
THE RIGHT TO ERASURE: WHAT IS THE FRAMEWORK GIVEN TO EU MEMBER STATES?

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Abstract: This article analyzes a key piece of EU data protection law – the right to erasure, also called “the right to be forgotten” notably dealt with in the *Google Spain* ruling of the Court of Justice of the EU. The ruling has put the right to erasure firmly within the post-Lisbon Treaty order of protection of fundamental rights in the EU. The article deals with the background of the right and the effect it has on data protection enforcement in Member States. Special attention is brought to several questions raised by the ruling, which have been until late left to national authorities to resolve.

Keywords: data protection, member states, *Google Spain*, right to be forgotten, right to erasure

INTRODUCTION

The right to erasure is one of individual’s – or *data subject’s* – rights under EU data protection legislation. Long present in EU secondary law – the 1995 Data Protection Directive – it was not until 2013 that the concept gained widespread attention. In its *Google Spain* judgment,² the Court of Justice of the EU (hereinafter the “Court”) upheld a Spanish national’s application against the largest internet search operator in the world. It did so, moreover, by referring to the now legally binding articles of the Charter of Fundamental Rights of the EU.

The notion of the “right to be forgotten,” as it came to be known, raised a number of concerns.³ The inclusion of separate Articles 7 and 8 in the Charter of Fundamental Rights of the EU, as well as the coming into force and upcoming start of enforcement of the General Data Protection Regulation, strongly suggests that the attention to privacy and data protection issues in EU law has taken a new turn.

This article seeks to analyze the developments that led to the ascent of the right to erasure in its current form and deal with some of the right to erasure’s core issues that national data protection authorities and courts will have to deal with in its enforcement.

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² Judgment of the Court of Justice in Case C-131/12, *Google Spain SL and Google Inc. v Agencia Española de Protección de Datos (AEPD) and Mario Costeja González* (further referred to as “*Google Spain*”).

³ For clarity purposes, the *right to be forgotten* will be further mainly referred to as the *right to erasure*, as it is named in the General Data Protection Regulation; where the former term is used (e.g. because it is expressly used by the preamble of the Regulation), it is intended to mean the same as the latter.

1. THE BACKGROUND LEADING TO GOOGLE SPAIN

1.1. The legal basis of the right to erasure

Since 1995, the basis for right to erasure could have been found in the Data Protection Directive (hereinafter the “Directive”).⁴ Article 12 (b) of the Directive, on data subject’s *right of access* to (personal) data, states that Member States shall guarantee the data subject the right to obtain, *inter alia*:

“as appropriate [...] the erasure [...] of data the processing of which does not comply with the provisions of this Directive, in particular because of the incomplete or inaccurate nature of the data;”

This is accompanied by Article 14 (a), which enables that individual to “*object at any time on compelling legitimate grounds relating to his particular situation to the processing of data relating to him*” with a justified objection meaning that “*the processing instigated by the controller may no longer involve those data.*”

The General Data Protection Regulation (hereinafter the “Regulation”),⁵ which replaces the Directive and is to be enforced as of May 2018, was undoubtedly influenced by the concept of the “right to be forgotten”⁶ and makes a similar account of the right to erasure in Article 17 (1), which stipulates that:

“[t]he data subject shall have the right to obtain from the controller the erasure of personal data concerning him or her without undue delay and the controller shall have the obligation to erase personal data without undue delay [...]”.

Data subjects may rely on several grounds to obtain erasure of their data, including under Art. 17 (1) c) the data subject’s objection pursuant to Art. 21 (1) of the Regulation against processing of personal data relating to that individual, provided the *data controller* – the party from which data subject is attempting to obtain erasure – is not able to prove any overriding legitimate grounds for the processing and consequently justifying refusal of such application for erasure.⁷

1.2. The roots of the right to erasure in fundamental rights instruments

After its introduction in 2000 as a political document, with the Treaty of Lisbon the Charter of Fundamental Rights of the EU (hereinafter the “Charter”) gained the same legal force as the Treaties through Art. 6 (1) of the Treaty on European Union. The Charter is notable from separating the right to respect for private and family life from the (now apparently independent) protection of personal data into distinct Articles 7 and 8.

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; Official Journal L 281, 23/11/1995, p. 0031–0050.

⁵ 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; Official Journal L119, 4/5/2016, pp. 1–88.

⁶ See recitals 65 and 66 of the Regulation.

⁷ The right to object in Art. 21 (1) is, however, bound to objections to processing based on Art. 6 (1) points (e) and (f), corresponding to grounds in Art. 7 (1) (e) and (f) in the Directive. It is the latter of these grounds (i.e. classified under (f) in both instruments) that was found to be the sufficient legitimation for processing of personal data in the context of search engine operation in the *Google Spain* judgment in para 73.

The Explanations to the Charter⁸ (further referred to as “Explanations”) do not give any reasons for the separation and only laconically enumerate legal instruments in which data protection matters have been dealt with in the past.⁹ No information is given either as to the importance of the new article in the Charter’s system; the Explanations merely conclude that existing EU secondary law contains conditions and limitations on the exercise of the right.¹⁰ Likewise, some early accounts on the Charter’s introduction into legal force focused on data protection only insofar as to state it belonged to a group of modern fundamental rights, which had not been at the time expressly recognized by the Court through general principles of the law.¹¹ Other commentaries suggest that while the notions of privacy protection and data protection overlap to a certain extent – McDermott calls privacy one of the *values* protected by data protection¹² and Lynskey argues that data protection and privacy *share common goals* such as psychological integrity or protection from unauthorized surveillance¹³ – the ambit of data protection does stand out from the one of privacy in certain respects. Crucially, data protection places a strong emphasis on improving the *autonomy of the individual*¹⁴ and his or her *informational self-determination*.¹⁵ Other outstanding aims of data protection are the protection from discrimination¹⁶ and reducing power asymmetry between data subject and entities processing personal data.¹⁷

Rather than dramatically adding new elements to the framework already in place, Article 8 is deemed to be a *restatement* of the existing (secondary law) provisions on data protection.¹⁸ Furthermore, the Court also usually does not distinguish between elements of Article 7 and 8.¹⁹ It has also been shown that the founding elements of the right to

⁸ Which, as stated in the document (Explanations relating to the Charter of Fundamental Rights, OJ C 303, 14.12.2007, pp. 17–35) itself: “do not as such have the status of law, [but] they are a valuable tool of interpretation intended to clarify the provisions of the Charter”.

⁹ E.g. Article 8 of the European Convention on Human Rights, where data protection falls within the protection of private and family life and the Council of Europe’s 1981 Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data.

¹⁰ See Explanation on Article 8 – protection of personal data.

¹¹ For instance, the speech of the VP of European Commission from 2010: REDING, V. The importance of the EU Charter of Fundamental Rights for European legislative practice. In: *ERA* [online]. 17. 10. 2010 [2017-11-20]. Available at: <http://www.era-comm.eu/charter_of_fundamental_rights/kiosk/pdf/speech_reding.pdf>, p. 2; or GROUSSOT, X., PECH, L. Fundamental Protection in the European Union post Lisbon Treaty. *Fondation Robert Schuman Policy Paper*. 2010, No. 173, p. 5; The first case cited to recognize the standalone right was the judgment in Case C-275/06, *Promusicae*, in para 63.

¹² MCDERMOTT, Y. Conceptualising the right to data protection in an era of Big Data. *Big Data & Society*. 2017, Vol. 4, No.1, p. 2.

¹³ LYNSKEY, O. Deconstructing Data Protection: The ‘Added-Value’ of a Right to Data Protection in the EU Legal Order. *International and Comparative Law Quarterly*. 2014, Vol. 63, No. 3, pp. 587–589.

¹⁴ MCDERMOTT, Y. *Conceptualising the right to data protection in an era of Big Data*, p. 3.

¹⁵ LYNSKEY, O. *Deconstructing Data Protection: The ‘Added-Value’ of a Right to Data Protection in the EU Legal Order*, pp. 589–590.

¹⁶ LYNSKEY, O. *Deconstructing Data Protection: The ‘Added-Value’ of a Right to Data Protection in the EU Legal Order*, pp. 589–590; MCDERMOTT, Y. *Conceptualising the right to data protection in an era of Big Data*, pp. 3–4.

¹⁷ LYNSKEY, O. *Deconstructing Data Protection: The ‘Added-Value’ of a Right to Data Protection in the EU Legal Order*, pp. 592–594.

¹⁸ Opinion of AG Jääskinen in Case C-131/12, *Google Spain SL and Google Inc. v Agencia Española de Protección de Datos (AEPD) and Mario Costeja González* (further referred to as “Google Spain Opinion”), para 113.

¹⁹ See the analysis in LYNSKEY, O. *Deconstructing Data Protection: The ‘Added-Value’ of a Right to Data Protection in the EU Legal Order*, pp. 6–15.

erasure have been present in European legal orders even before the Data Protection Directive came into force.²⁰

However, the emancipation of data protection in the Charter coincides with an *increased focus* on both data protection and privacy matters. The EU legislator is in the middle of an overhaul of related legislation with the Regulation in place and the ePrivacy Regulation in European Parliament.²¹ The Court has started what is called “the spring” of privacy²² which led e.g. to the *Digital Rights Ireland* case in which the Court struck down a piece of EU secondary law on the basis of privacy and data protection concerns.²³ The *Google Spain* case, examined below, was decided within this changing context.

1.3. A brief history of Google Spain

In 1998 the widely circulated Spanish newspaper *La Vanguardia* published a small announcement concerning a forced sale of property of Mario Costeja Gonzales, on account of social security debts, as required by the Spanish Ministry of Social Affairs. Crucially, the edition of the paper was also made available online and was displayed in Google search results page for his name.²⁴

More than 20 year later, Mr. Costeja Gonzales unsuccessfully tried to have the announcement, which included his *full name*, removed both from the online paper edition and from the list of Google search results. He subsequently launched a complaint to AEPD, the Spanish Data Protection Agency, which only upheld the de-listing request against Google. The case then went to court and eventually found its way to Luxembourg.

The request for preliminary ruling concerned interpretation of the Data Protection Directive – an instrument, which was, as the Advocate General pointed out, adopted at time when access to internet was “still a new phenomenon” and the Directive was accordingly given wide scope to accommodate future technological advance.²⁵

²⁰ ZANFIR, G. Tracing the Right to be Forgotten in the Short History of Data Protection Law: The ‘New Clothes’ of an Old Right. In: *SSRN Electronic Journal* [online]. 29. 9. 2014 [2017-11-20]. Available at: <<http://www.ssrn.com/abstract=2501312>>, p. 12–13.

²¹ The new regulation is set to replace Directive 2002/58/EC of the European Parliament and of the Council; see: <http://www.europarl.europa.eu/legislative-train/theme-connected-digital-single-market/file-jd-e-privacy-reform>.

²² ZANFIR, G. How CJEU’s ‘Privacy Spring’ Construed the Human Rights Shield in the Digital Age: The ‘New Clothes’ of an Old Right. In: *SSRN Electronic Journal* [online]. 12. 5. 2015 [2017-11-20]. Available at: <<http://www.ssrn.com/abstract=2604895>>.

²³ In Joined Cases C-293/12 and C-594/12, *Digital Rights Ireland Ltd v. Minister for Communication et al and Kärtner Landesregierung et al* the Court struck down on the basis of incompatibility with Articles 7 and 8 Charter the Directive 2006/24; several Member States’ constitutional courts did the same with implementing legislation conflicting with national constitutional provisions, such as the Czech Constitutional Court in the case Pl. ÚS 24/10.

²⁴ After Court’s ruling, Mr. Costeja Gonzalez’s name naturally appeared in every news outlet’s account of the case, along with the very information he sought to remove. Curiously, in 2015, Mr. Costeja Gonzales himself filed another de-listing request with the Spanish Data Protection Agency, seeking to remove a link to an article allegedly containing negative comments about his case. The Spanish SPA, however, rejected his request on the grounds that there was a *preponderant public interest in the details of his case* – one he himself allowed to be publicized. See PEGUERA, M. No More Right-to-be-forgotten for Mr. Costeja, Says Spanish Data Protection Authority. In: *The Center for Internet and Society at Stanford Law School Blog* [online]. 3. 10. 2015 [2017-07-27]. Available at: <<http://cyberlaw.stanford.edu/blog/2015/10/no-more-right-be-forgotten-mr-costeja-says-spanish-data-protection-authority>>.

²⁵ *Google Spain* Opinion, paras 27–28.

First, the Court found that operating a search engine amounts to *processing* of personal data as in Art. 2(b) of the Directive. Using the *Lindqvist* case, in which the Court put loading of personal data on the internet under the scope of processing,²⁶ it held that operating so called web crawlers that collect data, storing such data and subsequently making the data available to users through indexing programs and eventually lists of search results, also fits under the various descriptions of processing of personal data in Article 2 of the Directive.²⁷ It also stated that (following the *Satamedia* ruling²⁸) this analysis applied regardless of whether the data had already been published in unaltered form in the media.²⁹

Crucially, the Court also decided that Google was a *personal data controller* in the sense of Art. 2 (d) of the Directive. Prior to Court's decision, AG Jääskinen suggested to the Court to make a distinction between *controlling* i.e. “determining the purposes and means” of the processing of *data in general* on one hand and of *personal data* on the other. In his opinion Google's operation of search engine only fulfilled the former meaning.³⁰ The Advocate General contended that controlling personal data must be accompanied by the *awareness* of processing *personal data* and the subsequent responsibility over their control.³¹ He concluded that operating a search engine has predominantly an intermediary-only role.³² Contrary to his analysis, the Court held that such interpretation would go against the wording and the objective of the provision – in its opinion designed to encompass a *wide* range of activities – and decided that Google was in fact a *controller* according to Art. 2(d) of the Directive.³³

Regarding impact on fundamental rights under Articles 7 and 8 of the Charter, the Court held that insofar as the processing under Directive may infringe them, the Directive's provisions must be interpreted in their light.³⁴ Furthermore, the particular legal basis for Google's processing of personal data was built on the *necessity* of such processing for legitimate interests of either the controller or a third party – *except for* cases where data subjects fundamental rights to privacy and data protection would override these interests.³⁵

In the Court's view, search results such as in the case could provide an easily accessible structured overview of information relating to a person; such “digital profile” could offer information which “*could not have been interconnected or could have been only with great difficulty*” and was therefore liable to infringe fundamental rights under Articles 7 and 8 of the Charter.³⁶ In addition, the Court highlighted that:

²⁶ Case C-101/01, *Criminal proceedings against Bodil Lindqvist*, para 25.

²⁷ *Google Spain*, para 28.

²⁸ Case C-73/07, *Tietosuojavaltuutettu v Satakunnan Markkinapörssi Oy and Satamedia Oy*.

²⁹ *Google Spain*, para 30.

³⁰ *Google Spain* Opinion, paras 81–82.

³¹ *Google Spain* Opinion, paras 83 and 88.

³² Save for two exceptions, in which such operation *would* amount to controlling of personal data: ignoring an explicit “exclusion code” requesting that a page is not indexed in the search results and failing to respond to an update request from the website – both of which would presumably entail at least a certain level of personal data awareness proposed by the Advocate General – see *Google Spain* Opinion, paras 91–93.

³³ *Google Spain*, para 41.

³⁴ *Google Spain*, para 66.

³⁵ *Google Spain*, para 74.

³⁶ *Google Spain*, para 80.

*“the effect of the interference with those rights of the data subject 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 a list of results ubiquitous.”*³⁷

This then allowed the Court to formulate what has since been dubbed the “right to be forgotten” with regard to search engines – the right to request the *de-listing* of search results relating to a data subject’s personal data, which again in Mr. Costeja Gonzales’s case was his *full name*. Even the inclusion of correct and *legal*, but *outdated and irrelevant* information could interfere with the data subject’s rights under the Directive and Articles 7 and 8 of the Charter.³⁸ Mr. Costeja Gonzales was thus entitled to object under Article 14 subpar. (a) to the processing of his personal data by Google and request that under Article 12 (b), as the article was outdated and irrelevant, Google removed search results linking to the above mentioned articles in the online version of *La Vanguardia*.

2. FREEDOM OF EXPRESSION CONCERNS

Freedom of expression is protected in Art. 11 of the Charter. Its wording³⁹ corresponds verbatim to the first two sentences of Article 10 of the European Convention on Human Rights (hereinafter the “Convention”); pursuant to Article 52 (3) of the Charter, the meaning and scope of a Charter right is supposed to be the same as its Convention counterpart.

It is interesting to note that in interpreting Article 10 of the Convention, the European Court of Human Rights (hereinafter the “ECHR”) has recognized in that *“in 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.”*⁴⁰ Article 10 as such protects not only the content of information, but also applies to the Internet as the *means* of disseminating information and communication,⁴¹ even if used for commercial purposes.⁴² On the other hand, ECHR has also given way to an argument similar to that of the Court of Justice outlined above that communication on the Internet is, due to its nature, more liable to infringe on the respect for private life.⁴³

In a particularly noteworthy case of *Węgrzynowski and Smolczewski*, the ECHR rejected that a refusal to take down an online archive version of a newspaper article, would amount to a violation of the respect to private and family life under Article 8 of the Convention.⁴⁴ While the case does *not* primarily concern the issue of finding an article through a search results page, but rather the publication of an article in the Internet version of the particular newspaper, it deals with the broader topic of *conflict* between freedom of expression and protection of privacy and personal data in the online environment. Two lawyers in Poland

³⁷ Ibid.

³⁸ *Google Spain*, para 92.

³⁹ “Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.”

⁴⁰ *Times Newspapers Ltd v. the United Kingdom* (no. 1 and 2), no. 3002/03 and 23676/03, § 27, 10 March 2009.

⁴¹ *Delfi AS v. Estonia* [GC], no. 64569/09, § 131, 16 June 2015.

⁴² *Ashby Donald and Others v. France*, no. 36769/08, § 34, 10 January 2013.

⁴³ *Delfi*, para 133.

⁴⁴ *Węgrzynowski and Smolczewski v. Poland*, no. 33846/07, 16 July 2013.

had originally won a domestic court case against a widely-read newspaper and obtained compensation and an apology for the publication of an article which inaccurately accused them of being involved in shady deals involving Polish politicians. After some time, they launched a new claim to take down the *online version* of the article from the newspaper's website and obtain further damages, arguing among other that the article was placed prominently in Google search results of their names.⁴⁵ ECHR, however, refused their application, noting that it was not the courts' task to take part in re-writing history and giving instead respect to arguments raised by Polish courts that less restrictive solutions in that particular set of circumstances were available, such as the rectification, addition of a footnote or an apology the online version of the article.⁴⁶

The *Google Spain* judgment does not elaborate in detail on freedom of expression interests standing in conflict to the right to erasure. In the context of operating a search engine, multiple parties can have interests in leaving a link online: the original publisher, whose articles may be harder to find as a result of a de-listing or internet users interested in having access to an invaluable source of information.⁴⁷ The issue of search engine operators' interests remains open: it has been argued that they exercise their own freedom of expression through the publication of search results,⁴⁸ sometimes even as "curators" who decide on what information they consider most useful to be put forward in the search result order.⁴⁹

The Advocate General recognized freedom of expression and information, i.e. Article 11 of the Charter, protection on part of internet users and publishers of original content, but only gave the search engine operators rights under Article 16 of the Charter – the freedom to conduct a business.⁵⁰ As the Advocate General pointed out, none of the rights concerned in *Google Spain* are absolute and can be limited pursuant to Article 52 (1) of the Charter.⁵¹ The key part of the judgment in this respect states that:

*"the data subject's rights protected by those articles also override, as a general rule, that interest of internet users [...] that balance may however depend, in 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."*⁵²

⁴⁵ *Węgrzynowski and Smolczewski*, para 9.

⁴⁶ *Węgrzynowski and Smolczewski*, para 51; It should, however, be emphasized that the judgment should be read more as a set of preliminary and general points on the issue of taking down sources from the Internet, rather than a concrete argument against the concept of the right to erasure; the outcome of the case was particularly influenced by the complainants' inability to raise the issue in the original set of judicial proceedings – see in particular paras 60-64 of the case.

⁴⁷ KULK S., BORGESIU S. F. Z. *Google Spain v. González: Did the Court Forget about Freedom of Expression?: Case C-131/12 Google Spain SL and Google Inc. v. Agencia Española de Protección de Datos and Mario Costeja González*. *European Journal of Risk Regulation*. 2014, Vol. 5, No. 3 pp. 392–393.

⁴⁸ VAN HOBOKEN, J. *Search engine freedom: on the implications of the right to freedom of expression for the legal governance of web search engines*. Alphen aan den Rijn, The Netherlands: Kluwer Law International, 2012, p. 351.

⁴⁹ VOLOKH, E., FALK, D. M. *First Amendment Protection for Search Engine Search Results — White Paper Commissioned by Google: The 'New Clothes' of an Old Right*. In: *SSRN Electronic Journal* [online]. 14. 5. 2012 [2017-08-02]. Available at: <<http://www.ssrn.com/abstract=2055364>>, p. 27.

⁵⁰ *Google Spain* Opinion, paras 121–122 and 123.

⁵¹ *Google Spain* Opinion, para 125.

⁵² *Google Spain*, para 81.

With this rule, the Court apparently starts the balancing test from a different position than the ECHR, which places both rights on an equal footing.⁵³ This effectively tips the balancing exercise *decidedly* in favor of the data subject instead of suggesting careful balancing of fundamental rights, used to this point in cases dealing with privacy and data protection.⁵⁴ As has been frequently noted, the Court explained little in detail on how the conflicting rights ought to be balanced in practice beyond setting the test above and did not even refer to the case-law of the ECHR, which has dealt with balancing these interests with the past.⁵⁵ As the next chapters show, the absence of any further guidance brings a number of problems in the enforcement of the right to erasure.

3. THE RIGHT TO ERASURE AFTER GOOGLE SPAIN

3.1. Looking beyond search engine context: Manni

Three years after the Google Spain judgment, the Court obtained the chance to clarify how is the right to erasure to be enforced in the *Manni* case.⁵⁶ Salvatore Manni, a building company owner complained that properties in its latest development suffered from poor sales due to a record in the Italian public commercial register on the insolvency and eventual removal from register of Mr. Manni's former company.⁵⁷ Manni thus sought to have the file erased.

In Manni, Court balanced Manni's rights under Articles 12 and 14 of the Data Protection Directive (and Articles 7 and 8 of the Charter) against the requirements in the First Council Directive,⁵⁸ which laid down a requirement of disclosure of basic company documents in a public commercial register.⁵⁹ Such requirement was found to protect *legal certainty* in transactions between companies and third parties – it enabled to obtain information about the company and members of its organs; the latter information particularly useful

⁵³ KULK S., BORGESIOUS F. Z. *Google Spain v. González: Did the Court Forget about Freedom of Expression?: Case C-131/12 Google Spain SL and Google Inc. v. Agencia Española de Protección de Datos and Mario Costeja González*, p. 392.

⁵⁴ LYNKEY, O. *Rising Like a Phoenix: The 'Right to be Forgotten' Before the ECJ*. In: *European Law Blog* [online]. 13. 5. 2014 [2017-08-20]. Available at: <<http://europeanlawblog.eu/2014/05/13/rising-like-a-phoenix-the-right-to-be-forgotten-before-the-ecj/>>; Parts of this reasoning also appear in other decisions (with special emphasis on the high level of protection derived from Art. 1 and recital 10 of the Directive), see for instance Case C-212/13, *František Ryneš v Úřad pro ochranu osobních údajů*, para 27 and below or Case C-362/14, *Maximillian Schrems v Data Protection Commissioner*, para 39 and below.

⁵⁵ FRANTZIOU, E. *Further Developments in the Right to be Forgotten: The European Court of Justice's Judgment in Case C-131/12, Google Spain, SL, Google Inc v Agencia Espanola de Proteccion de Datos*. *Human Rights Law Review*. 2014, Vol. 14, No.4, p. 772.

⁵⁶ *Case C-398/15, Camera di Commercio, Industria, Artigianato e Agricoltura di Lecce v Salvatore Manni* (further referred to as “Manni”).

⁵⁷ With a decade-long gap between those events and the *Manni* case.

⁵⁸ First Council Directive 68/151/EEC of 9 March 1968; OJ L 65, 14.3.1968, pp. 8–12.

⁵⁹ Note that in contrast to *Google Spain*, the *Manni* case involves the “original” source of publically available information – a register file; in *Google Spain*, this probably would have been the La Vanguardia online article, rather than the search engine result. This might have played a role in the Court's approach.

after the dissolution of a company if a third party wants to enforce a claim originally arising during the company's life.⁶⁰

In the end the Court ruled that keeping the register file intact did not present a disproportionate interference with Manni's rights for three reasons:⁶¹ (1) the scope of personal data disclosed was narrow (full name only);⁶² (2) disclosure was vital for third parties' protection;⁶³ and (3) *as a principle*, the protection of legal certainty of third parties⁶⁴ should prevail over data subject's rights.

Furthermore, both the Opinion⁶⁵ and the judgment refused to limit access to file, *as a rule* (see below), to those who would demonstrate *prevailing legitimate interest* in obtaining that information, e.g. creditors of the company.⁶⁶ The Court also rejected the notion of a *guarantee* of obtaining erasure after a certain period of time (putting aside the apparent impossibility to *objectively* determine an appropriate period).⁶⁷

Only in exceptional circumstances then, are Member States' authorities entitled to accept a data subject's objection and limit the access to personal data in the commercial register to those parties who would demonstrate *specific interest* in the data.⁶⁸ At best, data subjects can thus achieve narrowing the group of people able to access their personal data, unlike succeeding with a full-fledged de-listing request such as in *Google Spain*.

Even though the case dealt with the rather specific legitimate aim behind public registers, it is a valuable clarification to the implementation of the right to erasure outside search engine processing. In practice, *Manni* seems to offer a more approachable view of the right to erasure, especially to controllers such as various open data initiatives working with information from such registers.⁶⁹

On a side note, however, both the Opinion of AG Bot and the judgment point out that the information from the register was apparently used also by at least one *commercial* service provider;⁷⁰ although the case does not deal with processing by such

⁶⁰ *Manni*, paras 49–52.

⁶¹ *Manni*, paras 58–60.

⁶² Notably, it would be also hard to imagine how would any *sensitive* personal data found their way into the register, save potentially for companies notoriously associated with e.g. political parties or religious organizations.

⁶³ As registered companies did not offer any other safeguards to their business partners than their *assets* (bringing into importance the above mentioned third parties' ability to launch a claim against the company/former member of organs if needed) and that data subjects such as the applicant used that particular form of business (including disclosure requirement) voluntarily, see para 59 of the case.

⁶⁴ Ensuring proper functioning of the internal market in the process, see para 60 of the case.

⁶⁵ Opinion of Advocate General Bot in Case C-398/15, *Camera di Commercio, Industria, Artigianato e Agricoltura di Lecce v Salvatore Manni* (Further referred to as "Manni Opinion").

⁶⁶ *Manni* Opinion, paras 87–88 and *Manni*, para 51.

⁶⁷ *Manni*, para 56.

⁶⁸ *Manni*, 57–61; provided, first, that they find in a case-by-case assessment that a sufficient period of time had elapsed and second, that overriding legitimate reasons tip the balancing of interests in favor of the data subject.

⁶⁹ This applies the strongest to those initiatives that seek to re-purpose information from official registries and offer them to the public in a more convenient way; less so to cases, where through data analysis, seemingly impersonal information can be linked to a person. For explanation of the latter category, see KULK, S., VAN LOREN B. Brave New Open Data World? *International Journal of Spatial Data Infrastructures Research*. 2012, Vol.7, p. 201.

⁷⁰ *Manni* Opinion, paras 27 and 34.

party, one can but wonder whether the Mr. Manni should not have taken his case against processing by such a company and, by extension, against Google itself.⁷¹

The inclusion of the insolvency in such a commercial overview would potentially be more similar in circumstances to Mr. Costeja Gonzales's forced sale announcement. The balancing test suggested by CJEU could have then been more akin to the one used in *Google Spain*, potentially leading to *erasure*, contrary to the *Manni* test, leading at best to *limitation of access*.

3.2. The right to erasure in practice

The issue of enforcement first raised a number of concerns with the Advocate General himself, who pointed out that “*any unregulated ‘notice and take down procedure’ being a private matter between the data subject and the search engine service provider [...] would amount to the censoring of his published content by a private party.*”⁷² As a consequence, “*an internet user’s right to information would be compromised if his search for information concerning an individual did not generate search results providing a truthful reflection of the relevant web pages [...]*”⁷³

Contrary to the AG’s concerns, in practice the balancing of data subjects’ rights and freedom of expression is primarily entrusted with the controllers themselves.⁷⁴ Google itself has de-listed almost 800,000 links, some 13,000 of those based on requests from the Czech Republic; the general success ratio of de-listing requests is roughly 40 percent in the former category and slightly over 50 percent in the latter.⁷⁵ Furthermore, Google does not share much information about its decisions beyond these numbers.⁷⁶ Potentially very delicate cases, which may need detailed scrutiny to arrive at a justifiable decision are regularly assessed by a private party without input (in individual cases) from Member States’ Data Protection Agencies (hereinafter “DPAs”) or courts unless these requests are rejected and brought to their attention by data

⁷¹ If such commercial service provider enabled customers (i.e. property buyers) to access information on building companies’ credibility in a user-friendly manner, rather than looking to the register (which can, presumably, be a little less comfortable and at least some customers would not take that step at all); for Google, this applies similarly. Obviously, it could be that such company uses software to “crawl” through various public registers, puts together the data and then offers a comprehensive review of a person’s business or financial reputation. The company (and beyond doubt Google) would be offering what is in *Google Spain* called a “structured overview” as a data controller of information about an individual.

⁷² *Google Spain* Opinion, para 134.

⁷³ *Google Spain* Opinion, para 131.

⁷⁴ Some search engines have prepared web forms to request erasure of search results:
https://www.google.com/webmasters/tools/legal-removal-request?complaint_type=rtbf&pli=1 or
<https://www.bing.com/webmaster/tools/eu-privacy-request>.

⁷⁵ FLEISCHER, P. *Google in Europe Blog: Three years of striking the right (to be forgotten) balance*. In: *Google* [online]. 15. 5. 2017 [2017-11-20]. Available at: <<https://www.blog.google/topics/google-europe/three-years-right-to-be-forgotten-balance/>>.

⁷⁶ It only shows plain and coarse examples of cases it dealt with: for instance, successful applicants included a former French political leader or a well-known Portuguese businessperson dealing with a criminal investigation; unsuccessful cases involved an Austrian couple accused of fraud and a high ranking political official in Hungary trying to remove information about his decades old criminal problems – All examples are taken from FLEISCHER, P. *Google in Europe Blog: Three years of striking the right (to be forgotten) balance*.

subjects. This in turn brings concerns about the quality of decision making and potential bias of controllers towards data subjects.⁷⁷

This also means that the de-listing procedure can go through without any input from two of the parties interested in the result of the balancing test – internet users and publishers (see Part 2 above). In practice, Google gives *some* information to content publishers – it informs them that their page has been de-listed, without disclosing any further details.⁷⁸ With respect to internet users *and* given what is the objective of the de-listing request itself, any meaningful involvement in individual cases is hard to imagine.

The Article 29 Working Party⁷⁹ came up in 2014 with a set of guidelines (the “Article 29 Working Party Guidelines”)⁸⁰ for the implementation of *Google Spain*, at the core of which was a set of criteria that ought to be taken into consideration in balancing the interests in question – the report is however addressed to Member States’ Data Protection Agencies. These criteria include the sensitivity of data, data subject’s role in public life, accuracy and relevance of data or the context of the published information. They nonetheless must be applied on a case-by-case basis.⁸¹

Some solutions for reforming this situation have been proposed.⁸² One of them can be derived from a point the Advocate General stated in *Google Spain*: the only circumstance in which he would consider Google to be a data controller was the possible refusal to respect an “exclusion order” provided in the code of the website.⁸³ It has been pointed out that Member State bodies could order that a website contains a “sleeping” exclusion order, which would activate on a specified date (e.g. several years from the original event or the publication of original content).⁸⁴ This way, DPAs could intervene at least in *some types* of cases and participate on the practice of de-listing while at the same time adding more legitimacy and insight to the process.⁸⁵

⁷⁷ GRATTON, E., POLONETSKY, J. Droit À L’Oubli: Canadian Perspective on the Global ‘Right to Be Forgotten’ Debate. *Colorado Technology Law Journal*. 2017, Vol. 15, No. 2, pp. 372–373.

⁷⁸ KULK S., BORGESIU S. F. Z. *Google Spain v. González: Did the Court Forget about Freedom of Expression?: Case C-131/12 Google Spain SL and Google Inc. v. Agencia Española de Protección de Datos and Mario Costeja González*, p. 397. According to a report cited therein, this may be partly due to the possibility that disclosing more specific information, e.g. the person requesting de-listing or the reasons for de-listing (i.e. most likely the result of the balancing test conducted by Google) might be actually detrimental to the efficiency of such a request.

⁷⁹ Article 29 Working Party is an advisory body created under Article 29 and 30 of the Directive; under the Regulation, it shall be reformed into a European Data Protection Board pursuant to Section 3 of the Regulation.

⁸⁰ ARTICLE 29 DATA PROTECTION WORKING PARTY. Guidelines on the Implementation of the Court of Justice of the European Union Judgment on “Google Spain and Inc v. Agencia Española De Protección De Datos (AEPD) and Mario Costeja González” C-131/12. In: *European Commission* [online]. 26. 11. 2014 [2019-01-23]. Available at: <https://ec.europa.eu/justice/article-29/documentation/opinion-recommendation/files/2014/wp225_en.pdf>.

⁸¹ See pú. 15–20 of the Article 29 Working Party Guidelines.

⁸² Note that these include the scenarios where the burden of administering the right to erasure would still lie with the data controller, not a national administrative or judicial body.

⁸³ For an explanation of the term and its functionality, see Part 1.3. of this paper and the citations therein.

⁸⁴ KULK S., BORGESIU S. F. Z. *Google Spain v. González: Did the Court Forget about Freedom of Expression?: Case C-131/12 Google Spain SL and Google Inc. v. Agencia Española de Protección de Datos and Mario Costeja González*, p. 398.

⁸⁵ On the other hand, this could also run into the problem voiced by the Court in *Manni*: that is, how to *objectively* select a time after which an information should be put out of public sight? Furthermore, while such system would involve DPAs and courts more, it would presumably need to work with clearly defined categories of cases.

A different proposal comes forward from an open data practice – a publicly available full database of requests (including an anonymized version) could only help circumvent the *Google Spain* ruling; on the other hand, the current model offers no clues on the context of decisions. The solution could be a *restricted-access* register of decisions, available only to a select group of auditors who would provide oversight and expertise.⁸⁶ This role could involve academics, but national DPAs could hypothetically fulfill this role as well. In fact, a not-so different position had already been given to the Google Advisory Council on the right to be forgotten, gathering experts across various fields to advise the company on the implementation of the key ruling.⁸⁷

Regardless of any changes to the data protection regime, the practice of Member States' authorities in enforcing de-listing attempts and balancing fundamental rights promises to be quite colorful in the future as it is not just limited to Google search engine requests:

In *Olivier G. v. Le Soir*⁸⁸, delivered after *Google Spain* had arrived, a Belgian Court dealt with a request for *anonymization* (rather than a de-indexing request towards Google or the publisher) of an online version of a news article, which reported on a fatal driving under the influence offense of the data subject. In such a context, rights under Articles 8 and 10 of the Convention were held to be of equal value (instead of data subjects' rights prevailing as a rule over others, as in *Google Spain*). Finding that the data subject's offense took place decades ago and that he had no public profile, Belgian courts agreed with the anonymization request.⁸⁹

A Spanish case *A.B. v. El Pais*⁹⁰ dealt with a similar kind of information about past offenses put in an online news archive – with the Spanish court's analysis being influenced by both Court of Justice case-law, including *Google Spain*, and ECHR's decisions, particularly the *Węgrzynowski and Smolczewski* case. The court struck down requests for *anonymization* of the article and exclusion from an internal search engine on the website, instead ordering the publisher to ensure that the page would not be indexed by search engines.

Requests raised against Google itself also led to litigation in Member States: in a Dutch ruling concerning a partner of a large consulting service who wanted to de-list articles

⁸⁶ MANTELERO, A. The protection of the rights to be forgotten: lessons and perspectives from open data. *CONTRATTO E IMPRESA. EUROPA*. 2015, Vol. 20, No. 2, pp. 739–740.

⁸⁷ See Google's webpage on the Advisory Council, its members and reporting at: <https://archive.google.com/advisorycouncil/>.

⁸⁸ Judgment of the Cour de cassation de Belgique N° C.15.0052.F from 29 April 2016. In: *Inform's Blog* [online]. 29. 4. 2016 [2017-11-21]. Available at: <<https://inform.files.wordpress.com/2016/07/ph-v-og.pdf>>.

⁸⁹ Case Law, Belgium: *Olivier G v Le Soir*. "Right to be forgotten" requires anonymisation of online newspaper archive – Hugh Tomlinson QC. In: *Inform's Blog* [online]. 19. 7. 2016 [2017-11-21]. Available at: <<https://inform.org/2016/07/19/case-law-belgium-olivier-g-v-le-soir-right-to-be-forgotten-requires-anonymisation-of-online-newspaper-archive-hugh-tomlinson-qc/>>; To put a fuller explanation to the rights of the data subject, it should be mentioned that under Art. 12 (b) data subject can request "*as appropriate the rectification, erasure or blocking of data*" – the balancing of interests is present nonetheless.

⁹⁰ Case Law, Spain: *A and B v Ediciones El Pais*, Newspaper archive to be hidden from internet searches but no "re-writing of history" – Hugh Tomlinson QC. In: *Inform's Blog* [online]. 19. 11. 2015 [2017-11-21]. Available at: <<https://inform.org/2015/11/19/case-law-spain-a-and-b-v-ediciones-el-pais-newspaper-archive-to-be-hidden-from-internet-searches-but-no-re-writing-of-history-hugh-tomlinson-qc/>>.

reporting about his disagreement with contractors working on his house, the courts held that his rights and freedom of expression held *equal* weight, rather than repeating the formula raised in *Google Spain*.⁹¹ An ongoing Irish case of an anti-gay campaigner seeking de-indexing of an online discussion thread in which strong opinions against his person were raised revolves around the notion of *accuracy* of personal data.⁹² In the last development in this case, a court decided that the title of the link on search results page itself was inaccurate⁹³ as it suggested that the information was a piece of fact, rather than an subjective opinion.⁹⁴

These cases show that data subjects have a number of strategies to protect their rights with regard to online content; each one of them nonetheless entails the need of Member States' DPAs and courts to balance fundamental rights – those, however, while aware of the *Google Spain* balancing test, seem to employ their own analysis even apparently challenging the notion raised in the Court's judgment that data subjects' rights prevail as a principle over other interests. The next two chapters focus on two particular issues which Member States' authorities face when deciding right to erasure cases. Crucially, these two problems have recently been submitted to the Court to provide further clarification on enforcing right to erasure.

3.3. Special categories of processing: the case of sensitive personal data

Under data protection legislation, processing of so called *special categories of personal data* is provided more protection than processing of regular (i.e. not falling within this special category) personal data. Special categories of data, or sensitive personal data, in Art. 8 of the Directive entail "*data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, trade-union membership, and the processing of data concerning health or sex life.*"⁹⁵

The processing of this kind of personal data is *generally prohibited* unless it is based on one of the exceptions laid down in data protection legislation; importantly, the broad legal basis of Art. 7 (f) of the Directive (and Art. 6 (f) of the Regulation respectively),⁹⁶ which enables processing "*for the purposes of the legitimate interests pursued by the controller or by the third party or parties to whom the data are disclosed*" cannot be used to justify processing of this category of personal data. In most cases, processing of sensitive data

⁹¹ KULK, S., BORGESIU, F. Z. Freedom of expression and right to be forgotten cases in the Netherlands after *Google Spain*. *European Data Protection Law Review*. 2015, No. 2, p. 122.

⁹² Mark Savage (Appellant) v. Data Protection Commissioner (Respondent) and Google Ireland (Notice Party) Record no. 2015/02589. In: *Data Protection Commission* [online]. [2017-11-21]. Available at: <https://www.dataprotection.ie/sites/default/files/uploads/2018-11/Savage_v_DPC_%26_Google_Ireland_Circuit_Court_judgment_11.10.16.pdf>.

⁹³ While the link transposed accurately a certain phrase raised in the original discussion thread, it did so without adding quotation marks or any other symbol to emphasize the *opinion* nature of the statement.

⁹⁴ Savage v. Data Protection Commissioner, para 51.

⁹⁵ A similar definition is provided in Article 9 (1) of the Regulation, which for instance explicitly adds genetic or biometric data into this category.

⁹⁶ These legal bases are relied on by search engine operators, see Part 1.1.

requires the data subject's *explicit consent*.⁹⁷ Kulk and Borgesius even imply that Google's operation of its search engine obviously does not have the explicit consent of every individual whose (potentially) sensitive data it processes – and that its activity is thus in certain situations illegal.⁹⁸

Nevertheless, the crucial question is how is the sensitivity of certain data – which may appear on web pages and being subsequently linked to in Google search results page – able to affect the balancing exercise between freedom of expression and data subject's fundamental rights under Articles 7 and 8 of the Charter.

The judgment in *Google Spain* does lightly touch upon this matter: it indirectly points to the argument that certain types of data may present a greater danger to a data subject's privacy: according to the ruling, the balance between freedom of expression and data subject's rights is, in specific cases dependent among other on the “*sensitivity for the data subject's private life*”.⁹⁹ The Article 29 Working Party Guidelines list the sensitivity of data as one of the criteria that ought to be taken into account in handling de-listing complaints by Member States' DPAs, stating that “*DPAs are more likely to intervene when de-listing requests are refused in respect of search results that reveal such information to the public.*”¹⁰⁰

Does this background mean that search results pointing to sources revealing sensitive personal data should be automatically de-listed?¹⁰¹ As suggested at the end of the previous Chapter, the Court of Justice will have to clarify these concerns: in a reference for a preliminary ruling¹⁰² the French Conseil D'Etat is asking the Court how to interpret Article 8 of the Data Protection Directive.¹⁰³ The applicants unsuccessfully sought erasure of search results linking to various sources potentially revealing sensitive information about them.¹⁰⁴

The core question of the case is, how much importance is the data controller supposed to put on the fact that its links point to pages containing sensitive data: the French Court is asking, whether this finding should lead to a “systematic” or a “matter of course” de-listing in itself.¹⁰⁵ In the context of other questions, it seems that this question deals with

⁹⁷ Art. 8 (2) (a) of the Directive; Art. 9 (2) (a) of the Regulation. The Directive does offer other exempting legal bases, however these are linked to specific situations, such as complying with specific employment law obligations or processing for medicinal purposes. Under the Regulation, which expands the list of exceptions in its Art. 9, an explicit consent still seems like the most important form of a legal basis.

⁹⁸ KULK S., BORGESIUS F. Z. *Google Spain v. González: Did the Court Forget about Freedom of Expression?: Case C-131/12 Google Spain SL and Google Inc. v. Agencia Española de Protección de Datos and Mario Costeja González*, p. 396.

⁹⁹ *Google Spain*, para 81.

¹⁰⁰ Article 29 Working Party Guidelines, pp. 17–18.

¹⁰¹ Leaving aside the question whether these search results can even be legally displayed in the first place.

¹⁰² Case C-136/17, *G.C., A.F., B.H., E.D. v Commission nationale de l'informatique et des libertés (CNIL)*.

¹⁰³ Corresponding largely to Art. 9 of the Regulation.

¹⁰⁴ On a first look, the case promises to be an exciting read – the Court was given a case involving: a YouTube video, which during the applicant's electoral campaign alleged intimate relations between her and a local commune mayor, whose chief of staff she was at the time; an article about a suicide of a member of Church of Scientology on a website of a public group “against mental manipulation” including the name of the next applicant who was the press officer of the Church at that time; articles relating to the beginning of a criminal investigation regarding financing one of the largest French political parties, which however ended in a dismissal, with applicant as one of the indicted; and finally the accounts of a correctional hearing of a sexual offender. The circumstances are further described in the recently delivered Opinion of AG Szpunar in Case C-136/17, *G.C., A.F., B.H., E.D. v Commission nationale de l'informatique et des libertés (CNIL)*, paras 25–31.

¹⁰⁵ See the request for a preliminary ruling published in OJ C 168, 29. 5. 2017, pp. 24–26.

the possibility that the sensitive nature of data would *automatically* prevail over *any* other interests in the balancing. In the alternative, the French court is asking whether it is possible to reject a de-listing request provided the processing of sensitive data has a valid Article 8 legal basis. Additionally, even if under the *Google Spain* ruling Google cannot rely *itself* on the so called journalistic exception in Article 9 of the Data Protection Directive, the reference also asks whether the fact that the page to which it is linked from the search results page contains processing of data covered by that exception (i.e. is a media article) can *allow* the search engine operator to reject a de-listing request.¹⁰⁶

The Court of Justice will thus have an opportunity to clarify further the implications of the *Google Spain* ruling and specify the application of the right to erasure.

3.4. The territorial scope of enforcement of the right to erasure: problems with global implementation

As the Advocate General in *Google Spain* noted on several occasions, the Directive was adopted before the use of Internet became so widespread that virtually anyone with a proper device could connect to the network.¹⁰⁷ The privacy and data protection regime thus had to adapt to cope with the rise of the internet to continue to sufficiently protect individuals; this kind of evolution seems to be nothing new as Warren and Brandeis advocated back in 1890 that to protect the privacy of a person, law had to evolve and cover technological advances (especially the expanse of photography and widespread newspaper circulation).¹⁰⁸

In *Google Spain*, the Court on several occasions brought up the crucial importance of *effectiveness* of the Directive regime and through it the efficient protection of fundamental rights. For instance, it noted that since online information on a website can be easily copied to new websites, the “*effective and complete protection of data users could not be achieved if the latter had to obtain first or in parallel the erasure of the information relating to them from the publishers of websites*” rather than turning to the search engine operator.¹⁰⁹ It nonetheless refrained from examining how strongly should the right to erasure be enforced its possible implications for the future of the Internet.

In theory, there are several levels of enforcement with corresponding technical executions: starting from a *domain based approach*, limited to erasing links only from the national localization of search engine (i.e. google.cz), *geographic filtering*, which provides effect in a wider, but still delimited territory (e.g. EU) from which Google’s pages are visited, and lastly *global implementation*, leading to erasure of results from every version of the search engine’s website on the Internet.¹¹⁰

The Article 29 Working Party states that data subjects must be “*effectively protected against the impact of the universal dissemination and accessibility of personal information offered by search engines*” and that to ensure effective protection of data subjects, any de-

¹⁰⁶ Ibid.

¹⁰⁷ *Google Spain* Opinion, paras 2, 10, 78.

¹⁰⁸ WARREN, S. D., BRAINDEIS, L. D. The Right to Privacy. *Harvard Law Review*. 1890, Vol. 4, No. 5, pp. 193–220; also cited by the Advocate General at the very beginning of his Opinion.

¹⁰⁹ *Google Spain*, p. 84.

¹¹⁰ VAN ALSENOY, B., KOEKKOEK, M. Internet and jurisdiction after *Google Spain*: the extraterritorial reach of the ‘right to be delisted’. *International Data Privacy Law*. 2015, Vol. 5, No. 2, p. 111.

listing exercise should not be limited to EU national domains, but include “*all relevant domains, including .com.*”¹¹¹ The Working Party thus clearly requires going beyond the national domain based approach. The Guidelines nonetheless do not elaborate in any more detail which of the other two is the preferred choice, whether a single approach is supposed to fit all requests or some categories of requests (discussed below) are more appropriate to be enforced globally.

The scope of enforcement has since the ruling been the subject of a dispute between Google and the French DPA – CNIL. Google initially de-listed links from all European localizations of its search engine pages, seemingly adopting the domain based approach.¹¹² Google has since changed its model and switched to a geographic filtering based model, so that any Google domain accessed from within the EU would comply with its ruling.¹¹³ CNIL in 2016, however, fined Google 100,000 euros for not taking down links worldwide.¹¹⁴ This case of enforcement has raised a lot of controversy and has since been before French courts.¹¹⁵

Recent developments also show that this question is not limited to EU data protection law: in the *Equustek* case, a small British Columbia based company took Google into a legal battle over its struggle to defend itself against unfair business practices of its rival.¹¹⁶ In the process, it sought that Google takes down certain search results worldwide.¹¹⁷ *Equustek* eventually succeeded in what was called a “global precedent” in de-indexing.¹¹⁸ In giving judgment, the necessity of such wide-reaching action seemed beyond doubt to Canadian courts: both the lower instance courts and the Supreme Court accepted¹¹⁹ that to grant sufficient relief to *Equustek*, Google’s action could not be confined to results on *google.ca* as the majority of their rival’s purchases came from outside Canada. The problem (of access to

¹¹¹ Article 29 Working Party Guidelines, p. 9.

¹¹² See FLEISCHER, P. Reflecting on the Right to be Forgotten. In: *Google* [online]. 9. 12. 2016 [2017-10-31]. Available at: <<https://www.blog.google/topics/google-europe/reflecting-right-be-forgotten/>>.

¹¹³ See FLEISCHER, P. Adapting our approach to the European right to be forgotten. In: *Google* [online]. 4. 3. 2016 [2017-10-31]. Available at: <<https://www.blog.google/topics/google-europe/adapting-our-approach-to-european-rig/>>.

¹¹⁴ See COMMISSION NATIONALE DE L’INFORMATIQUE ET DES LIBERTÉS. Délibération n°2016-054 du 10 mars 2016. In: *Legifrance* [online]. 10. 3. 2016 [2017-10-31]. Available at: <<https://www.legifrance.gouv.fr/affichCnil.do?oldAction=rechExpCnil&id=CNILTEXT000032291946&fastReqId=273825503&fastPos=1>>.

¹¹⁵ KELLER, D. Global Right to be Forgotten Delisting: Why CNIL is Wrong. In: *The Center for Internet and Society at Stanford Law School Blog* [online]. 18. 11. 2016 [2017-11-21]. Available at: <<http://cyberlaw.stanford.edu/blog/2016/11/global-right-be-forgotten-delisting-why-cnil-wrong>>.

¹¹⁶ SUPREME COURT OF CANADA. *Google Inc. v. Equustek Solutions Inc.*, 2017 SCC 34. In: *Judgements of the Supreme Court of Canada* [online]. 28. 6. 2017 [2017-09-29]. Available at: <<https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/16701/index.do>>, (further referred to as “*Equustek*”); *Equustek* sought to prevent its rival, *Datalink*, from selling as counterfeit products *Equustek* originally manufactured. As a part of its strategy, *Equustek* filed a de-listing request to Google with regards to links to *Datalink*’s websites, eventually asking Google to delist search results pertaining to *Datalink* worldwide.

¹¹⁷ See in particular paras 16 and below of the judgment; the court, with notable ease, pointed out that a simple change of URL from *google.ca* to any other Google search URL would simply bypass local de-listing and render it ineffective as long as the harm to the subject seeking de-listing would not be strictly limited to a certain location such as Canada.

¹¹⁸ LAANELA, M. Canada’s top court backs order for Google to remove firm’s website from global searches. In: *CBC News* [online]. 28. 6. 2017 [2017-11-16]. Available at: <<http://www.cbc.ca/news/canada/british-columbia/google-ruling-1.4181322>>.

¹¹⁹ See *Equustek*, paras 19–20 and 39–41.

rival's offers through Google) was “*occurring online and globally.*”¹²⁰ Google unsuccessfully tried to assert that such injunction would not be granted elsewhere (i.e. outside Canada) and that it would violate other jurisdictions' laws – the court however called these assertions only *theoretical* and refused to shift any argumentative burden on Equustek.¹²¹

In line with its argument above, Google recently launched a case in California seeking to prevent the enforcement of Canadian Supreme Court's worldwide de-listing order in the United States¹²² – threatening the very effectiveness of the measure ordered in Canada – if Google prevails in the USA, or potentially elsewhere, the value of the injunction granted to Equustek will greatly diminish.¹²³ As the time of writing this paper, Google already managed to obtain preliminary injunctive relief from the North California court, which found that Google was “*likely to prevail*” in its endeavor.¹²⁴

This experience presents two valid points to consider in data protection enforcement: whether global de-listing is *suitable at all*, given that it can easily run into obstacles and, if so, whether it should be mandated only in exceptional *cases*. At least the former one of these issues will have to be dealt with by the Court, as in a recent turn of events, the legal dispute between Google and CNIL mentioned above gave rise to a request for preliminary ruling. The French Conseil d'État asked the Court whether the “right to de-referencing” must be in fact enforced globally and, inter alia, if not, then whether search engine operators must apply “geo-blocking” - i.e. to adapt search results on any Google domain for requests coming from IP addresses.^{125,126}

¹²⁰ *Equustek*, para 41. Supreme Court also stated that while it would be important to consider impact of the action on freedom of expression, it did not find any such tangible elements in that case and that Google itself did not raise any such arguments of its own. – see para 44 of the case.

¹²¹ *Equustek*, para 44.

¹²² See Complaint in Case 5:17-cv-04207. UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF CALIFORNIA SAN JOSE DIVISION. Google Inc., vs. Equustek Solutions Inc., Clarma Enterprises Inc. and Robert Angus. In: *DocumentCloud* [online]. 24. 7. 2017 [2017-07-30]. Available at: <<https://assets.documentcloud.org/documents/3900043/Google-v-Equustek-Complaint.pdf>>.

¹²³ Contrary to Google's appeal in Canada, the US action is at least partially based on freedom of speech grounds, with Google arguing in particular that Equustek only focused on Google, leaving other search engines free to display the respective websites and has taken action only locally seeking global enforcement instead of going to other countries with its claim.

¹²⁴ See Order Granting Plaintiff's Motion for Preliminary Injunctive Relief in Case 5:17-cv-04207. UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF CALIFORNIA SAN JOSE DIVISION. Google LLC, V. Equustek Solutions INC., Et Al. In: *Santa Clara Law Digital Commons* [online]. 2. 11. 2017 [2019-01-23]. Available at: <<http://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=2589&context=historical>>. Note that the preliminary relief in the case was granted on the likelihood of success in argument regarding Section 230 of the Communication Decency Act – the court thus found it unnecessary to examine at that point further the First Amendment argument. See p. 4 §10-11 of the decision.

¹²⁵ See application in case C-507/17 *Google Inc. v Commission nationale de l'informatique et des libertés (CNIL)*.

¹²⁶ Shortly before the submission of this article, reports have arisen about a ruling of the Spanish La Audiencia Nacional (the same court was involved in *Google Spain*) in which the court expressly refused the possibility of applying the right to be forgotten in an extraterritorial manner, confirming as correct the refusal of a de-listing request lodged by a *Paraguayan* national to the *Spanish* DPA. The Spanish court ruled without turning to the Court of Justice. See BAVIÈRE, J. M. La Audiencia Nacional confirma que la aplicación extraterritorial del “derecho al olvido” es contraria al derecho internacional. In: *Lefebvre El Derecho* [online]. 13. 12. 2017 [2017-12-15]. Available at: <http://tecnologia.elderecho.com/tecnologia/privacidad/Sentencia-Audiencia-Nacional-derecho-olvido-aplicacion-extraterritorial_11_1168930002.html>.

However, if such approach can succeed, some authors suggest that global enforcement might be only suitable for *certain types of claims*, where the interest in enforcement is the strongest.¹²⁷ For instance the circumstances and importance thereof in *Google Spain* were limited to Spain and there seemed to be no interest in the information concerned outside the country – if a global removal could be effected, it would probably not raise much controversy.¹²⁸ Svantesson goes even further and proposes a whole model code, in which, *inter alia*, certain categories of content, such as child pornography, revenge porn or stolen credit card information should be strongly taken into consideration for being de-listed globally.¹²⁹

Similarly, to the core balancing exercise between data subjects' rights and freedom of expression outlined above, the issue of scope of enforcement leaves potentially a lot of space for consideration to national DPAs and national courts. It remains to be seen what will the *Google v CNIL* case bring in relation to the framework within which national authorities have to assess right to erasure claims. Especially should at least some global de-listing attempts succeed, national bodies may be faced with further delicate assessment of each case that arrives before, needing to determine *what form of enforcement* should be granted.

CONCLUSION

The article aimed to show that putting the right to erasure, as laid down by the *Google Spain* ruling, is by no means a straightforward matter. The ruling undoubtedly opened a door to many attempts along the line of those outlined in the article or perhaps even some new legal „animals“ based on or derived from the right to erasure. The resulting situation can thus be characterized by both the *quantity* and *variety* of cases where privacy, data protection and other interests might conflict.

The question that needs to be raised is whether the guidance given by the Court to resolve these issues is sufficient; at the very least, it can be said that with the speed the online world is developing, the decision mostly created a need for further clarification - the two issues that have been put to the Court to decide serve as illustration. Furthermore, given the conflicts between fundamental rights, it is surprising that the decision put private actors in such a strong position in their resolution - especially since it is the Member States who should be putting EU law into practice in such situations.

Another side of the right to erasure presented in the article is the revelation of the methods that underpin a lot of what we have come to accept as natural online environment and most of all their legal consequences. The case of processing of sensitive data only highlights that law (and ultimately the Court's analysis) can change in important ways how some online services work.

¹²⁷ VAN ALSENOY, B., KOEKKOEK, M. *Internet and jurisdiction after Google Spain: the extraterritorial reach of the 'right to be delisted'*, p. 116.

¹²⁸ VAN ALSENOY, B., KOEKKOEK, M. *Internet and jurisdiction after Google Spain: the extraterritorial reach of the 'right to be delisted'*, p. 118.

¹²⁹ SVANTESSON, D. J. B. *Limitless Borderless Forgetfulness? Limiting the Geographical Reach of the 'Right to be Forgotten'*. *Oslo Law Review*. 2015, Vol.3 No. 2, pp. 134–135.