Eclipsing the web: *online* data protection and liability of search engines in the *Google Spain* case.

ANTONIO DAVOLA*, ELISA STRACQUALURSI*

INTRODUCTION

The widespread availability of Internet raises increasingly complex issues in terms of information regulation. In fact, the amount of circulating information and the possibilities to track them is raising growing concerns, related both to business as well as personal freedoms, that were not even imaginable in the early Nineties, when the first legal provisions related to the protection of personal data were adopted by the European Union (hereinafter EU).

In May 2014, by "leveraging" a case that occurred within one of the EU Member States (namely, Spain, the main parties being a Spanish citizen, a Spanish media group, and the Google group), the EU Court of Justice ("EUCJ") wrote a new page on the protection of the "digital rights" of individuals when operating in the internet, by delivering a decision in contrast with a concept of net neutrality behind which the web companies can freely operate.[1] Purpose of this case comment is to read together, and eventually understand, the main features of a sea-changing EU jurisprudence. In order to do this, we will try, first, to introduce the relevant EU legal framework, moving then to a more detailed analysis of the case law; some conclusive (as well as critical) remarks will also be provided.

I. MAIN FEATURES OF RELEVANT EU LEGAL FRAMEWORK

The legal basis of the EUCJ decision is represented by the *Directive 95/46/EC 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* ("Directive"), regulating the pivotal aspects of personal data processing in accordance with some general principles expounded in the preliminary recitals.[2] In more detail, the Directive states that data processing systems must respect their fundamental rights and freedoms - notably the right to privacy - and contribute to the well being of individuals, whatever the nationality or residence of natural persons may be. Moreover, since the object of the national EU Member States laws on the processing of personal data is to protect fundamental rights and freedoms, those laws and their harmonization can never determine a lessening of the protection accorded by the Directive.

* Antonio Davola is a Ph.D. student at Sant'Anna School in Italy whose research interests include investors' preferences towards life insurance policies.
* Elisa Stracqualursi is a Ph.D. student at the University of Pisa in Italy. Her research interests include the philosophy of law.

1. Case C-131/12, Google Spain v. Agencia Española de protección de Datos, 2014.
2. Council Directive 95/46, art. 2, 10, 18,19, 20, 25, 1995 O.J. (L281) (EC).

and freedoms, those laws and their harmonization can never determine a lessening of the protection accorded by the Directive[3]

Since its enactment, the Directive has been subject to additions and specifications aimed at outlining its characteristics in a more accurate way. A pivotal role in this process has been covered by the Data Protection Working Party ("DPWP"), established in accordance with Art. 29 of the Directive. The DPWP is an independent organ that gives opinions on controversial aspects of the Directive on a regular basis, in order to keep a public eye open on the most relevant issues and foster the adaptation of the Directive to new technologies.[4]

Crucial information on the role of internet service providers can also be found in *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.* Furthermore, clarifications on the Directive came from European case law: in the *Lindqvist* case,[5] for instance, the EUCJ further specified the concept of personal data online processing[6] and underlined how the Directive must be interpreted in compliance with the purpose of maintaining a balance between freedom of movement of personal data and protection of private life.

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3. In order to guarantee the effectiveness of the Directive's provisions, any processing of personal data within the EU must be carried out in accordance with the law of one of the EU Member States, under the responsibility of a controller governed by the law of that State. With regards to this aspect, the legitimate jurisdiction must be determined through the geographic location of the controller's establishment, independently from its legal form (according to Art. 2, a "controller" is the natural or legal person, public authority, agency or any other body which alone or jointly with others determines the purposes and means of the processing of personal data). Eventually, the fact that the processing of data is carried out by a person established in a third country must not reduce the protection of individuals provided for in the Directive. The Directive then identifies its scope in "processing of personal data wholly or partly by automatic means", and in "processing otherwise than by automatic means of personal data which form part of a filing system or are intended to form part of a filing system" (art. 3). The act of "processing of personal data" identifies any operation performed upon personal data, whether or not by automatic means, such as collection, recording, organization, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, blocking, erasure or destruction of these data, whereas a personal data is defined as "any information relating to an identified or identifiable natural person" (art. 2). The national implementing legislations must also assure that personal data are processed fairly and lawfully, are collected only for specified, explicit and legitimate purposes in adequate, relevant and not excessive quantity; data must not be further processed in a way which is incompatible with their original collecting purpose. Last but not least, data must be accurate and, where necessary, kept up to date in a form that permits identification of data subjects for no longer than what is necessary for the purposes for which the data were collected or processed (art. 6). In order to consider the data processing legitimate, it must be indispensable for the purposes of the legitimate interest pursued by the controller or by the third party to whom the data are disclosed. Such interests decade when they are overridden by interests, fundamental rights and freedoms of the data subject who require protection (art. 7): in such cases the data subject will, in fact, have the right to object to the processing of the data (art. 14). Supra note 2.

4. Among the documents of the DPWP, it is important to draw the attention on the following opinions: *See generally* Data Protection Working Party, *Opinion 1/2008 on data protection issues related to search engines*, 00737/EN WP 148 (Apr. 4, 2008); Data Protection Working Party, *Opinion 1/2010 on the concepts of "controller" and "processor"*, 00264/10/EN WP 169 (Feb. 16, 2010); Data Protection Party, *Opinion 8/2010 on applicable law*, 0836-02/10/EN WP 179 (Dec. 16, 2010) (Clarifying the scope of application of the Directive (more in detail, its Article 4 determines which national data protection law adopted pursuant to the Directive may be applicable to the processing of personal data).

5. Case C-101/01, *Lindquist v. Sweden*, 2003 E.C.R. I-12992.

6. In particular, the act of referring, on an internet page, to various persons and identifying them by name or by other means, for instance by giving their telephone number or information regarding their working conditions and hobbies has been qualified as data processing. *See* U. Dammann, S. Simitis, Datenschutzrichlinie – Kommentar (Privacy Policy – Comment) 120 (Baden-Baden, Nomos, 1997).

II. FACTS

On March 5, 2010, a Spanish citizen resident in Spain, Mr. Costeja Gonzàlez, lodged a complaint against La Vanguardia Ediciones SL (La Vanguardia), Google Spain and Google Inc. (jointly, Google), through the Spanish Privacy Protection Authority (Agencia Española de Protección de Datos, "AEPD").[7] In more detail, Mr Gonzàles claimed that the quest of his name on Google Search led to two 1998's pages of La Vanguardia's newspaper, mentioning him as related to a real-estate auction connected with attachment proceedings for the recovery of social security debts.

As the above mentioned proceedings had been fully resolved, and that link therefore was no longer representative of his financial condition, Mr. Costeja Gonzàlez demanded the removal or alteration of his data from La Vanguardia's newspaper, or, at least, to exclude those results from the search engines of the newspaper. Furthermore, he demanded Google to remove or conceal his personal data from its research engine in order to avoid the appearance of any links to the above-mentioned webpage of La Vanguardia.

The AEPD, on one hand, rejected the complaint referred to La Vanguardia by considering that the publication of the data had to be considered coherent with some dispositions given by the Spanish Ministry of Labour and Social Affairs in order to provide the maximum publicity to the auction.

On the other hand, the AEPD upheld the claim against Google. According to AEPD's conclusions, search engine operators are subject to the data protection legislation and act as intermediaries of the data they provide: any owner of data subject will consequently have the right to ask the national institution responsible for the protection of personal data to order the removal and prohibition of access to that data from the search engine. The national authority will then be deemed to have protected such a right every time the dissemination of the data is deemed liable to compromise the fundamental right to data protection and the dignity of persons in a broad sense, that is to say also comprehending the mere wish of the person to maintain that data remains unknown.

Such order, furthermore, may be imposed regardless of the contextual obligation to erase the data or information from the website where it originally appears.

Google brought actions against the AEPD's decision. Since the solution of the conflict depends on the interpretation of the Directive regarding technologies that became available after its adoption, the competent Spanish court (Audiencia Nacional) decided to stay the proceeding and filed a request to the EUCJ for a preliminary ruling.[8]

By doing so, the Audiencia Nacional raised some preliminary questions, *i.e.* asking which basis it is possible to consider that a processor has an establishment in a given area in order to

7. *Agencia De Proteccion De Datos, Procedimiento Ordinario 725 /2010*.

8. According to Art. 267 TFUE, the Court of Justice of EU shall have jurisdiction to give preliminary rulings concerning the interpretation of the treaties, the validity and interpretation of acts of the Institutions, bodies, offices or agencies of the Union. Consolidated Version of the Treaty on the Functioning of the European Union, Part 6, Title 1, Ch. 1, § 5, Art. 267, 2008 O.J. (115).

identify the national law to be duly applied. The Audiencia Nacional questioned, then, if the temporary storage of the information indexed by internet search engines may be regarded as "use of equipment" in the terms of Article 4 of the Directive.[9] The Audiencia Nacional also asked the EUCJ if the Directive must be applied in the Member State where the most effective protection of the rights of Union citizens is possible, independently from the existence of formalized connecting factors.

Apart from the preliminary questions, the Audiencia Nacional demanded some clarifications on the role of research engines as content providers in relation to the Directive, wondering if the activity conducted by Google might be considered as data processing, and, in the case of an affirmative answer, if the managing undertaking must be deemed as controller of the personal data contained in the web pages that it indexes.

Whereas Google was to be considered a data controller, the court then asked if the AEPD had the right to impose directly on Google Search the removal or withdrawal of personal data without concern about the erase of the data from the website where it originally appears. Otherwise, the obligation of search engines will be excluded when information is still kept available on the web page from which it originates.

The last issue raised by the Audiencia Nacional related to the data subject's rights: the court asked, in particular, if data subjects may directly address the search engine in order to avoid indexing of personal information published – even legally – on third parties' web pages, when they think that such information might be prejudicial to them and they wish it to be consigned to oblivion.

III. ON THE GENERAL ADVOCATE AND EUCJ POSITIONS.

To paraphrase the above statements, the main questions referred to the Audiencia Nacional may be identified as follows:

1) Territorial scope of application of EU data protection rules;
2) Scope of application *ratione materiae* of the Directive;
3) Right to be forgotten.

9. 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 O.J. (L 281) Art. 4."Each Member State shall apply the national provisions it adopts pursuant to this Directive to the processing of personal data where: […] (c) the controller is not established on Community territory and, for purposes of processing personal data *makes use of equipment*, automated or otherwise, situated on the territory of the said Member State, unless such equipment is used only for purposes of transit through the territory of the Community." (emphasis added). *Id.*

Regarding the first group of questions, the EUCJ follows the position of the Advocate General (AG).[10] In fact, they both agree on the shortage of the "centre of gravity"[11] of the dispute as a criterion for a stronger protection in a certain Member State. On the basis of DPWP's interpretation, the territorial scope of the Directive should be determined by the location of the controller's establishment, the location of the means or the equipment being used (when the controller is established outside the EU).

The problem, however, is interpreting such provision in relation to Internet. In order to solve this problem, both the EUCJ and the AG take into account the keyword advertising and the provision of national web domains. The EUCJ in particular argues that, once verified that the entrepreneurial activity is located in Spain, the personal data processing will inevitably be carried on within the same Member State; this does not require, though, the processing to be carried out "by" the establishment concerned itself, but only "in the context of [its] activities".[12]

Moving to the second question, the EUCJ meditates on the role of the "controller" of the provider, here shifting away from the position of the AG. In fact, even if both affirm that Google, Inc. processes personal data, since it consists in "locating information published or included on the Internet by third parties," the AG doesn't believe that the Internet provider could be responsible for it.[13]

Indeed, the presence of personal data remains unknown[14], and there is no "difference between a source web page containing personal data and another not including such data"[15].

Consequently, the AG doubts that relating the Internet provider to the person 'determining the purposes and means of the processing of the personal data' could lead to a truthful construction of the Directive. He affirms:

> *"In my opinion the general scheme of the Directive is 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."*[16]

10. Conclusion of Advocate General Jaaskinen delivered on 25 June 2013. Case C-131/12, Google Spain SL v. Agencia Española de Protección de Datos, 2013 ECLI:EU:C:2013:424. It is worth remembering that the EUCJ is composed by one judge from each Member State, assisted by nine AG, whose role is to consider the written and oral submissions to the Court in every case that raises a new point of law, and deliver an impartial opinion to the Court on the legal solution. Although AG are full members of the court, they do not take part in the EUCJ's deliberations.
11. *Id*. para. 23, 52, 53.
12. Case C-131/12, Google Spain v. Agencia Española de Protección de Datos, 2014 ECR 616.
13. *Id*. para. 70. *See also* Lindqvist, 2003 E.C.R. I-12992.
14. The Internet provider is aware of the existence of personal data only as a statistical fact. Google Spain, C-131/12, para. 84.
15. *Id*. para. 72.
16. As a support of this position he notes the approach of Article 29 Working Party and the article 47 of the Directive, he affirms also that an opposite opinion would entail Internet search engines being incompatible with EU law, "a conclusion I would find absurd". The only situation in which there could be the responsibility of internet provider are: a decision not to comply with the exclusion codes on a web page; internet provider does not update a web page in its cache despite a request received from website.

According to the EUCJ, on the contrary, the Internet provider is responsible, since it is the operator that determinates the purposes and means of that processing. In fact, the Internet provider makes an overall dissemination of those data, "in that it renders the latter accessible to any Internet user"[17] and organises information by using secret search algorithms.

Therefore, a "general derogation from the application of the Directive 95/46 in such a case would largely deprive the directive of its effects".[18]

In reference to the third group of questions, the EUCJ underlines that the principles and the objectives of the Directive are supposed to be the pillars also of the high level of protection of the fundamental rights and freedom of natural persons.

For this reason, according to the EUCJ, it is possible to expand the boundaries of Article 12 so as to justify the possibility to remove from the list of results - when displayed by following a search made on the basis of a person's name - the link to web pages, also in a case where that name or information is not erased from those pages.[19] The Court adds, "in the light of the potential seriousness of that interference, it is clear that it cannot be justified by merely the economic interest which the operator of such an engine has in that processing."[20] However, once verified that such intervention has effects upon the legitimate interest of internet users,[21] it is no more necessary the balance between rights:[22] indeed, if there is such a right that the information relating to one person should no longer be linked to his name, it is inevitable that it will override not only the economic interest of the operator of the search engine but also the interest of the public in finding that information.

IV. SOME CRITICAL REMARKS ON THE DECISION

The EUCJ decision raised huge interest worldwide, due to its profound consequences on the design of the Internet. According to many comments, there is a good number of reasons for considering such decision controversial on both formal and substantial profiles. In fact, legal scholars[23] (and the same Advocate General) pointed out that that the EUCJ might have omitted a proper analysis of the relationship between the right to be forgotten, the public interest and freedom of the press, by simply embracing a literal interpretation of the Directive and posing a rigid hierarchy among the potentially conflicting principles. Such an interpretation seems confirmed by the words that the EUCJ uses to clarify the meaning of Article seven and eight of the Directive:

17. Case C-131/12, *Google Spain*, para. 36.
18 *Id.* para. 30.
19. As we can read in para 84 of the decision, "effective and complete protection of data users could not be achieved if the latter had to obtain first or in parallel the erasure of the information relating to them from the publishers of websites.
20. Case C-131/12, *Google Spain*, para. 81.
21. Considering the rights we can find out from Council Directive 46/95, art. 7 & 8.
22. In fact the internet provider could not take advantage from article 9 of the Directive.
23. Christopher Kuner, *The Court of Justice of the EU Judgment on Data Protection and Internet Search Engines: Current Issues and Future Challenges*, STUDIES OF THE MAX PLANCK INST. LUX. FOR INT'L, EUROPEAN AND REGULATORY PROCEDURAL LAW (Sept. 15, 2014), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2496060.

the Court underlines that users' right to protect their personal data "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."

It might be noted that, even considering the exemption of incurring overriding public needs, posing such a rigid graduation and suggesting the substantial lack of necessity of a balance of interests seems conceivably unjustified.[24]

The decision of the Court, furthermore, seems arguable also for its policy's implications. It should be noted that, since it is virtually impossible to identify an univocal criterion to distinguish which treatments of personal data are worthy of protection and which are not, research providers will be induced to deal with each request discretionally.

In order to prospect some possible scenarios we could hypothesize, e.g., that Google might decide to critically accept any request for cancellation, in fear of continuous refunds to data subjects.

It is equally plausible, though, that Google may reorganise its research algorithms in order to precautionary filter the information and differentiate its traceability depending on the location of those who carry out the research online and on the content of the information itself.

It is clear that such a solution arises complex problems in terms of governance and management of the diffusion of data. Some legal scholars[25] also noticed that the EUCJ seems unaware of the potential relations that can be delineated between the right to be forgotten – which is abundantly examined in the judgment – and the fundamental right of freedom of expression: since internet (and search engine services) permits anyone to divulge his contents to the general public through the display of information on the web, any interference with such a process might determine relevant constraints that should be taken into account. According to European legal tradition, "freedom of expression may be restricted to protect the rights of others."[26] it is undisputed, though, that the restrictions can be imposed only on a case-to case basis, operating a balance among the different rights that may conflict. It must be noted, with primary reference to the case here discussed, that freedom of expression includes the right to receive and pursue information, inasmuch such rights are essential for individuals to freely develop their personalities.[27] Since the research of data on the web intensely relies on the utilization of search engines, it is evident that any limitation on them will indirectly affect capability of web users to self-determinate.

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24. According to the jurisprudence of the Court, operating a balance of the various involved interests has always been an essential element for the judgement. *See generally:* Case C-101/01, *Lindquist v. Sweden*, 2003 E.C.R. I-12992, Case C-92/93-09, *Volker und Markus Schecke GbR and Hartmut Eifert v. Land Hessen*, OJ C 129, joint cases C-465/00, 138/01 and 139/01, *Rechnungshof v. Österreichischer Rundfunk et al. and Christa Neukomm and Joseph Lauermann v. Österreichischer Rundfunk*, 20 May 2003, ECR 2003 I-04989.

25. *See* Ioannis Igelzakis, *The Right to Be Forgotten in the Google Spain Case (Case C-131/12): A Clear Victory for Data Protection or an Obstacle for the Internet?*

26. Brendan Van Alsenoy, Aleksandra Kuczerawy & Jef Ausloos, *Search Engines after 'Google Spain': Internet@Liberity or Privacy@Peril*, ICRI RESEARCH PAPER 15 (Sept. 6, 2013).

27. Stefan Kulk & Fredrick J. Zuiderveen Bogesius, *Google Spain v. Gonźalez: Did the Court Forget About Freedom of Expression?*, EUROPEAN J. OF RISK REGULATION (Sept. 4, 2014).

Above all these considerations, it seems – and this is probably the most problematic aspect of the decision – that the EUCJ might have led the identification of the rights involved in the controversy more cautiously. In fact, its argumentations are essentially based on the contents of the right to be forgotten of the data subject: nevertheless, if the Court believes – as it seems – that Google conducts a data processing activity, it would have been probably more appropriate to refer to the right to objection to the processing of data of a data subject.

Indeed, if Google conducts a data processing activity, we should reasonably assume that, every time a new research is executed, this should be considered a new processing suitable for legitimate possible objections of concerned people.

Under this viewpoint, the protection of Mr. Gonzáles' right to be forgotten, which involves the removal of already processed "static" data, is probably improper: what should be considered instead is the "dynamic" aspect of the utilization of data by Google and, consequently the safeguard of the data subject's right to object in accordance with the Article 14 of the Directive. Moreover, if the EUCJ truly intended to protect the right to be forgotten of the data subject, the best solution would have been to legitimate the right of Mr. Gonzáles to proceed directly against the administrator of the web page: the problem is that, as AEPD correctly affirmed, the publicity requirements demanded from Spanish government precluded the removal of data from *La Vanguardia*. Once that the EUCJ agrees on the necessity of the maximum diffusion of the information, it seems plausible that the legal publicity requirement should prohibit the direct removal of the information from *La Vanguardia* as well as the indirect elimination through the search engine.

V. CONCLUSIONS

The EUCJ verdict in *Google Spain SL* v. *Agencia Española de Protección de Datos (AEPD) and González* could have been the occasion to settle once and for all the issue of the liability of the search engine: it will be, instead, harbinger of new significant controversies. The choice of qualifying search engines as data processors is probably irreconcilable with the possibility of granting to data subjects a protection in terms of right to oblivion: protection may granted, on such a premise, only in terms of objection to data processing. It is possible, though, that the decision's focus on the right to be forgotten might have been influenced by the considerable attention that legal scholars – and the public eye – are currently dedicating to the topic: nevertheless such an aspect might influence, in the future, the interpretation of the Directive in both the European and national context.

On the European side, the main contribution on the topic is currently the *Proposal 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) as for national legislations,[28] where its Article17 provides a general arrangement for the right to oblivion.

If we analyse the paragraph 3 of Article 17, it seems that the European legislator pursued a perspective of balance between privacy and public interest, which is paradoxically similar to the one that the EUCJ excludes in the interpretation of the Directive 95/46: the interpretation rendered by the latter seems, therefore, not in harmony with the new intents of the legislator.

As for national legislations, many States decided to take a stand on the issue of data treatment and right to be forgotten: for instance, the Italian Government has recently predisposed the draft of a "Charter of Fundamental Rights in Internet."[29] The document, which appears mainly programmatic, underlines the complexity of the data processing issue and the need of a balance amongst the various interests involved: no need to say, its efficacy (together with the same chance to be effectively adopted) will obviously need to be assessed in the near future.

28. COM(2012) 11 final 2012/0011 (COD) C7-0025/12 http://www.europarl.europa.eu/registre/docs_autres_institutions/commission_europeenne/com/2012/0011/COM_COM(2012)0011_EN.pdf.

29. *Cf*. the *Carta dei diritti in Internet*, http://www.camera.it/application/xmanager/projects/leg17/attachments/upload_file/upload_files/000/000/187/dichiarazione_dei_diritti_internet_pubblicata.pdf.