

The curious case of the right to be forgotten

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Abstract

This paper considers the so-called 'right to be forgotten', in the context of the 2014 decision of the European Court of Justice (ECJ) in the case of *Google Spain SL, Google Inc. v Agencia Española de Protección de Datos (AEPD), Mario Costeja González*. It also considers the 'right of erasure' contained in the current EU Data Protection Directive, as well as the proposal for a new right of erasure to be included in the new EU data protection framework. The paper proposes a particular way of understanding the right to be forgotten and suggests a broad definition of it. It examines claims that the ECJ's decision in Google 'invented' a right to be forgotten. It also considers whether individuals have a right to be forgotten under the current EU Directive, and whether they will have such a right when the new data protection regulation becomes law. More generally, the paper considers whether a right to be forgotten has been recognised as an aspect of a broader right to privacy, and whether the *Google* decision moves us closer to an understanding of privacy as the right to an appropriate flow of information, in line with Nissenbaum's framework of contextual integrity.

Keywords: Right to be forgotten, Google Spain, data protection, contextual integrity

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1. Introduction

In recent years there has been considerable media and academic interest in the so-called 'right to be forgotten'. The impetus for much of this focus has been the European Commission's proposal to include a right to be forgotten in the new European Union (EU) Data Protection Regulation.¹ This is so even though the reforms were billed as *strengthening* the right to be forgotten under the current European Directive on Data Protection,² implying that the right to be forgotten already exists under European data protection law and is simply 'in need of reinforcement'.³ More recently the European Court of Justice (ECJ) handed down its decision in the case of *Google Spain SL, Google Inc. v*

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¹ Commission, 'Proposal for a Regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data', COM (2012) 11 final ('Proposed Regulation'). See Meg Leta Ambrose and Jef Ausloos, 'The Right to be Forgotten Across the Pond' (2013) 3 *Journal of Information Policy* 1, 1.

² Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, OJ L281/31, 23 November 1995 ('Directive').

³ Bert-Jaap Koops, 'Forgetting Footprints, Shunning Shadows: A Critical Analysis of the Right to be Forgotten in Big Data Practice' (2011) 8(3) *SCRIPTed* 1, 4. This is also suggested by Recital 54 of Proposed Regulation COM (2012) 11 final which talks about Article 17 in terms of it strengthening the right to be forgotten. See also Viviane Reding, 'Tomorrow's Privacy: The Upcoming Data Protection Reform for the European Union' (2011) 1(1) *International Data Privacy Law* 3, 4; Napoleon Xanthoulis, 'The Right to Oblivion in the Information Age: A human-rights based approach' (2013) 10 *US-China Law Review* 84, 91.

Agencia Española de Protección de Datos (AEPD), Mario Costeja González.⁴ The *Google* decision has been widely described as a ruling on the right to be forgotten and even a decision that ‘invents’ a right to be forgotten.⁵

The right to be forgotten has been described by some as the ‘biggest threat to free speech’ in the coming decade⁶ and has provoked intense opposition and controversy among corporate and media interests, as well as academic commentators.⁷ Bernal has commented that the right to be forgotten provokes ‘emotional and instinctive reactions, often very negative, rather than rational or thought-through responses.’⁸ The right to be forgotten is not, however, without its supporters and various reasons, outlined in Part Three of this paper, have been put forward as to why a right is needed. Despite this, there is little common understanding of what is actually meant by a right to be forgotten and it has been described as a ‘vague concept’⁹ and one which is ‘complex to formulate in legal terms because its ambit encompasses a wide range of different matters.’¹⁰

This paper does not seek to critique arguments invoked either in support of or opposition to a right to be forgotten but to propose a particular way of understanding the right, and to suggest a broad definition of it. The paper considers claims that the ECJ’s decision in *Google* ‘invented’ a right to be forgotten, and considers whether individuals have a right to be forgotten arising from the current Directive, and from the Proposed Regulation should it become law.¹¹ More broadly, consideration is given to whether a right to be forgotten has been recognised as an aspect of a broader right to privacy.

Part Two of this paper discusses the meaning of the widely used term ‘the right to be forgotten’ and proposes a broad definition of the right, which distinguishes it from a right of erasure. Part Three

⁴ (Case C-131/12, 13 May 2014) [2014] QB 1022 (European Court of Justice) (*‘Google’*).

⁵ See, eg, Simon Breheny, Comment, ‘The Right to be Forgotten Online Sets a Dangerous Precedent’, *The Age (online)*, July 16 2014 < <http://www.theage.com.au/comment/the-right-to-be-forgotten-online-sets-a-dangerous-precedent-for-freedom-of-speech-20140715-zt7w7.html>> who writes: ‘Last month an EU court invented “the right to be forgotten”’. See also Alex Newman, ‘EU Court invents “Right to be Forgotten”, Orders Google to Obey’ *The New American* (online), 15 May 2014 < <http://www.thenewamerican.com/world-news/europe/item/18269-eu-court-invents-right-to-be-forgotten-orders-google-to-obey>>.

⁶ Jeffrey Rosen, ‘The Right to be Forgotten’ (2012) 64 *Stanford Law Review Online* 88, 88 < http://www.stanfordlawreview.org/online/privacy-paradox/right-to-be-forgotten?em_x=22> accessed 2 September 2014.

⁷ See, eg, David Drummond, Chief Legal Officer, Google, *Google Advisory Council Public Meeting on the Right to be Forgotten* (Paris, 25 September 2014) Audio recording, 42:42 < <https://www.google.com/advisorycouncil/>>; Peter Fleischer, ‘The Right to be Forgotten, or How to Edit Your History’ (*Peter Fleischer: Privacy....?* 29 January 2012) < <http://peterfleischer.blogspot.com.au/2012/01/right-to-be-forgotten-or-how-to-edit.html>>; HawkTalk, ‘Press and Google Misrepresent European Court’s Google Judgment’ (*Amberhawk Training Ltd*, 29 May 2014) < <http://amberhawk.typepad.com/amberhawk/2014/05/press-and-google-misrepresent-european-courts-google-judgment.html>>; Open Rights Group, ‘ECJ Google Spain Ruling Raises Concerns for Online Free Speech’ (undated) < <https://www.openrightsgroup.org/press/releases/ecj-google-spain-ruling-raises-concerns-for-online-free-speech>>; Rosen, ‘The Right to be Forgotten’ (n 6).

⁸ Paul A Bernal, ‘A Right to Delete?’ (2011) 2(2) *European Journal of Law and Technology* 1, 2.

⁹ Jef Ausloos, ‘The “Right to be Forgotten” – Worth Remembering?’ [2012] 28 *Computer Law & Security Review* 143, 143.

¹⁰ Dominic McGoldrick, ‘Developments in the Right to be Forgotten’ (2013) 13(4) *Human Rights Law Review* 761, 774.

¹¹ Following endorsement of the compromise text of the Proposed Regulation by the EU Parliament on 12 March 2014, the Council of the European Union agreed its position on part of the Regulation. The Regulation will become law once it is adopted by the Council of Ministers further to the ordinary legislative procedure ‘co-decision’: European Commission, ‘Data Protection: Progress on EU Reform Now Irreversible After European Parliament Vote’, Strasbourg 12 March 2014 (http://ec.europa.eu/justice/data-protection/files/factsheets/factsheet_dp_plenary_vote_140312_en.pdf) .

considers the rationale for and status of both a right of erasure and a right to be forgotten. Part Four summarises the findings of the ECJ in *Google* before offering a brief critique of that decision. Part Five considers the status of a right to be forgotten as an aspect of the broader right to privacy in light of the ECJ's findings. This part also considers whether *Google* moves us closer to an understanding of privacy that is in line with that proposed by Nissenbaum: namely that a right to privacy is neither a right to secrecy nor a right to control but a right to *appropriate* flow of information.¹² Finally the paper offers some thoughts on the significance of *Google* and the future for a right to be forgotten.

2. Interpreting the 'right to be forgotten'

Although the term 'the right to be forgotten' is widely used, there is little common understanding of what is meant by it. Ambrose and Ausloos observe that '[t]wo versions of the right to be forgotten result in muddled conceptions and rhetoric when not distinguished.'¹³ One version of the 'right to be forgotten' is, they suggest, better described as a 'right of erasure' in relation to information that a data subject has disclosed passively: in other words, information that an individual has provided about him/herself to others, other than in the context of active content creation.¹⁴ When announcing the right to be forgotten as one of four pillars of the proposed new European data protection framework Viviane Reding, European Commission ('EC') Justice Commissioner, described it as a right for an individual to 'have their data fully removed when they are no longer needed for the purposes for which they were collected or when he or she withdraws consent or when the storage period consented to has expired.'¹⁵ Reding's conceptualisation of a right to be forgotten is therefore in line with what Ambrose and Ausloos describe as the 'right of erasure'. Unlike the right of erasure described by Ambrose and Ausloos, however, Reding's definition suggests that the right is not necessarily limited to information that individuals themselves have provided. The right would extend to personal data about that individual provided by others, if that information is kept for longer than necessary.¹⁶ Reding's formulation also suggests that the right of erasure would arise even in relation to information *actively* created by the individual where that is processed by a data controller on the basis of the data subject's consent.

Given that Reding is describing the right in the context of the EU data protection framework, her definition is of a right exercisable only against a 'data controller', within the meaning of the Proposed Regulation, rather than against the world at large.¹⁷ Reding's formulation of a right to be forgotten also suggests that it is not always contingent upon the passage of time: where an individual has provided personal information about him/herself, the right (to call for erasure of the information) is

¹² Helen Nissenbaum, *Privacy in Context: Technology, Policy and the Integrity of Social Life* (Stanford University Press, 2009) 127 (emphasis in original).

¹³ Ambrose and Ausloos (n 1) 1.

¹⁴ *ibid*, 14-15. An example of active content creation would be an individual authoring a blog which contained personal information.

¹⁵ Viviane Reding, 'Tomorrow's Privacy' (n 3) 4.

¹⁶ This description of a right to be forgotten should be contrasted with the earlier description provided by Reding who explained the right to be forgotten as a right for individuals to 'withdraw their consent to the processing of the personal data they have given out themselves in situations where there is no legitimate reason for keeping it': Viviane Reding, 'The EU Data Protection Reform 2012: Making Europe the Standard Setter for Modern Data Protection Rules in the Digital Age' (Press Release, Speech/12/26, 24 January 2012), 5.

¹⁷ This means that the right, as described by Reding, would not be exercisable against individuals who collect or use personal data in a private capacity, as such individuals are subject to the household exemption under the Directive, or against others who are exempt from the provisions of the Directive: Dir 95/46/EC, art 2(2) and art 9.

exercisable upon that individual withdrawing their consent to the processing of the information.¹⁸ The Proposed Regulation contains a right for an individual to withdraw their consent to the processing of personal information, where processing is based on that consent, *at any time*.¹⁹ In other words, the right of erasure based upon the withdrawal of consent is not dependent upon the passage of time. By contrast, where information has been provided about the individual by another (or where the individual has provided the information but not withdrawn their consent to its processing) the right of erasure *is* time dependent: it comes into existence only when retention of the information becomes unnecessary in light of the purposes for which it was originally collected or is processed.

The other version of the right to be forgotten, as suggested by Ambrose and Ausloos, is based upon the French *droit à l'oubli* (or right of oblivion).²⁰ Graux et al describe the right of oblivion as one which has historically been exercised in cases brought by those who have 'temporarily entered the public limelight, and found themselves unable to shake off the unwanted attention when, after a given amount of time, it was no longer desired or warranted.'²¹ This right, which is not limited to France but finds expression in a number of European jurisdictions,²² is commonly invoked in cases where convicted criminals have sought to escape from publicity regarding the misdeeds of their past. An example of a decision of a Swiss court, based on the right of oblivion, is *X v Journal de Genève*.²³ Here, a rehabilitated offender succeeded in obtaining compensation for economic and mental harm arising from the publication of his name in connection with a previous conviction, in the context of a story of a new criminal trial against his former accomplice.²⁴ The right to oblivion is not an absolute right, however, and will be balanced against the public's right to information and a consideration as to whether or not that information remains newsworthy.²⁵

Without attempting a comprehensive definition of the right to be forgotten, and accepting that there are several perspectives of the right which may overlap to some degree,²⁶ it is proposed here that a

¹⁸ This suggests a quite separate right to withdraw consent to the processing of the data; one which is not provided for in the current Directive. Arguably it is this right to withdraw consent, in conjunction with the right to call for the deletion of data, that the EC originally conceived of as constituting the right to be forgotten: this would explain why the EC's definition of the right to be forgotten was 'the right [of individuals] to have their data deleted if they withdraw consent and if there are no legitimate grounds for retaining the data', a definition which, according to Xanthoulis, is tautologous with the right of erasure: Napoleon Xanthoulis, 'Conceptualising a Right to Oblivion in the Digital World', May 2012 <

http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2064503> accessed 4 September 2014, 16 referring to Commission, 'Safeguarding Privacy in a Connected World A European Data Protection Framework for the 21st Century (Communication' COM 2012 9 final, 6.

¹⁹ Proposed Regulation COM (2012) 11 final, art 7(3).

²⁰ Ambrose and Ausloos (n1) 1.

²¹ Hans Graux, Jef Ausloos and Peggy Valecke, 'The Right to be Forgotten in the Internet Era' (2012) 11 ICRI Working Paper, 4 < <http://ssrn.com/abstract=2174896>> accessed 28 August 2014.

²² See, eg, Jasmine E McNealy, 'The Emerging Conflict between Newsworthiness and The Right to be Forgotten' (2012) 39(2) North Kentucky Law Review 119, 120; Karen Eltis, 'Breaking through the "Tower of Babel": A "Right to be Forgotten" and How Trans-Systemic Thinking Can Help Reconceptualize Privacy Harm in the Age of Analytics' (2011) 22(69) Fordham Intellectual Property, Media & Entertainment Law Review 69, 72, 85-86, 91; Noberto Nuno Gomes de Andrade, 'Oblivion: The Right to be Different... from Oneself. Reproposing the Right to be Forgotten' (2012) 13 IDP (Revista De Internet, Derecho Y Política) 122, 124.

²³ Referring to *A v Journal de Genève et de la Gazette de Lausanne*, 23 10 2003, 5C156-2003 (2003), as cited and discussed by Werro: Franz Werro, 'The Right to Inform v The Right to be Forgotten: A Transatlantic Clash', in Aurelia Colombi Ciacchi, Christine Godt, Peter Rott and Leslie Jane Smith (eds), *Liability in the Third Millennium* (Nomos, 2009) 285, 290-291 .

²⁴ Werro (n 23) 290-291.

²⁵ Ambrose Ausloos (n 1) 1-2.

²⁶ See, generally, Koops (n 3).

better understanding of the ‘right’ is gained by viewing it as a right not to be *indefinitely* linked to information about one’s past (in line with the notion of oblivion). Whilst a right of erasure can be exercised in various situations which may or may not involve the passage of time, the notion of time, it is suggested, is intrinsic to understanding the right to be forgotten. This is not to say that the right to be forgotten must be regarded as an *ex post* right - exercisable only after the passage of a certain amount of time. For example, relying on the right to be forgotten as a justification for his proposal, Mayer-Schönberger suggests that expiry dates could be built into information when it is created. In this sense the right may also work *ex ante*.²⁷ Although the right of oblivion has been described as ‘a complex and intriguing juridical instrument’,²⁸ it is more difficult to conceptualise as a legal mechanism. A right to oblivion may be realised through the erasure of personal information,²⁹ the de-identification of information,³⁰ the payment of compensation,³¹ or some other means. As such, the right to be forgotten (whatever its status as a human right, value or interest³²) is best regarded as a justification for existing legal rights and technological measures or even, perhaps, the creation of new ones, rather than as a procedural or legal right in and of itself.

To avoid confusion the erasure aspect of the right to be forgotten is referred to throughout the remainder of this paper as the ‘right to erasure’. The right not to be indefinitely linked to information about one’s past will be referred to, simply, as ‘the right to be forgotten’.

3. The rationale for and status of the right of erasure and the right to be forgotten

3.1 The status of the right of erasure

As noted above, the right of erasure has been described, in the context of the EU data protection framework, as the right of an individual to call for the deletion of their personal information in certain circumstances. So formulated the right of erasure is a legal right, or procedural right, arising under data protection regulation.³³

3.2 The rationale for the right of erasure

In the context of a data protection framework the right of erasure finds its rationale in the notion that individuals should have control over their personal information.³⁴ Certainly the ability of internet

²⁷ See further *ibid* 26.

²⁸ de Andrade (n 22) 123.

²⁹ Such as is the case within a data processing context where the information is no longer necessary or relevant or adequate in light of the purposes for which it was originally collected or is processed: see, generally, *Google*.

³⁰ See, eg, Jennifer Granick, ‘Convicted Murderer to Wikipedia: Shhh!’ (*Deeplinks Blog, Electronic Frontier Foundation*, 10 November 2009) < <https://www.eff.org/deeplinks/2009/11/murderer-wikipedia-shhh> >, discussing a cease and desist letter sent to Wikipedia requesting the suppression of the name of a former convicted murderer. In relation to this matter see further: ‘Namen der Sedlmayr-Mörder Bleiben Online’, *Digital, Süddeutsche.de* (online), 17 May 2009 < <http://www.sueddeutsche.de/digital/bgh-grundsatzurteil-namen-der-sedlmayr-moerder-bleiben-online-1.144087> > (in German), referring to a ruling of the *Bundesgerichtshof* (Federal Court of Justice) allowing the name of the convicted murderer to remain online not least due to the public interest value of the story about the murder (considered one of the most ‘spectacular indictments in the history of German criminal law) and the adverse and significant impact upon the ability to maintain online archives.

³¹ As was the case in *X v Journal* discussed by Werro (n 23).

³² Koops (n 3) 2.

³³ See, eg, de Andrade (n 22) 125.

³⁴ Graux et al (n 21) 5; Reding, ‘Tomorrow’s Privacy’ (n 3) 4; see, also, European Parliament, ‘Resolution on the Proposal for a Regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection

users to exercise effective control of the data they themselves put online was one of the reasons for the proposed right of erasure put forward by the EC Justice Commissioner.³⁵ This notion of control, according to some theorists, should be regarded as underpinning the concept of privacy. Westin, for example, defined privacy as involving ‘the claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others.’³⁶ Others too have seen privacy in terms of the right of an individual to control or restrict access to themselves,³⁷ although it is true to say that control-based theories of privacy are not universally accepted.³⁸ Others have argued that the right of erasure should be seen as an aspect of the protection of personal data, a right guaranteed under Article 8 of the Charter of Fundamental Rights of the European Union, rather than an aspect of the right of privacy.³⁹ That the right of erasure is often referred to as the ‘right to be forgotten’ suggests, too, that some of the values which underlie the right to be forgotten, discussed below, also form part of the rationale for a right of erasure. In other words, the right of erasure may be justified by a right to be forgotten.

3.3 Status of the right to be forgotten

The status of the right to be forgotten - whether as a right, value or interest - is, according to Koops, unclear.⁴⁰ Xanthoulis has argued that the right should be conceptualised as a human right and, more specifically, as an expression of the broader right to privacy,⁴¹ whilst de Andrade has argued that it should be associated with a right to identity.⁴² Whether *Google* has added clarity in this regard will be considered in Part Five, following a summary of the decision in Part Four.

Regulation)’ COM (2012) 0011 – C7-0025/2012 – 2012/0011(COD), 12 March 2014 (‘Compromise Text’), Recital 6.

³⁵ Viviane Reding, ‘Building Trust in Europe’s Online Single Market’ (Press Release, Speech/10/327, 22 June 2010), 4.

³⁶ Alan F Westin, *Privacy and Freedom* (New York, Atheneum, 1967) 25.

³⁷ Irwin Altman believes that privacy is ‘an interpersonal boundary control process, designed to pace and regulate interactions with others’: Irwin Altman, ‘Privacy: A Conceptual Analysis’ in Daniel H Carson (ed) *Man-Environment Interactions: Evaluations and Applications, Part II* (Dowden, Hutchinson & Ross, 1974) Part 6-8 3, 3; Nicole Moreham, ‘Privacy in the Common Law: A Doctrinal and Theoretical Analysis’ (2005) 121 *Law Quarterly Review* 628, who defines privacy as ‘the state of “desired” inaccess’ or ‘freedom from unwanted access’, 636; Sidney M Jourard, ‘Some Psychological Aspects of Privacy’ (1966) 31 *Law and Contemporary Problems* 307, 307: ‘The wish for privacy expresses a desire to be an enigma to others or, more generally, a desire to control others’ perceptions and beliefs vis-à-vis the self-concealing person’ [references omitted]; Kirsty Hughes, ‘A Behavioural Understanding of Privacy and its Implications for Privacy Law’ (2012) 75(5) *Modern Law Review* 806.

³⁸ See, eg, Rebecca Wong, ‘Privacy: Charting its Developments and Prospects’ in Mathias Klang and Andrew Murray (eds), *Human Rights in the Digital Age* (Glasshouse Press, 2005) quoting Regan: “A further criticism of the control-based definition is its emphasis on individual autonomy, which has been identified as a weakness in formulating a policy to protect privacy.” See also W A Parent, ‘Privacy, Morality and the Law’, (1983) 12(4) *Philosophy & Public Affairs* 269, 273.

³⁹ See, eg, Graux et al (n 21). Although the authors suggest that it is the ‘right to be forgotten’ rather than a right of erasure that has its basis in the right to the protection of personal data under Article 8 of the Charter, the authors distinguish the modern ‘right to be forgotten’ under the Proposed Regulation from the ‘right to oblivion.’

⁴⁰ Koops (n 3) 2.

⁴¹ Xanthoulis (n 3) 84. Note, however, that Xanthoulis was not referring only to the right to be forgotten in terms of its oblivion aspect, but also in terms of its erasure aspect.

⁴² See, generally, de Andrade (n 22).

3.4 Rationale for the right to be forgotten

Various rationales underpin a right to be forgotten. One of these is the idea of rehabilitation,⁴³ a notion that can be viewed both as an individual and a social good. That individuals are entitled to a second chance, which may involve having the ‘slate wiped clean’ after a period of time, is not a unique idea and underlies various laws relating to bankruptcy and spent convictions.⁴⁴ Discussing the right to oblivion in Swiss cases involving offenders, such as that of *X v Journal de Genève* referred to above, Werro suggests that under Swiss law publishing the name of an offender who has served out his/her sentence will not be permitted unless the information remains newsworthy.⁴⁵ Information is, he suggests, less likely to be considered newsworthy where the former criminal has ‘radically changed his life’.⁴⁶ The right to oblivion is not only about escaping from records of crimes and former indebtedness, however. Allen believes that people have a ‘legitimate moral interest in distancing themselves from commonplace misfortunes and errors’⁴⁷ and that without the ability to escape the past feelings can be hurt and lives ruined.⁴⁸ Arguments along these lines have become particularly prevalent in the face of what has been described as the ‘iron memory’ of the internet⁴⁹ and the ease by which digital data can be searched, accessed, and linked to other information.⁵⁰ In particular, concern has been expressed as to the need to protect young people against youthful indiscretions or lack of judgment.⁵¹

The fact that people can and do change over time is central to the idea of rehabilitation but also suggests a broader rationale for a right to be forgotten: one less concerned with the ability of individuals to escape past mistakes per se than with recognising that people should not be forever tethered to their past, unable to ‘escape their digital representations’.⁵² Mayer-Schönberger suggests that memory in fact impedes the ability of individuals to change: ‘by recalling forever each of our errors and transgressions, digital memory rejects our capacity to learn from them, to grow and to evolve.’⁵³ In this sense, forgetfulness is seen as fundamental to the development of self and identity,⁵⁴ as well as to the capacity of individuals to make effective decisions.⁵⁵ Being perpetually confronted with things from their past that they would otherwise, naturally, have forgotten or assimilated in time

⁴³ Steven C Bennett, ‘The “Right to be Forgotten”: Reconciling EU and US Perspectives (2012) 30(1) Berkeley Journal of International Law 161, 170; Werro (n 26) 290-291.

⁴⁴ McGoldrick (n 10) 765; Jean-François Blanchette and Deborah G Johnson, ‘Data Retention and the Panoptic Society: The Social Benefits of Forgetfulness’ (2002) 18 The Information Society 33, 36-38; see also, for example, United Nations *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990), Article 40: ‘States Parties recognize the right of every child ‘alleged as, accused of, or recognised as having infringed the penal law to be treated in a manner consistent with the promotion of the child’s sense of dignity and worth, which reinforces the child’s respect for the human rights and fundamental freedoms of others and which takes into account the child’s age and the desirability of promoting the child’s reintegration and the child’s assuming a constructive role in society.’

⁴⁵ Werro (n 23), 291.

⁴⁶ *ibid.*

⁴⁷ Anita L Allen, ‘Dredging up the Past: Lifelogging, Memory and Surveillance (2008) 75(1) The University of Chicago Law Review 47, 57.

⁴⁸ *ibid.*

⁴⁹ Koops (n 3) 2.

⁵⁰ See, eg, *Google* 1074, para 80; McGoldrick writes that one of the main drivers behind a right to be forgotten is the availability and accessibility of information over the internet: McGoldrick, (n 10) 762.

⁵¹ Reding, ‘The EU Data Protection Reform 2012’ (n 16), 5; Viktor Mayer-Schönberger, *Delete: The Virtue of Forgetting in the Digital Age* (Princeton University Press, 2009) 5, 131; Proposed Regulation COM (2012) 11 final, Recital 29 and art 17(1) referring to the special position of children; Bennett (n 43) 167; Eltis (n 22) 88.

⁵² Mayer-Schönberger (n 51) 125. See also McNealy (n 22) 121.

⁵³ Mayer-Schönberger (n 51) 125.

⁵⁴ de Andrade (n 22) 126; Eltis (n 22), 88.

⁵⁵ Mayer-Schönberger (n 51) 117.

will, it has been suggested, make it difficult for individuals to live and act in the present ‘cognizant of, but not shackled by, past events’.⁵⁶ This perspective focusses then not only on the *future* impact of persistent digital memory but on present consequences of that persistence. From this perspective, arguments have been put forward that without a right to be forgotten individuals will behave differently, for fear of the persistence of information about them, and may hesitate to act or speak authentically.⁵⁷ This, in turn, impacts upon the development of democratic citizens and hence, in time, democratic societies.⁵⁸

Other objections to the persistence of digital memory focus less on what is known of the dangers posed by persistent remembering and more on what is not known. As Graux et al have pointed out ‘[e]specially in today’s information society, it is practically impossible to predict all (negative) consequences of the use of personal data. And even if one can foresee a few, they tend to be abstract, distant and uncertain.’⁵⁹ Indeed, Eric Schmidt, former Google CEO, was famously quoted as saying: ‘I don’t believe society understands what happens when everything is available, knowable and recorded by everyone all the time.’⁶⁰ This concern has been echoed by others.⁶¹

4 The Google decision

Typing Costeja González’s name into Google Search today brings up links to news stories with headlines such as ‘The man who sued Google to be Forgotten’,⁶² ‘Costeja González and a Memorable Fight for the Right to be Forgotten’⁶³ and ‘Spain’s Internet Warrior Who Cut Free from Google’s Tentacles.’⁶⁴ Doing so also brings up links to the ECJ’s decision in the case, as well as links to news stories with rather more cynical headlines, such as ‘Will Europe Censor this Article?’⁶⁵ Typing Mr González’s name into Google Search in 2009, however, would likely have revealed far fewer results⁶⁶ but would have included links to two announcements regarding the auction of property repossessed

⁵⁶ *ibid* 12.

⁵⁷ Blanchette and Johnson (n 44) 36; Bernie Hogan, ‘The Presentation of Self in the Age of Social Media: Distinguishing Performances and Exhibitions Online’ (2010) 30(6) *Bulletin of Science, Technology and Society* 377, 378.

⁵⁸ Blanchette and Johnson (n 44) 36; Stern describes situations in which the reactions of visitors to online presentations of self instigated a change in self-concept, self-presentation and ultimately (in some cases) the author’s offline behavior: Susannah Stern, ‘Producing Sites, Exploring Identities: Youth Online Authorship’ in David Buckingham (ed) *Youth, Identity and Digital Media* (MIT Press, 2008).

⁵⁹ Graux et al (n 21) 12.

⁶⁰ Holman W Jenkins Jr, Opinion, ‘Google and the Search for the Future’, *The Wall Street Journal* (online), 14 August 2010 < <http://online.wsj.com/articles/SB10001424052748704901104575423294099527212>> .

⁶¹ Anita Allen quotes Jim Gemmell as saying ‘What if I stored everything, what would it mean, what are the implications? We simply don’t know’: Allen, (n 47) 47 (references omitted); Eltis, (n 22) 88; Mayer-Schönberger (n 51) 131.

⁶² Reuters, ‘The Man Who Sued Google to be Forgotten’, *Newsweek* (Online), 30 May 2014 < <http://www.newsweek.com/man-who-sued-google-be-forgotten-252854>>.

⁶³ James Ball, News blog, ‘Costeja González and a Memorable Fight for the Right to be Forgotten’, *The Guardian* (online) < <http://www.theguardian.com/world/blog/2014/may/14/mario-costeja-gonzalez-fight-right-forgotten>>.

⁶⁴ Ashifa Kassam, ‘Spain’s Everyday Internet Warrior who Cut Free from Google’s Tentacles’, *The Guardian* (online), 14 May 2014 < <http://www.theguardian.com/technology/2014/may/13/spain-everyman-google-mario-costeja-gonzalez>> .

⁶⁵ Matt Ford, ‘Will Europe Censor this Article?’ *The Atlantic* (online), 13 May 2013 < <http://www.theatlantic.com/international/archive/2014/05/europes-troubling-new-right-to-be-forgotten/370796/>>.

⁶⁶ According to James Ball, the search results that Mr González took issue with consisted of a link to only one article (36 Spanish words long) whereas there are now ‘840 articles in the world’s largest media outlets’ about him: Ball (n 63).

from Mr González as a result of outstanding social security debts.⁶⁷ The notices were published in a Spanish newspaper in 1998, and then later in an online version of the newspaper.⁶⁸

In 2009 Mr González contacted the publisher of the newspaper complaining that when his name was entered into Google Search links to the announcements in the online newspaper appeared in the search results. He requested that the publishers erase the online data relating to the property sale, given that the debt proceedings had long been resolved and the data was therefore no longer relevant.⁶⁹ The publishers refused to delete the information, arguing that its publication was justified on the basis of an order of the Ministry of Labour and Social Affairs.⁷⁰ Mr González subsequently brought his complaint to Google Spain, which in turn forwarded it on to Google Inc.⁷¹ The complaint included a request that the links to the announcements about the auction be removed from the search results generated by Google's search engine as a result of a search conducted on the basis of Mr González' name.⁷² Mr González then lodged his complaint with the Spanish data protection authority, 'Agencia Española de Protección de Datos' ('the AEPD').⁷³ The complaint included two requests of Mr González, the first being that the publisher of the online newspaper either remove or de-identify the data relating to the property sale or protect Mr González' data using tools made available by search engines.⁷⁴ The second request was that Google Spain or Google Inc remove or conceal Mr González' data so that it 'ceased to be included in the search results and reveal links to the newspaper.'⁷⁵

The AEPD dismissed Mr González' complaint relating to publication of the announcements in the newspaper on the ground that the publications were legally justified.⁷⁶ The complaint relating to Google Spain and Google Inc (collectively 'Google') was, however, upheld. The AEPD called upon Google to 'take the measures necessary to withdraw the data from their index and to render future access to them impossible.'⁷⁷ Google subsequently appealed the AEPD's decision to the Spanish High Court, the *Audiencia Nacional*, which, in turn, referred the matter to the European Court of Justice. The referral by the Spanish High Court concerned:

*the question of what obligations are owed by operators of search engines to protect personal data of persons concerned who do not wish that certain information, which is published on third parties' websites and contains personal data relating to them that enable that information to be linked to them, be located, indexed and made available to internet users indefinitely.*⁷⁸

The answer to that question depended upon the interpretation of certain provisions of the Directive which had been transposed into Spanish law in 1999.⁷⁹ According to the Advocate-General, the referral by the Spanish High Court was the first time that the European Court of Justice had been

⁶⁷ *Google*, Opinion of AG Jääskinen ('Advocate-General Opinion')1030, para 18.

⁶⁸ *ibid.*

⁶⁹ *ibid.*

⁷⁰ *ibid.*

⁷¹ *ibid* 1030, para 19.

⁷² *ibid*, para 20.

⁷³ *ibid*, para 21.

⁷⁴ *ibid.* The tools referred to are presumably exclusion protocols and code which can be utilised by the publishers of websites to exclude certain information from being indexed by search engines: *Google*, para 39.

⁷⁵ *Advocate-General Opinion* 1030, para 21.

⁷⁶ *ibid*, para 22.

⁷⁷ *ibid.*

⁷⁸ *Google* 1063, para 19.

⁷⁹ The Directive was transposed into Spanish law by *Organic Law No 15/1999* of 13 December 1999: *Google* 1062, para 13.

required to interpret the Directive in the context of internet search engines.⁸⁰ The Advocate-General observed that the questions referred to the ECJ fell into three categories, namely (a) the territorial scope of application of the EU data protection rules; (b) the legal position of an internet search engine service provider under the Directive, and (c) the so-called ‘right to be forgotten’.⁸¹

In relation to questions falling into the first and second categories the European Court of Justice held that the operator of a search engine is to be regarded as ‘processing personal data’, within the meaning of the Directive, when it searches the internet for information about a person (which constitutes personal data within the meaning of the Directive), organises, stores and makes available that information – in the form of a link through its search results.⁸² As such, a search engine must be regarded as a ‘data controller’ within the meaning of the Directive vis-à-vis its processing of personal data.⁸³ In addition, even where the data controller is located outside of the territory (in this case Google Inc. was the operator of the search engine and therefore the actual data controller) the controller will have sufficient connection with the Member State, and be subject to the national provisions it adopts pursuant to the Directive, where the controller has established a branch or subsidiary within the territory that promotes and sells advertising space in connection with its search engine (directing its promotion to members of the territory in question).⁸⁴

Questions in the third category related to the interpretation and scope of Articles 12(b) and 14(a) of the Directive concerning, respectively, a conditional right for a data subject to call for the erasure of data, and to object to the processing of data on compelling legitimate grounds relating to his/her situation. A closer analysis of the Court’s finding in respect of these questions is undertaken below.

4.1 Article 12(b): right of erasure

Article 12(b) provides that 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.

A question earlier mooted in relation to Article 12(b) and raised also in *Google* was whether or not the words ‘in particular because of the incomplete or inaccurate nature of the data’ are to be considered limitative.⁸⁵ In other words, is the right restricted to situations where the personal data is incomplete or inaccurate? In this regard, the *Google* decision has confirmed that reference to the incompleteness or inaccuracy of the data is by way of example only and is not exhaustive, so that ‘non-observance of the other conditions of lawfulness that are imposed by the Directive upon the processing of personal data’ will render the processing non-compliant and permit a data subject to call for the rectification, erasure or blocking of that data under Article 12(b).⁸⁶ The ECJ further elaborated that a data subject will have the right to call for rectification, erasure or blocking of their personal data

⁸⁰ *Advocate-General Opinion* 1028, para 7.

⁸¹ *ibid*, para 6.

⁸² *Google* 1066, para 28. Article 2(b) of the Directive relates to the processing of personal data: Dir 95/46/EC.

⁸³ ‘Controller’ is defined in Dir 95/46/EC, art 2(d).

⁸⁴ *Google* 1071, para 60. This decision was on the basis that Article 4(1)(a) of the Directive provides that each Member State shall apply the national law adopted pursuant to the Directive to the processing of personal data which is (inter alia) carried out in the ‘context of the activities of an establishment of the controller on the territory of the Member State’: Dir 95/46/EC.

⁸⁵ *Koops* (n 3) 13.

⁸⁶ *Google* 1072-1073, para 70.

if the processing of that data does not comply with the principles of data quality in Article 6 of the Directive or with one of the criteria for making processing legitimate, as set out in Article 7. Importantly, this right is exercisable against any data controller who carries out non-compliant processing. Therefore even if the continued publication of the source information (in this case the newspaper notices about the real-estate auction) is lawful, further non-compliant processing (such as links in search results to that information) is not.⁸⁷

Article 6 stipulates that Member States are to provide that personal data must be processed fairly and lawfully.⁸⁸ The Article also provides that data must be ‘collected for specified, explicit and legitimate purposes and not further processed in a way incompatible with those purposes’; and that data must be ‘adequate, relevant and not excessive in relation to the purposes for which they are collected and/or further processed’.⁸⁹ Further, data must be ‘accurate and, where necessary, kept up to date’ and kept in a form allowing for the identification of a data subject for ‘no longer than necessary for the purposes for which the data were collected or further processed.’⁹⁰ The ECJ confirmed that even processing that is initially lawful may therefore become unlawful *in the course of time* where the data are no longer necessary in light of the purposes for which they were collected or processed, in particular where ‘the data appear inadequate, irrelevant or no longer relevant, or excessive in relation to those purposes and in the light of the time that has elapsed.’⁹¹ However, the Court emphasised that the relevant consideration for making a determination as to the relevance, adequacy and so forth of the data is the purposes for which data is processed *by the search engine*.⁹² As such, a data subject would be unable to argue against a link to personal information in search results simply on the basis that the information is no longer necessary (or is not adequate or relevant or is excessive) in light of the purpose for which it was collected or processed by another data controller. The question of whether processing is unnecessary or the data no longer relevant or adequate or is excessive must be considered in light of the purposes for which it is currently being processed by the data controller in question.⁹³ Moreover, the Court made no findings that the personal data relating to Mr González in the search results displayed were unnecessary or inadequate or were irrelevant, excessive or inaccurate in light of the purposes for which that data was collected or processed by Google.⁹⁴ Google – and indeed any operator of a similar search engine - would presumably be able to argue that almost any personal information, no matter how irrelevant it may be when considered in relation the purposes of its collection by a previous data controller, *is* relevant for *its* purposes, which are to search and provide access to information that is publically available on the internet.⁹⁵

A request for erasure under Article 12(b) may also be made where the processing of the information is not legitimate under Article 7 of the Directive. Article 7 requires Member States to make provisions allowing for processing of personal data only if the data subject has consented to the processing of

⁸⁷ *ibid* 1076, para 88. Note that Google had sought to argue that the principle of proportionality required any requests for rectification, erasure or blocking of the personal information to be directed to the publisher of the website, as that publisher has ‘available to him the most effective and least restrictive means of making the information inaccessible.’ *Google* 1071, para 63.

⁸⁸ Dir 95/46/EC, art 6(a).

⁸⁹ *ibid* art 6(c).

⁹⁰ *ibid* art 6(e).

⁹¹ *Google* 1077, para 93.

⁹² *Google* 1077, para 94.

⁹³ This was also the opinion of the Advocate-General: *Advocate-General Opinion* 1046-1047, para 98.

⁹⁴ The ECJ only observed that information and the links to it must be erased *if* it is found to be incompatible with the Directive because it is ‘inadequate, irrelevant or no longer relevant, or excessive in relation to the purposes of the processing at issue carried out by the operator of the search engine’: *Google* 1077, para 94.

⁹⁵ *Advocate-General Opinion* 1046-1047, para 98.

data, or if the processing is necessary on one of the other grounds set out in Article 7(b)-(f). The ECJ noted that the processing of data under Article 7 must be authorised for the entire period that the processing is carried out.⁹⁶

Given that Mr González did not consent to the initial or further processing of the personal information in question (and given that none of the other provisions of Article 7(b)-(e) were applicable), the processing of Mr González' information by Google was reliant upon it being necessary, under Article 7(f). The effect of Article 7(f) is that processing of personal information is lawful if it is necessary for the purposes of the legitimate interests pursued by the controller or by any third party to whom the data are disclosed, 'except where such interests are overridden by the interests for fundamental rights and freedoms of the data subject which require protection under Article 1(1).'⁹⁷ As such, the question for the ECJ was whether Mr González' rights (to prevent a link to information on a public website being displayed in search results) overrode the legitimate interests of Google and internet users who might utilise the Google search tool to conduct a search against Mr González' name. In this respect the ECJ found that in a case such as the present a data controller's economic interests alone cannot justify the interference with an individual's fundamental rights and freedoms, particularly his right to privacy and the protection of his personal information, given the 'potential seriousness' of the interference in question.⁹⁸ In the present case, the interference was so serious because, in the ECJ's view, the inclusion of links in a search page following a search against an individual's name allows internet 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 – information which potentially concerns a vast number of aspects of his private life and which, without the search engine, could not have been interconnected or could have been only with great difficulty – and thereby to establish a more or less detailed profile of him.*⁹⁹

The ECJ noted that it is necessary to consider the interest of other internet users in addition to those of the data controller.¹⁰⁰ Consideration of these third party interests, therefore, also required a balancing exercise to be carried out. However, the ECJ noted that the scales were not equal and that the fundamental rights of an individual to privacy and protection of personal information should 'in situations such as that at issue override, as a 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 upon a search relating to the data subject's name.'¹⁰¹ Salient factors in the court's decision to strike the balance of interests in Mr González' favour were that a great deal of time had elapsed between the subject matter of the original publication (the property sale for debt recovery purposes) and the sensitivity of the information in question.¹⁰² Nevertheless, the Court recognised that there may be situations where the balance would be struck differently: such as where the data subject is a public figure.¹⁰³

The court stressed that when evaluating the conditions for the application of the right to erasure under Article 12(b) (and the right to object under Article 14(a)) the court needed to consider 'inter alia' whether the data subject 'has a right that the information in question relating to him personally should, at this point in time, no longer be linked to his name by a list of results displayed following a search

⁹⁶ *Google* 1077, para 95.

⁹⁷ Dir 95/46/EC, art 6(f).

⁹⁸ *Google* 1074-1075, para 81.

⁹⁹ *ibid* 1074, para 80.

¹⁰⁰ *ibid* 1074-1075, para 81.

¹⁰¹ *ibid* 1077-1078, para 97.

¹⁰² *Ibid* 1078, para 98.

¹⁰³ *ibid*.

made on the basis of his name...'¹⁰⁴ The court held that a data subject did have that right and that it arose 'in the light of his fundamental rights under Article 7 and 8 of the Charter [of Fundamental Rights of the European Union].'¹⁰⁵

4.2 Article 14(a): right to object

In addition to considering Article 12(b) of the Directive, the ECJ also considered the provisions of Article 14(a), which provides that Member States are to allow a data subject:

*At least in the cases referred to in Article 7 (e) and (f), to object at any time on compelling legitimate grounds relating to his particular situation to the processing of data relating to him, save where otherwise provided by national legislation. Where there is a justified objection, the processing instigated by the controller may no longer involve those data.*¹⁰⁶

Arguably Article 14(a) does not give a data subject any rights over and above those already set out in Article 12(b), but simply directs the data controller or the regulatory authority to take more specific account of the data subject's situation when determining the legitimacy of processing based on Article 7(e) or 7(f). This seems to be how the ECJ interpreted Article 14(b).¹⁰⁷ In this case, Mr González's situation required account to be taken of the fact that so much time had elapsed since the publication of the source information, the sensitivity of the information and the means by which the information was made available (via a link in a list of search results displayed following a search against his name).¹⁰⁸

4.3 Criticisms of the Google decision

The ECJ's decision in *Google* has been criticised for promoting the rights of individuals over the right to freedom of expression and the right to access information¹⁰⁹ and, moreover, stating as an 'automatic rule' that the economic interests of a data controller will not override those of a data subject.¹¹⁰ As noted above, however, the way in which the ECJ struck the balance between the competing interests of the data controller and the data subject was particularly influenced by the 'seriousness of the

¹⁰⁴ *ibid* 1077, para 96.

¹⁰⁵ *ibid* 1077-1078, para 97.

¹⁰⁶ Dir 95/46/EC, art 14(a).

¹⁰⁷ *Google* 1074, para 76: 'The balancing to be carried out under subparagraph (a) of the first paragraph of Article 14 thus enables account to be taken in a more specific manner of all the circumstances surrounding the data subject's particular situation.' It will be recalled that processing is permitted under Article 7(f) only if the data controller's legitimate interests, or those of third parties to whom the data is disclosed, override the 'interests for fundamental rights and freedoms of the data subject which require protection under Article 1 (1).' On a strict interpretation of Article 14(a), therefore, a data subject has the right to object to the continued processing of data, *even* where the data controller's legitimate interests, or those of third parties, outweigh the data subject's fundamental rights and freedoms. Such an interpretation seems illogical, however, and the intention of Article 14 must therefore be to direct focus to a data subject's particular situation in determining the balance to be struck under Article 7(f).

¹⁰⁸ *Ibid* 1078, para 98.

¹⁰⁹ See, eg, Guy Vassell-Adams, Matrix Chambers, 'Case Comment: Google Spain SL, Google Inc v Agencia Espanola de Proteccion de Datos, Mario Costeja González' (*Eutopia Law*, 16 May 2014) <<http://eutopialaw.com/2014/05/16/case-comment-google-spain-sl-google-inc-v-agencia-espanola-de-proteccion-de-datos-mario-costeja-gonzalez/>>; and see generally Stefan Kulk and Frederik Zuiderveen Borgesius, 'Google Spain v. González: Did the Court Forget About Freedom of Expression?' (2014) *European Journal of Risk Regulation* (forthcoming)

¹¹⁰ Steve Peers, 'The CJEU's Google Spain Judgment: Failing to Balance Privacy and Freedom of Expression' (*EU Law Analysis*, 13 May 2014) <<http://eulawanalysis.blogspot.com.au/2014/05/the-cjeus-google-spain-judgment-failing.html>>.

interference'.¹¹¹ The interference in question was the processing of data at issue in *Google*¹¹² – namely the linking to personal information concerning Mr González in a list of search results which appeared following a search made against his name. It is unfortunate, however, that the ECJ did not offer any explanation as to why it regarded the data controller's interests in the processing of personal data for the purpose of its search facility as 'merely economic'.¹¹³ After all, the Advocate-General had found that Google's interests went beyond economic ones and included '(i) making information more accessible for internet users; [and] (ii) rendering dissemination of the information uploaded on the internet more effective.'¹¹⁴

The ECJ also held that the data subject's rights protected by Articles 7 and 8 of the Charter override 'as a general rule' the interest of internet users. This statement needs to be understood in the context of the matter before the court – namely the nature of the information (including its age, currency and sensitivity), the means by which the information was made available, and the need to consider whether the publication of personal information was in accordance with the Data Protection Directive.¹¹⁵ As to the latter it was incumbent upon the court to consider Article 1 of the Directive and its objectives, as stated in its preamble, from which it is apparent that the Directive 'seeks to ensure a high level of protection of the fundamental rights and freedoms of natural persons, in particular their right to privacy, with respect to the processing of personal data'.¹¹⁶ It seems that the ECJ used the objective of the Directive as a reason for asserting that the data subject's rights should, generally, prevail: at least in light of the nature of the interference.

By contrast, the Advocate-General had observed that in all cases a data subject's right to protection of his private life must be balanced with other fundamental rights and freedoms.¹¹⁷ This conclusion led the Advocate-General to engage in a detailed consideration of the fundamental rights and freedoms that would be affected if the inclusion of links to the information about Mr González' previous debts were not included in the search results. In this regard the Advocate-General noted that an internet search engine service provider 'lawfully exercises both his freedom to conduct business and freedom of expression when he makes available internet information location tools relying on a search engine.'¹¹⁸ Moreover, an internet user's right to information would, according to the Advocate-General, 'be compromised if his search for information concerning an individual did not generate search results providing a truthful reflection of the relevant web pages but a "bowdlerised" version thereof.'¹¹⁹

The fact that the ECJ circumvented any *detailed consideration* of the extent to which the rights and freedoms of others would be affected should links to the notices concerning the sale of Mr González' property be removed is curious indeed. Article 10(1) of the European Convention on Human Rights guarantees freedom of expression, which includes the freedom to receive and impart information and

¹¹¹ *Google* 1074-1075, para 81.

¹¹² *ibid* 1074, para 80.

¹¹³ *ibid* 1074-1075, para 81.

¹¹⁴ *Advocate-General Opinion* 1046, para 95; see also 1054, para 132: 'An internet search engine service provider lawfully exercises both his freedom to conduct business and freedom of expression when he makes available internet information location tools relying on a search engine.'

¹¹⁵ *Google* 1070-1071 and 1078, paras 58 and 98 (respectively).

¹¹⁶ *ibid* 1070-1071 and 1072, paras 58 and 66 (respectively).

¹¹⁷ *Advocate-General Opinion* 1053, para 128.

¹¹⁸ *ibid*.

¹¹⁹ *ibid* 1053-1054, para 131.

ideas.¹²⁰ Article 10(2) of ECHR provides that the exercise of the freedoms guaranteed in Article 10(2) may be subject to restrictions and conditions as prescribed by law and as are necessary in a democratic society including for the protection of the rights and freedoms of others. An interpretation of the Directive such that the rights of third parties to receive information about the data subject are ‘generally overridden’, albeit that this is with regard to the nature of the information and the seriousness of the interference, arguably fails to consider the extent to which that interference is proportionate in protecting the data subject’s rights to privacy. As noted by the European Court of Human Rights (ECtHR) in *Węgrzynowski v. Poland*¹²¹ ‘particularly strong reasons must be provided for any measure limiting access to information which the public has the right to receive.’¹²² Whilst this observation is made in the context of measures that interfere with the role of the press, the right to receive information under Article 10 ECHR is not limited to information provided by the press or in the course of journalistic activities. Moreover, in *Węgrzynowski* the ECtHR referred to previous decisions of the ECtHR which have ‘stressed the important contribution made by Internet archives to preserving and making available news and information. Such archives constitute an important source for education and historical research, particularly as they are readily accessible to the public and are generally free.’¹²³ This is not to suggest that a search engine is to be treated in the same way as an archive. However, to some extent a search engine fulfils a similar role to an archive in that it is an important source for education and research, is readily accessible, and – certainly in the case of Google’s search engine and many others – is free. Indeed, Google itself has stated that its search facilities are a form of ‘library card catalogue for the Web.’¹²⁴ On the other hand, it should be remembered that various tools and practices already exist that assist individuals (or businesses) to manage reputation on the internet: to some extent, these already affect the accessibility of information.¹²⁵

The ECJ decision has also been criticised for delegating to a private sector company the responsibility for conducting the balancing exercise required between a data subject’s rights, on the one hand, and those of the data controller and third parties on the other.¹²⁶ However, it is an inherent and long-standing principle of data protection regulation that (unless the data subject has consented to the processing of his/her data and unless the data controller is able to rely on another legitimate ground of processing) the data controller must only process data if it is necessary in their legitimate interests and, in each case, where those interests are not overridden by the interests of the data subject.¹²⁷ There is nothing new, therefore, in the ECJ’s decision in *Google* in this respect: it only serves to highlight that data controllers may need to institute formal processes and procedures when making a

¹²⁰ *European Convention on Human Rights* (‘ECHR’) opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 June 1952) art 8 and art 10 (‘ECHR’).

¹²¹ Application No 33846/07, European Court of Human Rights, Chamber (16 October 2013) (‘*Węgrzynowski*’).

¹²² *ibid* citing *Timpul Info-Magazin and Anghel v Moldova* (European Court of Human Rights, Chamber, Application No 42864/05, 2 June 2008), para 31.

¹²³ *Węgrzynowski*, para 59, citing *Times Newspapers Ltd v. the United Kingdom (nos 1 and 2)* (European Court of Human Rights, Chamber, Application Nos 3002/03 and 23676/03, 10 June 2009).

¹²⁴ Drummond (n 7) 42:23.

¹²⁵ See, eg, Graux et al (n 21) 9; Julia Powles and Luciano Floridi, ‘A Manifesto for the Future of the “Right to be Forgotten” Debate’, *Technology, The Guardian* (online) 22 July 2014 <

<http://www.theguardian.com/technology/2014/jul/22/a-manifesto-for-the-future-of-the-right-to-be-forgotten-debate>>.

¹²⁶ Reporters Without Borders, *Recommendations on the Right to be Forgotten by La Quadrature du Net and Reporters Without Borders* (26 September 2014) < <http://en.rsf.org/union-europeenne-recommendations-on-the-right-to-be-26-09-2014,47026.html>>. See also *Advocate-General Opinion* 1054, para 133: ‘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 provider.’

¹²⁷ Dir 95/46/EC, art 6(e).

determination as to whether their interests (or those of third parties to whom the data is disclosed) are legitimate and not overridden by the interests of the data subject, where previously there may have been none. Indeed, the decision in *Google* should not mask the fact that the company already has considerable power to make decisions as to what content is made available on its various services, including YouTube.¹²⁸ Moreover, allowing a private sector player to determine the balance does not preclude a data subject from submitting his/her request for erasure to a regulatory authority, in the event that the data controller does not grant the request.

5 The status of the right to be forgotten following *Google*

In his preliminary opinion in *Google*, the Advocate-General considered that:

*The Directive does 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. The purpose of processing and the interests served by it, when compared to those of the data subject, are the criteria to be applied when data is processed without the subject's consent, and not the subjective preferences of the latter.*¹²⁹

It seems that the ECJ agreed with the Advocate-General in this respect. The ECJ's findings were based fairly and squarely on an application of the criteria to be applied to processing of data without a data subject's consent: namely the purpose of the processing and the interests served by it, when compared to the interests of the data subject. The ECJ did not need to look outside of the Directive in order to determine that Mr González had a right to request the erasure of the data in question from the search results – that right was provided for within the provisions of the Directive itself. In other words, the decision confirms the scope of the right of erasure available to a data subject under the Directive.¹³⁰

In determining the scope of the right of erasure under the Directive might it be said however, that the ECJ has recognised the existence of at least a limited right to be forgotten, as an aspect of the broader right to privacy? After all the ECJ held that Mr González was able to request that the information in question *no longer* be made available to the public on account of its inclusion in a list of search results 'in the light of his fundamental rights under Articles 7 and 8 of the Charter.'¹³¹ This might suggest that Mr González does have a right not to be indefinitely linked to the information in question and that the right is an aspect of his broader rights to privacy and the protection of personal data. Unfortunately, and as noted above, the decision of the ECJ lacked any analysis of what those broader rights do in fact entail.

Certainly, when balancing Mr González' privacy rights with the countervailing interests of Google and internet users the age and currency of the information in question was a relevant factor in the

¹²⁸ Jeffrey Rosen, 'The Deciders: The Future of Privacy and Free Speech in the Age of Facebook and Google' (2012) 80 Fordham Law Review 1525, 1536.

¹²⁹ *Advocate-General Opinion* 1049, para 108.

¹³⁰ It should be noted that the right of a data subject to have information erased from search results is not the same as a right of data subject to call for the 'complete deletion of the page from the indexes of the search engine': see Article 29 Data Protection Working Party, *Guidelines on the Implementation of the European Court of Justice of the European Union Judgment on "Google Spain and Inc v. Agencia Española de Protección de Datos (AEPD) and Mario Costeja González C131/12 (14/EN WP 225) 26 November 2014* ('Article 29 Working Party 2014 Guidelines'), 9 [21]. This means that '[t]he page should still be accessible using any other terms of search.' (Article 29 Working Party 2014 Guidelines, 9 [21]).

¹³¹ *Google* 1077-1078, para 97.

ECJ's decision to strike the balance in favour of the data subject.¹³² However, just because a particular consideration is relevant to determining how serious the interference with the privacy right is, or where an appropriate balance between competing interests should be struck, does not mean that consideration in and of itself is an aspect of the right of privacy. Moreover, the fact that there *was* an interference with Mr González' privacy rights at all stemmed not from the nature of the information, including its age or currency/relevancy to the present day, nor the means of dissemination (an entry in search results), but from the fact that the case concerned the processing and communication, by electronic means, of personal information.¹³³

On the other hand, and as McGoldrick has noted, the idea of 'reasonable expectation' is 'fundamental to the evolving scope of the right to privacy' under EU (as well as US) law.¹³⁴ If it can be said that – at least in certain circumstances - a person has a reasonable expectation of privacy in respect of information, even information in the public domain, on account of its age and currency, or relevancy to the data subject in the here and now, then we can be more confident in saying that the right to be forgotten is an aspect of the broader right of privacy. Because the ECJ did not consider these issues in any detail in *Google*, the case is of little assistance in determining whether the right to be forgotten is an aspect of the broader right to privacy. Nevertheless, the judgment does hint at a more nuanced understanding of privacy, which moves beyond the idea of a public/private dichotomy,¹³⁵ and to some extent echoes aspects of Nissenbaum's thesis that expectations of privacy are determined by the contexts in which information is gathered and subsequently used.¹³⁶

According to Nissenbaum a right to privacy is 'neither a right to secrecy nor a right to control but a right to *appropriate* flow of personal information.'¹³⁷ Whether the flow of information in any given context (or from one context to another) is appropriate can be determined, according to Nissenbaum, by the application of the contextual integrity framework. This framework involves identifying, firstly, whether or not a particular information flow violates an entrenched context-relative informational norm.¹³⁸ Context-relative informational norms are norms which are 'specifically concerned with the flow of information' in a given context.¹³⁹ Therefore, identifying the relevant norms requires, as a first step, identification of the prevailing context. Within that context, informational norms further depend upon identification of information subjects, senders and recipients (referred to as 'actors'), and

¹³² It was of course only one factor: the means by which that information was disseminated was particularly relevant to the decision to strike the balance of interests in Mr González' favour, as was the fact that Mr Gonzalez was not considered to be a public figure: *ibid* 1074-1075, para 81.

¹³³ The ECJ has previously held that the processing of personal data recognised by Articles 7 and 8 of the Charter concerns 'any information relating to an identified or identifiable individual': see *Advocate-General Opinion* 1050, para 117 referring to *Volker und Markus Schecke and Eifert* (references omitted). As also noted by Advocate-General Jääskinen 'any act of communication relying on automatic means such as by means of telecommunications, e-mail or social media concerning a natural person constitutes as such a putative interference of that fundamental right [to private life] that requires justification': *Advocate-General Opinion* 1050-1051, para 118.

¹³⁴ McGoldrick (n 10) 765.

¹³⁵ Cases such as *Von Hannover v Germany* (2005) 40 EHRR 1 have already moved the debate about privacy beyond the traditional public/private dichotomy. See, further, Gavin Phillipson, 'The "Right" of Privacy in England and Strasbourg Compared' in Andrew T Kenyon and Megan Richardson (eds), *New Dimensions in Privacy Law* (Cambridge, 2010) 184, 204.

¹³⁶ See generally Nissenbaum (n 12).

¹³⁷ Nissenbaum (n 12) 127 (emphasis in original).

¹³⁸ Nissenbaum (n 12) 140.

¹³⁹ Nissenbaum (n 12) 140-141. Nissenbaum uses the word 'norm' to refer to a prescriptive standard rather than to merely describe what is the 'normal' or 'common' practice in a given situation (page 138).

relevant transmission principles (such as legal and other constraints on the transmission of information).¹⁴⁰

Another important parameter in determining relevant informational norms is the attributes of the information in question, or the type and nature of the information.¹⁴¹ Depending on the context, information of a certain nature may or may not be considered appropriate according to the relevant context-relative informational norms. To use an example from a job interview context, information about an applicant's marital status is generally considered inappropriate, whilst such information in a different context, say courtship, would be considered appropriate.¹⁴² Determining the attributes of information also involves a consideration of the conditions under which information is accessible. Depending on the form in which information is made available (whether, say, the information is digitised, placed online, or takes the form of words or of images) and the access conditions that apply to the information (for example, whether it is on a publically accessible website or is restricted to certain individuals/institutions), information can yield new information. One example, provided by Nissenbaum, is the placing of criminal records online with no access restrictions:

*Records placed on the Web may easily be harvested en masse by institutional information aggregators that facilitate grand sweeps of public records databases for inclusion in data warehouses.....[O]nline records allow in-depth targeting of particular individuals with the possibility of short-circuiting much effort if one is willing to pay the fee charged by information providers for dossiers of interest.*¹⁴³

Whilst the ECJ made no reference to Nissenbaum's work, comments made in the judgment about the nature of search engines certainly reveal an understanding of how novel flows of information can alter information attributes, and thus herald a departure from entrenched informational norms. Recall the passage, already quoted above, where the Court notes that the inclusion of links in a search page following a search against an individual's name allows internet 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 – information which potentially concerns a vast number of aspects of his private life and which, without the search engine, could not have been interconnected or could have been only with great difficulty – and thereby to establish a more or less detailed profile of him.*¹⁴⁴

According to the contextual integrity framework, when an information flow involves a change in the attributes of information, or in the actors or the applicable transmission principles, this should generate a 'red flag' and will constitute a prima facie violation of contextual integrity.¹⁴⁵ Identification of a prima facie violation of contextual integrity, however, is only the first stage of the enquiry. The next stage of the enquiry involves an evaluation of whether the new flow in fact enhances the values of the context in which the information is gathered. There is recognition that new practices and flows of information may 'sometimes be "better" than those prescribed by existing norms.'¹⁴⁶ In order to determine whether this is the case it is necessary to ask '[w]hat might be the harms, the threats to autonomy and freedom? What might be the effects on power structures, implications for justice,

¹⁴⁰ Nissenbaum (n 12) 141.

¹⁴¹ Nissenbaum (n 12) 143.

¹⁴² Nissenbaum (n 12) 144.

¹⁴³ Nissenbaum (n 12) 218-219.

¹⁴⁴ *Google* 1078, para 80.

¹⁴⁵ Nissenbaum (n 12) 182.

¹⁴⁶ Nissenbaum (n 12) 15.

fairness, equality, social hierarchy, democracy and so on?’¹⁴⁷ However, it is not enough simply to identify the relevant moral and political factors affected by the new information flow. It is necessary to ask what those factors *mean* in light of the ‘contextual values, ends, purposes and goals.’¹⁴⁸

Nissenbaum herself has suggested that the contextual integrity decision heuristic promises an approach to assessing reasonable expectations of privacy that may be less arbitrary than the approach often taken by the courts.¹⁴⁹ This is not the place to expand on that view, or to consider what might be the result if the contextual integrity heuristic is applied to the facts in *Google*. However, seen from a ‘privacy as contextual integrity’ perspective, there is no contradiction in asserting that a person has an expectation of privacy vis-à-vis information in one context (for example, information appearing in a list of search results) and not in another (for example, the publication on a website of certain information). Whether that expectation of privacy is reasonable – or how, if so, it should be weighed against other rights and interests - is another matter.

The contextual integrity framework also highlights the importance of understanding context-relative informational norms in accounting for technologies and practices that are often experienced as and described in terms of violations of privacy. Understanding how the passage of time renders information ‘de-contextualised, distorted, outdated, no longer truthful (but not necessarily false)’¹⁵⁰ also means that, depending on the circumstances, an appropriate flow of information may be achieved not by its erasure but by its contextualisation. This has been broadly recognised in a number of judgments of European courts. For example, in *Times Newspapers Ltd v. the United Kingdom (nos 1 and 2)*¹⁵¹ the ECtHR held that, in the context of an Article 10 complaint pursued by a newspaper, the requirement to publish an ‘appropriate qualification’ to an article contained in an internet archive managed by the newspaper, where the article was known to be defamatory, would not violate its Article 10 rights.¹⁵² The ECtHR ‘noted with approval the fact that the domestic courts had not suggested that potentially defamatory articles should be removed from archives altogether.’¹⁵³ This suggests that in cases concerning the continued online publication of materials held to be defamatory, the ability of the defamed to obtain suitable redress by the ‘addition of a degree of contextualisation’¹⁵⁴ of the information at issue is an important consideration in determining whether the State has fulfilled its obligation to strike a balance between the rights provided for in Articles 8 and 10 respectively.¹⁵⁵ In terms of privacy invasive material, rather than defamatory material, perhaps,

¹⁴⁷ Nissenbaum (n 12) 150.

¹⁴⁸ Nissenbaum (n 12) 182.

¹⁴⁹ Nissenbaum (n 12) 235 although it should be noted that Nissenbaum’s reference to an arbitrary approach to the application of the reasonable expectations test was in the context of its application in US Supreme Court cases.

¹⁵⁰ de Andrade (n 22) 127.

¹⁵¹ European Court of Human Rights, Chamber, Application Nos 3002/03 and 23676/03 (10 June 2009) (*‘Times Newspapers’*). See also reference to the decision of the Italian Court of Cassation holding that even true information contained in an internet archive may need to be contextualised and updated in light of a data subject’s right to be forgotten see: Angelo Monoriti, ‘Digital Archives and Data Protection: The Right to Update and Contextualise Newspaper News’ (*Studio Legale Associato*, May 2013) <<http://www.nctm.it/wp-content/uploads/2013/07/1370600267Privacyarchivi-online.pdf>>.

¹⁵² *Times Newspapers*, para 47. See also *Węgrzynowski* where the ECtHR suggested that the applicant could have sought an order for contextualisation of a defamatory article, contained in an online archive, by the addition of, say, an explanatory note: para 67.

¹⁵³ *Węgrzynowski*, para 59 citing *Times Newspapers*, para 47.

¹⁵⁴ McGoldrick (n 10) 775.

¹⁵⁵ On the issue of contextualisation and a decision of the Italian Court of Cassation holding that even true information contained in an internet archive may need to be contextualised and updated in light of a data subject’s right to be forgotten, see Monoriti (n 152).

as Eltis has suggested, 'giving greater weight to time in search result ranking would serve to alleviate some of the distortions caused by dated information overshadowing more current data in the online context.'¹⁵⁶

6 The significance of *Google* and the future of the right to be forgotten

6.1 Did Google invent a right to be forgotten?

Some commentators have argued that *Google* found a right to be forgotten in the current Directive which no-one thought was there,¹⁵⁷ or that the ECJ 'invented' a right to be forgotten.¹⁵⁸ This paper has argued that the decision only applied a right of erasure which already existed under Directive.¹⁵⁹ Although the age and currency/relevancy of the information at issue in the proceedings was a relevant factor in determining the appropriate balance between the rights of the data subject and the rights of Google and third parties with access to information, it is difficult to discern from the judgment that a right to be forgotten is being conceptualised as an aspect of the broader right to privacy.

Even if *Google* did not break new ground in terms of advancing an understanding of a right to be forgotten as a human right, its significance goes beyond the important findings on the material and territorial scope of the Directive. The implications of the ECJ's findings on the scope of the right to erasure in the Directive, and the weight to be attached to a data subjects' privacy rights vis-à-vis the countervailing rights of the data controller and internet users, are important, certainly for search engines. The implications for Google have certainly been significant. As of 25 September 2014, Google had received more than 135,000 erasure requests, each of which is to be reviewed individually.¹⁶⁰ In order to determine how to strike an appropriate balance between the rights of the data subject and other rights, Google has also instituted an Advisory Council and a series of consultation sessions run in seven European cities.¹⁶¹ The ECJ's findings also have potential implications for other data controllers, such as social networking services, and even those who upload information to social networking sites where they are not subject to the household exemption under the Directive.¹⁶² The ruling also affects internet users, including those who access non-EU domains. Guidelines issued by the Article 29 Data Protection Working Party on the implementation of the Google decision recommend that any de-listing of a data subject's personal information, which is

¹⁵⁶ Eltis (n 22) 86.

¹⁵⁷ Bob Gellman and Pam Dixon, *Decision in Europe: Controversial Revival of Practical Obscurity: Implications of the Google Spain Case* (20 May 2014) World Privacy Forum <<http://www.worldprivacyforum.org/2014/05/wpf-analysis-implications-of-the-google-spain-case/>>.

¹⁵⁸ Breheny (n 5).

¹⁵⁹ This view is also shared by Mayer-Schönberger: Viktor Mayer-Schönberger, Comment, 'Omission of Search Results is Not a "Right to be Forgotten" or the End of Google', *The Guardian* (online), 14 May 2014 <<http://www.theguardian.com/commentisfree/2014/may/13/omission-of-search-results-no-right-to-be-forgotten>>.

¹⁶⁰ Drummond (n 7) 43:44.

¹⁶¹ Google Advisory Council at <<https://www.google.com/advisorycouncil/>>. Although at least one critic has billed this process as little more than a PR stunt: see Sam Schechner and David Roman, 'Google Seeks Views in Europe on Right to be Forgotten', *Wall Street Journal* (online), 9 September 2014 <<http://online.wsj.com/articles/google-seeks-views-in-europe-on-right-to-be-forgotten-1410268827>> quoting Isabelle Falque-Pierrotin, head of France's privacy watchdog and chairman of the pan-European group of data-protection regulators, as saying that "They're trying to buy themselves goodwill."

¹⁶² In the opinion of the Article 29 Working Party a data controller involves a social networking service since they 'determine both the purposes and the means' of processing and have also opined that those uploading to SNS can also be considered controllers unless subject to the household exemption: Article 29 Data Protection Working Party, *Opinion 1/2010 on the Concepts of "Controller" and "Processor"* (2010), at 21, referring to their earlier opinion (WP 163) of 2009. In light of the Google decision as to who is a data controller, this opinion seems correct.

required to give effect to the data subject's rights following *Google*, should not be limited to EU domains:

The adequate implementation of the ruling must be made in such a way that data subjects are effectively protected against the impact of the universal dissemination and accessibility of personal information offered by search engines when searches are made on the basis of the name of individuals... ..In that sense, limiting de-listing to EU domains on the grounds that users tend to access search engines via their national domains cannot be considered a sufficient means to satisfactorily guarantee the rights of data subjects according to the judgment. In practice, this means that in any case de-listing should also be effective on all relevant domains, including .com.¹⁶³

However, it must be remembered that the balance between a data subject's rights to privacy and the rights of third parties might well be struck differently to the way in which the balance was struck in *Google*, depending on the means by which the information is made available, and the nature and extent of the 'interference' at issue.

6.2 Proposed Regulation and Compromise Text

The European Commission's proposal for the new Data Protection Regulation was finalised in 2012.¹⁶⁴ The Proposed Regulation has gone through a Committee process culminating in a Report on the Proposed Regulation,¹⁶⁵ following which, in March 2014, the European Parliament endorsed a compromise text of the Data Protection Regulation ('the Compromise Text').¹⁶⁶ The heading of Article 17 (originally titled 'a right to be forgotten and to erasure') was changed to 'a right to erasure'.¹⁶⁷ This title is more reflective of the fact that Article 17 does not provide per se for a right to be forgotten. A number of amendments to the wording of Article 17 as originally proposed by the EC were also endorsed by the Parliament.

Detailed consideration of Article 17 as per the Compromise Text is beyond the scope of this paper, particularly as that text is still subject to scrutiny by the Council of Ministers in accordance with the Ordinary Legislative Procedure.¹⁶⁸ However, broadly speaking, Article 17(1) of the Compromise Text is more explicit than Article 12(b) of the Directive as to the grounds upon which a data subject can call for the erasure of data, and extends the grounds by allowing a data subject to call for erasure upon the withdrawal of consent. Nevertheless, the overall effect of Article 17(1) is less generous to data subjects. Whereas the right of erasure (or rectification or blocking of data) under the Directive was automatic upon certain conditions being met (essentially that processing does not comply with the

¹⁶³ Article 29 Working Party 2014 Guidelines, 9 [20].

¹⁶⁴ Proposed Regulation COM (2012) 11 final.

¹⁶⁵ Committee on Civil Liberties, Justice and Home Affairs, 'Report on the Proposal for a Regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation)' COM (2012) 0011 – C7-0025/2012 – 2012/0011(COD), 22 November 2013.

¹⁶⁶ Compromise Text COM (2012) 0011 – C7-0025/2012 – 2012/0011(COD).

¹⁶⁷ *ibid.*

¹⁶⁸ In May 2014 the Council of the European Union agreed on a partial general approach on Chapter V of the Compromise Text (relating to the international dimension of data protection reform) but have not yet reached agreement on many of the proposed articles of the Compromise Text: Council of the European Union, 'Proposal for a Regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation) Partial General Approach to Chapter V', 10349/14, Brussels, 28 May 2014.

Directive¹⁶⁹), under the Regulation erasure is never automatic. In each case consideration has to be directed to whether or not retention is necessary for, among other things, the exercise of the right of freedom of expression in accordance with Article 80.¹⁷⁰ Article 80, in turn, provides that Member States are to provide for exemptions or derogations from certain provisions of the Regulation – including those in Article 17 – whenever this is necessary ‘to reconcile the right to protection of personal data with the rules governing freedom of expression in accordance with the Charter of Fundamental Rights of the European Union.’¹⁷¹ Data controllers may then be able to argue that they should be permitted to retain even material which has been unlawfully processed or which is no longer necessary in light of the purposes for which it was collected or processed, in view of any exceptions or derogations made pursuant to Article 80. Depending on what exemptions or derogations Member States make in accordance with Article 80, the amendment arguably tips the scales against an individual’s rights to privacy and protection of personal information. Whereas the current Directive provides that derogations may be made from certain of its provisions where data is processed ‘solely for journalistic purposes or the purpose of artistic or literary expression,’¹⁷² Article 80 of the Compromise Text is not so limited.

6.3 The future of the right of erasure and the right to be forgotten

As noted in the previous situation, an appropriate flow of information might be achieved by the contextualisation of that information rather than its erasure. That the Compromise Text adopts an ‘all or nothing’ approach – allowing the erasure of information which is processed in a way that is non-compliant – might therefore be seen as a missed opportunity. Allowing regulatory authorities more power to order the contextualisation of information (in whatever form that contextualisation may take) rather than, necessarily, its deletion might also help address some of the objections which have been vociferously pursued in response to the *Google* decision and the inclusion of a ‘right of erasure’ in the Compromise Text.

In the meantime, those objections are likely to continue, as are the calls for further development of a right to be forgotten. However this debate plays out, the ECJ’s decision in *Google* is likely to be remembered as a ‘watershed in the evolution of the infosphere – the informational environment represented by our increasingly hyper-connected world.’¹⁷³ For Mr *González* the decision has resulted in something of a curious irony: his bid not to be indefinitely linked through Google search to information concerning his debts was successful, but as a result of that success he is likely to be linked to the information he wished forgotten for a long time to come.

7. Conclusions

The ECJ’s decision in *Google* did not invent a right to be forgotten, but only applied a right of erasure which already existed under the Data Protection Directive. It is difficult to discern from the judgment

¹⁶⁹ Albeit that where the request is made on the basis that processing is not legitimate either because there are no legitimate grounds for processing the data, or there are legitimate grounds but they are overridden by the interests of the data subject, the request will entail a balancing of the data subject’s rights with those of the data controller and other third parties: Dir 95/46/EC, art 7(f).

¹⁷⁰ Compromise Text COM (2012) 0011 – C7-0025/2012 – 2012/0011(COD), art 17(3)(a).

¹⁷¹ *ibid* Recital 121 which emphasises the need for Member States to make exemptions and derogations from certain provisions of the Regulation in order to reconcile the right to receive the right for the protection of personal data with the rights of others to freedom of expression and ‘notably the right to receive and impart information, as guaranteed in particular by Article 11 of the Charter of Fundamental Rights of the European Union.’

¹⁷² Directive 95/46/EC, art 9.

¹⁷³ Powles and Floridi (n 126).

that a right to be forgotten is being conceptualised as an aspect of the broader right to privacy. The proposed new Data Protection Regulation will give individuals a right to call for erasure of their personal information, in certain circumstances, but not a right to be forgotten.