## **Definitions**

“Personal data” is defined as any information relating to an identified or identifiable natural person ('data subject'); an identifiable person is one who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his physical, physiological, mental, economic, cultural or social identity.

A “controller” is defined as 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.

**Background of the case**

In 1998 articles were published in a newspaper relating to the sale of properties belonging to Individual A (the **Complainant**) by the Spanish government in order to recoup monies owed to the treasury. The articles were published on the newspaper’s website and indexed by search engines, which returned them in response to searches for the complainant’s name.

In 2009, the complainant requested that the newspaper erase the articles from its website. This request was made pursuant to Article 12(b) of 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 (the **Directive**). The newspaper refused the request, citing “journalistic exemption”.

The complainant then notified his request to Google Spain SL, the operator of the Google search engine in Spain, which refused his request on the grounds that it did not consider its search engine to process personal data.

The complainant raised the matter with the Spanish data protection supervisory authority, which found in his favour and directed that Google comply with the request. Google challenged this decision in the Spanish courts, which in 2012 referred the case to the Court of Justice of the European Union for a preliminary ruling under Article 267 TFEU

This referral sought, among other things, a decision regarding how Articles 2, 4, and 12 of the Directive and Articles 7 and 8 of the Charter of Fundamental Rights of the European Union (the **Charter**) should be interpreted and whether data protection law applies to search engines and their operators. The core question being considered:

**Does the right to erasure apply in context of the operation of a search engine?**

Your tasks today are as follows:

* The Google Spain SL, Complainant, Government, and European Commission groupswill each receive a briefing note outlining their positions. You will have **ten minutes** to develop arguments in support of these positions. Each group is permitted a maximum of three points of argument in support of its position.
* The groups will then make oral submissions to the Grand Chamber of the Court of Justice of the European Union (**GC**). Each group will nominate one representative who will have **90 seconds** to put forward the agreed points of argument.
* The GC will then retire for **five minutes** to make its deliberations. During this time, the Advocate General (**AG**) will outline his opinion to the groups. Due to time limitations, the AG will outline the opinion to the GC while the groups are preparing their points of argument.
* The GC will then have **five minutes** to hand down its judgement. Following this, the real-world outcome of the case and its implications will be revealed, and the class will close the exercise with a brief discussion.

**Relevant provisions of European Union law**

In 1995, the European Union adopted Directive 95/46/EC on on the protection of individuals with regard to the processing of personal data and on the free movement of such data, which regulates the processing of personal data regardless of whether such processing is automated or not. Of particular relevance to this case are the following Articles:

* Article 2(b), which defines the “processing of personal data” as “*any operation or set of operations which is 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”;*
* Article 4(1)(a), which states that *“each European Union member state shall apply the national provisions it adopts pursuant to the Directive to the processing of personal data where the processing is carried out in the context of the activities of an establishment of the controller on the territory of the Member State; when the same controller is established on the territory of several Member States, he must take the necessary measures to ensure that each of these establishments complies with the obligations laid down by the national law applicable”*, and;
* Article 12(b), which states that *“European Union member states shall guarantee every data subject the right to obtain from the controller as appropriate the rectification, erasure or blocking of data the processing of which does not comply with the provisions of this Directive, in particular because of the incomplete or inaccurate nature of the data”.*

In 2009, the Charter of Fundamental rights of the European Union, which enshrines certain political, social, and economic rights in law, entered into application as part of the Treaty of Lisbon. Of particular relevance to this case are the following articles:

* Article 7 states that *“everyone has the right to respect for his or her private and family life, home and communications.”*
* Article 8 states that:
  1. Everyone has the right to the protection of personal data concerning him or her.
  2. Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified.
  3. Compliance with these rules shall be subject to control by an independent authority.

## **Briefing note - Google Spain SL’s representatives**

You are the legal team which is representing Google Spain SL, a private limited company established under Spanish law in 2003 with a registered address in Madrid. The company’s interests lie primarily in the operation of an online search engine, although the company also provides online community, chatting, and content delivery services.

You have been instructed that your client's position is that the operation of a search engine does not involve the processing of personal data and that the provisions of the Directive, and legislation which implements it into member state law, do not apply in this case.

Your client also considers that having to comply with the provisions of data protection law will interfere disproprotionately with its freedom, pursuant to Article 16 of the Charter to conduct a business in accordance with European Union law and national laws and practices.

Prepare a maximum of three points in support of your position.

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## **Briefing note - The complainant’s representatives**

You are the legal team which is representing the complainant, Individual A, who was the subject of the articles published by the newspaper and who exercised his right to erasure under data protection law. Since the publication of the articles, your client has had no further issues with the Spanish treasury and now lives quietly as a winemaker in Castilla y León*.*

Your client contends that his rights to privacy and protection of personal data are infringed by Google’s continued linking to the articles on the website of the newspaper. In particular, because your client has had no further issues with the Spanish treasury and no longer even works the area which caused those issues to arise in the first instance, a matter heavily commented on in the articles, your client considers that the articles are now inaccurate and irrelevant.

Your client also considers that because a right to erasure is explicitly transposed into the Spanish law which gives effect to the Directive, his exercise of this right in context of the operation of a search engine does not represent a novel interpretation of law.

Prepare a maximum of three points in support of your position.

## **Briefing note - The governments’ representatives**

You are the legal teams which are jointly representing the governments of,Austria, Greece, Italy, Poland, and Spain.

Your clients are supportive of the complainant’s position to varying degrees as they are all countries in which the right to privacy is afforded special consideration as a result of historical abuses conducted by authoritarian regimes.

In addition, each of your clients has transposed the Directive into national law in such a way as to grand individuals an explicit right to erasure, a position which they do not wish to see undermined by the judgement of the court.

Prepare a maximum of three points in support of your position.

## **Briefing note - The European Commission’s representatives**

You are the legal team which represents the European Commission. Your client is particularly interested in maintaining a balance between the Directive’s two stated objectives, the “*protection of individuals*” and the “*free movement of data*” and is concerned that activist judges may find heavily in favour of one position or the other.

Your client has also observed, with close interest, a significant increase in the number of cases referred to the CJEU which relate to data protection legislation and is examining the possibility of updating the Directive as part of a broader package of reforms in the area of information society services (social media, digital commerce, etc.) which may or may not involve the expansion of the rights outlined in the Directive.

Prepare a maximum of three points in support of your position.

## **Briefing note - The Grand Chamber of the Court of Justice of the EU**

The question which has been referred to the court is considered to be particularly significant, and as such the President of the Court has seen fit that the Grand Chamber consider the case. You are the ultimate arbiters of European Union law and your responsibility is to carefully consider the question and find in favour either of the complainant’s position or otherwise. You must consider the opinion of the Advocate General in your deliberations but you are not obliged to follow it, which allows you to reject it in part or in full. Your decision will be made by simple majority, with the President’s vote deciding.