/policies/privacy/docs/wpdocs/2010/wp169_en.pdf, the concept of controller "*is a functional concept, intended to allocate responsibilities where the factual influence is, and thus based on a factual rather than a formal analysis*", which entails that "*the controller must determine which data shall be processed for the purpose(s) envisaged*". Under this approach, the substantive provisions of the Directive, and more particularly Articles 6, 7 and 8 thereof, are based on the assumption that the controller knows what he is doing in relation to the personal data concerned, in the sense that he is aware of what kind of personal data he is processing and why. The Advocate General concludes that the internet search engine service provider merely supplying an information location tool does not exercise control over personal data included on third-party web pages, as it is not 'aware' of the existence of personal data in any other sense than as a statistical fact web pages are likely to include personal data. Noting that the search engine works on the basis of copies of the source web pages that its crawler function has retrieved and copied, the Advocate General asserts that Google has no relationship with the content of third-party source web pages on the internet where personal data may appear and cannot change the

Considering that according to Article 29 Working Data Protection Party [17], the purpose of the concept of controller is to determine who is to be responsible for compliance with data protection rules and that the principle of proportionality demands that when a search engine provider acts purely as an intermediary, it should not be considered as the principal controller with regard to the content related processing of personal data that is taking place, the Advocate General concludes that under a reasonable interpretation of the Directive an internet search engine provider, such as Google, cannot in law or in fact fulfil the obligations of the controller provided in the Directive in relation to personal data on source web pages hosted on third party servers [18].

B. Territorial scope

Nevertheless this issue won't be analysed in this paper, as its complexity demanded a comprehensive and deep study, the Court, in order to determine if Google had to comply with the Directive 95/46 and the Spanish national data protection law to Google, had to address the territorial scope of the Directive regarding Google Inc, an establishment based in the United States, but which had a subsidiary in the European Union⁵.

Briefly, the court reasoned that Google Spain, as a subsidiary of Google Inc, markets advertising space offered by Google Search and as Google Search and its advertising were inextricably linked, the processing of personal data by Google Search was carried out in the context of the activities of Google Spain, an establishment within the meaning of the directive, of the controller on the territory of a member state⁶.

The Court rejects the argument that the processing of personal data by Google Search is not carried out in the context of the activities of that establishment in Spain.

The Court upheld⁷ that as such data are processed for the purposes of a search engine operated by an undertaking which,

information in the host servers. So Advocate General reaches the conclusion that the provision of an information location tool does not imply any control over the content and does not enable the internet search engine service provider to distinguish between personal data, in the sense of the Directive, which relates to an identifiable living natural person, and other data. See Opinion of Advocate General Jääskinen delivered on 25 June 2013, Case C 131/12 Google Spain SL Google Inc. v Agencia Española de Protección de Datos (AEPD) Mario Costeja González, o.c., paragraph 86.

⁵ The national court mentioned three grounds: the 'establishment' in the territory and the 'use of equipment' in the territory (crawlers or robots, the possible storage of data and the use of domain names) following the criteria established in art. 4^o, n^o 1, al. a) e c) Directive, also established in the Spanish Law (Ley organica 15/1999, art. 2.1, a) e c)) or the application of the EU Charter of Fundamental Rights (Art. 8^o). See Audiencia Nacional. Sala de lo Contencioso, Google Spain SL y Google Inc., S.L. c. Agencia de Protección de Datos, Legal grounds, paragraphs 3.4, 3.5, 3.6.

⁶ The Court referred that in light of the objectives of the Directive, the rules on its scope 'cannot be interpreted restrictively', and that it had 'a particularly broad territorial scope'. See Google Spain SL v. Agencia Española de Protección de Datos (AEPD), Case C-131/12, o.c., paragraph 53.

⁷ The Court, in this regard, followed Advocate General Jääskinen conclusions, who also sustained that the primary factor that gives rise to its application is the processing of personal data carried out in the context of the activities of an establishment of the controller on the territory of the Member State. Advocate General Jääskinen proposed that the Court declared that processing of personal data takes place within the context of a controller's establishment and, therefore, that national data protection legislation is applicable to a search engine provider when it sets up in a Member State, for

although it has its headquarters in a non-member State, has an establishment in a Member State, the processing is carried out ‘in the context of the activities’ of that establishment, within the meaning of the directive, as the establishment is intended to promote and sell, in the Member State in question, advertising space offered by the search engine in order to make the service offered by the engine profitable [19].

C. Search Engine Liability

The CJEU, following the reasoning regarding the role of search engines as controllers, ruled that search engine operators are responsible, in different terms from the original web page publishers, owing to the higher interference with the data subject right to privacy resulting from the search engine activity, for removing information on data subjects from search engine results following a search made on the basis of a person’s name links to web pages containing information relating to that person, even when its publication on the original pages is lawful [20].

The Court, consequently, confirmed that the right to demand rectification, erasure or blocking of data provided for in Article 12(b) of the Directive, and the right to object to processing on “*compelling legitimate grounds*”, provided for in Article 14(a) of the Directive, did not apply only where the data are inaccurate and incomplete, but also when the processing is unlawful owing to the non compliance with other requirements, including when data are inadequate, irrelevant, or excessive in relation to purposes for which they are collected and processed [21].

Data subjects, under this approach, are entitled to request to search engines to remove any personal data from their search results and to the right to complain to the data protection supervisory authorities or courts if they refused [22].

The Court, bearing in mind that Article 7(f) of the Directive recognizes as ground for processing data, in the absence of a contract, legal obligation, public interest, protection of the data subject vital interests or consent, the ‘legitimate interests pursued by the controller’, upheld that those interests were overridden by the rights of the data subject [23].

In this matter, the Court accepted that there has to be a balancing of rights in such cases, including the fundamentals right to freedom of expression, but also noted that processing of personal data, such as that at issue in the case, carried out by the operator of a search engine may affect significantly the fundamental rights to privacy and to the protection of personal data, since that processing enables any internet user to obtain detailed profile. Therefore, the Court underlined that this effect on the right to privacy “*cannot be justified by merely the economic interest*” of the search engine operator [24].

As the data subject is entitled, in the light of his fundamental rights under Articles 7 and 8 of the Charter, to request that the information in question no longer be made

the promotion and sale of advertising space on the search engine, an office which orientates its activity towards the inhabitants of that State. See Opinion of Advocate General Jääskinen delivered on 25 June 2013, Case C 131/12 Google Spain SL Google Inc. v Agencia Española de Protección de Datos (AEPD) Mario Costeja González, o.c., paragraph 67.

available to the general public by its inclusion in such a list of results, the Court also held that those rights override, as a rule, not only the economic interest of the operator of the search engine, but also “*the interest of the general public in finding that information upon a search relating to the data subject’s name*”, except where the particular circumstances of the case “*such as the role played by the data subject in public life*”, the public interest in internet users having access to the information in question outweighs the data subject’s rights [25].

Under this approach, public interest in the information was only relevant where the data subject played a role in public life.

By sustaining a greater effect of search engine activity on the right to privacy, search engines are subject to a more severe application of the balancing test, as the information might remain available on the original website, even if it was removed from the list of results [26].

D. Right to be Forgotten: Data Subject’s Right to Request Removal

The CJEU seems to accept that the requirements of Directive 95/46 regarding the processing of personal data encompass the ‘right to be forgotten.’

The Court, therefore, suggested, as legal ground, that the “*right to be forgotten*” derived from the general principles laid down in Article 6 of the Directive.

The CJUE sustained that under Article 6(1) (c) to (e) of Directive 95/46, the controller has the task of ensuring that personal data are processed “*fairly and lawfully*”, are “*collected for specified, explicit and legitimate purposes and not further processed in a way incompatible with those purposes*”, that they are “*adequate, relevant and not excessive in relation to the purposes for which they are collected and/or further processed*”, that they are “*accurate and, where necessary, kept up to date*” and, finally, that they are “*kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which the data were collected or for which they are further processed*”. In this context, the controller must take every reasonable step to ensure that data which do not meet the requirements of that provision are erased or rectified [27].

This reasoning allowed CJEU to uphold that Article 12(b) of Directive 95/46, whose enforcement depends on the condition that the processing of personal data is incompatible with the Directive, applies not only when data are inaccurate but, in particular, when they are inadequate, irrelevant or excessive in relation to the purposes of the processing, are not kept up to date, or that they are kept for longer than is necessary, except when they are required to be kept for historical, statistical or scientific purposes [28].

Under this approach, CJUE sustains that even “*initially lawful processing of accurate data may, in the course of time, become incompatible with the directive where those data are no longer necessary in the light of the purposes for which they were collected or processed*” [29].

The Court concluded, then, that a request by a data subject pursuant to Article 12(b) of Directive 95/46, may be upheld

when the inclusion in the list of results displayed following a search made on the basis of his name of the links to web pages published lawfully by third parties and containing true information relating to him personally is incompatible with Article 6(1) (c) to (e) of the Directive because that information, having regard to all the circumstances of the case, to be inadequate, irrelevant or no longer relevant, or excessive in relation to the purposes of the processing at issue carried out by the operator of the search engine [30].

The Court, in support of the “*right to be forgotten*”, also refers Articles 7 and 8 of the EU Charter of Fundamental Rights, the right to respect for private life and the right to the protection of personal data respectively, underlining that Article 8 (2) and (3) specify that 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, that everyone has the right of access to data which have been collected concerning him or her and the right to have the data rectified, and that compliance with these rules is to be subject to control by an independent authority⁸.

The court hold that, in light of the fundamental rights under Articles 7 and 8 of the Charter, Article 12(b) and subparagraph (a) of the first paragraph of Article 14 of Directive 95/46 should be interpreted as meaning that data subjects have the right to demand that information which he considers irrelevant be removed from the list of results, even though the information remains available on the web pages, was lawfully published and causes no prejudice to the data subject [31].

Nevertheless the dispute shall be ruled by the national court, CJEU, considering the circumstances of the case, suggests that Mr Gonzalez’s rights have been violated by Google and Mr Gonzalez is entitled to the right to require the links to the articles of La Vanguardia to be removed from its list of results.

By contrast, on June 25, 2013, Advocate-General Jääskinen recommended that the EU Data Protection Directive 95/46 does not confer a right to be forgotten that could entitle Mr Gonzalez to require information relating to him personally to be deleted from search results.

Advocate General Jääskinen considered that the rights to rectification, erasure and blocking of data provided for in Article 12(b) of the Directive, and the right to object, provided for in Article 14(a) of the Directive, in light of the fundamental rights in the Charter to protection of personal data in Article 8, right to respect for private and family life in Article 7, freedom of expression and information, including freedom of expression of publishers of web pages and the freedom of internet users to receive information, as protected in Article 11, and the freedom to conduct a business in Article 16⁹, concern data whose

⁸ Awkwardly, the CJEU mentions that those requirements are implemented by Articles 6, 7, 12, 14 and 28 of Directive 95/46, forgetting that the Directive is previous to the Charter. See *Google Spain SL v. Agencia Española de Protección de Datos (AEPD)*, Case C-131/12, o.c., paragraph 69.

⁹ The rights of data subjects in Articles 7 and 8 will need to be juxtaposed against the rights protected by Articles 11 and 16 of those who wish to disseminate or access the data. See Opinion of Advocate General Jääskinen delivered on 25 June 2013, Case C 131/12 *Google Spain SL Google*

processing does not comply with the provisions of the Directive, in particular because of the incomplete or inaccurate nature of the data, which did not seem to be the case in the main proceedings [32].

Therefore, Advocate General denies that the rights provided for in Article 12(b) and Article 14(a) of the Directive enable the data subject to require the internet search engine service providers to erase from its search results personal data that has been published by third parties.

As Advocate General referred, Article 14(a) of the Directive compel Member States to grant a data subject the right to object at any time, on compelling legitimate grounds relating to his particular situation, to the processing of data relating to him, save where otherwise provided by national legislation. Within these exceptions are included the cases referred to in Articles 7(e) and 7(f) of the Directive, where processing is necessary in view of a public interest or for the purposes of the legitimate interests pursued by the controller or by third parties¹⁰.

The purpose of processing and the interests served by it, when compared to those of the data subject, are the criteria to be applied when data is processed without the subject’s consent, and not the subjective preferences of the latter.¹¹

A subjective preference alone does not amount to a compelling legitimate ground within the meaning of Article 14(a) of the Directive [33].

Hence, Advocate General concludes such a right cannot therefore be invoked against search engine service providers on the basis of the Directive, even when it is interpreted in accordance with the Charter of Fundamental Rights of the European Union [34].

Inc. v Agencia Española de Protección de Datos (AEPD) Mario Costeja González, o.c., paragraph 103.

¹⁰ Even in the situations where internet search engine service providers are considered to be controllers of the processing of personal data, Article 6(2) of the Directive constrains them to weigh the interests of the data controller, or third parties in whose interest the processing is exercised, against those of the data subject. As the Advocate General refers the CJEU considered relevant to this balancing test whether or not the data in question already appears in public sources. See Opinion of Advocate General Jääskinen delivered on 25 June 2013, Case C 131/12 *Google Spain SL Google Inc. v Agencia Española de Protección de Datos (AEPD) Mario Costeja González, o.c., paragraph 107.*

¹¹ The Advocate General also states that even if the Court were to find that internet search engine service providers were responsible as controllers for personal data on third-party source web pages, a data subject would still not have an absolute ‘right to be forgotten’. Nonetheless, in this context, the service provider would be required to put itself in the position of the publisher of the source web page and verify whether dissemination of the personal data on the page could be considered as legal, abandoning its intermediary function between the user and the publisher and assuming the responsibility for the content of the source web page, and when required, to censure the content by preventing or limiting access to it. See Opinion of Advocate General Jääskinen delivered on 25 June 2013, Case C 131/12 *Google Spain SL Google Inc. v Agencia Española de Protección de Datos (AEPD) Mario Costeja González, o.c., paragraph 109.*

III. CONCLUSIONS

Summing up, the CJUE, sustaining that Google is a content provider of data processing and a controller, in the sense Article 2(b) and d) of Directive 95/46, upheld that Article 12(b) and subparagraph (a) of the first paragraph of Article 14 of Directive 95/46 are to be interpreted, in the light of the data subject fundamental rights under Articles 7 and 8 of the Charter, as meaning that 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, also in a case where that name or information is not erased beforehand or simultaneously from those web pages, and even when the personal data publication on those pages is lawful and the information is true.

Under the CJEU approach, these fundamental rights override the economic interest of the operator of the search engine and the interest of the general public in having access to that information upon a search relating to the data subject's name.

The interest of the general public in having, through its inclusion in the list of results, access to the information regarding personal data, may prevail over the data subject fundamental rights to respect for private and family life in Article 7 and to protection of personal data in Article 8 proclaimed in the Charter, when the interference with the data subject fundamental rights is justified by certain circumstances, such as the role played by the data subject in public life.

Besides the insufficient grounds to consider Google a controller, in the light of the Directive, this decision of the CJEU raises some doubts regarding the fundamental right to freedom of expression and information enshrined in Article 11 of the Charter, which includes freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.

Freedom of expression constitutes one of the essential foundations of a democratic society and *"one of the basic conditions for its progress and for the development of every man"* [35].

Article 11 of the Charter, as pointed out by Advocate General, also encompasses the internet users' right to seek and receive information made available on the internet, including information on the source web pages and the information provided by internet search engines [36].

Consequently, there is a need to balance their right to protection of their personal data and their freedom to receive or impart information, which are rights safeguarded by Articles 8 and 11 of the Charter respectively, which, in our opinion, has not been done properly by CJEU in its judgment [37].

Publishers of web pages are equally protected by Article 11 of the Charter, as making content available on the internet strengthens freedom of expression, enabling a wide dissemination of content, especially when the publisher has linked his page to other pages and has not limited its indexing or archiving by search engines.

The role of web publication as a mean for people to take part in debates or spread their own content, including their personal information, or content uploaded by others on internet justifies the journalism exception in Article 9 of the Directive¹².

As it has also been noted by Advocate –General, this fundamental right to information should deserve particular protection in EU law, especially considering that owing to its vital role in democracy, dictatorial regimes tend to limit or censure the internet [36].

The CJEU judgment astonishingly does not make any reference to article 11 of the Charter regarding freedom of expression. This right must be considered during the balancing of the rights of data subjects and the rights of data controllers and of the general public.

This judgment seems to ignore the utmost concern of the European Court of Human Rights under Article 10 ECHR in protecting freedom of expression [38].

The importance of protecting freedom of expression can be perceived in the article 9 exemption for journalistic, artistic and literary works, which is explained by the restraining effect that the regulation of the processing of personal data and on the free movement of such data could have in the context of publications to the general public.

It has not also been duly considered the fundamental right to freedom to conduct a business in Article 16 Charter.

An interpretation of the Directive without balancing these four fundamental rights equally protected by the Charter will predictably produce a bias and unreasonable outcome.

By contrast, the Advocate General carefully brought these fundamental rights this matter, balancing the rights of data subjects and the rights of data controllers and of the general public in light of the freedom of expression and freedom to conduct a business, reaching the conclusion that reject the right to be forgotten.

As has already been referred, the Data Protection Directive was never intended to regulate internet publications, owing to the fact that in 1995 the internet was still in its early years and internet search engines were at their nascent stage [39].

Consequently, as underlined by Advocate General, the Directive must be interpreted in order to shelter new technological events, under the principle of proportionality, the objectives of the Directive and means provided therein for their attainment so that a balanced and reasonable outcome may be achieved [40].

The blind literal interpretation of the Directive in the context of the internet performed by CJEU regarding the concept of content provider in the sense of the Directive, as any *"provider of content which consists 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*

¹² This exception applies to every person engaged in journalism, as decided by CJEU in *Markkinapörssi Satakunnan Markkinapörssi and Satamedia*, C-73/07, ECLI:EU:C:2008:727, paragraph 58.

preference” encompasses a wide range of online services besides search engine activity [41].

On the other hand, the wide concept of controller upheld by the CJEU may encompass virtually everybody owning an owning a smartphone, a tablet or a laptop computer, as wisely referred by Advocate General [42].

These broad definitions sustained by CJEU may cover a wide range of new situations as a result of technological development.

Therefore, the scope of the Directive must be interpreted, in light of the principle of proportionality, so that an unreasonably wide scope, entailing adverse legal consequences, is avoided [43].

A reasonable interpretation of the Directive would first of all lead the CJEU to conclude that Google search engine cannot be regarded as the ‘controller’ of the personal data, rendering impossible that Google fulfill the obligations of controller provided in Articles 6, 7 and 8 of the Directive in relation to the personal data on source web pages hosted on third-party servers.

This interpretation is the only that it is fully harmonised with E-commerce Directive regime regarding intermediary liability.

This Directive provides liability exemptions for three types of activities performed by Internet intermediaries, namely: ‘mere conduit’ (article 12), ‘caching’ (article 13), or ‘hosting’ (art. 14).

Underlying this exemptions is the fear that a risk of liability for third-party content would present significant barriers for Internet intermediaries to enter the European market and that the liability for third-party content would force these intermediaries to scrutinize and even censor certain types of content, undermining the freedom of expression on the Internet [44].

Several authors, bearing in mind that despite certain conceptual resemblances, search engines do not fit into any of the categories, have suggested that search engines should receive similar protections, as they too merely facilitate access to content created by others.

They emphasize that search engines are not at the source of the information they link to, nor do they modify content in a substantive way.

Therefore, they conclude that any responsibility for third-party content would burden search engines in the same way as internet intermediaries, evolving the similar risks to freedom of expression [45].

The last, but not the least, the rights to erasure and blocking of data, provided for in Article 12(b), and the right to object, provided for in Article 14(a), of Directive 95/46, in light of the fundamental rights in the Charter to protection of personal data in Article 8, right to respect for private and family life in Article 7, freedom of expression and information, including freedom of expression of publishers of web pages and the freedom of internet users to receive information, as protected

in Article 11, and the freedom to conduct a business in Article 16, concern data whose processing does not comply with the provisions of the Directive.

Under a rule of reason approach, also sustained by Advocate General, the rights cannot legally ground a right to be forgotten that could entitle the a data subject to have his data, legally published, deleted from search engine results, invoking his mere desire that such information should not be known to internet users when he considers that it might be prejudicial to him or he wishes it to be consigned to oblivion [43].

In light of the fundamental rights involved, the purpose of processing and the interests served by it must be balanced with those of the data subject. In fact, none of the fundamental rights at stake are absolute and provided that there is a justification acceptable according to Article 52(1) of the Charter they may be limited [46].

We may not forget that, as sustained by the Advocate General, a subjective preference alone does not amount to a compelling legitimate ground within the meaning of Article 14(a) of the Directive [33].

This right cannot, therefore, be invoked against search engine service providers on the basis of the Directive, even when it is interpreted in accordance with the Charter of Fundamental Rights of the European Union.

This CJEU judgment, besides the insufficient legal ground, clearly replaced by political bias, lacks “a correct, reasonable and proportionate balance between the protection of personal data, the coherent interpretation of the objectives of the information society and legitimate interests of economic operators and internet users at large” [47].

Disappointingly, this *new right to be forgotten* may lead to an unjustified restriction of the freedom of expression, overruling unreasonably the rights to inform and to be informed, compelling search engine to analyse and even censor certain types of content, undermining perilously the freedom of expression online.¹³

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¹³ This matter has been regulated on the Recital 53 and 54 and article 17 and 19 of proposal for a regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation) (COM(2012)0011 – C7-0025/2012 –2012/0011(COD)). Article 17 provides the data subject's right to be forgotten and to erasure. Recently, the European Parliament legislative resolution of 12 March 2014 on the proposal for a regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation) (COM(2012)0011 – C7-0025/2012 –2012/0011(COD)) (Ordinary legislative procedure: first reading) has already introduced some changes to this proposal. The most significant is the replacement of the expression *the right to be forgotten* by right to *erasure* (see Amendment 27, 28 and 112). Nevertheless, the problems inherent to the notion of controller and if it applies to the operator of a search engine are not solved by the Regulation, nor the European Parliament legislative resolution of 12 March 2014.

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