RIGHT TO HAVE LINKS REMOVED

Evidence of Effective Data Protection

Case C-131/12 *Google v. Agencia Española de Protección de Datos (AEPD) and Mario Costeja Gonzalez*, Judgment of 13 May 2014

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§1. INTRODUCTION

The judgment delivered by the Court of Justice of the EU on 13 May 2014 in *Google v. Agencia Española de Protección de Datos (AEPD) and Mario Costeja Gonzalez*[1] provoked many reactions, with a wide variety of appreciations. The least one could say is that this judgment is controversial. Its controversial nature follows directly from the main issues it addresses.

The background of the case is relatively easy to understand.

The judgment was the result of a complaint by a Spanish resident – Mr. Costeja Gonzalez – against the fact that when his name was entered in Google Search, relatively old pages of a Spanish newspaper were displayed. On these pages, his name was mentioned in relation to the recovery of social security debts. As Mr. Costeja Gonzalez claimed, the issue was resolved for a number of years and the data were now entirely irrelevant. By claiming this, he invoked his right to be forgotten.[2]

Initially the claim was lodged with the Spanish data protection authority against the newspaper and against the search engine, more specifically the parent company of the Google group (Google Inc.), seated in the US as well as its subsidiary Google Spain. The claim against the newspaper was rejected,[3] but the claim against the search engine was

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1 Case C-131/12 *Google v. Agencia Española de Protección de Datos (AEPD) and Mario Costeja Gonzalez,* Judgment of 13 May 2014, not yet reported, para. 91.

2 Ibid., para. 91.

3 For (legal) reasons, not relevant in the context of this article.

upheld, and led to appeals by Google Spain and Google Inc. before a national Spanish tribunal, that in turn posed preliminary questions to the Court of Justice.

However, this seemingly relatively easy background led to a landmark decision.

Firstly, the Court allots responsibility to search engines for the links it provides to content on the Internet. They are not simply intermediaries, but to a certain extent, they are controllers in the meaning of Directive 95/46/EC (the Data Protection Directive).[4] Secondly, the Court assumes that – in certain circumstances – a European subsidiary of a US-based search engine provider may be held responsible, and by this assumption, it ensures a wide territorial scope of the Data Protection Directive. Thirdly, the Court explains the obligations of the search engine under the Directive, also in light of the Charter of the Fundamental Rights of the Union, and in particular the obligation to remove – on request of the person concerned – specific links from the list of search results that are based on the name of that person. Finally, it gives guidance on how a request for removal should be balanced against the right of the general public to know, which is particularly relevant when the person concerned is a public figure.

As a result of the judgment, individuals now may request a search engine to block certain sites when searches are made on the internet on the basis of their names. The search engine has to balance this request against the right of the general public to know. In the first two months after the judgment, Google received more than 91,000 requests from individuals.[5]

§2. THE EFFECTIVE PROTECTION OF FUNDAMENTAL RIGHTS ON THE INTERNET

This case fits within a more general tendency in the Court's case law – especially following the entry into force of the Lisbon Treaty – to attach great importance to the effective protection of fundamental rights.

This tendency is the logical consequence of the Lisbon Treaty, which not only confirms that the EU is a Union founded on values such as the respect for fundamental rights and that its aim is to promote these values (Articles 2 and 3 TEU), but that also establishes the Charter of the Fundamental Rights of the Union as a binding instrument. It furthermore reflects the principle of effectiveness (*effet utile*): EU law is not just law on paper, but should be relied on in practice.

Moreover, the rights to privacy and data protection have been given emphasis by the Court of Justice. The Data Protection Directive has been interpreted by the Court in the

4 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, [1995] OJ L 281/31.

5 P. Fleischer, 'Letter of Google Privacy Counsel of 31 July 2014 to Article 29 Working Party', https://docs.google.com/file/d/0B8syaai6SSfiT0EwRUFyOENqR3M/edit.

light of the fundamental rights even before the Charter became binding.[6] More recently, in cases as *Schecke*[7] and *Digital Rights Ireland and Seitlinger*,[8] the Court has assessed provisions of EU law on their compliance with the rights to privacy and data protection under Articles 7 and 8 of the Charter. This test is particularly strict and in both cases the Court struck down those provisions[9] of EU law, because they infringed those rights in a disproportionate manner.[10]

Finally, as was acknowledged by the Court in the present case, the internet makes effective protection of fundamental rights more complicated. The Court explains in paragraph 80 in relation to the processing by a search engine: it 'enables any internet user to obtain through the list of results a structured overview of the information relating to that individual that can be found on the internet (…) and thereby to establish a more or less detailed profile of him'. Also, the fact that information is ubiquitously available changes the perspective of the protection of privacy and data protection.

Of course, it is argued that in a world of big data, the main mechanisms to ensure privacy have lost much of their effectiveness and that new mechanisms must be found.[11] In particular, the principle of purpose limitation would not fit in current developments and business models.

It is evident that the Court could not honour these arguments, which are contrary to essential values laid down in EU law. On the contrary, a central theme in the approach of the Court seems to be to find angles to ensure protection of these values in a developing information society. As the Court states in paragraph 58 of the present judgment: if the processing of personal data by a search engine would escape the obligations and guarantees laid down by the Data Protection Directive, this 'would compromise the directive's effectiveness and the effective and complete protection of the fundamental rights and freedoms of natural persons which the directive seeks to ensure'.

In other words, the Court aims at ensuring that existing legal instruments remain effective for the protection of essential values, instead of getting rid of these instruments and giving up protection. In my view, by taking this approach the Court fulfils the tasks given to it under the EU Treaty and gives full effect to Articles 2 and 3 TEU.

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6 For example Case C-465/00 *Österreichischer Rundfunk and others* [2003] ECR I-04989, focusing on Article 8 ECHR.

7 Joined Cases C-92/09 and C-93/09 *Volker und Markus Schecke GbR (C-92/09) and Hartmut Eifert (C-93/09) v. Land Hessen* [2010] ECR I-11063.

8 Joined Cases C-293/12 and C-594/12 *Digital Rights Ireland (C-293/12) and Seitlinger (C-594/12)*, Judgment of 8 April 2014, not yet reported.

9 In *Digital Rights Ireland and Seitlinger* even an entire directive.

10 To be complete, in a third comparable case, the Court came to the opposite conclusion and decided that an obligation to provide for fingerprints to be stored in a passport was valid; see Case C-291/12 *Schwarz*, Judgment of 17 October 2013, not yet reported.

11 V. Mayer-Schönberger and K. Cukier, *Big Data: A Revolution That Will Transform How We Live, Work, and Think* (Eamon Dolan/Houghton Mifflin Harcourt, 2013).

It is against this background that I wish to comment on the main findings of the Court.

§3. SEARCH ENGINES PROCESS DATA AND ARE DATA CONTROLLERS[12] (paragraphs 21–41 Judgment)

In the first place, the Court rules that the activities of a search engine provider such as the loading of personal data on a web page qualify as processing of personal data, also with a reference to the *Lindqvist*[13] judgment. This is not different in a situation where the data had already been published. Despite the fact that Google Spain and Google Inc. had argued otherwise, this is not a controversial finding taking into account the wide definition of processing in the Data Protection Directive.

In the second place, search engine providers are controllers in respect of what they do. They determine the means and purposes of that processing, as is required under Article 2(d) of the Data Protection Directive. Their role is additional to that of the publisher of a website and they play a decisive role in the dissemination of personal data.

This finding is more controversial, if only because Advocate General Jääskinen had taken an opposite view.[14] He defends internet search engines as merely an information location tool and do not exercise control over personal data included on third-party web pages. According to the Advocate General, their functions are entirely passive and intermediary. This presumed passive and intermediary role has analogy with the eCommerce Directive[15] that exempts intermediary service providers to a certain extent from liability.

As the Advocate General observes, the eCommerce Directive is in itself not applicable[16] since the service of the search engine is not provided in return for remuneration.[17] However, more importantly, the analogy only has limited relevance for the present case, since exemptions from liability established in the eCommerce Directive only cover cases

12 Answering questions 2(a) and 2(b) of the referring tribunal on the material scope of the Data Protection Directive.

13 Case C-101/01 *Lindqvist* [2003] ECR I-12971.

14 This is an essential element of his reasoning that can be found in various parts of the opinion. For the main conclusion, see the Opinion of Advocate General Jääskinen in Case C-131/12 *Google v. Agencia Española de Protección de Datos (AEPD) and Mario Costeja Gonzalez,* delivered on 25 June 2013, not yet reported, para. 84.

15 Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce'), [2000] OJ L 178/1, Section 4.

16 This follows from Article 2(a) of the eCommerce Directive.

17 One can argue that the users of the search engines pay with their data, but I will not develop this argument in the context of this article.

in which the service provider has neither knowledge nor control over the information which is transmitted or stored.[18]

The Court explains – in my view, in a convincing manner – that search engine providers are not passive and have control. They have a role additional to that of publishers of websites, because they are decisive in the dissemination of information. When a search is done on an individual, they give a structured overview of the available information on the individual and even enable establishing a profile. Moreover, in the circumstances of the case, where a data subject requests to remove specific information, they have full knowledge of that information. Finally, a search engine like Google does not simply, objectively, index information, but it presents the information as part of a two-sided business model linking the information to its own vertical search services and to advertising services.[19]

For me, it is obvious that this judgment does not mean that a search engine provider should exercise preventive control over the information it disseminates, nor that it is in any other manner limited in its essential role of ensuring a free internet.[20] In essence, the Court confirms that a search engine – which has as its core activity the processing of large amounts of data with potentially important consequences for the private life of individuals – cannot escape from responsibility for its activities.

Their responsibility is as evident as the responsibility of other types of companies for the effects of their activities on the environment. One could argue that this is part of responsible entrepreneurship. This responsibility is also reflected in the concept of accountability, as developed in the area of data protection and is made more explicit in Article 22 of the proposed General Data Protection Regulation.[21]

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18 Recital 42 of the eCommerce Directive, as interpreted by the Court in Joined cases C-236/08 to C-238/08 *Google France SARL and Google Inc. V. Louis Vuitton Malletier SA (C-236/08), Google France SARL v. Viaticum SA and Luteciel SARL (C-237/08) and Google France SARL v. Centre national de recherche en relations humaines (CNRRH) SARL and Others (C-238/08)* [2010] ECR I-02417.

19 As explained by Vice-President Almunia in the Google antitrust investigation, Europa Rapid Press Release, *Joaquín Almunia Vice President of the European Commission responsible for Competition Policy Statement of VP Almunia on the Google antitrust investigation Press room Brussels,* 21 May 2012, SPEECH/12/372.

20 The case is completely different than the one described in G. Sartor and M.V. de Azevedo Cunha, 'The Italian Google-Case: Privacy, Freedom of Speech and Responsibility of Providers for User-Generated Contents', 18 *International Journal of Law and Information Technology* (2010).

21 Proposal for a Regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation), COM(2012) 11 final.

§4. RESPONSIBILITY OF A EUROPEAN SUBSIDIARY AND THE TERRITORIAL SCOPE OF DIRECTIVE 95/46 (paragraphs 42–60 Judgment)

The Court judges that Google Spain – a subsidiary of Google Inc. – is an establishment as meant in Article 4(1)(a) of the Data Protection Directive and subsequently it rules that the activities at stake take place 'in the context' of this establishment, which triggers the applicability of the Directive.

It is this second finding that provoked mixed reactions. Kuner argues for instance that this broad territorial application of EU law fails to set jurisdictional boundaries and does not exclude the interpretation that EU law applies to the entire internet.[22]

These reactions are not surprising, since the Court does not draw its conclusion on the basis of the place of the activities of the operation of the search engine provider (these activities are carried out by Google Inc.), but on the inextricable link with the advertising activities of Google Spain. The Court also emphasizes an essential rationale of its ruling: if the search engine were to escape the obligations of the Directive, this would compromise the effective and complete protection of fundamental rights.

For me, this rationale is key. It is the task of the EU to protect the fundamental rights of its citizens. This is also one of the reasons why the proposed General Data Protection Regulation[23] intends to clarify the applicability of EU data protection law and extends the scope *ratione personae* to non EU-based data controllers offering goods or services to EU data subjects and monitoring their behavior. This would ensure that a search engine provider like *Google Inc* falls within the scope of EU data protection law. Under the present law, the Court construed a solution based on the economic reality of the two-sided business model of the search engine.[24] The Court could also have used another point of attachment under Article 4 of the Data Protection Directive,[25] but there was no need for this.

22 C. Kuner, 'The European Union and the Search for an International Data Protection Framework', *Groningen Journal of International Law* (2014), (forthcoming), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2495273.

23 Article 3 of the proposal.

24 As explained above. Further read, Preliminary Opinion of the EDPS of 26 March 2014 on Privacy and competitiveness in the age of big data: The interplay between data protection, competition law and consumer protection in the Digital Economy, www.edps.europa.eu.

25 The use of equipment under Article 4(1)(c) of the Data Protection Directive.

§5. THE EXTENT OF THE OBLIGATIONS OF THE SEARCH ENGINE, THE 'RIGHT TO BE FORGOTTEN' AND THE BALANCING OF FUNDAMENTAL RIGHTS (paragraphs 62–99 Judgment)

As a first remark, it does not make sense, in my view, to distinguish the third and fourth part of the judgment in this commentary. This is immediately a first point of criticism, namely that the Court is not very consistent in the presentation of its arguments. The headings in the judgment claim to distinguish between the obligations of the search engine and the rights of the data subject, whereas in practice, both subjects are discussed together in different stages.

In its considerations on the extent of the obligations of the search engine, the Court underlines the need to keep data accurate and up to date. This is important, because further in the judgment (paragraph 93) the Court notes that an initially lawful processing may become incompatible with the Data Protection Directive because the data have become inadequate, irrelevant or no longer relevant, or excessive in relation to those purposes and in the light of the time that has elapsed.

Then, the Court elaborates the need for balancing the opposing rights and interests concerned. This need follows from Article 7(f) of the Data Protection Directive, the legal basis for processing by the search engine. It requires in this context a balancing between the legitimate interests of the search engine and of Internet users with the particular interests of the data subject. Balancing is also required when a data subject exercises his or her rights under Articles 12 and 14 of the Data Protection Directive to have his data removed or to object to the processing.

The Court emphasizes that the balancing by a publisher of a website and by a search engine may lead to a different outcome, basically for two reasons: in the first place, the activity of the search engine affects more significantly the rights to privacy and data protection; in the second place, the processing by the publisher of the website may fall within the derogation for journalistic purposes.[26]

On this basis, the Court comes to an outcome. It should be examined whether the data subject has a right that the information relating to him is no longer linked to his name[27] in the list of results following searches on the basis of his name. This examination is primarily a task of the search engine, on the request of the data subject.

As a rule, so the Court states, the rights to privacy and data protection will overrule the economic interest of the search engine and the interest of the general public to receive information, unless there would be a preponderant interest of the general public to receive the information, for instance when the data subject has played a role in public

26 Article 9 of Data Protection Directive.

27 The Court adds 'at this point of time' which is presumably the moment the request is done by the data subject.

life. For Mr. Costeja Gonzalez, this outcome means that the link to the publication will be removed, 16 years after the initial publication.

In my view, there are good reasons why the Court came to the conclusion that in this case the information will be removed, despite the fact that the information is not illegal nor inaccurate, but as Peers underlines,[28] simply embarrassing. It gives effect to a right that has obtained the reputation as the 'right to be forgotten', a right that became the object of largely polarized views. Whereas it was promoted as one of the main innovations of the proposed General Data Protection Regulation,[29] others consider it as an incentive for censorship on the Internet.[30] In any event, I argue that it fully makes sense that someone like Mr. Costeja Gonzalez may ask for a link to be removed.

The case also shows the complications in exercising this right. The Court ruled that it is a task of a search engine to balance the different interests at stake. One could argue that this is nothing new. As the judgment clearly illustrates, balancing of interests is a normal task of a data controller, especially when the processing takes place under Article 7(f) of the Data Protection Directive. Equally, any request of a data subject exercising his right under the Data Protection Directive requires an individual assessment.

The judgment, however, requires a balancing between different fundamental rights: privacy and data protection on the one hand and the freedom of expression – although not explicitly mentioned by the Court – on the other hand. This is not an obvious task for a search engine. Of course, the Court gives some guidance, but it is not very precise: after how many years can one claim that information should be removed? What role in public life of the data subject qualifies as relevant in order to legitimize the continuous linking to information by a search engine? Some further guidance may be needed, for example by the data protection authorities, by the European Commission or ultimately by the EU legislature.

Another point that requires reflection is the position taken by the Court that a search engine provider cannot profit from the journalistic exemption. Of course, a search engine is not a journalist, but in present times search engines are crucial mechanisms for the dissemination of journalistic products.[31] More in general, one could argue whether

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28 S. Peers, 'The CJEU's Google Spain judgment: failing to balance privacy and freedom of expression', *EU Law Analysis* (2014), http://eulawanalysis.blogspot.be/2014/05/the-cjeus-google-spain-judgment-failing.html.

29 See press release Vice-President Reding at presentation of proposal, Europa Rapid Press Release, *Viviane Reding Vice-President of the European Commission, EU Justice Commissioner The EU Data Protection Reform 2012: Making Europe the Standard Setter for Modern Data Protection Rules in the Digital Age Innovation Conference Digital, Life, Design Munich*, 22 January 2012, SPEECH/12/26.

30 Wikipedia for instance: The Guardian, 'Wikipedia swears to fight "censorship" of "right to be forgotten" ruling', 6 August 2014, www.theguardian.com/technology/2014/aug/06/wikipedia-censorship-right-to-be-forgotten-ruling.

31 See in same sense, S. Peers, 'The CJEU's Google Spain judgment: failing to balance privacy and freedom of expression', *EU Law Analysis* (2014), http://eulawanalysis.blogspot.be/2014/05/the-cjeus-google-spain-judgment-failing.html.

there is so much difference between the publisher and the search engine in cases like the present one. Was there a need for the Court to differentiate?

In this context, I would like to emphasize that in cases like the present, it would make sense if the data subject would primarily invoke his right towards publishers of websites. These publishers are primarily responsible for the content and in that capacity best placed to balance the different interests at stake. They could also make use of technological means that, on the one hand, would not require taking out names from a journalistic article – and changing history – whilst at the same time blocking external links.

However, there should be no doubt that in an information society where information is ubiquitously available, a data subject should ultimately be enabled to invoke his right against a search engine provider, because only removal by the search engine would give appropriate protection.

§7. IMPLICATIONS

It is evident that the case has important implications for search engines. As already mentioned, in the first two months Google had to handle 91,000 requests. The letter from Google to the Article 29 Working Party[32] gives a good overview of the way this company handles the consequences of the judgment. Just to illustrate, I mention the following statement by Google which speaks for itself: 'It can be difficult to draw the line between significant political speech and simple political activity, e.g. in a case where a person requests removal of photos of him- or herself picketing at a rally for a politically unpopular cause.'

Of course, there may also be implications for social media platforms and other internet companies hosting content produced by others.

Finally, I mention the consequences for the legislator. It could be argued that with this strong protection of privacy and data protection rights, there is no longer need for a strengthening of the rights of the data subject, as foreseen in the proposal for a General Data Protection Regulation. On the other hand, one could argue that the judgment leaves open essentials, such as the balancing between contrary interests. Here, legal certainty might require further guidance by the legislature.

In any event, the judgment will remain a lively source for further debate!

32 P. Fleischer, 'Letter of Google Privacy Counsel of 31 July 2014 to Article 29 Working Party', https://docs.google.com/file/d/0B8syaai6SSfiT0EwRUFyOENqR3M/edit.