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Comment

The 'right to be forgotten' or the 'principle that has been remembered'

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ABSTRACT

The Court of Justice of the European Union (CJEU) has ruled on questions referred by a Spanish court relating to interpretation of the Data Protection Directive and its application to search engine activities. In a controversial judgment, the CJEU found that search engines are data controllers in respect of their search results; that European data protection law applies to their processing of the data of EU citizens, even where they process the relevant data outside the EU; and that a 'right to be forgotten' online applies to outdated and irrelevant data in search results unless there is a public interest in the data remaining available and even where the search results link to lawfully published content.

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1. Google Spain SL & Google Inc. v Agencia Española de Protección de Datos (AEPD) & Mario Costeja González

1.1. The Facts

In 2010, the Spanish Data Protection Authority, the AEPD, received a complaint from Mr González requesting that Google be required to de-list search results which took users to two web pages published by a newspaper about the auction of his house which had been brought about by his failure to pay social security contributions. The AEPD accepted that the search results created a negative impression of him and ordered Google to de-list the relevant links. The AEPD rejected a complaint against the publisher of the newspaper on the grounds that publication of the information about Mr González was legally justified as it was required by the Spanish Ministry of Labour and Social Affairs. Google Spain and Google Inc. (Google) appealed to the National High Court of Spain which made a number of references to the CJEU.

1.2. The Law

1.2.1. *The Data Protection Directive (1995/46/EC[1]) (Directive)*
Article 1 – puts an obligation on Member States to protect the fundamental rights and freedoms of natural persons, in particular, their right to privacy with respect to the processing of personal data and in accordance with the Directive.

Article 2 – defines "personal data", "data subject", "processing of personal data", "controller" and "third party".

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[1] Transposed into Spanish law as Organic Law No 15/1999 on data protection and into English law as the Data Protection Act 1998.

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Article 3 – the Directive applies to personal data processed wholly or partly by automatic means.

Article 4(1) – sets out the territorial scope of the Directive, requiring Member States to apply national law adopted to give effect to the Directive, to the processing of personal data where there is an establishment of the controller on its territory, or, where there is no such establishment, where a controller is processing personal data using equipment situated in a Member State.

Article 6 – personal data must be processed fairly and lawfully, collected for a specific and legitimate purpose, be adequate, relevant and not excessive in relation to the purpose for which it is collected and processed, be accurate, up to date and be retained for no longer than is necessary.

Article 7 – personal data may be processed only if … the processing is carried out in the legitimate interests of the data controller or a third party to whom the data is disclosed unless such interests are overridden by the fundamental rights and freedoms of the data subject.

Article 9 – allows Member States to provide exemptions for the processing of data solely for journalistic purposes, only where necessary to reconcile the right to privacy with the rules governing freedom of expression.

Article 12 – gives data subjects a right of access to their personal data and to its rectification, erasure or blocking of data which is not processed in compliance with the Directive, in particular, where it is incomplete or inaccurate.

Article 14 – gives data subjects the right to object to the processing of their personal data in certain situations.

1.2.2. *The EU Charter of Fundamental Rights (Charter)*

Protects the fundamental rights of EU citizens and includes:

Article 7 – the right to respect for private life.

Article 8 – the right to data protection.

Article 11 – the right to freedom of expression and access to information.

1.3. *The Three Questions referred to the CJEU*

The National High Court of Spain referred the following matters to the CJEU which for the purposes of analysis we have split into 3 questions. We then set out first the Attorney General's answers to those 3 questions and then the answers which the Court has now given in its final judgment:

1.3.1. *Territorial application*

(a) Must it be considered that an establishment (as defined in Article 4(1)(a) of the Directive) exists where: a search engine provider outside the EU has an office or subsidiary in a Member State for the purpose of promoting or selling advertising space on the search engine and which orientates its activity towards the inhabitants of the Member State; or where the parent company designates a subsidiary in a Member State as its representative and controller for two specific filing systems which relate to the data of customers who have contracted for advertising; or where the subsidiary forwards to the parent company requests and requirements addressed to it both by data subjects and national regulators?

(b) Must Article 4(1)(c) of the Directive be interpreted as meaning that there is "use of equipment … .situated on the territory of that Member State" when: a search engine uses crawlers or robots to locate and index information contained in web pages located on servers in that Member State; or it uses a domain name pertaining to a Member State and arranges for searches and search results to be based in the language of that Member State?

(c) Can the temporary storage (caching) of information indexed by a search engine be regarded as a use of equipment under Article 4(1)(c) of the Directive and if the undertaking refuses to disclose where it stores those indexes on the grounds of competition, does that constitute a connecting factor under Article 4(1)?

(d) In the light of Article 8 of the Charter, must the Directive be applied in the Member State where the centre of gravity of the conflict is located and more effective protection of the rights of European Citizens is possible?

1.3.2. *Search engines as providers of content and their consequent responsibilities*

(e) Must the activities of the search engine as a provider of content, consisting in locating information, indexing it, temporarily storing it and making it available to users, be considered as processing personal data under Article 2(b) of the Directive?

(f) Must the search engine provider be regarded as the data controller of the data processed in the web pages that it indexes?

(g) May the national regulator require the search engine provider to withdraw an item of information from its indexes directly without first (or simultaneously) requesting that the publisher erase or suppress the information in order to protect an individual's rights under Articles 12 and 14 of the Directive?

(h) Would the obligation of the search engine to withdraw information to protect an individual's rights under Articles 12 and 14 of the Directive be excluded when the information containing the personal data has been lawfully published by third parties and remains on the originating web page?

1.3.3. *The right to be forgotten*

Do the rights to erasure and blocking of data under Article 12 and the right to object under Article 14 of the Directive, enable the data subject to require search engines to refrain from indexing related personal data published on third party web pages in order to ensure it is not known to users when the data subject considers that the information may be prejudicial or wishes it to be forgotten, even though it has been lawfully published by the third parties?

1.4. *The Advocate General's Opinion on the Three Questions*

Advocate General Jääskinen (AG) gave a non-binding Opinion in June 2013, in which he concluded:

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