

## RIGHT TO BE FORGOTTEN – INDEED A NEW PERSONAL RIGHT IN DIGITAL EU MARKET?

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### ABSTRACT

*The article analyses the judgment in case Google Spain, C-131/12, in which the Court of justice of the EU (CJEU) decided that search engines do bear certain part of a responsibility to protect privacy, although that they are not the author of certain information, nor they change the substance of such an information. The sole argument that they help searching certain information is, for the CJEU, enough to include them in the circle of persons, who are not without responsibility regarding different internet services. The decision has huge effects and as it is seen from the literature, much bigger and more comprehensive than the CJEU wanted. The article argues that this decision does not mean (not yet) a right to be forgotten as it could be understood from the outset. Namely, certain information, which somebody wanted to have removed, is still there, somewhere in the internet, just we cannot find it any more (unless we know the internet address or other criteria, not the name, which could help us find it).*

*Key words: Right to be forgotten, privacy, public persons, media, internet, search engines, right to be informed, freedom to speech, defamation, legal remedies against media*

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### 1. INTRODUCTION

The digital and internet developments have huge impacts on privacy. Not only that different information, photos, videos, texts, etc. can be easily published, they are also easily accessible to anybody worldwide. There is also another feature, which is indeed important from legal point of view; namely, certain information can be discovered very fast. A fast discovery of information is crucial also for the protection of privacy. Namely, even though that certain information is published somewhere in the internet, the fact that one cannot find it fast or in an easy way, influences a lot to the level of legal protection.

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In the case *Google Spain*,<sup>1</sup> in my opinion, the latter is at the heart/core of the court's judgment. I do not think that the judgment is indeed a lot about a new right, personal and fundamental right, a right to be forgotten, but rather refers to some other questions, where in the foreground, it is a question, how to frame the responsibilities of internet services providers, especially search engines, which offers a platform and applications for services of somebody else, or offers services which enable us to find certain information very quickly. The judgment does not refer to a right to be forgotten with these words. One cannot find these words written by the CJEU (only by the parties) in the interpretative part of the judgment. Even more, the judgment is not about certain information or about somebody that shall be removed from the internet. Therefore, the information is still there (and we cannot claim, that the person is therefore "totally" forgotten), just finding it is more difficult; that is the effect of the judgment.

Before going deeper into the judgment and its analysis, let us make a short discourse to the framework of the digital area at the one hand and privacy issues on the other hand. A development of the digitalization, the internet, the e-commerce, etc. faces us with the issues that we were not aware of in the past. Information as such has become a good of a market value. Information is in the core of the capital interests. It brings money, it brings advertisements, readers, buyers, interest groups, ... and if information is accessible by internet, worldwide, its value can increase rapidly. Having information somewhere there in the internet jungle, it is also necessary to have engines that help search for the information. Usually, if somebody is offering certain information on the internet, it is not the same person who also offers a search engine to look up for such information. Therefore, it is hard to distinguish what is the role of the author of the information, the role of person offering such information on the internet and the role of person which helps to search for it. Usually, the later will claim that it has no responsibility, since it did not give any content to the information, it did not legally or illegally put information into circulation and distribution, etc. It, the search engine namely, just offers the help how to search for it. But is this "help" really "nothing" from the perspective of the privacy issues?

One should also be aware, that information once on the internet can easily cross the states' borders. To be more direct, the internet is basically without the limits. The only limits are languages, type of the letters and the sole technical access to the internet. In such circumstances, privacy becomes very vulnerable. The attacks on the individual's privacy could have huge impacts worldwide; and basically is impossible to be forgotten.

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<sup>1</sup> Judgment of the Court (Grand Chamber) of 13 May 2014, *Google Spain SL and Google Inc. v Agencia Española de Protección de Datos (AEPD) and Mario Costeja González*, ECLI:EU:C:2014:317.

The following is especially important: there are basically no effective legal remedies available for persons which privacy was attacked. Hence it is very difficult for them to struggle and to fight against the author of the information, the media, the internet service provider (ISP), etc. Not only that is the information difficult to remove from the internet, it gets worse; even if such information is removed, that does not mean, that it was not already saved by the internet service provider (ISP), by other media and that it cannot be published by somebody else, etc. The effects of published information that violates privacy, its immediate and even interim or protective measures as the only tool affordable in legal systems for fast resolving of disputes, are of no actual effect.

Because of the above reasons one can imagine that search engines cannot be left aside, as being only a tool of a technical nature, with no effect to privacy. The article deals, in the stream-line, with the legal position of the search engines within the issue of privacy.

## **2. PRIVACY IN EU LAW**

Rules on privacy are basically included in every legal system, on the national level, as well as internationally. According to Article 8 of the European convention of human rights (ECHR) everybody has a right to private and family life. The Charter of the fundamental rights of the EU (CFR) also includes, under Article 8, protection of the personal data. According to this rule, everyone has the right to the protection of personal data, which concerns him or her. Such data must be processed fairly for specified purposes, basing on the consent of the persons concerned or on some other legitimate basis lied down by law. Also, everyone has the right of access to data which has been collected concerning him or her, and the right on that data rectification.

The right to personal data, therefore, has to be respected also in cases where certain data are publicly available. Especially, if data concerns private person, i.e. individual, and not public person, protection of personal data has to be judged by the higher standards. This is for special importance in media cases. Giving the right to personal data, will limit the right to be informed and the right of free speech. There are, of course, examples, where personal data will be very much linked to the information, that shall be available to wider public. In such cases the personal data cannot be protected. For instance, the use of public funds and questions of public expenditures will be usually related also to the certain person, where his/her name and surname also has to be revealed to the public.<sup>2</sup> Nevertheless, these are exemptions.

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<sup>2</sup> In another words, the personal data (like name and surname) can be revealed, if these data are related to the use of public funds (for instance, for salaries, honorariums, etc.). In Slovenia,

In general, the personal data shall be treated as a privacy issue of every individual. This is also regulated by the Directive 1995/46 on personal data.<sup>3</sup> The Directive dates in to 1995, this is only few years after the first HTTP protocol was invented by *Sir Tim Berners-Lee*,<sup>4</sup> meaning, that directive was adopted in a very early stage of the development of the internet. Therefore, the directive has not taken into account all possible issues related to the internet and data protection. Nevertheless, the European Court of Justice (CJEU), at least in my opinion, successfully filled up different *lacuna legis* which were brought up by actual cases.

One of such cases is also above mentioned judgment in *Google Spain*. The aim of this article is to offer certain analysis of this judgment, apart from what has been written above, also by upholding the decision. I shall clearly state this, since in the eyes of many this judgment is a mistake, improper turnover, bad revolution, etc.<sup>5</sup> I am not of such opinion; even more, I think that judgment offers an important legal remedy for those who fight against violation of their personal rights like human dignity. I am fully aware that the judgment is not above human dignity and that it concerns only personal data, but it can be extended, rightly so, also to such cases.

### **3. CASE GOOGLE SPAIN, C-131/12**

#### *3.1. THE ACTUAL BACKGROUND*

The case concerned a reference for a preliminary ruling (Art. 267 TFEU) made by the Spanish High Court to the CJEU, which arose out of a dispute between *Google Inc.* and *Google Spain* on the one hand, and *Mr Gonzalez* and the *Spanish Data Protection Agency* on the other. The dispute began when he lodged a complaint with the *Spanish DPA* against a daily newspaper, *La*

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where I came from, this is due to third paragraph of Art. 6 *Access to Public Information Act*: the access to personal data can be assured, if they are related to public expenditure. In addition, paragraph 2 of the same Art. 6, defines that certain exceptions from the access to personal data, can be given if the public interest of revealing them is more important than the interests of this concrete individual. The decision of the Information Commissioner, No. 090-263/2015 (07.01.2016) is well argued also in this respect.

<sup>3</sup> 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. 31–50.

<sup>4</sup> Sir Tim Berners-Lee invented the World Wide Web in 1989.

<sup>5</sup> See in this respect also Debbie Heywood, *Google Spain and the ‘right to be forgotten’*, article available at [http://united-kingdom.taylorwessing.com/globaldatahub/article\\_2014\\_google\\_spain.html](http://united-kingdom.taylorwessing.com/globaldatahub/article_2014_google_spain.html) (17.5.2016).

*Vanguardia*, as well as against *Google Inc.* and its Spanish subsidiary, *Google Spain*, for failure to protect his privacy.

The basis for complaint was that, whenever a *Google search* of his name was carried out, the top results listed linked the internet users to the two property auction notices for the recovery of social security debts that he had owed 16 years earlier which still appeared on *La Vanguardia's* website. The applicant sought to obtain an order to the effect that the newspaper should alter, delete, or protect him from this information, and that Google should either delete or conceal the links to those pages.

### 3.2. LEGAL ISSUES

The CJEU was faced with different questions. However the most important were, whether Google as a search engine could also be held as a person who is processing personal data and whether Google is controller of the data. The latter is an important starting question. It is not answered directly in the Directive 95/46 and therefore it needed to be explained by the CJEU. It was crucial in this case how to reply to this question, since all following questions depend on the answer. Namely, if the Google could not be found as the person processing a personal data or being controller of the data, then it would be excluded from the circle of subjects who can be faced with different liabilities on internet. As noted above, in the introduction part, the search engine is not the one who published information on the web, neither the one who distributes it. The search engine is only searching for the information and offering readers and *internauts* (Fr.) means how to get to the information very quickly. Although that search engine has nothing to do with the information and its content, it nevertheless offers the whole information to the individual, based on the search criteria, like name and surname.

Having said this, the CJEU dived into the question whether scanning documents for the purposes of inclusion information into the search engine, includes processing personal data. The court, unlike AG, answered positively and therefore it included search engines among subjects that, at least to the possible extend, have certain responsibility towards the holder of privacy protection.<sup>6</sup> As to the question, “whether the operator of a search engine must be regarded as the ‘controller’ in respect of the processing of personal data that is carried out by that engine in the context of an activity such as that at issue

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<sup>6</sup> See more in this respect and discourse by E. Frantziou, Further Developments in the Right to be Forgotten: The European Court of Justice’s Judgement in Case C-131/12, *Google Spain, SL, Google Inc. v Agencia Espanola de Proteccion de Datos*, *Human Rights Law Review*, 2014, 14, p. 766, 777.

in the main proceedings, it should be recalled that Article 2(d) of Directive 95/46” the court maintained that it is the search engine operator which determines the purposes and means of that activity (controlling) and thus of the processing of personal data that itself carries out within the framework of that activity and which must, consequently, be regarded as the ‘controller’ in respect of that processing pursuant to Article 2(d).<sup>7</sup> Furthermore, it would be contrary not only to the clear wording of that provision but also to its objective — which is: to ensure, through a broad definition of the concept of ‘controller’, effective and complete protection of data subjects — to exclude the operator of a search engine from that definition, on the ground that it does not exercise control over the personal data published on the web pages of third parties.<sup>8</sup> Inasmuch as the activity of a search engine could affect significantly the fundamental rights to privacy and to the protection of personal data, the operator is therefore liable, and additionally can be compared with that of the publishers of websites. The operator of the search engine as the person determining the purposes and means of that activity must ensure, within the framework of its responsibilities, powers and capabilities, that the activity meets the requirements of Directive 95/46 in order that the guarantees laid down by the directive may have full effect and that effective and complete protection of data subjects, in particular of their right to privacy, may actually be achieved.

In another words, even though that the search engine has nothing to do with the content and dissemination of the information art the first place, its role in finding the information (again, finding it very quickly), cannot be understood in a way that search engine has nothing to do with the privacy protection. The sole service of searching is very important and it might be even crucial in the whole picture. Namely, even if we know that there is certain information out there in the internet, we cannot search for it with the search engines, i.e. information will remain there without being really visible (in the internet jungle of information). It would be necessary for us to know the exact web address to find it. In another words, service of the search engines cannot be regarded as without any effects, and therefore exempted from the whole picture of privacy protection. On a contrary, the CJEU found the search engines as being controllers of the data and in order to continue with other questions, like what are obligations of the engines towards protection of privacy.

Next question which the court needed to answer is, whether information should be removed (in cases that such information is not important any more for the wider public, or simply, if certain individual is not happy with such an infor-

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<sup>7</sup> Paragraph 33 of the ruling.

<sup>8</sup> Paragraph 34 of the ruling.

mation and that it wants to be removed) although is legally put on the internet (being subject of a claim for removal)..

Here the court has to dive into lots of sub-questions, like which information can be regarded as being suitable to be removed, whether economical aspects of search engine should be taken into account, whether the same is true for information that relates to private persons, individuals, or also to public persons.

The court replied by using principle of proportionality and in line with the well-established case law on access to the information and the right to be informed with respect to public persons (for them, the level of privacy is decreased a lot in comparison to private individuals). The court answered: *“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 on account of its inclusion in such a list of results, 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 having access to 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 its inclusion in the list of results, access to the information in question.”*<sup>9</sup>

One can conclude that information of public relevance is not subject to limitations and the search engine can offer all hits and results based on the search criteria name. However, the economic interest of the information holder is shifted to the back stage.

Google reacted immediately, although the judgment was found very controversial. It is a kind of judgment that you either like or hate it. To certain extend, it is also different form approach of the ECHR. ECHR has a bit different standards to limit the right to be informed. Namely, according to ECHR particularly strong reasons must be provided to justify limitations.<sup>10</sup> Clearly, the CJEU made some departure from such a strict position of the ECHR.<sup>11</sup>

As noted above, the judgment was also subject of harsh critics, where by most of the critics come from the USA.<sup>12</sup>

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<sup>9</sup> From the tenor of the judgement.

<sup>10</sup> Case 33846/07, W & S v. Poland.

<sup>11</sup> See Nataša Pirc Musar, Svoboda izražanja in anonimnost internet – res nimata meja? In: Pravna praksa, 2015, Nr. 24-25, p. 3 and case 33846/07, W & S v. Poland.

<sup>12</sup> Guy Vassall-Adams, Matrix Chambers, Case comment: Google Spain SL, Google Inc. v Agencia Espanola de Proteccion de Datos, Mario Costeja González, available: <https://eutopi->

## 4. SOME ANALYSES

### 4.1. REGARDING “RIGHT TO BE FORGOTTEN” ITSELF

To my opinion, the case Google Spain is as Copernicus’ revolution and in a good sense of that phrase. CJEU has lowered the protection of the freedom of expression and the right to be informed, but not as some understand it. It has to be stressed, that the information itself is not removed from the internet. The information is still somewhere in the web, but what CJEU did is to limit search of such information. Further on, this limitation is not the absolute one, but the only limit is imposed by the search criteria (name). This means, that not only that information can still be somewhere in the web, but we can also search for it not just by the name of the person but with any other search term. For instance, one would like to know something about me, being private individual, but the information he is looking for, using as a searching term my name, cannot be found (due to its removal). But such information can still be found by using other search terms. If information concerns my immovable property, than a search term regarding immovable in the area where I live, will be necessary.

Therefore, one can establish that this is not a true right to be forgotten. Information about certain individual is still somewhere in the web and it can still be found, even if the exact web address is not known.

The CJEU in its judgment did not elevate the right to be forgotten to a “super right” as being another fundamental right, such as the freedom of expression or the freedom to the information. On the contrary, it confirmed that the right to get your data erased is not absolute and has clear limits. The request for erasing has to be assessed on a case-by-case basis. It only applies where personal data storage is no longer necessary or is irrelevant for the original purposes of the processing for which the data was collected. Removing irrelevant and outdated links is not tantamount to deleting content.

As was said, the CJEU also clarified, that a case-by-case assessment will be needed. Neither the right to the protection of personal data nor the right to freedom of expression are absolute rights. A fair balance should be sought between the legitimate interest of internet users and the person’s fundamental rights. Freedom of expression carries with it responsibilities and has limits both in the online and offline world.<sup>13</sup>

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alaw.com/2014/05/16/case-comment-google-spain-sl-google-inc-v-agencia-espanola-de-proteccion-de-datos-mario-costeja-gonzalez/

<sup>13</sup> European Commission: Factsheet on the “Right to be forgotten ruling” available at: [http://ec.europa.eu/justice/data-protection/files/factsheets/factsheet\\_data\\_protection\\_en.pdf](http://ec.europa.eu/justice/data-protection/files/factsheets/factsheet_data_protection_en.pdf) (18.5.2016)

This balance may depend on the nature of the information in question, its sensitivity for the person's private life and on the public interest in having that information. It may also depend on the personality in question: the right to be forgotten is certainly not about making prominent people less prominent or making criminals less criminal. The mentioned case itself provides an example of this balancing exercise. While the CJEU ordered Google to delete access to the information, deemed irrelevant by the Spanish citizen, it did not rule that the content of the underlying newspaper archive had to be changed in the name of data protection.<sup>14</sup> The Spanish citizens' data may still be accessible but is no longer ubiquitous. This is enough for the citizen's privacy to be respected.

Google will have to assess deletion requests on a case-by-case basis and to apply the criteria mentioned in EU law and the CJEU's judgment. These criteria relate to the accuracy, adequacy, relevance - including time passed - and proportionality of the links, in relation to the purposes of the data processing.<sup>15</sup> The criteria for accuracy and relevance for example may critically depend on how much time has passed since the original references to a person. While some search results linking to content on other webpages may remain relevant even after a considerable passage of time, others will not be so, and an individual may legitimately ask to have them deleted.<sup>16</sup>

#### *4.2. IS THE JUDGMENT APPLICABLE TO DEFAMATION CASES?*

We can use this court approach also in cases where certain individual is defamed with certain information on the internet. Imagine, that certain individual cannot find out who is the author of such information, neither who is the internet service provider, offering such information on the web. It also might be that internet service provider is on another part of the world, being difficult or hardly impossible to start any action against it. Actually, any kind of legal procedure is either not possible or hardly accessible. Imagine also, that information on the web is not the correct one, or is even a lie. Not being able to attack and to start the legal procedures against the author of the information or against the holder of the server (ISP), a request to internet search engines, like Google, Yahoo, Bing, etc., can help limit the effect of such improper information by removing the search result from the list of the results.

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<sup>14</sup> Par. 88 of the CJEU ruling.

<sup>15</sup> Par. 93 of the CJEU ruling.

<sup>16</sup> European Commission: Factsheet on the "Right to be forgotten ruling" available at: [http://ec.europa.eu/justice/data-protection/files/factsheets/factsheet\\_data\\_protection\\_en.pdf](http://ec.europa.eu/justice/data-protection/files/factsheets/factsheet_data_protection_en.pdf) (18.5.2016).

There is no effective legal remedy to cure violation of privacy or human dignity with the help of internet in the world (more particularly in the legal world). I can only say that this judgment finally gives certain change in defense of individuals or at least limits improper and negative effects of wrongful information. This is not an absolute and fully powerful remedy; it still does not hit media very much, neither has it limited substantially the power of media, especially electronic media. Although, unequal weapon, it still is a weapon.

For those, who believe that internet should be without any borders, even this unequal weapon is already too much.<sup>17</sup> But it shall not be so. Internet shall not be, at least not when it comes to the human dignity and personal data protection, playground without any rules and borderlines. Those, not willing to except this, are most likely opportunists, perhaps not yet been victims of violation of the personal data or not yet been defamed. The improper and wrong information on internet, lies about somebody, could change the lives of persons, so far that people sometime even commit suicides and I strongly support even much stricter and more effective legal remedies in such cases. I would like to see that judgment in the case Google Spain is the beginning of new era of more effective legal remedies against wrongful conduct of media on the internet or any digitalized and written form of news spreading.<sup>18</sup>

According to the Regulation 2016/679,<sup>19</sup> data subject should have the right to have personal data concerning him or her rectified and the 'right to be forgotten' where the retention of such data infringes this Regulation or Union or Member State law to which the controller is subject. In particular, data subject should have the right to have his or her personal data erased and have them no longer processed, where the personal data are no longer necessary in relation

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<sup>17</sup> See the viewpoint I cannot support: I. Vuksanovic, Napoved tezkih casov za anonimne forumaše, Prava praksa 2015, št. 26, str. 22-23. The article refers to the judgement *Delfi*, rendered by ECHR. It refers to the liability of the e-forum editors.

<sup>18</sup> The European Commission put forward its EU Data Protection Reform in January 2012 to make Europe fit for the digital age. More than 90% of Europeans say they want the same data protection rights across the EU – and regardless of where their data is processed.

The Regulation is an essential step to strengthen citizens' fundamental rights in the digital age and facilitate business by simplifying rules for companies in the Digital Single Market.

<sup>On</sup> 4 May 2016, the official texts of the Regulation and the Directive have been published in the EU Official Journal. While the Regulation will enter into force on 24 May 2016, it shall apply from 25 May 2018. The Directive enters into force on 5 May 2016 and EU Member States have to transpose it into their national law by 6 May 2018. More: [http://ec.europa.eu/justice/data-protection/reform/index\\_en.htm](http://ec.europa.eu/justice/data-protection/reform/index_en.htm)

<sup>19</sup> 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) (Text with EEA relevance), OJ L 119, 4.5.2016, p. 1–88.

to the purposes for which they are collected or otherwise processed, where a data subject has withdrawn his or her consent or objects to the processing of personal data concerning him or her, or where the processing of his or her personal data does not otherwise comply with this Regulation. That right is relevant in particular where the data subject has given his or her consent as a child and is not fully aware of the risks involved by the processing, and later wants to remove such personal data, especially on the internet. The data subject should be able to exercise that right notwithstanding the fact that he or she is no longer a child. However, the further retention of the personal data should be lawful where it is necessary, for exercising the right of freedom of expression and information, for compliance with a legal obligation, for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller, on the grounds of public interest in the area of public health, for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes, or for the establishment, exercise or defense of legal claims.<sup>20</sup> To strengthen the “right to be forgotten” in the online environment, the right to erasure should also be extended in such a way that a controller who has made the personal data public should be obliged to inform the controllers which are processing such personal data to erase any links to, or copies or replications of those personal data. In doing so, that controller should take reasonable steps, taking into account available technology and the means available to the controller, including technical measures, to inform the controllers which are processing the personal data of the data subject’s request.<sup>21</sup> These rules are wider than the Google Spain Judgment, but also include more exceptions.

#### 4.3. REGARDING TERRITORIALITY OF THE EU RULES

Regarding the territoriality of the EU rules, the CJEU decided that even if the physical server of a company processing data is located outside Europe, EU rules apply to search engine operators if they have a branch or a subsidiary in a Member State which promotes the selling of advertising space offered by the search engine.<sup>22</sup> In this regard, it is to be noted recital 19 in the preamble to Directive 95/46 states that *‘establishment on the territory of a Member State implies the effective and real exercise of activity through stable arrangements’*

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<sup>20</sup> Par. 65 of the preamble to the Regulation.

<sup>21</sup> Par. 66 of the preamble to the Regulation. See also Art. 17 of the Regulation.

<sup>22</sup> See also Christopher Kuner, The Court of Justice of the EU Judgment on Data Protection and Internet Search Engines, LSE Law, Society and Economy Working Papers, available: [https://www.lse.ac.uk/collections/law/wps/WPS2015-03\\_Kuner.pdf](https://www.lse.ac.uk/collections/law/wps/WPS2015-03_Kuner.pdf), p. 9-13.

and that ‘*the legal form of such an establishment, whether simply branch or a subsidiary with a legal personality, is not the determining factor*’.<sup>23</sup> Therefore, although it is not disputable that Google Spain engages in the effective and real exercise of activity through stable arrangements in Spain (moreover, it has separate legal personality and it constitutes a subsidiary of Google Inc. on Spanish territory and, therefore, an ‘establishment’ within the meaning of Article 4(1) (a) of Directive 95/46<sup>24</sup>), even in case that there is no branch or subsidiary – but mere exercise of the activities on the stable and continuous basis, this would suffice for the application of the EU rules.

In addition, also 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 is carried out ‘in the context of the activities’ of the establishment. This enables the full effect of the Directive 95/46, which aims to ensure effective and complete protection of the fundamental rights and freedoms of natural persons, and in particular their right to privacy, with respect to the processing of personal data. As the CJEU stated, those words cannot be interpreted restrictively.<sup>25</sup>

The CJEU went even further and connected, rightly, the advertising effects in favor of the company located in the third state. The CJEU stated: “In the light of that objective of Directive 95/46 and of the wording of Article 4(1) (a), it must be held that the processing of personal data for the purposes of the service of a search engine such as Google Search, which is operated by an undertaking that has its seat in a third State but has an establishment in a Member State, is carried out ‘in the context of the activities’ of that establishment if the latter is intended to promote and sell, in that Member State, advertising space offered by the search engine which serves to make the service offered by that engine profitable.”<sup>26</sup>

This is rather important, since the overall objective of the search engines is to gain profit from the advertising services. Therefore, the activities of the operator of the search engine and those of its establishment situated in the

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<sup>23</sup> Par. 48 of the CJEU judgement.

<sup>24</sup> Par. 49 of the CJEU’s ruling.

<sup>25</sup> Par. 53 of the CJEU’s ruling and by analogy, see also Case C-324/09 *L’Oréal and Others* EU:C:2011:474, par. 62 and 63.

It is to be noted in this context that it is clear in particular from recitals 18 to 20 in the preamble to Directive 95/46 and Article 4 thereof that the European Union legislature sought to prevent individuals from being deprived of the protection guaranteed by the directive and that protection from being circumvented, by prescribing a particularly broad territorial scope (par. 54 of the CJEU’s ruling).

<sup>26</sup> Par. 55 of the CJEU ruling.

Member State concerned are inextricably linked since the activities relating to the advertising space constitute the means of rendering the search engine at issue economically profitable and that engine is, at the same time, the means enabling those activities to be performed.<sup>27</sup> It is clear from the interpretation of the CJEU that any other solution, making possible companies with the registered seat in the third countries but operating the search engines within the EU territory, would mean easy escape from the application of the EU data protection rules, and not taking into account that digital activities cannot be stopped, at least not easily, being cross-border. Locating them to single state or the Member State is not a real option. It was therefore of outmost importance that the CJEU interpret the territorial scope of the application the EU data protection rules broadly.

## 5. TO CONCLUDE

The decision in case *Google Spain* has a huge effects and as it could be seen from the literature, much bigger and more comprehensive than the CJEU wanted or had in mind when adjudicating.<sup>28</sup> The search engines do bear certain part of a responsibility to protect privacy, although that they are not the author of certain information, neither have they changed the substance of such information. The sole argument that they help searching certain information is, for the CJEU, and also to my own opinion, enough to burden them with the responsibility.

Nevertheless, the court's decision does not mean (not yet) the “true right to be forgotten” as it could be understood from the outset. Namely, certain information, which somebody wanted to be removed, is still there, somewhere in the

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<sup>27</sup> And the CJEU, on my opinion rightly, concluded that: “*That being so, it cannot be accepted that the processing of personal data carried out for the purposes of the operation of the search engine should escape the obligations and guarantees laid down by Directive 95/46, which would compromise the directive’s effectiveness and the effective and complete protection of the fundamental rights and freedoms of natural persons which the directive seeks to ensure (see, by analogy, L’Oréal and Others EU:C:2011:474, paragraphs 62 and 63), in particular their right to privacy, with respect to the processing of personal data, a right to which the directive accords special importance as is confirmed in particular by Article 1(1) thereof and recitals 2 and 10 in its preamble (see, to this effect, Joined Cases C-465/00, C-138/01 and C-139/01 Österreichischer Rundfunk and Others EU:C:2003:294, paragraph 70; Case C-553/07 Rijkeboer EU:C:2009:293, paragraph 47; and Case C-473/12 IPI EU:C:2013:715, paragraph 28 and the case-law cited).*” Par. 58.

<sup>28</sup> This can also be seen from the fact, that the whole world (also the new Regulation 2016/679) is talking about new personal right - *a right to be forgotten*, although the court did not refer to it in its interpretative part (only parties), neither it invented it.

internet, just we cannot find it any more (unless we know the internet address or other criteria, and not the name, which could help us find it).

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