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GOOGLE SPAIN SL v AGENCIA ESPAÑOLA DE PROTECCIÓN DE DATOS (EUROPEAN COURT OF JUSTICE, C-131/12, 13 MAY 2014)

I INTRODUCTION

In *Google Spain SL v Agencia Española de Protección de Datos*,¹ the European Court of Justice (‘the Court’) held that European data protection law applies to search engines, such as Google, and gives individuals the right to have links removed from search results, provided certain conditions are met. *Google Spain* has been heralded as a landmark decision because the Court’s expansive approach to the rights of data subjects amounts to judicial recognition of the ‘right to be forgotten.’² This case note suggests that the Court erred in its interpretation of art 6(1)(c) of *Directive 95/46*,³ a provision central to the right to be forgotten, and that its approach to rights and interests is largely unexplained and unjustified.

II FACTS

In March 2010 Mr Costeja Gonzalez, a Spanish citizen, complained to the Agencia Española de Protección de Datos (the Spanish data protection agency — ‘AEPD’) that links to newspaper articles concerning the auction of his house to pay social security debts appeared in Google search results for his name.⁴ The complaint was directed against the newspaper, La Vanguardia, and Google Spain and Google Inc. The newspaper articles were published in 1998 and Mr Costeja Gonzalez argued that, since the debts had been resolved many years ago, reference to them was now irrelevant.⁵ The AEPD rejected the complaint against La Vanguardia on the grounds that it was legally obliged to publish the notices, but upheld the complaint against Google and ordered that it remove the links to the newspaper articles from the search results. Google Inc and Google Spain brought actions against that decision before the Audiencia Nacional (Spain’s high court).⁶

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¹ (European Court of Justice, C-132/12, 13 May 2014) (*‘Google Spain’*).

² See, eg, Lorna Woods, *Google Spain: Freedom of Expression and the Right to be Forgotten* (13 May 2014) Human Rights Centre <<http://blogs.essex.ac.uk/hrc/2014/05/13/google-spain-freedom-of-expression-and-the-right-to-be-forgotten/>>.

³ *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* [1995] OJ L 281/31, art 6(1)(c) (*‘Directive’*).

⁴ *Google Spain* (European Court of Justice, C-132/12, 13 May 2014), [14]–[15].

⁵ *Ibid* [15].

⁶ *Ibid* [18].

III ISSUES

The Court considered three main groups of questions referred to it by the Audiencia Nacional. The first group concerned whether the territorial scope of the *Directive* extends to Google Inc, the operator of the search engine, given its subsidiary, Google Spain, does not undertake search-related activities but instead sells advertising. The second concerned whether the *Directive* applies to search engines, such as Google Search, that is whether a search engine's activities involve the processing of personal data and whether the search engine operator is the controller of that processing. The third question concerned the scope of a data subject's rights under the *Directive*.

IV DECISION

The Court held that, upon the request of a data subject, a search engine operator is obliged to remove search results that involved processing data in a way that is non-compliant with the *Directive*.⁷ Significantly, the Court differed from the opinion of the Advocate-General on two main issues: whether Google was the 'controller' of the processing of personal data and whether issues of freedom of expression arose.⁸ The Advocate-General took a more policy-driven approach that recognised the *Directive* predated the appearance of search engines and considered the implications of requiring search engines to balance interests on a case-by-case basis.⁹ He concluded that Google was not a controller because it is not 'aware' of the personal data on third party websites and does not intend to process that data in any 'semantically relevant way'.¹⁰ Unlike the Court, he considered balancing the rights to data protection and privacy with the right to freedom of expression and concluded that recognising a right to be forgotten 'would entail sacrificing pivotal rights such as freedom of expression and information'.¹¹

A Material Scope of the Directive

The Court held that the operations of a search engine involve the 'processing of personal data' within the meaning of art 2(b) and that the operator of the search engine must be regarded as the 'controller' in respect of that processing within the meaning of art 2(d).¹² It noted that it was not contested that the information processed by search engines includes personal data.¹³ A search engine's operations involve processing because it "collects" such data which it subsequently "retrieves",

⁷ Ibid [94].

⁸ The Advocate-General gives a non-binding advisory opinion before the Court gives judgment.

⁹ *Google Spain SL v Agencia Española de Protección de Datos* (European Court of Justice, C-132/12, 25 June 2013), [26]–[31], [133].

¹⁰ Ibid [83].

¹¹ Ibid [133].

¹² *Google Spain* (European Court of Justice, C-132/12, 13 May 2014), [41].

¹³ Ibid [27].

“records” and “organises” within the framework of its indexing programmes, “stores” on its servers and, as the case may be, “discloses” and “makes available” to its users in the form of lists of search results.¹⁴ All of the quoted terms are referred to in the art 2(b) definition of ‘processing’.¹⁵ The operator of a search engine is the controller of that processing because it ‘determines the purposes and means’ of the processing and this is how ‘controller’ is defined by the *Directive*.¹⁶ In coming to its conclusion on these issues, the Court emphasised that a search engine is ‘liable to affect significantly, and additionally compared with that of the publishers of websites, the fundamental rights to privacy and to the protection of personal data.’¹⁷ This is because a search engine makes a ‘more or less detailed profile’ of a data subject accessible to users upon the search for a data subject’s name.¹⁸

B *Territorial Scope of the Directive*

The territorial scope of the *Directive* extends to the processing of personal data ‘carried out in the context of the activities of an establishment of the controller on the territory of the Member State.’¹⁹ It was undisputed that Google Spain was an establishment because it ‘engages in the effective and real exercise of activity through stable arrangements in Spain’.²⁰ The Court noted that the words of art 4(1)(a) could not be interpreted restrictively because of the *Directive*’s objective of rights-protection.²¹ The Court held that the processing was carried out in the context of the activities of an establishment because of the inextricable link between the activities of the establishment and those of the controller.²² The establishment, Google Spain, renders the search engine economically profitable by selling advertising, and the search engine is the means enabling those advertising activities to be performed.²³ Hence the *Directive*’s territorial scope extends to Google’s data processing.²⁴

C *The Right to be Forgotten*

The Court took an expansive approach to interpreting a data subject’s rights under the *Directive*. In coming to its conclusion, the Court stated that the data subject does not need to establish that the inclusion of the personal information in search results

¹⁴ Ibid [28].

¹⁵ Ibid.

¹⁶ Ibid [32]–[33].

¹⁷ Ibid [38].

¹⁸ Ibid [37].

¹⁹ *Directive* [1995] OJ L 281/31, art 4(1)(a).

²⁰ *Google Spain* (European Court of Justice, C-132/12, 13 May 2014), [49].

²¹ Ibid [53].

²² Ibid [56].

²³ Ibid.

²⁴ Ibid [60].

is prejudicial.²⁵ Nor does it matter that the information is lawfully published on third party websites and is not also erased from those websites.²⁶ The Court noted that art 12(b), which grants data subjects the right to obtain from the controller, ‘as appropriate, the rectification, erasure or blocking of data’,²⁷ is not restricted to circumstances where the data are incomplete or inaccurate.²⁸ This circumstance is ‘stated by way of example and is not exhaustive’;²⁹ data subjects also have the right where the data processing is otherwise non-compliant with the *Directive*. This includes where the data are inadequate, irrelevant or excessive in relation to the purposes of the processing.³⁰ The assessment of whether data processing is compliant with the *Directive* has a temporal dimension: it is assessed ‘in the light of the time that has elapsed’.³¹ This temporal dimension mirrors the temporal nature of memory and forgetting: hence the ‘right to be forgotten’.

The Court also stated, but did not explain or justify, that a data subject’s rights ‘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 having access to that information upon a search relating to the data subject’s name.’³² However, the Court did qualify this general rule: this is not the case ‘if it appeared, for particular reasons, such as the role played by the data subject in public life, that the interference with his fundamental rights is justified by the preponderant interest of the general public in having ... access to the information in question.’³³

V ANALYSIS

A *A Purposive Approach to Adequacy, Relevance and Excess*

Under the *Directive* a data subject has a right to have information erased from search results, not only because it is inaccurate, but also when its processing is otherwise non-compliant with the *Directive*.³⁴ The Court emphasised that processing can be non-compliant with the *Directive* because the data are inadequate, irrelevant or no longer relevant, or excessive in relation to the purposes for which they are collected and/or processed and in the light of the time that has elapsed.³⁵ Although the Court repeated the wording of art 6(1)(c) numerous times throughout its judgment, it largely ignored the fact that the concepts of adequacy, relevance and excess are assessed *in*

²⁵ Ibid [96].

²⁶ Ibid [88].

²⁷ *Directive* [1995] OJ L 281/31, art 12(b).

²⁸ *Google Spain* (European Court of Justice, C-132/12, 13 May 2014), [70].

²⁹ Ibid.

³⁰ Ibid [92].

³¹ Ibid [93].

³² Ibid [97].

³³ Ibid [99].

³⁴ Ibid [72] and [92].

³⁵ Ibid [93].

relation to the purposes of the data processing.³⁶ The Court did not state or analyse the purposes of the data processing when considering art 6(1)(c). Earlier in its judgment, the Court suggested that the purposes of data processing (in the search engine context) are ‘the service of a search engine’³⁷ and ‘the operation of the search engine’.³⁸ If these are the purposes of the data processing, it is difficult to understand how personal data could be inadequate, irrelevant or excessive in relation to these purposes.

‘The operation of the search engine’ is incredibly broad: a search engine operates by crawling the web, indexing data and using algorithms to find information and rank results.³⁹ A search engine has no problem with ‘excessive’ information, including information constituting personal data; indeed, the concept of ‘excessive’ is inapposite in the context of a search engine because search engines operate most effectively when they index as much information as possible. It is similarly difficult to see how personal data could be inadequate or irrelevant in relation to the operation of a search engine. Google Search is in the business of determining whether information is relevant: it is the most popular search engine in the world because it is the most effective at delivering results relevant to a user’s search query. Of course, being relevant to a user’s search query may be different to being relevant in relation to the purposes of the data processing, that is the operation of the search engine, but it is questionable whether a court can determine what information is inadequate or irrelevant for the operation of a business that it knows almost nothing about.

B *The Philosophical Ideal*

Despite the wording of art 6(1)(c), the Court appears to have understood the requirement of ‘adequate, relevant and not excessive’ in relation to the assessment of the data subject’s present identity and character and not in relation to the purposes of the data processing. This approach reflects an attempt to make it fit with the philosophical ideal of the right to be forgotten and is closer to the approach of Viktor Mayer-Schönberger, an early and influential proponent of the right to be forgotten.⁴⁰ The Court evinced this misunderstanding of art 6(1)(c) in paragraph 98 of its judgment, where it stated:

it should be held that, having regard to the sensitivity for the data subject’s private life of the information contained in those announcements and to the fact that its initial publication had taken place 16 years earlier, the data subject establishes a right that that information should no longer be linked to his name by means of such a list.⁴¹

³⁶ *Directive* [1995] OJ L 281/31, art 6(1)(c).

³⁷ *Google Spain* (European Court of Justice, C-132/12, 13 May 2014), [55].

³⁸ *Ibid* [58].

³⁹ Google, *How Search Works* <<http://www.google.com/insidesearch/howsearchworks/thestory/>>.

⁴⁰ Viktor Mayer-Schönberger, *Delete: The Virtue of Forgetting in the Digital Age* (Princeton University Press, 2009).

⁴¹ *Google Spain* (European Court of Justice, C-132/12, 13 May 2014), [98].

This paragraph, combined with the preceding paragraphs that failed to consider the purposes of data processing in relation to art 6(1), suggests that the Court believes that the information is irrelevant, in part, because it is 16 years old. This may make it irrelevant to the applicant's present identity and character, but would not make it irrelevant in relation to the operation of the search engine. Subsequent media⁴² and academic commentary⁴³ has failed to appreciate that 'adequate, relevant and not excessive' are not discrete concepts but relational ones, and relational to the purposes of the data processing. Likewise, Google itself asks data subjects applying for the removal of links for 'an explanation of why the inclusion of that result in search results is irrelevant, outdated, or otherwise objectionable':⁴⁴ the purposive dimension has been jettisoned. How this has affected the evaluation of more than 150,000 requests for removal is unclear.⁴⁵ The rights to the protection of personal data found in the *Directive* are quite different to the philosophical idea of the right to be forgotten. The right to be forgotten, in theory, is about relevance to a person's present identity and/or character, not about relevance to the purposes of data processing. However, the fact that the Court did not actually decide whether the applicant had a right to have the information erased — this was for the referring court to decide — may mean this misunderstanding of art 6(1)(c) cannot be attributed to the Court. If this is so, the above analysis is still useful because it distinguishes the philosophical idea of the right to be forgotten from the rights found in the *Directive*.

C Life, Liberty and the Protection of Personal Data?

The Court characterised the rights of a data subject as fundamental rights that '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 having access to that information.'⁴⁶ The Court's approach raises three questions: first, why do the rights of a data subject override these other interests? Second, why are the other interests characterised as mere interests rather than as rights? Third, why are rights relating to data processing fundamental? The Court neglected to justify its general rule that a data subject's rights override other interests. Nor did it explain why there is an exception to the general rule in the case of data subjects who play a role in public life. The Court stated only that in these cases the interest of the general public is 'preponderant.'⁴⁷ The point here is not that this exception cannot be justified; rather, it is

⁴² See, eg, 'The Right to be Forgotten: Drawing the Line', *The Economist* (London), 4 October 2014.

⁴³ See, eg, 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.co.uk/2014/05/the-cjeu-google-spain-judgment-failing.html>>.

⁴⁴ Google, *Search Removal Request Under Data Protection Law in Europe* <https://support.google.com/legal/contact/lr_eudpa?product=websearch>.

⁴⁵ Google, *European Privacy Requests for Search Results* <<https://www.google.com/transparencyreport/removals/europeprivacy/?hl=en>>.

⁴⁶ *Google Spain* (European Court of Justice, C-132/12, 13 May 2014), [97].

⁴⁷ *Ibid.*

that the Court should have provided the justification. It should have done so because the language of the *Charter* is absolute: ‘*Everyone* has the right to protection of personal data concerning him or her.’⁴⁸

In regards to question two, the Court failed to recognise that ‘the interest of the general public in having access to ... information’⁴⁹ is one facet of the *right* to freedom of expression. This is confirmed by considering both the text of art 11 of the *Charter of Fundamental Rights of the European Union* and an argument from analogy. Art 11 states that ‘[e]veryone has the right to freedom of expression. This right shall include *the freedom* to hold opinions and *to receive and impart information and ideas without interference by public authority* and regardless of frontiers.’⁵⁰ The Court would understand that the right to freedom of expression means that the general public should have access, free from government interference, to unmodified search results upon a search for ‘democracy’. The same right is at stake when ‘democracy’ is substituted for the name of a data subject. Despite these considerations, freedom of expression (art 11) is conspicuously absent from the judgment.

Finally, the Court’s characterisation of the rights relating to data processing as ‘fundamental’ is odd. On the one hand, it is easily justified: art 8 of the *Charter of Fundamental Rights of the European Union* provides for rights relating to the protection of personal data.⁵¹ On the other hand, the nature of the rights and their interaction with other, more-established, rights suggest that they are not fundamental, at least as a matter of theory. The data processing rights include the right to have accurate but irrelevant information removed from search results; the corollary is a positive obligation on others to remove the results. Erasing such information from search results on the grounds that it is irrelevant to a person’s current identity and character reflects a poor assessment of the public’s ability to understand identity and judge character. It suggests that people cannot properly evaluate information when they are forming an understanding of another’s identity or judging their character; it implies that they cannot take into account the age of the information, the reliability of its source and the fact that people change. Furthermore, why should you have resort to the coercive powers of the state if another makes information about you more easily accessible? Mr Costeja Gonzalez could have instead utilised his own right to freedom of expression by creating a blog briefly addressing the out-of-date newspaper articles. This response would have been indexed by Google and appeared alongside the newspaper articles in search results. And, unlike litigation, it would not have resulted in the information being memorialised in a judgment of the Court and subsequent media attention.

⁴⁸ *Charter of Fundamental Rights of the European Union* [2010] OJ C 83/389, art 8.

⁴⁹ *Google Spain* (European Court of Justice, C-132/12, 13 May 2014), [97].

⁵⁰ *Charter of Fundamental Rights of the European Union* [2010] OJ C 83/389, art 11 (emphasis added).

⁵¹ *Ibid* art 8.

D *Data Protection in Australia*

Although the same result could not be reached by Australian courts for reasons of jurisdiction,⁵² and differences in the substantive law,⁵³ the decision of *Google Spain* is of significant interest to Australian policymakers, lawyers and jurists for three reasons. First, privacy law has recently undergone significant reform in Australia,⁵⁴ and the publication of the Australian Law Reform Commission ('ALRC') report in June 2014 on *Serious Invasions of Privacy in the Digital Era* suggests that more reform is possible.⁵⁵ The ALRC considered,⁵⁶ but did not recommend,⁵⁷ the introduction of a new Australian Privacy Principle ('APP') that empowers individuals to have their personal information destroyed or de-identified. This was in the context of the ALRC recognising the problem of 'digital eternity' that has influenced the development of the right to be forgotten in Europe.⁵⁸ However, the ALRC's proposed APP is distinguishable from the rights in the *Directive* because it is directed at 'personal information that the individual had provided to the entity'⁵⁹ rather than personal information that an entity is processing, regardless of its source.

Second, the decision of *Google Spain* is, fundamentally, a decision about the scope and nature of rights: the right to privacy and the right to the protection of personal data. Rights jurisprudence is of international significance, particularly when the rights concerned are in their infancy (the right to the protection of personal data) or under threat from technological change (the right to privacy). Furthermore, the *Privacy Act* is intended, in part, 'to implement Australia's international obligation in relation to privacy'⁶⁰ (its obligations under the *International Covenant on Civil and*

⁵² Like *Google Spain SL*, *Google Australia Pty Ltd* does not own, control or direct the operations of *google.com* or *google.com.au*. It is the American-based *Google Inc* that owns and operates these domains. Although the *Privacy Act 1988* (Cth) ('*Privacy Act*') has extra-territorial application by virtue of s 5B, *Google Inc* would likely lack the requisite 'Australian link' because it was not incorporated in Australia and does not carry on business in Australia. Hence the *Privacy Act* would not apply to *Google Inc*.

⁵³ A comprehensive answer to the question of whether a search engine's operations (crawling the web, indexing data and using algorithms to rank results) are subject to the *Privacy Act*'s APPs would require consideration of whether a search engine 'collects' or 'holds' 'personal information' (all terms defined in the *Privacy Act*) and whether it 'uses' or 'discloses' such information (terms not defined in the *Privacy Act*). A briefer answer is that, unlike the *Directive*, the *Privacy Act* does not contain a mechanism allowing individuals to request destruction or de-identification of personal data.

⁵⁴ The *Privacy Amendment (Enhancing Privacy Protection) Act 2012* (Cth) commenced operation in March 2014.

⁵⁵ Australian Law Reform Commission, *Serious Invasions of Privacy in the Digital Era*, Report No 123 (2014).

⁵⁶ *Ibid* [16.44]–[16.45].

⁵⁷ *Ibid* [16.51].

⁵⁸ *Ibid* [1.1], [16.44].

⁵⁹ *Ibid* [16.45].

⁶⁰ *Privacy Act* s 2A(h).

Political Rights), so its purpose is analogous to that of the *Directive* vis-à-vis the *Charter of Fundamental Rights of the European Union*.

Finally, the *Privacy Act* contains similar language and concepts to the *Directive*. Although it does not contain the concepts of ‘data processor’ and ‘data controller’, the *Privacy Act* does require an APP entity to ‘take such steps (if any) as are reasonable in the circumstances to ensure that the personal information that the entity uses or discloses is, *having regard to the purpose of the use or disclosure, accurate, up-to-date, complete and relevant*.’⁶¹ APP 13.1 provides that individuals have a right to the correction of personal information if this requirement is not met.⁶² Like art 6(1)(c) of the *Directive*, the *Privacy Act* imposes a requirement that is relational to the purposes of the data use or disclosure. Hence it will be interesting to see whether Australian courts properly recognise the relational aspect of the data integrity requirement.

VI CONCLUSION

Peter Fleischer, Google’s Global Privacy Counsel, has observed that the right to be forgotten is ‘like a Rorschach test ... people can see in it what they want.’⁶³ In *Google Spain* the Court went further than this and saw in the *Directive* what they wanted: a right to be forgotten that corresponds to the philosophical ideal. In doing so, the Court jettisoned the relational nature of the requirement that data be adequate, relevant and not excessive, and failed to explain or justify its approach to rights and interests.

⁶¹ Ibid sch 1 cl 10.2 (emphasis added).

⁶² Ibid sch 1 cl 13.1.

⁶³ Peter Fleischer, *The Right to be Forgotten, Or How to Edit Your History* (29 January 2012) <<http://peterfleischer.blogspot.com.au/2012/01/right-to-be-forgotten-or-how-to-edit.html>>.

