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ADVANCEMENT OF THE RIGHT TO BE FORGOTTEN – ANALYSIS OF THE JUDGMENT OF THE COURT OF JUSTICE OF THE EUROPEAN UNION OF 24 SEPTEMBER 2019 IN THE CASE OF GOOGLE LLC VERSUS COMMISSION NATIONALE DE L'INFORMATIQUE ET DES LIBERTÉS (CNIL) – C-507/17

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Abstract:

The analyzed judgment of the Court of Justice of the European Union dated 24th of September 2019 concerning the case Google LLC versus Commission nationale de l'informatique et des libertés (CNIL) – C-507/17, is another judgment that explains the application of the right to be forgotten by the Internet search engine operators. In the judgment, the CJEU focused on analyzing the territorial scope of the application of the abovementioned right. It was important to answer the question whether the right to be forgotten can be used for search engine versions with extensions for countries outside the European Union, assuming that the data subject lives in the EU. In other words, is it possible to use this institution globally and not only within the EU? The author of this article analyzes the judgment in the abovementioned scope, and at the same time compares the decision to other judgments of the CJEU (including in cases C-136/17 and C-18/18), but also the judgment of the European Court of Human Rights in the case of M.L. and W.W. against Germany. The author focuses on the potential effects of the decision of the CJEU and its impact on the further functioning of the right to be forgotten in relation to Internet search engine operators.

Keywords: personal data, right to be forgotten, data protection, privacy, GDPR, Internet search engine, territorial scope, right to freedom of information.

Summary: 1. Introduction. – 2. Factual circumstances. – 3. Ruling. – 4. Analysis of the ruling. – 5. The Court's position in the case of Eva Glawischnig-Piesczek versus Facebook Ireland Limited. – 6. Two stages of exercising the right to be forgotten? – 7. Conclusion.

1. Introduction

The foundations of the right to be forgotten were laid by the judgment of the Court of Justice of the European Union of 13 May 2014 in the case of Google Spain SL and Google Inc. versus *Agencia Española de Protección de Datos* (AEPD) and *Mario Costeja González* [1] and by Art. 17 of Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) [2]. The above-mentioned judgment of the CJEU introduced this institution into the EU law, while the GDPR led to its codification and – at the same time – to extending its application beyond Internet search engines.

In the following years, the right to be forgotten was addressed on the basis of subsequent CJEU rulings, such as in the judgment of 9 March 2017 in the case of *Camera di Commercio, Industria, Artigianato e Agricoltura di Lecce* versus *Salvatore Manni* [3], which limited the possibility of removing personal data of a member of a body of a limited company consisting of information being processed in the register of business entities, even though sufficient amount of time has passed since the company's existence ceased.

24 September 2019 brought further rulings regarding the subject of protection of personal data in the context of the operation of search engines. The first one was issued in the case of GC and Others versus *Commission nationale de l'informatique et des libertés* (CNIL) [4]. The second one concerns the case of *Google LLC* versus *Commission nationale de l'informatique et des libertés* (CNIL) [5]. The French supervisory authority was party to the proceedings before the Court in both cases. Despite the fact that Directive 95/46/EC [6] was still in

[1] Case C-131/12, Google Spain SL and Google Inc. v Agencia Española de Protección de Datos (AEPD) and Mario Costeja González, ECJ, 13.4.2014, hereinafter referred to as the "judgment in the case of Google Spain".

[2] OJEU L 119, p. 1, hereinafter referred to as the GDPR.

[3] Case C-398/15, Camera di Commercio, Industria, Artigianato e Agricoltura di Lecce contro Salvatore Manni, ECJ, 9.3.2017.

[4] Case C-136/17, GC and Others v Commission nationale de l'informatique et des libertés (CNIL), 10.1.2019.

[5] Case C-507/17, Google LLC, successor in law to Google Inc. v Commission nationale de l'informatique et des libertés (CNIL), 24.9.2019, hereinafter referred to as the "judgment in the case of Google LLC".

[6] Directive 95/46/ EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, (1995) OJEU L 281, 31–50.

force at the time when these proceedings started, the CJEU also cited the GDPR regulations which were applicable during the ruling period.

The case of Google LLC regulates the territorial scope of application of the right to be forgotten in the context of the operation of an Internet search engine. In turn, the judgment in the case of GC and Others raised the issue of processing specific categories of data by Internet search engines, such as medical data or data concerning offences. The subject-matter of this article is primarily to discuss the issue of the territorial scope of the right to be forgotten under judgment C-507/17. However, in further parts of the article the author will consider judgment C-136/17.

2. Factual circumstances

In this case, the chairwoman of CNIL requested from Google LLC to take a global approach to exercising the right to be forgotten. In a situation where a natural person would request removal of links to websites that appeared in the search results when the name of that person was entered, the removal should be carried out for all domain extensions of this search engine. In other words, it would not be sufficient to remove links from the google.fr search list; they would have to be removed from all the extensions. Contrary to the CNIL's request, Google LLC removed only the links that appeared in search results of Google search engine domains corresponding to EU Member States. In addition, Google proposed CNIL to apply "geo-blocking" to other domain extensions, which would prevent the display of links in search results carried out in France, regardless of the search engine domain used (i.e. also the ones corresponding to non-EU countries).

However, CNIL stated that Google LLC did not comply with its request and, as a result, by the resolution of 10 March 2016 imposed a fine of EUR 100,000 on the company. The controller lodged a complaint with Conseil d'État - the Council of State. Having doubts regarding the application of Art. 12(b) and Art. 14(a) of Directive 95/46/EC being in force at the time, the Council asked the following questions to the Court of Justice of the European Union:

1) Must the "right to de-referencing", as established by the Court of Justice of the European Union in its judgment of 13 May 2014 on the basis of the provisions of Articles 12(b) and 14(a) of Directive [95/46/EC] of 24 October 1995, be interpreted as meaning that a search engine operator is required, when granting a request for de-referencing, to deploy the de-referencing to all of the domain names used by its search engine so that the links at issue no longer appear, irrespective of the place from where the search initiated on the basis of the re-

quester's name is conducted, and even if it is conducted from a place outside the territorial scope of Directive [95/46/EC] of 24 October 1995?

2) In the event that Question 1 is answered in the negative, must the "right to de-referencing", as established by the Court of Justice of the European Union in the judgment cited above, be interpreted as meaning that a search engine operator is required, when granting a request for de-referencing, only to remove the links at issue from the results displayed following a search conducted on the basis of the requester's name on the domain name corresponding to the State in which the request is deemed to have been made or, more generally, on the domain names distinguished by the national extensions used by that search engine for all of the Member States of the European Union?

3) Moreover, in addition to the obligation mentioned in Question 2, must the "right to de-referencing", as established by the Court of Justice of the European Union in its judgment cited above, be interpreted as meaning that a search engine operator is required, when granting a request for de-referencing, to remove the results at issue, by using the "geo-blocking" technique, from searches conducted on the basis of the requester's name from an IP address deemed to be located in the State of residence of the person benefiting from the 'right to de-referencing', or even, more generally, from an IP address deemed to be located in one of the Member States subject to Directive [95/46/EC] of 24 October 1995, regardless of the domain name used by the internet user conducting the search?

3. Ruling

In this case the Court ruled that "where a search engine operator grants a request for de-referencing pursuant to those provisions, that operator is not required to carry out that de-referencing on all versions of its search engine, but on the versions of that search engine corresponding to all the Member States, using, where necessary, measures which, while meeting the legal requirements, effectively prevent or, at the very least, seriously discourage an internet user conducting a search from one of the Member States on the basis of a data subject's name from gaining access, via the list of results displayed following that search, to the links which are the subject of that request".

The Court's line of reasoning is based on the assumption that numerous third States do not recognise the right to be forgotten (in this case – the right to de-referencing) or have a different approach to that right[7]. The right to the protection of personal data alone is not an absolute right, but must be balanced against

[7] Judgment C-507/17 (fn 5) para 59.

other fundamental rights, in accordance with the principle of proportionality. The CJEU emphasised that the balance between the right to privacy and the protection of personal data and the freedom of information of internet users is not uniform, and is likely to vary significantly around the world [8]. According to the Court, the problem of uniformity in balancing the above-mentioned values also occurs between Member States themselves, which is caused, among others, by the GDPR itself [9]. For example, according to Art. 85(1) of this regulation, the Member States shall by law reconcile the right to the protection of personal data pursuant to the general regulation with the right to freedom of expression and information, including processing for journalistic purposes and the purposes of academic, artistic or literary expression.

In the light of the above, in order to develop common standards for balancing between the rights of data subjects and freedom of information, supervisory authorities of Member States should cooperate with each other under Chapter 4 Section 2 of the GDPR as part of cohesion policy [10]. The joint decision obtained that way would be binding for the supervisory authorities and would be observed by the data controller in the aspect of processing personal data in all its facilities within the EU [11].

4. Analysis of the ruling

The judgment discussed here was considered a great victory for Google LLC in protecting global freedom of expression and flow of information. According to *Article 19*, an organisation working for freedom of expression, courts or data regulators in the UK, France or Germany should not be able to determine the search results obtained by the Internet users in America, India or Argentina [12].

Where does the title of this article come from then? In its judgment the Court indicated that although the EU law does not require the exercise of the right to de-referencing in all versions of a search engine, it also does not prohibit such activities. Thanks to this, a judicial or supervisory authority of a Member State

[8] Judgment C-507/17 (fn 5) para 60.

[9] Judgment C-507/17 (fn 5) para 67.

[10] At the time of writing this article, there are consultations underway on the guidelines for the right to be forgotten in search engines. The deadline for submitting comments expires on 5 February 2020; details available on the page https://edpb.europa.eu/our-work-tools/public-consultations-art-704/2019/guidelines-52019-criteria-right-be-forgotten-search_pl.

[11] Judgment C-507/17 (fn 5) para 68.

[12] https://www.article19.org/resources/google-win-in-right-to-be-forgotten-case-is-victory-for-global-freedom-of-expression/.

– guided by national standards of protection of fundamental rights – remains competent to weigh up the two disputed values. On the one hand there is a data subject's right to privacy and the protection of personal data concerning them. On the other one there is the right to freedom of information. After weighing those rights against each other, a judicial or supervisory authority of a Member State shall be able to order the operator of that search engine to carry out a de-referencing concerning all versions of that search engine [13].

The above is demonstrated by the CNIL statement of 24 September 2019, where the content of the CJEU judgment was acknowledged. Despite the fact that the Court did not base its decision on the position of the French supervisory authority, CNIL still has the right to demand from the search engine operator to remove search results from all versions of the search engine if the protection of data subjects' rights is justified [14].

Due to this, the Court's judgment indicated the territorial scope of the right to be forgotten, in principle limiting it to the Member States of the European Union. However, it established a kind of a "loophole" for further expansion of the institutions from Art. 17 of the GDPR outside the EU. This "loophole" applies to a situation where the rights of the data subject, i.e. the right to privacy and protection of personal data exceeds the right to freedom of information.

In the presented case, the Court has not indicated any criteria to be followed by judicial or supervisory authorities which should be applied when balancing the values cited above. This may cause significant interpretation problems in the future. As pointed out by *O. J. Gstrein*, one of the interpretations that the Court may have used in the presented judgment would be that the right to be forgotten is not based on one's belief in the importance of privacy or freedom of expression. Its purpose, however, is to determine where the power of informational self-determination of individuals ends in the digital domain, and at the same time – how to guarantee the legitimate need of society to access information [15].

The content of judgment C-136/17, which was announced on the same day as the judgment analysed in this article, may provide a clue as to the above scope in relation to a specific category of personal data. In this judgment, the CJEU states that in determining whether to remove links to websites where outdated information on criminal proceedings against a data subject is published, one should consider such factors as:

1) the nature and seriousness of the offence in question;

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[13] Judgment C-507/17 (fn 5) para 72.

[14] https://www.cnil.fr/en/right-be-forgotten-cjeu-ruled-issue.

[15] O.J. GSTREIN, *The Judgment That Will Be Forgotten: How the ECJ Missed an Opportunity*, in *Google vs CNIL* (C-507/17) (2019) VerfBlog, available on https://verfassungsblog.de/the-judgment-that-will-be-forgotten/ - DOI: https://doi.org/10.17176/20190925-232711-0.

2) the progress and the outcome of the proceedings;
3) the time elapsed from ending the proceedings;
4) the part played by the data subject in public life;
5) the data subject's past conduct;
6) the public's interest at the time of the de-referencing request;
7) the content and form of the publication in question;
8) the consequences of the publication for the data subject [16].

In the author's opinion, items 4-8 apply not only to the data related to criminal proceedings, but also to a much wider range of publications on the Internet.

Interestingly, in a situation where the operator of an Internet search engine finds that the continued existence of a link to an outdated article is necessary for reconciling the data subject's rights to privacy and protection of personal data with the freedom of information, it is necessary to adjust the search results list in such a way that it reflects the current legal situation of the data subject. Thus, the results list should start with links to pages containing current articles. Such a search update should occur at the time of requesting a removal of the disputed links links at the latest [17].

Another clue can be found in the judicial decisions of the European Court of Human Rights concerning Art. 6 section 2 of the Treaty on European Union [18]. In the judgment of 28 June 2018 in the case of M.L. and W.W. versus Germany [19], the ECtHR pointed out a number of criteria regarding the application of the right to be forgotten in relation to press publications on the Internet, although in most cases they can also be used in relation to search engines. It is important that the judicial or supervisory authority examines the following factors concerning the publication:

1) the contribution to a debate of public interest;
2) the degree to which the person concerned is well-known, and the subject of the report;
3) the prior conduct of the person concerned with regard to the media;
4) the content, form and consequences of the publication;
5) the circumstances in which the photos were taken (if applicable).

It should be emphasised that some views on the global removal of links from the search results list have been already presented before, also outside the European Union. In the controversial judgment of 29 June 2017, in the case of *Google* versus *Equustek*, the Supreme Court of Canada upheld the injunction

[16] Judgment C-136/17 (fn 4) para 77.

[17] Judgment C-136/17 (fn 4) para 78.

[18] See C 326/13 on Official Journal of the European Union, 26.10.2012.

[19] Applications 60798/10 and 65599/10, M.L. and W.W. v Germany, HUDOC, 28.6.2018, available on https://hudoc.echr.coe.int/eng/#{%22itemid%22:[%22001-184438%22]}.

for global removal of search results. "The problem in this case is occurring online and globally. The Internet has no borders – its natural habitat is global. The only way to ensure that the interlocutory injunction attained its objective was to have it apply where Google operates – globally"[20].

The Court's view that it is for Member States to develop their own standards in balancing data subject's rights and freedom of information can also be problematic for search engine operators. A scenario in which each Member State, despite the cohesion mechanism provided for in Art. 63 et seq. of the GDPR, will establish criteria that will present a different approach to the territorial scope of the right to be forgotten in terms of operation of search engines is not at all unlikely. In country A – the prevailing position will be that de-referencing should be global, in country B – the scope of the law will be narrowed down to the UE territory, and in country C – de-referencing covering the search engine for the domain corresponding to the extension for that Member State will suffice. The institution of the right to be forgotten would then be fragmented, which in turn would have impact on the effectiveness of its implementation. Such a state of affairs would also not be beneficial for the Internet search engine operator, which would have to adapt to the regulations of every Member State in this respect[21].

The issue of geo-blocking is another aspect that has not been fully resolved by the Court. The Court decided to generalise this issue, stating only that "it is for the search engine operator to take, if necessary, sufficiently effective measures to ensure the effective protection of the data subject's fundamental rights. Those measures must themselves meet all the legal requirements and have the effect of preventing or, at the very least, seriously discouraging internet users in the Member States from gaining access to the links in question using a search conducted on the basis of that data subject's name[22]". The CJEU has developed virtually no criteria for search engine operators in this regard. Thus, this problem was entirely passed on to operators, who in the event of a potential dispute will have to prove that their technological solutions are fully sufficient to prevent access to incriminated information by Internet users. On the other hand, however, one can understand the Court's position on such a general guideline, as the rapid development of search engine technology is likely to make the current solutions proposed by Google LLC insufficient over time. Setting the above minimum framework for operators by the CJEU may prove to be more beneficial then, especially for persons executing their right to de-referencing.

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[20] Case C-36602, Google Inc. v Equustek Solutions Inc., SCC Canada 34, 28.6.2017, available on https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/16701/index.do.

[21] Cf. O.J. GSTREIN (fn 15).

[22] Judgment C-507/17 (fn 5) para 70.

5. The Court's position in the case of Eva Glawischnig-Piesczek versus Facebook Ireland Limited

Interestingly, the CJEU in its judgment of 3 October 2019 (i.e. just a few days after the announcement of the judgment concerning the case C-507/17) in the case of Eva Glawischnig-Piesczek versus Facebook Ireland Limited [23], was settling a dispute quite similar to the one presented in this article. The basis for the Court's ruling was Art. 15 of Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the internal market (Directive on electronic commerce) [24]. This provision pertains to the monitoring being carried out by service providers, concerning the content that is being posted on their websites by their users. Referring to recital 52 of Directive 2000/31/EC, the CJEU pointed out that the damage that may arise in connection with information society services is characterised both by its rapidity and by its geographical extent [25]. The directive itself does not provide for any geographical restrictions concerning the use of prescriptive measures [26]. Thus, it is possible to order the hosting service provider to remove or block access to information worldwide, provided the EU regulations comply with the international law framework.

According to *L. Woods*, the balancing test in case C-18/18 differs from the one in judgment C-507/17 [27]. In the case of Google LLC, the Court pointed out that the right to freedom of information stands opposite to the rights of the data subject (i.e. the right to privacy and protection of personal data). However, in the case of Eva Glawischnig-Piesczek, opposite to the rights of the data subject stands the need of not imposing an excessive burden on the hosting service provider within the scope of supervision and searching for unlawful content. Nevertheless, it should be noted that the presented subject-matter is very similar and is likely to be raised by advocates of global de-referencing.

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[23] Case C-18/18, Eva Glawischnig-Piesczek contro Facebook Ireland Limited, ECJ, 3.10.2019.

[24] OJEU L of 17 July 2000.

[25] Judgment C-18/18 (fn 23) para 28.

[26] Judgment C-18/18 (fn 23) paras 49 and 50.

[27] L. WOODS, *Facebook's liability for defamatory posts: the CJEU interprets the e-commerce Directive* (2019) *EU Law Analysis*, available on http://eulawanalysis.blogspot.com/search?q=507%2F17.

6. Two stages of exercising the right to be forgotten?

It should be noted that the judgments in the case of Google Spain and in the case of Google LLC actually introduce the need for search engine operators to implement two stages of verifying whether specific links should be removed from the search results list. The first one, introduced on the basis of the judgment in the case of Google Spain – in accordance with paragraph 4 of the judgment, requires the operator to check whether the rights of the data subject prevail in the specific situation over the economic interest of the operator or the interest of recipients in finding said information as part of conducting a search based on the first and last name of this person (although the Court itself states that the data subject's rights prevail over those two opposite values). In addition, the operator must determine whether in the particular case there are special reasons why it is not possible to remove the links in question (e.g. the role that the person plays in public life).

If the search engine operator concludes that it is necessary to remove specific search results, it will be required to move to the second stage, i.e. to decide on the extent of the territorial right to be forgotten in connection with the judgment in the case of Google LLC. The operator must then balance the values of the data subject, i.e. the right to privacy and protection of personal data, against the right to freedom of information. If the controller considers that the Internet users' (including those outside the EU) access to disputed links about a person whose main centre of interest lies within the EU will have immediate and significant consequences for that person in the EU itself, it will be advisable to remove these links from search results lists for every search engine extension. However, if the operator does not believe the above situation to take place, the links removal (or at least the application of measures that would considerably discourage users from gaining access to those links) should be limited only to the territory of the Member States of the Union.

7. Conclusion

To sum up, it should be concluded that the judgment in the case of Google LLC will not stop the initiation of further proceedings regarding de-referencing on all versions of search engines, not only those corresponding to the extensions to the Member States of the European Union. The Court allowed the possibility of formulating such requests in special situations, which means that subsequent court and administrative cases, which will be conducted in the courts of the Member States to the indicated extent, will simultaneously create a catalogue of cases in which such protection should be granted to data subjects. At the same

time, it cannot be ruled out that further requests for preliminary rulings in this respect will be issued to the CJEU.

Unlike countries, the Internet is not limited by any borders. This fact becomes problematic in the perspective of effective application of the right to be forgotten. There seem to be two solutions to this state of affairs. The first one is extraterritorial application of the above institution based on EU regulations, which would necessarily result in a conflict with other legal regulations in this respect (e.g. with American law and its distinctive approach to the relationship between the right to privacy and protection of personal data, and the freedom of information). The second potential solution, although certainly requiring some time in terms of its implementation, is an attempt to standardise legal regulations in the aspect of applying the right to be forgotten. This, of course, is associated with the need to reconcile many legal systems and their solutions provided for Internet search engines [28]. It seems appropriate to opt for the second solution in the long run. After all, global problems require global solutions.

[28] It should also be noted that the right to be forgotten has been addressed in some legislations or court orders (the case of Virginia da Cunha v Yahoo and Google, see E.L. CARTER, *Argentina's Right to be Forgotten* (2013) *Emory International Law Review*, available on http://law.emory.edu/eilr/content/volume-27/issue-1/recent-developments/argentinas-right-to-be-forgotten.html) even before the ruling in the case of Google Spain. More and more legal regulations outside the European Union provide for the ability of removing one's own personal data. Cf. D. ERDOS-K. GARSTKA, *The 'Right to be Forgotten' Online within G20 Statutory Data Protection Frameworks* (2019) 31 *University of Cambridge Faculty of Law Research Paper*.