

Beyond Fables: a commentary on the 2014 Google Decision

Más allá de las fábulas: comentario a la decisión Google 2014

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A scorpion and a frog meet on the bank of a stream and the scorpion asks the frog to carry him over a river. The frog asks, «How do I know you won't sting me?» and the scorpion replies, «Because if I do, I will die too». The frog agrees carrying the scorpion, but midway across the river the scorpion stings the frog that feels the onset of paralysis and starts to sink. Knowing that both are doomed the frog asks, «Why?» the scorpion replies, «it's my nature» (popular fable).

Many believe that the European Court of Justice (hereinafter, the Court) in Case C-131/12 acted like the scorpion in the popular animal fable, not being able to evade its nature as judicial ward and thus falling into the short-sighted trap of the immediate protection of the interest of the complainant. To outline the result of the above-mentioned

1. I would like to thank Ángela Marcos Figueruelo for her valuable comments. All remaining errors are mine.

case, the Court endorsed the previous view adopted by the Spanish Data Protection Agency (AEPD) in requiring Google Spain and Google inc. to take the necessary measures to withdraw the data relating to a Spanish citizen, Mr Costeja González, from their index and to render access to the data impossible in the future. The pages indexed in the search engine list of results contained an announcement published in *La Vanguardia*'s newspaper of 1998 for a real estate auction organised following the proceedings for the recovery of social security debts owed by Mr Costeja González.

This conclusion, that basically allows individuals to request that public information about them be delated from search engine listings has undergone, as pointed-above, heavy criticism mostly by digital rights advocates. These reproaches, which at first sight might seem inexplicable coming from organizations which support freedoms in the digital world, are more understandable if one believes that the following two basic ideas hold true: first, that there is an insuperable conflict between freedom of expression and information and high levels of protection of personal data; and, second, that the conflict of interest between internet users and data subjects cannot be satisfactorily balanced on a case-by-case basis. These ideas inform the opinion of Advocate General (AG) Jääskinen who not only indicated the more or less obvious existence of the conflict between freedom of information and the high levels of protection of personal data that would be necessary to support in order to endorse the conclusion of the AEPD, but also the naivety of the case-by-case approach. These same ideas are rejected by the Court. According to the Court conflict might be reconcilable and thus the controller (broadly speaking the person who determines the purpose of the processing of personal data) needs to reasonable assess the circumstances of the particular case to arrive to a reasonable decision. Too much reason and reasonability, perhaps, for a search engine, that is a business, that would need to make a great economic and operational effort to manage an otherwise unmanageable number of request of citizens that want to «be forgotten» or that would avoid this financial and operational burden by the automatic withdrawal of links to any objected contents.

AG Jääskinen also refers to the importance of reason, but by contrast to the Court, his reasonableness is used to justify a perspective that transcends the particular interests of Mr Costeja González to embrace also the objectives of the digital age and the legitimate interests of the internet users. In other words, reason or the exercise of reason is not deferred to the controller, as it happens in the Court's assessment, but is by contrast used to justify the *a priori* exclusion of the need for the controller's to determine whether the right to be forgotten applies to a concrete situation. AG Jääskinen does this by first, denying that a search engine who acts as intermediary between users and published content can be rightly defined as controller and second, by denying the existence of a right of the data subject to address a search engine in order to prevent indexing of the information relating to him personally, published legally on third parties' web sites, invoking his wish that such information should not be known to the internet users.

In the below lines I claim that while agreeing with AG Jääskinen overall approach, I believe his first conclusion, that I call «the first conclusion from reason», is wrong. I also argue that his second conclusion, «the second conclusion from reason» is right. In addition I believe that the Court is right in recognizing search engine service providers as controllers, and wrong in granting a right to be forgotten when accurate and legal content is involved.

THE FIRST ASSESSMENT FROM REASON: ON WHETHER A SEARCH ENGINE CAN BE DEFINED AS CONTROLLER

In the opinion of Advocate General Jääskinen, the absence of immediate human intermediation in the data processing operation should play a relevant role in the determination of what (or who) is the «controller». According to Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data (hereinafter the Directive or the Data Protection Directive), the controller is «the natural or legal person, public authority, agency which alone or jointly with others determines the purpose and means of the processing of personal data» (see Article 2(d) the Directive). AG Jääskinen expresses that search engine providers like Google do not possess the means of changing the information of the source web pages that their mechanized crawler function has retrieved and copied, and thus these search engines cannot be aware of the existence of personal data in any other sense than as a statistical fact. Obviously a search engine can always re-establish its basic search parameters to exclude displaying certain source web pages, but the a priori establishment of a precautionary filtering policy cannot be equated with the fundamental component of awareness. Indeed for AG Jääskinen, the proposition «determination of the purpose and means of the processing of personal data» should be understood as constant, frictionless and humanly mediated determination. He offers the example of the e-Commerce Directive 2000/31, in which the exceptions to liability of Articles 12, 13 and 14 are built on the legal principle according to which automated, technical and passive relationships to electronically stored or transmitted content do not create control or liability over it. In addition, the EU legislator in the Data Protection Directive also seems to embrace the idea of the exclusion of responsibility for passive relationships. In this respect recital (47) of the Directive affirms that in messages containing personal data transmitted by means of telecommunication or electronic mail services, the controller will normally be considered to be the person from whom the message originates. Even the Opinion 1/2008 of the Working Party on the protection of individuals with regard to the processing of Personal Data (also known as Article 29 Working Party because the legal basis for its creation is found in Article 29 of the Directive) states that «the principle of proportionality requires that to the extent that a search engine provider

acts purely as an intermediary, it should not be considered as the principal controller with regard to the content related processing of personal data that is taking place». Therefore, according to AG Jääskinen, a «truthful construction of the Directive», and more concretely of Article 2(d) must take into account the complexities associated with the information society in general, and of search engines in particular. Indeed, these complexities seem to have been understood by the EU legislator in the e-Commerce Directive and by the Article 29 Working Party.

The Court in its judgment of 13 May 2014 expresses a different opinion. For the Court the search engine operator clearly determines the purposes and means of data processing operations and accordingly it should be qualified as controller. The Court disregards the passivity or unawareness element emphasized by AG Jääskinen in his opinion and justifies its interpretation of Article 2(d) of the Directive on textual grounds and on the impact that search engines have in the dissemination of personal data. In this respect the Court states that «inasmuch as the activity of a search engine is therefore liable to affect significantly [...] the fundamental rights to privacy and to the protection of personal data, the operator of the search engine as the persona 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» (see paragraph 38). Therefore, the Court takes a simplified view of processing operations, one in which the realities about the processing of data are outweighed by the impact of these processing operations on the data subjects. Indeed, if for AG Jääskinen the ontology of the information society justifies the narrow interpretation of the concept of controller, for the Court is by contrast the impact of data processing operations on the data subjects' rights the element justifying the broad understanding of Article 2(d).

Reason, understood in this context as what it should be thought as reasonable for the interpreter of Article 2(d) taking into account the impact of its interpretation in data subjects, internet users and economic operators such as search engine service providers, calls for an interpretation of the concept of controller along the lines followed by the Court. Indeed, the narrow understanding of controller proposed by AG Jääskinen has the consequence of leaving search engines practically outside of the scope of the Data Protection Directive. Even if one is against preventing indexing of accurate and legal personal data-related information, it would not be prudentially wise for a Court to cancel their future review power over the data processing operations of search engines. In addition, the argument from ontology put forward by AG Jääskinen, even if accurate from the point of view of the operational activity of search engines, cannot avoid the fact that search engines must assume certain responsibility from the huge impact that they have in their automatic dissemination of data.

THE SECOND ASSESSMENT FROM REASON: ON WHETHER A RIGHT TO BE FORGOTTEN EXISTS WHEN ACCURATE AND LEGAL CONTENT IS INVOLVED

With «the right to be forgotten» commentators refer to both the right of erasure and blocking of data and the right to object to the processing of information containing personal data. These rights are respectively provided for in Article 12(b) and Article 14(a) of the Directive. According to Article 14(b) a data subject shall possess the right to obtain from the controller the rectification, erasure or blocking of the data which does not comply with the Directive, in particular because of the incomplete or inaccurate character of the data. Analogously Article 14(a) provides, obviously upon transposition, for the right to object «on legitimate grounds» to the data processing operation. Since the right to be forgotten can only be invoked *vis-a-vis* the controller, the relevancy of this right in Case C-131/12 passes for the recognition of the search engine as a controller. In that case, and as far as the right to be forgotten is not considered in absolute terms, the service provider would need to leave its passive and intermediary position between the internet user and the publisher, and adopt the role of the latter in order to verify whether the dissemination of the personal data of the website can be considered as legal and legitimate for the purposes of the Directive. In other terms, the recognition of the search engine as controller places the latter in a position that does not correspond with its traditional operative functioning and moreover, it compels it to make an assessment on an issue that until that moment was foreign to its interests. This is however, and as it has been indicated above, a burden and a responsibility that the search engine must assume.

According to AG Jääskinen, even if the search engine is recognized as a controller, the relative or non-absolute character of the right to be forgotten makes it inapplicable in the present circumstances. Indeed, Article 6 of the Directive indicates the need for the controller to ensure that the data is processed fairly and lawfully, collected for specified and legitimate purposes, proportional in relation to its purposes, accurate and, where necessary, kept up to date. It is therefore clear from the wording of this Article that the controller must weigh its interests against those of the data subject. These interests might be rightly invoked in the form of fundamental rights, and accordingly the case-law of the European Court of Human Rights (ECHR) might also be of relevance. In this respect AG Jääskinen does not deny that the right to be forgotten might be adequately derived from the right to private life of Article 7 of the Charter of Fundamental Rights. He refers to the view of the ECHR in the *Aleksey Ovchinnikov* case in which it stated that «in certain circumstances a restriction on reproducing information that has already entered the public domain may be justified, for example to prevent further airing of the details of an individual's private life which do not come within the scope of any political or public debate on a matter of general importance». However AG Jääskinen

also points to other rights at stake, such as the freedom to conduct a business or the freedom of information, recognized respectively in Article 16 and Article 11 of the Charter of Fundamental Rights. In relation to the former, AG Jääskinen considers that commercial internet search engine service providers such as Google offer their information location services in the context of business activity aiming at revenue from keyword advertising. In relation to the latter, he refers to case *Times Newspapers Ltd v. the United Kingdom* in which the ECHR observed that internet archives «constitute an important source for education and historical research, particularly as they are readily accessible to the public and are generally free [...] the margin of appreciation afforded to States in striking the balance between the competing rights is likely to be greater where news archives of past events, rather than news reporting of current affairs are concerned». The right of information is precisely relevant in the context of the reference at hand because in the contemporary information society, one of the most important ways of materialising this right is by means of search engines. Accordingly, AG Jääskinen believes that in addition to the interests of the controller and the data subject, the interest of the internet users to exercise their right of information should also be taken into account. Indeed, in the present litigation the exercise by internet users of their right of receiving information is undisputed since as AG Jääskinen claims, the data protection problem would only be present if an internet user types the data subject's name and surnames into the search engine's search bar. The internet subject appears then as an active agent who purposively uses his right to receive information concerning the data subject from public sources for reasons known only to him.

It is precisely that presence of the internet user exercising his right to receive information that shifts the balance towards the not recognition of a right to be forgotten to the data subject in the present circumstances. Indeed, and as AG Jääskinen expressed in his preliminary observations, the correct, reasonable and proportionate balance between the constellation of fundamental rights and interests present in the case at hand should also take into account the coherent interpretation of the objectives of the information society and legitimate interests of the economic operators and internet users at large. Therefore, once this broad view is adopted, is easy to conclude that it would not make sense enlarge the scope of protection of the data subject under the Directive at the expense of the fundamental rights of freedom of information and expression. AG Jääskinen's view is also forward-looking since he believes that concluding in favour of (i) the recognition of search engines as controllers, (ii) the recognition that in conformity to Article 12(b) the data subject might in case of lawful information published in websites address the search engine in order withdraw the links containing that information, and (iii) the recognition of an effective right to be forgotten even in cases in which other rights such as the right of freedom of information and expression are involved, would lead to the automatic withdrawal by search engines of the links to any objected content, assuming a lower organisational costs that otherwise would need to

assume in case they set a internal mechanism in order to deal with complaints by the data subjects.

The Court in interpreting Articles 12(b) and 14(a) of the Directive cannot any longer rely in a textual approach. Indeed, a *prima facie* textual interpretation of Article 12(b) would not justify the removal of the links to websites displayed in the list of results offered by the search engine since that provision refers in particular to data of an incomplete or inaccurate nature. The Court, in order to extend the right to be forgotten to situations of lawful published content, as it does in the present case, must justify this extension on the basis of certain claims or in theory about the purpose of the Directive. It is precisely with this aim that the Court points to recital 10 to refer to the high level of protection that it must offer to natural persons under the Directive, in particular to their right to privacy with respect to the processing of personal data. The Court claims that the right to privacy must necessarily be interpreted in the light of fundamental rights, however and by contrast to the opinion of AG Jääskinen, the Court does not elaborate an extended argument justifying the greater weight of the right to privacy over other competing rights such as the freedom to conduct a business or the freedom of information and expression. The only argument in this respect is found in paragraphs 80 and 81 of the judgment wherein the Court highlights the possibility for an internet user to obtain a detailed profile of the data subject through a simply search by the individual's name. According to the Court, the potential seriousness of this interference to the data subject's right to privacy cannot be justified on the economic interest that the search engine may have in the processing. In relation to the interest of the internet users, the Court argues that as a general rule, the latter is overridden by the data subject's right to privacy, but that however the balance may depend, in specific cases, on the nature of the information in question and its sensitivity for the data subject's private life and on the interest for the public of having that information, an interest that may vary according to the role played by the data subject in public life. What the Court does not address is whether freedom of information or expression might override the data subject's right to privacy in situations in which the information on the latter is not incomplete or inaccurate and has been lawfully published. Indeed the vagueness of the Court's reasoning in relation to the relative weights of the involved rights and interests paves the way to its argument in favour of addressing these conflicting interests on a case-by-case basis. Since, according to the Court, the principles relating to data quality of Article 6 and the criteria for making data protection legitimate of Article 7, belong to the considerations that might be invoked by the data subject in order to obtain his right to be forgotten, and furthermore, since these considerations have all a general character, the controller would need to take all these circumstances into account when dealing with potential complaints on the basis of Article 14 of the Directive.

That case-by-case method outlined by the Court, even if reasonable as far as it shows a concert for the particularities and complexities that might be involved in an

individual case, seems to forget how things work in reality. Agents will normally drive their behaviour by minimizing costs. In this respect, and as AG Jääskinen has rightly indicated, a search engine will not set up costly conflict-solving mechanisms to determine whether in a concrete case the right to be forgotten applies. A search engine will normally anticipate possible conflicts by automatically withdrawing objected contents; a measure that negatively affects the right of information and free expression. In addition, the search engine might start (and indeed has already started) to place generic search warnings when it believes someone is searching for an individual name, whether or not the content related to the name has been removed, making those warnings completely useless for providing any clear indication of removed content, and affecting thus in an even more negative way the right of information.

Therefore since these pragmatic concerns are intrinsically linked with fundamental rights-based considerations, it would be more reasonable if the Court followed the opinion of AG Jääskinen and denied the existence of a right to be forgotten when accurate and legal content is involved.

CONCLUSION

This commentary started with the popular fable of the scorpion and the frog, and despite to what it has been said above it would not be totally fair to identify the Court with the scorpion since the Court surely regarded its decision as the correct one (the same cannot be said of the scorpion). However and only a few months after the adoption of the decision, the concerns on the freedom of information and expression raised by AG Jääskinen seem to have materialized (the reader can try by himself: for example, the introduction of the name «omar jones» in the Google search bar will automatically result in a warning stating that «some results may have been removed under data protection law in Europe»). The Court may want to keep an open eye and perhaps change its decision in a near future.