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Right to be forgotten on the internet in Europe and Russia

Direito ao esquecimento na Internet em Europa e Rússia

<http://dx.doi.org/10.18316/2237-8049.2016.2>

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Abstract

The article discusses the legal basis for establishing the right to be forgotten in Europe: Data Protection Directive, Proposal for General Data Protection Regulation and, Especially, the European case *Google v. González*, where search results by an individual's name were recognised as personal data, and search engine operators as data controllers, so the right to block such search results were established. The article also compares newly enacted Russian law with the European approach.

Keywords: Right to be forgotten. Access to information. Internet.

Resumo

O artigo discute a base jurídica para o estabelecimento do direito ao esquecimento na Europa: Diretiva de Proteção de Dados, Proposta de Regulamento Geral de Proteção de Dados e, especialmente, o precedente europeu *Google v. González*, em que os resultados de pesquisa pelo nome de um indivíduo foram reconhecidos como dados pessoais, e os operadores de pesquisa (*search engine operators*) como controladores de dados, de modo que o direito de bloquear tais resultados de pesquisa foram implementados. O artigo também analisa a recém-aprovada lei russa com uma abordagem comparativa europeia.

Palavras-chave: Direito ao esquecimento. Acesso à informação. Internet.

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1. Introduction

One of the key elements of the institute of personal data is the right to be forgotten – the right of personal data subjects to demand deletion of information about them if free access to such information is harmful for them. This right is particularly important in the Internet era, when a lot of various information about a person is easily searchable and accessible.

This right is being actively developed in Europe, and this process is of significant interest. Other countries use European experience to create their own legislation on the right to be forgotten. Pertinent law has been enacted in Russia in 2015, establishing the mechanism for deletion of particular Internet search results containing personal data. Brazil is currently discussing the bill demanding search engine operators to remove links to irrelevant or outdated information about person demanding so¹.

In Europe, the foundation for this right was made as early as in 1995, in 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 (hereinafter – the Data Protection Directive or the Directive)². Art. 12(b) established the right of a data subject for erasure or blocking of data if its processing does not comply with the provisions of the Directive. The most recent legal source is the decision of the Court of Justice of the European Union (hereinafter CJEU) in *Google Spain SL and Google Inc. v Agencia Española de Protección de Datos (AEPD) and Mario Costeja González*, C-131/12³. The court stated that search results by an individual's name are personal data, and search engine operators are data controllers⁴, accordingly, they have to erase or block search results violating rights of data subjects. Europe is currently discussing 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)⁵, which is supposed to establish right to be forgotten as a separate right on a legislative level.

2. Google case

The judgement in *Google Spain v González*, was a landmark decision of the CJEU. It introduced the new right – right of Internet users to demand from search engines operators to erasure from the search results particular

¹ Projeto de Lei PL 7881/2014. Available on: <http://www.camara.gov.br/proposicoesWeb/fichadetramitacao?idProposicao=621575>. Last visited on 31.10.2015.

² [1995] OJ L 281/31.

³ EU:C:2014:317.

⁴ Those who determine the purposes, conditions and means of the processing of personal data – see Art. 4(5) of the General Data Protection Regulation.

⁵ COM/2012/011 final. Available on: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2012:0011:FIN>. Last visited on 30 October 2015.

information about themselves. Although CJEU calls the right established by it in that case “the right of the data subject that the information relating to him personally should no longer be linked to his name”, all the commentators have no doubts that it is actually “the right to be forgotten”. The court ruling influences directly the Internet industry and guides the development of the privacy concept. While European Union is discussing the reform in data protection regulation, this decision serves as testing new approaches, and it has policy-making meaning.

2.1. The reason for the dispute

The cause of action was the dissatisfaction of señor Costeja González, citizen of Spain, by the fact that results of Google search on his name included links to some old articles (of 1998 year) of *La Vanguardia*, Spanish daily newspaper, from which anybody could know that señor González had had social security debts, which had been recovered by selling his property on a real-estate auction. Señor González felt that it damaged his reputation, so he turned to Spanish Data Protection Agency, *Agencia Española de Protección de Datos* (AEPD) with the claim to the publisher of the newspaper and two Google entities – Google Inc., parent company based in the US, and Google Spain, the local subsidiary⁶.

AEPD rejected the complaint relating to *La Vanguardia*, stating that the original publication was perfectly legal, but upheld the complaint to Google requiring to remove or to conceal links to *La Vanguardia* from the search results about señor González⁷. AEPD supposed the operator of the search engine was the subject of data protection law who was directly responsible for the data dissemination despite the fact that it did not operate the website storing the data. Accordingly, AEPD demanded to erase personal data from the search results, although its storage on the website of the newspaper was legal⁸. Google Spain and Google Inc. brought actions against that decision before the High Court of Spain, which referred to the CJEU for a preliminary ruling on interpretation of the Data Protection Directive⁹.

The case includes two group of issues: first, jurisdictional – material and territorial scope of application of the Data Protection Directive, and second, substantial – extent of the responsibility of an operator of a search engine under the Directive and the scope of the data subject’s rights towards the search engine. It was the last one that caused a significant resonance among legal scholars and practitioners.

2.2. Argumentation of CJEU

CJEU interpreted the Data Protection Directive in favour of señor Costeja González by recognising the search engine operator as the controller of

⁶ *Google Spain v. Gonzalez* (C-131/12), paragraph 14.

⁷ *Ibid*, paragraph 16.

⁸ *Ibid*, paragraph 17.

⁹ *Ibid*, paragraphs 18-20.

personal data and declaring that the data subject has the right that the information relating to him personally should no longer be linked to his name.

First, CJEU declared that the search results by an individual's name are personal data because they are an organised and structured overview of the information relating to that individual that can be found on the Internet enabling other Internet users to establish a more or less detailed profile of the data subject¹⁰. Therefore, it constitutes a more significant interference with the data subject's fundamental right to privacy than the publication on the web page¹¹. Accordingly, the court recognised that Google as the search engine operator fits the definition of the controller of personal data from the Directive¹², because it determines the purposes and means of the search activity and thus of the processing of personal data¹³.

Second, CJEU, interpreting Art. 12(b) and 14 of the Directive, confirmed the right of the data subject and the corresponding obligation of the controller to rectification, erasure or blocking of data the processing of which is incompatible with the Directive¹⁴. Third, CJEU interpreted incompatibility with the Directive as meaning that such data is inaccurate or inadequate or irrelevant or excessive in relation to the purposes of the processing or not kept up to date or that it is kept for longer than is necessary¹⁵. Finally, applying these rules to the case in point, the court stated that the information in the newspaper announcement was sensitive for the data subject's private life, and that the event had taken place 16 years ago¹⁶.

2.3. The outcome – “(un)forgotten” information

While beginning the litigation, señor Costeja González stipulated his wish that nobody knew about his old debts. After the process in ECHJ, he became famous for having had debts and wishing to conceal this fact. The results of Google search by his name now are impressive; there are about 35,800 results, most of them are describing the *Google* case. It does not only attract considerable attention from lawyers, it was also covered by media¹⁷, and some news articles even contain the image of the original article from *La Vanguardia*. *The Guardian* called the result of the case pyrrhic victory and the example of “Streisand effect”¹⁸.

¹⁰ *Ibid*, paragraph 37.

¹¹ *Ibid*, paragraph 87.

¹² Data Protection Directive, Art. 2(d).

¹³ *Google Spain v. Gonzalez* (C-131/12), paragraph 33.

¹⁴ *Ibid*, paragraph 70.

¹⁵ *Ibid*, paragraph 92.

¹⁶ *Ibid*, paragraph 98.

¹⁷ See, e.g.: LEE, DAVE. **What is the 'right to be forgotten'?** BBC News (13 May 2014). Available on <http://www.bbc.com/news/technology-27394751>. Last visited on 5 November 2014;

BALL, JAMES. **Costeja González and a memorable fight for the 'right to be forgotten'**. *The Guardian* (14 May 2014). Available on <http://www.theguardian.com/world/blog/2014/may/14/mario-costeja-gonzalez-fight-right-forgotten>. Last visited on 1 November, 2015.

¹⁸ Internet phenomenon, when attempts to hide or remove information leads to spreading information more widely.

However, while the effect of the case on state of affairs of señor González was information dissemination, not hiding, other Google users got the way to demand Google observe their rights. Answering to the CJEU decision, Google devised a form of search removal request. To demand removing of specific search results, requesters has to identify each search result that they want to remove by URL; prove that specified web page are about the requester (or those for whose behalf the requester acts); and explain, separately for each URL, why the inclusion of specified URLs as a search result is irrelevant, outdated or otherwise objectionable¹⁹.

Google decision as a piece of law was severely criticized in the United Kingdom. The House of Lords of the Parliament of the UK in its report "EU Data Protection law: a 'right to be forgotten'?"²⁰ criticised the CJEU decision on numerous ground. Among them, it said that the same expression "right to be forgotten" is misleading, because the pages of *La Vanguardia* still exist in hard copy, and can immediately be accessed electronically by typing in the name of the co-owner of the property which was being auctioned²¹.

3. Importance of *Google* case for the development of the right to be forgotten

3.1. Balancing approach or superiority of the privacy rights?

Data Protection Directive demands to find a balance between legitimate interests of the controller or third parties in data processing and the fundamental rights and freedoms of the data subject²². CJEU followed the balancing approach and developed it in a test. It listed a number of factors that balance would depends on in particular cases:

- the nature of the information in question;
- sensitivity of the information for the data subject's private life;
- interest of the public in having that information that depends on the role played by the data subject in public life²³.

Although CJEU declared the balancing test to be used, it further stated that privacy rights of the data subject "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". Therefore, the court factually established a

¹⁹ Google. Search removal request under data protection law in Europe. Available on https://support.google.com/legal/contact/lr_eudpa?product=websearch. Last visited on 25 October 2015.

²⁰ House of Lords, European Union Committee. *EU Data Protection law: a 'right to be forgotten'?* (30 July 2014). Available on: <http://www.publications.parliament.uk/pa/ld201415/ldselect/ldcom/40/40.pdf>. Last visited on 1 November 2015.

²¹ *Ibid*, paragraph 15.

²² Data Protection Directive, Art. 7(f).

²³ *Google Spain v. Gonzalez* (C-131/12), paragraph 81.

presumption of superiority of privacy rights instead of a balance.

However, CJEU specified that this rule is applicable to ordinary people but not to public figures, for whom “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”²⁴.

Sensitivity of the information for the data subject’s private life is too vague criteria. Indeed, if a person dislikes some information about him, if this information somehow troubles him, therefore, it is sensitive for him. Under the ruling of CJEU it is the ground to demand erase it from the search results.

3.2. Framing the right to be forgotten

The decision of CJEU is particularly important in the light of proposal of General Data Protection Regulation²⁵, being discussed for the last couple of years. Italian representatives in the Council of the European Union propose, building on the *Google* judgment, to examine how the future legislation on “the right to be forgotten” and the right to erasure should be developed. To the contrast, UK called it ‘misguided in principle and unworkable in practice’ and offers to amend the proposed regulation by excluding search engine operators from the scope of personal data controllers and by erasing “right to be forgotten” as it is now²⁶.

CJEU decision says only about operators of search engines, but it can be followed in cases concerning another services of user generated content, such as social networks which allow “tagging”²⁷.

3.3. Economic impact

CJEU declared that privacy rights of the data subject should override, as a rule, the economic interest of the operator of a search engine²⁸. House of Lords of the UK said that judgment is unworkable because, among other reasons, it ignores the effect on smaller search engines which, unlike Google, may not have the resources to consider individually large numbers of requests for the deletion of links²⁹.

Art. 23 of the Data Protection Directive, as well as Art. 77 of the proposed General Data Protection Regulation, provide the right to receive compensation from the controller for the damage suffered, unless the controller proves he

²⁴ *Google Spain v. Gonzalez* (C-131/12), paragraph 97.

²⁵ 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) (COM 2012/11 final). Available on: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2012:0011:FIN>. Last visited on 1 November 2015.

²⁶ House of Lords. *EU Data Protection law: a ‘right to be forgotten’?*, paragraphs 57-58, 62-63.

²⁷ HÖRNLE, JULIA. Google’s algorithms, search results and relevancy under data protection law - whose data quality? *Entertainment Law Review*, n. 25(6), p. 211-212, 2014.

²⁸ *Google Spain v. Gonzalez* (C-131/12), paragraph 97.

²⁹ House of Lords. *EU Data Protection law: a ‘right to be forgotten’?*, paragraph 56.

is not responsible for the event that gave rise to the damage. Depending on the interpretation of limits of responsibility, search engine operators need more or less resources to control the legitimacy of data processing. If the burden is too heavy, it will be able to ruin smaller companies.

3.4. A search engine operator as easiest-to-claim respondent

CJEU separated the question of responsibility of the search engines from the operators of web-sites. It leaved it to be up for a claimant to choose to whom to address the claim. Claimants may choose the operators of the search engine not because they are more guilty, but because of litigation strategy. Web sites may be registered in various jurisdiction, making it difficult to sue them. To the contrast, Google has subsidiaries in European Union, so there always is a defendant who is under the jurisdiction of a Member State court, who values its reputation, who has assets to recover damages.

3.5. Concerns about censorship

Google case raises serious concerns about the abuse of “the right to be forgotten” by data subjects and about censorship. Right to privacy and right to freedom of information have always been confronting rights. CJEU was criticized because freedom of expression was hardly mentioned in his decision³⁰.

4. EU proposed Regulation

Data Protection Directive is supposed to be replaced by the Regulation 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)³¹. Regulation will have broader scope of regulation than the Data Protection Directive, and it will be directly applicable in EU member states, as distinct from directives which need implementation. The project of the Regulation is still discussed.

Art. 17 of the General Data Protection Regulation deals with the right to be forgotten. The right is constructed more broadly than in *Google* decision. While in *Google* CJEU was answering the particular question about the results of a search made on the basis of a person’s name, the Regulation aims to set the general norm. It is addressed to any controllers and covers all kinds of personal data, especially personal data that was made available by the data subject while he or she was a child. This clause is not limited to Internet issues, but the European Comission’s Press Release says that right to be forgotten is

³⁰ KOUTRAKOS, PANOS. To strive, to seek, to Google, to forget. *European Law Review*, n. 39(3), p. 294, 2014.

³¹ 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). COM/2012/011 final. Available on: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2012:0011:FIN>. Last visited on 30 October 2015.

aimed to help people better manage data protection risks online³².

Comparison of three mentioned sources of law shows that the scope of personal data erasure conditions is being extended. According to the Data Protection Directive, personal data can be erased or blocked if its processing does not comply with the provisions of the Directive, in particular because of the incomplete or inaccurate nature of the data³³. In *Google* case, this rule was interpreted broadly, adding to inaccuracy such grounds as inadequacy, irrelevancy and excessiveness in relation to the purposes of the processing, not keeping up to date, or keeping for longer than is necessary³⁴. Under General Data Protection Regulation, the reasons for data erasure are: loss of its necessity in relation to the purposes of collection, consent withdrawal, non-compliance with the Regulation³⁵.

Additionally, Regulation, as well as Google decision, provides for the balancing of interests of data subject, data controller and general public. For this reason only, data subject's own objection is necessary. Right to be forgotten may be realised if a data subject claim that data processing is not necessary to protect the vital interests of the data subject, to perform a task carried out in the public interest, or to realize controller's legitimate interests, but only unless the controller demonstrates compelling legitimate grounds for the processing which override the interests or fundamental rights and freedoms of the data subject³⁶. Distribution of burden of proof in this mechanism is worth highlighting: the data subject makes a claim without argumentation, but the controller needs to prove his right to process data.

5. Russia: a law to take force in 2016

The law on the right to be forgotten was enacted in Russia recently. Federal law No 264-FZ on 13.07.2015 amended the long-existing Federal Law on Information, Information Technologies, and Information Protection³⁷ by adding to it article 10.3. The law will enter into force on 1 January 2016, and Russian Parliament has been still discussing the size of sanctions for breaching this right in October 2015.

Right to be forgotten is constructed in Russia rather similarly to the European model; however, it differs in some aspects. Under the new law, search engine operators, such as Google, are obliged, if requested by natural persons, to delete from the search results links to the information about that person, if such information distribution violates law, or such information

³² European Commission, Press release: Commission proposes a comprehensive reform of data protection rules to increase users' control of their data and to cut costs for businesses. Available on: http://europa.eu/rapid/press-release_IP-12-46_en.htm?locale=en. Last visited on 30 October 2015.

³³ Art. 12(b).

³⁴ Paragraph 92.

³⁵ Art.17(1).

³⁶ Art. 19(1).

³⁷ See Federal law No 264-FZ on 13.07.2015, Собрание законодательства РФ [Collection of Legislation of RF], 20.07.2015, No 29 (part I), Art. 4390.

is not accurate or actual, or lost its importance for the applicant due to subsequent events or applicant's actions. However, a person cannot demand deletion of information about criminal offences. The exception are cases where terms of statutes of limitation have expired, or a person is deemed to be non-convicted due to annulling or removing of a criminal record.³⁸

There could be a question of jurisdiction, i.e., to what extent Russian law is applicable, since most of the search engines are global and extraterritorial. The law provides that Russian Federation have jurisdiction when search engine operators aimed at attraction of attention of consumers residing in Russia.

The mechanism of the right to be forgotten realization is the following. After receiving the links deletion request, a search engine operator have to satisfy the request or send the applicant a reasoned refusal in ten working days. The refusal can be appealed to a court. Search engine operators must keep secret all the requests. This information may be disclosed only when directly provided by law.

Yandex, one of the biggest Russian Internet company that operates 4th largest search engine worldwide³⁹, met the new law with serious criticism. Their opinion was that this law breaches the constitutional right on freedom of search and access to information. Yandex also noticed that the law puts on search engine operators the burden of determining whether information is accurate, and the duty of legal qualification of information, e.g. whether it relates to criminal offences, and what are their statutes of limitation. The company also supposes that the law is not effective: even if the link to information is deleted from the search results, the information itself is still on the Internet, and can be distributed by other ways, for instance, via social networks⁴⁰.

Sanctions for search engine operators for breaching the law on the right to be forgotten are to be established separately. According to recently proposed legislation, fine for not answering the request for links deletion should be approximately equal to 1.5 thousand USD, and for not obeying a court's decision – 47 thousand USD⁴¹.

6. Conclusion

CJEU by deciding the *Google* case made an important precedent. The consequences of this precedent would be possible to evaluate by the practical

³⁸ See Art. 86 of the Criminal Code of the Russian Federation (in English). Available on: <http://www.wipo.int/edocs/lexdocs/laws/en/ru/ru006en.pdf>. Last visited on 26 October 2015.

³⁹ See CLAYTON, NICK. Yandex Overtakes Bing as World's Fourth Search Engine. *Wall Street Journal*, 11 February 2013. Available on: <http://blogs.wsj.com/tech-europe/2013/02/11/yandex-overtakes-bing-as-worlds-fourth-search-engine>. Last visited on 26 October 2015.

⁴⁰ «Яндекс» назвал антиконституционным законопроект о «праве на забвение» [Yandex said the proposed legislation on the right to be forgotten is unconstitutional]. *Meduza* (29 May 2015). Available on: <https://meduza.io/news/2015/05/29/yandeks-nazval-antikonstitutsionnym-zakonoproekt-o-prave-na-zabvenie>. Last visited on 26 October 2015.

⁴¹ Proposed legislation No 804140-6. Available on: <http://asozd.duma.gov.ru/main.nsf/%28Spravka%29?OpenAgent&RN=804140-6>. Last visited on 26 October 2015.

results of the decisions following it. The main open question is how broad would courts understand the sensitivity of information for the private life of the data subject. Now the practice is not enough representative, there was only one case in the UK, *Hegglin v Persons Unknown, Google Inc.* [2014] EWHC 2808 (QB), when injunction from the search results were granted for sites with defamations about the claimant. The bigger and more diverse would be the practice, the more chances are that the European Commission would correctly assess the possible implications of the proposed General Data Protection Regulation and finds the most effective balance between right to privacy, freedom of information and promoting technical development.

Not the less important is how the third countries, i.e. Brazil and Russia will use that experience. The starting points – texts of initial legislative acts – are rather similar to European approach. The question of further realisation remains open, will these processes be parallel to European ones, or will develop in their own way.

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