THE DIGITAL RIGHT TO BE FORGOTTEN 2.0:

Internet search engines
after the *Google Spain* Judgment *(C-131/12)*

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1. Introduction. The *googlised* online global village

In technologically advanced societies, which are characterised by the internet, social network, www 2.0 and on-line globalisation, with "digital natives and digital immigrants" (Prensky, 2001[1]), which are referred to as information or knowledge societies, information (and the data that supports it) is increasingly valuable in the everyday lives of States, organisations and individuals (*netcitizens*).

The protection of individual privacy and personal data is particularly relevant in this high pressure technological context, given the immense and unparalleled data processing power of innumerable *Big Brothers*[2].

This is particularly true with regard to the European Union, which has had a high level of protection, since the approval of European Parliament and Directive 95/46/CE of 24th October 1995 on the protection of individuals with regard to the processing of personal data and (also) the free movement of such data[3] [4].

This standard, which was further augmented by the approval of the European Union Charter of Fundamental Rights in 2009[5], which, for the first time, enshrines the Fundamental (Human) Rights of respect for private and family life (art. 7), protection of personal data (art. 8) and also free speech and freedom of information (art. 11) and business freedom (art. 16), in a binding European Union legal instrument.

Since then, on 27th January 2012, given the need for an upgrade and unification of the protection of personal data and the freedom of movement of information with a view to the 2020 Single Digital Market, the European Commission formally commenced the legislative amendment procedure with a "*privacy package"* which includes a Proposed General Regulation regarding the Protection of Personal Data[6], which introduces the so-called digital "right to be forgotten"[7].

At the same time, various judgments of national courts, which have been followed more recently in the European Union, by emblematic judgments of the Court of Justice of the European Union (CJEU), have gradually emerged regarding privacy and the reinstatement of the power of European citizens to control the use of their personal data – i.e. information self-determination – that involve gigantic search engines (the *Google Spain* case, 2014[8]) or even social networks (the *Facebook Ireland/Schrems* case*, 2015*[9]), which have had a major impact on public opinion

Of these judgments, we shall conduct a detailed analysis of the famous 2014 *Google Spain* case as a case study. This case involved the internet giant *Google Inc.* and *Google Spain, SL* on one side, and

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[1] "Digital Natives, Digital Immigrants", Marc Prensky, MCB University Press, vol. 9 no. 5 October 2001
[2] "Nineteen Eighty-Four", George Orwell, Penguin Books, Modern Classics, 2003
[3] Official Journal no. L 281 of 23/11/1995 p. 0031 - 0050
[4] Hereinafter referred to as "Directive 95/46/EC"
[5] Official Journal of the European Union, C 83/389, of 30/03/2010
[6] The "*Privacy Package*" includes: a 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) – 2012/0011 (COD); proposal for a directive of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data by competent authorities for the purposes of prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and the free movement of such data – 2012/0010 (COD)
[7] Cf. art. 17 "*The right to be forgotten and to erasure"*
[8] C-131/12, of 13th May 2014
[9] C-362/14, of 6th October 2015

the Spanish Data Protection Agency (AEDP) and a Spanish citizen, Mario Costeja González, on the other, a veritable "David against Goliath".

This is an exemplary Judgment in which the CJEU, was, for the first time, called upon to decide regarding the activity of internet search engines in the European Union in the area of the Fundamental Rights of privacy and the protection of personal data.

2. Internet, search engines, social networks, cloud computing, Big Data, personal data and privacy.

As the Advocate General, Niilo Jääskinen, stated in his conclusions in the *Google Spain* (C-131/12) case: "the protection of personal data and privacy of natural persons has become increasingly important. Any content that includes personal data (…) can be made available worldwide instantaneously and permanently in a digital format. The internet has revolutionised our lives by removing the technical and institutional obstacles to the dissemination and reception of information and created a platform for various information society services. These are of benefit to consumers, businesses and society as a whole. This has given rise to novel circumstances in which it is necessary to establish a balance between various fundamental rights, such as free speech, freedom of information and business freedom, on the one hand, and the protection of personal data and privacy of natural persons, on the other."[10]

From a certain scale of magnitude, e.g. as in *Big Data* – the massive processing of personal data involves a huge technological capacity and a gigantic amount of data in order for the discovery of patterns, or the creation of profiles (for a wide range of purposes, e.g. research, health, marketing, etc.) to be both useful and interesting.

The fact that there is no legal definition of anonymization does not mean that reference cannot be made to various legislative references to anonymization[11] [12], which permit a conceptual definition of anonymization as:

- A technique applicable to personal data;
- Involving permanent and irreversible "de-identification"
- So that data via which it was previously possible to identify a person no longer permits such (by the data controller or a third party).

Conclusions regarding best practices according to Opinion 05/2014:

- The selection of the appropriate technique should be made on a case-by-case basis;
- The context and objectives must be clarified in advance;
- The application must be kept under permanent review by the Data Controller.

3. Case study: The Google Spain SL/Google Inc./AEPD/ Mário González Costeja (C-131/12) case

a) The complaint to the AEPD

[10] Conclusions: 2

[11] For example, such as in Recital no. 26 of Directive 95/46/EC or in Recital no. 26, Articles 6 and 9 of Directive 2002/58/EC.

[12] This reference is retained in the Proposed General Personal Data Protection Regulation, cf. Recital no. 23

The case dates back to 5th March 2010, when the Spanish citizen and resident *Mario Costeja González* submitted a complaint to the Spanish Data Protection Authority *(AEPD)* because he considered that he had been harmed professionally by the results displayed by the Google search engine.

A Google search made against his name resulted in the display of links to two notices of the sale of his house (then subject to judicial seizure) by public auction by reasons of debts owed by *Mario Costeja González* to the Social Security Authorities, which debts had long since been regularised, which were published in the *La Vanguardia* newspaper on 19th January[13] and 9th March[14] 1998.

The complaint was against *Google Spain, SL, Google Inc.* and *La Vanguardia Ediciones, SL,* and sought an order from the AEPD that the said online information be deleted or hidden, because it was of no current relevance[15].

By a decision dated 30th July 2010, the AEPD rejected the application with regard to the *La Vanguardia* newspaper because it considered that the alteration would amount to a significant violation of free speech, as the newspaper had merely published a notice at the request of the Ministry of Employment and Social Affairs with the legal justification of obtaining the greatest number of bids.

However, the AEPD granted the application with regard to *Google Inc.* and *Google Spain, SL,* as they process personal data and are therefore responsible and act as information society intermediaries[16].

b) Appeals of Google Inc. and Google Spain to the *Audiencia Nacional*

Google Inc. and *Google Spain, SL* did not accept this decision and appealed separately to the *Audiencia Nacional*[17] for a judgment overturning the AEPD decision. The *Audiencia Nacional* subsequently consolidated these appeals on 20th June 2011[18]. The Respondents in the said appeal are the AEPD and *Mario Costeja González.*

c) Reference to the Court of Justice of the European Community for a preliminary ruling

The *Audiencia Nacional* decided to stay the proceedings by an Order dated 27th February 2012[19] and to seek a preliminary ruling from the CJEU[20] with regard to the interpretation of articles 2, paragraphs b) and d), 4, no. 1, paragraphs a) and c), 12, paragraph b) and 14, first paragraph, paragraph a) of Directive 95/46/EC, and also of art. 8 of the European Union Charter of Fundamental Rights.

The reference for a preliminary ruling can essentially be summarised in the following three questions[21]:

1. Territorial application.

   Is European directive 95/46/EC applicable to providers of internet search engine services established in a Member State, whose services are specifically oriented to citizens of that member state, even if the said services are merely the sale of advertising space and when only technical resources located within the said Member State are used and the provider's head office is not located in the European Union?

[13] Hemeroteca *La Vanguardia,* 19th January 1998
[14] Hemeroteca *La Vanguardia*, 9th March 1998
[15] Case no. TD/00650/2010
[16] Resolution no. R/01680/2010, of 30th July 2010
[17] Appeal no. 725/2010 and Appeal no. 757/2010
[18] Ordinary Action 725/2010 and Ordinary Action 757/2010.
[19] Order of 27/02/2012, *Single Identification Number: 28079 23 3 2010 0004781*
[20] Cf. art. 267 of the Treaty regarding the Functioning of the European Union (TFEU)
[21] Order of 27/02/2012 cit.

2. *Data processing*

   Do the activities of web indexing of and searching for personal data on third party sites by an Internet search engine, such as *Google Search,* which stores such data temporarily and makes it available to internet surfers in accordance with a specific order of preference, fall within the concept of *data processing*?

3. The right to be forgotten

   Do data subjects have cancellation, opposition or blocking rights with regard to their personal data in relation to search engines, even though they merely reproduce personal data published by third parties, and even though these have not been cancelled at source and even if they are lawful?

d) Conclusions Advocate General Niilo Jääskinen

The following are the Advocate General's conclusions, which suggest that the Court will adopt the same approach:

1. "Processing of personal data is carried out in the context of the activities of an 'establishment' of the controller within the meaning of Article 4(1)(a) of Directive 95/46/EC, when the undertaking providing the search engine sets up in a Member State for the purpose of promoting and selling advertising space on the search engine, an office or subsidiary which orientates its activity towards the inhabitants of that State."
2. "An internet search engine service provider, whose search engine locates information published or included on the internet by third parties, indexes it automatically, stores it temporarily and finally makes it available to internet users according to a particular order of preference, 'processes' personal data in the sense of Article 2(b) of Directive 95/46 when that information contains personal data. However, the internet search engine service provider cannot be considered as 'controller' of the processing of such personal data in the sense of Article 2(d) of Directive 95/46, with the exception of the contents of the index of its search engine, provided that the service provider does not index or archive personal data against the instructions or requests of the publisher of the web page."
3. "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, do not confer on the data subject a right to address himself to a search engine service provider in order to prevent indexing of the information relating to him personally, published legally on third parties' web pages, invoking his wish 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."

e) The Court's Decision

Conclusions of the Judgment of the Court of Justice:

1. 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 (Article 2(b) and (d) of Directive 95/46/EC).

2. 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 (Article 4(1)(a) of Directive 95/46/EC).
3. 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 12(b) and subparagraph (a) of the first paragraph of Article 14 of Directive 95/46).
4. It should be examined whether the data subject has a right that the information in question relating to him personally should, at this point in time, no longer be linked to his name by a list of results displayed following a search made against his name, without it being necessary in order to find such a right that the inclusion of the information in question in that list causes prejudice to the data subject.

   In principle, the data subject's right prevails not only over the economic interest of the operator of the search engine but also over the interest of the general public in having access to that information, except if there are particular reasons, such as the role played by the data subject in public life, when interference with his fundamental rights is justified by the preponderant interest of the general public in having access to the information (articles 12, paragraph b) and 14, first paragraph, paragraph a) of Directive 95/46/EC and articles 7 and 8 of the European Charter of Fundamental Rights.

d) The Judgment of the *Audiencia Nacional*

Following the Judgment of the CJEU of 13th May 2014, the *Audiencia Nacional* handed down its judgment in the appeals filed by *Google Spain* e *pela Google Inc.* on 29th December 2014, which proceedings had been stayed, as to the decision on the merits, pending the preliminary ruling.

The *Audiencia Nacional* dismissed the appeals of *Google Inc.* and *Google Spain, SL* and upheld the decision of the AEPD of 30th July 2010, as construed in accordance with the case law of the CJEU, and ordered Google to "takes the steps necessary in order to remove or delete the links to the webpages complained of from the list of search results obtained from a search against the name of the complainant[22]".

Given the sensitive nature of the information contained in the two said notices in the *La Vanguardia* newspaper, with regard to the private life of *Mario Costeja González,* which had been published more than sixteen years ago (1998) and which "have no relevance in terms of the public life of the interested party" the *Audiencia Nacional* ordered their removal or deletion from the list of search results.

[22] Order of 29th December 2014: Thirteenth, Fourteenth and Fifteenth

4. The Fundamental Rights of data subjects and third party Fundamental Rights: guidelines for a fair balance.

In the *Google Spain* judgment, the CJEU enunciated the principle of the prevalence of the data subject's right to the protection of his personal data and private life and the high level at which these rights are protected by the European Union Charter of Fundamental Rights (articles 7 and 8), in relation to other lawful interests or rights, such as the economic interest of the operator of the search engine, or the right to inform and be informed, which rights are also protected by the Charter of Fundamental Rights (Free speech, art. 11, or Business freedom, art. 16)[23].

Given the legality of the processing conducted by operators of search engines (art. 7, paragraph f) of Directive 95/46/EC), the CJEU requires a balancing of opposing rights and interests, i.e. a right balance that takes the high level of protection of data subjects into consideration.

Still in 2014, *Google* created *The Advisory Council to Google on the Right to be Forgotten*[24], comprising eight independent specialists of good standing, with a view to the creation of standardised criteria for the establishment of the right balance of rights, in accordance with the Judgment of the CJEU of 13th May 2014.

A Final Report containing the interpretation and criteria with regard to the right to be forgotten to be applied by Google in specific cases[25] was published on 6th February 2015 and contains the following conclusions:

- Firstly, it is clear from the case law of the CJEU that it does not create a general Right to be Forgotten and that it is preferable to use the term delisting.
- The CJEU only refers to removal from the lists of results of a search against a person's name, if: the data is inadequate, irrelevant or no longer relevant, or excessive.
- The CJEU invokes various rights, such as the Right to private life and to data protection, the Right of free speech, the Right to access information, which must be considered within the overall framework of the various legal instruments regarding Rights and Fundamental Liberties within the European Union.
- The said Rights of data subjects to oppose exist whether or not they sustain loss or damage.
- The evaluation of the loss and damage caused to the data subject must be effected on a practical, legal and ethical basis.
- Operators of search engines must establish the right balance between the preponderant interests of: the Rights of the data subject, the economic interest of the operator and the general public interest of access to information.

Four main criteria are indicated with regard to the evaluation of delisting applications, none of which are decisive *per se* and which are not ranked *inter se*:

1. The data subject's role in public life.

   Three categories are identified:

[23] Cf. C-131/12: 97, 99 and Conclusions 4)
[24] The Advisory Council to Google on the Right to be Forgotten, https://www.google.com/advisorycouncil/
[25] The Advisory Council to Google on the Right to be Forgotten, Final Report – 6 February 2015 https://drive.google.com/file/d/0B1UgZshetMd4cEI3SjlvV0hNbDA/view

a) A clear role in public life, e.g. politicians, celebrities, performers, sportspersons, etc. in which the public interest generally prevails;
b) No role in public life, in which the rights of data subjects generally justify delisting;
c) A role in public life that is limited, or is restricted to a specific context, such as head teachers and some public officials, in which the specificity of the information is normally decisive in terms of the decision to delist.

2. The nature of the information

   Types of information that is indicative that the rights of the individual prevail:

   a) Information related to intimate or sexual matters;
   b) Personal financial information;
   c) Private contacts and information;
   d) Information that is deemed by the data protection legislation to be sensitive;
   e) Private information regarding minors;
   f) Information that is incorrect, includes incorrect associations, or which places the data subject at risk;
   g) Video or image information.

   Types of information that is indicative that the public interest will prevail:

   a) Political information, guidance and opinions;
   b) Information regarding religious or philosophical opinions;
   c) Information related to public health and consumer protection;
   d) Information regarding criminal activities;
   e) Information that contributes to the debate regarding matters of general interest;
   f) Factual and accurate information;
   g) Complete information regarding historical records;
   h) Complete information regarding scientific issues, or artistic expression.

3. Source

   It is necessary to consider the source of the information and the motive for publishing it. For example, is the information published by established bloggers or authors of public standing and is it published with the data subject's consent?

4. Time

   The judgment refers to information was once relevant but which, with the alteration of circumstances, is no longer relevant, for example this criteria may be decisive when data subjects had, but no longer have, an active public role.

   This criterion is particularly relevant with regard to criminal records.

The Art. 29 Working Group listed the following thirteen practical criteria to be taken into consideration in case-by-case evaluation of the exercise of the right to be forgotten in relation to search engines.

Criteria:

1. Does the search concern a natural person? Are the search results specific to a search based on the person's name?
2. Does the data subject play an active role in public life? Is the data subject a public figure?

3. Is the data subject a minor?
4. Is the data accurate?
5. Is the data relevant and non-excessive? Does the data concern the data subject's professional life? Is the search result associated with the information that allegedly amounts to hate speech, or similar offences committed in the statement against the complainant? Is it evident that the data reflects the personal opinion of the individual, or is it presented as an established fact?
6. Is the information sensitive, in accordance with the provisions of art. 8 of Directive 95/46/EC?
7. Is the data up-to-date? Is the data available for more time than is necessary in order to process it?
8. Is the processing of the data harmful to the data subject? Has the data got a disproportionate negative impact on the data subject?
9. Does the search result indicate information that places the data subject at risk?
10. In what context was the information published? Did the data subject voluntarily make the content publically available? Was the content intended to be made public? Could the data subject reasonably be aware that the content could be made public?
11. Was the original content published in a journalistic context?
12. Does the publisher have the power or legal obligation to make the data public?
13. Does the data concern a crime?

5. The Right to be Forgotten and the "new" digital right to be forgotten in the future European Union General Data Protection Regulation

As already mentioned, the European Commission issued a Proposed General Regulation on the Protection of Personal Data[26], which unifies and simplifies the procedural rules in order to reduce administrative overheads and to facilitate movement within the Single Digital Market.

One of the main new features of the Proposed Regulation is the introduction of the so-called "Right to be Forgotten" in art. 17, which is entitled "The Right to be forgotten and to erasure":

This right is based on a provision of French law (*droit à l'oubli)* which the Commission Nationale de l'Informatique et des Libertés (CNIL) bases on the principle of purpose in the context of data protection and which has been adopted by Digital Law theory, and which, in 2009, favoured recognition of the fundamental character of the right to be forgotten[27].

The so-called "right to be forgotten" is defined as the "right of persons to prevent the continued processing of their data and to have the same deleted when they cease to be necessary for lawful purposes. This is, for example, the case of processing based on the person's consent, when the person withdraws his consent, or when the storage period has terminated".

[26] A 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) – 2012/0011 (COD)

[27] Pere Simón Castellano - El reconocimiento del derecho al olvido digital en España y en la EU. Efectos tras la sentencia del TJUE de mayo de 2014, Bosch, 2015, page 230 Bosch, 2015

No. 2 of the Proposed regulation enshrines a provision that is specifically designed for search engines:

> *Where the controller referred to in paragraph 1 has made the personal data public, it shall take all reasonable steps, including technical measures, in relation to data for the publication of which the controller is responsible, to inform third parties which are processing such data, that a data subject requests them to erase any links to, or copy or replication of that personal data. Where the controller has authorised a third party publication of personal data, the controller shall be considered responsible for that publication.*

Some changes have already been made to the initial version of this Proposed General Regulation, by a vote of the European Parliament on 12th March 2014[28], which introduced more than two hundred amendments of the version initially proposed by the Commission. These changes are limited to changes of terminology and essentially retain the original substance of the proposed regulation:

Article 17

"The Right to Erasure"

1. *The data subject shall have the right to obtain from the controller the erasure of personal data relating to them and the abstention from further dissemination of such data, and to obtain from third parties the erasure of any links to, or copy or replication of, that data where one of the following grounds applies:*
   - *(a) The 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 when the storage period consented to has expired, and where there is no other legal ground for the processing of the data;*
   - *(c) The data subject objects to the processing of personal data pursuant to Article 19;*
   - *(c-A) A court or regulatory authority based in the Union has ruled as final and absolute that the data concerned must be erased;*
   - *(d) The data has been unlawfully processed.*

6. Conclusions

The so-called digital right to be forgotten is now fully effective in the case law of the CJEU in its *Google Spain* Judgment and in worldwide cyberspace legal theory, which placed this digital law concept on the agenda, far beyond the horizons of the Law.

Internet search engines are the first providers of global services with the duty to study this recent European case law carefully and apply it properly on a case-by-case basis (because providers such as

[28] P7_TA-PROV(2014)0212, Protection of individuals with regard to the processing of personal data ***I (A7-0402/2013 - Rapporteur: Jan Philipp Albrecht), Legislative resolution of the European Parliament, of 12th March 2014, regarding 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) – 2012/0011 (COD)) 28, Alteration 112, page 95/657

Google, YouTube, Bing, Yahoo, DuckDuckGo, Baidu, Yandex RU and many others are specifically targeted by the Judgment).

They are however not the only information society service providers targeted by European case law, as many others providers, such as social networks and many others, “process” personal data and are “responsible” and have clearly defined European Law obligations and are required to comply with this case law and the “official” criteria in order to perform their obligations correctly.

The proposed regulation is not revolutionary, as the steady steps taken as reflected in the established legal doctrine of recognised bodies, such as the Article 29 Working Group, or the National Supervisory Authorities, will create a new and challenging standard in the defence of Fundamental Rights in relation to the protection of personal data, respect for private life, and other equally relevant Fundamental Rights, such as Free Speech, the Right to inform and be informed, or the right to economic initiative.