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Divergent Views On The Right To Be Digitally Forgotten: The Opinions Of The General Advocates Vs. The Decisions Of The Court of Justice Of The European Union

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Abstract

The current configuration of the right to be digitally forgotten is due to several judgements rendered by the Court of Justice of the European Union on the interpretation of the Union law regarding the protection of personal data. However this right is not an absolute one, but it must be considered in relation to its function in society and be balanced against other fundamental rights, in accordance with the principle of proportionality, considering that the General Data Protection Regulation respects the freedoms recognised in the Charter as enshrined in the Treaties, in particular the freedom of expression and information. The right to be delisted on search engines was born precisely at the intersection of these opposing rights and freedoms. In each case both the Advocate general and the Court tipped the balance between the right to privacy and the protection of personal data, on the one hand, and the freedom of expression and information, on the other hand, and every time the Court had, at least in part, a different standpoint on the right to be digitally forgotten.

Key words: *European Union Law, right to be digitally forgotten, right to be delisted on search engines, freedom of expression, freedom of information, Court of Justice of the European Union, judgement, advocate general, opinion.*

As mentioned on another occasion, the right to be forgotten in the digital age comes in the form of two distinct rights which are the two facets of the same medal but without being confused[1].

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[1] Silviu-Dorin Şchiopu, *Perspective ale dreptului de a fi uitat*, Revista „Dreptul" no. 5/2019, p. 34 et seq.

On the one hand, we have a *right to be digitally forgotten*, also known as the right to be delisted on search engines or the right to dereferencing, which has been jurisprudentially consecrated by the Court of Justice of the European Union[2]. The data remains on the source site that published it and the web page continues to be accessible either directly by entering the URL or via a search engine, but by using relevant keywords other than the name and surname of the data subject. On the other hand, there is also another right to be forgotten, which is in fact a *right to erasure of personal data* and which is intended to be exercised by the data subject not against the search engine operator, but against the publisher of the web page on which the information concerning the data subject was made available, its purpose being to obtain the erasure of personal data available on those web pages. Unlike deleting online data for which the right to be forgotten (right to erasure) is exercised against the publisher of a web page, *the right to be digitally forgotten* tends to create the premises for forgetting information about the data subject when excessive visibility is driven by their indexing[3] by search engines and disproportionately affects the rights to privacy and the protection of personal data.

The Court of Justice of the European Union has not consecrated oblivion in itself, but a right the exercise of which creates the premises of a natural oblivion. In practice, forgetting facts of the past occurs after the data subject has requested and obtained from the search engines the removal from the list of results – displayed following a search made on the basis of that natural person's name – of those links whose display opposes natural forgetfulness, a phenomenon inherent in any human being.

As natural oblivion has become inoperative in the context of information technology, whereas any data posted online may remain accessible for an indefinite period and the Internet has transferred the "curse" of eternal remembrance onto its users[4], it was necessary to establish appropriate legal mechanisms to ensure that the spectre of the past will not forever haunt the data subjects.

In addition to the notion of right to digital oblivion, as presented above, there is also a *right to de-indexing*, however, as opposed to removing (de-listing) links from the results list displayed when the data subject's name is used as a keyword, de-indexing involves deleting links to third party web pages from the

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[2] CJUE, *Judgment of the Court (Grand Chamber) from 13 May 2014*, Case C-131/12, *Google Spain and Google*, ECLI:EU:C:2014:317, published in the electronic Reports of Cases (Court Reports - general).

[3] For how indexing works and how the results list is created, see Conseil d'État, *Conclusions de Mme Aurélie Bretonneau*, rapporteur public, affaire n° 399922 – Google Inc., p. 5 et seq., http://www.conseil-etat.fr/fr/arianeweb/CRP/conclusion/2017-07-19/399922.

[4] Andreea Verteş-Olteanu, *Art. 17 din Regulamentul general privind protecţia datelor – un prim pas în direcţia uitării dreptului de a fi uitat*, in Andrei Săvescu (ed.), RGPD – Regulamentul general privind protecţia datelor cu caracter personal. Comentarii şi explicaţii, Bucureşti: Editura Hamangiu, 2018, p. 50.

indexing database itself, so that the links are no longer displayed in the results list regardless of the keywords used for the search.

De-indexing also does not affect the information published on the source site. Nonetheless it will no longer be possible to access it through the search engine regardless of the keywords used, but only directly by accessing the URL of the web page. Basically, de-indexing makes those web pages invisible to web surfers trying to find information through the search engine[5]. The information continues to exist online but no longer enjoys the visibility that results from the indexing of web pages by search engines.

The current configuration of the right to be digitally forgotten in the European Union is due to three judgements rendered by the Court of Justice on the interpretation of the Union law regarding the protection of personal data. However this right is not an absolute one, but it 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 particular the freedom of expression and information[6].

Since the data subject's right to be delisted on search engines was born precisely at the intersection of these opposing rights and freedoms, in each case both the Advocate general and the Court tipped the balance between the protection of personal data and the freedom of expression and information, and every time the Court had, at least in part, a different standpoint on the right to be digitally forgotten. That is why in the following we will focus on this balance.

Opinion of Advocate General Jääskinen in Case C-131/12

At the level of the European Union, the emergence of the right to dereferencing or de-listing was the result of a preliminary ruling[7] on the interpretation of some provisions from Directive 95/46/EC of the European Parliament and of the Council

[5] For an example of de-indexing (injunction against Google to cease indexing or referencing certain search results on its Internet search engine), see Supreme Court of British Columbia, *Equustek Solutions Inc. v. Jack* 2014 BCSC 1063, http://www.courts.gov.bc.ca/jdb-txt/SC/14/10/2014BCSC1063.htm, and Supreme Court of Canada, *Google Inc. v. Equustek Solutions Inc.* 2017 SCC 34, https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/16701/index.do. De-indexing webpages but not entire websites proved to be ineffective since the defendant simply moved the objectionable content to new pages within its websites, circumventing the court orders. The plaintiff therefore obtained an interlocutory injunction to enjoin Google from displaying any part of defendant's websites on any of its search results worldwide.

[6] See Recital (4) of *Regulation (EU) 2016/679* of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons 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), published in the Official Journal of the European Union L 119 from 4 May 2016.

[7] See *Reference for a preliminary ruling from the Audiencia Nacional (Spain) lodged on 9 March 2012* — Google Spain, S.L., Google Inc. v. Agencia Española de Protección de Datos, Mario Costeja González, Case C-131/12, published in the Official Journal of the European Union C 165/18 from 9 June 2012.

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[8].

In the opinion of the Advocate General Jääskinen, the *fundamental right to information of internet users*, protected by Article 11 of the Charter[9], which concerns both information on the source web pages and the information provided by internet search engines, "merits particular protection in EU law especially in view of the ever-growing tendency of authoritarian regimes elsewhere to limit access to the internet or to censure content made accessible by it"[10], the Web publication also being seen as a means for individuals to participate in debate. Article 11 of the Charter equally protects the publishers of web pages, their *freedom of expression* manifested by making content available on the internet and allowing its indexing or archiving by search engines, thereby indicating their wish for wide dissemination of content[11].

The preliminary reference concerned personal data republished online as part of the historical archives of a newspaper and, in the opinion of the Advocate General, the freedom of information protects the newspaper publisher's right to digitally republish its printed newspapers on the internet and it cannot be justified the "digital republishing of an issue of a newspaper with content different from the originally published printed version" since "(t)hat would amount to falsification of history"[12].

The Advocate General stressed that the right to search information published on the internet by means of search engines is one of the most important ways to exercise the fundamental right to receive information concerning the data subject from public sources and "the right to information would be compromised if the search for information concerning an individual did not generate search results

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[8] Published in the Official Journal of the European Communities L 281 from 23 November 1995. Transposed into national legislation by *Law no. 677 from 21 November 2001* on the protection of individuals with regard to the processing of personal data and the free movement of such data, published in The Official Journal of Romania, Part I, no. 790 from 12 December 2001.

[9] *Charter of Fundamental Rights of the European Union*, published in the Official Journal of the European Union C 326 from 26 October 2012.

[10] *Opinion of Advocate General Jääskinen delivered on 25 June 2013*, Case C-131/12, Google Spain and Google, ECLI:EU:C:2013:424, para. 121.

[11] *Idem*, para. 122.

[12] *Idem*, para. 129. For an opposite view, see Cour d'appel de Liège, *Arrêt du 25 septembre 2014*, numéro de rôle 2013/RG/393, http://jure.juridat.just.fgov.be/view_decision.html?justel=F-20140925-11&lang=FR. This Court, on the anonymization of the online version of a newspaper archive, stated that „granting the plaintiff's request does not have the effect of conferring on each individual a subjective right to rewrite history, nor of allowing a «falsification of history» or of creating for the defendant an «exorbitant liability»". We point out that this case law concerned not the right to be delisted on search engines but *the right to erasure of personal data exercised against the publisher of the web page* on which the information was made available. Although the decision of the Court of appeal from Liège (25 September 2014) is subsequent to the judgment in the Google Spain case (13 May 2014), the judgment of the first instance is prior (25 January 2013).

providing a truthful reflection of the relevant web pages"[13]. In his view, the internet search engine service provider exercises not only his freedom to conduct business, but also his freedom of expression, when he makes available internet information location tools relying on a search engine, and admitting a right to be forgotten against the Internet search engine would entail an interference with the freedom of expression of the publisher of the web page[14].

In light of the above, the Advocate General concluded that the rights provided for by the Directive 95/46/EC do not extend to a right to be forgotten such as described in the preliminary reference, provided that the search engine operator does not index or archive personal data against the instructions or requests of the publisher of the web page, thus linking the freedom of expression of the web page editor to that of the search engine operator as if it were one and the same. If the Court of Justice of the European Union had followed the Advocate General's opinion, the right to be digitally forgotten wouldn't exist today as we know it.

The Court considered that the processing of personal data carried out in the context of the activity of a search engine can be *distinguished* from and is *additional* to that carried out by publishers of websites. Also, the activity of search engines plays a *decisive role in the overall dissemination of those data* in that it renders the latter accessible to any internet user making a search on the basis of the data subject's name, *including to internet users who otherwise would not have found the web page* on which those data are published. Therefore the activity of a search engine if likely to affect significantly and additionally, compared with that of the publishers of websites, the fundamental rights to privacy and to the protection of personal data. Moreover, the fact that the publishers of websites indicate to operators of search engines that they wish the information published on their site to be included in the automatic indexes, doesn't release the operator of a search engine from its responsibility for the processing of personal data that it carries out in the context of the engine's activity.[15]

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[13] *Opinion of Advocate General Jääskinen delivered on 25 June 2013*, Case C-131/12, Google Spain and Google, ECLI:EU:C:2013:424, para. 131. Nowadays, when the delisting cannot be done yet, the operator is required to adjust the list of results in such a way that the overall picture it gives the internet user reflects the current state of legal proceedings brought against an individual, which means in particular that links to web pages containing information on that point must appear in first place on the list. See CJUE, *Judgment of the Court (Grand Chamber) of 24 September 2019*, Case C-136/17, *GC and Others*, ECLI:EU:C:2019:773, published in the electronic Reports of Cases (Court Reports - general), para. 78.

[14] *Idem*, para. 132 and 134. The Advocate General also mentioned that an effective remedy against the publisher infringing the right to private life, which in the context of internet would concern the publisher of the web page, is a completely different matter.

[15] CJUE, *Judgment of the Court (Grand Chamber) from 13 May 2014*, Case C-131/12, *Google Spain and Google*, ECLI:EU:C:2014:317, published in the electronic Reports of Cases (Court Reports - general), para. 35-36, 38-39.

The Court also considered that the weighing of the interests at issue may differ according to whether the processing carried out by the operator of a search engine or that carried out by the publisher of the web page is at issue, given that, *first*, the legitimate interests justifying the processing may be different and, *second*, the consequences of the processing for the data subject, and in particular for his private life, are not necessarily the same. The inclusion in the list of results it is likely to constitute a more significant interference with the data subject's fundamental right to privacy than the publication on the web page[16].

The Court ruled that, in so far as the conditions laid down by the provisions of Directive 95/46/EC are in fact satisfied, "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"[17]. The Court further ruled that the links must be removed from the list of results including in the event that the name or information is not erased beforehand or simultaneously from those web pages and even when its publication in itself on those pages is lawful[18]. It is also irrelevant whether or not the inclusion of that information in the list of results causes any prejudice to that data subject.[19]

In order for the data subject to benefit from the removal of links – to web pages published by third parties – from the list of results, "it should inter alia 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 on the basis of his name"[20].

The Court also stressed that the right to respect for private life and the right to the protection of personal data, fundamental rights provided in article 7 and 8 of the Charter of Fundamental Rights of the European Union, "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"[21].

However, it may happen that, by balancing the rights of the data subject, on the one hand, and the interest of Internet users to have access to that information, on the other hand, the latter prevails when, for particular reasons, such as the role played by the data subject in public life, the interference with his

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[16] *Idem*, para. 87.

[17] *Idem*, para. 88.

[18] Therefore, the admission of the right to be digitally forgotten does not lead to the erasure of the information on the web page on which those data are published, nor is it conditioned by the possible illicit nature of the publication.

[19] CJUE, *Judgment of the Court (Grand Chamber) from 13 May 2014*, Case C-131/12, *Google Spain and Google*, ECLI:EU:C:2014:317, published in the electronic Reports of Cases (Court Reports - general), para. 99.

[20] *Ibidem*

[21] *Ibidem*.

fundamental rights is justified by the preponderant interest of the general public in having access to the information in question via o list of results. In such a situation, the data subject will not be able to obtain the removal of the links to web pages published by third parties from the list of results. This is the very essence of the right to be digitally forgotten and we believe that "at this point in time" must be related to the phenomenon of natural forgetfulness that should have occurred in the absence of the facilities offered by information technology.

The recognition of a right to digital oblivion was necessary whereas requiring the data subject to obtain the erasure of his personal data directly from the web pages would not ensure an effective and complete protection, especially in the case of publishers to whom EU law on the protection of personal data does not apply, as well as in the case of publications made exclusively for journalistic purposes which fall within the scope of the exception regarding the exercise of the freedom of expression provided by article 9 of Directive 95/46/EC, respectively article 17 (3) (a) and article 85 of Regulation (EU) 2016/679[22].

Thus, in the case of the right to be delisted on search engines, unlike the right to erasure of personal data exercised against the publisher of the website, only the interest of the public to receive information will be taken into account, not the right to the freedom of expression of the internet search engine service provider or the freedom of expression of the publisher of the web page. That is why it may happen that the data subject can successfully exercise the right to dereferencing in relation to the search engine operator, situation when the freedom of expression is not in question, but not in relation to the publisher of the respective web page that benefits from the freedom of the media provided by article 11 (2) of the Charter of Fundamental Rights of the European Union.

Opinion of Advocate General Szpunar in Case C-136/17

The Advocate General Szpunar has reiterated the thesis that "when weighing up the interest of potentially interested internet users in having access to an internet page via a search conducted on the basis of the data subject's name against that data subject's fundamental rights under Articles 7 and 8 of the Charter, it is also necessary to take into account the *freedom of expression* and freedom to receive and impart information of publishers and internet users guaranteed by Article 11 of the Charter"[23].

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[22] *Regulation (EU) 2016/679* of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons 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), published in the Official Journal of the European Union L 119 from 4 May 2016.

[23] *Opinion of Advocate General Szpunar delivered on 10 January 2019*, Case C-136/17, *G.C. and Others* (Déréférencement de données sensibles), ECLI:EU:C:2019:14, para. 89 and 92.

Basically, the Advocate General tried to bring up again the right to freedom of expression of the person from whom the information emanates in the sense that the information published by a journalist whose job is to inform the public is a factor to weigh in the balance.

However, the Court, when referring to the fact 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, mentions *expressis verbis* only the right of information, guaranteed by Article 11 of the Charter[24], despite the fact that article 17 (3) (a) of Regulation (EU) 2016/679 clearly provides that right to erasure shall not apply to the extent that processing is necessary for exercising the right of *freedom of expression* and information.

Furthermore, the Court stressed that "Regulation 2016/679, in particular Article 17(3)(a), thus expressly lays down the requirement to strike a balance between the fundamental rights to privacy and protection of personal data guaranteed by Articles 7 and 8 of the Charter, on the one hand, and the fundamental right of *freedom of information* guaranteed by Article 11 of the Charter, on the other" [25].

Instead of a Conclusion

The silence of the Court regarding the *freedom of expression* confirms that there is no full identity between the right to be delisted on search engines, enshrined by the Court of Justice of the European Union, on the one hand, and the right to erasure of personal data provided by article 17 of the General Data Protection Regulation, on the other hand. The right to be digitally forgotten exercised against the search engine operator remains a jurisprudential creation having an individuality and a specificity that distinguishes it, at least in part, from the right to be forgotten that can be invoked against the publisher of a website.

[24] CJUE, *Judgment of the Court (Grand Chamber) of 24 September 2019*, Case C-136/17, *GC and Others*, ECLI:EU:C:2019:773, published in the electronic Reports of Cases (Court Reports - general), para. 57.

[25] *Idem*, para. 59.