THE ENFORCEMENT OF THE RIGHT TO BE FORGOTTEN AMONG EU MEMBER STATES: BALANCING PRIVACY AND FREEDOM OF EXPRESSION RIGHTS

Abigail Browne Fellowship by Cullen International

Author : Catalina Capatina
Supervisor : Javier Huerta Bravo
Period : January – March 2017

LIST OF TABLES AND PICTURES

LIST OF CASES

AEPD	Agencia Española de Protección de Datos
Article 29 WP	Article 29 Working Party
BDSG	Bundesdatenschutzgesetz
BVerfG	Bundesverfassungsgericht
CFREU	Charter of Fundamental Rights of the European Union
CJEU	Court of Justice of the European Union
CNIL	Commission Nationale de l'Informatique et des Libertés
DE	Germany
DPD	Data Protection Directive
DPA	Data Protection Act 1998
ECHR	European Convention on Human Rights
EU	European Union
ES	Spain
FR	France
GDPR	General Data Protection Regulation
GG	Grundgesetz
LOPD	Ley Orgánica de Protección de Datos de Carácter Personal
RtBF	Right to Be Forgotten
UK	United Kingdom
URL	Unified Resource Locator

CONTENTS

Abstract

In May 2014 the Court of Justice of the European Union (CJEU) delivered a landmark ruling in *Google Spain SL, Google Inc. v Agencia Española de Protección de Datos* (*AEPD), Mario Costeja González*. The CJEU held for the first time that EU citizens have – under certain circumstances – the right to be forgotten online. With this ruling, the CJEU imposed a duty upon Google and other search engine operators (e.g. Bing, Yahoo) to protect EU citizens' personal data. They must now comply with requests to remove information from the list of results displayed when an individual's name is entered into the search engine.

The CJEU's decision affects the way in which several fundamental rights are adjudicated, not only the right to privacy and data protection but also freedom of expression, information and freedom of the press. Scholars and freedom of expression advocates fear that the right to be forgotten might be misused by various individuals to delete information that is of general public interest, and thus undermine the freedom of expression rights of both internet users as well as news publishers.

Building on these theoretical assumptions and based upon existing case-law, this paper seeks to understand how the right be forgotten is being implemented among Member States. Particular attention is given to 'right to be forgotten' cases requiring a balance between the fundamental right to privacy and the right to freedom of expression (information and press freedom).

In particular, it adresses the specific question of (i) whether the implementation of the right to be forgotten undermines the freedom of expression rights of individuals and news publishers, and (ii) whether national courts achieve an appropriate balance between these 'conflicting' rights and values.

The scholarly literature also revealed that the right to be forgotten could eventually undermine search engines' right to freedom of expression too. This is understood as the right of search engines to publish references on a website, as well as the process of crawling. Also relevant is the fact that the right to be forgotten, as set out in the General Data Protection Regulation (GDPR), which will enter into force as from May 25, 2018, presents practical and technical difficulties.

The analysis of the case-law confirmed that the right to be forgotten is not absolute, as it neither undermines individuals' right to seek and have access to information on the internet, nor news publishers' right to publish, impart and store such information online. The argument that search engines could possibly claim freedom of expression was also not sustained by any of the analyzed case-law. The issue of freedom of expression by search engines does however add a new dimension to the debate about the right to be forgotten, and may form a basis for future research.

I. INTRODUCTION

In May 2014 the Court of Justice of the European Union (CJEU) delivered a landmark ruling in *Google Spain SL, Google Inc. v Agencia Española de Protección de Datos (AEPD), Mario Costeja González.*[1] The CJEU held for the first time that EU citizens have, under certain circumstances, the right to be forgotten online.[2] Scholars have generally defined this right as individuals' right to 'remove' or restrict the public's access to their personal information on the internet.[3]

With this ruling, the CJEU imposed a duty on Google and other search engine operators (Bing, Yahoo) to protect EU citizens' personal data. They must now comply with requests to remove information from the list of results displayed when an individual's name is entered into the search engine.[4] The CJEU's decision however affects the way in which several fundamental rights are adjudicated, not only the right to privacy and data protection but also freedom of expression, information and freedom of the press.[5] Scholars and freedom of expression advocates fear that such a right might be misused by various individuals to delete information that is of general public interest, and thus undermine the freedom of expression rights of individuals and news publishers.

- The **right to be forgotten** is throughout the paper understood as a form of **online privacy**, because it involves data subject's right to protect and control his/her personal data on the internet.
- **Freedom of expression** encompasses **freedom of information** and **freedom of the press**.
- The **issue**: removing information from the internet could affect the freedom of expression rights of both, individuals as well as press publishers
    - individuals (internet users, searchers, general public)
        - have the right to freedom of expression, namely:
        - the right to know (inform oneself) by accessing and seeking information on the internet, as well as the right to publish/impart information (opinions and ideas)
    - press publishers (e.g. digital newspapers, news websites)
        - play an essential societal role as they contribute to the forming of ideas, thoughts and opinions, and in so doing enable individuals to take informed decisions

1 Court of Justice of the European Union. (2014). *Google Spain SL, Google Inc. v. Agencia Española de Protección de Datos, Mario Costeja González (Case C-131/12).* Available at http://curia.europa.eu/juris/document/document_print.jsf?doclang=EN&docid=152065
2 European Commission, DG Justice. (2014). *Factsheet on the "right to be forgotten" ruling.* Brussels: European Commission. Available at http://ec.europa.eu/justice/data-protection/files/factsheets/factsheet_data_protection_en.pdf
3 Carter, L.E. (2016). The right to be forgotten. *Media & Communication Policy*. Available at http://communication.oxfordre.com/view/10.1093/acrefore/9780190228613.001.0001/acrefore-9780190228613-e-189
Lindsay, D. (2014). Chapter 13 - The 'right to be forgotten' in European data protection law. In W. Normann (Ed.), *Emerging challenges in privacy law.* UK : Cambridge University Press, pp. 470.
4 Court of Justice of the European Union. (2014). *Google Spain*, para. 100(3).
5 Kulk, S. & Borgesius, F. Z. (2014). Google Spain v. González: Did the court forget about freedom of expression?. *European Journal of Risk Regulation, 5*(3), 389-398.
Singleton, S. (2015). Balancing a right to be forgotten with a right to freedom of expression in the wake of Google Spain v. AEPD. *Georgia Journal of International and Comparative Law*, *44*, 165-193.

- are protected by the freedom of the press and have the right to provide information, namely:
- the right to publish/impart information on the internet, and to store such information in their (online) archives/internal search engines.

This paper addresses that issue, and looks in particular at how national courts apply and define the boundaries of the right to be forgotten when confronted with cases involving a balance of privacy and freedom of expression rights. Based on scholarly literature and legal case study research, this paper seeks to provide an answer to the specific question of *(i) whether the implementation of the right to be forgotten undermines the freedom of expression rights of individuals and news publishers, and (ii) whether national courts achieve an appropriate balance between these 'conflicting' rights and values.*

Chapter II summarizes the *Google Spain* case in light of the European Data Protection framework ; Directive 95 (DPD) and General Data Protection Regulation (GDPR). Chapter III, (A) outlines the main provisions regarding freedom of expression in Europe, and (B) presents scholarly and legal arguments on the right to be forgotten. Chapter IV compares how the right to be forgotten is being implemented in countries such as France, Germany, Spain and United Kingdom. It first (A) provides an overview of the provisions concerning privacy and freedom of expression in the respective Member States, followed by the analysis of the corresponding case-law (B). The concluding chapter V, starts by enumerating the (A) general trends resulting from the analysis of the case-law. Subchapter (B) provides an explanation of the research findings, (C) lists a few unexpected issues, and (D) concludes with final thoughts and future research suggestions.

II. RIGHT TO BE FORGOTTEN: GOOGLE SPAIN, DIRECTIVE 95 & GDPR

In 2010 a Spanish citizen, Mario Costeja Gonzalez, complained that the link to an auction notice in a newspaper of his seized home on Google's search results infringed his privacy rights because the proceedings concerning him had been resolved for a number of years and therefore the reference to these had become irrelevant. He requested[6] that:

- the newspaper removed the pages in question so that the personal data relating to him no longer appeared; and
- Google Spain or Google Inc. removed the personal data relating to him, so that it no longer appeared in the search results.

Both the newspaper and Google refused to comply with his request, and which Mr. Costeja lodged a complaint against them before the Spanish Data Protection Authority (AEPD). The AEPD rejected the claim against the newspaper, but upheld it against Google, ordering the search engine to "*remove the data from its index and to prevent future access to them*"[7]. Google appealed the AEPD decision before a Spanish Court, which decided to stay the proceedings and refer the case to the Court of Justice of the EU (CJEU).

The Spanish Court demanded that the CJEU determine[8], (i) whether the DPD [9] applies to Google Spain, given that the company's data processing server is located in the United States, and (ii) whether an individual has the right to request that his or her personal data is removed from search engine results (the right to be forgotten).[10]

In its ruling of 13 May 2014, the Court of Justice of the European Union (CJEU) decided[11] that: (i) search engines are data controllers and thus responsible before EU law when handling personal data; (ii) even if the physical server of a company processing data is located outside Europe, EU data protection law still applies, as long as the company has a subsidiary or a branch in a Member State, and (iii) individuals have the right to ask search engines to remove links with personal information about them. This applies where the information is inaccurate, inadequate, irrelevant or excessive for the purposes of the data processing.

The Court based its decision on the provisions of the DPD and the Charter of Fundamental Rights of the European Union (CFREU). In particular, the Court referred to the importance of individual's right to respect of private life (Article 7) and the right to the protection of personal data (Article 8) as guaranteed

6 Court of Justice of the European Union. (2014). *Google Spain*, para. 14, 15.
7 As quoted in Peguera. M. (2015). In the aftermath of Google Spain. How the right to be forgotten is being shaped in Spain by courts and the Data Protection Authority. *Int J Law Info Tech*, *23*(4): 325-347, p. 326. Available at https://academic.oup.com/ijlit/article-abstract/23/4/325/2357337/In-the-aftermath-of-Google-Spain-how-the-right-to
8 Court of Justice of the European Union. (2014). *Google Spain*, para. 20.
9 *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*. Luxembourg: European Parliament & the Council. Available http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:31995L0046&from=EN
10 The House of Lords.(2014-2015). *EU Data Protection Law: a 'right to be forgotten'.* London: The Stationery Office limited, p. 7-9. Available at https://www.publications.parliament.uk/pa/ld201415/ldselect/ldeucom/40/4002.htm
11 European Commission, DG Justice. (2014). *Factsheet on the "right to be forgotten" ruling.* Brussels: European Commission. Available at http://ec.europa.eu/justice/data-protection/files/factsheets/factsheet_data_protection_en.pdf

by the Charter.[12] As to whether individuals have a right to be forgotten, the Court interpreted the provisions of articles 6, 12 and 14 of the DPD.[13]

Article 6 (1) of the DPD requires that personal data must be (i) *"adequate, relevant and not excessive in relation to the purposes for which they are collected and/or further processed*", and (ii) must be kept up to date. Mr. Gonzalez claimed that the issue of his financial debts had been resolved for a number of years and that the data were at that time entirely irrelevant. Further, Article 12(b) foresees the "*rectification, erasure or blocking of data"* if the data is *"incomplete or inaccurate*", and Article 14(a) establishes the data subject's "*right to object to the processing of data relating to him*".

Seen in this light, the claim[14] that the Court created a new right is mistaken. The Court did nothing more than interpret the erasure provisions of the current DPD.

Further, the right to be forgotten has to be understood also in the context of the EU's data protection reform. The European Commission introduced the idea of removing private information from internet searches long before the CJEU's judgment. In 2010, Viviane Reding, then vice president of the European Commission argued that as *"more and more private data is floating around the Web – especially on social networking sites […] people should have the right to have their data completely removed*".[15]

In this context, in January 2012 the Commission came up with a proposal for a General Data Protection Regulation (GDPR)[16], which would repeal and replace the DPD. As the Commission's Communication accompanying this proposal stated, it was motivated by an understanding that the "*existing rules provide neither the degree of harmonisation required, nor the necessary efficiency to ensure the right to personal data protection".*[17] To meet these challenges and to "*put individuals in control over their personal data*"[18], a new set of rules were proposed, among which a specific provision on the right to be forgotten.

With the adoption[19] of the GDPR in April 2016, the right to be forgotten has been codified, and is governed by Article 17, titled the right to erasure ('right to be forgotten').[20] A relevant aspect is that the GDPR does not restrict the right to be forgotten to search engines. According to the definition provided in the GDPR, a data controller is "*the natural or legal person, public authority, agency or other body*

12 European Parliament, the Council and the Commission. (2000). Charter of Fundamental Rights of the European Union. *Official Journal of the European Communities*, *2000*/346, p. 10. Available at http://ec.europa.eu/justice/fundamental-rights/charter/index_en.htm
13 European Parliament & the Council. (1995). *Directive 95/46/EC*. Section I - Principles relating to data quality, Section V – The data subject's right of access to data, Section VII – The data subject's right to object.
14 Newman, A. (2014). EU Court invents "right" to be forgotten, orders Google to obey. *New American*. Available at https://www.thenewamerican.com/world-news/europe/item/18269-eu-court-invents-right-to-be-forgotten-orders-google-to-obey
15 Reding, V. (2010). *Privacy matters - why the EU needs new personal data protection rules*. Speech/10/70, 30 November, Brussels: European Commission. Available at http://europa.eu/rapid/press-release_SPEECH-10-700_en.pdf
16 European Commission. (2012). (*COM/2012/011 final - 2012/0011 (COD). Proposal for a Regulation of the European Parliament and 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, GDPR*. Brussels: European Commission. Available at http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52012PC0011&from=EN
17 European Commission. (2012). Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee of Regions *COM(12)9 final. Safeguarding privacy in a connected world: a European data protection framework for the 21st Century.* Brussels: European Commission, p. 3. http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52012DC0009&from=en
18 *Ibid*., p. 4.
19 European Commission. (2016). Joint statement on the final adoption of the new EU rules for personal data protection. Available at http://europa.eu/rapid/press-release_STATEMENT-16-1403_fr.htm
20 European Parliament & Council. (2016). *Regulation on the Protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation, GDPR),* Article 17 (1), (2), Article 4 (7). Brussels: European Parliament & the Council

which, alone or jointly with others, determines the purposes and means of the processing of personal data"[21]. Actually, every data controller that has made personal data public is bound by the right to be forgotten.

Article 17.1 creates an obligation for Member States to provide data subjects with the right to obtain from the controller erasure of personal data, if

- the data is no longer necessary in relation to the purposes for which it was collected or processed.
- the data subject has withdrawn his/her consent.
- the data subject objects to the processing and there is no legitimate grounds to deny this request.
- the data has been processed unlawfully.

A new element can be found in the second paragraph of Article 17 that stipulates[22] that:

> *where a controller has made the personal data public, and is obliged to erase the personal data, the controller, shall then take reasonable steps, including technical measures, to inform controllers processing the same personal data, that the data subject has requested the erasure by such controllers of any links to, or copy or replication of, those personal data*.

Interestingly, this paragraph is in sharp contrast with a recent resolution[23] of the Spanish data protection authority (AEPD) to Google Inc. According to the AEPD, communicating to editors of websites (data controllers) that a data subject has requested the removal of personal data from their website may constitute a serious infringement of the right to secrecy, as stipulated in article 10[24] of the Spanish Data Protection Act (LOPD).[25]

In fact, the AEPD noted that, the mere indication by a controller of the URL linking to an article about a data subject that has to be removed from internet searches constitutes personal data processing. This is so, because the URL alone contains information related to an identifiable person, and the indication by a controller of that URL is an infringement of that data subject's right to secrecy.[26]

Given that the GDPR defines[27] 'personal data' broadly, a URL linking to an article about an individual could eventually be considered personal data too. A URL (Unified Resource Locator) is another word

21 *Ibid.*, Article 4 (7), p. 33.
22 GDPR, recital 66.
23 Agencia Española de Protección de Datos (AEPD). (2016). Resolucion: R/02232/2016. Available at http://www.agpd.es/portalwebAGPD/resultados-ides-idphp.php
24 LOPD, Article 10. Data Secrecy - The controller and any persons involved in any stage of the processing of personal data, shall be subject to professional secrecy as regards such data, and to the duty to keep them. These obligations shall continue even after the end of the relations with the owner of the file or, where applicable, the person responsible for it. Available at www.legislationonline.org/download/action/download/id/1743/file/947c21b7194415dba67549f41b99.pdf
25 Peguera, M. (2017). Derecho al olvido: ¿el buscador puede informar a la fuente de la eliminación de un enlace?. *Responsabilidad en Internet blog*. Available at: https://responsabilidadinternet.wordpress.com/2017/03/04/derecho-al-olvido-el-buscador-puede-informar-a-la-fuente-de-la-eliminacion-de-un-enlace/
26 *Idem*.
27 GDPR, Article 4 – personal data : any information relating to an identified or identifiable natural person; an identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a

for a web address, and provides a means for identifying or locating a resource (article, document, image, etc.) on the web.[28] Usually, a URL is made up of three components: a scheme, host name and path name.[29] Viewed separately, some components may refer to information related to an identifiable person. Take for example the following URL

https://www.lesechos.fr/08/11/2006/LesEchos/19789-196-ECH_le-conseil-d-etat-reduit-la-sanction-des-freres-dokhan-a-un-blame.htm

Table 1 – URL components

Scheme	The protocol to be used to acccess the article on the internet	https://
Host name	Host that holds the article (e.g. digital newspaper *Les Échos*)	www.lesechos.fr/
Path name	The specific article on lesechos.fr (to be delisted from internet searches) Contains elements by which a data subject could be easily identified (e.g. date, title article, name)	08/11/2006/LesEchos/19789-196-ECH_le-conseil-d-etat-reduit-la-sanction-des-freres-dokhan-a-un-blame.htm 08/11/2006, Le Conseil d'Etat reduit la sanction des frères Dokhan a un blâme (emphasis added).

Considering the AEPD's reasoning, it can be argued that,

- if *Google* indicates to the newspaper *Les Échos* the URL linking to the article, that the data subject has requested to be removed from internet searches,
- that *Google* in such case, provides identifiable information (name, date, title article) about that data subject to *Les Échos*,
- which according to AEPD is personal data processing too, and therefore a violation of that data subjects' right to secrecy.

The AEPD's decision raises the question of whether it is technically possible to inform controllers without disclosing any information related to an "identifiable" data subject. Additionally, this case illustrates the following privacy paradox. On initial viewing, the right to be forgotten and the right to secrecy may seem to both be privacy rights, since they involve the denial of access to others of personal data.[30] The

name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person.
28 Berners-Lee, T. (2005). *Uniform Resource Identifier (URI) : generic syntax*, p. 5. Available at https://tools.ieft.org/pdf/rfc3986
29 IBM Knowledge Center. The components of a URL. Available at https://www.ibm.com/support/knowledgecenter/en/SSGMCP_5.1.0/com.ibm.cics.ts
30 Tunick, M. (2015). *Balancing privacy and free speech: unwanted attention in the age of social media*. London : Routledge, p. 26.

difference is that the right to be forgotten involves the *control/protection* of personal data, while the right to secrecy implies the *concealment* of such data.[31]

Since the AEPD does not elucidate on the difference between these closely related rights, one may get easily confused that in this case the implementation of a form of privacy (right to be forgotten) is being impeded by another form of privacy (right to secrecy). This issue adds a new perspective on the debate about the right to be forgotten, illustrating that achieving a balance between privacy rights could eventually be problematic too. Further elaboration on this issue is beyond the scope of this paper.

Altogether, the AEPD's resolution has created an important legal precedent, providing that (i) URL addresses contain personal data, (ii) that the mere indication to these by controllers is personal data processing, and (iii) consequently a violation of data subject's right to secrecy.

As mentioned above, Article 17.2 as set out in the GDPR remains controversial. The table below presents further examples and remarks concerning the applicability of this right. Entering into detail provides the necessary background for the analysis of the case-law and contributes altogether to a better understanding of the right to be forgotten.

Table 2 - Article 17.2 into detail

Article 17.2	**Examples/Remarks**
Where a controller,	Every natural or legal person, public authority, agency or other body, which has made personal data public e.g. Google, Facebook, news publishers (digital newspapers, operators/editors of news websites)
has made the personal data public,	posted it online
and is obliged to erase the personal data,	A. On a data subjects' erasure request (17.1), if - the data is no longer necessary in relation to the purposes for which it was collected or processed - the data subject has withdrawn his consent - the data subject objects to the processing and there is no legitimate grounds to deny this request - the data has been processed unlawfully. B. If erasure request not honoured and following a decision by a data protection authority or court.
the controller, shall then take reasonable steps, including technical measures,	What kind of technical measures? E-mail notification, use of protocols, other?

31 Warren, C. & Laslett, B. (1977). Privacy and secrecy : a conceptual comparison. J*ournal of Social Issues, 33*(3), p. 43-44.

to inform other controllers processing the personal data,	Notification obligation: - Who are the other controllers? - Notify them all? - What about subsequent controllers/joint controllers[32]? - At which point does the notification obligation stop?
that the data subject has requested the erasure by such controllers of any links to, or copy or replication of, those personal data.	A data controller has the duty to inform other data controllers that a data subject has requested the erasure of his/her data by such controllers. Are the other controllers *solely* informed about the erasure request as such, or are they *also* expected to proceed with the erasure of those data effectively?

To these remarks/questions, the European Commission (Directorate-General for Justice and Consumers) replied[33], merely stating that "*[…] the Commission has regular meetings with a Member State Expert Group to ensure that, where necessary, adjustments are made to Member State law for the application of the GDPR within the timeframe and there is a smooth transposition of the Data Protection Directive for Police and Criminal Justice Authorities into Member State law. The Commission is also speaking directly with other stakeholder representative groups to discuss specific issues of application, particularly on new provisions" (*emphasis added).

Furthermore, it added, that "*Article 29 WP already published some guidelines and a set of common criteria on the concrete application of this right in light of the Google Spain judgment"*. It should be borne in mind, however, that these guidelines are based on the erasure provisions of the Directive 95 (mainly art. 12 and art. 14), while the GDPR's right to be forgotten contains new elements and raises new issues, to which Article 29 WP's guidelines do not provide sufficient explanation.

Hence, given that the GDPR has not yet entered into force, and there is rather limited academic and legal documentation on the implementation of article 17, it can be argued that article 17.2 appears to suggest that in principle controllers have knowledge of other controllers processing the data that they have collected, and therefore the obligation to inform those controllers about the erasure of data is placed upon them. From a practical point of view however, a controller might not know who all the other controllers processing the same data are, or not be able to contact them all.[34]

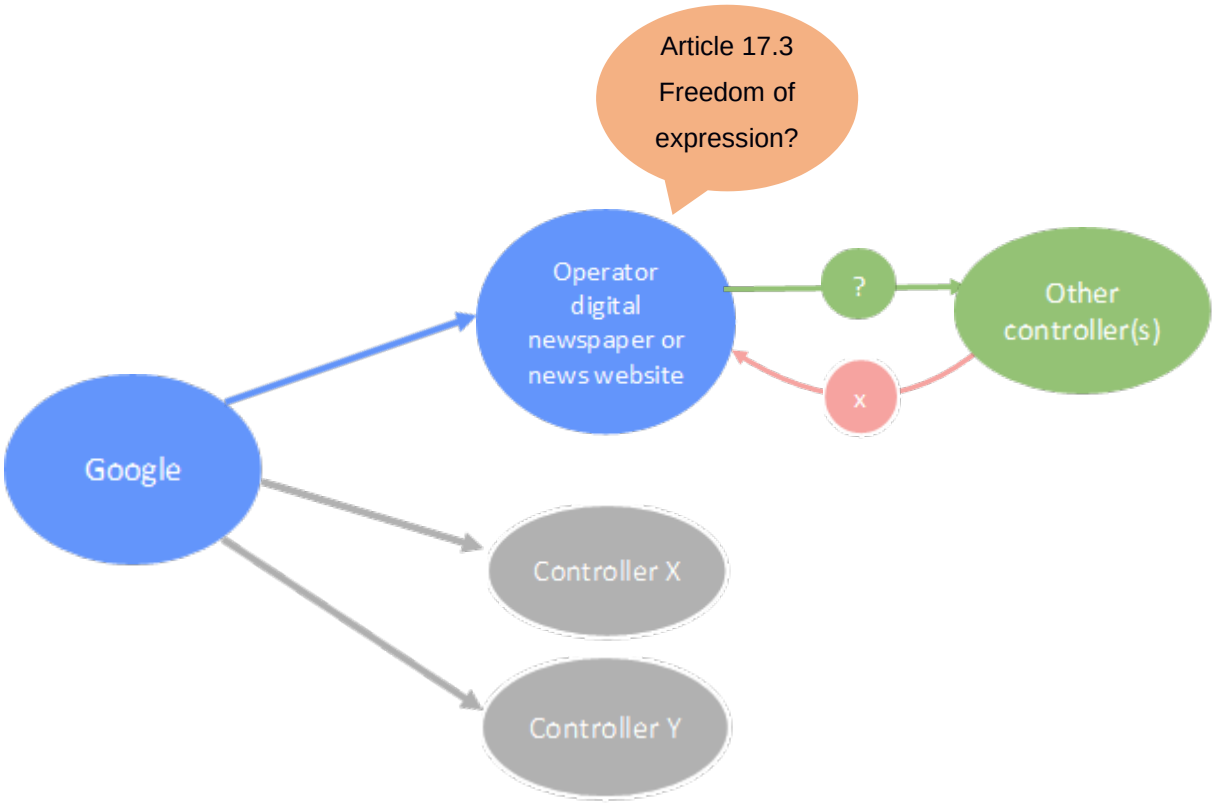
It should be also noted that, where a data controller is required to take technical measures to inform controllers, it remains unclear from the GDPR, by means of what kind of technical measures a data controller can inform other controllers about the erasure of personal data. Should controllers simply

32 GDPR, Article 26 – definition joint controllers.
Where two or more controllers jointly determine the purposes and means of processing, they shall be joint controllers. They shall in a transparent manner determine their respective responsibilities for compliance with the obligations under this Regulation, in particular as regards the exercising of the rights of the data subject.
33 Email response from the Europe Direct Service
34 Bartolini, C. & Siry, L. (2016). The right to be forgotten in the light of the consent of the data subject. *Computer Law & Security Review, 32(*2), p. 12-14. Available at http://private-law-theory.org/?p=8335

notify by email or use protocols (e.g. *noindex*) as technical measures. These technical aspects will come back in the analysis of the case law, yet they do not feature centrally in this paper and remain rather open questions.

Furthermore, the GDPR does not say explicitly if this notification obligation would also apply to every subsequent controller or joint controller. If this is not the case, the compliance with erasure could be easily eluded and the right to be forgotten is thus not effectively guaranteed.[35] To make this more comprehensible, consider the illustrated example below : the implementation of article 17.2 and few of its practical difficulties.

Picture 1 – Implementation of Article 17.2



If Google following an erasure procedure has to inform other controllers (e.g. the operator of a digital newspaper or a news website, controller X, controller Y, etc.) about the erasure of data, does this mean that those other controllers are then also obliged to inform subsequent controllers that they might know to process the same data (e.g. other news websites that copied an article)? At which point does such notification obligation stop?

Technically speaking, it would be a cumbersome task for a data controller to trace, locate and contact all the other data controllers that might process, have copied or replicated the originally published information and ask them all to delete that data. Additionally, after assessing an incoming erasure request the data controller could eventually also decide not to comply with such a request. This is

35 *Ibid.*, p. 12-14.

especially true as regards operators of news websites or digital newspapers. These are anyway protected by the freedom of expression (article 17.3, GDPR)[36] and thus have a legitimate interest in keeping data online. Google for instance may erase *El País'* articles from its search results, but has no obligation to inform *El País* about that incoming erasure request and ask them to erase those articles from their own internal search engine. As said, this is so because *El País* either way will not have the obligation to comply with such incoming request based upon their right to freedom of expression (17.3).

Accordingly, it can be argued that the information obligation (17.2) to other controllers about a data subject's erasure request will not apply where the other controllers are operators of news websites, digital newspapers or other controllers that exercise a journalistic role. Yet, in other cases (e.g.Yahoo – controller X, Facebook – controller Y), Google retains the obligation to inform those controllers about a data subject's erasure request, because those are not controllers that fulfill a journalistic role.

Seen in this light, article 17.2 (information obligation) seems rather contradictory. The information "obligation" is in practice an obligation that does not apply to all controllers. Eventually, a more suitable formulation of article 17.2 would have specified that controllers such as news publishers, digital newspapers, news websites (or actually every controller that exercises an informational/press activity or has a journalistic role) fall outside the scope of the information obligation.

It remains however unclear whether the application of article 17.2 works conversely, namely if operators of digital newspapers (e.g. *El País*) do have an information obligation about data subject's erasure requests towards other controllers (e.g. Google)? On first viewing, the answer to this question could be considered negative, because again article 17.3 may exempt operators of digital newspapers from the duty to inform other data controllers about erasure requests. Consider the following explanation[37] of this additional detail.

Article 17.2 - Information obligation

A. Search engine (controller) towards news publisher (controller)? (e.g. Google → *El País*)

1) Data subject X, asks data controller Google to erase his/her personal data from its search results (article 17.1, GDPR – right to be forgotten)
2) Google decides to erase that data from its search results (compliance with article 17.1)
3) But, Google has an additional obligation (article 17.2, GDPR – information obligation)
    - it has to inform other controllers, that it might know to process the same data or have copies of those data,
    - that data subject X has required the erasure of those data by such controllers
4) However, if one of those controllers that Google knows to process that data is for instance the digital newspaper *El País*

36 Article 17.3 stipulates that paragraph 2 (information obligation) shall not apply to the extent that the processing is necessary: (a) for exercising the right of freedom of expression and information.

37

- which is a controller too (based on article 4(7), GDPR), but differs from other controllers, in the sense that
- it has a journalistic role and is protected by the freedom of expression claim (article 17.3, GDPR)

5) *El País* will then have the right not to comply with such incoming erasure request[38]

6) In other words, the information obligation that Google has towards controllers, falls away for *El País* (digital newspaper)

It is unclear whether the information obligation applies vice versa. [39]

B. News publisher (controller) towards search engine (controller)? (e.g. *El País* → Google)

1. Data subject X asks data controller *El País* to erase links to articles from Google search results
2. *El País* decides to erase those links
3. Additional obligation - Article 17.2: information obligation - but does this apply?
   - *El País* is not obliged to comply with data subject's erasure request when informed by Google (article 17.3 – freedom of expression)
   - However, does this mean that *El País* has no information obligation about that data subject's erasure request towards Google?
   - Is Google not also expected to know about the erasure of those links by *El País* from its search results?[40] Does it automatically observe/know when a data controller delists information from its search results?

C. In other words, the **open question** remains, whether

- **press publishers** (digital newspapers, news websites - controllers that exercise an informational/press activity or have a journalistic role)
- have **neither the duty to comply** with incoming erasure requests when informed about such requests by other controllers
- **nor the duty to inform** about the data subject's erasure requests to other controllers?

38 Note that we are talking here about an erasure request resulting from the information obligation (17.2), not about a data subject requesting the erasure of that data from *El País*.
39 Note that the explanation below is rather hypothetical.
40 Note that the erasure of links by *El País* from Google search results is possible through the application of exclusion protocols (e.g. *robot.txt*) or codes (e.g. *noindex, noarchive*) by *El País.* Such protocols make sure that once those links were delisted from Google search results, that they will not be anymore indexed by Google through *El País'* website/archive and consequently will not be anymore listed as search results on Google.

Probably this is not the case conversely, but as mentioned, at this stage there is rather limited evidence from experts in the field that could support such reasoning. Hence, this remains rather an open question. However, the 'information obligation' as regards operators of digital newspapers is rather *voluntary*. This is so because *El País* for instance, when required by a data subject to remove articles from internet searches, even if it eventually has no obligation to inform Google about this, it may however in some case find it necessary to inform/contact Google concerning issues related to the erasure of those data.

This is in accordance with what Article 29 WP suggested in its opinion[41] on the implementation of the right to be forgotten. Indeed, sometimes it may be legitimate for data controllers to contact original publishers (which are controllers too) prior to any decision about an erasure request, and this is so particularly in difficult cases, when it is necessary to get a fuller understanding about the circumstances of the case.

Finally, it is noteworthy to mention that often data controllers required to erase links to personal data from internet searches will simply *"boycott the erasure of the link by awarding a new URL to the same content"*[42]. In fact, in so doing, the controller not only circumvents the right to be forgotten, but gives additional publicity to the disputed content, infringing data subject's privacy even more. This phenomenon has been often described the "*Streisand effect"*[43], whereby attempts to remove embarrassing content from the internet has often the opposite effect, namely just drawing more attention to it.

It is hereby also important to understand that from a technical point of view, a right to be forgotten is not absolute. Given that the internet makes the endless republication of data possible, the probability that a copy of those data will remain somewhere hidden on the internet is high. This indicates that even the existence of a right to be forgotten cannot provide guarantees for 'total' privacy. Additionally, consider that the GDPR has not yet entered into force and will only apply in all EU Member States as from May 25, 2018. At present, the only official (non-binding) guidelines on how to implement this right are those assembled by the Article 29 WP. Yet, these guidelines build on the *Google Spain* judgment, providing rather an interpretation of the right to be forgotten based on Directive 95.

Taken together, the issues mentioned in this chapter demonstrate that implementing the right to be forgotten as set out in the new Regulation presents technical and practical difficulties. Nevertheless, the *Google Spain* case is seminal, because it not only confirmed the existence of a right to be forgotten, but also highlighted the importance given to privacy and data protection in the European Union, which are fundamental rights and may prevail over other fundamental rights, notably freedom of expression. The next section addresses that issue.

41 Article 29 Data Protection Working Party. (2014). Guidelines on the implementation of the Court of Justice of the European Union judgment on "Google Spain and Inc v. Agencia Española de Protección de Datos (AEPD) and Mario Costeja Gonzalez" C-131/12, 14/EN/WP 225, p. 10. Available at http://www.dataprotection.ro/servlet/ViewDocument?id=1080

42 Peguera, M. (2017). Derecho al olvido: ¿el buscador puede informar a la fuente de la eliminación de un enlace?, in Reponsabilidad en Internet. Available at: https://responsabilidadinternet.wordpress.com/2017/03/04/derecho-al-olvido-el-buscador-puede-informar-a-la-fuente-de-la-eliminacion-de-un-enlace/

43 Parkinson, J. (2014). The perils of the Streisand effect. BBC News Magazine. Available at: https://bbc.com/news/magazine-28562156

III. ISSUE ARISING: PRIVACY VS FREEDOM OF EXPRESSION

A. Freedom of expression: legal provisions

Table 3 – Legal provisions freedom of expression (EU level)

Charter of Fundamental Rights of the European Union (CFREU) • **Art. 11** freedom to hold opinions, to receive and impart information and ideas without interference by public authority and regardless of frontiers	**European Convention on Human Rights (ECHR)** • **Art. 10** freedom to hold opinions, to receive and impart information and ideas without interference by public authority and regardless of frontiers
Directive 95/46/EC • **Art. 9** exemptions or derogations for the processing of personal data carried out for journalistic purposes or the purpose of artistic or literary expression	**General Data Protection Regulation (GDPR)** • **Art. 85** Reconciles the right to the protection of personal data with the freedom of expression and information Exemptions or derogations for the processing of data carried out for purpose of academic expression • **Art. 17.3** Paragraph 2 (information obligation controllers) shall not apply to the extent that the processing is necessary: (a) for exercising the right of freedom of expression and information

Freedom of expression is one of the essential foundations of the European Union.[44] The right to freedom of expression is broad and covers both the right to have access to information as well as freedom of the press. These freedoms are essential for democracy, as they contribute significantly to the formation of opinions, ideas and thoughts, thus allowing people to make informed choices in their political decisions.[45]

Within the EU legal framework, freedom of expression is protected by Article 11 of the Charter of Fundamental Rights of the European Union (CFREU). This right includes the *"freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers*".[46] This article corresponds to Article 10 of the European Convention on Human Rights (ECHR).[47]

Further, the relationship between the right to privacy and freedom of expression rights is also addressed in Article 9 of the DPD.[48] Member States are required to *"provide exemptions or derogations* [...] *for the*

44 European Parliament. (2016). *Factsheets on the European Union - Human Rights*. Available at http://www.europarl.europa.eu/atyourservice/en/displayFtu.html?ftuId=FTU_6.4.1.html
45 European Parliament. (2015). *Press freedom in the EU: legal framework and challenges*. Available at http://www.europarl.europa.eu/EPRS/EPRS-Briefing-554214-Press-freedom-in-the-EU-FINAL.pdf
46 European Parliament, Council & the Commission. (2000). *Charter of Fundamental Rights on the European Union*, p. 3.
47 Council of Europe and European Court of Human Rights. (1950). *European Convention on Human Rights*, p. 10.
48 European Parliament & the Council. (1995). *Directive 95/46/EC,* p. 41.

processing of personal data carried out solely for journalistic purposes or the purpose of artistic or literary expression". Similarly, but wider in scope Article 85 [49] of the GDPR requires Member States to *"reconcile the right to the protection of personal data with the freedom of expression and information*" (emphasis added). Member States are hereby required to *"provide exemptions or derogations for the processing of data carried out"* also for *"purpose of academic expression"* (emphasis added).

Article 17 of the GDPR, which codifies the right to be forgotten, has an inbuilt reference to the balance with freedom of expression rights.[50] Paragraph 3 stipulates that the obligation of controllers to comply with removal requests is not absolute as there are exceptions related to freedom of expression and information. When applying article 17 to operators of news websites (e.g. digital newspaper *El País* [51]) the following aspects should be taken into account.

> *El País* is a controller that processes and makes personal information public. Therefore, *El País* is also bound by the right to be forgotten. In the case where it is asked to remove information containing personal data from its own indexes (archive/website) or from search engine results (Google), it shall proceed as such. However as already noted, *El País*, even if it is considered a controller, still, differs from other controllers, inasmuch as *El País* exercises a journalistic role, and the processing of personal information by a news publisher is legitimized by the public interest and protected by the freedom of expression.Therefore, although *El País* is bound by the right to be forgotten, it may object to incoming erasure requests from Google (resulting from the information obligation – 17.2), invoking the freedom of expression claim (17.3; freedom of the press and public's right to have access to that information).

B. Right to be forgotten & freedom of expression: Clash of rights and arguments

Some scholars have objected to the right to be forgotten, claiming that such a right is "*the biggest threat to free speech on the Internet in the coming decade*"[52]. A common denominator in the criticisms is that the right to be forgotten will be (mis)used by various individuals (e.g. convicted murderers, public figures involved in corrupt or indecent affairs, etc.) to remove lawfully published information that should be remembered, thus favouring online censorship and preventing freedom of information.[53]

---

49 European Parliament and the Council. (2016). *Regulation 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/45/EC (GDPR)*, Article 85, p. 83-84.
50 European Parliament & Council. (1995). *Directive 95/46/EC*, Article 17, para. 3 (a), (b), (c), p. 44.
51 The choice for *El País* is arbitrary (prevalent in Spanish cas-law).
52 Rosen, J. (2012). The right to be forgotten. *Standford Law Review Online*, 88, 88. Available at https://www.stanfordlawreview.org/online/privacy-paradox-the-right-to-be-forgotten/
53 Solon, (O). (2014). People have the right to be forgotten, rules EU court. *Wired UK*. Available at http://www.wired.co.uk/article/right-to-be-forgotten-blog
Levine, (D). (2014). The MH17 disaster demonstrates the dangers of "right to be forgotten". *Slate Future Tense*. Available at http://www.slate.com/blogs/future_tense/2014/07/22/mh17_investigation_and_the_right_to_be_forgotten.html
Van Hoboken, J. (2013). The proposed right to be forgotten seen from the perspective of our right to remember : freedom of expression safeguards in a converging information environment. 30 pp. Available at http://www.law.nyu.edu/sites/default/files/upload_documents/VanHoboken_RightTo%20Be%20Forgotten_Manuscript_2013.pdf

Access to information however is an essential part of a democratic society. Bernal[54] pointed out that there will always be some categories for which data might need to be preserved regardless of whether an individual wishes to delete it. This implies for example information for archival reasons in order to keep a good, accurate and useful historical record of events.

Privacy advocates, on the other side of the debate, praised the CJEU's ruling arguing that, "*letting citizens remove […] troubling aspects of their current and former lifestyle from search indexes is the least we can do [in order to protect citizens' privacy]*"[55]. Moreover, since the general consensus is that "*the web never forgets*"[56], individuals are becoming more and more concerned about the part of their life that can be searched. Articles once published online, remain accessible through the websites of the news publishers even after a considerable period of time has passed. Search engines on the other hand store and index that information and make it easily findable. Hence, a simple query on an individual's name or surname can reveal information that can be detrimental for the professional and social life of the individuals concerned.

Kulk & Borgesius have pointed out that when a search engine is requested to de-index links to information about a data subject from its search results, the individual's right to privacy clashes with public's right to information. Because none of these rights is absolute the question arises as to how to find an appropriate balance between these conflicting rights and values.[57]

In Google Spain the CJEU argued that in such a situation "*a fair balance*" [58] must be sought between the legitimate interests of internet users in having access to information and the privacy and data protection rights of the data subject. In this regard, scholars have pointed out that the Court did not provide much guidance as on how to achieve such a balance, leaving in the first instance search engine operators, data protection authorities and ultimately national courts to perform this balancing exercise.[59]

Further, the Court stated that as a general *"rule*" the rights to privacy and data protection "*override [...] the public's interest in finding information.*"[60] As Singleton[61] remarked, such language is contradictory and in tension with the right to freedom of expression as provided for in Article 11 of the Charter. The latter also protects an individual's personal data, but it does not do so at the expense of freedom of

54 Bernal, P. (2011). A right to delete?. *European Journal of Law and Technology, 2*(2). Available at http://ejlt.org/article/view/75/144

55 Morozov. E. (2014). Google says we have a "right to know," but really just wants the right to profit from your personal information. *New Republic*. Available at https://newrepublic.com/article/117844/googles-right-know-vs-europes-right-be-forgotten

56 Rosen. J. (2011). Free speech, privacy and the web that never forgets*. Journal on Telecommunications and High Technology*, *9*, p. 345. Available at http://jthtl.org/content/articles/V9I2/JTHTLv9i2_Rosen.PDF

57 Kulk, S., Borgesius, Z.J.F. (2015). Freedom of expression and 'right to be forgotten' cases in the Netherlands after Google Spain'. *European Data Protection Law Review, 2*, pp. 113-125. Available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2652171

58 Court of Justice of the European Union. (2014). *Google Spain*, para. 81.

59 Frantziou, (E). (2014). Further developments in the right to be forgotten: the European Court of Justice's judgment in Case C-131/12, *Google Spain, SL, Google Inc v Agencia Española de Protección de Datos. Human Rights Law Review, 14* (4): 761-777. Available at https://academic.oup.com/hrlr/article/14/4/761/644686/Further-Developments-in-the-Right-to-be-Forgotten

Keller, D. (2015). The final draft of Europe's "right to be forgotten" law. Available at http://cyberlaw.stanford.edu/blog/2015/12/final-draft-europes-right-be-forgotten-law

Wechsler, S. (2015). The right to remember: The European Convention on Human Rights and the right to be forgotten. *Columbia Journal of Law and Social Problems*, *49*(1), p. 136-164. Available at https://www.researchgate.net/publication/298641066_The_right_to_remember_The_European_convention_on_human_rights_and_the_right_to_be_forgotten

60 Court of Justice of the European Union. (2014). *Google Spain*, para. 97.

61 Singleton, S. (2015). Balancing a right to be forgotten with a right to freedom of expression in the wake of Google Spain v. AEPD. *Georgia Journal of International and Comparative Law*, *44*, p. 179. (166-193) Available at http://digitalcommons.law.uga.edu/gjicl/vol44/iss1/6/

expression, and does not purport to hold one right in greater importance over the other, such as the Court's language in this case suggests.

It is important to note that the CJEU did however recognize that the right to be forgotten is not an absolute right, and that the balance may depend on "*the nature of the information in question, its sensivity for the data subject's life, and on the interest of the public in having [access to] that information.*"[62] As regards the public's interest to information, this will be significantly greater if the data subject plays an important role in public life.[63]

Although, the Court did not mention what constitutes a role in public life, Article 29 Working Party non-binding guidelines[64] filled this gap, clarifying that, "*politicians, senior public officials, business-people and members of [the] regulated professions*" can be considered individuals who fulfill a role in public life. Thus, in delisting cases involving such individuals, the argument will be usually *"in favour of the public being able to search for information relevant to their public roles and activities*."

In this regard, Peguera[65] noted that, while right to be forgotten requests are decided on a case-by-case basis, in most cases courts will still offer little justification on why a particular case deserves the requested delisting or not – beyond the obvious situation of public figures involved - , and thus legal certainty for the right to be forgotten is still far from being achieved.

Further, although the CJEU decided that even lawfully published information can be regarded as information that should be 'forgotten' from search engine results, this does not mean that it will be completely deleted from the internet. Rather, the CJEU's decision calls search engines only for the information to be de-indexed/de-listed from the list of search results regarding a person's name. The information however will still be accessible using other search terms, or by direct access to the publisher's original source, but it will no longer appear as first results on Google search.[66] This suggests that data subject's privacy is not protected in a manner that the freedom of expression rights of the original news publishers are infringed upon.

The curious case of search engines

As to search engines, the CJEU does point to the *"decisive role*"[67] played by search engines in the modern society, but only to underline that their activities "*constitute a more significant interference with the data subject's fundamental right to privacy than the publication on the [newspaper's] website*."[68] Thus, the Court makes a distinction between the activities of the search engine operator and those of publishers of websites (e.g. digital newspapers, online news publishers), emphasizing that since it is the search engine operator who renders information contained in a list of results ubiquitous, its activities are more privacy-invasive than those of news publishers.[69]

---

62 Court of Justice of the European Union. (2014). *Google Spain*, para. 81.
63 *Ibid*., para. 97.
64 Article 29 Data Protection Working Party. (2014). *Guidelines on the implementation of the Court of Justice of the European Union judgment on "Google Spain and Inc v. Agencia Española de Protección de Datos (AEPD) and Mario Costeja Gonzalez" C-131/12*, 14/EN/WP 225, p. 2, 13. Available at http://www.dataprotection.ro/servlet/ViewDocument?id=1080
65 Peguera, M. (2017). The application of the right to be forgotten in Spain. *ISP liability blog*. Available at https://ispliability.wordpress.com/2017/07/03/the-application-of-the-right-to-be-forgotten-in-spain/
66 *Ibid*., p. 19.
67 Court of Justice of the European Union. (2014). *Google Spain*, para. 36.
68 *Ibid.,* para. 87.
69 Court of Justice of the European Union. (2014). *Google Spain*, para. 87.

Furthermore, publishers of websites appear to benefit from the journalistic exception as stipulated in Article 9 of the DPD, while search engines are left outside of the scope of this provision.[70] Some scholars pointed out that a search engine may indeed not be considered a "journalist" in the traditional sense of journalism, nevertheless in the information society search engines are "*crucial mechanisms for the dissemination of journalistic products*."[71]

Similarly, Van Hoboken noted that search engines do not only facilitate access to information, but "*contribute to the ideals underlying freedom of expression and the functioning of the networked information environment as a whole*."[72] Consequently, search engines should be able to invoke the right to freedom of expression (emphasis added). This right can be derived from article 10 ECHR and understood as the right to *" […] claim protection for […] publication of references on a website as well as the process of crawling that makes it possible to offer a search engine in the first place."*[73]

According to some U.S legal scholars[74], by the very fact of publishing references, search engines exercise "*editorial judgments*" that are at the core similar to that of traditional newspapers/media. Out of the thousands of possible references that could be included in the search results, search engines (by means of algorithms) make editorial decisions (select and sort the results for end-users) that entail a valuation of ideas and opinions about what users are likely to find interesting and valuable. In this sense, search engines do not only distribute but also produce speech/content. In so doing, search engines contribute to the ideals and functioning of the information society and should therefore benefit from free-speech rights.

On a different matter, Karapapa and Borghi[75] noted that although the *Google Spain* case dealt with the obligation to remove search results upon request, the case gives prevalence to arguments favoring a right to informational self-determination that could also apply to search queries (automated suggestions/predictions by search engine algorithms when typing in the search bar) (emphasis added). Despite the fact that suggested search queries are algorithmically generated, the search engine company (e.g. Google) remains the ultimate publisher of such queries. Seen in this light, "*the operator of a search engine is then no longer a mere facilitator or a technical distributor of information, but it takes on an active role and is liable as such for the message conveyed by its service*" (emphasis added).

Moreover, the recurring argument that search results/queries are implemented through computerized algorithms, and are supposedly 'neutral', does not exempt operators of search engines from liability, as the algorithm (the program) itself is written and operated by humans.[76] This line of argument is supported by the US jurisprudence, where generally speech - created by human as well as machine (algorithm-

70 Court of Justice of the European Union. (2014). *Google Spain*, para. 85.
71 Peers, S. (2014). 'The right to be forgotten': The future EU legislation takes shape. Available at http://eulawanalysis.blogspot.be/2014/09/the-right-to-be-forgotten-future-eu.html
Hijmans, H. (2014). Right to have links removed: evidence of effective data protection. p. 562 (556-563) Available at https://www.ivir.nl/publicaties/download/1718.pdf
72 As quoted in Kulk, S. & Borgesius, F. Z. (2014). Google Spain v. González: did the Court forget about freedom of expression?. *European Journal of Risk Regulation*, p. 7. Available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2491486
73 van Hoboken, J. V. J. (2012). Search engine freedom: on the implications of the right to freedom of expression for the legal governance of Web search engines, p. 228. Available at https://pure.uva.nl/ws/files/1769429/104098_thesis.pdf
74 Volokh, E. & Falk, M. D. (2012). White paper - Google: First amendment for search engine results, p. 4-5. Available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2055364
75 Karapapa, S. & Borghi, M. (2015). Search engine liability for autocomplete suggestions: personality, privacy and the power of the algorithm. *International Journal of Law and Information Technology, 23(3)*, p. 274-275. Available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2862667
76 Karapapa, S. & Borghi, M. (2015), *op. Cit*., p. 267.

based) thinking - is protectable under the First Amendement, so long as it communicates a message to an audience.[77]

This is in sharp contrast with the European approach, where in a French ruling[78], the court noted that Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms makes clear that "*freedom of expression is a right that applies to persons, and cannot be invoked to protect [the automated functioning of] a search engine application, that the laws applicable to human thinking cannot apply to machine generated content"*[79]*.*

Similarly, in *Google Spain* the CJEU is silent about the freedom of expression by search engines. In the CJEU's view search engines are solely facilitators of information, and do not create new autonomous content, but only indicate where existing content, made available by third parties (other controllers) on the internet, can be found.[80] Therefore, it is suggested that the activities of search engines are primarily economic in nature and cannot override data subject's right to privacy.[81]

Recital 153 of the GDPR provides that in order to take account of the importance of the right to freedom of expression in every democratic society, it is necessary to interpret notions relating to that freedom, such as journalism, broadly.[82] Accordingly, it can be reasoned that given the decisive role of search engines in disseminating information, potentially this recital provides scope for exempting their processing from the right to be forgotten. If the processing of data by a news publisher can be justified by the journalistic role, so too eventually is the processing by search engines an activity aimed at disclosing information and can thus be justified by the freedom of information.

Furthermore, the CJEU's emphasis on the 'economic interests' requires a more nuanced view, since not only search engines, but publishers of websites (e.g. news websites, digital newspapers) have legitimate economic interests too. Search engines on the one hand, offer free digital services and enable internet users to search and find information on the web. This in turn implies that the aggregation of user's personal data is the primary source of value by which these companies generate revenues.[83] Publishers of websites on the other hand, may fulfill a 'journalistic' role, and therefore rely on Article 9 of the DPD. This however does not take away the fact that their publishing activity has also the purpose of raising advertising revenues online.

---

77 Karapapa, S. & Borghi, M. (2015), *op. Cit*., p. 267.
See also: Stern J., M. (2014). Speaking in code. Are Google search results protected by the First Amendment?. *Slate*. Available at http://www.slate.com/articles/technology/future_tense/2014/11/are_google_results_free_speech_protected_by_the_first_amendment.html

78 Tribunal de grande instance de Paris 17ème chambre civile Jugement du 23 octobre 2013. Bruno L., Ressources et actualisation / Google Inc., Google France. Defamation case - person's and company's name associated with 'escroc' (swindler), and 'secte' (sect). Available at https://www.legalis.net/jurisprudences/tribunal-de-grande-instance-de-paris-17eme-chambre-civile-jugement-du-23-octobre-2013/

79 *Ibid.*, Karapapa, S. & Borghi, M. (2015), p. 276.

80 Court of Justice of the European Union. (2013). Opinion of Advocate General Jääskinen delivered on 25 June 2013 (1) Case C-131/12 Google Spain SL Google Inc. v Agencia Española de Protección de Datos (AEPD) Mario Costeja González, para. 32. Available at http://curia.europa.eu/juris/document/document.jsf?docid=138782&doclang=EN

81 Court of Justice of the European Union. (2014). *Google Spain*, para. 97.

82 Regulation on the Protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation, GDPR). Brussels: European Parliament & the Council. p. 28.

83 Tarruella-Lopez, A. (2012). 1. Introduction: Google pushing the boundaries of law. In Tarruella-Lopez, A. (ed*.) Google and the law: empirical approaches to legal aspects of knowledge-economy business models*. The Netherlands: T.M.C. Asser Press, pp. 404.

A key point in the context of the right to be forgotten is to consider whether actually search engines claim (or not) to have a right to freedom of expression. Search engine companies like Google typically do not follow that line of argumentation, usually being very eloquent against any regulatory efforts that may shape their activities. By claiming freedom of expression for its search results Google would in principle have to recognize that they do make 'editorial decisions' as regards their search results. By recognizing such editorial intervention, Google could eventually benefit from freedom of expression, but at the same time be held liable for the results their search engine presents to end-users. Seen in this light, the question is then whether search engine companies are consistent in claiming freedom of expression rights, or do they tend to claim different things (e.g. corporate rights), depending on the favoring circumstances.

To conclude, as Tunick[84] argued, there are circumstances in which freedom of expression is not in conflict with privacy and the two values could go hand in hand. Sometimes to be free to communicate one needs privacy - assurance of confidentiality or anonymity. However, there are also circumstances in which the two values conflict, such as this chapter illustrated. One of the difficulties then in trying to weigh the importance of the right to be forgotten (privacy) against the importance of freedom of expression is that people in general value both privacy and freedom of expression differently. Therefore, *"the ethically desirable outcome may not be the legally desirable outcome, and vice versa"*[85].

The right to be forgotten implies in principle a difficult balance between the rights of multiple parties: data subject's right to privacy on the one hand, and freedom of expression rights of searchers, publishers and search engine operators on the other. Scholars and national courts may hold different opinions on the balance between privacy and freedom of expression rights, favoring or advocating for instance for privacy above freedom of expression or vice versa. However, such a balance cannot rely on 'preferences' and requires appropriate and justified legal arguments. Therefore, a case-by-case analysis imposes itself. The next section analyzes current case-law and will provide more understanding on how the rights at stake are being balanced.

IV. ENFORCEMENT BY NATIONAL COURTS

A. National provisions protecting privacy and freedom of expression

Table 4 – Provisions protecting privacy and freedom of expression (Member States' level)

	Provisions data protection/privacy & Data Protection Authority (DPA)	**Provisions freedom of expression/ press freedom**
FR	• Loi du 7 octobre 2016 pour une République numérique (Digital Republic Act) o Art. 54 – the right to decide and control the use of personal data o Art. 63 – right to be forgotten (formerly art. 38 – right to object to the processing of personal data)	• Déclaration des Droits de l'homme et du citoyen du 26 août 1789 (Declaration of the Rights of Man and of the Citizen) o Art. 10 & 11 – freedom of opinion and expression • Loi du 29 Juillet 1881 sur la liberté de la presse (Press Freedom Act) • Loi du 7 octobre 2016 pour une République numérique (Digital republic Act)

84 Tunick, M. (2015). *Balancing privacy and free speech: unwanted attention in the age of social media*. London : Routledge, p. 14.
85 *Idem*.

	• Commission Nationale de l'Informatique et des Libertés (CNIL)	o Article 63 – derogation in favour of the processing of personal data for journalistic purposes
DE	• German Constitution o Art. 1 – human dignity o Art. 2 – personal freedoms • Bundesdatenschutzgesetz, BDSG (Federal Data Protection Act of 14 January 2003) o Section 35 : right to erasure • New Federal Data Protection Act of 5 July 2017 (will apply as from 25 May 2018) o Right to erasure provisions similar to previous framework • Bundesbeauftragter für den Datenschutz und die Informationsfreiheit, BfDI (Federal Commissioner for Data Protection and Freedom of Information or DPA of each state)	• German Constitution o Art. 5 – freedom of expression and freedom of the press
ES	• The Spanish Constitution 1978 o Art. 18 – intimacy and inviolability of the home o Art. 18(4) – limited data processing in order to guarantee the honour and personal and family privacy of citizens • Ley orgánica 15/1999, de 13 de diciembre, de protección de datos de carácter personal, LOPD (Organic Law on the protection of personal data) o Art. 16 – Right of rectification or cancellation o Art. 10 – Data secrecy • Agencia Española de Protección de Datos (AEPD)	• The Spanish Constitution 1978 o Art. 20 o free expression principle = the right to freely express and spread thoughts, ideas and opinions through words, in writing or by any other means of reproduction o free information principle = the right to freely communicate or receive truthful information by any means of dissemination whatsoever
UK	• Data Protection Act 1998 (DPA) o Section 10 – the right to prevent the processing of personal data o Section 14 – the right to require the rectification, blocking, erasure or destruction of personal data • Statement of intent New Data Protection Bill • Information Commissioner's Office (ICO)	• European Convention on Human Rights (ECHR) o Art. 10 – everyone has the freedom of expression, the freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers • Data Protection Act 1998 (DPA) o Section 32 – processing of personla data : exemption for journalism, art and literature, which can be applied by media companies, bloggers and other publishers depending on the circumstances.

1. France

France was among the first countries that enacted a law on data protection.[86] The "*Loi du 6 janvier 1978 relative à l'informatique, aux fichiers et aux libertés "* (Act of 6 January 1978 on information technology, data files and civil liberties)[87] was until recently the principal law regulating data protection in France. On 7 October 2016, a new "*Loi pour une République numérique*" (Digital Republic Act) has been adopted. The new Act constitutes a first step in the implementation of the GDPR – which will apply in all EU Member States as from May 25, 2018 – modifying a number of provisions of the 1978 Data Protection Act. [88] Enforcement of the law is principally through the 'Commission Nationale de l'Informatique et des Libertés' (CNIL) and the courts.[89]

The Digital Republic Act in particular establishes (i) new powers for the French data protection authority and (ii) new rights for individuals and obligations for the data controllers. As regards the new rights for individuals, the Act introduces[90]:

- the right to decide and control the use of personal data (Art. 54) : This provision, seeks to guarantee control over personal data, and in particular the ability for the data subject to decide whether and how his/her data should be used.

- a right to be forgotten (Art. 63) : Article 40 of the 1978 Data Protection Act already granted data subjects a right to obtain the erasure of personal data.[91] This provision remains basically the same, but a minor's right to be forgotten is amended. Under the previous Act minors or their legal representatives had only the right to oppose to the processing of the data if there was a legitimate reason. Within the current framework minors can obtain the erasure of personal data as soon as possible and for no particular reason. Companies are obliged to comply within one month following a specific request for erasure. In addition, they must take reasonable steps, including technical measures, to inform data controllers to whom they have disclosed the data of the request for erasure.

Further, article 63 stipulates that the right to be forgotten is not absolute and specific exceptions may apply. This includes the following cases: (i) exercise of the right to freedom of expression and information (e.g. journalistic use of personal data); (ii) compliance with a legal obligation of collection (e.g. police report recording an offense committed by a minor); (iii) grounds of public interest (e.g. public health considerations or archival, scientific, historical and statistical research); (iv) recognition, exercise or defense of legal rights.

86 Weber, H. R. (2011). The right to be forgotten: more than a pandora's box. *JIPITEC*, 120, 2, para. 1, p. 123. Available at http://www.jipitec.eu/issues/jipitec-2-2-2011/3084
87 French Parliament. (1978). *Loi 78/17 du janvier 6, 1978, relative à l'informatique, aux fichiers, et aux libertés.* Available at https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000886460
88 French Parliament. (2006). *Loi n° 2016-1321 du 7 octobre 2016 pour une République numérique.* Available at https://www.legifrance.gouv.fr/affichTexte.do;jsessionid=2EEDDC53AA4334B2F421EFAD13113A7B.tpdila23v_1?cidTexte=JORFTEXT000033202746&dateTexte=&oldAction=rechJO&categorieLien=id&idJO=JORFCONT000033202743
89 French Government. (2016). *Innovation, inclusion, confiance: loi pour une république numérique*. Dossier de Presse. Available at https://www.economie.gouv.fr/files/files/PDF/DP_LoiNumerique.pdf
90 Latham & Watkins Internet & Digital Media Industry Group. (2016). French Digital Republic law expands rights of users and regulators. Available at https://www.lw.com/thoughtLeadership/French-digital-republic-law-english
91 French Parliament. (1978). *Loi 78/17 du janvier 6, 1978, relative à l'informatique, aux fichiers, et aux libertés.* Available at https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=LEGITEXT000006070722

In France, freedom of opinion and expression is enshrined in the ‘’*Déclaration des Droits de l'homme et du citoyen du 26 août 1789”* (Declaration of the Rights of Man and of the Citizen).[92] As for the freedom of the press, it is enshrined in the “*Loi du 29 Juillet 1881 sur la liberté de la presse*”[93] (Press Freedom Act), providing a framework for press freedom by setting restrictions aimed at striking a balance between freedom of expression, protection of individual rights, and public order.[94]

2. Germany

German citizens highly value online privacy and are proactive in voicing their disapproval of data practices that may infringe on that privacy.[95] Thus, Germany is presented as one of the Member States that has a very protective system of data protection. This has been significantly influenced by the jurisprudence of the Federal Constitutional Court (*Bundesverfassungsgericht*, BVerfG). This Court’s Population Census Decision (“*Volkszahlungsurteil*”) constitutes a cornerstone in the development of federal data protection laws and is referred to as “*the very key to the German view on data protection*”[96].

With this decision, the Federal Constitutional Court recognized the principle of informational self-determination as being part of the right of personality[97], guaranteed by Article 1 (human dignity) in conjunction with Article 2 (personal freedoms) of the German Constitution (Grundgesetz, GG).[98] Thus, the right of personality forms the legal basis for data protection in Germany and guarantees amongst others the right of the individuals to decide for themselves on the disclosure and use of their personal data. Therefore in Germany, the right of informational self-determination is perceived as the basis for the right to be forgotten.[99]

The general provisions of a right to erasure can be found in Section 35 of the the Federal Data Protection Act (Bundesdatenschutzgesetz, BDSG).[100] This Act incorporates the principles of data processing as laid out in the EU Data Protection Directive and aims to protect individuals’’ privacy and guard against the mishandling of personal data. Section 35 (2) distinguishes four situations in which an individual has the right to request that his/her personal data is erased. This applies where (i) the data is unlawfully recorded; (ii) the data is sensitive (e.g. racial or ethnic origin, political opinions, religious or philosophical

92 Jurizine.net. *Liberté d’opinion et liberté d’expression*. Available at http://www.jurizine.net/2005/09/03/33-articles-10-et-11-ddhc-liberte-dopinion-et-liberte-dexpression
93 French Government. (2017). *Loi du 29 juillet 1881 sur la liberté de la presse -Version consolidée au 17 octobre 2017*. Available at https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000877119&fastPos=1&fastReqId=1757100542&categorieLien=cid&oldAction=rechTexte
94 French Government. (2008). *Loi du 29 Juillet 1881 sur la liberté de la presse*. Available at http://www.gouvernement.fr/en/everything-you-need-to-know-about-freedom-of-expression-in-france
95 Zell. A.M. (2015). Data protection in the Federal Republic of Germany and the European Union: an unequal playing field. *German Law Journal*, *15*(03), p. 462. Available at https://static1.squarespace.com/static/56330ad3e4b0733dcc0c8495/t/56a95d4c4bf1182859633f69/1453940044969/GLJ_Vol_15_No_03_Zell.pdf
96 Hornung & Shnabel. (2009), as quoted in Kodde, C. (2016). Germany’s right to be forgotten - between freedom of expression and the right to informational self-determination. *International Review of Law, Computers & Technology*, p. 3. Available at http://www.tandfonline.com/doi/abs/10.1080/13600869.2015.1125154?journalCode=cirl20&
97 Kodde, C. (2016). Germany’s right to be forgotten - between freedom of expression and the right to informational self-determination. *International Review of Law, Computers & Technology*, p. 4.
98 German Parliament. (2014). *German basic law*. Available at https://www.btg-bestellservice.de/pdf/80201000.pdf
99 Blind, J. & Brommer, A. (2015). *Privacy & the media. Traditional & emerging protections in an online world*. International Association of Young Lawyers, AIJA National Congress, National Report Germany, p. 17. (20 p.) Available at http://london.aija.org/wp-content/uploads/2015/07/Germany-IP-REPORT.pdf
100 German Parliament. (2009). *Federal Data Protection Act in version promulgated on 14 January 2003, as most recently amended by Article 1 of the Act of 14 August 2009*, Section 35, para. 2, 5, 7. Available at https://www.gesetze-im-internet.de/englisch_bdsg/englisch_bdsg.html

beliefs, trade-union membership, health, sex life, punishable actions or administrative offences); (iii) the purpose of the collection of the data is fulfilled, or (iv) further retention is unnecessary.

Further, Section 35 (5) BDSG stipulates that personal data may not be collected, processed or used if the data subject lodges an objection with the controller and an examination indicates that legitimate interests of the data subject due to its particular situation outweigh the interest of the data controller in such collection, processing or use. The bodies to which these data were transferred for recording shall be informed of the rectification of inaccurate data, the blocking of disputed data and erasure or blocking due to unlawful recording, if this does not involve a disproportionate effort and does not conflict with the legitimate interest of the data subject. Enforcement of the law is through the Federal Commissioner for Data Protection and Freedom of Information (BfDI)[101] or through the data protection authority of each state.[102]

As to freedom of expression and freedom of the press, these are basic rights enshrined in the German Constitution.[103] Article 5 of the Constitution (*Grundgesetz*) says that "*every person shall have the right to freely express and disseminate his opinions in speech, writing and pictures, and to inform himself from generally accessible sources. Freedom of the press and freedom of reporting by means of broadcasts and films shall be guaranteed. There shall be no censorship*". Restrictions may apply if necessary for the protection of young persons and for the protection of the right to personal honour.

Recently, Germany has passed a new Federal Data Protection Act. The main provisions of the new act which was published[104] in law in Germany on 5 July, will apply from 25 May 2018, the same date that the GDPR will apply from. Many of the new provisions are similar to the previous framework under the Federal Data Protection Act (Bundesdatenschutzgesetz,BDSG).

3. Spain

In Spain the protection of personal data is guaranteed by article 18 (intimacy and inviolability of the home) of the Constitution. Paragraph 4 stipulates that "*the law will limit the use of data processing in order to guarantee the honour and personal and family privacy of citizens [...]"*[105](emphasis added). Further, the central piece of legislation protecting personal data is the Organic Law of 13 December 1999 [106](*Ley Orgánica de Protección de Datos de Carácter Personal, LOPD*).

The general provisions of a right to erasure can be found in Article 16 LOPD, entitled "*Right of rectification or cancellation.*"[107] If the personal data is incorrect or incomplete, or has been processed in breach of the LOPD, the data subject is entitled to have it corrected or erased by the data controller

101 BfDI. Federal commissioner for data protection and freedom of information. Available at https://www.bfdi.bund.de/DE/Home/home_node.html
102 The North Rhine-Westphalia commissioner for data protection and freedom of information (LDI NRW). *Data Protection Authorities in Germany*. Available at https://www.ldi.nrw.de/LDI_EnglishCorner/mainmenu_DataProtection/Inhalt2/authorities/authorities.php
103 German Parliament. (2014). *German basic law.* Freedom of expression, Article 5 (1), (2).
104 German Parliament. (2017). *Gesetz zur Anpassung des Datenschutzrechts an die Verordnung (EU) 2016/679 und zur Umsetzung der Richtlinie (EU) 2016/680 (Datenschutz-Anpassungs- und -Umsetzungsgesetz EU - DSAnpUG-EU)*. Available at https://www.bgbl.de/xaver/bgbl/start.xav?startbk=Bundesanzeiger_BGBl#__bgbl__%2F%2F*%5B%40attr_id%3D%27bgbl117s2097.pdf%27%5D__1502799623691
105 The Spanish Constitution. (1978). Article 18 (4), p. 12. Available at http://www.parliament.am/library/sahmanadrutyunner/ispania.pdf
106 Boletin Oficial del Estado (BOE). (2011). *Ley orgánica 15/1999, de 13 de diciembre, de protección de datos de carácter personal.* Available at http://www.boe.es/buscar/act.php?id=BOE-A-1999-23750&p=20110305&tn=2
107 *Ibid.*, Article 16, p. 7

within ten days of the request. Cancellation includes blocking of data, and keeping it solely for the use of administration and tribunals in determining responsibilities. The *Agencia Española de Protección de Datos* (AEPD), the Spanish Data Protection Authority enforces the law.[108]

Furthermore, Article 10 LOPD, entitled "Data secrecy" stipulates that a controller and any persons involved in any stage of the processing of personal data, shall be subject to professional secrecy as regards such data, and to the duty to keep them. These obligations shall continue even after the end of the relations with the owner of the file or, where applicable, the person responsible for it. As noted earlier in this paper, the AEPD considers that the mere indication by a controller of the URL linking to an article about a data subject that has to be removed from internet searches constitutes personal data processing. This is so, because the URL alone contains information related to an identifiable person, and the indication by a controller of that URL is according to the AEPD a serious infringement of data subject's right to secrecy.

The LOPD does not make any reference to freedom of expression. But Article 20 of the Spanish Constitution[109] recognizes and protects the right to freely express and spread thoughts, ideas and opinions through words, in writing or by any other means of reproduction (free expression principle) and the right to freely communicate or receive truthful information by any means of dissemination whatsoever (free information principle). These freedoms are limited by respect for the right to honour, privacy, to the personal image and to the protection of youth and childhood.

4. United Kingdom

The UK does not have a written constitution that enshrines a right to privacy and there is no common law that provides for a general right to privacy. The UK has, however, incorporated the European Convention on Human Rights into its national law, which provides for a limited right of respect towards an individual's privacy and family life.[110] The primary legislation in the UK that regulates "*the processing of information relating to individuals, including obtaining, holding, use or disclosure of such information*", is the Data Protection Act 1998 (DPA).[111]

In the UK, the provisions for a right to erasure are limited to Section 10 and Section 14 of the DPA.[112] Section 10 grants data subjects the right to prevent the processing of personal data where such processing is causing unwarranted damage or substantial distress. Section 14 mirrors article 12 of the DPD, providing the right to require the rectification, blocking, erasure or destruction of personal data where such data is inaccurate.

Further, Section 32 of the DPA confirms the exemption for journalism, art and literature, which can be applied by media companies, bloggers and other publishers depending on the circumstances.[113] The United Kingdom incorporated the European Convention on Human Rights (ECHR) into its domestic law

108 Agencia Española de Protección de Datos (AEPD). https://www.agpd.es/portalwebAGPD/index-ides-idphp.php
109 The Spanish Constitution. (1978). Chapter 2 – Rights and Liberties. Section 20, p. 16-17.
110 Library of Congress. Online privacy law: United Kingdom. Available at https://www.loc.gov/law/help/online-privacy-law/uk.php
111 The National Archives. Data Protection Act 1998, c. 29. UK Government. Available at http://www.legislation.gov.uk/ukpga/1998/29/contents
112 *Ibid*., Section 10, para. 1 (a), (b) & Section 14 (1).
113 Data Protection Act 1998, *op. Cit*., Section 32.

(Human Rights Act).[114] Article 10 of the Human Rights Act guarantees that everyone has the freedom of expression, the freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.

The Information Commissioner's Office (ICO)[115] is the UK's independent authority set up to uphold information rights in the public interest, promoting openness by public bodies and data privacy for individuals. Part of ICO's role is to take action to ensure organisations meet their information rights obligations.

The UK government announced[116] recently its plans for a new data protection bill that will bring the European General Data Protection Regulation into UK law by next year. Matt Hancock, the Minister of State for Digital, said that the new bill "*will give people more control over their data, require more consent for its use, and prepare Britain for Brexit*"[117]. Lynskey[118] observed that the ministerial statement of intent presents lamentable errors. The first noteworthy feature is that the data protection bill is presented as a novelty, while "*hiding the fact that it mainly implements EU data protection frameworks […]*".

A second issue the document reveals is the inaccurate use of language as regards the idea of giving people more control over their personal data. In fact, empowering people to 'take ownership' of their data suggests – erroneously – that the new legal framework would confer ownership rights in personal data.

Further, the document states that the "principle difference" between the existing right to erasure as set out in the DPA and the GDPR right is: *"a strengthening of the law from being applicable when substantial damage or distress is likely to be caused, to whenever a data subject withdraws their original consent for the data to be available, as long as it is no longer necessary or legally required for the grounds on which it was originally collected, or there are no overriding legitimate grounds for processing*."

Such formulation, Lynskey[119] argues, mischaracterises the Article 17 of the GDPR, as if the withdrawal of consent may be neither a necessary nor a sufficient basis for the exercise of the right, depending on the circumstances. From the point point of view of children's privacy rights, Livingstone[120] noted that the right to be forgotten in the new bill is strongest for children, and "*a post on social media made as a child would normally be deleted upon request*". However, it remains to see how/whether these provisions are going to work in practice.

---

114 Equality and Human Rights Commission. (2016).The Human Rights Act: Article 10 – freedom of expression. Available at https://www.equalityhumanrights.com/en/human-rights-act/article-10-freedom-expression

115 Information Commissioner's Office (ICO). https://ico.org.uk/about-the-ico/

116 UK Government. Department for Digital, Culture, Media and Sport. (2017*). A new Data Protection Bill: our planned reforms. Statement of intent*. Available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/635900/2017-08-07_DP_Bill_-_Statement_of_Intent.pdf

117 Hancock, M. (2017). *Government to strengthen UK data protection law*. Press release, 7 August, Department of Digital, Culture, Media & Sport, UK Government. Available at https://www.gov.uk/government/news/government-to-strengthen-uk-data-protection-law

118 Lynskey, O. (2017). The great data protection rebranding exercise. *LSE Media Policy Project blog*. Available at http://blogs.lse.ac.uk/mediapolicyproject/2017/08/08/the-great-data-protection-rebranding-exercise/

119 *Idem.*

120 Livingstone, S. (2017). Children's privacy rights are prominent in the data protection bill but there's many a slip…. *LSE Media policy project blog*. Available at http://blogs.lse.ac.uk/mediapolicyproject/2017/08/14/childrens-privacy-rights-are-prominent-in-the-data-protection-bill-but-theres-many-a-slip/

B. Case-law

The criteria for selecting the case-law were the following: the cases had to imply (i) the enforcement of the right to be forgotten by national courts, and (ii) solely in those cases where it required a balance with freedom of expression rights. As regards the time span, court decisions originating from the period shortly after the *Google Spain* judgment, in particular, the period May 2014 – May 2016 were analyzed. The selected period is important, because it was precisely on 13 May 2014 that the Court of Justice of the European Union (CJEU) rendered its decision in the *Google Spain* case, 'establishing' a 'right to be forgotten'. In April 2016 the General Data Protection Regulation Regulation (GDPR), which codifies this right has been finally adopted, and will enter into force as from May 25, 2018.

The selected cases and the corresponding court decisions refer to:

- data subject's **erasure requests** of (links to) **newspaper articles** or newsworthy content
  - amounts to information of general public interest, and
  - the erasure of such content may affect both, searchers and news publishers
- from **Google** search results
- from **digital newspapers'** internal search engine/archives
- or from **news websites**

The table presented in this subchapter provides an overview of the case-law relating to the balance between privacy and freedom of expression. The distinction between the two main columns – *Privacy/RtBF* vs *Freedom of expression/information/press freedom* – is based on the definition of the right to be forgotten and freedom of expression as provided throughout this paper.

The **right to be forgotten** is in this paper understood as a form of **online privacy**, because it involves data subject's right to protect and control his/her personal data on the internet.

Freedom of expression encompasses the **freedom of information** and **freedom of the press**, understood in this paper as:

- the right of press publishers or editors of news websites to publish and impart information online, and to store such information in their online archives/internal search engines.
- the right of the public (individuals, searchers, internet users) to know, to seek and to have access to such information.

The column in between freedom of expression and privacy – titled '*privacy balanced with freedom of expression*' – covers those cases requiring a 'fair balance' between the right to be forgotten on the one hand and freedom of expression on the other. This is in line with the *Google Spain* judgment and the 'fair balance' requirement that the CJEU suggested to be sought. Namely, between the legitimate interests of internet users in having access to information on the one hand and the privacy and data protection rights of the data subject on the other.

Table 5 – Overview case-law relating to the balance between privacy and freedom of expression

	Freedom of expression/information/press freedom	Privacy balanced with freedom of expression	Privacy/Right to be forgotten
FR	**Case Dokhan/ LesEchos.fr** • Fraud allegations • Public figure/ News public relevance • *"[…] imposing on a newspaper organisation the obligation to de-index articles from its online archive [...] exceeds the restrictions that may be imposed on the freedom of press*" • Nor the names deleted from the article, nor the article de-listed form *Les Échos* archive		**Marie-France M./Google Fr & Google Inc.** • Conviction for fraud • Not public figure • Time lapse/news irrelevant • No mention of conviction on criminal record • Re-integration society necessary • Google Fr & Google Inc. to delist from search results all the links referring to the article of the newspaper Le Parisien
	M.P./ 20 Minutes France • Rape allegations • Public figure/ News public relevance • Articles not de-indexed from news website, nor anonymized • *"[…] if the article in question did not contain the name of the person concerned, it could not meet the informational objective which justifies it*"		
DE		**OLG Hamburg, 7 July 2015: RtbF can be claimed against online (newspaper) archives** • Criminal proceeding (defamation) • Not public figure • Privacy balanced with publishers' right to freedom of the press • Archived articles neither de-indexed from online archive, nor anonymized • BUT only de-indexed from search engine results	
ES	**Spanish Supreme Court: Public's right to information overrides the right to privacy of public figures** • Corruption case • Public figure • Time lapsed, but news truthful & public relevance	**A & B vs Ediciones *El País*: Privacy balanced with press freedom** • Conviction drug trafficking/ reported by *El País* • Not public figures • News lawful, but time lapse/ irrelevant • Continued access articles = infringement honour & privacy • Privacy balanced with press freedom • *El País* to de-index archived articles from Google search results • BUT articles neither de-indexed from *El País*' own archive • NOR articles anonymized • *"[…] digital archives are protected by freedom of information as they satisfy a public interest. That's why old news cannot be cancelled"*	

	Freedom of expression/information/press freedom	Privacy balanced with freedom of expression	Privacy/Right to be forgotten
		Spanish Supreme Court: 'Outdated' information about individuals with no role in public life can be removed from Google search results • Prosecution for crime/ reported by *El País* • Not public figure + Time lapsed + Sensivity information for data subject's private life • = data subject's right to privacy precedes public's interest in having access to the information • Privacy balanced with freedom of information of news publisher (*El País*) • *"the use of a search engine as a tool to silence information lawfully published constitutes an abuse of law, since digital newspapers fall within the scope of the protection of freedom of information"* • Article not de-indexed from *El País*' website, only from Google search results	

UK	**Case Malcom Edwards-Sayer: Press freedom & public interest**
	
	• Convicted for tax fraud
	• Public figure
	• Addressed to news publications/ RtbF request
	• Request dismissed: freedom press + news public relevance (public interest)
	• Court application: accessibility articles = interference with right to privacy
	• Claim rejected
	  o Public figure
	  o Seriousness case
	  o News public relevance
	• Press freedom & Public's right to information		

1. France

Case	**Dokhan/ LesEchos.fr: Prevalence of freedom of expression on RtBF**
Details	On 12 May 2016, the French Superior Court (*Cour de Cassation*) rendered a decision stating that the right to be forgotten does not supersede the freedom of press.[121] In this case, two brothers, Stephane and Pascal Dokhan were punished in 2003, involving the withdrawl of their business cards[122] by the Disciplinary Commission of the "Conseil des Marchés Financiers".[123] In 2006, this case has been reported by the financial newspaper *Les Échos* in an online article titled "*the Council of State reduced the sanction of the Dokhan brothers to a blame*".[124] The brothers objected to the fact that a search on their name on Google returned this article as first result. In view of these facts, which were detrimental for their reputation and limited their chances of finding a job in the business community, the brothers lodged a complaint against the newspaper. Relying upon article 38 (right to object to the processing of personal data) of the 1978 Data Protection Act, they requested their names to be erased from the newspaper article, and the piece to be de-indexed from the newspapers' online archive.[125] In October 2010 at first instance[126], the District Court (TGI Paris, 27 October 2010) held that "*neither the title of the article that used their name as keyword, nor the article in itself [...] is misleading, equivocal or faulty."* Further, the Court noted that anonymizing the people in question would have rendered the news irrelevant and uninteresting, and that the accessibility of the article is an essential component of the exercise of freedom of the press. The Court of Appeal of Paris (Cour d'Appel, Paris, 26 February 2014) confirmed the decision of the Court of First Instance, adding that *"the difficulties encountered by the brothers in finding a job in the business community cannot be attributed to the article itself, but to the reading of it by professionals".*
Decision	In its ruling of 12 May 2016, the French Superior Court (*Cour de Cassation*) upheld the decisions of both courts, confirming once again that "*imposing on a newspaper organisation the obligation to de-index articles from its online archive [...] exceeds the restrictions that may be imposed on the freedom of press.*"[127] In reaching its decision the Court pointed out that the archiving of newspaper articles fell within the scope of Article 67 of the Digital Republic Act, which provides for a derogation in favor of the processing of personal data for journalistic purposes, thus making the right to be forgotten inapplicable to online newspapers and their archives.

Analysis	• Individuals: public figures (businessmen)
	• Content article relevant: reporting about fraud allegations = public relevance/ newsworthy
	• Complaint: injuries to personal reputation
	• Relying on: the right to object to the processing of personal data (formerly art. 38, at present art. 63)
	• Request:
	  o removal of the names (Stephane & Pascal Dokhan) from the online newspaper
	  o removal of the article from the online archive of the newspaper
	• Court decision:
	  o online newspaper archives are protected by the freedom of the press (Act of 29 July 1881)
	  o processing of personal data is legitimate if that data has public relevance (Art. 67 Digital Republic Act)
	  o Names, nor article removed from *Les Échos* archive
	• Similarly: Article 29 WP – relevant information about public figures cannot be de-listed from internet searches nor from online newspapers' archive
	• The case illustrated that:
	  o Online newspapers can oppose to the removal of information (both, names and the article) about public figures from their archives, if that information is of general public interest.
	  o Right to be forgotten does not undermine news publishers' right to impart and store information in their archives.
	  o The article, together with the full names remain publicly available online on newspapers' website, and can be found through Google and other search engines too.

121 French Supreme Court. (2016). Cour de Cassation - Première, Stéphane et Pascal X. c/ Les Échos, N° 15-17729. Available at http://junon.univ-cezanne.fr/u3iredic/?p=19689
122 In the decision literally as "*retrait de la carte professionelle*"
123 Varet, V. (2016). Quand le droit à l'oubli numérique se heurte à la liberté de la presse. Available at http://www.journaldunet.com/economie/expert/64585/quand-le-droit-a-l-oubli-numerique-se-heurte-a-la-liberte-de-la-presse.shtml

Case	**M.P./ 20 Minutes France: RtbF cannot prevent a news publisher from exercising his right to freedom of the press** [128]
Details	In an article posted on its website in April 2011, the daily newspaper *20 minutes* reported about the placement in custody of M.P, a famous sportsman who had been accused of rape. In 2014, the case ended with the stay of the proceedings. When typing his name on the internet, M.P. detected that the newspaper did not report about this fact, but that the article from 2011 was still accessible through their website. In view of these facts, M.P. addressed the publishing company demanding not the deletion of the old article, but the publication of a text (right of reply), mentioning that the rape accusations against him had been cancelled. The newspaper accepted to publish the text, but not in its entirety. In December 2014, the newspaper published on its website a short article titled *"The charges against a rider accused of rape have been dismissed"*. The article however did not satisfy M.P. because it mentioned once again his full name and it did not specify the grounds on which he has been acquitted. It was in those circumstances that M.P asked the Court to order the newspaper to (i) delete and/or (ii) anonymize (only initials to be mentioned) the article in question. The data subject stated that there has been an unfair collection of his personal data pursuant article 38 of the Law of 6 January 1978 according to which any person may object for legitimate reasons to the processing of his/her personal data.
Decision	In view of this request, the Court considered that the protection provided by the 1978 Data Protection Law on the processing of personal data should not override the right to information *"concerning the functioning of justice and the handling of serious cases*". Consequently, the Court considered that the article was not defamatory, the publication of the name, age and profession of the applicant being the legitimate interest of the news publisher. Further, as regards applicants' request to anonymize the article (article 2 (2) Data Protection Law of 1978), the Court rejected his request stating that *"if the article in question did not contain the name of the person concerned, it could not meet the informational objective which justifies it and the updating of the initial information from 2011 would not be effectively achieved"*.
Analysis	• Individual: public figure (famous sportsman) • Content article: reporting about rape accusations • Complaint: In the meantime rape accusations cancelled, but name still publicly available on the internet • Relying on: the right to object to the processing of personal data (art. 38) + anonymization of data (art. 2(2)) • 1st request: Right of reply - rape accusations cancelled • 2nd request: Full name not to be mentioned again, only initials (M.P) • Court decision: Full name nor de-listed, nor anonymized • The case illustrated that: As in the previous case, the French Court once again confirmed that the right to be forgotten cannot prevent a news publisher from exercising his right to freedom of the press. The article continues to exist on the website in its entirety: full name neither de-listed, nor anonymized.

124 Les Échos. (2006). Le Conseil d'Etat réduit la sanction de frères Dokhan a un blâme. Available at https://www.lesechos.fr/08/11/2006/LesEchos/19789-196-ECH_le-conseil-d-etat-reduit-la-sanction-des-freres-dokhan-a-un-blame.htm

125 World Association of Newspapers and News Publishers (WAN IFRA). (2016). French judge establishes prevalence of freedom of the press on the right to be forgotten. Available at https://blog.wan-ifra.org/2016/05/23/french-judge-establishes-prevalence-of-freedom-of-the-press-on-right-to-be-forgotten

126 Allegra, A. (2016). Données personnelles: primauté de la liberté d'information sur le droit à l'oubli. *LexTimes, Journal d'information juridique indépendant et participatif*. Available at http://www.lextimes.fr/jurisprudence/droit-civil/donnees-personnelles/primaute-de-la-liberte-dinformation-sur-le-droit-loubli

127 French Supreme Court. (2016), *op. Cit*., p. 3.

128 Tribunal de Grande Instance de Paris (2015). Ordonnance de réfère du 23 mars 2015. Available at https://www.legalis.net/jurisprudences/tribunal-de-grande-instance-de-paris-ordonnance-de-refere-du-23-mars-2015/

Case	**Marie-France M./Google Fr & Google Inc.**
Details	In this case Mrs. M. requested Google France to remove internet links which referred to an article published on the website of the newspaper *Le Parisien* and concerned a fraud case for which she received a sentence in 2006.[129] When entering her name in Google, Mrs. M found that Google displayed the articles in question as first results. Google France dismissed her request asserting public's right to information. Mrs. M. turned to the Court and objected on the basis of article 38 of the 1978 Data Protection Law to the processing of her personal data, stating that the accessibility of those results to everyone on a simple internet query is an infringement of her privacy and that these articles would cause her difficulty in finding a job. Furthermore, relying upon article 6 (principles relating to data quality) of the European Data Protection Directive, Mrs. M. argued that the articles in question have now become irrelevant, inadequate and excessive. Google France and Google Inc. intervened voluntarily in the proceeding invoking their right to inform internet users of facts relating to criminal proceedings that are of general public interest.
Decision	The Court was faced with (i) determining whether it is *Google Inc.* or *Google France* who is responsible for the processing of personal information. In this regard, the Court held that *"the activities of the search engine operator and his establishment in a Member State are inseparably linked".* Further, the Court (ii) considered that the amount of time lapsed faded the public's interest in the matter, the article has now become irrelevant and inadequate, posing a threat to plaintiff's private and professional life. Moreover, since there was (iii) no mention of plaintiff's conviction on her criminal record[130], the Court found that plaintiff's request was legitimate. On these grounds, the Court ordered both *Google France* and *Google Inc.* to delist from their search results all the links referring to the article of the newspaper *Le Parisien*.[131]

Analysis	• Individual: Not public figure
	• Content article: Fraud allegations
	• Complaint:
	  o Articles publicly available through Google on a simple name search
	  o Violation personal privacy & detrimental for social life (job)
	• Relying on: the right to object to the processing of personal data (art. 38, Digital Republic Act) & data quality principle (art. 6, DPD)
	• Request:
	  o Google to remove from its search results all the links (webpages) referring to the article
	• Google's answer: Right to inform about facts of general public interest
	• Court decision:
	  o Time lapse makes the information irrelevant for the general public
	  o Re-integration society: clean slate necessary for professional and social life
	
	• The case illustrated that:
	  o In comparison to previous cases where the Court considered that freedom of expression prevailed, in this case the Court favoured individual's right to privacy.
	  o The decisive element appears to be the fact that the data subject does not play an important role in public life.
	  o It should be noted that this decision did not affect the freedom of expression of the news publisher, since the Court reasoned in line with the Google Spain judgment and considered that it is neither the newspaper company (*Le Parisien*) nor the operator of the newspapers' website who is directly responsible for the processing of personal data, but the search engine operator.
	  o Interestingly, it can be noticed that Google asserted a right to freedom of expression, the right to inform internet users about relevant facts.
	  o However, neither in the Google Spain judgment, nor in this case did the Court take into consideration the freedom of expression of search engine operators.

2. Germany

Case	**OLG Hamburg, 7 July 2015: RtbF can be claimed against online (newspaper) archives**
Details	In July 2015, the Higher Regional Court of Hamburg (*Oberlandesgericht Hamburg*), referring to the CJEU judgement, decided that the right to be forgotten can be claimed against the operator of online (newspaper) archives.[132] The plaintiff, a communication consultant, applied for injunctive relief against the publisher of a regional newspaper and the operator of the newspaper's website. The website in question did not only reported on the current events but also stored past articles in their online archive. Among those articles were reports on preliminary proceedings against the plaintiff dating back to 2010 and 2011. According to the criminal complaint, the plaintiff was accused of anonymously insulting and sending defamatory faxes to a politician. The criminal proceedings were closed with the payment of a fine by the plaintiff. Later, when entering his name on the internet, he found that the articles reporting the circumstances of the case could still be accessible through the newspaper's online archive. He objected and requested the court to restrain the newspaper from further publishing those articles.[133]

	In 2012 at first instance[134] the Hamburg District Court (*Landgericht Hamburg*) dismissed the plaintiff's complaint, stating that ordering the publisher of a newspaper to delete or change the articles that had initially been lawfully disseminated would constitute a massive infringement on the freedom of the press. The Court added that this cannot be justified by his right to privacy as the reporting was on subject of public interest at the time of the publication, concerning a mere suspicion and did not portray the plaintiff as a convicted offender.
Decision	In response to the plaintiff's appeal the Higher Regional Court of Hamburg (Oberlandsgericht Hamburg) annulled the lower court's decision and partially granted the appeal.[135] The Court decided that the applicant has no right to claim that the publisher modifies or deletes the articles from its online archive, as his right to privacy does not outweigh the publishers' right to freedom of the press, as foreseen by article 5 (1) of the Constitution (GG). However, the Court allowed the appeal insofar as it has requested the publisher to de-list the articles, so as to prevent them from appearing in the list of search results when his name was entered into search engines. In reaching its decision the Court stated that (i) the public interest in the current case had expired over time, and (ii) the fact that the articles could be permanently found on the internet by simply entering the applicant's name, was a significant breach of his personality rights (Article 1(1) and Article 2(1) of the Constitution). The Court also added that if claims to de-list content could be brought against a search engine operator, then it can be asserted all the more against the original provider of such content (operator online archive/website publisher).[136] This decision is in line with the GDPR, which specifies that not only search engines, but every data controller is bound by the right to be forgotten. Thus, in Germany, the right to be forgotten can be asserted against operators of online (newspaper) archives, which have to take technical measures to ensure that their archive entries cannot be found via search engines.
Analysis	• Individual: not public figure • Content article: reports about criminal proceeding • Complaint: Criminal proceedings ended, but article with the full name publicly accessible through Google search • Request: Online newspaper to remove the article from its archive as such as that the article does not appear anymore in Google search results • Court decision: o Newspapers are protected by the freedom of the press (art. 5 Basic Law) o No possibility to modificate (by anonymization) or remove articles from newspapers' archive o Archived articles not de-indexed from online archive, nor anonymized o BUT only de-indexed from search engine results (Google search results) • The case illustrated that: o the balance between data subject's right to be forgotten and freedom of expression is difficult, yet not impossible and even necessary. o It shows that courts generally try to make an appropriate balance, respecting both individuals' privacy and news publishers' freedom of expression. o Although the newspaper reports about relevant facts (criminal proceedings) and thus is protected by the freedom of press, retaining the right to not delete that article from its online archive, o But, taken into account that the facts are not relevant anymore due to the time elapsed, and that data subject is not a public figure, this is a valid argument for partly granting that data subject the right to be forgotten. o Similar as in France, the German court appears to highlight the importance of the re-integration into society of an individual. To achieve this, the right to be forgotten is in this context a necessary legal instrument.

129 Tribunal de Grande Instance de Paris. (2014). Ordonnance de référé du 19 décembre 2014. Marie-France M./Google France et Google Inc. Available at https://www.legalis.net/jurisprudences/tribunal-de-grande-instance-de-paris-ordonnance-de-de-refere-du-19-decembre-2014/
130 Absence of mention of the criminal record on "*Bulletin nr. 3*". This bulletin mentions the most serious convictions committed by a person.
131 Cheron, A. (2015). Affaire Marie-France M/Google: sur le déréférencement, le droit à l'oubli et les données personnelles. Available at https://www.village-justice.com/articles/Affaire-Marie-France-Google-sur,18720.html
132 Raab, T. (2015). Das „recht auf vergessenwerden" kann erst recht gegenüber dem betreiber eines online-archivs geltend gemacht werden. *IRIS, 10:1*/10, Saarbrücken/Brüssel. Available at http://merlin.obs.coe.int/iris/2015/10/article10.de.html
133 Oberlandesgericht Hamburg. (2015). Urteil vom 07.07.2015, 7 U 29/12, para. 11, 12, 13 Available at https://openjur.de/u/838786.html
134 *Ibid*., para. 14
135 Oberlandesgericht Hamburg. (2015). Urteil vom 07.07.2015, 7 U 29/12 (2015), para. 24, 25, 26.
136 *Ibid*., para. 29, 30.

3. Spain

Case	**A & B vs Ediciones El País: Privacy balanced with press freedom**
Details	For the first time, after the Google Spain case, the Spanish Supreme Court rendered a decision on the applicability of the right to be forgotten to online newspaper archives. In October 2015, the Court ruled that the newspaper *El País* must apply protocols to prevent the indexing of its web page by general search engines (Google, Yahoo, Bing, etc.), but that the newspaper was not required to remove or anonymize the names of individuals from the original articles, nor to de-index the disputed articles from its digital archive.[137] The case began in 1980s, when two individuals, *A* and *B* were convicted for drug trafficking. They were both drug addicts and when imprisoned suffered withdrawal symptoms. The newspaper *El País* reported about the case providing details about their names, professions and drug addiction and treatment. After having served their prison terms, the plaintiffs reintegrated into society, overcame their drug addiction and developed their personal and professional lives.[138] In 2007 the newspaper *El País* digitalized its archive and allowed the general public free access to it through their website www.elpais.com. Search engines Google and Yahoo indexed *El País'* archive. Thus, in 2009, the plaintiffs detected that when entering their full names on the internet, the archived articles from *El País* reporting about their arrests appeared as first results on both Google and Yahoo.[139] In view of this facts, the plaintiffs requested the newspaper to stop processing their personal data on its website or to replace their names with initials and to ensure that the articles in question are not further indexed by search engines. *El País* dismissed their requests. In 2011, the plaintiffs brought the case before the Barcelona Court claiming that *El País* was violating their right to privacy and honour. In first instance, the Court confirmed that "*the disclosure of a person's criminal record threatened that person's honor, privacy, and the right to the protection of personal data*".[140] The Barcelona Court added that the economic interest of *El País* (raising advertising revenues online) could not prevail over plaintiffs' right to privacy, given that they were not public figures and have already served their prison terms and their criminal records were cancelled. Consequently, the Court ordered *El País* to take technological measures to stop the indexation of the articles by search engines. The Court thus ruled that the articles in question could still be accessed through *El País'* digital archive in their original form (not anonymized), but not anymore listed as search results on both Google and Yahoo. Both the newspaper and the plaintiffs found court's decision inadequate and appealed. *El País* argued that freedom of expression should prevail, given that the articles are truthful and newsworthy. The plaintiffs on the other hand demanded the newspaper not only to de-index the articles but also to anonymize them.[141] The Court of Appeal confirmed lower's court decision granting the appeal in plaintiffs' favour. It ordered *El País* to (i) cease using plaintiffs' personal data in the article's source code[142] and (ii) completely anonymize the articles ("*[...] nor their names or surnames, nor their initials*").[143] In view of this decision, *El País* brought the case before the Supreme Court.
Decision	Ultimately, the Spanish Supreme Court sought to strike an appropriate balance between the right to freedom of the press of *El País* and plaintiffs' right to privacy. In this respect, the Court noted that although the news about the plaintiffs' conviction was lawful and published for journalistic purposes, the plaintiffs were not public figures and the news about their convictions had no longer any informational or historical relevance. Furthermore, the fact that internet makes the disputed articles easy available on an ordinary web search, interferes with plaintiffs' right to honour and privacy. Building on the Google Spain judgment, the Supreme Court ruled that *El País* should take technical measures (apply exclusion protocols such as *robot.txt,* or codes like *noindex* or *noarchive*) to prevent the indexing of its webpage and archive by general search engines (e.g. Google, Yahoo, Bing).[144] However, the Supreme Court rejected the appellate court order and did not require the newspaper to anonymize the original articles, nor to de-index them from the website's internal search engine, but only from Google search results, stating that "*digital archives are protected by freedom of information as they satisfy a public interest. That is why old news cannot be cancelled or altered*"[145].

137 Abril, S.P. & Moreno, P.E. (2016). Case report. Lux in Arcana: decoding the right to be forgotten in digital archives. *MDPI Laws*, 5:33, 1-9. Available at http://www.mdpi.com/2075-471X/5/3/33/htm
138 Tribunal Supremo. (2015). Sentencia N° 545/2015. Primero-antecedentes del caso, para. 2, 3 Available at http://www.poderjudicial.es/cgpj/es/Poder-Judicial/Noticias-Judiciales/El-Supremo-reconoce-el--derecho-al-olvido--digital-de-dos-procesados-implicados-en-un-caso-de-drogas-en-los-ochenta
139 *Ibid*., para 4.
140 Abril & Moreno, *op. Cit*., p. 4.
141 Abril, S.P. & Moreno, P.E. (2016). Case report. Lux in Arcana: decoding the right to be forgotten in digital archives, p. 4.
142 By reading the source code of the articles/webpages, Google can determine where these should appear in their indexes for a given search query.
143 Abril & Moreno, *op. Cit*., p. 4.
144 Tribunal Supremo. (2015). Sentencia N° 545/2015. Fundamentos de derecho. Quinto - El tratamiento de datos personales que realiza el editor de una pagina web, para. 2.
145 Rincon, R. (2015). Supreme Court rejects claim to alter digital newspaper archives. *El País* Available at https://elpais.com/elpais/2015/10/20/inenglish/1445336346_537716.html

Analysis	• Individuals: not public figures • Content article: *El País* reported about their conviction for drug trafficking • Complaint: Continued accessibility of the articles through internet violates their right to honour & privacy • Requested: o *El País* to de-index the articles from both, its archive and from Google search results o and to completely anonymize them (nor names, nor surnames, nor initials). • Court decision: o Digital archives are protected by freedom of information o News lawful, yet time elapsed makes the news irrelevant o *El País* to de-index archived articles from Google search results o BUT articles neither de-indexed from *El País'* archive o NOR articles anonymized • The case illustrated that o neither the right to be forgotten, nor the freedom of expression are absolute rights o courts will often need to make an appropriate balance o As a result of this decision, the integrity of the newspaper archive was preserved (freedom of the press), whilst the news stories about plaintiffs' criminal past are no longer available on an internet search (privacy). o Contrary to the previous decisions, this case is also important because it is the first court decision mentioning more details about the technical measures that controllers can undertake in order to de-list information from the internet. o Namely, the application of exclusion protocols *robot.txt* or codes such as *noindex*, *noarchive*. o It remains however unclear from courts' argumentation what this entails and how such technical measures work in practice. In this regard, it can be argued that courts' argumentation lacked depth. o Noteworthy is also that these technical measures can be traced back in the GDPR, in article 17.2 (information obligation). However, the new Regulation too, does not elucidate what such measures precisely entail and in particular how these can be applied. o This issue illustrates that the right to be forgotten prior to being a right and/or a value, it is above all a very technical (legal) instrument, that needs to be understood from a technical perspective too.

Case	**Spanish Supreme Court: Public's right to information overrides the right to privacy of public figures (Audiencia Nacional judgment of 5 June 2015)** [146]
Details	The case began in May 2011, when a practicing lawyer, Angel Daniel, opposed to the processing of his personal data by Google Spain. The plaintiff argued that Google Spain showed links to news published about him where he was imputed in a corruption case. Google dismissed his request and replied that they were merely processing data that was already published online. The data subject turned to the Spanish Data Protection Authority (AEPD). The AEPD rejected his claim too, arguing that the news has public relevance and that the search engine did not show links to webpages containing inaccurate or incorrect information. The AEPD ordered Google to de-index the webpages in question as to prevent their further access by internet users, but it did not request Google to delete the content from the webpages. The data subject appealed against this decision, and the case was referred to the Spanish Supreme Court (*Audencia Nacional*, AN). The plaintiff stated that although the webpages will not be easily accessible by everyone on an internet search, the information displayed on those webpages in itself is obsolete and not truthful.
Decision	The AN was faced in determining whether the data subject's right to privacy outweighs the freedom of the press of news publishers and the public's right to information. The AN decided that in this case freedom of the press should prevail. The Court considered that although time lapsed, the reported facts continue to be of significant public relevance. Given that the data subject is a public figure and plays an important role in public life (Lawyer and Chair of the Association of Matrimonial Lawyers), this makes the information in question even more relevant for the general public. Thus, in this case public's right to have access to information overrides the right to privacy and data protection of public figures.
Analysis	• Individual: public figure • Complaint: • Request: Google to de-list links to that article, because information obsolete and not truthful • Court decision: o Since public figure o the time factor does not alter the newsworthiness of the article • The case illustrated that: o As in the previous case (France) where the court argued in favour of freedom of expression/press,

146 Audencia Nacional. (2015). Sentencia de 5 de junio de 2015. N° 267/2015. Available at http://www.poderjudicial.es/search/doAction?action=contentpdf&databasematch=AN&reference=7438497&links=derecho%20al%20olvido&optimize=20150720&publicinterface=true

	o this case illustrates again that where the individual requesting the removal of personal information from the internet is a public figure (lawyer), the right to be forgotten is less likely to be granted. o This reasoning is similar to the argumentation in *Google Spain* and Article 29 Working Party non-binding guidelines.

Case	**Spanish Supreme Court: 'Outdated' information about individuals with no role in public life can be removed from Google's search results (AN Judgment of 19 February 2015)** [147]
Details	In March 2013, Jose Manuel requested Google Spain to remove all the weblinks referring to an archived article of the newspaper *El País*, and to prevent the future access to them. The article in question, dating back to February 1983, reported about data subject's prosecution for crime, and mentioned his name and surname. The data subject argued that the information contained in the article is obsolete, uninteresting and is causing him significant harm by being accessible to anyone who types his name on Google. Google Spain dismissed his request stating that only Google Inc. can de-index any links from Google search results. Moreover, Google Spain argued that the data subject has to address to the operator of the webpage to modify or remove the content from the webpage, otherwise the information will continue to appear in the Google search results. As the right to rectification and cancellation of personal data was not heeded, the data subject filed a claim before the Spanish Agency for Data Protection (AEPD). The AEPD granted the appeal in favour of the data subject. Google appealed against AEPD's decision before the Administrative Chamber of the Supreme Court (*Audencia Nacional*, AN).
Decision	AN held that AEPD's decision violates the freedom of information and expression of news publishers, stating that "the use of a search engine as a tool to silence information lawfully published constitutes an abuse of law, since digital newspapers fall within the scope of the protection of freedom of information". Referring to the Google Spain judgment, AN said that Google Spain being a subsidiary of Google Inc., is the entity responsible for the processing of plaintiffs' personal data. Thus, the data subject may directly address to Google Spain and request the de-indexing of the links in question. Furthermore, the AN considered that in light of (i) the time elapsed (more than 30 years since the initial publication of the information), (ii) the sensitivity of the information for the data subject's private life, and (iii) on account that the data subject plays no important role in public life, data subject's right to privacy should prevail over public's interest in having access to that information.
Analysis	• Individual: not public figure • Complaint: Crime prosecution reported by *El País* • Request: information has become obsolete and infringes his right to privacy • Court decision: o Given that individual is not a public figure, o and regardless of whether the news is lawful o the time factor (time elapsed) o and the sensivity of that information for data subject's private life o results that, data subject's right to privacy precedes public's interest in having access to that information • The case illustrated that: o the article remains accessible through *El País'* website, thus satisfying the right to freedom of the press of the news publisher, public's right to have access to that article and data subject's right to privacy. o Hence, as in the previous case (*A&B/ El País*) the Spanish Supreme Court confirms once again that the enforcement of the right to be forgotten does not result in censorship on the internet, and that an appropriate balance is necessary and possible. o However, neither in the case *A&B/ El País*, nor in the current case does the Spanish Supreme Court make any reference to a possible protection of the freedom of expression of search engine operators.

147 Audencia Nacional. (2015). Sentencia de 19 Febrero de 2015. N° 105/2015. Available at http://www.poderjudicial.es/search/doAction?action=contentpdf&databasematch=AN&reference=7331380&links=derecho%20al%20olvido&optimize=20150323&publicinterface=true

4. United Kindgdom

Case	**Press freedom: Case Malcom Edwards-Sayer** [148]
Details	In 2015, Malcom Edwards-Sayer, a former law lecturer and lay preacher, applied for injunctive relief forcing certain news publications, including BBC, to remove articles from Google search reporting about his imprisonment for tax fraud. Mr. Edwards claimed that the continued accessibility of the articles interfered with his right to privacy and the ability to lead a normal life. The data subject invoked the right to be forgotten under the 1998 Data Protection Act, the EU DPD and Article 8 of the Human Rights Act, which protects the right to respect for private and family life. He also referred to the CJEU's Google Spain ruling. However, at the time of his request, the data subject was still serving his sentence. The news publications and BBC alike objected to his demand, stating that given the seriousness of the case there was and remains *"a very significant public interest"* in the publication of the article complained about. BBC's director of editorial policy and standards, added that "*BBC's online news website replicates a library newspaper archive and it is important […] that it is retained intact to maintain public confidence in the service and avoid any suggestion that the BBC is erasing the past or altering history [...]."*
Decision	The Nottingham County Court dismissed Mr. Edwards' application, stating that the application is "*totally out of merit*". Considering the seriousness of the case and its public relevance, the Court approved that freedom of the press should prevail upon individual's right to privacy. The news stories about the original case still show up when "Malcolm Edwards-Sayer" is typed into Google.

Analysis	• Individual: Public figure
	• Complaint: accessibility of the articles reporting about his imprisonment for tax fraud infringes his right to privacy
	• Request: News publishers to delete the articles in question
	• Court decision:
	  o Given the individual is a public figure
	  o Seriousness of the case (the reports, but also the fact that the individual is still serving his sentence)
	  o Public has to know about those facts (public relevance)
	  o Primacy of freedom of the press and public's right to information
	• This case illustrated that:
	  o Articles reporting about judicial involvement of public figures, cannot be removed from online newsapers

148 BBC News. *Man loses 'right to be forgotten' Google court bid.* Available at http://www.bbc.com/news/uk-england-nottinghamshire-33706475

V. CONCLUSION

In the Google Spain ruling the CJEU makes clear that the implementation of the right to be forgotten under the Directive requires that delisting requests "*may be addressed by the data subject directly to the controller*", and that where the request is not granted, the data subject may "*bring the matter before the supervisory authority or the judicial authority*".[149] This paper looked at the latter aspect, namely, it compared *how the right to be forgotten is being enforced by courts in France, Germany, Spain and United Kingdom*. Particular attention was given to 'right to be forgotten' cases dealing with the aspect of balancing fundamental right to privacy with the right to freedom of expression, information and press freedom.

A. General trends

From this research, the following general trends can be identified :

- Out of the four countries analyzed, French (three cases) and Spanish (three cases) courts have dealt with more 'right to be forgotten' cases than German (one case) or British courts (one case).
- A majority of 'right to be forgotten' cases refer to pieces of news in digital newspapers reporting on data subjects' involvement in a judicial procedure, such as cases where criminal charges (fraud, drugs trafficking, rape and defamatory allegations) have been brought against them.
- In half of the cases, the data subjects requesting the delisting of information are public figures (businessmen, lawyer, sportsman, lay preacher) that play or have played an important role in public life.
- The freedom of expression (in the sense of right to provide information) of press publishers has always prevailed. In no case has a press publisher been requested to remove personal data from an article.
- Solely in one case did Google claim to have the right to freedom of expression (in the sense of the right to inform about facts of general public interest)
- But in no case did the court assess the freedom of expression of search engines.

B. Research questions answered

As mentioned above, in 'right to be forgotten' cases concerning public figures, courts have a strong argument in favour of freedom of expression. The main argument is that such information remains publicly relevant, as it is inseparably linked to the public role of the person concerned. This conclusion results from the case law in France (*Dokhan/Les Échos; M.P/20 Minutes*), Spain (*AN judgment, 5 June 2015*) and United Kingdom (*Malcom Edwards-Sayer*). These decisions reinforce the argument held by CJEU in Google Spain, namely that the right to be forgotten is not an absolute right and that in certain

149 Court of Justice of the European Union (2014). *Google Spain*, para. 77.

circumstances, such as when the data subject plays a role in public life, public's right to access information will prevail upon the right to privacy and data protection.

The delisting of information from search engine results is more likely to be granted when the data subject is not a public figure, regardless of whether the information is lawful, or whether the data subject was finally convicted or not. An important legal precedent has been created in Spain, where in two cases (*A & B/ El País; AN judgment, 19 February 2015)* the Supreme Court stated that detrimental information affecting individuals without any public relevance should not be easily accessible on the Internet, when the news has lost relevance over a considerable period of time.

It can be noted that in the cases where the right to be forgotten has been granted, in relation to both, search engines (*Marie-France M./Google Fr & Google Inc.; OLG Hamburg, 7 July 2015; AN judgment 19 February 2015*) and digital newspapers (*A&B/ El País)* **courts managed to strike an appropriate balance between data subject's right to privacy and freedom of expression rights of the general public and news publishers.** The recurring argument is that the articles de-indexed from Google search results remain accessible through newspapers' digital archives in their original form. This in turn implies that (i) the data subject's right to privacy is protected, (ii) public's interest in finding and having access to information is guaranteed, and (iii) the integrity of the press (online news publishers) is preserved.

The right to freedom of information of news publishers has always prevailed, as in no case has a news publisher been requested to de-index the articles from its website/archive, nor to anonymize them (delete personal data from the article). Rather, they were only asked to de-index the (archived) articles from search engine results and to prevent their further and future access by external search engines (e.g. Google). This is in line with the arguments held by the CJEU in *Google Spain* and with Article 29 WP non-binding guidelines. Information is never deleted, but only de-indexed from search results, and it remains accessible for the general public by using other search terms, or by direct access to the publisher's original source. Hence, contrary to what scholarly arguments suggest, the case law confirms that **the right to be forgotten does not undermine freedom of expression of the general public nor that of online news publishers**.

C. Beyond the usual suspects : freedom of expression by search engines

Scholarly criticism that the right to be forgotten may favour online censorship and prevent freedom of expression is legitimate. Nevertheless, a closer reading of CJEU's arguments in the Google Spain ruling reveals that the right to be forgotten does not undermine freedom of expression, at least of certain parties, namely individuals in search for information nor that of publishers willing to impart information. Equally important, but left outside of CJEU's analysis is search engines' freedom of expression - understood as **the right to claim protection for publishing referencing information and for their crawling activity.**

This argument is not sustained by any of the national cases. Whereas courts have given precedence to the freedom of press over the right to privacy, **no consideration has been given to a possible freedom of expression by search engines**. As in *Google Spain*, the national cases indicate that there is a lack of attention to the freedom of expression by search engines. Whereas news publishers are

protected by the freedom of information because they satisfy a public interest, search engines cannot benefit from such protection because their activity is intermediary and rather economic in nature.

The economic argument is plausible, however this paper illustrated that news publishers similar to search engines, also have legitimate economic interests. Search engines on the one hand, offer free digital services and enable internet users to search and find information on the web, which in turn implies, that the aggregation of user's personal data is the primary source of value by which these companies generate revenues. News publishers/Publishers of websites (e.g. news websites, digital newspapers) on the other hand fulfil a 'journalistic' role (Art. 9, DPD; Art. 17.3, GDPR); nevertheless, their publishing activity also has the purpose of raising advertising revenues online.

D. Final thoughts & research suggestions

Taken together, the case-law confirmed that the right to be forgotten does not compromise the freedom of expression rights of searchers and publishers of information. Yet, it has also demonstrated that **the right to be forgotten implies in principle a difficult balance between the rights of multiple parties** (beyond the usual suspects): (i) data subject's right to privacy, freedom of expression rights of (ii) searchers, (iii) news publishers and (iv) eventually search engine operators.

Seen from a societal perspective, the implementation of the right to be forgotten highlights the importance given to privacy in the European Union. However, the paper illustrated that **the right to be forgotten is more than a right or value. It is in essence a complex technical instrument**. Implementing such a right requires the application of 'technical measures' by controllers. The GDPR does not provide any explanation about what such measures could entail, nor did the European Commission (Directorate General for Justice and Consumers) elucidate upon this issue. The analysis of the national cases revealed that this implies among others, the application of exclusion protocols such as *robot.txt*, or codes like *noindex* or *noarchive* by controllers. Courts alike, still offer little to any explanation on what these protocols/codes entail, nor how these work in practice. Therefore, prior to any legal discussion a technical perspective may be necessary.

Further, the study highlighted that in the European Union search engines are not considered companies that provide content (based on which they would eventually invoke freedom of expression claims). Search engines only facilitate access to content but do not create any new autonomous content. At present, there is rather limited research on search engines' freedom of expression, and the question of whether these could eventually benefit from freedom of expression remains largely unanswered.

This aspect adds a new dimension to the debate about the right to be forgotten and freedom of expression, and **the following open questions may provide a basis for a future research**. Is freedom of expression a right of individuals and limited to news publishers, or can search engines benefit from freedom of expression too? What is the approach in other cases? Are there any legal grounds for this in the European Union, what does the law provide? Is the freedom of expression claim by search engines a recurring argument (are they consistently claiming freedom of expression), or do they claim different things (e.g. corporate rights) depending on the favoring circumstances of the case?

BIBLIOGRAPHY

Abril, S.P. & Moreno, P.E. (2016). Case report. Lux in Arcana: decoding the right to be forgotten in Digital Archives. *MDPI Laws*, 5:33, 1-9. Available at http://www.mdpi.com/2075-471X/5/3/33/htm

Allegra, A. (2016). Données personnelles: Primauté de la liberté d'information sur le droit à l'oubli. *LexTimes*, *Journal d'information juridique indépendant et participatif*. Available at http://www.lextimes.fr/jurisprudence/droit-civil/donnees-personnelles/primaute-de-la-liberte-dinformation-sur-le-droit-loubli

Agencia Española de Protección de Datos (AEPD). https://www.agpd.es/portalwebAGPD/index-ides-idphp.php

Audencia Nacional. (2015). Sentencia de 5 de junio de 2015. N° 267/2015. Available at http://www.poderjudicial.es/search/doAction?action=contentpdf&databasematch=AN&reference=7438497&links=derecho%20al%20olvido&optimize=20150720&publicinterface=true

Audencia Nacional. (2015). Sentencia de 19 Febrero de 2015. N° 105/2015. Available at http://www.poderjudicial.es/search/doAction?action=contentpdf&databasematch=AN&reference=7331380&links=derecho%20al%20olvido&optimize=20150323&publicinterface=true

Article 29 Data Protection Working Party. (2014). Guidelines on the implementation of the Court of Justice of the European Union Judgment on "Google Spain and Inc v. Agencia Española de Protección de Datos (AEPD) and Mario Costeja Gonzalez" C-131/12, 14/EN/WP 225, p. 2, 13. Available at http://www.dataprotection.ro/servlet/ViewDocument?id=1080

Bartolini, C. & Siry, L. (2016). The right to be forgotten in the light of the consent of the data subject. *Computer Law & Security Review, 32*(2), pp. 218–237. Available at http://private-law-theory.org/?p=8335

BBC News. *Man loses 'right to be forgotten' Google court bid.* Available at http://www.bbc.com/news/uk-england-nottinghamshire-33706475

Bernal, P. (2011). A right to delete?. *European Journal of Law and Technology, 2*(2). Available at http://ejlt.org/article/view/75/144

Berners-Lee, T. (2005). *Uniform Resource Identifier (URI): generic syntax.* 61 p. Available at https://tools.ieft.org/pdf/rfc3986

BfDI. Federal commissioner for data protection and freedom of Information. Available at https://www.bfdi.bund.de/DE/Home/home_node.html

Blind, J. & Brommer, A. (2015). *Privacy & the media. Traditional & emerging protections in an online world*. International Association of Young Lawyers, AIJA National Congress, National Report Germany, pp. 20. Available at http://london.aija.org/wp-content/uploads/2015/07/Germany-IP-REPORT.pdf

Boletin Oficial del Estado (BOE). (2011). *Ley orgánica 15/1999, de 13 de diciembre, de protección de datos de carácter personal*. Available at https://www.boe.es/buscar/act.php?id=BOE-A-1999-23750&p=20110305&tn=2

Burke, (B). (s.d.). *A close look at close reading : scaffolding students with complex texts*. National Board Certified Teachers (NBCT), 14 p. Available at https://nieonline.com/tbtimes/downloads/CCSS_reading.pdf

Carter, L.E. (2016). The right to be forgotten. *Media & Communication Policy*. Available at http://communication.oxfordre.com/view/10.1093/acrefore/9780190228613.001.0001/acrefore-9780190228613-e-189

Cheron, A. (2015). *Affaire Marie-France M/Google: Sur le déréférencement, le droit à l'oubli et les données personnelles*. Available at www.village-justice.com/articles/Affaire-Marie-France-Google-sur,18720.html

Council of Europe and European Court of Human Rights. (1950). *European Convention on Human Rights*. Available at http://www.echr.coe.int/pages/home.aspx?p=basictexts

Court of Justice of the European Union. (2014). Google Spain SL, Google Inc. v. Agencia Española de Protección de Datos, Mario Costeja González (Case C-131/12). Available at http://curia.europa.eu/juris/document/document_print.jsf?doclang=EN&docid=152065

Court of Justice of the European Union. (2013). Opinion of Advocate General Jääskinen delivered on 25 June 2013 (1) Case C-131/12 Google Spain SL Google Inc. v Agencia Española de Protección de Datos (AEPD) Mario Costeja González, para. 32. Available at http://curia.europa.eu/juris/document/document.jsf?docid=138782&doclang=EN

European Commission. (2012). Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee of Regions COM(12)9 final. Safeguarding privacy in a connected world: a European data protection framework for the 21st Century. Brussels: European Commission. Availbale at http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52012DC0009&from=en

European Commission, DG Justice. (2014). *Factsheet on the "right to be forgotten" ruling*. Brussels: European Commission. Available at http://ec.europa.eu/justice/data-protection/files/factsheets/factsheet_data_protection_en.pdf

European Commission. (2012). (*COM/2012/011 final - 2012/0011 (COD)* Proposal for a Regulation of the European Parliament and 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, GDPR. Brussels: European Commission. Available at http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52012PC0011&from=EN

European Commission. (2016). Joint Statement on the final adoption of the new EU rules for personal data protection. Available at http://europa.eu/rapid/press-release_STATEMENT-16-1403_fr.htm

European Parliament & Council. (2016). Regulation on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation, GDPR). Brussels: European Parliament & the Council Available at http://ec.europa.eu/justice/data-protection/reform/files/regulation_oj_en.pdf

European Parliament. (2016). *Factsheets on the European Union - Human Rights*. Available at http://www.europarl.europa.eu/atyourservice/en/displayFtu.html?ftuId=FTU_6.4.1.html

European Parliament. (2015). *Press freedom in the EU: legal framework and challenges*. Available at http://www.europarl.europa.eu/EPRS/EPRS-Briefing-554214-Press-freedom-in-the-EU-FINAL.pdf

European Parliament, the Council and the Commission. (2000). Charter of Fundamental Rights of the European Union. *Official Journal of the European Communities*, 2000/346. Available at http://ec.europa.eu/justice/fundamental-rights/charter/index_en.htm

European Parliament & the Council. (1995). 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. Luxembourg: European Parliament & the Council. Available http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:31995L0046&from=EN

Equality and Human Rights Commission. (2016).*The Human Rights Act: Article 10 – freedom of expression*. Available at https://www.equalityhumanrights.com/en/human-rights-act/article-10-freedom-expression

Frantziou, (E). (2014). Further developments in the right to be forgotten: The European Court of Justice's judgment in case C-131/12, Google Spain, SL, Google Inc v Agencia Española de Protección de Datos. *Human Rights Law Review, 14 (*4): 761-777. Available at https://academic.oup.com/hrlr/article/14/4/761/644686/Further-Developments-in-the-Right-to-be-Forgotten

French Supreme Court. (2016). *Cour de Cassation - Première, Stéphane et Pascal X. c/Les Échos, N° 15-17729*. Available at http://junon.univ-cezanne.fr/u3iredic/?p=19689

French Government. (2016). *Innovation, inclusion, confiance: loi pour une république numérique*. Dossier de Presse. Available at http://www.economie.gouv.fr/files/files/PDF/DP_LoiNumerique.pdf

French Government. (2008). *Loi du 29 Juillet 1881 sur la liberté de la presse*. Available at www.gouvernement.fr/en/everything-you-need-to-know-about-freedom-of-expression-in-france

French Government. (2017). *Loi du 29 juillet 1881 sur la liberté de la presse -Version consolidée au 17 octobre 2017*. Available at https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000877119&fastPos=1&fastReqId=1757100542&categorieLien=cid&oldAction=rechTexte

French Parliament. (1978). Loi 78/17 du janvier 6, 1978, relative à l'informatique, aux fichiers, et aux libertés. Available at https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000886460

French Parliament. (1978). *Loi 78/17 du janvier 6, 1978, relative à l'informatique, aux fichiers, et aux libertés*. Available at https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=LEGITEXT000006070722

French Parliament. (2006). *Loi n° 2016-1321 du 7 octobre 2016 pour une République numérique*. Available at https://www.legifrance.gouv.fr/affichTexte.do;jsessionid=2EEDDC53AA4334B2F421EFAD13113A7B.tpdila23v_1?cidTexte=JORFTEXT000033202746&dateTexte=&oldAction=rechJO&categorieLien=id&idJO=JORFCONT000033202743

German Parliament. (2009). *Federal Data Protection Act in version promulgated on 14 January 2003, as most recently amended by Article 1 of the Act of 14 August 2009*. Available at https://www.gesetze-im-internet.de/englisch_bdsg/englisch_bdsg.html

German Parliament. (2014). German basic law. Available at https://www.btg-bestellservice.de/pdf/80201000.pdf

German Parliament. (2017). *Gesetz zur Anpassung des Datenschutzrechts an die Verordnung (EU) 2016/679 und zur Umsetzung der Richtlinie (EU) 2016/680 (Datenschutz-Anpassungs- und -Umsetzungsgesetz EU - DSAnpUG-EU)*. Available at https://www.bgbl.de/xaver/bgbl/start.xav?startbk=Bundesanzeiger_BGBl#__bgbl__%2F%2F*%5B%40attr_id%3D%27bgbl117s2097.pdf%27%5D__1502799623691

Hancock, M. (2017). *Government to strengthen UK data protection law*. Press release, 7 August, Department of Digital, Culture, Media & Sport, UK Government. Available at https://www.gov.uk/government/news/government-to-strengthen-uk-data-protection-law

Hijmans, H. (2014). Right to have links removed: evidence of effective data protection. pp. 556-563. Available at https://www.ivir.nl/publicaties/download/1718.pdf

IBM Knowledge Center. *The components of a URL*. Available at https://www.ibm.com/support/knowledgecenter/en/SSGMCP$_5$.1.0/com.ibm.cics.ts

Information Commissioner's Office (ICO). https://ico.org.uk/about-the-ico/

Jurizine.net. *Liberté d'opinion et liberté d'expression*. Available at http://www.jurizine.net/2005/09/03/33-articles-10-et-11-ddhc-liberte-dopinion-et-liberte-dexpression

Karapapa, S. & Borghi, M. (2015). Search engine liability for autocomplete suggestions: personality, privacy and the power of the algorithm. *International Journal of Law and Information Technology, 23(3)*, 261-289. Available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2862667

Keller, D. (2015). The final draft of Europe's "right to be forgotten" Law. Available at http://cyberlaw.stanford.edu/blog/2015/12/final-draft-europes-right-be-forgotten-law

Kodde, C. (2016). Germany's Right to be Forgotten - between freedom of expression and the right to informational self-determination. *International Review of Law, Computers & Technology*. Available at http://www.tandfonline.com/doi/abs/10.1080/13600869.2015.1125154?journalCode=cirl20

Kulk, S., Borgesius, Z.J.F. (2015). Freedom of expression and 'right to be forgotten' cases in the Netherlands after Google Spain'. *European Data Protection Law Review*, 2, pp. 113-125. Available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2652171

Kulk, S. & Borgesius, F. Z. (2014). Google Spain v. González: did the Court forget about freedom of expression?. *European Journal of Risk Regulation*, 5(3), 389-398. Available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2491486

Latham & Watkins Internet & Digital Media Industry Group. (2016). *French Digital Republic law expands rights of users and regulators*. Available at: https://www.lw.com/thoughtLeadership/French-digital-republic-law-english

Les Échos. (2006). *Le Conseil d'Etat réduit la sanction de frères Dokhan a un blâme*. Available at https://www.lesechos.fr/08/11/2006/LesEchos/19789-196-ECH_le-conseil-d-etat-reduit-la-sanction-des-freres-dokhan-a-un-blame.htm

Levine, (D). (2014). The MH17 disaster demonstrates the dangers of "right to be forgotten". *Slate Future Tense*. Available at http://www.slate.com/blogs/future_tense/2014/07/22/mh17_investigation_and_the_right_to_be_forgotten.html

Library of Congress. Online privacy law: United Kingdom. Available at https://www.loc.gov/law/help/online-privacy-law/uk.php

Lindsay, D. (2014). Chapter 13 - The 'right to be forgotten' in European data protection law. In W. Normann (Ed.), *Emerging challenges in privacy law*. UK, Cambridge University Press, pp. 470.

Livingstone, S. (2017). Children's privacy rights are prominent in the data protection bill but there's many a slip… . *LSE Media policy project blog*. Available at http://blogs.lse.ac.uk/mediapolicyproject/2017/08/14/childrens-privacy-rights-are-prominent-in-the-data-protection-bill-but-theres-many-a-slip/

Lynskey, O. (2017). The great data protection rebranding exercise. *LSE Media policy project blog*. Available at http://blogs.lse.ac.uk/mediapolicyproject/2017/08/08/the-great-data-protection-rebranding-exercise/

Morozov. E. (2014). Google says we have a "right to know," but really just wants the right to profit from your personal information. *New Republic*. Available at https://newrepublic.com/article/117844/googles-right-know-vs-europes-right-be-forgotten

Newman, A. (2014). EU Court invents “right” to be forgotten, orders Google to obey. *New American*, Available at https://www.thenewamerican.com/world-news/europe/item/18269-eu-court-invents-right-to-be-forgotten-orders-google-to-obey

Oberlandesgericht Hamburg. (2015). Urteil vom 07.07.2015, 7 U 29/12. Available at https://openjur.de/u/838786.html

Parkinson, J. (2014). The perils of the Streisand effect. BBC News Magazine. Available at: https://bbc.com/news/magazine-28562156

Peers, S. (2014). ‘The right to be forgotten’: The future EU legislation takes shape. Available at http://eulawanalysis.blogspot.be/2014/09/the-right-to-be-forgotten-future-eu.html

Peguera. M. (2015). In the aftermath of Google Spain. How the right to be forgotten is being shaped in Spain by courts and the Data Protection Authority. *Int J Law Info Tech, 23*(4): 325-347. Available at https://academic.oup.com/ijlit/article-abstract/23/4/325/2357337/In-the-aftermath-of-Google-Spain-how-the-right-to

Peguera, M. (2017). Derecho al olvido: ¿el buscador puede informar a la fuente de la eliminación de un enlace?. *Responsabilidad en Internet blog*. Available at: https://responsabilidadinternet.wordpress.com/2017/03/04/derecho-al-olvido-el-buscador-puede-informar-a-la-fuente-de-la-eliminacion-de-un-enlace/

Peguera, M. (2017). The application of the right to be forgotten in Spain. *ISP liability blog*. Available at https://ispliability.wordpress.com/2017/07/03/the-application-of-the-right-to-be-forgotten-in-spain/

Raab, T. (2015). Das „recht auf vergessenwerden“ kann erst recht gegenüber dem betreiber eines online-archivs geltend gemacht werden. *IRIS, 10:1*/10, Saarbrücken/Brüssel. Available at http://merlin.obs.coe.int/iris/2015/10/article10.de.html

Reding, V. (2010). *Privacy matters - why the EU needs new personal data protection rules*. Speech/10/70, 30 November, Brussels: European Commission. Available at http://europa.eu/rapid/press-release_SPEECH-10-700_en.pdf

Rincon, R. (2015). Supreme Court rejects claim to alter digital newspaper archives. *El País.* Available at http://elpais.com/elpais/2015/10/20/inenglish/1445336346_537716.html

Rosen. J. (2011). Free speech, privacy and the web that never forgets. *Journal on Telecommunications and High Technology*. Available at http://jthtl.org/content/articles/V9I2/JTHTLv9i2_Rosen.PDF

Rosen, J. (2012). The right to be forgotten. *Standford Law Review Online, 88*, 88. Available at https://www.stanfordlawreview.org/online/privacy-paradox-the-right-to-be-forgotten/

Solon, (O). (2014). People have the right to be forgotten, rules EU court. *Wired UK*. Available at http://www.wired.co.uk/article/right-to-be-forgotten-blog

Singleton, S. (2015). Balancing a right to be forgotten with a right to freedom of expression in the wake of Google Spain v. AEPD. *Georgia Journal of International and Comparative Law, 44*: 166-193. Available at http://digitalcommons.law.uga.edu/gjicl/vol44/iss1/6

Stern J., M. (2014). Speaking in code. Are Google search results protected by the First Amendment?. *Slate*. Available at http://www.slate.com/articles/technology/future_tense/2014/11/are_google_results_free_speech_protected_by_the_first_amendment.html

Tarruella-Lopez, A. (2012). 1. Introduction: Google pushing the boundaries of law. In Tarruella-Lopez, A. (ed.) *Google and the law: empirical approaches to legal aspects of knowledge-economy business models*. The Netherlands: T.M.C. Asser Press, pp. 404.

The House of Lords.(2014-2015). *EU data protection law: a 'right to be forgotten'*. London: The Stationery Office limited. Available at https://www.publications.parliament.uk/pa/ld201415/ldselect/ldeucom/40/4002.htm

The National Archives. Data Protection Act 1998, c. 29. UK Government. Available at http://www.opsi.gov.uk/acts/acts1998/ukpga_19980029_en_1

The North Rhine-Westphalia commissioner for data protection and freedom of information (LDI NRW). Data Protection Authorities in Germany. Available at https://www.ldi.nrw.de/LDI_EnglishCorner/mainmenu_DataProtection/Inhalt2/authorities/authorities.php

The Spanish Constitution. (1978). Available at http://www.parliament.am/library/sahmanadrutyunner/ispania.pdf

Tribunal de grande instance de Paris 17ème chambre civile Jugement du 23 octobre 2013. Bruno L., Ressources et actualisation / Google Inc., Google France. Available at https://www.legalis.net/jurisprudences/tribunal-de-grande-instance-de-paris-17eme-chambre-civile-jugement-du-23-octobre-2013/

Tribunal de Grande Instance de Paris (2015). Ordonnance de réfère du 23 mars 2015. Available at www.legalis.net/jurisprudences/tribunal-de-grande-instance-de-paris-ordonnance-de-refere-du-23-mars-2015/

Tribunal de Grande Instance de Paris. (2014). Ordonnance de référé du 19 décembre 2014. Marie-France M./Google France et Google Inc. Available at www.legalis.net/jurisprudences/tribunal-de-grande-instance-de-paris-ordonnance-de-de-refere-du-19-decembre-2014/

Tribunal Supremo. (2015). Sentencia N° 545/2015. Available at http://www.poderjudicial.es/cgpj/es/Poder-Judicial/Noticias-Judiciales/El-Supremo-reconoce-el--derecho-al-olvido--digital-de-dos-procesados-implicados-en-un-caso-de-drogas-en-los-ochenta

Tunick, M. (2015). *Balancing privacy and free Speech: unwanted attention in the age of social media.* London : Routledge, pp. 222.

UK Government. Department for Digital, Culture, Media and Sport. (2017*). A new Data Protection Bill: our planned reforms - statement of intent*. Available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/635900/2017-08-07_DP_Bill_-_Statement_of_Intent.pdf

Van Hoboken, J.V.J. (2013). The proposed right to be forgotten seen from the perspective of our right to remember : freedom of expression safeguards in a converging information environment. 30 pp. Available at

http://www.law.nyu.edu/sites/default/files/upload_documents/VanHoboken_RightTo%20Be%20Forgotten_Manuscript_2013.pdf

Van Hoboken, J. V. J. (2012). Search engine freedom: on the implications of the right to freedom of expression for the legal governance of Web search engines, 228 pp. Available at https://pure.uva.nl/ws/files/1769429/104098_thesis.pdf

Varet, V. (2016). *Quand le droit à l'oubli numérique se heurte à la liberté de la presse*. Available at http://www.journaldunet.com/economie/expert/64585/quand-le-droit-a-l-oubli-numerique-se-heurte-a-la-liberte-de-la-presse.shtml

Volokh, E. & Falk, M. D. (2012). White paper - Google: First Amendment for search engine results. pp. 27. Available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2055364

Warren, C. & Laslett, B. (1977). Privacy and secrecy : a conceptual comparison. J*ournal of Social Issues, 33*(3), p. 43-51. Available at http://onlinelibrary.wiley.com/doi/10.1111/j.1540-4560.1977.tb01881.x/abstract

Wechsler, S. (2015). The Right to Remember: The European Convention on Human Rights and the right to be forgotten. *Columbia Journal of Law and Social Problems, 49(*1), p. 136-164. Available at https://www.researchgate.net/publication/298641066_The_right_to_remember_The_European_convention_on_human_rights_and_the_right_to_be_forgotten

Weber, H. R. (2011). The right to be forgotten: more than a pandora's box. *JIPITEC*, 120, 2, para. 1, p. 123. Available at http://www.jipitec.eu/issues/jipitec-2-2-2011/3084

World Association of Newspapers and News Publishers (WAN IFRA). (2016). *French judge establishes prevalence of freedom of the press on the right to be forgotten*. Available at https://blog.wan-ifra.org/2016/05/23/french-judge-establishes-prevalence-of-freedom-of-the-press-on-right-to-be-forgotten

Zell. A.M. (2015). Data Protection in the Federal Republic of Germany and the European Union: an unequal playing field. *German Law Journal, 15(*03). Available at https://static1.squarespace.com/static/56330ad3e4b0733dcc0c8495/t/56a95d4c4bf1182859633f69/1453940044969/GLJ_Vol_15_No_03_Zell.pdf