

TUTORIAL

The right to be forgotten

Course: Data Science Law & Regulation

Cluster: Privacy and Data Protection

24 May 2024

TUTORIALS

- Please read carefully the Opinion of the Advocate General and the judgment of the Court of Justice in the *Google Spain* case. Please try to focus on the differences in their conclusions (which significantly diverge) and on the reasons behind them
- It is not necessary (nor required) that you capture all the legal technicalities of the case in the reasoning of both AG and ECJ: let's try to focus on the essence of their arguments on the different points
- If you don't understand something in particular, please be prepared to share your question(s) at the beginning of the tutorial: we will not explore the case but just summarize the main findings of the Court
- Once read the opinion and the judgment, please focus on the following points/questions...

TUTORIALS

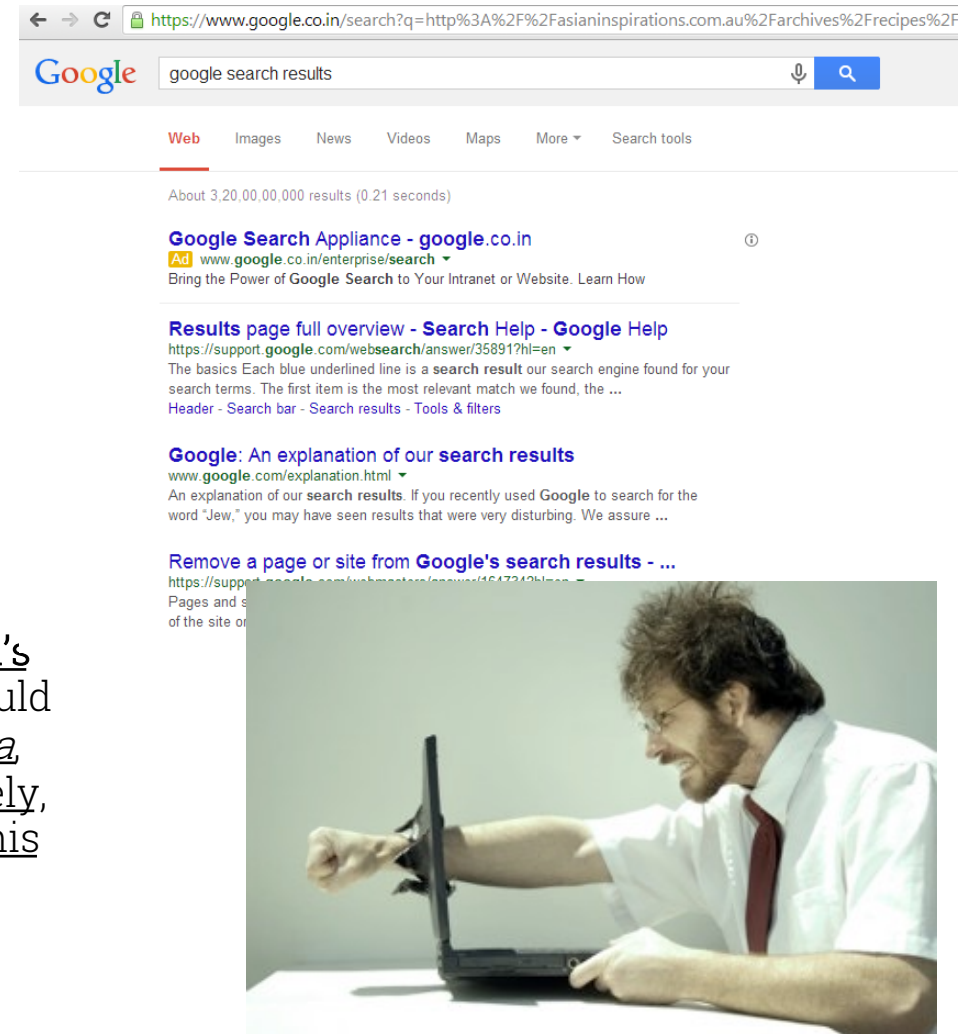
- Do you agree that companies based outside the European Union should comply with EU data protection law when it comes to the processing of data of European residents?
- Do you agree that a search engine service provider carries out a processing of personal data any time it retrieves information from the Internet, on third-parties' websites, based on the prompts input by its users?
- Do you agree that a search engine service provider acts as controller in respect of the personal data it indexes when providing search results to its users?
- Do you agree that a search engine like Google is tasked with evaluating whether a request to obtain the removal of links to personal data should be accepted or rejected?

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Antecedents

FACTS OF THE CASE

- Mr Costeja Gonzalez lodged with the Spanish Data Protection Authority a complaint against *La Vanguardia*, which publishes a daily newspaper with a large circulation and against Google Spain and Google Inc.
- The complaint was based on the fact that, when an internet user entered Mr Costeja's name in the Google search engine, he would obtain links to two pages of *La Vanguardia*, of 19 January and 9 March 1998 respectively, on which an announcement mentioning his name appeared for a real-estate auction connected with attachment proceedings for the recovery of social security debts.

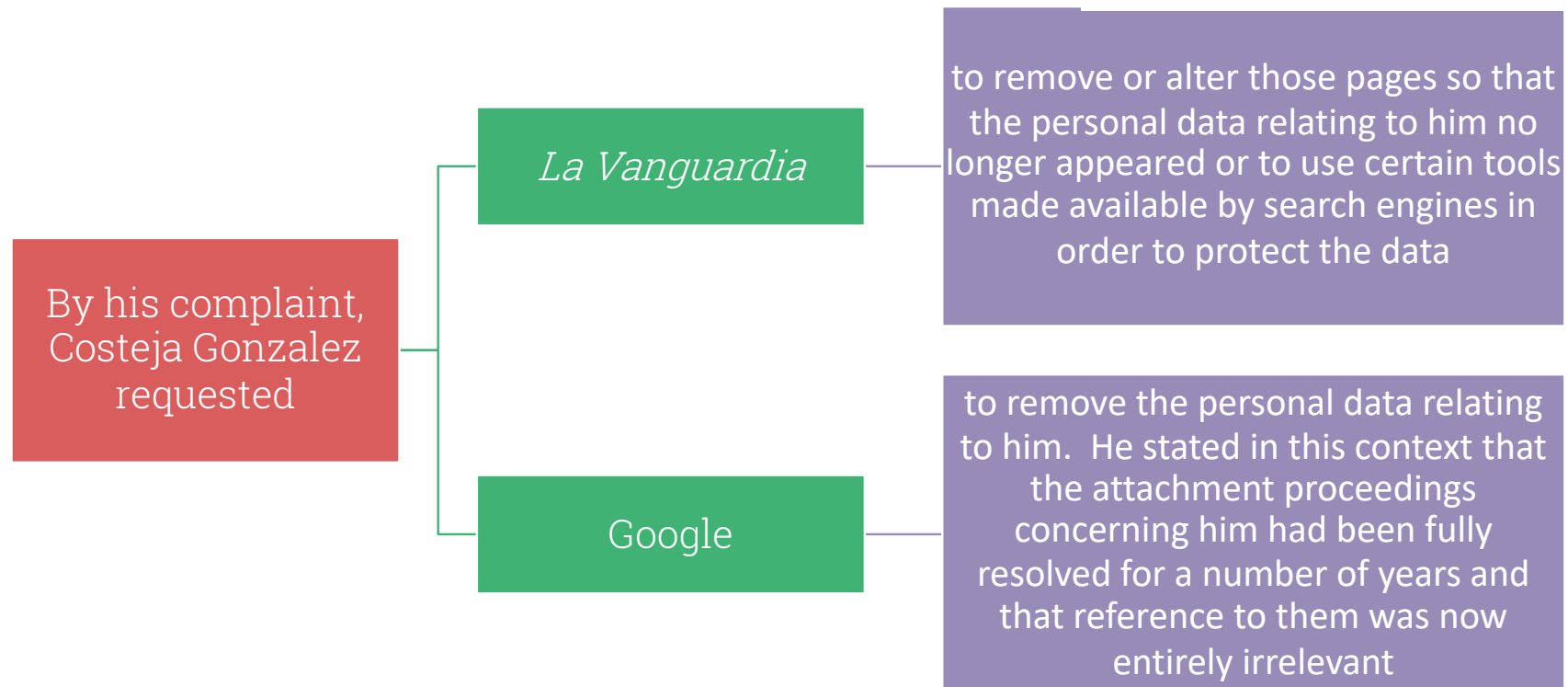


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Antecedents

MR COSTEJA GONZALEZ'S REQUESTS TO THE AEPD

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DE DATOS



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Antecedents

THE DECISION OF THE AEPD

AGENCIA
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DE DATOS



- The Spanish DPA took the view that it had the power to demand the withdrawal of data and the prohibition of access to certain data by the operators of search engines when the locating and dissemination of the data are liable to compromise the fundamental rights to data protection and the dignity of persons
- That obligation may be owed directly by operators of search engines, without it being necessary to erase the data or information from the website where they appear, including when retention of the information on that site is justified by a statutory provision.



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Antecedents

THE DECISION OF THE AEPD

- By decision of 30 July 2010, the Spanish Data Protection Authority rejected the complaint in so far as it related to *La Vanguardia*, taking the view that the publication by it of the information in question was legally justified and was intended to give maximum publicity to the auction in order to secure as many bidders as possible
- On the other hand, the complaint was upheld in so far as it was directed against Google Spain and Google Inc. The Authority considered that operators of search engines are subject to data protection legislation given that they carry out data processing for which they are responsible and act as intermediaries in the information society

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ESPAÑOLA DE
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LA VANGUARDIA



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Antecedents

THE APPEAL BEFORE THE AUDIENCIA NACIONAL DE MADRID

- Google Spain and Google Inc. brought appeal against that decision before the Audiencia Nacional de Madrid
- The court stated in the order for reference that the actions raise the question of what obligations are owed by operators of search engines to protect personal data of individuals who do not wish that certain personal information, published on third parties' websites, be located, indexed and made available to Internet users indefinitely



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Case C-131/12, *Google Spain, Google Inc. v. AEPD*

MAIN QUESTIONS REFERRED TO THE CJEU

1. Does the activity carried out by Google as a search engine amount to a processing of personal data?
2. If so, does Google qualify as data controller?
3. If so, may a national data protection authority order Google to remove links to indexed information without prior consulting the owner of the web page?
4. If so, is such an obligation excluded when the information contains personal data lawfully published by third parties?
5. Must it be considered that the rights to erasure and blocking of data entail the possibility of enforcing a 'right to be forgotten vis-à-vis search engines'?

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ADVOCATE GENERAL JÄÄSKINEN'S OPINION



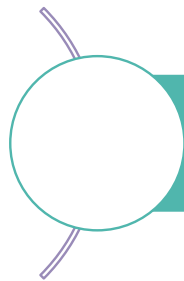
1. Does the activity carried out by Google as a search engine amount to a processing of personal data?

- The operations conducted by Google count indeed as ‘processing’ of personal data
- However, the ISP supplying an information location tool is not “aware” of the existence of personal data in any other sense than as a statistical fact web pages are likely to include personal data.
- The ISP has no relationship with the content of third-party source web pages on the Internet where personal data may appear. Moreover, as the search engine works on the basis of copies of the source web pages that its crawler function has retrieved and copied, the service provider does not have any means of changing the information in the host servers

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ADVOCATE GENERAL JÄÄSKINEN'S OPINION



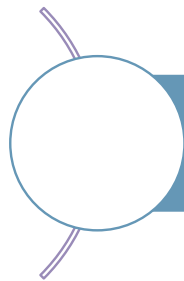
2. If so, does Google qualify as data controller?

- ISPs cannot in law or in fact fulfill the obligations of the controller provided in the Directive in relation to personal data on source web pages hosted on third party server
- [However,] the ISP controls the index of the search engine which links keywords to the relevant URL addresses. The ISP may technically block certain search results, for example by not displaying URL addresses from certain countries or domains within the search results
- Moreover, the ISP controls the index in the sense that it decides whether exclusion codes on source web page are to be complied with or not

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ADVOCATE GENERAL JÄÄSKINEN'S OPINION



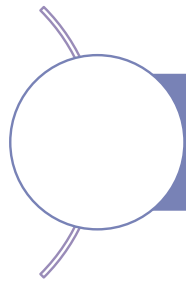
3. If so, may a national data protection authority order Google to remove links to indexed information without prior consulting the owner of the web page?

- A national DPA cannot require an ISP to withdraw information from its index except in cases where this service provider has not complied with the exclusion codes or where a request emanating from a website regarding an update of cache memory has not been complied with
- A possible 'notice and take down procedure' concerning links to source web pages with illegal or inappropriate content is a matter for national civil liability law based on grounds other than data protection

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ADVOCATE GENERAL JÄÄSKINEN'S OPINION



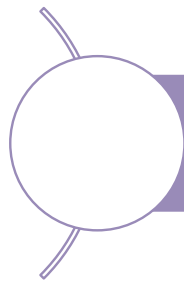
4. If so, is such an obligation excluded when the information contains personal data lawfully published by third parties?

- In view of the conclusions concerning the previous question, this question would be moot

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ADVOCATE GENERAL JÄÄSKINEN'S OPINION



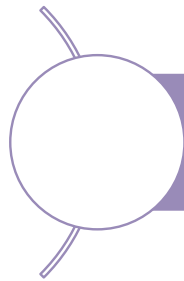
5. Must it be considered that the rights to erasure and blocking of data entail the possibility of enforcing a 'right to be forgotten' *vis-à-vis* search engines?

- The rights to rectification, erasure and blocking of data provided in Article 12(b) of the Directive concerned data the processing of which did not comply with the provisions of the Directive, in particular because of the incomplete or inaccurate nature of the data itself
- Article 14(a) of the Directive obliged Member States to grant a data subject the right to object at any time, on compelling legitimate grounds relating to his particular situation, to the processing of data relating to him or her. This applied especially in cases referred to in Articles 7(e) and 7(f) of the Directive, that is where processing is necessary in view of a public interest or for the purposes of the legitimate interests pursued by the controller or by third parties.

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ADVOCATE GENERAL JÄÄSKINEN'S OPINION



5. Must it be considered that the rights to erasure and blocking of data entail the possibility of enforcing a 'right to be forgotten' *vis-à-vis* search engines?

- The Directive did not provide for a general right to be forgotten in the sense that a data subject is entitled to restrict or terminate dissemination of personal data that he considers to be harmful or contrary to his interests.
- Even if the Court were to find that ISPs were responsible as controllers for personal data on third-party source web pages, a data subject would still not have an absolute 'right to be forgotten' which could be relied on against these service providers.

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ADVOCATE GENERAL JÄÄSKINEN'S OPINION



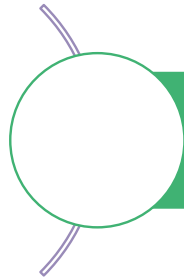
«The particularly complex and difficult constellation of fundamental rights that this case presents prevents justification for reinforcing the data subjects' legal position under the Directive, and imbuing it with a right to be forgotten. This would entail sacrificing pivotal rights such as freedom of expression and information»

«I would also discourage the Court from concluding that these conflicting interests could satisfactorily be balanced in individual cases on a case-by-case basis, with the judgment to be left to the internet search engine service provider.»

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THE CJEU'S DECISION



1. Does the activity carried out by Google as a search engine amount to a processing of personal data?

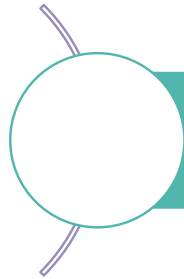
AGREE

- The CJEU confirmed that the activities carried out by Google constitute processing of personal data

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THE CJEU'S DECISION



2. If so, does Google qualify as data controller?

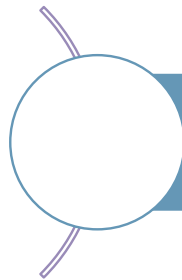
DISAGREE

- It has no relevance whether the search engine has actual knowledge or not of the fact that the personal data is contained in the websites subject to indexing
- Therefore, it amounts to a data controller and as such bears the obligations provided by the Directive 95/46

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THE CJEU'S DECISION



3. If so, may a national data protection authority order Google to remove links to indexed information without prior consulting the owner of the web page?

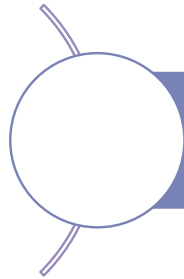
DISAGREE

- The supervisory authority or judicial authority may order the operator of the search engine to remove from the list of results displayed following a search made on the basis of a person's name links to web pages published by third parties containing information relating to that person, without an order to that effect presupposing the previous or simultaneous removal of that name and information – of the publisher's own accord or following an order of one of those authorities – from the web page on which they were published

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THE CJEU'S DECISION



4. If so, is such an obligation excluded when the information contains personal data lawfully published by third parties?

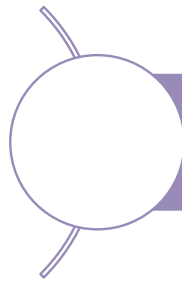
DISAGREE

- The operator of a search engine may be reached by an order of 'de-indexing' also in a case where that name or information is not erased beforehand or simultaneously from those web pages, and even, as the case may be, when its publication in itself on those pages is lawful

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Case C-131/12, *Google Spain, Google Inc. v. AEPD*

THE CJEU'S DECISION



5. Must it be considered that the rights to erasure and blocking of data entail the possibility of enforcing a 'right to be forgotten' *vis-à-vis* search engines?

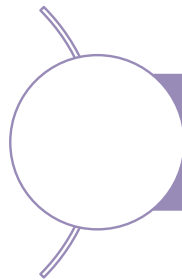
DISAGREE

- Artt. 12 and 14 of the Data Protection Directive provided data subjects with the right to objection and to request the erasure or blocking of personal data in case of unlawful processing
- In the Court's view, since not up-to-date news amounts to not correct information, an unlawful processing of personal data is at stake and, accordingly, the rights under Artt. 12 and 14 are enforceable
- Broad interpretation of "unlawful processing"

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THE CJEU'S DECISION



5. Must it be considered that the rights to erasure and blocking of data entail the possibility of enforcing a 'right to be forgotten' *vis-à-vis* search engines?

DISAGREE

- It is first for the search engine provider, in its capacity as data controller, to receive the requests of data subjects under Artt. 12 and 14 and, if the case, to ensure that the right to be forgotten is respected
- No prior consultation of the website's owners is necessary
 - Can this represent a risk for **freedom of expression**?
- However, data subjects may go before the competent DPA or judicial authority and ask for the removal of undesired contents

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TERRITORIAL SCOPE OF THE DATA PROTECTION DIRECTIVE

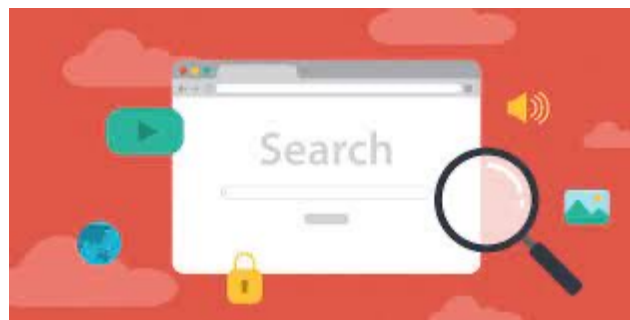
- Broad interpretation of the notion of 'establishment' and of the words 'in the context of the activities'
- «In the light of the objective of Directive 95/46 of ensuring effective and complete protection of the fundamental rights and freedoms of natural persons, and in particular their right to privacy, with respect to the processing of personal data, those words cannot be interpreted restrictively»



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SEARCH ENGINE AS A 'CONTROLLER'

- This finding is not supported by empirical evidence but rather relies on the goal of affording individuals' data privacy broad protection
- «It would be contrary not only to the clear wording of the Directive but also to its objective – which is to ensure, through a broad definition of the concept of 'controller', effective and complete protection of data subjects – to exclude the operator of a search engine from that definition on the ground that it does not exercise control over the personal data published on the web pages of third parties»



The right to be forgotten

ARTICLE 12(b) AS A LEGAL GROUND FOR THE RIGHT TO BE FORGOTTEN

- Extensive interpretation of article 12(b), concerning 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
- Not a *numerus clausus* of conditions: article 12(b) only mentions some examples of the conditions authorizing data subject to enforce their rights.



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RIGHT TO BE FORGOTTEN AND FREEDOM OF EXPRESSION

