The Right to be Forgotten?

Users have the right to have links to web pages about them removed from Google's results page because the passage of time makes them 'irrelevant'.
Do you consider this judgement to be worthy of support?

The right to be forgotten can be defined as the individual's right to prevent search engines from including on their result pages links to websites containing personal data about him, even in cases where the information is lawfully published. The right was confirmed to exist by the Court of Justice of the European Union (CJEU) in the case of *Google Spain Sl and Google Inc.*v *Agencia Espanola de Proteccion de Datos (AEPD) and Mario Costeja Gonzales*[1] on 13th May 2014. However, the ruling of the Court was, in fact, based on a broad, 'privacy friendly'[2] interpretation of a pre-existing EU legislation, the EU Data Protection Directive (95/46), enacted 19 years before the judgement. I shall argue that this judgement (and consequently this interpretation of Directive 95/46) is not worthy of support for three reasons: firstly, the CJEU took selective interpretation of fundamental rights; secondly, Google is the least to blame in this scenario; and thirdly, the possible negative effects of the ruling outweigh the possible positive ones.

The ruling in *Google* v *AEPD*[3] should not be considered to be worthy of support due to the selective interpretation of fundamental rights taken by the Court. Given that the Court set a precedent with potentially wide application, which some scholars see as '[o]ne of the most important (if not the most important) decisions of the Court of Justice of the European Union in 2014'[4], the rigid rule adopted there should not be supported. In particular, by ruling that the rights to respect for private life[5] and to protection of personal data,[6] 'override, as a

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[1] (C-131/12)
[2] J Hörnle, *'Google's algorithms, search results and relevancy under data protection law - whose data quality?*' [2014] Ent. L.R. 209
[3] (C-131/12) *Google Spain SL* v *Agencia Espanola de Proteccion de Datos (AEPD)* [2014]] 3 W.L.R. 659 (ECJ (Grand Chamber))
[4] J Hörnle, *'Google's algorithms, search results and relevancy under data protection law - whose data quality?*' [2014] Ent. L.R. 209
[5] Charter of Fundamental Rights of the European Union (2000), Article 7

rule, not only the economic interest of the operator of the search engine but also the interest of the general public in finding that information' the Court completely disregarded the rights of other potentially affected parties. Most notably, the CJEU failed to consider the right to freedom of expression and information[7] in relation to the operators of search engines, publishers of websites, and other internet users; and the right to conduct a business[8] in relation Google's advertising activity.[9] It can be argued that the aim of Directive 95/46 is to protect the rights of the data subject and this is exactly what the Court did. However, there is an obvious inconsistency between the wide interpretation of the rights of the data subject and the lack of any interpretation or consideration of the other parties' rights which amounted to a rigid rule where one person's rights are protected, compromising the fundamental rights of millions of people 'as a rule'.[10] Moreover, the CJEU used the fundamental rights protection of the data subject as the underlying reason for its decisions on all the three issues it was requested to consider, thus furthering the inconsistency.

Some people may argue that the CJEU did not adopt such a rigid rule, as it created the public figure exception, which is likely to cover much more instances than the case of Mr Costeja, therefore allowing wider protection of internet users' fundamental rights. However, as Crowther points out, this exception is highly inadequate, given that it allows people to 'try to "clean up" their internet profile prior to taking up a role in public life'.[11] This is made further possible as the Court stated that 16 years are enough to make a statement irrelevant, but did not state how many years are not enough. In addition, the Court created the exception, but as the decision was made a few months ago, it is further to be seen how the 'relevance'

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[6] *Ibid*, Article 8
[7] *Ibid*, Article 11
[8] *Ibid*, Article 16
[9] (C-131/12) *Google Spain SL* v *Agencia Espanola de Proteccion de Datos (AEPD)* [2014]] 3 W.L.R. 659 (ECJ (Grand Chamber)), at [63]
[10] Ibid, [97]
[11] H Crowther, *'Remember to forget me: the recent ruling in Google v AEPD and Costeja*' [2014] C.T.L.R. 163

test applies to such scenarios.[12] Therefore, the future holds at least another possibility for assessment of the exception's effectiveness in practice.

The second reason why the CJEU decision is not worthy of support is because it is against Google, which, considering the roles of the three parties, can be concluded to be the least to blame in this situation. Firstly, one of the Court's arguments against Google was that it is the 'controller' of the processed personal data, although search engines 'process all the information available on the internet without effecting a selection between personal data and other information[,]…[and have] no knowledge of those data and does not exercise control over the data'.[13] Secondly, the information that Google is held to 'process' and 'control' was in fact lawfully published in La Vanguardia's newspaper and uploaded on their website, for this reason, the complaint against them was rejected by the AEPD; however, had not it been published there, it would not have been available through Google Search as well. Finally, it was Mr Costeja's actions which led to his social security debts; therefore, the information in question would not have been available online but for his actions. However, in the end the Court found against Google. This decision raises some important issues. For example, even if the information in La Vanguardia was published in order to provide information rather than because of the order of the Ministry of Labour and Social Affairs (as was the case here), ordering the erasure of the information would definitely raise freedom of expression issues; however, blaming Google in this case allows the Court to get around this problem. In addition, La Vanguardia is a 'daily newspaper with a large circulation';[14] therefore, given that the vast majority of websites have search engines, including La Vanguardia, and it is a popular newspaper, it is reasonably expected that if someone is looking for information about Mr Costeja, this particular website will be one of (if not the first) starting points for research.

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[12] E Kelsey, *'Google Spain SL and Google Inc v AEPD and Mario Costeja Gonzalez: protection of personal data, freedom of information and the "right to be forgotten"'* [2014] E.H.R.L.R 395

[13] (C-131/12) *Google Spain SL* v *Agencia Espanola de Proteccion de Datos (AEPD)* [2014]] 3 W.L.R. 659 (ECJ (Grand Chamber)), at [22]

[14] *Ibid*, at [14]

Also, in finding against Google, the Court stated that a search based on one's name allows users to '[obtain] through the list of results a structured overview of the information relating to that individual that can be found on the internet enabling them to establish a more or less detailed profile of the data subject'.[15] However, every single person's actions define himself and search engines do nothing but restate the facts that already exist on the internet. On this point, the Court argued that the information was irrelevant and out-of-date; it is arguable if information can be outdated, though, if it is stated that the event occurred 12 earlier. Thus, as Advocate General Jääskinen stressed, removing certain information about an individual compromises internet users' right since the search engines will not provide 'a truthful reflection of the information'.[16] In addition, the Court ruled that Google plays a more significant role in the retrieval of information by internet users than websites and therefore data subjects are entitled to request the erasure of certain links. However, this, as supporters of the judgement also admit, is 'likely to lead to a flood of requests for the removal of links in search results',[17] which can be costly, lead to the removal of any information that was requested to be removed or amount to unmanageable workload for search engines.[18] If the latter, it can further open the floodgates to litigation, but the Court decided that taking the risk with any of these options is better than the usage of exclusion protocols by websites. At the end of the day, La Vanguardia was held to have statutory duty to publish the information; Mr Costeja was conferred the 'right to be forgotten'; Google was held responsible for its fully mechanical generation of search results; and the general public was left with possibly inaccurate information about people because the Court decided that inaccuracy of information is better than irrelevancy.

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[15] *Ibid*, at [37]
[16] H Crowther, *'Remember to forget me: the recent ruling in Google v AEPD and Costeja*' [2014] C.T.L.R. 163
[17] [17] J Hörnle, *'Google's algorithms, search results and relevancy under data protection law - whose data quality?*' [2014] Ent. L.R. 209
[18] H Crowther, *'Remember to forget me: the recent ruling in Google v AEPD and Costeja*' [2014] C.T.L.R. 163

Finally, the CJEU's judgement is not worthy of support because the possible negative effects outweigh the possible positive effects. Some of the disadvantages, such as freedom of expression issues, unanswered questions amounting to gaps in the law, and inaccurate presentation of information, have already been discussed above. Another drawback of the rule, as it currently stands, is that the decision as to whether certain information should be forgotten or not is made by private companies, such as Google, instead of a specialist body that can be held accountable for its decisions, for instance. In addition, given that Google is the biggest and most popular search engine, it can be assumed that despite the workload, it might be able to handle all the requests. However, the Court's decision applies to all search engines and the smaller ones might struggle with the workload and therefore can have a significant impact on their business activities. In addition, the right to be forgotten by search engines allows people to become more irresponsible as to their deeds, since after a certain period of time any mistake can be erased. This can be particularly important disadvantage with regard to public figures, who usually tend to be role models, especially for teenagers, and for this reason it is crucial how the public figure exception will be implemented. Also, by ruling that Google Spain's activities were carried out 'in the context of the activities of an establishment' the Court, in effect, held that the EU legislation in question applied to a non-EU company. Therefore, 'this could be extended to membership, subscriptions or even seeking donations—where this is done by an establishment in the EU'[19] and can have a negative impact on the EU economy due to non-EU companies unwillingness to be bound by the EU law. Finally, although the case concerned the removal of web links, some scholars oppose the decision on the ground that it is 'unlikely… [to] stop at search engines'[20] and might be extended to banks, for example, where information about one's social debts is much more relevant than on the internet. On the other hand, the wide protection of individuals

[19] *Ibid*
[20] *Ibid*

granted by the right to be forgotten is not to be underestimated in the digital era. Protecting one's reputation online is quite important, given that everything ends up on the internet sooner or later. Additionally, the right to be forgotten grants protection to data subjects from being judged by internet users at the expense of their right to information. The fact that online right of privacy is necessary is not questioned, but the lack of fair balance is, and this is what the Court potentially failed to achieve. Furthermore, as Google's results pages are generated automatically, it is difficult to be kept to the point; therefore, the right to be forgotten allows the individuals not to be defined by random search results, which, despite being irrelevant, are the first thing one sees when googling someone's name. However, discussion of any advantages and disadvantages of the judgement at this stage are highly speculative, since there has not been enough time to see the true effect of the CJEU's decision.

To sum up, the right to be forgotten was held to exist since 1995 through a wide interpretation of the EU Data Protection Directive (95/46). This wide interpretation, however, disregarded the fundamental rights of all parties concerned but the data subject; blamed the most innocent party; left gaps in the law, thus creating more issues; and resulted in many disadvantages as opposed to the only advantage – online protection of one's reputation. For all these reasons, the CJEU's decision is not worthy of support, at least for now.