

Case Notes

The Case Notes section will identify and analyse important judgments that shape the interpretation and application of the EU law in the field of privacy and data protection. If you are interested in contributing, please contact the Case Note Editor Maja Brkan at maja.brkan@maastrichtuniversity.nl.

Google and the Right to Be Forgotten

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Case C-131/12, Google Spain SL & Google Inc. v Agencia Española de Protección de Datos (AEPD) & Mario Costeja González, 13 May 2014, ECLI:EU:C:2014:317 – Opinion Advocate-General Jääskinen of 25 June 2013

Personal data – Protection of individuals with regard to the processing of such data – Material and territorial scope – Internet search engines – Processing of data contained on websites – Searching for, indexing and storage of such data – Responsibility of the operator of the search engine – Establishment on the territory of a Member State – Extent of that operator's obligations and of the data subject's rights

Article 2, 4, 12 and 14 of Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data

I. Facts

In 2010, Mr Costeja González, a Spanish national residing in Spain, lodged a complaint with the Spanish data protection authority (“AEPD”) against La Vanguardia (publisher of a daily newspaper) and against Google Spain and Google Inc. González's complaint concerned the fact that, when an internet user entered Mr Costeja González's name in the Google search engine, he would obtain links to two pages from an edition of La Vanguardia's newspaper published in 1998, containing notification of an auction of real estate owned by Mr Costeja Gonzalez arising from attachment proceedings for the recovery of social security debts. González requested the AEPD to order La Vanguardia to remove or alter those pages so that the personal data relating to him no longer appeared or to use certain tools made available by search engines in order to protect the data. Furthermore, González requested the AEPD to order Google Spain and Google Inc. to remove or conceal the personal data relating to him so that they ceased to be included in the search results and no longer appeared

in the links to La Vanguardia. He stated that the attachment proceedings concerning him had been fully resolved for a number of years and that reference to them had become entirely irrelevant.

The AEPD rejected the complaint in relation to La Vanguardia, taking the view that the publication of the information was legally justified as it took place upon order of the Ministry of Labour and Social Affairs and was intended to give maximum publicity to the auction in order to secure as many bidders as possible. The complaint against Google Spain and Google Inc. was upheld and the AEPD ordered Google Spain and Google Inc to withdraw the data. In the subsequent proceedings before the Spanish Nation-

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al High Court the question was raised concerning the obligations of the operators of search engines to protect personal data of persons concerned who do not wish certain information linked to them, to be located, or indexed or made available to internet users indefinitely. Since the answer depended on the way in which Directive 95/46 should be interpreted, the Court decided to request the Court of Justice for a preliminary ruling.

II. Judgment

1. The material scope of Directive 95/46

The referring Court firstly raised questions relating to the material scope of Directive 95/46.¹ In particular, the Court asked whether the activity of a search engine as a provider of content which consists in finding information published or placed on the internet by third parties, indexing it automatically, storing it temporarily and, finally, making it available to internet users according to a particular order of preference must be classified as “processing of personal data” within the meaning of Article 2(b) of Directive 95/46. In case of a positive answer to this question, the referring Court asked whether the operator of a search engine must be regarded as the “controller” in respect of that processing of the personal data, within the meaning of Article 2(d) of Directive 95/46. This last question is of relevance, as the controller is the person responsible for compliance with the data protection rules.²

In its judgment the Court of Justice notes that it is not contested that the data found, indexed and stored by search engines and made available to their users include information relating to identified or identifiable natural persons and thus constitute “personal data” within the meaning of Article 2(a) of Directive 95/46 (para. 27). The activities of the search engine regarding this data must be classified as “processing”, regardless of the fact that the operator of the search engine also carries out the same operations in respect of other types of information and does not distinguish between the latter and the personal data

(para. 28). This finding is not affected by the fact that those data have already been published on the internet and are not altered by the search engine (para. 29).

As to the question whether the search engine must be regarded as controller, Google had argued that it could not be considered as such since it has no knowledge of the data in question and does not exercise control over the data (para. 22). The Court rejects this reasoning and recalls that Article 2(d) of Directive 95/46 defines “controller” as “the natural or legal person, public authority or agency or any other body which alone or jointly with others determines the purposes and means of the processing of personal data” (para. 32). Since it is the search engine operator which determines the purposes and means of the activities which includes the processing of personal data, the search engine must be regarded as controller in respect of that processing (para. 33). According to the Court any other conclusion would not only be contrary to the clear wording of the provision, but also to its objective which is to ensure, by employing a broad definition of the concept of “controller”, the effective and complete protection of data subjects (para. 34). This conclusion is further developed in the following four paragraphs (para. 35-38) in which the Court addresses the different and additional nature of the activity of a search engine compared with the activity of the publishers of websites (such as *La Vanguardia*). The Court emphasises that the “activity of search engines plays a decisive role in the overall dissemination of those data” and that the possibility of searching on an individual’s name, enables users “to establish a more or less detailed profile of the data subject” (para. 36/37). The “activity of a search engine is therefore liable to affect significantly, and additionally compared with that of the publishers of websites, the fundamental rights to privacy and to the protection of personal data” (para. 38).

2. The territorial scope of Directive 95/46

The Court then considers the question of whether it is possible to apply the Spanish legislation, transposing Directive 95/46, in the circumstances of the case. Google had argued that the actual data processing was exclusively performed by Google Inc., which operates and manages the search engine and which is established in the United States. Google Spain, as a subsidiary of Google Inc., only promotes, facilitates

¹ The precise content of the questions can be found in para. 20 of the ruling.

² See Article 6(2) of Directive 95/46.

and effectuates the sale of on-line advertising products and services to third parties and markets that advertising.

The Court takes the view that Google Spain is an establishment of Google Inc. within the meaning of Article 4(1)(a) of Directive 95/46 (para. 49). The Court points out that Article 4(1)(a) of Directive 95/46 does not require the processing of personal data in question to be carried out “by” the establishment concerned itself, but only that it be carried out “in the context of the activities” of the establishment a phrase which has to be interpreted broadly (para. 52-54). According to the Court this condition is fulfilled in the present case since the activities of the operator of the search engine and those of its establishment situated in the Member States concerned are inextricably linked as the activities relating to the advertising space constitute the means of rendering the search engine economically profitable and that engine is, at the same time, the means enabling those activities to be performed (para. 55-56).

3. The extent of the responsibility of the operator of a search engine under Directive 95/46

The next question the Court considers is whether Article 12(b) and Article 14(1)(a) of Directive 95/46 should be interpreted as meaning that the operator of a search engine is obliged to remove from the list of results displayed from a search made on the basis of a person’s name links to web pages published by third parties and which contains information relating to that person, also in a case where that name or information is not erased beforehand or simultaneously from those web pages, and whether this obligation exists even when the web page publication is, in itself, lawful (para. 62). Article 12(b) provides for the right of the data subject to obtain the rectification, erasure or blocking of data the processing of which does not comply with Directive 95/46. Pursuant to Article 14(1)(a) the data subject may, at any time, on compelling legitimate grounds relating to his particular situation, object to the processing of data relating to him.

The Court recalls in relation to Article 12(1)(b) that all processing of personal data must in principle comply with the principles relating to data quality as set out in Article 6 of Directive 95/46³ and must meet

one of the criteria for making the processing of personal data legitimate as listed in Article 7 of Directive 95/46 (para. 71). According to the Court, the processing by Google is capable of being covered by the ground in Article 7(f) which permits the processing of personal data where it is necessary for the purposes of the legitimate interests pursued by the controller or by the third party or parties to whom the data are disclosed, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject (para. 73-74). The Court considers that the application of Article 7(f) necessitates a balancing of the opposing rights and interests concerned, in the context of which account must be taken of the significance of the data subject’s rights arising from Article 7 and 8 of the Charter (para. 74).

The Court continues by stating that the question whether the processing complies with Articles 6 and 7(f) of Directive 95/46 may follow a request of the data subject on the basis of Article 12(b). In addition, in certain circumstances, the data subject may rely on the right to object as laid down in Article 14(1)(a) (para. 75). The balancing to be carried out under Article 14(1)(a) enables account to be taken in a more specific manner of all the circumstances surrounding the data subject’s particular situation (para. 76). The data subject may address these requests directly to the controller who must then duly examine their merits and, as the case may be, end processing of the data in question. Where the controller does not grant the request, the data subject may bring the matter before the supervisory authority or the judicial authority so that it carries out the necessary checks and orders the controller to take specific measures accordingly (para. 77).

The Court subsequently deals with the balance to be made in the case at hand. It emphasises that the activities of the search engine are “liable to affect significantly the fundamental rights to privacy and to the protection of personal data” and states that the effect of the interference with those rights “is height-

3 According to this provision data must be processed “fairly and lawfully”, be “collected for specified, explicit and legitimate purposes and not further processed in a way incompatible with those purposes”, be “adequate, relevant and not excessive in relation to the purposes for which they are collected and/or further processed”, be “accurate and, where necessary, kept up to date” and, finally, be “kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which the data were collected or for which they are further processed”.

ened on account of the important role played by the internet and search engines in modern society, which renders the information contained in such a list of results ubiquitous” (para. 80). According to the Court the interference cannot be justified by merely the economic interest of the search engine operator, however, it may have effects upon the legitimate interest of the internet users potentially interested in having access to the information (para. 81). Therefore, a fair balance has to be sought:

Whilst it is true 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.

If a supervisory authority comes to the conclusion that the interests of the data subject prevail, it may order the operator of the search engine to remove the data from the list following a search, without presupposing the previous or simultaneous removal of the name and information from the web page on which they were published (para. 82). In that respect, the Court again points at the distinction between the activities of the search engine and the publisher of a website (para. 83). It adds that, “given the ease with which information published on a website can be replicated on other sites and the fact that persons responsible for its publication are not always subject to European Union legislation”, effective and complete protection of data subject would not be achieved if the latter had to obtain first or in parallel the erasure of their information from the publishers of websites (para. 84). Furthermore, the processing of the publisher could fall under derogations for data processing carried out “solely for journalistic purposes” as foreseen in Article 9 of Directive 95/46, while this is not the case for a search engine (para. 85).

The Court finally notes that the ground which would justify the publication of personal data on a website does not necessarily coincide with the ground that could apply to justify the activity of search engines (para. 86). Furthermore, the outcome of the weighing of the interests at issue may in any event differ according to whether the processing is carried out by the operator of a search engine or that

carried out by the publisher of the web page is at issue, given that, first, the legitimate interests justifying the processing may be different and the consequences of the processing for the data subject, and in particular for his private life, are not necessarily the same (para. 86). Indeed, since the inclusion in the list of results, displayed following a search made on the basis of a person's name, of a web page and of the information contained on it relating to that person makes access to that information appreciably easier for any internet user making a search in respect of the person concerned and may play a decisive role in the dissemination of that information, it is liable to constitute “a more significant interference” with the data subject's fundamental right to privacy than the publication on the web page (para. 87).

4. The scope of the data subject's rights guaranteed by Directive 95/46

The final question considered by the Court concerns the so-called “right to be forgotten”. The question asked is whether Article 12(b) and Article 14(1)(a) must be interpreted as enabling the data subject to require the operator of a search engine to remove the personal data from the list of results, on the ground that that information may be prejudicial to him or that he wishes it to be “forgotten” after a certain time (para. 89).

As regards Article 12(b), the Court considers that it follows from Article 6(1)(c) to (e) that the processing of accurate data which is lawful initially may, in the course of time, become incompatible with the directive where those data are no longer necessary in the light of the purposes for which they were collected or processed. A finding of such incompatibility upon a request based on Article 12(b) should lead to the erasure of the information and links concerned in the list of results (para. 94).

If the non-compliance is based on an alleged non-compliance with the conditions laid down in Article 7(f) and requests under Article 14(1)(a), the Court points out that in each case the processing of personal data must be authorized under Article 7 for the entire period during which it is carried out (para. 95).

Then, the court considers:

96. In the light of the foregoing, when appraising such requests made in order to oppose processing such as that at issue in the main proceedings, it should in particular be examined whether the da-

ta subject has a right that the information relating to him personally should, at this point in time, no longer be linked to his name by a list of results displayed following a search made on the basis of his name. In this connection, it must be pointed out that it is not necessary in order to find such a right that the inclusion of the information in question in the list of results causes prejudice to the data subject.

97. *As the data subject may, in the light of his fundamental rights under Articles 7 and 8 of the Charter, request that the information in question no longer be made available to the general public by its inclusion in such a list of results, it should be held, as follows in particular from paragraph 81 of the present judgment, that those rights override, as a rule, not only the economic interest of the operator of the search engine but also the interest of the general public in finding that information upon a search relating to the data subject's name. However, that would not be the case if it appeared, for particular reasons, such as the role played by the data subject in public life, that the interference with his fundamental rights is justified by the preponderant interest of the general public in having, on account of inclusion in the list of results, access to the information in question.*

98. *As regards a situation such as that at issue in the main proceedings, which concerns the display, in the list of results that the internet user obtains by making a search by means of Google Search on the basis of the data subject's name, of links to pages of the on-line archives of a daily newspaper that contain announcements mentioning the data subject's name and relating to a real-estate auction connected with attachment proceedings for the recovery of social security debts, it should be held that, having regard to the sensitivity for the data subject's private life of the information contained in those announcements and to the fact that its initial publication had taken place 16 years earlier, the data subject establishes a right that that information should no longer be linked to his name by means of such a list. Accordingly, since in the case in point there do not appear to be particular reasons substantiating a preponderant interest of the public in having, in the context of such a search, access to that information, a matter which is, however, for the referring court to establish, the data subject may, by virtue of Article 12(b) and subparagraph (a) of the first paragraph of Article 14 of Directive*

95/46, require those links to be removed from the list of results.

III. Comment

1. A right to be forgotten

This ruling has been widely reported around the world. The Court acknowledges a right to be forgotten which can be invoked against operators of search engines. This ruling appears to enable a person to polish his digital image which follows from a search on the person's name on a search engine (also known as "egosurfing" or "ego-googling"). Control over own data is reinforced. Still, the ruling has not been well received by all, including digital rights organisations such as European Digital Rights (EDRi).⁴ The main criticism of the ruling concerns the lack of regard or weight the Court gives to the freedom of expression. In addition there has been some criticism of the fact that in first instance the Court leaves it up to the provider of the search engine, in this case Google, to perform the balancing exercise. Obviously, Google was disappointed with the judgment.⁵ It indicated in December 2014 that since the ruling of the Court it had received 185.745 requests for removal of links in the list of search results.⁶ Viviane Reding, until the summer of 2014 the European Commissioner responsible for justice matters, was not impressed by earlier figures provided by Google. She pointed at the 761.898 requests Google receives per day to take off material which is protected by intellectual property rights.⁷

The questions put to the Court of Justice were not easy to answer. The Court had to address a situation in light of EU data protection rules which date back to 1995, a year in which both internet and mobile

4 See <http://www.edri.org>, post of 21 May 2014, (last accessed on 5 December 2014).

5 See The Guardian of 13 May 2014, "EU court backs 'right to be forgotten': Google must amend results on request", to be found at <http://www.theguardian.com/technology/2014/may/13/right-to-be-forgotten-eu-court-google-search-results>, (last accessed on 5 December 2014).

6 See Google Transparency Report to be found at <https://www.google.com/transparencyreport/removals/europeprivacy/?hl=en>, (last accessed on 5 December 2014).

7 To be found at <https://docs.google.com/file/d/0B8syaai6SSfiT0EwRUFyOENqR3M/edit?pli=1>, (last accessed on 5 December 2014), see pt. 23.

telephony were in their infancy. In addition, the Court had to reconcile different fundamental rights, the importance of which have grown in parallel with the development and growth of the digital society. The Court could validly have come to different conclusions, as is illustrated by the opinion of the Advocate-General in this case, from which the Court to a large extent deviates.

The ruling follows one month on from another important judgment in which the Court annulled the EU directive which required the retention of telephone data.⁸ In both judgments the Court acknowledges the importance of strong and effective privacy and data protection rights. The two rulings have already been used as points of reference in further case law, as follows from a recent ruling on the legality a private surveillance system located under the eaves of a family home.⁹

As to the present case, most media attention was given to the recognition of a right to be forgotten. However, the first two hurdles the Court had to clear, before it commenced its analysis on the right to be forgotten, are also of significant importance. These concern the questions whether Google can be considered to be a controller and whether the EU rules apply to Google at all.

2. First hurdle: can Google be qualified as controller?

The conclusion of the Court that the activities of Google (finding information published or placed on

the internet by third parties, indexing it automatically, storing it temporarily and, finally, making it available to internet users according to a particular order of preference) should be considered to be the processing of personal data in the sense of Article 2(b) of Directive 95/46 does not come as a surprise. It follows logically from earlier case law, in particular the rulings in *Lindqvist* and *Satakunnan*. In *Lindqvist*, the Court considered that putting personal data on a website should be considered as processing of personal data, and in *Satakunnan* the Court concluded that it made no difference whether the personal data had already been in the public domain.¹⁰

It was less evident that Google Spain should be seen to be the person responsible for the processing, the so-called “controller”. The Advocate-General (“AG”) had come to the conclusion that this was *not* the case.¹¹ His interpretation of the notion of “controller” followed a generally more reserved approach towards questions on the material scope of the data protection rules.¹² The AG considered the definition of controller which refers to the person “determining the purposes and means of the processing of the *personal data*”.¹³ In his view, the general scheme of the directive, in most language versions and the individual obligations it imposes on the controller “are based on the idea of *responsibility of the controller* over the *personal data* processed in the sense that the *controller* is aware of the existence of a certain defined category of information amounting to personal data and the controller processes this data with some intention which relates to their processing *as personal data*”.¹⁴ The AG followed the Article 29 Working Party who, in an advice on search engines from 2008, made a distinction between the completely passive and intermediary functions of search engines and situations in which search engines actually control the personal data, in which case the search engine should be considered as controller.¹⁵ On the basis of this, the AG came to the conclusion that in the present case, Google could not be held responsible, except for the cases where it had not complied with the exclusion codes on a website or where a request emanating from the website regarding update of cache memory had not been complied with.¹⁶

The Court, in its assessment of how the term “controller” should be defined takes an approach which is different to that of the AG. According to the Court, the definition of the notion “controller” is clear and

8 CJEU 8 April 2014, *Digital Rights Ireland and Seitlinger a.o.*, C-293/12 and C-594/12, ECLI:EU:C:2014:238.

9 CJEU 11 December 2014, *Františic Ryneš*, C-212/13, ECLI:EU:C:2014:2428, see pts. 27-29.

10 CJEU 6 November 2003, *Lindqvist*, C-101/01, EU:C:2003:596, pt. 25 and CJEU 12 September 2007, *Satakunnan Markkinapörssi and Satamedia*, C-73/07, EU:C:2008:727, pts. 48 and 49.

11 Opinion AG Jääskinen, pt. 100.

12 *Ibid.*, pts. 30/31 and 78/79.

13 *Ibid.*, pt. 80, emphasis in original.

14 *Ibid.*, pt. 82, emphasis in original.

15 *Ibid.*, pt. 85, with reference to Opinion 1/2008 of the Article 29 Working Party of 4 April 2008 on data protection issues relating to search engines (WP 148), to be found at http://ec.europa.eu/justice/data-protection/article-29/index_en.htm (last accessed on 5 December 2014). The Article 29 Working Party is an EU advisory body composed of the data protection authorities of all the EU Member States and the European Data Protection Supervisor.

16 *Ibid.*, pt. 99.

to exclude search engines from the scope would be contrary to the objective of the provision which is to ensure, through a broad definition of the concept, the effective and complete protection of data subjects (para. 34). As indicated, the Court emphasises that the activities of the search engine are different from the activities of the website (para. 35). The activity of the search engine significantly affects the rights of the data subject, which are *in addition* to the activities of the website holder (para. 38). This distinct character of the activities of a search engine is a crucial point in the reasoning of the Court and with respect to several of the questions considered by the Court, it explains why it took an approach different to that of the AG, starting with whether Google can be considered "controller".

The Court does not accept that the role of Google, as the provider of a search engine, is only a passive one. Accordingly, the Court concludes that Google can be held responsible for data to which its searches may lead a user and it must therefore ensure that the processing of the personal data complies with the requirements of Directive 95/46. Obviously, this only applies if the directive is applicable with a view to its territorial scope, the second hurdle.

3. Second hurdle: are the EU rules applicable to the activities of Google?

Article 4 of Directive 95/46 sets out the territorial scope of the directive. The data protection rules apply if the processing of personal data is carried out in the context of the activities of an establishment of the controller on the territory of a Member State, or, in case no such establishment exists, if for the purpose of processing personal data, the controller makes use of equipment on the territory of a Member State.¹⁷ In the present case, there is no doubt that Google Inc. had an establishment in Spain. It was less evident that the Court would conclude that the processing of personal data by Google was carried out in the context of the activities of the Spanish establishment, since the activities of Google Spain concerned only the commercial exploitation of the search engine.

Again, the Court is led by the objective of Directive 95/46, which is to offer individuals effective protection. In order to prevent individuals from being deprived of the protection guaranteed by it, and that

protection from being circumvented, the directive prescribed "a particularly broad territorial scope" (para. 54). Since the activities of Google Spain and Google Inc. are inextricably linked, the Court concludes that the personal data processing activities take place in the context of the activities of the Spanish establishment.

This leaves the reader with an unanswered "what if" question. What if the Court concluded otherwise on this point, and had to assess whether Google Inc. for the purpose of the data processing made use of equipment on the Spanish territory? Not an easy question to answer, since this element to define the territorial scope of the directive seems outdated. Due to cloud computing services, the physical equipment used for the storage and transfer of personal data could in theory be located everywhere in the world. Moreover, the exact geographical location of Google data centres are kept secret.¹⁸

The positive answer of the Court, which is actually in line with the opinion of the Advocate-General, avoids the odd situation whereby the EU data protection rules would not apply to a Spanish citizen who, through a Spanish website, searches on his own name, and finds a link to a Spanish website of a Spanish newspaper which published his personal data on something that happened in Spain. It may perhaps be assumed that the Court *had* to give a positive answer to the question.

Still, the ruling has not been free from criticism on this point. Kuner argues that the EU is creating a sort of EU internet which is different from the worldwide web.¹⁹ Indeed, parallel digital realities could exist if in a situation like the present case Google would only remove the link to La Vanguardia for persons that are performing the search from the EU territory, but not for persons who are doing so while being physically outside the EU. However, this does not seem to be the consequence of a broad interpretation of the territorial scope of the EU data protection rules,

¹⁷ See Article 4(1)(a) and (c) of Directive 95/46. Another possibility is provided in Article 4(1)(b), when the controller is not established on a Member States' territory, but in a place where the national law of a Member State applies by virtue of international public law.

¹⁸ See opinion AG Jääskinen, pt. 62.

¹⁹ Christopher Kuner, *The Court of Justice of EU's Judgment on the "Right to be forgotten": An International perspective*, 20 May 2014, to be found at <http://www.ejiltalk.org>, (last accessed on 5 December 2014).

but rather the borderless nature of internet and the limits of national and regional jurisdictions.

In January 2012, the European Commission proposed new data protection rules. The provision on the territorial scope of the regulation which is supposed to replace Directive 95/46 is changed. The rules should still apply if the processing of personal data takes places in the context of the activities of an establishment of the controller, but the criterion on the use of equipment has been abolished. Instead, in the absence of an establishment, the rules apply if the processing activities are related to the offering of goods and services to data subjects residing in the Union, or the monitoring of their behavior.²⁰ This approach is in line with the one chosen for the protection of consumers on internet.²¹ With these new rules, there would obviously be no doubt that the rules apply to a situation such as in the present case.

4. The right to be forgotten in Directive 95/46

The Advocate-General presented a definition of the right to be forgotten, namely the entitlement of a data subject “to restrict or terminate dissemination of personal data that he considers to be harmful or contrary to his interests”.²² According to the AG such an entitlement was not provided for in Directive 95/46. The purposes of processing and the interests served by it, when compared to those of the data subject, are the criteria to be applied when data is processed without the subject’s consent, and not the subjective preferences of the latter.²³ The AG took the view that a subjective preference does not amount to a compelling legitimate ground within the meaning of Article 14(a) of the directive.

Because the right to data protection in Article 8 of the EU Charter “does not as such add any significant new elements” to the interpretation of Directive 95/46, the AG looked at whether the right to be forgotten could possibly be derived from the right to privacy in Article 7 of the EU Charter.²⁴ Such a right should then be balanced with the right of freedom of expression and information (Article 11 Charter) and the right to conduct a business (Article 16 EU Charter), which, according to the AG, leads to “a particular complex and difficult constellation of fundamental rights” which “prevents justification for reinforcing the data subject’s legal position under [Directive 95/46] and imbuing it with a right to be forgotten”.²⁵ It would entail “sacrificing pivotal rights such as freedom of expression and information”.²⁶ The AG explicitly discourages the Court from concluding that the conflicting interests could satisfactorily be balanced in individual cases on a case-by-case basis, with the judgment to be left to the internet search engine service provider:

*In particular, internet search engine service providers should not be saddled with such an obligation. This would entail an interference with the freedom of expression of the publisher of the web page, who would not enjoy adequate legal protection in such a situation, any unregulated ‘notice and take down procedure’ being a private matter between the data subject and the search engine service provider. [...] It would amount to the censoring of his published content by a private party. [...] It is a completely different thing that the States have positive obligations to provide an effective remedy against the publisher infringing the right to private life, which in the context of internet would concern the publisher of the web page.*²⁷

Despite this warning, the Court concludes that a right to be forgotten can be derived from Directive 95/46 and that Google, after receiving a request to that extent, has to assess case-by-case whether the request should be accepted or not.

At the basis of the divergence of views, is the position of the Court that the activities of a search engine like Google are separate from and come in addition to the activities of the website holder. This distinction allows the Court to declare the legality of the initial publication of the data on internet irrelevant for assessing whether the search engine operator should remove the contested links (para. 86). In the

20 See Article 3 of the proposal of 25 January 2012 for a regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation), COM(2012)11.

21 See e.g. CJEU 7 December 2010, *Pammer and Hotel Alpenhof*, C-585/08 and C-144/09, ECLI:EU:C:2010:740.

22 Opinion AG Jääskinen, pt. 108.

23 *Ibid.*

24 *Ibid.*, pt. 113 and 126 and further.

25 *Ibid.*, pt. 133.

26 *Ibid.*

27 *Ibid.*, pt. 134.

same logic, the Court can conclude that a person is not required to lodge a parallel request for removal to the publisher of the website (para. 82-84).

The Court also uses the distinction between the activities of the search engine and the website holder to allow it to leave a consideration of the important role a search engine plays, as an instrument of the freedom of expression and information for persons wanting to disseminate information (the publisher of a website), largely out of its analysis.²⁸ Having made this distinction, the Court is able to say that the interests of the search engine operator are solely economic. In line with this, the Court considers that the activities of a publisher of a website can fall under Article 9 of Directive 95/46, which contains the exception for journalistic purposes, while the activities of the search engine operator appear to be outside the ambit of Article 9 (para. 85). For the present case, the Court is able to leave the interests of the website holder outside the analysis because when making the balance of interests under Article 7(f) only the legitimate interests of the third party or parties “to whom the data are disclosed” are taken into account and not those of the third party who disseminates the information.

The Court places the emphasis on the interest of the data subject. This is most clearly illustrated by the consideration that the rights of the data subject, as a rule, override not only the economic interest of the operator of the search engine but also the interest of the general public in finding that information upon a search relating to the data subject's name (para. 81 and 97). However, the Court identifies some circumstances in which the right of the general public in having access to the information in question prevails. In determining whether such circumstances exist, the criteria the Court will consider, namely the role played by the data subject in public life and the interest of the public of having that information, resemble the criteria used by the European Court of Human Rights in its well-established case law on the balance between the right to privacy and the freedom of expression.²⁹

By formulating the point of departure as being that the rights of the data subject, as a rule, prevail over the interests of the search engine and its users, the Court seems to take the position that the subjective preferences of the data subject are sufficient ground for a successful request for removal of the link from the list of search result. Apparently, the Court was not convinced by the objections of the AG, who want-

ed to give meaning to the requirement in Article 14 that the data subject should have compelling legitimate grounds for the objection to the processing. The Court in fact seems to absorb this criterion in the balance of interests to be made under Article 7(f). It thereby relinquishes the opportunity to use the criterion provided in Article 14 to give a bit more weight to the right of freedom of expression and avoid criticism on the lack of a proper balance between the conflicting rights at stake.³⁰

As a consequence of the ruling, if a request arrives from a person concerning search results for his name Google has to assess where the balance of interests lay on a case-by-case basis. Out of the almost 186.000 requests it received in December 2014, Google indicated that it had refused about 60 percent. On 26 November 2014, the Article 29 WP published guidelines indicating the agreed common approach of all data protection authorities in the EU.³¹ It developed 13 main criteria which should be seen as a flexible working tool to help data protection authorities during their decision making process.³² Data protection authorities should now be ready to deal with what might become a flood of complaints of persons whose requests were denied by Google.

5. The new EU rules on data protection

Now that a right to be forgotten can be derived from the provisions of Directive 95/46, the question arises, what added value the right to be forgotten has in the newly proposed rules on data protection. The

28 The Court does point at the “important role” played by search engines, but only to underline that its activities constitute a more significant interference with the data subject's fundamental right to privacy than the publication on the website, see pts. 80 and 87. See for criticism on this point Hielke Hijmans, *Right to have links removed: Evidence of effective data protection*, Maastricht Journal, p. 555-563.

29 See e.g. ECHR 14 June 2004, *Von Hannover v. Germany* (59320/00, *RJD* 2004-VI).

30 See e.g. Steve Peers, *The CJEU's Google Spain judgment: failing to balance privacy and freedom of expression*, post of 13 May 2014 on <http://eulawanalysis.blogspot.be>, (last accessed on 5 December 2014).

31 These guidelines (WP 225) can be found at http://ec.europa.eu/justice/data-protection/article-29/index_en.htm, (last accessed on 5 December 2014).

32 See the press release which accompanied the publication of the guidelines, to be found at http://ec.europa.eu/justice/data-protection/article-29/index_en.htm, (last accessed on 5 December 2014).

right to be forgotten (together with the right to erasure) has explicitly been included in Article 17 of the proposed Regulation and has been presented as one of the important reinforcements of the rights of the data subject.³³

According to Article 17(2) where “the controller [...] has made the personal data public, it shall take

all reasonable steps, including technical measures, in relation to data for the publication of which the controller is responsible, to inform third parties which are processing such data, that a data subject requests them to erase any links to, or copy or replication of that personal data”. The third paragraph contains some exceptions, including that when retention of the data is necessary “for exercising the right of freedom of expression”.³⁴

The proposed new right to be forgotten goes further than the one derived from the current rules. We must await to see what the provision will look like after the legislative procedure has been concluded.

33 See speech of former Commissioner Viviane Reding of 25 January 2012 when launching the new data protection proposals, to be found at http://europa.eu/rapid/press-release_SPEECH-12-26_en.htm, (last accessed on 5 December 2014).

34 See also the Opinion of AG Jääskinen, pt. 110.