In the future, the right to be forgotten will also apply to online archives

Federal Constitutional Court expands scope of data protection claims

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With its two decisions published yesterday, the Federal Constitutional Court has strengthened personality rights in the digital world. It has further developed the right to be forgotten in a way that optimizes the basic rights of freedom of expression and information as well as the right to informational self-determination. The statements of the Hamburg Commissioner for Data Protection and Freedom of Information requested by the court in both cases in the proceedings were confirmed.

So far, the right to be forgotten, created by the case law of the ECJ and incorporated into the applicable General Data Protection Regulation, has mainly been applied to the relationship between search engine operators and data subjects. Since 2014, the latter have been able to request that search engine operators – in Germany essentially the Google search engine – no longer display certain results in a name-based search if this is necessary to protect their right to informational self-determination and their right to privacy. This right is applied directly by the Federal Constitutional Court to the online archives of press companies.

The decision of the BVerfG "Right to be forgotten I" is about reporting on a murder committed in 1981, as a result of which the perpetrator was sentenced to life imprisonment and released from prison in 2002. After weighing up freedom of the press and the protection of personal rights, the BVerfG recognizes that the operator of an online archive has a duty to take into account the temporal circumstances - in this case more than 30 years - in the case of name-related reporting. Under the current conditions of the information society, there is no absolute right that would allow press publishers to disseminate information about archived articles indefinitely via the Internet, even in the case of otherwise permissible reporting. Rather, the right to informational self-determination must include the duration of the reporting and weigh it against the personal rights of those affected by the reporting. In particular, the taking of technical measures, such as restricting web crawlers' access to certain files or redirecting them to copies of the content with unrecognizable personal references, should be considered by press publishers in the future. However, this obligation of press publishers to check does not exist independently of the occasion, but only insofar as the persons concerned expressly assert their right.

The “Right to be Forgotten II” decision, on the other hand, does not see the judicial rejection of a claim for delisting from the search results as a violation of the right to informational self-determination. The complainant had unsuccessfully contacted

Google to have her name blocked from being linked to a news magazine report. The Federal Constitutional Court expressly emphasizes that the ability to find media reports on the behavior of a person concerned as an employer, using the term "nasty tricks", can affect not only the area of the social sphere, but also the private sphere due to the permanent availability. Ultimately, however, the decision confirms the expert court's consideration of not recognizing a right to erasure in a specific case. Both the lack of time and the fact that the complainant gave her consent to the interview that was the subject of the disputed contribution spoke against a claim for delisting.

The Hamburg Commissioner for Data Protection and Freedom of Information, Johannes Caspar: “It is gratifying that the Federal Constitutional Court has confirmed our view brought into the proceedings in both cases. The two decisions will influence future legal debate and practice on the right to be forgotten. It should be particularly emphasized that the Federal Constitutional Court strengthens the third-party effect of the fundamental right to informational self-determination with a view to private legal claims of those affected in the press area. This applies in particular against the background that those affected do not have the opportunity to contact the supervisory authorities for data protection due to the so-called media privilege of press publishers.

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