



Strasbourg, 30 July 2014

CDL-JU(2014)014
Engl. only

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

in co-operation with the
CONSTITUTIONAL COURT OF GEORGIA

4th Black Sea Regional Conference
“Emerging Challenges to the Right to Privacy”
Batumi, Georgia
5 July 2014

REPORT

by
Ms Herdís THORGEIRSDÓTTIR
(Vice-President of the Venice Commission, Iceland)

Censorship by a private party threatens public debate on the Internet (Google v Spain judgment of the ECJ in May 2014)

The European Court of Justice (ECJ) delivered a landmark judgment on 13 May 2014 regarding data protection and the “right to be forgotten” on the Internet in the case of Google against Spain.¹ The ECJ ruled that individuals have – under certain conditions – the “right to be forgotten” and that Google must delete “inadequate, irrelevant or no longer relevant” data from its results when a member of the public requests it. Failure to do so can result in fines.

This ruling has sent shock waves throughout Europe and beyond. Many thought that when the Advocate General Jääskinen delivered his opinion in the Google Spain case, in June 2013, it was the last nail in the coffin of the controversial “right to be forgotten and to erasure” provided for in the EU’s 2012 Proposed Data Protection Regulation.²

There is a genuine concern on the part of many that their personal lives have become over-exposed in the era of the Internet. It is however disputed whether inconvenient information should be removed subject to a decision of a private party running a search engine like Google.

The ECJ may have taken a dangerous step in its ruling in May throwing into jeopardy the right of the public to receive information and ideas from the Internet which, despite its threats to privacy rights in many respects, is the most democratic forum for the exercise for freedom of expression that exists.

The long-awaited judgment raises serious questions about the balance between privacy and freedom of expression in the digital environment. It may have repercussions beyond Google, paving the way for compromising the openness of the Internet and giving a private corporation editorial powers on a forum “owned by nobody”. Since the ruling Google has received almost 100 thousand requests covering almost 330 thousand links that the applicants want taken down.³ It may be questioned whether we have entered an Orwellian era where a search engine - “a de facto monopoly like Google”⁴ - can rewrite history on the premises that it is protecting the privacy of individuals?

Background of the case

The ruling stemmed from a case brought by a Spanish citizen Mario Costeja González who lodged a complaint against a Spanish newspaper with the national Data Protection Agency and against Google Spain and Google Inc. The citizen complained that an auction notice of his repossessed home on Google’s search results infringed his privacy rights because the proceedings concerning him had been fully resolved for a number of years and hence the reference to these was entirely irrelevant. He requested, first, that the newspaper be required either to remove or alter the pages in question so that the personal data relating to him no

¹ Case C-131/12 Google Spain SL, Google Inc. v. Agencia Española de Protección de Datos (AEPD) and Mario Costeja González, judgment 13th May 2014

² http://ec.europa.eu/justice/data_protection/document/review2012/com_2012_11_en.pdf

³ Dave Lee, technology reporter BBC News, <http://www.bbc.com/news/technology-28458194>

⁴ Daniel Fisher: Europe's ‘Right To Be Forgotten’ Clashes With U.S. Right To Know, in Forbes, 16 May 2014 (<http://www.forbes.com/sites/danielfisher/2014/05/16/europes-right-to-be-forgotten-clashes-with-u-s-right-to-know/>)

longer appeared; and second, that Google Spain or Google Inc. be required to remove the personal data relating to him, so that it no longer appeared in the search results.

The Spanish Court referred the case to the Court of Justice of the EU asking:

- (1) Whether the **EU's 1995 Data Protection Directive** applied to search engines such as Google;
- (2) Whether the EU law (Directive) applied to Google Spain, given that the company's data processing server was in the United States;
- (3) Whether the individual has the right to request that his or her personal data or history be removed from accessibility via a search engine (whether there exists akin to "the right to be forgotten" under the 1995 Data Protection Directive?)

Regarding the issue on the territoriality of EU rules Google claimed that no processing of personal data relating to its search engine took place in Spain. The ECJ held that even if the physical server of a company processing data is located outside Europe, EU rules apply to search engine operators if they have a branch or subsidiary in a Member State which promotes the selling of advertising space offered by the search engine. This conclusion is in line with the Advocate General's opinion in June 2013 who held that the Data Protection Directive and Spanish implementing rules applied to Google in these circumstances.⁵

Regarding the material scope of application of the Data Protection Directive 95/46EC the ECJ held that search engines like Google are controllers of personal data and **Google could therefore not escape its responsibilities** before European law when handling personal data by saying it is a search engine.

Controversies: Enlisting large companies as the government's collaborators in restricting the flow of information

The ECJ ruling that Google has editorial responsibilities is in stark contrast with what the Advocate General considered in his opinion in June 2013.⁶

The Advocate General recalled that when the Directive was adopted in 1995, the Internet and search engines were new phenomena and their current development was not foreseen by the Community legislator. Google in his view could **not to be considered as a 'controller' as it cannot in law or in fact fulfill the obligations of the controller provided in the Directive** in relation to personal data on source web pages hosted on third party servers. In effect, provision of an information location tool does not imply any control over the content included on third party web pages. Therefore, a national data protection authority cannot require an internet search engine service provider to withdraw information from its index. **A possible 'notice and**

⁵ Advocate General's Opinion in Case C-131/12 Google Spain SL, Google Inc. v Agencia Española de Protección de Datos, Mario Costeja González. Court of Justice of the European Union Press Release No. 77/13, Luxembourg, 25 June 2013.

⁶ <http://curia.europa.eu/jcms/upload/docs/application/pdf/2013-06/cp130077en.pdf>

take down procedure' concerning links to source web pages with illegal or inappropriate content is a matter for national civil liability law based on grounds other than data protection.

The Advocate General's approach to search engines is similar to that of the widely cited 2003 Declaration, the Committee of Ministers of the Council of Europe that urged member states to adopt the following policy:

"In cases where ... service providers ... store content emanating from other parties, member states may hold them co-responsible if they do not act expeditiously to remove or disable access to information or services as soon as they become aware ... of their **illegal nature**.

When defining under national law the obligations of service providers as set out in the previous paragraph, due care must be taken to respect the freedom of expression of those who made the information available in the first place, as well as the corresponding right of users to the information."³

The European Court of Human Rights has confirmed the significant role of the internet in realizing freedom of expression for democratic objectives. The approach taken by the ECJ in the Google ruling is hence at odds with the European Court of Human Rights case law (at least until recently), which has *stated that* "[i]n light of its accessibility and its capacity to store and communicate vast amounts of information, the Internet plays an important role in enhancing the public's access to news and facilitating the dissemination of information generally."⁷ Likewise, in *Ahmet Yildirim v. Turkey*, the Second Section of the Court emphasised that "the Internet has now become one of the principal means of exercising the right to freedom of expression and information, providing as it does essential tools for participation in activities and discussions concerning political issues and issues of general interest".⁸

It is evident from the case law of the European Court of Human Rights that the internet is entitled to maximum protection under Article 10 of the European Convention on Human Rights protection freedom of expression. The US Supreme Court the 1997 judgment *Reno v. American Civil Liberties Union* described the Internet as a "vast library" of millions of publications and "the most participatory form of mass speech yet developed" as it enabled anyone connected to it to become a publisher in his/her own right.

Google had not been launched at the time of the adoption of the Data Protection Directive in 1995, which the ECJ is basing its decision on. During the time of the adoption of the Directive the estimated number of websites were about 23 thousand while in 2013 the number of websites was about 673 million.⁹

In the Google ruling the ECJ refers only to Articles 7 and 8 of the EU Charter of Fundamental Rights – the rights to privacy and data protection. It does not at all mention Article 11 of the Charter of Fundamental Rights or Article 10 of the European Convention on Human rights protecting freedom of expression. Furthermore it does not, surprisingly, link its statements

⁷ *Times Newspapers Ltd v. the United Kingdom* (Nos. 1 and 2), Judgment of 10 March 2009, para. 27. See also Editorial Board of *Pravoye Delo and Shtekel v. Ukraine*, Judgment of 5 May 2011. (See also: http://www.laquadrature.net/en/civil-society-calls-on-the-echrs-grand-chamber-to-overturn-delfi-v-estonia-ruling#footnote1_i7nqfyy)

⁸ *Ahmet Yildirim v. Turkey* Judgment of 18 December 2012.

⁹ <http://www.internetlivestats.com/total-number-of-websites/>

about the balancing test to the European Court of Human Rights case law balancing privacy and freedom of expression.

The ruling acknowledges the importance of journalism, but not the significance of the huge marketplace of ideas in relation to the democratic ideal of a robust, wide-open public debate. The Internet provides the tool for the public's right to impart and to receive information and ideas of all kind, which is essential for the right to know and for increased transparency of the conduct of power holders and other forces shaping society. Access to all kinds of information and ideas through search engines on the Internet is an indispensable element of modern opinion formation.

Reasoning that Google and other search engines are controllers of information (real live publishers) comes into conflict with the principle of net neutrality, which is the principle that governments and internet service providers should not discriminate between data on the internet on the basis of user, content or site. It holds that companies providing Internet service should treat all sources of data equally. This became apparent in June after the ECJ Google ruling when the EU national justice ministers agreed to adapt legislation to take the ruling against Google into account that they failed to agree on common underlying principles relating to net neutrality, the principle of open internet. They had different views on how to balance net neutrality and reasonable traffic management.¹⁰ The concept of net neutrality has been the center of a debate over whether telecommunication companies can give preferential treatment to content providers who pay for faster transmission, or to their own content, in effect creating a two-tier Web, and about whether they can block or impede content representing controversial points of view.

The ECJs view of the search engine provider's role gives the impression that authorities are enlisting large companies as the government's collaborator's in deciding what is of public interest.¹¹

Right to be "forgotten"?

The final issue the ECJ dealt with in the Google Spain case is the concept of the 'right to be forgotten', i.e the right of an individual to insist (in this case) that his or her history be removed from accessibility via a search engine.

The ECJ referred to the EU directive from 1995¹² on the protection of individuals with regard to the processing of personal data and on the free movement of such data (which unlike the 2012 proposal by the EU Commission does not entail a right to be forgotten). The Court emphasized that the objective of this EU Directive is protecting the fundamental rights and freedoms of natural persons, in particular the right to privacy when personal data are processed, while removing obstacles to the free flow of such data.

In response to the question of **the right to be forgotten on the Internet** the ECJ concluded that the EU directive enabled individuals to request that links to web pages be removed from list of results on the grounds that he/she wishes the information appearing on those pages relating to him/her personally to be forgotten after a certain time and that if it is found that the

¹⁰<http://www.euractiv.com/sections/infosociety/ministers-move-ensure-right-be-forgotten-applies-non-eu-companies-302677>

¹¹ See f. ex. Daniel Fisher, 'Europe's right to be forgotten clashes with U.S. Right to Know, in Forbes 16 May 2014.

¹² Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ 1995 L 281, p. 31).

inclusion of those links in the list – at this point in time – is incompatible with the directive – then the links and information must be erased.

The ECJ observed in this regard that even initially lawful processing of accurate data may, in the course of time, become incompatible with the directive where, having regard to all the circumstances of the case, the data appear to be inadequate, irrelevant or no longer relevant, or excessive in relation to the purposes for which they were processed and in the light of the time that has elapsed.

Here the ECJ is in stark conflict with the Advocate General's opinion, which considered that the 1995 Directive does not establish a general 'right to be forgotten', stating: 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. The rights to rectification, erasure and blocking of data provided in the Directive concern data whose processing does not comply with the provisions of the Directive, in particular because of the incomplete or inaccurate nature of the data. This does not seem to be the case in the current proceedings.

The Directive also grants any person 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 as otherwise provided by national legislation. However, the Advocate General considers that a subjective preference alone does not amount to a compelling legitimate ground and thus the Directive does not entitle a person to restrict or terminate dissemination of personal data that he considers to be harmful or contrary to his interests.

It is possible that the secondary liability of the search engine service providers under national law may lead to duties amounting to blocking access to third party websites with illegal content such as web pages infringing intellectual property rights or displaying libellous or criminal information. In contrast, requesting search engine service providers to suppress legitimate and legal information that has entered the public domain would entail an interference with the freedom of expression of the publisher of the web page. In the Advocate General's view, it would amount to "**copyright of his published content by a private party**".

The enormous implications of the Google Spain judgment

Anyone who feels that information which is no longer 'relevant' to their current situation – be it an old conviction for drug use, domestic violence or involvement in financial scandals will be in a strong position to approach Google and request that the page listing that information is de-indexed. In the wake of the ruling Google has received approximately 100 thousand requests to remove material. There have been reports on businesses that have sought for links to negative reviews on a forum to be removed; of a man who tried to kill members of his own family who asked for links to a news article to be taken down; an ex-politician seeking re-election has asked to have links to an article about his behaviour in office removed.

The ECJ judgment places Google and other search engines in a sudden position of power to pick and choose what other people can see when they type in an individual's name. Google will now be tasked with becoming the front-line arbiter of what should and should not be deleted. For every request that comes in Google will determine the public interest in that content, and it will have to navigate the 28 EU Member States.

The ECJ's approach circumvents the democratic function of the public's access to the wide source of information and ideas on the Internet. Who is to say that information that is not subject to defamation is at some point in time no longer relevant – just because it may not be convenient for somebody to have it online.

Content that is not illegal may be removed subject to a decision by a large company, which has become the authorities' collaborator in deciding what is in the public interest – and what should be forgotten.

In his famous book 1984 Orwell warned that: Who controls the past controls the future. Who controls the present controls the past.

The ECJ has with this judgment embarked on a dangerous route to private censorship. It remains a fact of life as stated in Shakespeare's Macbeth: What's done cannot be undone.¹³

¹³ 5.1.75