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The right to be forgotten – a right in the digital world

The Internet is a tool of communication accumulating an uncountable quantity of information that never disappears from its surface. This also applies to the information which becomes obsolete over time. In the context of the basic rights of individuals – such as personal data protection – this is an issue of the most basic significance. How can the law be adjusted to technological change?

In the age of the development of information society, not only European law providers have to deal with the problem of personal data protection. Once uploaded to the internet, information ceases to be controlled by the subject which uploaded it. This results from the technological nature of the internet as a network of autonomously connected computers constituting independently operating nodes. The advocate general turns attention to the above in his opinion concerning case C-131/12 Google Spain and Google vs Agencia Española de Protección de Datos (AEPD). As a part of this case, prejudicial questions were directed to the Court of Justice in connection with a dispute between Google and Google Spain on the one side, and a Spanish data protection body (AEPD) and a Spanish citizen on the other. The dispute was related to requiring Google Spain and Google to take indispensable measures to withdraw personal data from their index and prevent further access to them. The case concerned information on the seizure of a real estate due to unpaid social insurance premiums that was published in a popular Spanish daily in 1998.The person whose data were published was mentioned as the owner. At a later date, the publisher made an electronic version of the newspaper available on the internet. After eleven years, the person contacted the newspaper publisher, claiming that after entering his name and address into the Google search engine, a reference to the newspaper pages containing the announcement of the real estate auction is shown. The data subject claimed that despite the fact that the seizure order was concluded and resolved years ago, the announcement continued to be shown in search results. Responding to the request, the publisher stated that the removal of data was not appropriate, since the publication was legally justified. The data subject asked Google Spain to prevent further links to the newspaper with the announcements to be generated in search results when his name is entered. The request was forwarded to Google Inc. in California, which provides internet search services.

Then the data subject asked AEPD to oblige the publisher to remove his personal data or change the publication in such a way that his personal data are not

shown. He also demanded that Google be obliged to remove or hide his personal data so that they are not linked to the auction announcement. The Spanish Personal Data Protection Agency admitted the complaint from the data subject and demanded that Google Spain SL and Google Inc. withdraw his data from their indexes (lists). However, the body held that the information on the auction published in the newspaper must be kept in view of its legal justification. Google Spain and Google Inc. submitted two appeals against the decision, demanding that it be annulled.[1]

The judges collected all their doubts encountered while analysing the request in nine questions.[2] The court understood that the complaint concerns the problem of the personal data protection-related obligations of the entities handling internet search engines. Individuals may not wish for certain information published on websites of third parties, containing their personal data and allowing to identify them, to be uploaded, indexed, and made available to the internet users indefinitely.

The first doubt of the judges concerned the territorial application of Community and national regulations pertaining to the protection of personal data. Do they apply in this case, or – as Google argues – should data subjects turn to the court of law in California, where the parent company is seated?

The Court also asked whether, while indexing information, search engines process personal data, and whether they are responsible for their processing and in view of this fact should abide by individuals' right to having their data withdrawn and/or lodging an objection, although the information is kept in the original sources since it has been considered legal.

Finally, the judges asked the Court of Justice of the European Union (CJEU) whether personal data protection applies when a given individual objects to the indexing and dissemination of information which concerns them, despite it being legal and precise at its source, since they consider it negative or harmful to themselves (Europa Praw Człowieka 2012).

A characteristic of the internet

All contents in the form of texts or audiovisual materials, including personal data, can be readily and permanently available globally in the digital format. The internet revolutionised our life, removing technical and institutional barriers

[1] Opinion of the advocate general Niil Jääsinen presented on 25.06.2013, case C-131/12, http://curia.europa.eu/juris/document/document.jsf?text=&docid=138782&pageIndex=0&doclang=PL&mode=req&dir=&occ=first&part=1&cid=305413 [accessed on 23.11.2015].

[2] Reference for a preliminary ruling made by Audiencia Nacional (Spain) on 9 March 2012 – Google Spain, S.L., Google, Inc. vs Agencia de Protección de Datos (AEPD), Mario Costeja González (case C-131/12), http://curia.europa.eu/juris/document/document.jsf?docid=123131&doclang=PL [accessed on 23.11.2015].

to the dissemination and reception of information.[3] Information should be free[4] and publicly available, and anything that hinders the freedom should be omitted. These barriers include authorities, bureaucracy, and discrimination.

The above understanding of the freedom of information is a challenge to the law-makers. The subject uploading information to the internet loses control over it. The autonomy of information is a constitutive feature of the internet. The relationship between the information and its author is levelled. In their autonomy, messages are disseminated regardless of the intentions of the person who posts them. It is impossible to keep control over this independent, non-hierarchized network. Control is effective when a structure has strong features characteristic for hierarchy. If there is no hierarchy to a structure, control is limited or utterly impossible. Case C-131/12 is symptomatic for information society. This results from two basic premises. The first one concerns the protection of personal data that is guaranteed by the EU law. The second premise concerns the freedom to conduct business. We are dealing with a conflict between two equally important values.

In the case of the internet, we need to identify three situations related to personal data:

– the first one concerns the publication of personal data on any website;
– in the second one, the search engine shows search results leading the internet user to the source website;
– in the third situation, the user searches through a search engine, and some of their personal data, including his IP address, are transferred to the provider of the search services[5].

Responding to the above three issues by the law- and decision makers is of key importance for the determination of the principles of functioning of one of the most basic tools of the internet society, i.e. search engines. The case Google vs AEPD and Mario Costeja Gonzàlez is unprecedented. It is the first case brought to the Court of Justice including a request for an interpretation of the directives on the protection of personal data in the context of internet search engines. From the legal point of view, the implementation of new technologies stepping beyond borders and time

[3] Opinion of the advocate general Niil Jääsinen presented on 25.06.2013.

[4] Freedom is understood as an unrestrained access, and absence of institutional and technical barriers limiting information. "Distortion is inscribed into the very laws of optics. The lens always makes a selection, shows a snapshot of reality, which, through the mechanism of enlargement, acquires the features of the entire picture. The viewer is convinced that the whole of that world looks so. It is an example showing that complete disinformation can be practiced in the world full of information" (Wang 2001: 11). "On the one hand, information wants to be expensive, because it's so valuable. The right information in the right place just changes your life. On the other hand, information wants to be free, because the cost of getting it out is getting lower and lower all the time. So you have these two fighting against each other" (Anderson 2009). What is important in Anderson's quotation is the grasping of the economic relationship between the world of ideas and technology. Using an anthropomorphic metaphor with reference to information, implying that it might have desires rather than a political attitude (information "wants to be" rather than "should be") suggests the freedom of the information marking powers of nature (see: Anderson 2009).

[5] Opinion of the advocate general Niil Jääsinen presented on 25.06.2013.

limits, developed after the present regulations were adopted, calls for a new interpretation of personal data protection regulations. But what should it be like?

Positions and opinions in the course of the procedure

The advocate general seeks an answer to this question, weighing the rights guaranteed by the Charter of Fundamental Rights and placing on one of the scales of justice the right of respect to private and family life of which the right to personal data protection is a part, and putting on the other one the freedom of speech of website publishers and persons publishing on the internet as well as the internet users' right to information, which in the light of the growing tendency of authoritarian regimes to censure contents deserves – according to the advocate general – special protection in the EU law. He adds to this the right to conduct business enjoyed by the providers of search services (Europa Praw Człowieka 2013).

Search engines are among the basic tools used on the internet. The popularity of the search engine seems to demand reflection on the functioning of the tool in the context of the legal protection of personal goods. Such a reflection is necessary to make sure that subjects functioning in the digital space have access to their data, can modify them as necessary and withdraw them. Such a solution is provided in the draft regulations presented by the European Commission (European Commission 2012b). On 25 January 2012, the European Commission presented draft amendments to EU data protection regulations adopted in 1995. The proposed changes are to strengthen the right to privacy on the internet inter alia by obliging all subjects offering services on the internet to manage data in a more transparent way. The new draft regulations provide that data can be withdrawn and no longer disseminated if one of the following premises takes place:

– data are no longer necessary for the purposes for which they were collected;
– the data subject revokes their consent on which the processing of the data is based, or the period during which the data were to be stored under their consent has passed, or there is no longer any legal basis for the processing of the data;
– the data subject is opposed to the processing of their personal data;
– the data processing is inconsistent with the regulation (European Commission 2012a).

The amendment of personal data protection law takes into account the technological change that has taken place in the society, as well as the possibilities it provides in the area of access to personal data. Some member states have a critical attitude to the European Commission's amendments, arguing that the suggested solutions will be too much of a burden for entrepreneurs.

Also, the European Network and Information Security Agency (ENISA) indicates in its report that technical obstacles may have a negative effect on the legal

solutions proposed by the European Commission as regards the right to be forgotten – in particular wherever this concerns high volumes of data.

> For any reasonable interpretation of the right to be forgotten, a purely technical and comprehensive solution to enforce the right on the open internet is generally impossible. An interdisciplinary approach is needed and policy makers should be aware of this fact. […] A related question is how aggregated and derived forms of information (e.g. statistics) should be affected when some of the raw data from which statistics are derived are forgotten. Removing forgotten information from all aggregated or derived forms may present a significant technical challenge (Druschel, Backes, Tirtea 2011: 7 and 11).

The deletion of images and posts visible to the general public is basically problem-free. The situation becomes more complex when we are dealing with high volumes of data– for example, when the information we want to delete was used in an analysis and permanent access to the data is necessary.

According to ENISA, the main problem of the regulation is its too excessive approach. The regulation does not cater for example for who has the right to be forgotten, and what sort of information the above may apply to. A vagueness of personal data definitions was also pointed out, describing the data as information that can be clearly connected with a possibility to identify a given natural person. The definition that is necessary to effectively exercise the right to be forgotten is insufficiently clear.

> However, they [definitions] leave to interpretation whether it [data] includes information that can be used to identify a person with high probability but not with certainty, e.g. a picture of a person or an account of a person's history, actions or performance. Neither is it clear whether it includes information that identifies a person not uniquely, but as a member of a more or less small set of individuals, such as a family (Druschel, Backes, Tirtea 2011: 6).

According to critics, the suggested changes were formulated too extensively, which may disproportionally burden data controllers. This standpoint was taken by the European Data Protection Supervisor (EDPS), who, while positively assessing the proposal of the introduction of the right to be forgotten, thinks it necessary to define its scope more precisely (Hustinx 2012). EDPS admits that the suggested changes include more realistic obligations to exercise best effort rather than obligations as to results. Moreover, EDPS believes that the suggested solution introduces on controllers the obligation to inform every recipient to whom data were disclosed about any amendment, correction, or deletion of the data. The exception to this is when such information requires an impossible or disproportionate effort. Hence, the article stressed that personal data controllers shall not be obliged to carry out insurmountable tasks. According to EDPS, in order to ensure that the right to be forgotten is effective, the draft regulation needs to be made more concrete.

Unclear phrases such as "all reasonable steps" shall require further interpretation that may define the scope of the right.

What is interesting is the position of the Polish government in this case. Piotr Waglowski (2012) insightfully pointed out that what can be seen in its context is another constitutive feature of the information society – access to public information. In this concrete case, it was only possible to become acquainted with the position of the Polish government in the aspect of the key importance for the information society under the pressure of a non-governmental organisation. In relation to the main question concerning the right to be forgotten and the obligation imposed on search engines, the Polish government did not adopt a clear position. At the beginning, a search engine was defined as "a programme or internet website designed to facilitate the search for information to users. It processes various data, including the personal data of network users" (Majczyna, Szpunar 2012). The government expresses a belief that the functioning of search engines consisting in locating information published or included on the net by third parties, indexing it automatically, storing it temporarily and finally making it available to internet users according to a particular order of preference, when that information contains personal data of third parties, is considered data processing as understood in Art. 2 let. b) of directive 95/46/EC.

Legal and social doubts

The Spanish case showed a number of doubts in the area of personal data protection and the right to be forgotten. These doubts largely concern the functioning of search engines, including the collection of data on users and privacy policy. Controversies concern the duration of data storage and the possibility to connect them with the identity of a person. Another problem is the basic functioning of search engines, i.e. the provision of search lists. This function raises serious concerns in the context of the right to be forgotten. The subject is all the more controversial as in order to be able to fulfil their basic function, search engines must index websites. In practice, this is tantamount to the copying of website contents by dedicated applications to facilitate the users' search for content. In the context of the discussion on the practical consequences of the right to be forgotten, a question arises whether one may demand a deletion of unfavourable or obsolete information from search results that appear after one enters someone's full name (Smętek, Warso 2012).

In the case in question, there is one more issue worth analysis. It concerns important information, in particular sensitive material, which should not be available after some time. Criminal law distinguishes the so-called "spent conviction", and Michał Ilnicki recalls its meaning as: "[…] a solution aimed at eliminating legal and social consequences of conviction, thus making normal life possible for the convicted person, who over a time period required by law complied with the legal order"

(Ilnicki 2014: 135). When information dispersed on the internet begins to – using a colloquialism – almost live its own life, the term spent conviction can hardly be applied. There is no single person or institution responsible for supervision over information. In the case in question, it is neither (until the Court of Justice delivers its judgement) the newspaper, which published information that was true, nor the search engine. The model of information distribution has changed. Technological development has resulted in changing the concept of time, which ceased to have a linear dimension. We may imagine the situation in the pre-internet era. A newspaper publishes information on an auction. The information is available as long as the copies of the newspaper remain on sale – we may assume that it is limited. The information is then stored in archives visited only by interested individuals. The information on the internet is available all the time and it is difficult to locate it, and thus to delete or block it. For this reason, its longevity causes various effects that are distant in time. Information once referring to the reality, may be used against the person it concerned in future. To describe this phenomenon, Ilnicki uses the category of "post-defamation":

> I shall use the word "post-defamation" with reference to information which upon publication cannot be objectively considered as defaming. However, as the information remains valid over time, it causes excessive stigmatisation of its subject (Ilnicki 2014: 135).

The Spanish case is an example of post-defamation. The protection of personal goods is cumulative, since it is guaranteed by European regulations – such as the Charter of Fundamental Rights, and, in Poland, by the Constitution (Art. 47) and the Criminal Code (Art. 212 discussing defamation) (Ilnicki 2014: 136). For this reason, the protection of personal goods should be guaranteed regardless of the society's technological possibilities. Technological development should be followed by the law-making activity providing effective protection of the basic rights.

Erasing memory has considerable social consequences. On the one hand, we are terrified to see how the internet "fails to forget", but on the other, we sometimes are not aware of the fragility of digital information. The digital memory exists for as long as we are able to read the information it contains. Today, we would find it hard to read information on a diskette, be it because of it being hard to find the appropriate equipment or software enabling the reading of data. Trusting technology, we entrust our data to companies providing cloud services, believing that the data will be safe and kept permanently there (Moglen 2013: 129).

The case of the court decision extends beyond the discussion on the freedom of expression and the possibility of influencing digital reality. This also applies to socially and culturally significant norms regulating the issues of memory as an important element of the collective and the individual identity, and the right to be forgotten and forgiven.

Content of the decision

All the above doubts and suggestions are unimportant in the face of the decision of the Court of Justice. But what does that decision really concern and how should it be interpreted?

The Court of Justice decided that the operator of a search engine not only processes personal data, but also is their controller – i.e. a subject determining goals and means of data processing. Hence, the operator is obliged to meet the requirements burdening data controllers and resulting from the regulations of Directive 95/46/EC. Moreover, the Court of Justice concluded that Google Inc., despite being a company under American law, is subject to the requirements of the EU law, since Google Spain, its subsidiary, conducts business in the territory of Spain.

What exactly did the Court of Justice order Google to do? What exactly must the "disappearance from the search engine" involve? What is new about it and what impact can it have?

Certainly the answer to the above questions is not that everyone has the right to erase their history from search engines. The Court of Justice did not order that data must be removed from the internet, either. The right to be forgotten in the version suggested by the CJEU boils down to the possibility to correct the manner in which the search engine connects personal data contained in a query with answers. Hence, if we prove that some concrete information should not be linked to our full name (as it is fake, obsolete, or there is no longer any public interest in it being published), search engines should change the way it is indexed and no longer provide the result in answer to the query containing our personal data. Such an interference does not affect the availability of the information: it will still be possible to reach it by making another query in the search engine or entering the page on which it was published (Szymielewicz 2014).

However, CJEU noticed that internet users may have a vested interest in obtaining access to information, and that in view of the above, a balance should be sought between the interest and the basic rights of the data subject. In particular, this is about the individual's right to respect of their private life and protection of their personal data. The Court clearly stated that the rights of the data subject are, as a rule, superior to the above interest of internet users.

In his book Świątyni*a w cyberkulturze: technologie cyfrowe i prawo w społeczeństwie wiedzy* [Shrine in Cyberculture: Digital Technologies and the Law in the Knowledge Society], Zdzisław Brodecki wrote as follows:

> At the beginning of the 21st century, we are observing in social life two overlapping disputes of the basic importance for the philosophy of law: the dispute between "atomists" and "holists", and the dispute between "individualism" and "collectivism". Usually, "atomists" support individualism and are liberals, while holists prefer collectivism and are communitarians. It is the thought of the West, which needs to be confronted with the philosophy of the East. Only in this way can we begin the construc-

tion of a thought bridge with a view to overcoming the crisis in international relations and creating a starting point for the binary code of the legal culture. This code is for legal security what the Aristotelian acorn is for the oak (Brodecki, Nawrot 2007: 91).

This spot-on analysis accurately reflects the situation of our civilisation. The ability to combine two opposite philosophical concepts requires sensitivity, methodical work, as well as a visionary approach. The internet has become a new area of social activity, which needs new reflection on the heretofore functioning of the society. Technological change forces us to reconstruct the basic social notions, since the social area of human life takes on a broader meaning, becoming more fluid. Conflicts often result from the fact that the law does not keep up with the changing reality. In its construction, the law has to take on the appropriate dynamics. It may not function only in a hermetic environment of professionals, because in this way it will become a semantic product understandable only to insiders. In the age of the new media, it is a challenge not only to become familiar with the law but also to use it, so that it becomes an integral part of the public space.

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Summary

The Right to Be Forgotten – a Right in the Digital World

The internet has become a tool for storing memories. Owing to its dynamics and nature, the uploaded information begins to live and evolve. Access to information and the

possibility to create or modify information has never been as easy as when the internet became widespread. The control of information is hindered, if not impossible. The autonomy of content, and its evolution in the network, which is not entirely left without control, may raise concerns. That is why the European legislator seeks to regulate the management of information on the internet. The unprecedented judgment of the Court of Justice gives individuals the right to be forgotten on the internet. In the era of new media, the judgment becomes a beacon determining the direction to be taken by the legislation.

Keywords

right to be forgotten, information, internet, search engine

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