Application No. 77419/16

IN THE EUROPEAN COURT OF HUMAN RIGHTS

BIANCARDI

Applicant

-v-

ITALY

Respondent

WRITTEN COMMENTS OF THE THIRD-PARTY INTERVENERS

Introduction

1. The Third-Party Interveners ("the Interveners") submit these written comments pursuant to leave granted by the President of the Third Section under Rule 44 (3) of the Rules of the Court.

2. This case concerns the 'right to be forgotten'[1] and raises important questions of principle concerning how individual states balance competing rights of access to information, free expression and opinion, and press freedom with privacy and data protection. While recognising that each member state of the Council of Europe is entitled to strike what it considers to be a fair and proper balance between these rights, the Interveners submit that the Court must take into account the serious and negative impact the 'right to be forgotten' has had on access to information, freedom of expression, and freedom of the press. Those adverse impacts, described below, have been exacerbated by the application of the 'right to be forgotten' beyond its intended scope.

3. In its 2014 Google Spain judgment the Court of Justice of the European Union (the 'CJEU') was asked to define the extent of the rights and obligations arising out of Directive 95/46/EC (the Directive').[2] That judgment held that search engine operators must, upon request from a data subject, remove links that result from searches of an individual's name where those results are "inadequate, irrelevant or no longer relevant, or excessive in relation to the purposes... carried out by the operator of the search engine". The initial scope of the 'right to be forgotten' was limited in a number of ways, including to search engines, and imposed the requirement to de-list search results associated with an individual's name. It did not extend to the underlying content in issue, for example newspaper archives or other online content.

4. Since the Google Spain judgment, courts in Europe and elsewhere have expanded the scope of the 'right to be forgotten'. This expansion, often requiring removal or anonymisation of content, has had a significant impact on how the media, and other Internet content providers, make content available online. A fundamental aspect of the right to freedom of expression is the right of the media to perform its essential function as a "public watchdog" in a democratic society. The media discharges this function where it informs and educates the general public about public interest matters. Any barrier or obstacle that prevents the media from being able to discharge this function will inevitably have an adverse effect on the right to receive and impart information and ideas on matters of public concern. While there is a balance to be struck between the right to freedom of expression and other rights in the context of the 'right to be forgotten', the permanent removal of public interest information from the Internet in particular will have a deleterious impact on the online media archive, which is an essential component of modern-day newsgathering and reporting.

5. The Interveners are concerned that the 'right to be forgotten' is now being applied in a way that represents a significant threat to the Article 10 right to freedom of expression. These written comments will focus on the following issues, with reference to relevant international and comparative law and commentary:

    (i) The importance of protecting and maintaining the media archive, and public access to that archive, including online;
    (ii) The expansion of the 'right to be forgotten' beyond its intended scope; and
    (iii) Removal of online content should only take place where certain minimum standards are met.

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[1] The term 'right to be forgotten' typically refers to the right to have personal information which is discoverable through a search carried out using a person's name "delisted" or "de-indexed" by the operators of internet search engines.

[2] CJEU, *Google Spain SL, Google Inc. v Agencia Española de Protección de Datos (AEPD), Mario Costeja González,* Case C-131/12, (13 May 2014), available at: https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62012CJ0131&from=EN

Maintaining public access to the media archive, including online

6. This Court has recognised that "in the light of its accessibility and its capacity to store and communicate vast amounts of information, the Internet plays an important role in enhancing the public's access to news and facilitating the dissemination of information in general".[3] This is increasingly true, as more and more people and entities rely on the Internet as an essential source of information and as a critical tool for dissemination of information.[4]

7. In that regard, search engines are an important tool for journalists to research, locate and gather information, to follow investigative leads, and to discover relevant facts. Where delisting of information from search results displayed on search engines takes place, that prevents journalists from knowing that information was erased, and impacts on the important journalistic task of investigating and uncovering information of public interest. This is especially true since the 'right to be forgotten' operates on the basis that searches for particular names should no longer return search results. It should therefore be obvious that preventing searches by name has a detrimental impact on investigative journalism, which often requires the ability to find out potentially embarrassing or damaging information about particular individuals. Equally, news reports generate interest because they tell stories about particular individuals.[5] The ability to search for someone's name is therefore often crucial to finding relevant information. This threat to press freedom is real and has been well documented.[6]

8. Requests for erasure of newspaper articles containing the personal information of individuals, or for anonymisation of articles directed against online media publishers, considerably expand the scope of the 'right to be forgotten'. They also place it in even starker conflict with freedom of expression and press freedom.[7] The CJEU, in its Google Spain decision, imposed delisting obligations on search engines. It expressly did not impose those same obligations on online media websites because the relevant EU Directive afforded protections for content created for journalistic purposes as well as for the protection of freedom of expression.[8] Similarly, the General Data Protection Regulation (the 'GDPR') recognises that "the processing of personal data solely for journalistic purposes, or for the purposes of academic, artistic or literary expression should be subject to derogations or exemptions from certain provisions of this Regulation … This should apply in particular to the processing of personal data in the audio-visual field and in news archives and press libraries".[9]

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[3] ECtHR, *Times Newspaper Ltd v United Kingdom (nos. 1 and 2)*, App nos. 3002/03 and 23676/03, § 27. Contrast this with *Google Spain*, § 87, which did not seem to fully acknowledge that vital role ("*may* play a decisive role").

[4] See ECtHR, *Times Newspapers Ltd v the United Kingdom (nos. 1 and 2)*, App nos. 3002/03 and 23676/03, § 45.

[5] See for example *Guardian News and Media Ltd & Ors, Re HM Treasury v Ahmed & Ors* [2010] UKSC 1 (27 January 2010) and Lord Rodger's speech at § 63: "What's in a name? 'A lot' the press would answer. This is because stories about particular individuals are simply much more attractive than stories about unidentified people. It is just human nature".

[6] The Court noted the impact of the 'right to be forgotten' on the media in ECtHR, *M.L. and W.W. v. Germany*, App nos. 60798/10 and 65599/10, § 103-104 (28 June 2018). According to the Google Transparency Report - under *Categories of websites hosting content requested for delisting* - news websites accounted for 19.4% of the websites containing URLs subject to a request for delisting since the start of 2016. The Court should note that the Transparency Report is not a detailed analysis of how Google deals with delisting requests and so does not, for example identify requests relating to journalism that appear on websites other than those categorised by Google as 'news websites', available at: https://transparencyreport.google.com/eu-privacy/overview?hl=en_GB.

[7] See Haya Yaish, *Forget Me, Forget Me Not: Elements of Erasure to Determine the Sufficiency of a GDPR Article 17 Request* (2019) Vol. 10 Issue 1 Journal of Law, Technology & The Internet, available at: https://scholarlycommons.law.case.edu/cgi/viewcontent.cgi?article=1115&context=jolti

[8] See Article 29 Working Group *four salient features of the Google Spain decision* – "4. No information is deleted from the original source - The judgment states that the right only affects the results obtained from searches made on the basis of a person's name and does not require deletion of the link from the indexes of the search engine altogether. That is, the original information will still be accessible using other search terms, or by direct access to the publisher's original source." Available at: https://www.pdpjournals.com/docs/88502.pdf

[9] See Article 85 and Recital 153 of the GDPR available at: https://gdpr-info.eu.

9. This Court has recognised the importance of media archives, noting that they "constitute an important source for education and historical research, particularly as they are readily accessible to the public and are generally free".[10] It has highlighted that in addition to its role in communicating information and ideas the press has an additional function, that of building up archives from already-published information and making those archives available to the public.[11] This constitutes an essential resource for teaching and for historical research and an important tool for journalists to research, locate and gather information, to follow investigative leads, and to discover relevant facts. Delisting information from the Internet prevents journalists from knowing that information was erased, thereby impairing the important journalistic task of investigating and uncovering information of public interest.

10. This Court has, on a number of occasions, emphasised that media archives are entitled to protection under Article 10, and particularly strong reasons must be provided for any measure limiting access to information which the public has the right to receive, in particular where the content relates to contemporaneous court reporting.[12] In *ML and WW v Germany* it noted that deference should be afforded to editorial judgment in that context when deciding whether to remove existing news articles.

11. In that case, the Court expressed concern about the chilling effect 'right to be forgotten' requests would have on media organisations with respect to archived content. For example, would the media organisations be required to constantly examine their archived material for content that might be unlawful or have become unlawful? The obligation to perform such a task would place a considerable, potentially ruinous, burden considering how many documents, audio and video files and other content is added to often already substantial media archives on a daily basis.[13] These concerns arise even if the 'right to be forgotten' is considered upon request, on a case-by-case basis, and in the absence of any general obligation to monitor and delete archived publications. These concerns are particularly relevant in circumstances where the passage of time – whether a piece of information is 'no longer' relevant – is one of the key considerations in determining whether that information should be removed. It is difficult to reconcile this consideration with the purpose of archives, which contain information that might become relevant at a future, unknown date.

12. The Interveners are already concerned about the effect the application of the 'right to be forgotten' against search engines is having on media archives. Although content that is delisted from search engines may still remain available on the original website, for the vast majority of the public it becomes much more difficult to access that content because of delisting. In the pre-digital age researchers, historians, journalists and the public generally relied on newsstands, libraries, and radio and television broadcasts to access information. Now they rely on Internet search engines, often even in place of a particular publisher's website.[14] Delisting of information on a search engine significantly impacts the ability of publishers to distribute information to a wide audience.[15] Moreover, delisting may not only prevent readers from finding information, but may actually mislead many people into believing that information does not exist. When a search does not reveal information, many users may conclude that there is

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[10] ECtHR, *Węgrzynowski and Smolczewski v Poland*, App no. 33846/07, § 59 (16 July 2013).

[11] ECtHR, *Observer and Guardian v the United Kingdom* (26 November 1991) Series A no. 216.

[12] See ECtHR, *Timpul Info-Magazin and Anghel v Moldova,* App no. 42864/05, § 31 (27 November 2007); and ECtHR, *Times Newspapers Ltd v the United Kingdom (nos. 1 and 2)*, App nos. 3002/03 and 23676/03, § 41, ECHR 2009.

[13] ECtHR, *M.L. and W.W. v Germany*, App nos. 60798/10 and 65599/10, § 83 – 85 (28 June 2018).

[14] Donald Cleveland & Ana Cleveland, *Introduction to Indexing and Abstracting 259*, 4th edition 2013.

[15] The role that search engines play has been acknowledged by the Member States' data protection authorities in the WP 29 *Guidelines on the right to be forgotten* ("Taking into account the important role that search engines play in the dissemination and accessibility of information posted on the Internet and the legitimate expectations that webmasters may have with regard to the indexation of information and display in response to users' queries"), see Guidelines at p. 10. However, the Guidelines fail to set up a workable system to make sure that access to information is properly taken into account.

nothing to be found about a particular person, when in fact there is information, but it has simply been delisted. This problem applies *a fortiori* where that content is removed from the original source.

13. If people are not able to freely search for delisted information through Internet search engines such as Google, the practical consequence is that the delisted information will become significantly harder to access. Where that information is ordered to be removed from the primary publisher it is effectively censored from public view.

The expansion of the 'right to be forgotten' beyond its intended scope

14. The 'right to be forgotten' is not an international legal standard.[16] Many jurisdictions do not recognise the 'right to be forgotten', or an approximate equivalent, and some jurisdictions go further than that, affirmatively requiring public access to certain types of information.[17]

15. While different countries may strike different balances between the right to freedom of expression and press freedom, on the one hand, and the right to protection of personal data on the other, worryingly, several European courts have extended the doctrine beyond its intended scope, in the process disregarding the well-established exemption for newspaper websites' processing of data for journalistic purposes, and imposing anonymisation, delisting, and even erasure obligations on newspapers.[18]

16. This Court has developed a long line of case law that establishes a carefully calibrated balance between data subjects' privacy rights and newspapers' right to freedom of expression.[19] A decisive factor in that balancing exercise is whether the public interest is engaged.[20] Despite this clear line of authority, many European courts have ignored free expression and press freedom and have instead expanded the 'right to be forgotten' and associated privacy rights in a way that constitutes a serious threat to freedom of expression and press freedom.

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[16] See for example U.S. Court of Appeals of the 9th Circuit, judgment in *Garcia v Google, Inc.*, 786 F.3d 733, 745 (9th Cir. 2015), finding that American actress could not force Google to remove her association with a video on YouTube, "such a 'right to be forgotten', although recently affirmed by the Court of Justice of the European Union, is not recognized in the United States."; Colombian Constitutional Court, judgment of 12 May 2015, No. T277 *Gloria v Casa Editorial El Tiempo*, p. 45, "a solution such as the one adopted by the Court of Justice of the European Union in *Costeja v AEPD*, while being a mechanism ensuring the right to reputation of the person affected by the disclosure of information, implies an unnecessary sacrifice of the principle of Internet neutrality and, along with this, of the freedom of speech and freedom of information."; 12th Civil Division of the Tokyo High Court, judgment of 12 July 2016, No. 192, *Google Inc. v Mr. M.*, "'the right to be forgotten' … is not established by the laws of Japan and the legal conditions of when it should be recognized or the effects of such right remain unclear." See also the opinion of the Advocate General of the CJEU in the Google Spain case, delivered on 25 June 2013, available at: http://curia.europa.eu/juris/document/document.jsf?docid=138782&doclang=EN

[17] See for example the requirement under Italian law that information concerning a company director and relating to the insolvency of that company should not be removed from the companies register – CJEU, *Case C-398/15 Manni* (Approximation of laws Data protection Freedom of establishment) ECLI:EU:C:2017:197. The Court noted the "considerable heterogeneity in the limitation periods provided for by the various national laws" and the corresponding difficulty of identifying a single period from which the inclusion of such data in a companies register would no longer be necessary (§ 55). The Court found that there was no right for natural persons to obtain the erasure of their personal data from such a register as a matter of principle after a certain period of time (§ 57).

[18] Article 9 of Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 provides the following exemption: 'Member States shall provide for exemptions or derogations from the provisions of this Chapter, Chapter IV and Chapter VI for the processing of personal data carried out solely for journalistic purposes or the purpose of artistic or literary expression only if they are necessary to reconcile the right to privacy with the rules governing freedom of expression.', available at: http://curia.europa.eu/juris/document/document.jsf?text=&docid=152065&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=133613. See also, Article 17 of the EU General Data Protection Regulation 2016/679, available at: https://www.privacy-regulation.eu/en/article-17-right-to-erasure-'right-to-be-forgotten'-GDPR.htm

[19] See for example ECtHR, *Von Hannover v Germany (no. 2) [GC],* App nos. 40660/08 and 60641/08, ECtHR 2012; and ECtHR, *Axel Springer AG v Germany* [*GC],* App no. 39954/08 (7 February 2012).

[20] *Ibid*

17. In a decision handed down in October 2015, the Spanish Supreme Court held that the 'right to be forgotten' imposes obligations not only on search engines but also on newspapers and publishers of the original content.[21] The case concerned a request by individuals, who had been convicted of drug trafficking offences, to render inaccessible a news article that *El País* had published in 1985 about those convictions. The newspaper argued that the article was accurate and truthful, and that it was not a data controller within the meaning of the relevant legislation. The court rejected these arguments, finding that the 'right to be forgotten' extended to the newspaper and the content the individuals sought to render inaccessible was no longer relevant. The court ordered the newspaper to implement technical measures to render the content of the article inaccessible to the public.[22]

18. In Germany, courts have also imposed obligations directly on newspapers and publishers of Internet content to use technological measures to render certain articles inaccessible to the public. In 2017, the Highest Regional Court of Hamburg imposed those obligations directly on a newspaper, despite the newspaper's argument that it was protected by journalistic privilege.[23] This case involved an application by a well-known politician for an order that the newspaper take measures to render inaccessible to the public a number of articles describing criminal proceedings where he was accused of being a paedophile. Notwithstanding his position as a public figure, the court ordered that the newspaper implement technological measures to ensure that the articles could not be indexed by search engines. In rejecting the newspaper's defence the court applied the following reasoning: "[I]f the operator of a search engine [like Google] may be obliged . . . to block the accessibility of certain online information upon a simple name search, this has to apply all the more to the originator of the information [the publisher or newspaper], regardless of whether or not he or she enjoys the press privilege.[24] Consistent with this approach the German Federal Constitutional Court recently confirmed that media outlets can be required to put in place measures to prevent search engines returning information relating to serious criminal offences they have reported on; in that case, a double murder.[25]

19. The effect of these decisions is that the impugned articles are no longer available to the general public. They cannot be accessed through a search on the names of the relevant persons, or through a search on any search engine. This goes far beyond the consequences intended by the decision in the Google Spain case. The 'right to be forgotten' was intended to allow for the de-listing of web pages from results appearing following a search under a data subject's name. Because the courts ordered entire news articles regarding the data subjects to be rendered invisible to search engines like Google, the articles are no longer accessible to the public through any search engine.

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[21] Spanish Supreme Tribunal, Civil Chamber, Judgment 545/2015, *B and A v Ediciones El Pais, S.L,* (15 October 2015), available at:http://www.poderjudicial.es/search/contenidos.action?action=contentpdf&databasematch=TS&reference=7494889&links=%222772%2F2013%22%20%22545%2F2015%22&optimize=20151019&publicinterface=true

[22] In another Spanish Supreme Court decision, handed down in November 2020, the 'right to be forgotten' was arguably extended beyond its intended scope in a different way. In that case the Supreme Court held that it would not be consistent with the 'right to be forgotten' doctrine to apply it when an online search is carried out from the (full) name of a person and to deny it when that search is carried out only from the two surnames of that person. The search engine in that case had argued that blocking the latter type of search could leave out from a search results that had no connection at all with one data subject in particular. The search engine's position was supported by the Spanish Data Protection Commissioner, and the Audiencia Nacional Court had ruled in its favour. On appeal the Supreme Court reversed that decision. Supreme Court*, Mariano v Microsoft Corporation*, Contentious-Administrative Chamber, No. STS 4016/2020 (27 November 2020) available at: https://www.poderjudicial.es/search/openDocument/f83656617da28f9f

[23] Higher Regional Court, Hamburg, 7th Civil Division, *7U 29/12* (7 July 2015), available at: https://perma.cc/W5NY-SETA

[24] See Sebastian Schweda, *Germany, Hamburg Court of Appeal Obliges Press Archive Operator to Prevent Name Search in Archived Articles* (2015) 1 EUR. DATA PROT. L. REV. 299, 300.

[25] *In the Proceedings on the Constitutional Complaint of Mr T against the Judgment of the Federal Court of Justice* of *13 November 2012, VI ZR 330/11,* BVerfG, Order of the First Senate*,* 1 BvR 16/13, (6 November 2019) available at: https://www.bundesverfassungsgericht.de/e/rs20191106_1bvr001613en.html

20. The Belgian courts have gone even further. In 2016 the Belgian Court of Cassation ordered the *Le Soir* newspaper to anonymise the online version of an article it had published in 1994 concerning a drunk driving incident resulting in two deaths. The incident was caused by a medical doctor. The article accurately described the incident and his conviction for drunk driving. In 2008, the newspaper made its news archives available online, thereby making the article available through a search engine or through the news archive's search function. Following a request from the doctor the newspaper refused to anonymise the article. The doctor, relying on the argument that his Article 8 right to privacy and 'right to be forgotten' outweighed the newspaper's Article 10 right to freedom of expression, succeeded at first instance and on appeal.

21. On further appeal, the Belgian Court of Cassation held that the 'right to be forgotten' and associated privacy rights enshrined in Article 8 of the Convention allowed a person previously convicted of a crime to object to elements of his criminal past being disclosed to the public and that this right justified limitations on the newspaper's right to freedom of expression. The court noted that the digital archiving of the article constituted a new disclosure of the doctor's personal data that interfered with his 'right to be forgotten' and held that the newspaper must remove all references to him from the article in its online archives. As a result, it was ordered that the doctor's name be replaced with the letter 'X'. In reaching this decision the court, in distinguishing between print and online journalism, observed that freedom of expression and journalistic privilege were more relevant and appropriate to print journalism than its online equivalent.[26]

22. While the original articles in the Spanish and German cases were left unchanged in the online archives of the newspapers, the Belgian courts have engaged in a practice that was described by this Court in the following terms:

> *"… it is not the role of judicial authorities to engage in rewriting history by ordering the removal from the public domain of all traces of publications which have in the past been found, by final judicial decisions, to amount to unjustified attacks on individual reputations. Furthermore, it is relevant for the assessment of the case that the legitimate interest of the public in access to the public Internet archives of the press is protected under Article 10 of the Convention."*[27]

A court should only order the removal of online content where certain minimum standards are met

23. Access to, and use of, the Internet is a fundamental aspect of freedom of expression.[28] The UN Human Rights Committee has observed that:

> *"Any restrictions on the operation of websites, blogs or any other internet-based, electronic or other such information dissemination system, including systems to support such communication, such as internet service providers or search engines, are only permissible to extent that they are compatible with paragraph 3 [of Article 19 ICCPR]."*[29]

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[26] Court de Cassation de Belgique, Arrêt N° C.15.0052.F, (29 April 2016), available at: http://jure.juridat.just.fgov.be/pdfapp/download_blob?idpdf=F-20160429-1

[27] ECtHR, *Węgrzynowski and Smolczewski v Poland*, App no. 33846/0, § 65 (16 July 2013).

[28] See for example UN Special Rapporteur on Freedom of Expression: *Individuals depend on digital access to exercise fundamental rights, including freedom of opinion and expression, the right to life and a range of economic, social and cultural rights,* A/HRC/35/22, (30 March 2017), § 76 available at: https://documents-dds ny.un.org/doc/UNDOC/GEN/G17/077/46/PDF/G1707746.pdf?OpenElement

[29] OHCHR, *General Comment No 34: Freedoms of opinion and expression* (29 July 2011), §43, available at: https://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf

24. Consistent with this, the Committee of Ministers of the Council of Europe has emphasised the need for states to protect and promote Internet freedom[30] and has urged its member states to ensure that:

> *"Any measure taken by State authorities or private-sector actors to block or otherwise restrict access to an entire Internet platform (social media, social networks, blogs or any other website) or information and communication technologies (ICT) tools (instant messaging or other applications), or any request by State authorities to carry out such actions complies with the conditions of Article 10 of the Convention regarding the legality, legitimacy and proportionality of restrictions"*[31]

25. Article 10 of the Convention protects freedom of expression as a comprehensive fundamental right, which includes "the freedom to hold [and disseminate] opinions, and to receive and import information and ideas without interference by public authority and regardless of frontiers". It also protects the right of users of the Internet who might potentially be interested in having access to delisted information. Article 10 further protects "freedom and pluralism of the media," including journalists' ability to investigate stories, sort and collect information, and making information readily available to the public.[32] In interpreting Article 10 of the Convention, the Court has said that "[f]reedom of expression constitutes one of the essential foundations of a democratic society" and that exceptions "must be narrowly interpreted and the necessity for any restrictions must be convincingly established."[33]

26. In the context of this case, when determining whether the restriction on access to, or removal of, content is necessary and proportionate, a court must ensure that an applicant's interest in restriction or removal has been sufficiently balanced against the right to freedom of expression and press freedom. The exercise the Court must undertake in this context is an assessment of proportionality.

27. This Court has, in a series of judgments, stressed the need for national authorities to strike "a fair balance" between the rights freedom of expression and privacy where the two rights conflict. It has also stressed that as a matter of principle, these rights deserve *equal* respect.[34] In *Von Hannover no.2,* the Grand Chamber identified the relevant criteria for balancing the right to respect for private life (Article 8) against the right to freedom of expression (Article 10). These were: contribution to a debate of general interest; how well-known the person concerned was; the subject of the report; the prior conduct of the person concerned; the content,

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[30] Council of Europe, *Recommendation of the Committee of Ministers to member states on internet freedom*, CM/Rec (2016)5[1] (13 April 2016), available at: https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016806415fa

[31] *Ibid,* § 2.2.1

[32] See ECtHR, *Editorial Board of Pravoye Delo and Shtekel v Ukraine,* App no. 33014/05 (5 May 2011); ECtHR, *Mosley v the United Kingdom,* App no. 48009/08, § 129 (10 May 2011); ECtHR, *Observer and Guardian v the United Kingdom*, (26 November 1991), Series A App no. 216; and ECtHR, *Bladet Tromsø and Stensaas v Norway [GC],* App no. 21980/93, ECHR 1999-III.

[33] ECtHR, *Observer and Guardian v United Kingdom*, App no. 13585/88, (26 November 1991) Ser. A, No. 216, §59

[34] ECtHR, *Von Hannover No. 2 v Germany [GC],* App nos. 40660/08 and 60641/08, § 106, (7 February 2012). Contrast, CJEU in *Google Spain,* op. cit. and its interpretation in *NT1 and NT2 v Google LLC,* [2018] EWHC 799 (QB) at § 132 ff. In *Google Spain*, the CJEU held that "a fair balance should be sought in particular between that interest [i.e. the legitimate interest of internet users potentially interested in having access to delisted information] and the data subject's fundamental rights under Articles 7 and 8 of the Charter". Against that background, the CJEU held that a data subject's fundamental rights "override, as a rule, not only the economic interest of the operator of the search engine but also the interest of the general public in finding that information upon a search relating to the data subject's name." That statement was not entirely clear. Did the CJEU mean to carry out and then present the result of a comprehensive balancing test or did it simply require the evaluation of the data subject's fundamental rights against economic 'interests' of the search engine operator and the information 'interests' of the public? Notably, the CJEU did not mention the right to freedom of expression when carrying out its assessment.

form and consequences of the publication; and (in the case of photographs) the circumstances in which they were taken.[35]

28. This balancing exercise was applied in a recent decision of this Court where the applicant relied on the *Google Spain* case.[36] The applicant complained that the refusal of the German courts to grant an injunction against the website of the New York Times in respect of a story mentioning his alleged ties to organised crime had breached his right to privacy under Article 8. In doing so, the applicant relied on the *Google Spain* decision, arguing that "the reasoning regarding the right to be forgotten could be transferred to the present case".[37]

29. This Court held that the applicant's case required "an examination of the question of whether a fair balance has been struck between the applicant's right to the protection of his private life under Article 8 of the Convention and the newspaper's right to freedom of expression as guaranteed by Article 10"[38], having regard to its established criteria in the context of balancing competing rights.[39]

30. The Interveners submit that in cases where the right to privacy, and its concomitant right, the 'right to be forgotten', is sought to be applied against newspaper publishers and other publishers of Internet content, this Court should consider the following additional factors:

(a) Source of the information

31. High profile de-listing requests made on the basis of the 'right to be forgotten' tend to concern news articles regarding matters of public interest. Therefore, the nature and origin of the linked information should be considered.[40] In the Interveners' view, there should be a presumption that links to articles published by individuals or entities engaged in journalistic activity, whether news organisations, bloggers, civil society organisations or other groups performing a public watchdog function, should not be de-listed. The same presumption should be applied to links to books or academic articles. That presumption should be applied even more strongly to cases where the permanent removal of online information from primary publishers is sought.

32. The same is equally applicable to information which is part of the public record or government information. Where a government body has published personal information, (for example in criminal records, court judgments or bankruptcy filings), and that information has been in the public domain for some time, it would be improper for such information to be de-listed under the 'right to be forgotten'. Unless national legislation provides for such information to be expunged after a certain period of time, (for example to enable rehabilitation), there should be a strong presumption that the information should not be de-listed.

(b) Whether the complainant has demonstrated substantial harm

33. In weighing the rights to privacy and freedom of expression, the Court should also consider whether complainants have demonstrated that they have suffered substantial damage or harm due to the availability of the search results linked to their name.[41] Such harm should be more

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[35] ECtHR, *Von Hannover No. 2 v Germany* [GC], App nos. 40660/08 and 60641/08 § 108-114 (7 February 2012).
[36] ECtHR, *Fuchsmann v Germany,* ECHR 925, App no. 71233/13 (19 October 2017).
[37] *Ibid* § 27
[38] I*bid* § 32
[39] *Ibid* § 34
[40] This is also consistent with the criteria adopted by the Article 29 Working Party, *Guidelines on the implementation of the CJEU judgment in Google Spain*, Part II, 29 November 2014. In the Guidelines, the Working Party considered the journalistic purpose of the publication of the original content, available at: https://ec.europa.eu/justice/article-29/documentation/opinion-recommendation/files/2014/wp225_en.pdf
[41] See *NT1 and NT2 v Google LLC,* [2018] EWHC 799 (QB). In that case, Warby J considered that the relevant harm was "that which is being or will be caused by the processing which the claimant seeks to prevent. He cannot place any great weight on harm which would result in any event [from his own conduct]" (§ 151). The element of time is therefore

than mere embarrassment or discomfort. Actual harm should be required. It should also be sufficiently specific. In our view, this is consistent with the case-law of this Court. In *Karakó v Hungary,* the Court held that for Article 8 to come into play, the attack on personal honour and reputation must attain a certain level of gravity and must have taken place in a manner that caused prejudice to personal enjoyment of the right to respect for private life.[42]

34. The "substantial harm" criterion is especially important in circumstances where individuals seek the de-listing of links to information, which is both true and of a public nature, or information to which publication they previously consented, or information they themselves made publicly available (for example on social media). The Interveners submit that in such cases, complainants should be required to show that their privacy is significantly affected by the information remaining easily searchable (through a search of their name).[43]

(c) How recent the information is and whether it retains public interest value

35. Further, this Court should consider whether sufficient weight was given to the impact of the passage of time on the public interest value of the information at issue and whether it should remain easily discoverable through a search of someone's name or news archives.

36. Information available on the Internet poses new challenges for the balance between the protection of freedom of expression and the 'right to be forgotten'. Certain information may be of limited intrinsic value when published but it may acquire more significance over time, either because the individual in question may become a public figure, or simply from the perspective of academic, scientific, or historical research. The German Federal Constitutional Court came to a similar conclusion in a recent decision concerning news reports about a public figure's attempt to cheat in a bar exam several decades ago. The German Constitutional Court highlighted that the right of a free press to report on matters of public interest did not expire with the mere passage of time.[44]

37. Notwithstanding the above, as a general rule, recent information is more likely to have immediate public interest value. However, it is also the case that links to certain types of information should always remain accessible by searches of a person's name due to the overriding public interest value in them, such as information about serious crimes. In particular, unless domestic law provides for information to be expunged after a period of time (for example to enable the rehabilitation of juvenile offenders), information about criminal proceedings should always remain available.

38. Furthermore, if a piece of information is already in the public domain, there exists an interest in preserving it and keeping it available for the purposes of research and archiving. The authorities responsible for the protection of data themselves consider that the collection of historical and cultural data—including data of a personal character—must be encouraged and treated as a legitimate method of preserving data beyond the date of operational usefulness.[45]

(d) The public's right to receive information

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relevant to the assessment of the substantial harm criterion. Moreover, in that case, Warby J distinguished between the impact on the complainant's business life as opposed to his private life.

[42] ECtHR, *Karakó v Hungary*, App no. 39311/05, § 23 (28 April 2009); See also ECtHR, *Polanco Torres and Movilla Polanco v Spain*, App no. 34147/06, § 40 (21 September 2010).

[43] For a thorough analysis of how this criterion should be applied in practice, see *NT1 and NT2, op. cit., §* 151 ff.

[44] See *In the Proceedings on the Constitutional Complaint of M against the decision of the Federal Court of Justice from 25 March 2014 1 BvR 1240/14 – Rn. 1-34,* BVerfG, decision of the 2nd Chamber of the First Senate (23 June 2020), available at: https://www.bundesverfassungsgericht.de/e/rk20200623_1bvr124014.html.

[45] Contribution of the Belgian Data Protection Authority to the European Commission's consultation on the comprehensive approach to personal data protection in the European Union, Brussels 2011.

39. The Interveners submit that individuals should not be empowered to restrict access to information concerning them published by third parties, except when this information has an essentially private or defamatory character or when the publication of the information is not justified for other reasons.[46] In other words, personal information may equally "belong" to the public, in the sense that the public should be able to access it. For example, the fact that a person declared bankruptcy ten years ago is information concerning not only that person but also her/his debtors. A principle by which an individual would have the ultimate right to control this information does not take account of the broader right of the public to share and receive information even if that information is placed legally within the public domain. In the Interveners' view, this is particularly important when the information at issue was published by the press. The Court itself has recognised that "not only does the press have the task of imparting information and ideas on matters of public of interest: the public also has the right to receive them."[47] The latter is an important aspect of the balancing exercise that must take place between the right to freedom of expression and the 'right to be forgotten' but one that is only too frequently elided.[48]

Conclusion

40. Since the *Google Spain* judgment in 2014, the scope of the 'right to be forgotten' has expanded rapidly to encompass content published by newspaper publishers, often in relation to the reporting of crime. This has had the insidious effect of removing perfectly lawful information on matters of public interest from the public domain. For this reason, the Interveners urge the Court to uphold a high standard of protection of freedom of expression in 'right to be forgotten' cases.

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MEDIA DEFENCE

Gabrielle Guillemin
ARTICLE 19

(On behalf of the Interveners)

[46] See *mutatis mutandis*, *In the Proceedings on the Constitutional Complaint of M against the decision of the Federal Court of Justice from 25 March 2014 1 BvR 1240/14 – Rn. 1-34,* BVerfG, decision of the 2nd Chamber of the First Senate (23 June 2020), § 16 available at: https://www.bundesverfassungsgericht.de/e/rk20200623_1bvr124014.html

[47] See e.g. ECtHR, *Fressoz and Roire v France* [*GC],* App no. 29183/95, § 51 (21 January 1999).

[48] See Inform Blog, Daphne Keller, *Free Expression Gaps in the General Data Protection Regulation,* (6 December 2015), available at: https://inforrm.org/2015/12/06/free-expression-gaps-in-the-general-data-protection-regulation-daphne-keller/