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THE PROTECTION OF PERSONAL DATA AND THE "RIGHT TO DATA DELETION"[1]

Abstract

The "Right to Data Deletion" or "Right to be Forgotten" is a relatively recent and emerging legal concept with great relevance for internet policies. The progressive evolution and diffusion of search engines and their increasing power demonstrate that a certain degree of protection of the privacy of personal life is indespensable. This article focuses on the jurisdiction of the European Court of Human Rights and the 2014 landmark decision of the Court of Justice of the European Union and the 2019 and 2022 judgements which complement the Court`s prior case-law. The article identifies the main characteristics of the case-law on the interpretation of the fundamental right of data protection. The underlying hypothesis is that the jurisdiction of Europe`s two highest courts play an important role in the development of the fundamental rights to privacy and data protection and has an extensive influence on their doctrine. Account is also taken of closely linked legal instruments, such as Art. 17 of the new General Data Protection Regulation.

Keywords: right to data deletion; right to be forgotten; Google; information society; personal data; data protection; CJEU; ECtHR; search engine operator; internet policy.

1. Introduction

Internet has an "elephant-memory" and does not forget anything. Search engines are "gatekeepers" of our information society.[2]

Are there means to force public authorities and search engine operators to remove

[1] The article was presented on 06.02.2023 and was reviewed on 24.03.2023.

[2] V. Boehme-Neßler, "Das Recht auf Vergessenwerden – Ein neues Internet-Grundrecht im Europäischen Recht <The Right to be Forgotten – A new fundamental right of the internet in european law>", "Neue Zeitschrift für Verwaltungsrecht (NVwZ)", ISSN 0721-880X, Vol. 33, Issue 13, 2014, p. 825-830.

certain webaddresses from search engine results or delete certain personal data that individuals do not want search engines to process anymore?

1.1. Overview

The "right to data deletion" or "right to be forgotten" is a relatively recent and emerging legal concept with great implications for internet policies. It is still very much debated at the global level, partly due to conflicts in its interpretation, as well as to practical issues regarding its implementation.[3]

Also known as the "right to erasure", it gives individuals the right to ask organizations to delete their personal data in certain specified situations. But organizations don`t always have to do it! The right can be exercised against controllers, who must respond without undue delay.

The right to oblige public authorities or private parties (search engine operators) to remove personal data derives from rulings by the European Court of Human Rights and the Court of Justice of the European Union. This article explores the relevant jurisprudence of Europe`s two highest courts. Both courts tend to treat data protection as an expression of the right to privacy.[4]

2. The two higher systems of fundamental rights protection in Europe

The following distinct but related systems are to ensure the protection of personal data in Europe:

The first system is that of the European Convention on Human Rights and Fundamental Freedoms (ECHR), an international agreement between the states of the Council of Europe. All member states of the European Union are part of this organization. The accession of the European Union to the Convention is currently under negotiation.[5] The final arbiter on the Convention is the European Court of Human Rights (ECtHR), which hears complaints by individuals on alleged breaches of human rights by signature states.[6]

The second system is based on the jurisprudence of the Court of Justice of the Eu-

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[3] See Cl. Perarnaud, „Right to be forgotten", "digwatch Observatory", <https://www.dig.watch/topics/right-to-be-forgotten, Keyword: Right to be forgotten in 2022> (access 01.02.2023); J. Centon, "Data Deletion and Censorship", "Data Protection and Privacy", ISSN 8231-3616, Vol. 31, Issue 10, 2018, p. 26-31.

[4] J. Kokott, Chr. Sobotta, "The distinction between privacy and data protection in the jurisprudence of the CJEU and the ECtHR", "International Data Privacy Law", <https://doi.org/10.1093/idpl/ipt017 > (access 01.02.2023).

[5] Final Report to the CDDH on the Accession of the European Union to the Convention on Human Rights and Fundamental Freedoms of 5 April 2013.

[6] See A. Leger, "Data Protection versus Freedom of Information", "Data Law", ISSN 1736-2506, Vol. 6, Issue 3, 2019, P. 17; J. Kokott, Chr. Sobotta, "The distinction between privacy and data protection in the jurisprudence of the CJEU and the ECtHR", "International Data Privacy Law", <https://doi.org/10.1093/idpl/ipt017> (access 01.02.2023).

ropean Union (CJEU), which guarantees the protection of fundamental human rights within the European Union. Respect of these rights is part of the constitutional principles of the European Union.[7]

Initially the CJEU developed these rights as general principles of european law in close alignment with the Convention system, but by now most guarantees are laid down in the Charter of the Fundamental Rights of the European Union.[8]

Both systems are closely linked and already today interpretation of the Charter follows that of the Convention,[9] even though the European Union is not yet a party to the Convention. Moreover, the interpretation of the Convention by the ECHR is taken into account by the CJEU.[10]

What about the responsibilities of private parties (search engine operators)?

The data protection law of the European Union puts similar obligations with regard to processing of personal information on public authorities and private parties. For the ECHR, the situation is different, because under Article 1 the Contracting Parties – the member states – are responsible, not individuals.[11] However, there are positive obligations of the member states to secure respect for personal data protection even in the sphere of the relations of individuals between themselves.[12]

3. Case-law as a "common source" for personal data protection

It is of interest to consider the jurisdiction of ECtHR and CJEU on personal data protection. What are the main takeaways?

3.1. Jurisdiction of the European Court of Human Rights

Art. 8 of the ECHR is a "common source" for both data protection and the tort of

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7 See Judgement of the CJEU in joined Cases C-402/05 P and C-415/05 P, Kadi and Al Barakaat International Foundation/Council and Commission, ECLI:EU:C:2008:461, 3 September 2008, paragraph 285.

8 OJ 2010 L 83, p. 389; J. Kokott, Chr. Sobotta, "The distinction between privacy and data protection in the jurisprudence of the CJEU and the ECtHR", "International Data Privacy Law", <https://doi.org/10.1093/idpl/ipt017> (access 01.02.2023).

9 See Article 52(3) of the Charter.

10 Judgement of the CJEU in joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P, Limburgse Vinyl Maatschappij and others/Commission, ECLI:EU:C:2002:582, 15 October 2002, paragaph 274; J.Kokott, Chr. Sobotta, "The distinction between privacy and data protection in the jurisprudence of the CJEU and the ECtHR", "International Data Privacy Law", <https://doi.org/10.1093/idpl/ipt017> (access 01.02.2023).

11 See J. Kokott, Chr. Sobotta, "The distinction between privacy and data protection in the jurisprudence of the CJEU and the ECtHR", "International Data Privacy Law", <https://doi.org/10.1093/idpl/ipt017> (access 01.02.2023); J. Centon, "Data Deletion and Censorship", "Data Protection and Privacy", ISSN 8231-3616, Vol. 31, Issue 10, 2018, P. 38.

12 A. Leger, "Data Protection versus Freedom of Information", "Data Law", ISSN 1736-2506, Vol. 6, Issue 3, 2019, p. 21; J. Kokott, Chr. Sobotta, "The distinction between privacy and data protection in the jurisprudence of the CJEU and the ECtHR", "International Data Privacy Law", <https://doi.org/10.1093/idpl/ipt017> (access 01.02.2023).

misuse of private information. The protection of personal data is of fundamental importance to a person`s enjoyment of his or her right to respect for private and family life, as guaranteed by Article 8 of the ECHR. In accordance with Article 52(3) of the Charter, Article 7 of the Charter (and Article 8) is thus to be given the meaning and the same scope as Article 8 of the ECHR, as interpreted by the case-law of the ECtHR.

The main principles of personal data protection and the "Right to Data Deletion" are laid down in the case of Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland:[13]

3.1.1. Two finnish applicant companies collected data from the Finnish tax authorities for the purpose of publishing information about natural person`s taxable income and assets in an online newspaper. Several other publishing and media companies also published such data which, pursuant to Finnish law, are accessible to the public. The Data Protection Ombudsman contacted the applicant companies and advised them that, although accessing and publishing taxation data were not prohibited as such, they had to cease publishing such data in a certain manner and extent. The applicant companies refused to abide by this request, which they considered violated their right to freedom of expression.

3.1.2.In the particular context of data protection, the ECtHR has, on a number of occasions,[14] referred to the Data Protection Convention.[15]

That Convention defines personal data in Article 2 as "any information relating to an identified or identifiable individual". The Court provided an interpretation of the notion of "private life" in the context of storage of personal data by public authorities. The Court pointed out, that the domestic law must afford appropiate safeguards to prevent any such use of personal data as may be inconsistent wih the guarantees of Article 8 ECHR. This Article thus provides for the right to a form of informational self-determination, allowing individuals to rely on their right to privacy as regards data which, albeit neutral, are collected, processed and disseminated collectively and in such a form or manner that their Article 8 rights may be engaged.[16]

Furthermore the ECtHR stated the relevant principles which must guide its assessment – and, more importantly, that of domestic courts – of necessity. The Court thus identified a number of criteria in the context of balancing the competing rights. The relevant criteria have been defined as: contribution to a debate of public interest, the

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13 Application no. 931/13, ECtHR 27 June 2017.

14 European Court of Human Rights, "Guide to the Case-Law of the European Court of Human Rights", updated 31 August 2022, p. 62-67; European Court of Human Rights, "Guide on Article 8 of the European Convention on Human Rights", updated on 31 August 2022, p. 56.

15 Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, 28 January 1981, European Treaty Series No. 108.

16 Case of Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland, Application no. 931/13, ECtHR 27 June 2017, paragraph 137.

degree of notoriety of the person affected, the subject of the news report, the prior conduct of the person concerned, the content, form or consequences of the publication, and, where it arises, the circumstances in which photographs were taken. The Court also examined the way in which the information was obtained and its veracity, and the gravity of the penalty imposed on journalists or publishers.[17]

3.2. Judgement of the Court of Justice of the European Union in Case C-131/12, Google Spain SL, Google Inc./Agencia Espanola de Proteccion de Datos, Mario Costeja Gonzales, 13 May 2014[18]

3.2.1. In 2010 a spanish national lodged with the Agencia Espanola de Proteccion de Datos (Spanish Data Protection Agency) a complaint against La Vanguardia Ediciones SL and against Google Spain and Google Inc. He contended that, when an internet user entered his name in the search engine of the Google group, the list of results would display links to two pages of La Vanguardia´s newspaper. Those pages in particular contained an announcement for a real-estate auction organised following attachment proceedings for the recovery of social security debts owed by the plaintiff. With that complaint, the plaintiff rquested, first, that Vanguardia will be required either to remove or alter the pages in question (so that the personal data relating to him no longer appeared) or to use certain tools made available by search engines in order to protect the data. Second he requested, that Google Spain or Google Inc. will be required to remove or conceal the personal data relating to him so that the data no longer appeared in the search results.[19]

3.2.2. In the judgement, the Court of Justice, found, first of all, that by searching automatically, constantly and systematically for information published on the internet, the operator of a search engine "collects" data within the meaning of the 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 of the free movement of such data.[20]

The Court considered, furthermore, that the operator, within the framework of its indexing programmes , "retrieves", "records" and "organises" the data in question, which it than "stores" on its servers and "discloses" and "makes available" to its users in the form of lists of results. Those operations, which are referred to expressly and unconditionally in the above mentioned directive, must be classified as "processing", regardless

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17 Case of Satakunnan Markinapörssi Oy and Satamedia Oy v. Finland, Application no. 931/13, ECtHR 27 June 2017, paragraph 165. Further: Case of Couderc and Hachette Filipacchi Associes v. France, Application no. 40454/07, ECtHR 10 November 2015, paragraph 93; Case of Axel Springer AG v. Germany, Application no. 39954/08, ECtHR 7 February 2012, paragraphs 90-95.

18 ECLI:EU:C:2014:317.

19 Court of Justice of the European Union, Press Release No 70/14.

20 OJ 1995 L 281, p. 31.

of the fact that the operator of the search engine carries them out without distinction in respect of information other than the personal data. The Court also pointed out that the operations referred to by the directive must be classified as "processing" even where they exclusively concern material that has already been published as it stands in the media. A general derogation from the application of the Directive 95/46/EC in such a case would have the consequence of largely depriving the directive of its effect.

The Court further held that the operator of the search engine is the "controller" in respect of that processing, within the meaning of the directive, given that it is the operator which determines the purposes and means of the processing. The Court observed in this regard that, inasmuch as the activity of a search engine is additional to that of publishers of websites and is liable to affect significantly the fundamental rights to privacy and to the protection of personal data, the operator of the search engine must ensure, within the framework of its resonsibilities, powers and capabilities, that its activity complies with the diective`s requirements. This is the only way that the guarantees laid down by the Directive 95/46/EC will be able to have full effect and that effective and complete protection of data subjects (in particular of their privacy) may actually be achieved.[21]

The Court pointed out in this context that processing of personal data carried out by such an operator enables any internet user, when he makes a search on the basis of an individual`s name, to obtain, through the list of results, a structured overview of the information relating to that individual on the internet. The Court observed, furthermore, that this information potentially concerns a vast number of aspects of his private life and that, without the search engine, the information could not have been interconnected or could have been only with great difficulty. Internet users may thereby establish a more or less detailed profile of the person searched against. Furthermore, the effect of the interference with the person`s rights is heightened on account of the important role played by the internet and search engines in modern society, which render the information contained in such lists of results ubiquitous. In the light of its potential seriousness, such interference cannot, according to the Court, be justified by merely the economic interest which the operator of the engine has in the data processing. However, inasmuch as the removal of links from the list of results could, depending on the information at issue, have effects upon the legitimate interest of internet users potentially interested in having access to that information, the Court held that a fair balance should be sought in particular between that interest and the data subject`s fundamental rights, in particular the right to privacy and the right to protection of personal data. The Court observed in this regard that, whilst it is true that the data subject`s rights also override, as a general rule, that interest of internet users, this balance may however depend, in

[21] Press Release No 70/14.

specific cases, on the nature of the information in question and its sensitivity for the data subject`s private life and on the interest of the public in having that information, an interest which may vary, in particular, according to the role played by the data subject in public life.[22]

The Court word-by-word formulated:[23]

"...that Article 12(b) and subparagraph (a) of the first paragraph of Article 14 of Directive 95/46/EC are to be interpreted as meaning that, when appraising the conditions for the application of those provisions, it should inter alia be examined whether a 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 on the basis of 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. As the data subject may, in the light of his fundamental rights under Articles 7 and 8 of the Charter (Charter of Fundamental Rights of the European Union – author),[24] request that the information in question no longer be made available to the general public on account of its inclusion in such a list of results, 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 having access to that information upon a search relating to the data subject`s name. However, that would not be the case if it appeared, for particular reasons, such as the role played by the data subject in public life, that the interference with his fundamental rights is justified by the preponderant interest of the general public in having, on account of its inclusion in the list of results, access to the information in question..."

3.3. Judgement of the Court of Justice of the European Union in Case C-507/17, Google LLC/Commission nationale de l`informatique et des libertes (CNIL), 24 September 2019[25]

3.3.1.The case occured in 2015/2016. By an adjucation, the Commission nationale de l` ìnformatique et des libertes (CNIL - French Data Protection Authority) imposed a penalty of 100.000 Euro on Google Inc. because of the company`s refusal, when granting a de-referencing request, to apply it to all its search engine`s domain name extensions. Google Inc. (successor in law Google LLC – author), having been given formal notice by the CNIL to apply the de-referencing to all the extensions, had refused to do so and had confined itself to removing the links in question from only the results displayed following searches conducted from the domain names corresponding to the

[22] See Press Release No 70/14.
[23] ECLI:EU:C:2014:317, paragraph 99.
[24] OJ 2010 L 83, p. 389.
[25] ECLI:EU:C:2019:772.

versions of its search engine in the Member States of the European Union (EU). Google Inc. requested the Conseil d`Ètat (Council of State) to annul the adjucation. It considers that the right to de-referencing does not necessarily require that the links at issue are to be removed, without geographical limitation, from all its search engine`s domain names.[26]

The Conseil d`Ètat wanted to know whether the rules of EU law relating to the protection of personal data[27] are to be interpreted as meaning that, where a search engine operator grants a request for de-referencing, that operator is required to carry out that de-referencing on all versions of its search engine or whether, on the contrary, it is required to do so only on the versions of that search engine corresponding to all the Member States or only on the version corresponding to the Member State of residence of the person benefiting from the de-referencing.[28]

3.3.2.In this judgement the Court of Justice delineated the scope of the "right to be forgotten" in the context of search engines. The Court emphasized that, in a globalised world, internet users`access – including those outside the EU – to the referencing of a link referring to information regarding a person whose centre of interests is situated in the EU is likely to have immediate and substantial effects on that person within the EU itself, so that a global de-referencing would meet the objective of protection referred to in EU law in full. However, it states that numerous third States do not recognise the right to de-referencing or have a different approach to that right. The Court added that the right to the protection of personal data is not an absolute right, but must be considered in relation to its function in society and be balanced against other fundamental rights, in accordance with the principle of proportionality. In addition, the balance between the right to privacy and the protection of personal data, on the one hand, and the freedom of information of internet users, on the other, is likely to vary significantly around the world.[29]

Thus, the Court concluded that, currently, there is no obligation under EU law, for a search engine operator who grants a request for de-referencing made by a data subject, as the case may be, following an injunction from a supervisory or judicial authority of a Member State, to carry out such a de-referencing on all the versions of its search engine. However, EU law requires a search engine operator to carry out such a de-referencing on the versions of its search engine corresponding to all the Member States and

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[26] Court of Justice of the European Union, Press Release No 112/19.

[27] Directive 95/46/EC and Regulation (EU) 2016/679 of the European Parliament and the Council of 27 April 2016 on the protection of individuals with regard to the processing of personal data and on the free movement of such data and repealing Directive 95/46/EC (General Data Protection Regulation – GDPR), OJ 2016 L 119, p. 1, first Corrigendum, OJ 2016 L 314, second Corrigendum, OJ 2018 L 127, and third Corrigendum, OJ 2021 L 074.

[28] Press Release No 112/19.

[29] Press Release No 112/19.

to take sufficiently effective measures to ensure the effective protection of the data subject`s fundamental rights. Thus, such a de-referencing must, if necessary, be accompanied by measures which effectively prevent a search through a version of that search engine "outside the EU", to the links which are the subject of the request for de-referencing (e.g. geo-blocking – author). It will be for the national court to ascertain whether the measures put in place by Google Inc. meet those requirements. Lastly, The Court pointed out that, while EU law does not currently require a de-referencing to be carried out on all versions of the search engine, it does not prohibit such a practice.[30]

The Court word-by-word formulated:[31]

"...that , on a proper construction of Article 12(b) and subparagraph (a) of the first paragraph of Article 14 of Directive 95/46/EC and Article 17(1) of Regulation 2016/679, where a search engine operator grants a request for de-referencing pursuant to those provisions, that operator is not required to carry out that de-referencing on all versions of its search engine, but on the versions of that search engine corresponding to all the Member States, using, where necessary, measures which, while meeting the legal requirements, effectively prevent or, at the very least, seriously discourage an internet user conducting a search from one of the Member States on the basis of a data subject`s name from gaining access, via the list of results displayed following that search, to the links which are the subject of that request..."

3.4. Judgement of the Court of Justice of the European Union in Case C-136/17, G.C. and Others/Commission nationale de l`informatique et des libertes (CNIL), 24 September 2019[32].

3.4.1. Ms G.C. and others brought proceedings before the Conseil d`Ètat against the Commission national de l`ìnformatique et des libertes (CNIL) concerning four decisions of the CNIL refusing to serve formal notice on Google Inc. to de-reference various links appearing in the lists of results displayed following searches of their names. Those links led to web pages published by third parties that included a satirical photomontage relating to a female politician that was placed online pseudonymously and articles mentioning one of the individuals concerned in his capacity as public relations officer of the Church of Scientology, the judicial investigation of a male politician and the sentencing of another individual for sexual assaults on minors. The Conseil d`Ètat referred to the Directive 95/46/EC and seeked, in particular, to establish whether, having regard to the specific responsibilities, powers and capabilities of the operator of a search engine, the prohibition imposed on other controllers on processing data falling within

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30 See Press Release No 112/19.

31 ECLI:EU:C:2019:772, paragraph 73.

32 ECLI:EU:C:2019: 773.

certain special categories (such as political opinions, religious or philosophical beliefs and sex life) applies also to the operator of a search engine.[33]

3.4.2.The Court made clear that the processing of personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, or trade-union membership, and the processing of data concerning health or sex life is prohibited, subject to certain exceptions and derogations. In addition, subject to specific derogations, the processing of data relating to offences, criminal convictions or security measures may be carried out only under the control of official authority, and a complete register of criminal convictions may be kept only under the control of official authority. The Court considered that this prohibition and those restrictions apply, subject to the exceptions provided for by EU law, to all controllers carrying out such processing. It emphasized, however, that the operator of a search engine is responsible not because personal data referred to in those provisions appear on a web page published by a third party but because of the referencing of that page and in particular the display of the link to that web page in the list of results presented to internet users following a search.[34]

The Court found, next, that while the data subject`s rights override, as a general rule, the freedom of information of internet users, that balance may be called into question depending on the nature of the information in question and its sensitivity for the data subject`s private life and on the interest of the public in having that information, an interest which may vary, in particular, according to the role played by the data subject in public life. Thus, the Court concluded that, where the operator of a search engine receives a request for de-referencing relating to a link to a web page on which sensitive data are published, the operator must, on the basis of all the relevant factors of the particular case and taking into account the seriousness of the interference with the data subject`s fundamental rights to privacy and protection of personal data, ascertain whether the inclusion of that link in the list of results displayed following a search on the basis of the data subject`s name is strictly necessary for protecting the freedom of information of internet users potentially interested in accessing that web page by means of such a search.[35]

Furthermore, where the processing relates to data which are manifestly made public by the data subject, an operator of a search engine may refuse to accede to a request for de-referencing provided that the processing satisfies all the other conditions of lawfulness and unless the data subject has the right to object to that processing on compelling legitimate grounds relating to his or her particular situation.

The Court word-by-word formulated:[36]

"...that the processing by the operator of a search engine of the special categories

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33 Court of Justice of the European Union, Press Release No 113/19.

35 See Press Release No 113/19.

36 ECLI:EU:C:2019:773, paragraphs 61 and 79.

of data referred to in Article 8(1) of Directive 95/46/EC is capable in principle of being covered by the exceptions in Article 8(2)(a) and (e), which provide that the prohibition is not to apply where the data subject has given his or her explicit consent to such processing, except where the laws of the Member State concerned prohibit such consent, or where the processing relates to data which are manifestly made public by the data subject. Those exception have now been repeated in Article 9(2)(a) and (e) of Regulation (EU) 2016/679…

…that the provisions of Directive 95/46/EC must be interpreted as meaning that, first, information relating to legal proceedings brought against an individual and, as the case may be, information relating to an ensuing conviction are data relating to "offences" and "criminal convictions" within the meaning of Article 8(5) of Directive 95/46/EC, and second, the operator of a search engine is required to accede to a request for de-referencing relating to links to web pages displaying such information, where the information relates to an earlier stage of the legal proceedings in question and, having regard to the progress of the proceedings, no longer corresponds to the current situation, in so far as it is establisnhed in the verification of the reasons of substantial public interest referred to in Article 8(4) of Directive 95/46/EC that, in the light of all the circumstances of the case, the data subject`s fundamental rights guaranteed by Articles 7 and 8 override the rights of potentially interested internet users protected by Article 11 of the Charter (freedom of expression and information - author)…"

3.5. Judgement of the Court of Justice of the European Union in Case C-460/20, TU, RE/Google LLC, 8 December 2022[37]

3.5.1.The case ocurred in… Two managers of a group of investment companies requested Google to de-reference results of a search made on the basis of their names, which provided links to certain articles criticising that group`s investment model. They assert that those articles contain inaccurate claims. They also requested Google to remove photos of them, displayed in the form of "thumbnails", from the list of results of an image search made on the basis ot their names. That list displayed only the thumbnails as such, without reproducing the context of the publication of those photos on the referenced internet page. In other words, the original context of the images` publication was neither stated nor otherwise visible when the thumbnails were displayed.[38]

Google refused to comply with that request, referring to the professional context in which those articles and photos were set and arguing that it was unaware whether the information contained in those articles were accurate or not. The German Federal Court of Justice, before the dispute was brought, requested the Court of Justice to provide an interpretation of the general data protection regulation, which governs the right

[37] ECLI:EU:C:2022:962.

[38] Court of Justice of the European Union, Press Release No 197/22.

to erasure ("right to be forgotten") as well as the directive on the protection of individuals with regard to the processing of personal data, read in the light of the Charter of Fundamental Rights of the European Union (Articles 7, 8, 11 and 16).[39]

3.5.2.In the judgement, the Court pointed out that the right to protection of personal data is not an absolute right but must be considered in relation to its function in society and be balanced against other fundamental rights, in accordance with the principle of proportionality. Accordingly, the general data protection regulation expressly provides that the right to erasure is excluded where processing is necessary for the exercise of the right, in particular, of information. The data subject`s rights to protection of private life and protection of personal data override, as a general rule, the legitimate interest of internet users who may be interested in accessing the information in question. That balance may, however, depend on the relevant circumstances of each case, in particular on the nature of that information and its sensitivity for the data subject`s private life and on the interest of the public in having that information, an interest which may vary, in particular, according to the role played by that person in public life. However, the right to freedom of expression and information cannot be taken into account where, at the very least, a part – which is not of minor importance – of the information found in the referenced content proves to be inaccurate.[40]

Regarding, first, the obligations of the person requesting de-referencing on account of inaccurate content, the Court stated that it is for the person making such a request to establish the manifest inaccuracy of the information or of a part of that information which is not of minor importance. However, in order to avoid imposing on that person an excessive burden which is liable to undermine the practical effect of the right to de-referencing, that person has to provide only evidence that can reasonably be required of him or her to try to find.[41]

Regarding, second, the obligations and responsibilities incumbent on the operator of the search engine, the Court considered that, following a request for de-referencing, the operator of the search engine must take into account all the rights and interests involved and all the circumstances of the case. However, that operator cannot be required to play an active role in trying to find facts which are not substantiated by the request for de-referencing, for the purposes of determining whether that request is well-founded or not. Therefore, where the person who has made a request for de-referencing submits relevant and sufficient evidence capable of substantiating his or her request and of establishing the manifest inaccuracy of the information found in the referenced content, the operator of the search engine is required to accede to that request. Where the inaccuracy of information found in the referenced content is not obvious, in the light of the evidence provided

[39] Press Release No 197/22.
[40] See Press Release No 197/22.
[41] Press Release No 197/22.

by the person making the request, that search engine operator is not required, where there is no judicial decision, to accede to such a request. However, in such a situation, the person making the request must be able to bring the matter before the supervisory authority or the judicial authority so that it carries out the necessary checks and orders that contoller to adopt the necessary measures. The operator of the search engine has to warn internet users of the existence of administrative or judicial proceedings.[42]

As regards the display of photos in the form of thumbnails, the Court decided that the display, following a search by name, in the form of thumbnails, of photos of the data subject is such as to constitute a particular significant interference with that person`s rights to private life (Article 7 of the Charter) and their personal data (Article 8 of the Charter). The Court observed that when the operator of the search engine receives a request for de-referencing concerning photos displayed in the form of thumbnails, it must ascertain whether displaying those photos is necessary for exercising the right to freedom of information of internet users who are potentially interested in accessing those photos. In that regard, contribution to a debate of public interest is an essential factor to be taken into consideration when striking a balance between competing fundamental rights. The Court clarified that a separate weighing-up of competing rights and interests is required, where, on the one hand, what is at issue are articles containing photos which, when placed into their original context, illustrate the information provided in those articles and the opinions expressed in them, or, on the other hand, photos displayed in the list of results in the form of thumbnails by a search engine outside the context in which they were published on the original internet page. In the weighing-up exercise concerning photos displayed in the form of thumbnails, the Court held that account must be taken of the informative value of those photos without taking into consideration the context of their publication on the internet page from which they are taken.[43]

The Court word-by-word formulated:[44]

"…the obligations of the person requesting de-referencing on account of the referenced content being inaccurate, it is for that person to establish the manifest inaccuracy of the information found in that content or, at the very least, of a part – which is not minor in relation to the content as a whole – of that information…In that regard, that person cannot be required, in principle, to produce, as from the pre-litigation stage, in support of his or her request for de-referencing made to the operator of the search engine, a judicial decision against the publisher of the website in question, even in the form of a decision given in interim proceedings…It should be added that, in accordance with what has been stated in the present judgement, it would also be disproportionate to de-reference articles, with the result that accessing all of them on the internet would

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42 See Press Release No 197/22.

43 Press Release No 197/22.

44 ECLI:EU:C:2022:962, paragraphs 68, 74, 95, 100 and 108.

be difficult, in a situation where only certain information of minor importance, in relation to the content found in those articles as a whole, proves to be inaccurate…

A person`s image constitutes one of the chief attributes of his or her personality as it reveals the person`s unique characteristics and distinguishes the person from others. The right to the protection of one`s image is thus one of the essential components of personal development and mainly presupposes that person`s control over the use of that image, including the right to refuse publication of it…the purpose of the processing at issue, it should be noted that the publication of photographs as a non-verbal means of communication is likely to have a stronger impact on internet users than text publications. Photographs are, as such, an important means of attracting internet users`s attention and may encourage an interest in accessing the articles they illustrate…In the light of all the foregoing, Article 12(b) and point (a) of the first paragraph of Article 14 of Directive 95/46 as well as Article 17(3)(a) of the GDPR must be interpreted as meaning that, in the context of the weighing-up exercise which is to be undertaken between the rights referred to in Articles 7 and 8 of the Charter, on the one hand, and those referred to in Article 11 of the Charter, on the other hand, for the purposes of examining a request for de-referencing…, account must be taken of the informative value of those photographs regardless of the context of their publication on the internet page…"

4. Related Article of the General Data Protection Regulation and suitable Recital

Following the 2014 judgement of the EU Court of Justice the European Parliament and the Council established the cited EU General Data Protection Regulation 2016/679 (GDPR). Adopted in April 2016 and applicable from May 2018, the GDPR is the centrepiece of the recent reform of the EU regulatory framework for protection of personal data. It replaced the Directive 95/46/EC and has become the most significant piece of data protection legislation in the EU.[45]

The "right to be forgotten" appears in Article 17 of the GDPR:

Right to erasure ("right to be forgotten")

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

[45] For more information see F. Bieker, "The Right to Data Protection – Individual and Structural Dimensions of Data Protection in EU Law", "Information, Technology and Law", ISBN 978-94-6265-5027, Vol.34, Kiel/The Hague 2022; Ch. Kuner, L.A. Bygrave., Ch. Docksey, L. Drechsler (eds.), "The EU General Data Protection Regulation (GDPR): A Commentary", ISBN 978-0-19-882649-1, Oxford University Press 2020; K. von Lewinsky, G. Rüpke, J. Eckardt (eds.), "Datenschutzrecht – Grundlagen und europarechtliche Umgestaltung <Data protection law – Principles and european Remodelling>", ISBN 9783406740282, Munich 2022, p. 114-276.

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).

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.

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 defence of legal claims.

The correspondingly-named rule is accompanied by Recital 66 of the GDPR:

To strengthen the right to be forgotten in the online environment, the right to erasure should also be extended in such a way that a controller who has made the personal data public should be obliged to inform the controllers which are processing such personal data to erase any links to, or copies or replications of those personal data. In doing

so, that controller should take reasonable steps, taking into account available technology and the means available to the controller, including technical measures, to inform the controllers which are processing the personal data of the data subject`s request.

5. Main takeaways

The "right to data deletion" or "right to be forgotten" reflects the claim of an individual to have certain data removed so that third persons can no longer trace them.[46] One can define it as the "right to silence" on past events in life that are no longer occuring.[47] Based on grounds relating to its particular situation, a data subject can request public authorities or a search engine operator to "de-reference" from search results links leading to websites containing personal data pertaining to it.[48] The "right to be forgotten" is a human right, but no absolute right. When the deleting of search results might negatively affect others, such request have to be carefully weighed against their rights. That means that the "right to data deletion" is not unreservedly guaranteed; it is limited especially when colliding with the information society`s right of freedom of expression and information under Article 10 of the ECHR and Article 11 of the Charter. Other exceptions are if the processing of data which is subject to an erasure request is necessary to comply with legal obligations, for archiving puposes in the public interest, scientific or historical research purposes or statistical purposes or for the defence of legal claims.[49] Consequence: Giving competing interests and the hyper-connected nature of the internet, the "right to be forgotten" is much more complicated than individuals simply requesting that an organisation erase their personal data.[50]

A data subject is not required to exercise its "right to data deletion" or "right to be forgotten". But when it does the erasure request is not subject to any particular form. Also the search engine operator may not require a specific form.[51] The right is to exercise against controllers who must respond without "undue delay"[52], in any event within one month, although this can be extended in difficult cases. The controller has to prove

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46 See R. H. Weber, "The right to be forgotten. More than a Pandora´s Box", "Journal on Intellectual Property, Information, Technology and E-Commerce Law (JIPITEC)", ISSN 2190-3387, 2011, p. 120; A. Leger, "Data Protection versus Freedom of Information", "Data Law", ISSN 1736-2506, Vol. 6, Issue 3, 2019, p. 23.

47 G. Pino, "The right to personal identity in Italian private law: Constitutional interpretation and judge-made rights", M. van Hoecke, F. Ost (eds.), "The harmonization of private law in Europe", ISBN 978-1-84113-137-5, Oxford University Press 2000, p. 237.

48 See J. Globocnik, :The Right to Be Forgotten is Taking Shape: CJEU Judgments in GC and Others (C-136/17) and Google v CNIL (C-507/17)", "Journal of European and International IPLaw (GRUR International)", ISSN 2632-8550, Vol. 69, Issue 4, 2020, p. 381.

49 Art. 17(3) of the GDPR; see GDPR.EU, <https://www.gdpr-info.eu/issues/right-to-be-forgotten> (access 31.01.2023).

50 GDPR.EU, <https://www.gdpr-info.eu/issues/right-to-be-forgotten> (access 31.01.2023).

51 See GDPR.EU, <https://www.gdpr-info.eu/issues/right-to-be-forgotten> (access 31.01.2023).

52 Art. 17 (1) of the GDPR.

the identity of the data subject and can request additional information.[53] All this can create a challenge for an organisation as any of its employees could receive a valid verbal request.

6. Conclusion

Should a person be "punished" for a "mistake" years or decades later because of indexed websites on search engines like Google?[54]

– The "right to data deletion" or "right to be forgotten" has arisen from desires of individuals to "determine the development of their life in an autonomous way, without being perpetually or periodiocally stigmatised as a consequence of a specific action performed in the past".[55] The right is based on Article 8 of the ECHR and was established in the 2014 landmark decicision of the CJEU, further shaped by two 2019 judgements and a 2022 judgement. The latter brought the processing of sensitive data by search engines out of the grey area caused by the first Court`s decision; however certain important aspects of the "right to be forgotten" remained unanswered.[56] The right is now enshrined in Article 17 of the GDPR. It continues to be open to improvement. It would under no circumstances decrease the quality of the internet through censorship.[57]

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Նորբերթ Բերնսդորֆ

ՀՀ դատախազության «Օրինականություն»
գիտագործնական պարբերականի խմբագրական խորհրդի անդամ,
իրավաբանական գիտությունների դոկտոր,
Մարբուրգի Ֆիլիպսի անվան համալսարանի պատվավոր պրոֆեսոր,
Հիմնարար իրավունքների Եվրոպական միության խարտիայի
ազգային փորձագետ (Վիեննա),
Գերմանիայի դաշնային սոցիալական դատարանի նախկին դատավոր

ԱՆՁՆԱԿԱՆ ՏՎՅԱԼՆԵՐԻ ՊԱՇՏՊԱՆՈՒԹՅՈՒՆԸ ԵՎ «ՏՎՅԱԼՆԵՐԸ ՋՆՋԵԼՈՒ ԻՐԱՎՈՒՆՔԸ»[58]

Համառոտագիր

«Տվյալների ջնջման իրավունքը» կամ «Մոռացված լինելու իրավունքը» համեմատաբար նոր և ձևավորվող իրավական հայեցակարգ է, որը մեծ նշանակություն ունի համացանցի քաղաքականության համար: Որոնողական համակարգերի առաջադեմ էվոլյուցիան ու տարածումը և դրանց աճող հզորությունը ցույց են տալիս, որ անձնական կյանքի գաղտնիության որոշակի աստիճանի պաշտպանությունն անքակտելի է և անհրաժեշտ: Այս հոդվածը ներկայացնում է Մարդու իրավունքների եվրոպական դատարանի և Եվրոպական միության արդարադատության դատարանի իրավասությունները և 2014, 2019 և 2022 թվականների վճիռները, որոնք լրացնում են նախկինում արտահայտված նախադեպային իրավունքը: Հոդվածում նշվում են տվյալների պաշտպանության հիմնարար իրավունքի մեկնաբանման վերաբերյալ նախադեպային իրավունքի հիմնական բնութագրերը: Առանցքային վարկածն այն է, որ Եվրոպայի երկու բարձրագույն դատարանների վճիռներում կարևոր դեր է հատկացվում գաղտնիության և տվյալների պաշտպանության հիմնարար իրավունքների զարգացմանը և դոկտրինին: Հոդվածում ներկայացվել են նաև այնպիսի կարևոր իրավական ակտեր, ինչպիսին է Տվյալների պաշտպանության ընդհանուր կանոնակարգի 17-րդ հոդվածը:

Հիմնաբառեր- տվյալները ջնջելու իրավունք, մոռացված լինելու իրավունք, գուգլ, տեղեկատվական հասարակություն, անձնական տվյալներ, տվյալների պաշտպանություն, Եվրոպական միության արդարադատության դատարան, Մարդու իրավունքների եվրոպական դատարան, որոնման համակարգի օպերատոր, ինտերնետային քաղաքականություն:

[58] Հոդվածը ներկայացվել է 06.02.2023թ., գրախոսվել է 24.03.2023թ.:

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ЗАЩИТА ПЕРСОНАЛЬНЫХ ДАННЫХ И «ПРАВО НА УДАЛЕНИЕ ДАННЫХ»[59]

Абстракт

«Право на удаление данных» или «Право быть забытым» — это относительно недавнее развивающееся юридическое понятие, имеющее большое значение для интернет политики. Прогрессивная эволюция и распространение поисковых систем, а также их растущая мощь демонстрируют, что определенная степень защиты конфиденциальности личной жизни необходима. В этой статье основное внимание уделяется юрисдикции Европейского суда по правам человека и знаменательному решению Суда Европейского Союза от 2014 года, а также постановлениям от 2019 и 2022 годов, которые дополняют предыдущую прецедентную практику. В статье определены основные характеристики судебной практики по толкованию права на защиту данных. Гипотеза заключается в том, что юрисдикция двух высших судов Европы играет важную роль в развитии основных прав на неприкосновенность частной жизни и защиту данных и оказывает значительное влияние на их доктрину. Учитываются также тесно связанные правовые инструменты, такие как ст. 17 нового Общего регламента по защите данных.

Ключевые слова: право на удаление данных; право быть забытым; гугл; информационное общество; личные данные; защита данных; CEC; ЕСПЧ; оператор поисковой системы; интернет политика.

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[59] Статья была представлена 06.02.2023 и прошла рецензирование 24.03.2023.