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Rastislav Funta

Some remarks on the Google ECJ ruling (C-131/12)

ABSTRACT

A large number of opinions have been expressed about the decision C-131/12. Initially, Google's defeat has been widely welcomed as the giant had suffered a bitter defeat. After a first joy about the containment of Google's arrogance it became clear that the excessive claim for right to be forgotten will dry out our sources of information. Can privacy be seen as a fear for diversity of opinion? It may be due to the tension between data and reputation protection on the one hand and the possibility to protect against lies and fraud on the other hand. It is not just Google's freedom of expression, which is in the centre of our interests. We want to find informations and Google is helping us in this regard. Forcing Google to suppress the information flow can not hinder Google to earn money. If we go through the opinion of the Advocate General and compare it with the reasoning of the ECJ, then we come to the conclusion, that the ECJ had to decide in this a way on the grounds of the current legal status. The ECJ was standing with the back to the wall, because it has to apply the current law and this left no option open. Thus, the ECJ could not follow the opinion of the Advocate General. In the following I will shortly summarize the Spanish Data Protection Authority (SDPA) decision, before moving to the Advocate General opinion and the judgment of the ECJ and finally provide an outlook on possible future development in this regard.

Keywords: ECJ, Google, personal data, search engines

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Kilka uwag w sprawie wyroku ETS przeciwko Google (C-131/12)

STRESZCZENIE

Orzeczenie C-131/12 od chwili jego wydania stało się przedmiotem dyskusji. Początkowo porażka Google'a została przyjęta z entuzjazmem, szybko jednak stało się jasne, że nadmierne szerokie rozumienie prawa do bycia zapomnianym może spowodować znaczne ograniczenie w dostępie do informacji. Ze względu na konieczność ochrony danych osobowych i wolności osobistych z jednej strony, a ochrony przed kłamstwem i oszustwem z drugiej, ochrona prywatności łatwo może być odbierana jako strach przed różnorodnością opinii. W centrum zainteresowania znajduje się nie tylko wolność wypowiedzi Google'a, ale także konieczność zapewnienia swobody prowadzenia działalności gospodarczej (zarabiania), którą zmuszenie Google'a do tłumienia przepływu informacji może utrudniać.

W dalszej części artykułu zawarte zostało krótkie podsumowanie decyzji Hiszpańskiego Urzędu Ochrony Danych (SDPA), opinii Rzecznika generalnego dotyczącej wyroku ETS oraz wskazanie kierunku przyszłego rozwoju w tym zakresie.

Słowa kluczowe: ETS, dane osobowe, wyszukiwarki

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1 INTRODUCTION

On one hand, the opinions about the judgment are not clearly summarized. On the other hand, my aim is not to recite it. On January 19th, 1998, the newspaper La Vanguardia published (on its 23rd page) a regular auction listing from the Labour Ministry with the property seize (90 m2), with the corresponding location (San Feliú de Llobregat, Catalonia, Spain), description and owner list (jointly owned by Mario Costeja González and his wife). As it can be seen from the ECJ case number, the Spanish court has referred the case to the ECJ two years ago. One might expect that the search engines and parties will stop further infringement of privacy by deleting the references. There are also a large number of articles with the Name Lookup Mario González Costeja. It can be stated, therefore, that the world now knows that Mario González Costeja has not paid his liabilities vis a vis the social security office followed by a foreclosure of his apartment. But no one knows why he did not pay his liabilities (maybe for good reasons). We can also notice that the aim of the directive and the judgment was not reached. Mario González Costeja and the foreclosure should be forgotten. The whole story has exactly the opposite effect and Mario González Costeja is now famous. Has this been the aim of the whole story? And what does this have to do with privacy? Of course not all will become famous, who will be forgotten by Google. Google has an index of all sources that should not to be indexed. The Mountain View Company[1] undertakes searches in order to be sure that results which may not be displayed are not shown. But what is the purpose of data protection? Should Google follow the right to be forgotten? Through the obligation placed on Google an Orwellian database was created. Has this been the aim of the ECJ? No. Is this technologically inevitable? No. Is it legally inevitable? Yes. And this is exactly where the problem lies: The ECJ is right, but the result contradicts all objectives of the privacy[2] policy. But it goes even worse.

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[1] R. Funta, V. Bovoli, *Freedom of Establishment of Companies in the EU/La libertà di stabilimento delle società dell'UE*, Brno 2011, p. 5–7.

[2] R. Funta, EU–USA Privacy Protection Legislation and the Swift Bank Data Transfer Regulation: A Short Look, *Masaryk University Journal of Law and Technology*, Iss. 1/2011, p. 25–26.

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2

THE DECISION OF THE SPANISH DATA PROTECTION AUTHORITIES REMAIN UNCLEAR

Mario González Costeja[3] has originally contested against La Vanguardia and Google. The Spanish Data Protection Authority has suspended the appeal against La Vanguardia and Google. The justification for the Spanish Data Protection Authority (SDPA) decision is adventurous. The SDPA had ruled that the archives of the La Vanguardia could stay online because the advertisements were induced by a statutory provision and at the request of the Ministry of Social Affairs. The reason for the publication was that it can be reached a high price at the time of the real-estate auction. Each retrieval on the Web is indeed a re-processing. Why should this reason now be covered by a ground from the year 1998, which had long been resolved? The problem of official publications is an ancient, well-known problem. All legislative databases, all services which have to publish in the gazettes are confronted with the problem. There are solutions through which some parts will be made anonymous or be kept out of the search engines, including the own search engine. By the SDPA we miss any approach in this direction.

3

THE ADVOCATE GENERAL VIEW

The Advocate General Niilo Jääskinen tried in his opinion to present the right solution, meaning he has not seen the Google Company responsible for the data processing. He said that the SDPA should direct its attention against the newspaper La Vanguardia. The legal schollars may find many well-known, right and proper arguments in the Advocate General Jääskinen conclusions. The Advocate General Jääskinen has found the right arguments, but no support for his arguments in the law (in the Directive 95/46/EC). The key question is, according to the Advocate General Jääskinen, whether

[3] M.R. Cooper, Search engine, liability under the European Parliament Committee on Civil Liberties, Justice and Home Affairs (libe) data regulation proposal: interpreting third party responsibilities as informed by Google Spain, *Georgetown Journal of International Law*, Vol. 45/2014, p. 865 and follows.

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„it matters that within the definition of controller the Directive refers to the controller as a person determining the purposes and means of the processing of the personal data"[4].

This denies the Advocate General Jääskinen with the following arguments:

1. The search engine has no control over the personal data available on third party websites
2. The service provider „is not 'aware' of the existence of personal data in any other sense than as statistical fact web pages are likely to include personal data"[5].
3. The search engine would be incompatible with EU law „being responsible of the data processing"[6].

The first argument was as a question referred to the ECJ not relevant. Because in fact, it is not about the control over the site of La Vanguardia (the SDPA has this prevented through the preliminary proceedings). The second argument is better than the other two, but has no support in the law. The law does not prerequisite the search engine to known whether it process personal data. Recital 83 of the Opinion of the Advocate General Niilo Jääskinen says precisely that the data processing must appear to the controller as „processing of personal data that is information relating to an identified or identifiable natural person"[7]. In other words, all means should be taken into account that could be reasonably used either by the person responsible for the processing or by a third party to identify the said person. If we type in the search engine Mario González Costeja one can find everything. That's really the purpose of a search engine. And the search engine itself does not need to know that. Thus, this argument is not convincing. The third argument is known under the title, what is not permitted is forbidden. We can agree with this due to practical reasons. But this is not legally relevant. Or we allow that courts decide that a new nuclear power plant could be built otherwise the power supply can not be guaranteed. It is evident that such a political argument goes beyond the power of decision of the Court. One may also question whether it makes sense to take all the search

[4] Opinion of the Advocate General Niilo Jääskinen, point 80.

[5] *Ibidem*, point 84.

[6] *Ibidem*, comment 55.

[7] *Ibidem*, point 83.

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engines out of the scope of data protection. But also the comparison between the opinion of the Advocate General and the state-of-the-art of the technology raise doubts. This doubt comes from the NSA affair as search engines are semantically loaded. Thus, search engines can very well decide about the purposes and means of the processing of personal data(s)[8]. The Advocate General was therefore aware of the correct solution, but has found no adequate justification in the outdated laws.

3.1. The ECJ[9] can only answer the asked question

Because the basic problem about the personal data in La Vanguardia archives is not subject of the proceedings, remains only the question concerning the amplifier of the data protection problem. Google allows as an overall information portal a generalized search. Often emerge unexpected results, because the seeker himself would have never thought to search in this particular source. This is expressed very concretely in the word „to google". Thus, we expect (or believe) from Google that the reply is comprehensive. The SDPA decided that Google has to delete the information. But Google has denied the SDPA request. As a reaction, after the SDPA filed a lawsuit, the court has stayed the proceedings and referred the following questions to the ECJ[10]:

1. When will be the European data protection law territorially applicable?
2. Does the search engines process personal data within the meaning of the Directive?
3. Can a citizen (data subject) by virtue of Art. 14 of the Data Protection Directive 95/46/EC request the right to be forgotten concerning search results from the search engine?

These questions disguise the matter of power. Can Google ignore the demand from the data protection authority or not? Can the citizens (data subjects) defend themself against Google or not? The ECJ is not a political entity that can simply discard an outdated regulation and create a new one. The questions referred to the ECJ contain the basic problem: should the information about the real-estate auction be forgotten? This question has already been answered: The information about the real-estate auction remains public!

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[8] P. Svoboda, *Úvod do evropského práva*, Praha 2010, p. 278.

[9] V. Karas, A. Králik, *Právo európskej únie*, C.H. Beck 2012, p. 106.

[10] P. Varga, *Fundamentals of European Union Law*, Plzeň 2012, p. 69.

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4

WHEN IS THE EU DATA PROTECTION LAW TERRITORIALLY APPLICABLE?

With regard to the application of standards in transnational media, there is a broad and well-established case law regarding satellite television. From it we can take some points for the same questions posed in Internet, namely that the ECJ applied a wrong argumentation. As Google has offices throughout Europe, it satisfies the ECJ that it has link to the Spanish subsidiary and avoids the question of whether an establishment in Hamburg can lead to the application of Spanish law. As stated in recital 55, 64 and 65 of the opinion of the Advocate General Niilo Jääskinen, the territorial scope of application of the Directive 95/46/EC and „the national implementing legislation is triggered either by the location of the establishment of the controller, or the location of the means or equipment being used when the controller is established outside the EEA. Nationality or place of habitual residence of data subjects is not decisive, nor is the physical location of the personal data... and that the ECJ should approach the question of territorial applicability from the perspective of the business model[11] of internet search engine service providers. This is due to the fact, that the establishment plays a „relevant role in the processing of personal data if it is linked to a service involved in selling targeted advertisement to inhabitants of that Member State"[12].

5

DOES SEARCH ENGINES PROCESS PERSONAL DATA WITHIN THE MEANING OF THE DIRECTIVE 95/46/EC?

The answer is yes. Because search engines check very carefully what information they process and will be displayed. Search engines make a profit with this control. If they can this, why should they not recognize any name lookup? But lawyers can not openly admit this simplicity. We have already

[11] R. Funta, *Business strategy and competitive advantage*, Krasnoyarsk 2014, p. 264.

[12] Opinion of the Advocate General Niilo Jääskinen, point. 55, 64 and 65.

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seen that the Advocate General Niilo Jääskinen had tried to escape through this narrow path. But the ECJ did not follow him as the damage for the entire system of data protection would be too big. Interesting is the reasoning of privacy advocates and Google. Google with its arrogance stressed that they do not read our E-mails. It is the search machine and then is showing us the advertising. The NSA tried a similar argument, saying that they have everything, they can do everything and we can rely on them, that they are not doing this. And finally Google argument, that they are only an intermediate storage and as such not responsible. But the ECJ has decided in a different way. If there was a standard for search engines and Google itself would follow it, then we can rely on Article 13 of the 2000/31/EC eCommerce Directive. However, such privacy-related standards are lacking. And generally accepted industry standards are also not available for search engines. On other hand, the privacy advocates around the SDPA have not solved the basic problem about archiving. Instead, they have focused their attention on the search engine. But the search engine is seen only as a marginal-problem. One has the impression that the lack of problem solving is pushed onto the giants.

6

DELETION OF LINKS – RIGHT TO BE FORGOTTEN[13]

The ECJ had to answer the crucial question as whether the deletion of links (in accordance with Art. 14a of Directive 95/46/EG) may be required. It was assumed that the personal data of Mario González Costeja remain publicly available. Google defended its position with the view that a search engine could respond only if the primary information on the website is no longer available, meaning that if the website has deleted the information. After the opinion of Mario González Costeja, followed by the Italian, the Spanish and the Polish government, the court denied a mandatory cancellation of the primary information. It is possible in the future to precede parallel against primary information and links.

[13] C.S. Bennett, The "Right to Be Forgotten": Reconciling EU and US Perspectives, *Berkeley Journal of International Law*, Vol. 30/2012, p. 163–164.

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7

FINAL REMARKS

The court had found that the search engine is processing personal data, that the European law is applicable and that Google is controlling its computers. Thus, Google is responsible for processing of personal data and that the personal data have been processed. Accordingly, the search engine needs a legitimating reason for processing of personal data (so called general processing permission). The contradiction between perpetual availability of data by Mr Costeja-González and the ban hanged on Google are thus due to the SDPA and were not subject to the proceeding. As the ECJ confirmed in its judgment (recital 93) even initially „lawful processing of accurate data may, in the course of time, become incompatible with the directive where those data are no longer necessary in the light of the purposes for which they were collected or processed. That is so in particular where they appear to be inadequate, irrelevant or no longer relevant, or excessive in relation to those purposes and in the light of the time that has elapsed"[14]. From this recital it is clear the balance between the public information interest and privacy. The decision takes us forward in two ways:

- ☒ It is clear why the data protection directive is outdated;
- ☒ Search engine providers have to fulfill their social responsibility.

The Data Protection Directive 95/46/EG is outdated – and also the new draft regulation. Neither the ECJ nor he SDPA have removed the idea of how their demands can be implemented and what impact they bring to the Web. The Advocate General Jääskinen evokes that he has concerns about the regulation if he says that search engines could not be compatible with the law. Google has to deal with all requests concerning deletion and consider if it outweighs the public interest or not. But Google is a commercial undertaking and has in case of doubt no investment interest about the publicness of the information. If our conversation in the web would be used for processing of personal data, because we talk to each other through IP addresses, then the processing of personal data may be seen as a general communication. And that leads to an absolutely fundamental question: If

[14] C-131/12, Google Spain SL v AEPD, recital 93.

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our communication almost always represent a processing of personal data, then is our computer communication subject to permission. Ultimately, the privacy specialists determine, what I may say. Everything is forbidden, what is not allowed. But this contradiction is not resolved by the new draft regulation. If we want a liberal network constitution, then the privacy debate has to be different. We need to discuss in more detail what we do not want and dissolve the general prohibition. One may ask what services are actually relevant to the private network infrastructure, and what privileges but also special obligations result from that. The judgment, however, makes it clear that the search engines have social responsibility. The Internet and the Web are so successful because they allow everyone maximum freedom and individuality, and at the same time provide communication functionality. This characteristic is achieved by pushing the complexity and responsibility as much as possible to the periphery. The network is therefore a complex and gigantic form of federalism. The first problem caused by the judgment concerns the scaling. There are billions of people and billions of web pages. In Europe, there are 500 million people and billions of pages on the Web. If now 1 per 100 sends a request to Google because there are five pages relating to this person, then we have 15 million queries. An individual processing is not possible in regards to the figures. Thus a balance of public interest and the protection of privacy is an illusion. The tension between information and freedom of expression on the one hand and the protection of privacy on the other hand is best played between website owners and the affected data protection subject. If therefore parts of the publication can be removed automatically from the search engine, then that would scale. In this regard we must find a way to make the functionality in the network so that it meets the objectives of the EU Charter of Fundamental Rights. Or we have to give the players in the Internet the right tools at hand at least. To build tools for the Internet costs a lot of money (for experts, meetings etc), requires a lot of patience and an educational phase of the implementation of the tool. The search engine operators should handle. Either they invest the money they earn in a better functionality with which they can argue in front of the court, or they remain inactive.

As the freedom of information protected by the ECHR has been impaired by the ECJ judgment, another problem arises whether a further appeal to the ECtHR would be possible. According to Art. 6 (2) of the Treaty on European Union, the EU shall accede to the European Convention for

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the Protection of Human Rights and Fundamental Freedoms. But as the accession has not happened to date, a direct appeal seems not be possible. Possible would be the appeal of the Audiencia Nacional (Spanish National Court) to the ECHR. Because it is assumed that the Audiencia Nacional will follow the ECJ, a restrictive decision may be expected, which could be judged differently by the ECtHR as by the ECJ. The Google ECJ judgment has assigned the search engine operators a judicial function, which may not be delegated to private in a State based on the rule of law. The Google ECJ judgment violates the freedom of information, which is guaranteed by both the EU Charter of Fundamental Rights and by the ECHR. This violation can not be justified by the overriding interest of a private person, as long as it is an information lawfully published. According to my opinion, an obligation to remove search results by the search engine operator appears only if they contain evidently unlawful content.

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