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THE RIGHT TO BE FORGOTTEN: THEORY AND PRACTICE

Master thesis

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LIST OF ABBREVIATIONS

Camera di Commercio, Industria, Artigianato e Agricoltura di Lecce v Salvatore Manni – Manni case

Court of Justice of the European Union – CJEU

Data Protection Commissioner – Commissioner

Data Protection Committee - Committee

Data Protection Agency – DPA

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 – Directive 95/46/EC

European Court of Human Rights – ECHR

European Convention on Human Rights – Convention

European Union – EU

First Council Directive 68/151/EEC of 9 March 1968 on co-ordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, with a view to making such safeguards equivalent throughout the Community – Directive 68/151/EEC

General Data Protection Regulation – GDPR

General Directorate of Protection of Personal Data – GDPD

Google Spain SL and Google Inc. v Agencia Española de Protección de Datos (AEPD) and Mario Costeja González – Google Spain decision

Spanish Data Protection Authority – AEPD

Virginia Da Cunha – Da Cunha

INTRODUCTION

Problem of research. The Internet provides admission to a wide range of information about individuals all around the globe. Disclosure of personal information in digital world has become a common condition for users of various services while using the variety of goods they propose. Whereas access to data offers meaningful social benefit, on the other hand it creates risks to humans. Nowadays, personal information available online is a resource which either consumer want to control. Therefore, current fundamental modernization of European data protection framework establishes a vast number of new rights for citizens including data portability, data breach notifications and the "right to be forgotten" that grants individuals the right to request erasure of information from data controller. However, some scholars claim that application of this right might pose a hindrance to free expression and the public interest in access to information unlike others, who consider this right as an opportunity to better manage their online reputation. Consequently, the lack of consensus regarding the applicability of the right to be forgotten between jurisdictions leads to difficulties as an extraterritorial issue. Accordingly, legal regulation of the right to be forgotten is not enough effective now and requires revision for modern social, political and legislative demands.

Relevance of the final thesis. This topic is quite actual as ongoing legislative changes connected with the adoption of the General Data Protection Regulation leads to broad reform and acceptance of new data protection paradigm among European countries. In addition, there is a need to decrease present contradictions in case-law, select coherent criterions for further practical application of the right to be forgotten by judges and apply stable strategy for adaptation of legal acts in the sphere of data protection rights. By introducing the right to be forgotten, the European Union wants to defend Internet users in diverse obstacles and to ensure an appropriate balance of public and private interests required in a democratic society. On the opposite, such an approach is associated with the output of new problems and sharpening of the existing one. As an example, the excessive concentration of power in hands of Internet giants, their readiness and ability to hold the balance of interests as well as openness of those processes.

Appropriate and effective legislative regulation of the right to be forgotten, fair restoration of infringed right will promote growth of respect to human rights in society and development of civil society.

The **scientific novelty** of this theme has become among the first complex research in Lithuania and in Ukraine of theoretical problems of the concept of the right to be forgotten and criterions of its applicability by Court of Justice of the European Union and national courts. This is the first time, the new in-depth analysis of ground of recognition and application of the right to

be forgotten in judicial practice of various European states. As a result, a wide range of new theoretical provisions, conclusions, propositions, which have features of scientific novelty have been suggested:

1. In order to define the nature of the right to be forgotten, it is proposed to understand as a possibility of individual under certain conditions to ask search engines to remove links with personal information about them so that such records do not continue to impede present perceptions of that human.

2. Based on scientific research made a structured characterization of origination and current development of the right to be forgotten in both European and non-European countries.

3. Substantiated the expediency of further global legislative changes in data protection policy connected with adoption of the General Data Protection Rights and introduction a number of new data protection rights.

4. Based on analysis of court practice distinguished distinct criterions of selection of the right to be forgotten, way of its further implementation.

5. Made propositions for legislative revision of the Ukrainian Law "On the protection of personal data" including establishment of the right to be forgotten, framework for its execution.

Recently, the right to be forgotten has been given a lot of attention by the public, mainly due to rapid development of its framework within the European Union. Mostly, foreign scholars analyze such aspects like current legislative regime in comparison to planned regulation, comprehensive, in-depth analysis of Google Spain judgment, way of its application in wide range of European jurisdictions, including French, Italian, Germany, Dutch and Latin American states, evolution of the right to be forgotten, fair balance between main human values like right to privacy and freedom of speech as well as its extensive interpretation. However, lack of attention is paid to the unification of criteria used by judges while granting individual's right to erase the data and analysis of the interpretation of the ruling adopted in Google Spain case amongst non-European countries.

For instance, theoretical and scientific base for this work have become articles of Brendan van Alsenoy, Meg Ambrose, Pedro Anguita, Jef Ausloos, Alexander Benecke, Maria Biasiotti, Anna Bunn, Frederik Zuiderveen Borgesius, Edward L. Carter, Ignacio Cofone, Arthur Cox, Mario Viola de Azevado Cunha, John W. Dowdell, Michael Douglas, Sebastiano Faro, Eleni Frantziou, Giancarlo F. Frosio, Sue Gold, Eloise Gratton, Oskar J. Gstrein, Debbie Heywood, Gabriel Itagiba, Michael J. Kelly, Marieke Koekkoek, Claudia Kodde, Daniel Kroslak, Stefan Kulk, Monika Kuschewsky, Edward Lee, Jasmine E. McNealy, Alessandro Montelero, Jules Polonetsky, Christopher Rees, Jeffrey Rosen, David Satolam, R. Stefanchuk, Cecile de Terwangne, Alexander Tsesis, A.J. Verheij, Mike Wagner, Julian Wagner, Rolf Weber and others.

The **significance of** the exact **final thesis** for theory and practice expressed in several directions:

1) in scientific area – as a background for further scientific explorations of the concept of the right to be forgotten, its elements, ways of global practical implementation;

2) in legislative sphere – propositions described in the master thesis as well as particular recommendations concerning the improvement of national law in the sphere of data protection could become a framework for further amendment to the Ukrainian Law "On the protection of personal data" and other legal acts;

3) in court practice – application of scientific results of this work could simplify the process of consideration of the exact case and promote development of rather particular court practice;

4) in educational process – during preparation of separate chapters, tutorials and study programs.

The **aim of this research** is to formulate individual scientific and practical conclusions during the process of in-depth, complex analysis of the concept of the right to be forgotten, legal nature of this institute and its relationship with the right to privacy, freedom of speech and self-expression, legislative acts either national and supranational power as well as practice of Court of Justice of the European Union, European Court of Human Rights, national courts and develop suggestions regarding the improvement of Ukrainian law as this concept is new and recommendations concerning practical applicability of specific norms in this sphere.

For achievement of the aim within the work such an **objectives** have been formulated:

— to identify the institute of the right to be forgotten including its definition, elements and correlation with related notions;

— to present the evolution of the right to be forgotten in various states;

— to analyze court practice of the Court of Justice of the European Union, European Court of Human Rights, national courts of European and non-European countries and provide conclusion about the criterions used by judges and responsible authorities to assess the right to be forgotten;

— prepare review of directions of interpretation of the right to be forgotten and current challenges on its way in various states;

Research methodology includes *scientific* and *special methods* of doctrinal analysis. Respectively, during the research *dialectical method* was used while investigating legal nature, tendency of development, notion and main elements of the right to be forgotten.

Historical method gave a chance to select stages of evolution and changes in the manner of legislative regulation to relationships in the sphere of the right to be forgotten across the world.

Logical, method of analysis and synthesis grant a possibility to organize critical evaluation of terms and notions in the sphere of the right to be forgotten and formulate own notion and key features.

By virtue of method of *systematic-structural analysis* a research on correlation between rights to privacy, right to be forgotten, freedom of speech and expression has been done.

Special methods were used in such way:

— comparative method was used during analysis of national court practice and decisions of the Court of Justice of the European Union as well as European Court of Human Rights and respective data authorities;

— modeling method was applied entirely while formulating theoretical and practical conclusions, recommendations and propositions as well as directions for further scientific research.

Structure of research includes introduction establishing actuality of the topic including problem and relevance of research, scientific novelty and significance of research, formulated aim and objectives, scientific novelty, practical application of the results of the master thesis, described main methods used for complex analysis of both scientific articles and judicial practice.

The *first chapter* seeks to offer a theoretical determination of the right to be forgotten as well as its correlation with related definitions so as to provide unified understanding for every government that considers acknowledgment of the concept. Also, it will proceed analysis of introduction and development of the right to be forgotten in comparative overview among European and non-European countries. France and Italy are presented as founders of notion, where local and national courts in various forms have been used it for different aims for over a decade. After that, main features of Argentina's case as such which was a way before the well-now Google Spain case will be characterized. In addition, German, Dutch and Brazilian experience is also characterized.

The *second chapter* introduces a comparison of current European Union's data protection regime expressed in Directive 95/46/EC in contrast to new approved General Data Protection Regulation which will become effective after 25 May 2018. Furthermore, this chapter provide in-depth critical analysis of several landmark judgments from the Court of Justice of the European Union's practice and consideration of practical criteria of its application. Afterwards, this chapter focuses on recent cases of the European Court of Human Rights, decisions of national data authorities and analysis of its approach.

The *final chapter* presents a view on explanation of the right to be forgotten in Europe as well as in Latin America nations by respective public authorities and national courts.

Defense statements of the final thesis shall be expressed as follows:

1) There is no unified approach to the definition and structural elements of the right to be forgotten among scholars.

2) Appropriate application of balancing test between individual's right to privacy and interest of the public in particular data influence on efficient realization of the right to be forgotten by data subjects.

3) The case law regarding the application and interpretation of the right to be forgotten is contradictory in various jurisdictions.

1. THEORETICAL FRAMEWORK FOR THE RIGHT TO BE FORGOTTEN

This chapter will produce a comparative observation of definition of the right to be forgotten among foreign scholars, and proposition of unified understanding, which might be used as a starting point for either jurisdiction which decides to adopt such concept. Then, interconnection with related notions as well as balancing of legal values would be expressed. Afterwards, this paper will critically analyse the historical roots of the right to be forgotten in European countries. Lastly, it will expose peculiarities of development and application of this institute among non-European countries.

1.1 Academic Definition of the Right to be Forgotten

1.1.1. Correlation and Differences Between Notions of Oblivion, Delisting (Deletion) and Erasure (Forgetfulness)

To begin with, there is different approach among scholars to the interaction between right to erasure, right to delete, right to oblivion and the right to be forgotten. Normally, some authors simply overlook that exact notions overlapping while others apply definitions without being fully aware of its implication.

To clarify this point, while analyzing the distinction between the right to be forgotten and the right to delete Bernal suggests considering the latter as a conceptual solution to represent the direction in which society should examine personal data on the internet nowadays, instead of the modern right to be forgotten.[1] From his point of view, "the immediate corollary of this shift of assumptions would be the establishment of a general right to delete."[2] Thus, holders of the data must put into place instruments that allow the data subjects to realize their right to delete information relating to them in any time. Then, he identifies, how right to delete will differ from the right to be forgotten. Firstly, the distinction occurs through the difference in names: "the intention of the right should not be to allow people to erase or edit their "history", but to control the data that is held about them", taking into account the fact that a "right to delete" is a direct right - a right to act - whereas a "right to be forgotten" appears to be a right to control someone else."[3] As a result, he clarifies that: "this idea of control is connected closely with the association

[1] Ioana Stupariu, "Defining the Right to Be Forgotten: A Comparative Analysis between the EU and the US" (LL. M. short thesis, Central European University, 2015), 9, http://dx.doi.org/10.2139/ssrn.2851362.
[2] Paul A. Bernal, "A Right to Delete?" *European Journal of Law and Technology* 2, 2 (2011): 10.
[3] ibid.

made between the idea of a right to be forgotten and restrictions on free speech, and on censorship. The change in name should help to make it clearer that the connection between a right to delete and censorship is tenuous at best - and in a practical sense non-existent."[4]

Secondly, one more valuable difference expressed in the exceptions to the right, which set out the situations when information could not be deleted. Entirely, the right to delete would be a qualified right in comparison to the right to be forgotten where difficulties in qualification would be an inherent for the last one. To clarify this point, Bernal proposes five leading categories of reasons for which information have to be protected irrespective of an individual's desire to delete it. They include:

> *1) paternalistic reasons – storage of data is in the individual's interest, but, in certain circumstances, interests of society can prevail over the individual's will (e.g. medical data);*
>
> *2) communitarian reasons – preservation of information is in the community's interest (e.g. criminal records);*
>
> *3) administrative or economic reasons – maintenance of databases containing public and commercial records required for fulfillment social needs (e.g. tax records);*
>
> *4) archival reasons - for keeping historical records about particular events and ensuring its accuracy (e.g. newspaper archives). "This category is very important, but could easily be governed through a system by which a particular database is agreed to be "archival" in nature, and thus not covered by the right to delete - but also restricted in the uses to which it can be put and so forth. This is in itself another contentious issue;"*[5]
>
> *5) security reasons – protection of data in order to achieve security objectives (e.g. records of criminal investigations). Due to a highly debatable character of this category, it should be subject to precise analysis including political perspective as well as constant reassessment.* [6]

Honestly, such exemptions remind the data protection principle of "fair and lawful processing" (e.g. consent, administration of justice), "processing exemptions" (e.g. history and statistics) and the special purposes exemptions (e.g. journalism).[7]

It is clear that archival exceptions could prevent rewriting of historical facts, appearance of blank pages and creation of danger for newspapers. One more way of implication of this exception would be the fact that what is already posted will remain in public domain.

The other exceptions would deal with other objections to the idea of a right to be forgotten: the communitarian and paternalistic exceptions, for example, would remove the worries set out by Kenneth Clarke about the right causing problems for the portability of medical data or for legitimate information being used for credit histories. "They would not, however, prevent a

[4] ibid.
[5] Bernal, (*supra*, note 2): 10.
[6] Bernal, 10-11.
[7] Bernal, 11.

user from deleting records from Facebook that might be used inappropriately against them by potential employers, insurance companies or individuals with a grudge." [8]

Definitely, "the right to delete is more about reforming data protection in the rights and principles of data subjects and less about a legal framework for businesses to work around"[9], as it usually in practice, however, it looks a bit pretended, as it hard to imagine how the term right to delete adopt mostly control and not erasure, as the author offer after his analysis including the disregard of any related notions.

Alternatively, Prof. de. Terwangne states that the notion of the right to oblivion coincide with the right to be forgotten although from her perspective there is the difference between the right to be forgotten and the right to erasure. She has drawn a conclusion that the right to erasure suggest limitations and prevention of the unlawful use of personal's data while the aim of the right to be forgotten to add two more ways to restrict personal data use: withdrawal of consent prescribed in article 17 (1)(b) and data subject rejecting to the processing of data prescribed in article 17 (1)(c) [10] of the General Data Protection Regulation (hereinafter – GDPR).

However, such an interpretation is more applicable to the European Union (hereinafter - EU) jurisdiction and pays lack of attention to peculiarities of notions, principles and its interaction in other states. Respectively, distinctions would be relevant only inside the EU and could be omitted during further legislative changes in particular sphere.

Prof. Rosen found the "intellectual roots" of the newly proposed right to be forgotten in French "right to oblivion", a right under French law "that allows a convicted criminal who has served his time and been rehabilitated to object to the publication of the fact of his conviction and incarceration."[11] Today as prof. Terwangne states: "the right to oblivion of the judicial past has widely gone beyond these criminal records. It has been recognized by case law in several countries, based on the right to privacy or as a part of personality rights." [12] She differentiates: "the right to oblivion of the judicial past, the right to oblivion established by data protection legislation and a

[8] Bernal, 11-12.

[9] Irma Spahiu, "Between the right to know and the right to forget: looking beyond the Google case," *European Journal of Law and Technology* 6, 2 (2015): 18, http://ejlt.org/article/viewFile/377/577.

[10] See Stupariu (*supra*, note 1): 11.

[11] Jeffrey Rosen, "The Right to be forgotten," *Stanford Law Review Online* 64, 2012: 88, http://www.stanfordlawreview.org/online/privacy-paradox/right-to-be-forgotten [Accessed March 17, 2018]. (cited from: Oleksandr Pastukhov, "The right to oblivion: what's in the name?" *Computer and Telecommunications Law Review* 19, 1 (2013): 15.

[12] Cécile de Terwangne, "The right to be forgotten and the Informational Autonomy in the Digital Environment," Publication office of the EU, (2013):13, http://publications.jrc.ec.europa.eu/repository/bitstream/JRC86750/jrc86750_cecile_fv.pdf.

new still controversial, digital right to oblivion that amounts to personal data having an expiration date or being applicable in the specific context of social networks."[13] As previously stated,

> *Prof. de Terwangne's "second type of the right to oblivion has always been contemplated in legal documents and academic writings as a logical extension, a further development of the right to personal data protection, whereby the periods of time during which personal data are processed and/or retained for different purposes would be capped and only the essential flawed new definition of personal data endorsed by the proposed Regulation would give ground to suggesting any connection with the first type of the right to oblivion. At the same time, it is submitted below, the proposed Regulation falls short of creating a meaningful right of the third type."*[14]

Furthermore, from Prof. de Terwangne's opinion:

> *"oblivion" could mean an obligation to delete data, but could equally refer to a prohibition to further use the data, at least in the personalized format. This would perhaps be more realistic taking into consideration the economic cost of deletion mentioned earlier. If the specific problems of Internet media and social networks are focused on, "oblivion" could also amount to the prohibition to further disseminate the data."*[15]

So, the right to oblivion means the possibility for human beings to limit the access to their personal data contained in criminal and police records aiming to reintegrate into society and ruin ties with past actions. On the contrary, the right to be forgotten tries to turn public data into private by denying access to such information by third parties. There, right to be forgotten is a guarantee for the individuals against discrimination ones could face in case of spreading through the Internet his private notes.

Ultimately, one more approach of other scholars aims to suggest the most compelling perspective. As Meg Ambrose and Jef Ausloos states in their article:

> *"right to oblivion finds its rationale in privacy as a fundamental right related to human dignity, reputation and identity while right of erasure (deletion) is more about collection and processing of information by third parties. In addition, they believe that the exact scope and rationale behind the right to be forgotten as proposed in the European Data Protection Regulation framework (GDPR), is not entirely clear. Although some fear that the regulation will embrace both deletion and oblivion, at a minimum the regulation proposes granting more control to data subjects over personal data in the form of erasure."*[16]

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[13] Cécile de Terwangne, "Internet Privacy and the Right to Be Forgotten/Right to Oblivion," *IDP. Revista de Internet, Derecho y Politica*, 13 (2012): 109.

[14] Oleksandr Pastukhov, "The right to oblivion: what's in the name?" *Computer and Telecommunications Law Review* 19, 1 (2013): 15.

[15] See de Terwangne (*supra*, note 13): 117.

[16] Meg L. Ambrose and Jef Ausloos, "The right to be forgotten across the pond," *Journal of Information policy*, 3 (2013): 2.

Lastly, it is also a difference in a scope that supports this theory. As Bert-Jaap Koops states: "the right to oblivion only concerns data that are no longer relevant, whilst the right to erasure covers not only this category, but also any other category of personal data that are covered by regulations." [17]

1.1.2. Scientific and Legislative Approach to the Concept of the Right to be Forgotten

On the whole, there is no mere answer concerning the definition of the right to be forgotten among scholars.

As once was stated by the European Commissioner for Justice, Viviane Reding: "As somebody once said: "God forgives and forgets but the Web never does!" This is why the "right to be forgotten is so important for me. With more and more private data floating around the Web – especially on social networking sites – people should have the right to have their data completely removed".[18]

To start with, Dr. van Hoboken distinguishes three elements of the right to be forgotten. Firstly, "this right is only applicable in very specific contexts and restricts the legality of publishing about convicted criminals when the interest of reintegration outweighs the interests of society in being informed about the history of specific individuals and their criminal records".[19] To illustrate, "individuals who have been convicted of crimes, yet who have served their sentence and paid their debt to society, are entitled to protection of their privacy. While media coverage of their crimes, including their identities, might be warranted at the time of the offense, as time passes the weight given to their right to privacy increases and the weight given to the media's freedom of expression and the public's right to know wane." [20]

Secondly, a broader view on the right to be forgotten refers to cases where the last one should be introduced "as a reaction to new forms of publicity and access to information facilitated by the Internet."[21] In other words, the right to be forgotten can be identified as a proposition to deal with new form of publicity over time facilitated by the Internet. Author does not provide the

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[17] See Stupariu, (*supra*, note 1): 11. (cited from: Koops Bert-Jaap "Forgetting Footprints, Shunning Shadows. A critical analysis of the right to be forgotten in the Big Data practice," *SCRIPTed: A Journal of Law, Technology and Society* 8, 3 (2011): 1-28).

[18] Viviane Reding , "Why the EU needs new personal data protection rules?" *The European Data Protection and Privacy Conference*. Brussels, 2010, http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/10/700.

[19] Joris van Hoboken, "The Proposed Right to be Forgotten Seen from the Perspective of Our Right to Remember, Freedom of Expression Safeguards in a Converging Information Environment," Prepared for the European Commission, (2013): 3.

[20] Lawrence Siry and Sandra Schmitz, "A right to be forgotten? – How recent developments in Germany may affect the Internet Publishers in the US", *European Journal of Law and Technology* 3, 1 (2012): 1, http://ejlt.org/article/view/141/221.

[21] See van Hoboken, (*supra*, note 19): 4.

exact content of this idea and rather concentrates on examples and their analysis. Moreover, from his perspective, some have argued in favor of the right to be forgotten as a "clean slate approach". For instance, "in the context of the possibility of a fresh start on the internet, Jonathan Zittrain proposed the concept of "reputation bankruptcy", modeling his proposal on a sector-specific data protection in the US, called the Fair Credit Reporting Act."[22]

Thirdly, the last definition as proposed by the European Commission as a part of new General Data protection Regulation – is "to strengthen the existing obligation by stipulating an actual right in Article 17 of the Regulation to have one's data deleted in situations in which their processing is no longer legitimate, for instance if the processing was based on consent and such consent has been withdrawn."[23]

Beside this, Jeffrey Rosen propose three separate classes of obstacles that are in Peter Fleischer's view[24], are covered by the right to be forgotten.

> *The first one deals with right of individual to control and remove the photos as well as other data from public display. In light of recent Court of Justice of the European Union (hereinafter - CJEU) this opportunity recognized on the supranational level and must be abided. An interesting fact is that this right is the part of policy that social networks such as Facebook or Twitter apply with regards to their users, thus granting an automatic right to deletion. However, this has also stirred some controversies, as recent disclosures have shown that Facebook, for instance, does not erase in reality user deleted content from its servers.*[25]

A second challenge connected with the situation when the data subject post some sort of information and then somebody else (third party) repost or copy it. The question is whether the data subject can control that sort of information. By the way, Rosen does not provide a direct answer and provide compatibility of such request with previous propositions to the GDPR, explaining how this component would be covered as well. To clarify, he states: "when someone demands the erasure of personal data, an Internet Service Provider "shall carry out the erasure without delay," unless the retention of the data is "necessary" for exercising "the right of freedom of expression," as defined by Member States in their local laws."[26] Furthermore, part 1 and 2 of article 85 of GDPR creates an exemption from the duty to remove data for "the processing of personal data solely for journalistic purposes, or for the purposes of artistic or literary expression."[27]

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[22] ibid, (*supra*, note 19): 5.
[23] ibid, (*supra*, note 19): 6.
[24] Peter Fleischer, "Foggy Thinking About the Right to Oblivion," Blogger.com, 2011, http://peterfleischer.blogspot.com/2011/03/foggy-thinking-about-right-to-oblivion.html
[25] Zack Whittaker, "Facebook does not erase user-deleted content", zdnet.com, 2010, http://www.zdnet.com/article/facebook-does-not-erase-user-deleted-content/.
[26] See Rosen, (*supra*, note 11): 90.
[27] ibid, (*supra* note 11): 90.

The third category of takedown request form Rosen's view occurs when someone post some kind of information relating to an individual beyond his or her control. In this situation, "the U.S. Supreme Court has held that states cannot pass laws restricting the media from disseminating truthful but embarrassing information – such as the name of a rape victim – as long as the information was legally acquired."[28] Nevertheless, article 4 (2) of the GDPR treats takedown requests for truthful information posted by others identically to placement of one's information without his or her approval. Lastly, as Rosen states:

> *"if someone demand takedown, the burden of proof, once again, is on the third party to prove that it falls within the exception for journalistic, artistic or literary exception. As a result, this could transform Google into a censor-in-chief for the EU, rather than a neutral platform. And because this is a role Google won't want to play, it may instead produce blank pages whenever a European user types in the name of someone who has objected to a nasty blog post or status update."* [29]

Conversely, Rolf Weber makes accent on the time frame that leads to two dimensions of the right:

> *"a right to forget refers to the already intensively reflected situation that a historical event should no longer be revitalized due to the length of time elapsed since its occurrence until the right to be forgotten reflects the claim of an individual to have certain data deleted so that third party can no longer trace them". "Therefore, the right to be forgotten is based on the autonomy of an individual becoming a rightholder in respect of personal information on a time scale. The longer the origin of the information goes back, the more likely personal interests prevail over public interests."*[30]

Similar approach is used by Rouvory, "although she proposes different grounds: the relationship between the parties involved in the process of data processing."[31] The same as Weber, she propose two distinct components – the right to be forgotten and the right to forget. "On the one hand, the right to be forgotten is focused on the existence of third parties and their inherent duty to forget the information they on the data owner, on the other hand, the right to forget is focused on the protection of the data owner himself against his own past, so that he would be able to forget it."[32] Yet, such concept rather creates more uncertainties like carrying burden of proof on third parties than clarification in understanding.

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[28] ibid, (*supra*, note 11): 91.

[29] ibid, (*supra*, note 11): 92.

[30] Rolf Weber, "The Right to Be Forgotten More Than a Pandora's Box?" *JIPITEC* 2, 2 (2011): 120-121, https://www.jipitec.eu/issues/jipitec-2-2-2011/3084.

[31] See Stupariu, (*supra*, note 1): 16

[32] ibid, (*supra*, note 1). (cited from: Antoinette Rouvory, "Reinventer l'art d'oublier et de se faire oublier dans la societe d'information?" Contribution aux Actes du Colloque Asphalès sur La protection de l'individu numérisé, L'Harmattan, 2008: 249-278, https://works.bepress.com/antoinette_rouvroy/).

To compare, Koops as well divide two concepts of the right to be forgotten. Foremost, emphasis "the link with "fresh start" that has long been an element of several areas of law to foster social forgetfulness such as bankruptcy law, juvenile criminal law and credit reporting."[33] Interestingly, that emphasis is made on the perspective of individual rather than on interests of society. The second one focuses on "wider range of strategies that familiar to art of human forgetting providing an individual right to have his information deleted on time."[34]

Analogously, Werro identifies the right to be forgotten as a part of personality rights as in Swiss law it precludes others from characterizing his or her from criminal past. There the main focus is rather on the control over the use of data than on its deletion. For instance, publication of information about someone's offences after relevant period of time has elapsed may be allowed only if the data is important for society. In light of this fact, in some situations right to be forgotten may prevail over the right to privacy, but in case of need to protect the public it will not occur.[35]

Finally, the interesting opinion regarding the place of the right to be forgotten in constitutional legislation had been presented by scientist Pedro Anguita:

> *"due to its uniqueness, some authors have argued that the right to be forgotten, exceed levels of protection conferred by the right to privacy, honor and the rules on protection of personal data, finding as the best foundation, the free development of the personality, violated by being subject to interference that hamper the plan of life of those affected.[…] Thus, in cases where the right to oblivion is raised, courts of justice can resort to a broad right, such as the right to free development of personality, to integrate by means of rules of interpretation, principles, values and purposes and to provide protection."*[36]

Before starting deep analysis, it is important to differentiate the right to be forgotten from the right to erasure and the right to have certain search results delisted under European legislative framework. The right to erasure is recognized by article 12(b) of the EU Directive 95/46 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (hereinafter – Directive 95/46/EC), which allows data subjects to require data controllers to erase their personal data if such data is incomplete or inaccurate whereas article 17 of the new General Data Protection Regulation provides the data subject with the right to be forgotten and to erasure as a single right.

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[33] Koops Bert-Jaap "Forgetting Footprints, Shunning Shadows. A critical analysis of the "Right to be forgotten" in the Big Data practice," *SCRIPTed: A Journal of Law, Technology and Society* 8, 3 (2011): 5.

[34] ibid, (supra, note 33): 6.

[35] See Koops, (supra, note 33): 5. (cited from: Franz Werro, "The Right to inform v. The right to be forgotten: A Transatlantic Clash," In: *Haftungsrecht im dritten Millennium - Liability in the Third Millennium*, Aurelia Ciacchi, Christine Godt, Peter Rott and Lesley Smith, 291. Germany: Nomos, 2009).

[36] Pedro Anguita, "The right to be forgotten in Chile. Doctrine and jurisprudence," E-conference on the Right to be forgotten in Europe and Beyond, Blogdroiteuropeen, 2017, 2-3, https://blogdroiteuropeen.files.wordpress.com/2017/06/article-pedro-chile-final-version.pdf

To my mind, the most complex definition of the right to be forgotten is proposed in the new GDPR as "a right of data subject to have their data no longer processed and deleted when they are no longer needed for legitimate purposes as well as when a data subject has withdrawn his or her consent or objects to the processing of personal data concerning him or her or where the processing of his or her personal data does not otherwise comply with the aim of the GDPR."[37] Here, the key distinction is that the right to be forgotten tries to turn public information into private at a certain time by no longer allowing third parties to access such information.

1.2 Balance of Legal Values and Controversies Concerning the Right to be Forgotten

Generally, balancing rights form an instrument that allows them to be effectively used out of inducting damage to the other guaranteed values. In the context of the free access to Web, a right to hold personal data confidential can be in clash with such values like, free speech, freedom of expression, publicity and others. One of the most popular disputes against a right to be forgotten is that it would establish a masked form of censorship.[38]

From Jef Ausloos's perspective: "by allowing people to remove their personal data at will, important information might become inaccessible, incomplete and/or misrepresentative of reality while there might be a great public interest in the remembrance of information."[39]

One of the main exception in the application of the right to be forgotten is freedom of expression, but the fact is that limitations to these exclusion are to be determined by the Member States according to the provisions of the GDPR as each responsible authority in the corresponding state has a discretion to define a fair balance between those values.

For example, "Smet discusses this conflict between the protection of reputation and freedom of expression in his analysis of *Chauvy and others v. France*, a defamation case where the Court recognized this tension."[40] The case considers facts of arrests of leader of the French resistance motion during the Second World War published in a book and accusation of treason against Mr. and Mrs. Aubrac.[41] While assessing their application, the European Court of Human

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[37] "Regulation 2016/679 of the European Parliament and of the Council on the protection of natural persons with regard to the processing of personal data and on the free movement of such data," *Official Journal of the European Union* 119, 1(2016), https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32016R0679&from=EN.

[38] See Fleischer, (*supra*, note 24).

[39] Jef Ausloos, "The right to be forgotten – Worth Remembering?" *Computer law & Security review* 28, 2 (2012): 146.

[40] Muge Fazlioglu, "Forget me not: the clash of the right to be forgotten and freedom of expression on the Internet," *International Data Privacy Law* 3, 3 (2013): 154.

[41] "Case of Chauvy and others v. France," HUDOC, accessed 2018 April 10, https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%22Chauvy%20and%20others%20v.%20France%22],%22documentcollectionid2%22:[%22GRANDCHAMBER%22,%22CHAMBER%22],%22itemid%22:[%22001-61861%22]}.

Rights (hereinafter – ECHR) balanced the requirement of protection of the interests of applicants and public's interest in being informed about such occasions. As a result, the ECHR

> *"found that the domestic court's ruling struck a fair balance between both rights involved because it had not construed the "principle of freedom of expression too restrictively or the aim of protecting the reputation of others too extensively. Having further established that the sanctions imposed on the applicants in the domestic proceedings were not unreasonable and not unduly restrictive of their freedom of expression, the Court found that there had been no violation of Article 10."*[42]

Finally, in his evaluations, Smet noted that in such cases where freedom of expression and the right to reputation are in contradictions the reasoning of the ECHR "suffers from a lack of clarity, consistency and transparency."[43]

During the last decades, the ECHR has ruled many decisions by applying balancing of interest test between the right to privacy prescribed in Article 8 of the European Convention on Human Rights and the freedom of expression regulated by Article 10, however only several cases directly touches the right to be forgotten, except recent "*Wegrzynowski and Smolczewski v. Poland*" case, which would be deeply analyzed later, a case of *Caroline von Hannover v. Germany* and *A. v. Norway* could be described. The last two cases were among the first dealt with the issue of balance between discussed values.

In situation of *Von Hannover v. Germany* members of Monaco royal family appealed against German newspaper which published series of photos in addition the article about private life of their family. The German courts found that two of three photos violated the Princess Caroline's right to privacy, but rejected claim regarding third photo about the health of the Princess's father on the grounds of matter of public interest.[44]

During its assessment of the separate lawsuit presented before the ECHR, the judges used the criteria previously presented in original Von Hannover case. "This test required the evaluation of the publication according to five criteria: (1) whether the information contributes to a debate of general interest; (2) the notoriety of the person or people concerned; (3) the prior conduct of the person concerned; (4) the content, form, and consequences of the publication; (5) the circumstances in which the photos were taken."[45]

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[42] Stjin Smet, "Freedom of Expression and the Right to Reputation: Human Rights in Conflict," *American University International Law Review* 26, 1 (2010): 194.

[43] ibid, (*supra*, note 42): 187.

[44] "Case of Von Hannover v. Germany (No. 2)," HUDOC, accessed 2018 April 10, https://hudoc.echr.coe.int/eng#{%22display%22:[%220%22],%22languageisocode%22:[%22UKR%22],%22appno%22:[%2240660/08%22,%2260641/08%22],%22documentcollectionid2%22:[%22GRANDCHAMBER%22],%22itemid%22:[%22001-126822%22]}

[45] "Case Von Hannover v. Germany (No. 2)," Global freedom of Expression Columbia University, accessed 2018 April 10, https://globalfreedomofexpression.columbia.edu/cases/von-hannover-v-germany-no-2/

Overall, for the first issue the ECHR confirmed that by its content two of three photos did not relate to matters of public interest, for the second one, undoubtedly agreed that they were public figures, for the third question, claimed that previous interplay with the press should not be recognized in current situation, for the fourth rejected the abusive character of photos and lastly, found that there were no mistakes in application of corresponding legal acts by national courts.[46]

As a result, the ECHR did not found a violation of the Article 8 of the European Convention on Human Rights.

Closer to the "forgetting" subject, the ECHR clarified the relation of the freedom of press, presumption of innocence and right to privacy in case of *A. v. Norway*.

The case was about A's unsuccessful defamatory complaint to *Fædrelandsvennen* newspaper, which had published two articles devoted to the issues of pre-trial investigations into a murder case in which the applicant was mentioned. The fact of A's questioning was disclosed to society both by newspapers and television as well as other facts presenting him as murderer, although it was untrue.[47]

On the national level, Norwegian courts recognized as defamatory the publications as "*they were capable of giving the ordinary reader the impression that the applicant was regarded as the most probable perpetrator of the murders, yet concluded that, on balance, the newspaper had right to publish the articles, as it had acted in the interest of the general public, which had the right to be informed of the developments in the investigation and the pursuit of the perpetrators*."[48]

Being dissatisfied with the judgment, A. filed a lawsuit before the ECHR on the grounds of Article 6, paragraph 2 and Article 8.

After substantive analysis, the ECHR rejected A's allegation under Article 6, paragraph 2 and found that "the publications in question had gravely damaged to A's reputation and honor and had been especially harmful to his moral and psychological integrity and to his private life"[49]and in fact disproportionate and in breach of Article 8.

[46] ibid.
[47] "Case of A. v. Norway," HUDOC, accessed 2018 April 10, https://hudoc.echr.coe.int/eng#{%22appno%22:[%2228070/06%22],%22itemid%22:[%22001-92137%22]}
[48] Dirk Voorhoof, "Case of A. v. Norway," IRIS Merlin, 2009, http://merlin.obs.coe.int/iris/2009/6/article2.en.html
[49] ibid.

1.3 Evolution of the Right to be Forgotten

1.3.1. Development in European Countries

Generally, scientist joint legal origins of the right to be forgotten with French (*droit à l'oubli*) and Italian (*diritoo al'oblio*) as springing from the "right to oblivion" – defined as a right to silence over past instances that are no longer transpiring."[50] "Under French law, the concept of limitation on information is incorporated into both civil and criminal law, with the duration of forgetting depending on the subject matter, such as category of offenses in criminal law."[51] France takes the privacy of criminal records seriously and endeavors to rehabilitate former convicts'.[52]As a fact, France was the first country, which implemented "a right to oblivion (*droit à l'oubli*) in the late 1970s, through Article 40 of Law 78-17/1978, which recognized the right of individuals to demand the erasure of personal data when the data is no longer relevant and later included in the Criminal Code an effective way to enforce it."[53] Nowadays, still, there is no fixed definition of the right to be forgotten in French legislation as it considers it as a part of privacy's concept, but legislative background is strengthened by well-developed case law of French courts that had implemented value of Google Spain judgment in their practice.[54]

Currently, by resolving modern challenges, French Data Protection Agency has placed the right in the context of networked environment, provide special attention and stated that continued availability of personal data on the internet poses threats to the individual's freedom of expression and the freedom to change his opinion. Therefore, first of all French Data Protection Agency proposed legislative changes in relevant sphere while "French Secretary of State and Prospective Development of the Digital Economy initiated a "Code of Good Practice on the Right to Be Forgotten on Social Networks and Search Engines."[55] This Code was signed in 2010 and pursuit to increase user's control over their digital data.[56]

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[50] Michael J. Kelly and Satolam David, "The Right to Be Forgotten," *University of Illinois Law Review 2017*, 1 (2017): 25.

[51] Alex Turk, "The Internet Policy in France and the Role of the Independent Administrative Authority CNIL," 5 *KAS International Report*, 5 (2011): 87, 93, http://www.kas.de/wf/doc/kas_22806-544-2-30.pdf?110516131251. (cited from: Michael J. Kelly and Satolam David, "The Right to Be Forgotten," *University of Illinois Law Review 2017*, 1 (2017): 25).

[52] Martine Herzog-Evans, "Judicial Rehabilitation in France: Helping with the Desisting Process and Acknowledging Achieved Desistance," *European journal of Probation* 3, 1 (2011): 4, 6-8, 13. (cited from: Michael J. Kelly and Satolam David, "The Right to Be Forgotten," *University of Illinois Law Review 2017*, 1 (2017): 25.).

[53] See Stupariu, (*supra*, note 31).

[54] Owen Bowcott, Kim Willsher, "Google's French arm faces daily 1000 Euro fines over link to defamatory article." *The Gurdian*, November 13, 2014, https://www.theguardian.com/media/2014/nov/13/google-french-arm-fines-right-to-be-forgotten.

[55] See Hoboken (*supra*, note 19): 11.

[56] ibid.

In the aggregate, "in the Italian legal order, there are no specific rules regulating the right to oblivion. Nevertheless, based upon the action undertaken by the courts and, afterwards, by the Italian Data Protection Authority, the right to oblivion is duly recognized and protected, which has been inspired by the corresponding French expression ("*droit à l'oubli*")."[57]

"Italian judges started to mention the right to oblivion in the mid-1990s whilst legal literature had already studied it and affirmed the existence of such right from the beginning of the 1980s."[58]

From the point of retrospective analysis:

> *"The lower courts started by conceiving and building this right for protecting an individual with regard to a new publication by the media of information, relating to specific events that occurred and were already publicized in the past, which the individual involved in, when time has passed and knowledge of such information seems to be no longer of public interest. Such approach was later confirmed by the Court of Cassation, which ruled that the interest of an individual is to be protected to not be over exposed to the risk of being damaged in relation to his or her identity by the renewed publication of information lawfully disseminated in the past, with the only exception of public interest in new publication of that information arising from new situations."*[59]

Discussing the legal grounds of the Italian right to oblivion, two main characteristics are to be pointed out. On the one side, this right is based on specific constitutional provision, in particular, article 2 of the Italian Constitution, which states that: "The Republic recognizes and guarantees the inviolable rights of the person, both as an individual and in the social groups where human personality is expressed."[60] In this sense, the Rome Tribunal in 1996 "explicitly stated that the actual right of an individual to "repossess" his information, even if lawfully disseminated in the past, directly arises from the above cited article of the Constitution, conceived as a general clause able to cover newly emerging personal values."[61]

On the other hand, the development of this right occurred earlier and irrespective to the adoption of national legislation on personal data protection, which appeared in Italy on the end of 1996 and continued the development separately from the right to data protection.

As Italian scientist claim: "the right to oblivion arises from the need to balance the right of the person with the freedom of speech and information: it exists when there are no public interests or reasons why the news story could lawfully circulate again, notwithstanding having

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[57] Maria A. Biasiotti & Sebastiano Faro, "The Italian perspective of the right to oblivion," *International Review of Law, Computers & Technology* 30, 1-2 (2016): 5, http://dx.doi.org/10.1080/13600869.2015.1125159.
[58] ibid.
[59] ibid.
[60] Mario Einaudi, "The Constitution of the Italian Republic." *The American Political Science Review* 42, 4 (1948): 661-676.
[61] See Biasiotti and Faro (*supra*, note 57): 6.

being lawfully disseminated in the past."[62] To this aim, Italian courts, when deciding on cases where the balancing between those constitutional values were to be applied, referred mainly to three parameters:

1) "the time lapsed since the first publication and the existence of the public interest in the information;"[63]

This criteria is one of the most important while dealing with right to oblivion as due to the elapsing of time, public might not be interested in such information. Time would be a touchstone for evaluating the lawful treatment of data, always being into due consideration with public interest in the news story.

2) "modalities utilized for the publication of individual's information;

3) individual's participation in the fact."[64] Considering the right to oblivion in relation to the role of individual in specific events and situations, it would predominant the right to information when the involvement of a person was extreme, meaning that the dissemination is lawful, given only that any situation of that person is taken out of the news context.

The first time the right to be forgotten had been mentioned in the context of the data protection rights was a case before Italian Supreme court in 1998. In that situation, Italian Data Protection Agency (hereinafter - DPA) "grounds this right on the data quality principle and in this context emphasizes the character of the internet, on which information can easily be found with search engines."[65] As a result, Italian DPA recognized that information should not be proceed more than required owing to damage that may be caused from public information including archives, news and registers. Italian DPA claimed that individuals should have a chance to delete their data after a certain period of time when the relevant aim had been achieved.

"A major issue at stake in Italy has been the transfer of online newspaper archives into the Web and the role played by general search engines, as these always render accessible news and information independently from their original context."[66]

Namely, there were several questions considered by the Italian DPA regarding the need to protect individual's privacy in the further case "*Garante per la protezione dei dati personali*". The brief facts of the case:

> *"The plaintiffs complained about the fact that by putting their names in a general search engine people obtained information about their life up to 15 years before. In one case, one of the plaintiffs was completely acquitted from the criminal injuries cited in the news item, but this situation did not appear at all in the search engines results. In other cases, interested individuals, although they changed their*

[62] ibid (*supra*, note 57): 6-7.
[63] ibid.
[64] ibid.
[65] See Hoboken (*supra*, note 19): 9.
[66] See Biasiotti and Faro (*supra*, note 57): 9.

> *professional lives, were still appearing to be associated with information belonging to their past."*[67]

The DPA did not confirm the plaintiffs' request regarding deletion or any changes in the content of information from newspaper online archives, however, taking into account the peculiarities of the exact case considered lawful the request in relation to their personal identity.

Predictably, DPA had established that due to the historical meaning of online archives for research as well as to necessity for achieving the aim of news story, personal data accumulated in that archives should not be erased. On the contrary, search engines should delete webpages containing tidings about plaintiff's personal sphere. By this I mean that Italian DPA imposed on data providers an obligation to avoid the reconstruction of news even though plaintiff's sensitive data included into newspaper archives and could be accessed through general search engines external to the newspaper website. Thus, news can be found directly on the web-site of the newspaper's online archive, but cannot be redressed through mass search engines.

Consequently, "this solution allows protection to be granted to data subjects and in the meantime to safeguard the integrity of historical memory, the freedom of historical research as well as the right to study and to inform, as users can keep accessing the integral version of the news items by browsing and searching directly into the newspapers site."[68]

Alternatively, in its recent decisions, the Court of Cassation

> *has expressed a distinct to DPA approach to the awareness to the right to oblivion and created a new landmark decision. Decision no. 5525/2012 states that "a news story must be updated according to the developments of the event, otherwise the event, from being complete and true as it was at the rime of its manifestation, would not corresponding to the current truth. Without updating and integration of the news, the present identity of the person would be damaged whenever the story, in its original version was read by the public."*[69]

By this decision the court certified the need for further changes into online archives systems in the context of actualization of information so as to allow users an easy access to the updated information. This would guarantee the individual's possibility to correct and complete the information.

However, the decision of the Court of Cassation was widely discussed in legal circles due to the imposition of heavy duty on online newspapers archives providers from economic perspective obtaining from publishers updating of information which from the other side force newspapers to withdraw from making their archives available online, with serious harm to the

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[67] "Garante per la protezione dei dati personali", 11 December 2008, doc. web 1582866, http://www.garanteprivacy.it/. (cited from: Maria A. Biasiotti & Sebastiano Faro, "The Italian perspective of the right to oblivion", *International Review of Law, Computers & Technology* 30, 1-2 (2016): 9, http://dx.doi.org/10.1080/13600869.2015.1125159) .

[68] ibid (*supra*, note 66): 9.

[69] ibid (supra, note 57): 10.

freedom of information and research. "The court of Cassation seems to ask online newspaper archive providers to act in a way that seems to change the nature of these archives: an archives is, by the definition provided by the same Court, a collection of news items organized and ordered according to specific criterion and not a historical collection presenting facts and their further developments."[70] "The Court of Cassation seems to raise a false problem: the news contained in a historical archive is in fact contextualized in that it evidently refers to past events and to a certain data and hence in itself is likely to have been superseded by subsequent events."[71] Nevertheless, the Italian Supreme Court did not explained any liability of search engines and search engines providers concerning storage of cache copy of the original news item retrievable online without further renewal.

Apart from this, in its recent decisions, Italian DPA upheld the appeal[72] of two citizens claiming the availability in newspaper historical archive online of information about their involvement into criminal proceedings in past without further updating. Plaintiffs asked to withdraw the information from public access available through general access. As a result, DPA reject removing the information "from the archive, on the grounds of freedom of expression, historical research and the right to education and information, but it accepted the request for updating and integrating the information contained in the news item, in order to protect the current personal identity of the individuals, which risked being affected by events of the past that no longer correspond to their current reality."[73]

Ultimately, recently, the Milan Tribunal enacted the decision of 26 April 2013, no 5820/2013[74]. In short,

> *"the plaintiff complained about the presence in the online archive of a newspaper of a 1985 news item, retrievable by using general search engines, in which he was described as a usurer and tax evader. The interested individual invoked defamation and infringement of the right to oblivion. The DPA ruled out defamation, but acknowledged the violation of the right to oblivion. Specifically, it affirmed that the information reported was partially untrue and that there was no particular interest to justify a wide public access to news item, in light of the time elapsed and the lack of significant role of the involved subject. Therefore, in line with the landmark case of Court of Cassation, admitting as an extreme measure the*

[70] Ciommo Di, Francesco, and Roberto Pardolesi. "Dal diritto all'oblio in Internet alla tutela dell'identita` dinamica. E' la Rete, bellezza!" *Danno e reposnsabilita`*, 7 (2012): 704–705. http://www.cnr.it/istituti/Allegato_115265.pdf (cited from: Maria A. Biasiotti & Sebastiano Faro, "The Italian perspective of the right to oblivion," *International Review of Law, Computers & Technology* 30, 1-2 (2016): 11, http://dx.doi.org/10.1080/13600869.2015.1125159).

[71] See Biasiotti and Faro (supra, note 57): 11.

[72] Garante per la protezione dei dati personali, 20 December 2012, doc. web 2284632, http:// garanteprivacy.it; Garante per la protezione dei dati personali, 24 January 2013, doc. web 2286820, http:// garanteprivacy.it.

[73] See Biasiotti and Faro (supra, note 57): 11.

[74] Luigi Manna, "Internet e diritto "all'oblio": una recente sentenza del Tribunale di Milano." Diritto 24, 2013, http://www.diritto24.ilsole24ore.com. (cited from: Maria A. Biasiotti & Sebastiano Faro, "The Italian perspective of the right to oblivion," *International Review of Law, Computers & Technology* 30, 1-2 (2016): 11, http://dx.doi.org/10.1080/13600869.2015.1125159).

> *removal of an article from the internet, the DPA imposed on the publisher to remove the article from the newspaper's online archive, allowing it to keep only a hard copy for historical documentary purposes."*[75]

To sum up, according to the Italian case law development, the right to oblivion has very exact meaning and usually there is a need to find a right balance between personality rights and freedom of press and information. A chance to require an erasure of data should not be considered as redrafting of historical events and rather should include imposition of some limitation on scope of information or its contextualization or updating in the context of further changes.

In comparison to French and Italian approach, Dutch law does not recognize the right to be forgotten as such, although several judgments can be mentioned that grant protection of the right to be forgotten. Also, according to art. 6:162 of the Dutch Civil Code, the right to privacy is protected by the tort of negligence and does not define the scope of interests that are protected.[76]

In order to illustrate the development of court practice, lower courts have produced narrowed way of protection against past faults.

> *To summarize, the facts of the first case is that claimant sued against information posted on defendant's web-site identifying him as "pedophile lover", involvement into sexual abuse of five children and creating obstacles so as to delay police investigation concerning sexual abuse of children. The Court of Rotterdam recognized the violation of the Act on the protection of personal data the publishing of personal information on the website by private person and therefore tortious. Additionally, the Court ruled that plaintiff's right to privacy predominant over the right to freedom of expression by the defendant as well as imposed an obligation on the later to eliminate the personal information and accusation of the claimant.*[77]

In second case,

> *overall, the court analyzed the request of a mother to her ex-husband regarding removal of photos of their five-year-old son from his profile in social network. The claimant argued that due to the specificity of her work facts about her private life should not be public. Taking this into account, the Court of Almelo distinguished between those photographs that were only visible to anyone accessing the internet, the Court considered only the latter photos violated the privacy of the plaintiff and her son.*[78]

In one more case,

> *in summary, the issue was whether a father could post things about his ten-year-old son on a weblog. The brief facts of the case are that father had published photos and annual congratulations for son's birthday in his weblog while mother demanded to prohibit such an activity claiming violation of privacy and probable son's bulling. In that situation, the Court of Arnhem denied the claim on*

[75] See Biasiotti and Faro (*supra*, note 57): 12.
[76] "Civil Code of the Netherlands", Dutch Civil Code, http://www.dutchcivillaw.com/civilcodebook066.htm
[77] A.J. Verheij, "The right to be forgotten – a Dutch perspective," *International Review of Law*, Computers & Technology 30, 1-2 (2016): 36.
[78] See Verheij (*supra*, note 77): 37.

the basis that photos were very old and the weblog was more about father's life rather than about his son in addition to the only way to reach the attention of his son.[79]

At last, in one case connected with Google, the Court of Appeal of Amsterdam rejected the request of the claimant concerning removal of request connected with his name.

As to the facts,

one popular TV show in the Netherlands had shown an interview with an assassin discussing the best way to murder a competitor and mentioned only the last name of the plaintiff. As a result, claimant was convicted and sentenced into jail for an attempt to assassination. In addition, writer composed and published a book as a mix of facts and fiction using the name of plaintiff. Therefore, the petitioner sued against Google and requested removal of URL links from the search. However, District Court of Amsterdam and Court of Appeal of Amsterdam discard his claims.[80]

The Court of Appeal based its judgment on further basis:

1) public interest to claimant's criminal charge and prosecution;
2) lack of direct coincidence between information posted on the website and claimant's full name for potential requesters as the webpage only contains the initials
3) public cannot identify the far-fetched scope of book eventhough it uses reference to plaintiff's initials due to the absence of clear connection between the book and his identity;[81]

In summary, Dutch tort law protect individuals personal data only in situations when data published by themselves used by third parties to bother them or after a long period of time has elapsed. Also, the structure of Dutch tort law made accents on conduct rather than on protected interests and consequently, absolute nature of tort law principles are likely to make the development of the right to be forgotten a lasting process.

Analyzing the German approach to the right to be forgotten, the main problem is that this term is unknown both by legislation and court practice, but "German Basic Constitutional Law recognizes a right to informational self-determination granting individuals the right to decide for themselves on how their personal data are released and used. This lead to cases at the Federal Supreme Court and the Federal Constitutional Court in which the Courts have had to respond to the question of if, and under what circumstances an individual can ask for the deletion of personal data."[82]

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[79] ibid.
[80] Stefan Kulk and Frederik Zuiderveen Borgesius, "Freedom of Expression and "Right to Be Forgotten" Cases in the Netherlands after Google Spain," *European Data Protection Law Review1*, 2 (2015): p. 117-118.
[81] See Kulk and Borgesius (*supra*, note 80): p. 118-119.
[82] Claudia Kodde, "Germany's "right to be forgotten" – between the freedom of expression and the right to informational self-determination," *International Review of Law, Computers & Technology* 30, 1-2 (2016): 18, https://doi-org.skaitykla.mruni.eu/10.1080/13600869.2015.1125154.

The first codification in the sphere of data protection was in the Länder in the mid-twentieth century. As a cornerstone in the development of federal data protection laws was the Court's Population Census Decision, which identified the right to informational self-determination as a new constitutional right, which can be regarded as the constitutional basis for the right to be forgotten.[83] In this case, there were several groups: the right to privacy, the right to self-presentation and informational self-determination.

In its reasoning, Federal Constitutional Court of Germany had declared that the constitutional right to informational self-determination that assure the right of individual to decide for themselves the way of usage of their personal data is a constitutional basis for data protection in Germany. In addition, the general ground for the right to delete is section 35 paragraph (2) to (4) of the Federal Data Protection Act.[84] This document provides that personal information should be erased in the following situations:

> *1) "if their storage is inadmissible;*
> *2) if they concern information on racial or ethnic origin, political opinions, religious or philosophical convictions, union membership, health, sex life, criminal offences or administrative offences and the controller is unable to prove their accuracy;*
> *3) they are processed for one's own purposes, as soon as knowledge of them is no longer needed for fulfilling the purpose for which they are stored;*
> *4) they are processed commercially for the purpose of transfer and an examination at the end of the fourth calendar year, for data concerning matters that have been concluded and the data subject does not object at the end of the third calendar year after the data were first stored, if an examination shows that further storage is unnecessary."*[85]

Generally, those provisions were incorporated into the Federal Data Protection Act during the adoption of the Directive 95/46/EC into national legislation. Usually, broad interpretation of the right to personality includes the right to be forgotten connected with cases of former convicted criminal and their right to reintegration which always prevails over the interest of society to be informed about their criminal past. Characteristically, this right primarily used in situations combined with potential limitations to publish facts about the past events rather than consideration of the legality of historic publications themselves which still available online.

"A fundamental pillar of jurisprudence concerning a constitutional right to be forgotten can be found the "Lebach" decision which had established a right to informational self-determination."[86] The facts of the case were that German television channel showed a film about

[83] See Kodde (*supra*, note 82): 19.
[84] "Federal Data Protection Act in the version promulgated on 14 January 2003", Federal Law Gazette, https://www.gesetze-im-internet.de/englisch_bdsg/englisch_bdsg.html#p0532.
[85] ibid.
[86] See Kodde (*supra*, note 82): 26.

the murder of four soldiers which draw a lot of attention among the public, therefore, one of the offender of the crime claimed violation of his constitutional right to personality by this film. As a result, Federal Constitutional Court of Germany stated that "in case of reports of current events, the information needs of the public generally outweigh the individual's right to personality,"[87] but also, quite important is to abide the principle of proportionality. Overall, the court had ruled in favor of the plaintiff claiming that "reports a long time after the actual event become disproportional if they pose new risks for the person concerned, especially if they are endanger social rehabilitation of the criminal who served his or her time."[88]

In this judgment, this was the first time, before the adaption of the data protection legislation, when judges used the term "a right to be let alone".

Distinct approach was approved in another decision of the Federal Constitutional Court of Germany called "Sedlmayr" case. To be more precise, case is about a lawsuit of convicted murderer to a radio station seeking to withdrawn from circulation an article regarding the murder in their online archive 10 years after the event.[89] Although, the Federal Court of Justice of Germany had recognized the principle applied in "Lebach" judgment, it decided not to apply it in here.

> *The arguments were that "a criminal, despite having a legitimate interest in "being let alone", does not have a right to be confronted publicly with his or her crime". Furthermore, unlike the film, a news in online archive aimed to engage a wide public attention whilst the first one has a very limited scope of interest for the public.*[90]

Consequently, the constitutional rights of the respondent override the offender's rights as such record was protected by "journalistic purposes".

In summary, it is hard to explain why judges do not use the term "right to be forgotten" in their decisions as well as absence of this term in German legislative acts although separate elements could be identified into court decisions. Thus, an answer could be the presence of the right to deletion in the Federal Data Protection Act, but often users will not be familiar with the process of processing and transmitting of their data so it would hard to engage into court proceeding due to the lack of developed and stable court practice.

[87] ibid.
[88] ibid.
[89] ibid.
[90] ibid.

1.3.2. Spreading Among non-European Jurisdictions

Except Europe, recently Argentina was one of the first countries which considered a dispute following the issue of fair balance between privacy and freedom of speech online. Approximately two hundred of claims were sued by actresses, models and athletes through their lawyers against Google and Yahoo, demanding the removal of Internet search results and link to various content. The main requirement was association of their photos – some of which are sexually suggestive and which were presumably taken and posted originally with permission – with pornography and prostitution.[91]

The brightest example, which provoked a worldwide attention in the form of increase of conflict between privacy and free speech on the Internet is a case of Virginia Da Cunha (hereinafter – Da Cunha), who filed a lawsuit against Google and Yahoo and won trial in 2009, but lost an appeal in 2010.

To be more precise, in the first instance Da Cunha claimed that her name and private photos emerged into Google and Yahoo search engines results linked to, or used in, websites offering sexual content, pornography, escorts and other activity related to sex trafficking.[92] She claimed illegal usage of her images arguing that this caused harm to her career as a model, actress, singer and media personality. Moreover, she sought a damage compensation of 200000 Argentine pesos (approx. $42000) for material and moral harms, damage to her rights to personality, reputation and privacy and composed a copyright claim seeking to restrict users in their right to download her photos from Yahoo and Google URL links and place them into books.[93] Furthermore, she alleged that her character and individual beliefs did not coincide with search results connecting her with sex-related websites.

In its decision, Judge Virgina Simari issued that: erotica, pornography and sex content could be sorted both by Google and Yahoo in the search results by tags. Beside this, Yahoo could exclude those search results from its list, as it has its own filter specifically including adult-only websites.[94] From the perspective of Virginia Simari, "the key conflict in the case between the right

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[91] "La Justicia Argentina Sobreseyo a Adriana Norena, Directora General de Google", *Info Technology*, 2012, http://www.infotechnology.com/internet/La-Justicia-argentina-sobreseyo-a-Adriana-Norena-directora-general-de-Google-20120604-0005.html. (cited from: Carter Edward L., "Argentina's right to be forgotten", *Emory International law review* 27, 1 (2013): 23, http://law.emory.edu/eilr/content/volume-27/issue-1/recent-developments/argentinas-right-to-be-forgotten.html).

[92] Carter Edward L., "Argentina's right to be forgotten", *Emory International law review* 27, 1 (2013): 26, http://law.emory.edu/eilr/content/volume-27/issue-1/recent-developments/argentinas-right-to-be-forgotten.html

[93] ibid.

[94] Ibid.

to freedom of expression, on the one hand, and the right of an individual to control the use of his or her image, on the other hand."[95]

The judge recognized that the Constitution of Argentina does not regulate the protection of this right however, she indicated that this right is mentioned in the Universal Declaration of Human Rights, the American Declaration of the Rights and Duties of Man and in the American Convention on Human Rights and the International Convention on Civil and Political Rights, but "a right to control the use of one's image" does not mention in neither of this documents particularly, "but instead they all refer to general rights of reputation and privacy."[96]

After that, she asserted that the right to control one's image should be identified as a privilege of individual to limit others possibility to catch, reprint or publish one's image without permission. Virginia Simari then specified that in each case, the image that the law should protect is that one's which conforms with the image created by its subject, and stated that this image might change over time, but the high level of publicity of an individual do not empower third parties to unlimited access and use of that images.[97]

In conclusion, the judge recognized "that the appearance of Da Cunha's photographs on the search engines of Google and Yahoo, linked with pornography, sex trafficking and prostitution constituted a violation of Da Cunha's right to control her own image in the present time, when she opposed the message that the linked photographs would send."[98] The judge of trial court granted moral damage for 50000 pesos from Google and Yahoo and approved the deletion of search results related with erotic, sex and pornography.[99]

During collegial consideration in National Court of Civil Appeals of the Federal Capital, three-judges reversed the judgment of the court of first instance and found that Google and Yahoo were not responsible for damage caused to Da Cunha by Internet user who placed her photos on sex-related websites.

Judge Patricia Barbieri had found that search engines could not be held liable for the materials posted by private individuals and legal entities on their own websites. She did not find a causal link between damage caused to Da Cunha and links generated by the search engines catalogs. Additionally, the judge emphasized on the free and unregulated character of the Internet. Lastly, she cited Google's own Terms of Service, stating that Google was not responsible for

[95] ibid (*supra*, note 92): 26-27.
[96] ibid (*supra*, note 92): 27.
[97] ibid (supra, note 92): 28.
[98] ibid.
[99] ibid.

content on individual websites, and "Google's compliance with the notice and take-down provisions of the U.S. Digital Millennium Copyright Act."[100]

Second judge, Ana Maria R. Brilla de Serrat supported the opinion of the judge Patricia Barbieri stating that either Google or Yahoo were not responsible. However, contrary to her colleague she supported the right of individual to have a right to be forgotten and agreed with the position of the Italian legal commentator Stefano Rodota "for the proposition that the right to be left alone includes a right to control information about oneself."[101] Apart from this, she cited the scholar Victor Mayer-Schonberger as stating that "digital information almost never disappears, even if we want it to, and that this results in the performance of the past in the present as well as went out to state that remembering has become the norm and that she agreed with Mayer-Schonberger's statement that it is worth remembering that with respect to some things, there is value in forgetting."[102]

Distinctive approach was proposed by third judge, Diego C. Sanchez, who confirmed the decision of the trial court in favor of Da Cunha. He claimed that "search engines are not merely passive carriers of information, but active participants in attracting attention to certain types of information."[103]

On the whole, although the courts have not adopted the concept of the right to be forgotten a case of Da Cunha allowed other claimants to base their decisions on copyright, privacy and data protection matters. Argentina's case law supports the idea that freedom of speech and the right to be forgotten must be balanced.

One more illustrative example of the development of the right to be forgotten beyond the European jurisdiction is Brazilin legal framework. The main act which goes into same direction as the GDPR regarding data subject's rights and entirely applies to search engines is Brazilian Consumer Code. Article 43 and 44 of the Brazilian Consumer Code regulate consumer databases and reference files. To compare with GDPR, in defiance of similarities, the provisions of this legal act not the same, particularly, regarding the rights of erasure, of blocking and the right to object to data processing. Actually, the Brazilian Consumer Code does not empower consumers with a right to object to a processing of their personal data nor does it require data controllers to keep personal data updated as does Directive 95/46/EC in its article 6(d) and 14(b).[104]

[100] ibid (supra, note 92): 29.
[101] ibid.
[102] ibid (supra, note 92): 30.
[103] ibid (supra, note 92): 30-31.
[104] Mario Viola de Azevedo Cunha, Gabriel Itagiba, "Between privacy, freedom of information and freedom of expression: Is there a right to be forgotten in Brazil?" *Computer Law & Security Review* 32, 4 (2016): 638.

As an example, Brazilian Superior Court of Justice in its recent rulings in one decision recognize the existence of the right to be forgotten while denying such a right in another one.

The first case called "**Candelaria massacre case**" was connected with the fact of mentioning on a TV show a man who was suspected in committing a crime without his approval.

In short, while preparing a TV show, a responsible person contacted to the plaintiff and asked for permission to mention his name and demonstrate his photo on the show taking into account that claimant was a suspect during the investigation, although he was later released, but eventhough plaintiff denied, his data was presented on TV. Consequently, plaintiff has filed a lawsuit stating that there were violation of his right to privacy, anonymity and family peace as threats and accusation from his community and family members occurred regularly. In addition, claimant said that his professional life was ruined.[105]

The Rio de Janeiro Appeals Court brought forward some interesting considerations about the limitation of the freedom of information and freedom of press:

> *1) "the first one is focused on the person who is having his name once again connected to a crime. To the appeals Court, if the person was anonymous before the event, it is their right to return to such status;*
>
> *2) the second was that there was no harm to the freedom of expression, freedom of information and freedom of the press. To the Appeals Court, the story of the Candelaria Massacre could have been presented without mentioning plaintiff's name, considering that he was found not guilty, and that it did not add much to the case".*[106]

Later, while considering the appeal of TV channel, Superior Court of Justice in its decision, sustain the position of Appellate court conforming that there was no damage to freedom of information, freedom of press and expression since TV program could have presented the story without mentioning claimant's personal information, defending his right to anonymity and the right to be forgotten for occasions happened 20 years ago.[107] Furthermore, the court stated that there is no difference between public interest and the interest of the audience.

In the second case called "**Aida Curi's case**" concerning the right to be forgotten, Superior Court of Justice rejected the claim of Aida's brother claiming that the information posted during the TV show brought back to their lives the pain and suffering they went through more than 30 years before, when his sister was murdered.

Here, the Court balanced the right to intimacy and privacy on the one hand and freedom of expression and press on the other side.[108] To compare, the Court said that in the "Candelaria

[105] See Cunha and Itagiba (supra, note 104): 639.
[106] ibid (supra, note 104): 639-640.
[107] ibid.
[108] ibid (supra, note 104): 640.

massacre case", it would have been real to introduce the facts without mentioning the name of the plaintiff, but the same would have been unreal in Aida's situation due to the fact that information about a crime reached the public domain after a long period of time.[109] The main argument was that victim in this case was an essential element for the crime and her name was important for certification of the freedom of expression while in the first case claimant was exonerated and not a center of discussion.

In conclusion, this Chapter was focused on analysis between related to the right to be forgotten notions such as right to delete, right to oblivion and right to erasure. To my mind, among all this terms, right to deletion is more about control and reforming of data protection and less about legal background while right to oblivion is more about erasure of information as in most European countries, the concept of "oblivion" is associated with reintegration and possibility of "clean slate" as well as main peculiarity of the right to be forgotten – possession of control of individuals regarding their digital information on the Internet.

Balancing of the rights and freedoms is one of the key concepts and the appropriate balance will ensure that neither of the legal and controversial interests of each individual is subjected to unwarranted restrictions.

As to the evolution of the right to be forgotten, it varies considerably in each state. French and Italian perspective characterizes no direct definition and separate legislative framework for the right to be forgotten, Dutch law do not recognize the concept of the right to be forgotten and protect interests of individuals by the tort of negligence and for Germany as well unknown both in legislation and in court practice. In Argentina Da Cunha's case became a background for the development of further case law, while Brazilian concept of the right to be forgotten mostly depended from development of court judgments. Mostly, each case requires finding first of all a right balance between freedom of expression, freedom of press and personality rights including privacy and secondly, individual case by case assessment application criterions devolved by court practice particularly in each country.

[109] ibid.

2. THE EUROPEAN UNION PROSPECT

This chapter will be dedicated firstly, to the legislative changes in the sphere of data protection, including the right to be forgotten due to the adoption of the General Data Protection Regulation. Secondly, this part will suggest analysis of the landmark judgment of the CJEU in Google Spain case paying attention to criterions used by judges to establish the right to be forgotten and further implementation of this case. Finally, general tendencies of application of the right to be forgotten in the context of modern challenges in the court practice of the European Court of Human Rights would be considered.

2.1 Comparative Analysis Between Current Legislative Regime and Planed Regulation in the Scope of the Right to be Forgotten

Nowadays, in the EU the main legislative act is 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. From the historical perspective, one of the targets of this document was to ensure the equivalent level of protection of personal data in all Member States so as to ensure the free flow of information on an internal market as one of the fundamental pillars of the EU. However, this legal document do not have the direct effect, thus main provisions and ideas have to be adopted while preparing the domestic legal system inside the Member States so as to have an impact on individuals and legal entities rights.

The Directive 95/46/EC has two aims: first prescribed in article 1(1): "to protect the fundamental rights and freedom of natural persons, and in particular their right to privacy with respect to the processing of personal data and second prescribed in article 1(2): to safeguard the free flow of personal data between EU member states."[110] In contrast, General Data Protection Regulation states in article 1(2) and 1(3) respectively that "Member States shall neither restricted nor prohibited free movement of personal data for reasons connected with the protection of natural persons with regard to the processing of personal data and protect fundamental rights and freedoms of natural persons and in particular their right to the protection of personal data."[111]

Nonetheless, due to the need for fundamental modernization of European data protection rules and erasing of the right to oblivion in particular European countries as well as other

[110] "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", "*Official Journal of the European Union"* 281, 1995, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31995L0046:en:HTML.

[111] See Regulation 2016/679 (*supra*, note 37).

challenges, in 2010 the European Commission announced the beginning of creating a "new general legal framework for the protection of personal data in the European Union covering data processing operations in all sectors and policies in the European Union" and intent to "introduce" the right to be forgotten."[112] After that, in 2012, the European Commission released the proposal of the GDPR and later on 27th of April 2016 it was adopted and published in the Official Journal of the European Union. It will come into force after 25 May 2018. An important fact is that unlike Directive 95/46/EC, the GDPR will be binding directly throughout the EU, enforced by national data protection authorities and courts, without demand to switch into national legal acts.

In reality, the right to be forgotten is not totally new concept for data protection. The Directive 95/46/EC already included "the right to access" in its article 12 (b), which give a chance for claimant "to require rectification, erasure or blocking of data the processing of which does not comply with the provisions of this Directive, in particular because of the incomplete or inaccurate nature of the data."[113] Furthermore, article 6 subparagraph (b) and (c) of Directive 95/46/EC declares that: "information should be collected for specified, explicit and legitimate purposes and not further processed in a way incompatible with those purposes as well as adequate, relevant and not excessive in relation to the purposes for which they are collected and/or further processed what in fact impose limitations on this process."[114] Alternatively, the new GDPR in article 17 states that the "data subject shall have the right to obtain from the controller the erasure of personal data concerning him or her without undue delay."[115]

Such a requirement would become an obligation for the controller who shall erase the personal data in next situations:

> *"a) the personal data are no longer necessary in relation to the purposes for which they were collected or otherwise processed; b) the data subject withdraws consent on which the processing is based for a specific purpose or on a given explicit consent for special categories of data and where there is no other legal ground for the processing; c) the data subject objects to the processing and there are no overriding legitimate grounds for the processing, or the data subject objects to the processing for direct marketing purposes; d) the personal data have been unlawfully processed; e) the personal data have to be erased for compliance with a legal obligation in EU or Member State law to which the controller is subject; f) the personal data have been collected in relation to the offer of information society services referred to in Article 8(1), i.e., of a child."*[116]

[112] Meg Leta Ambrose, "Speaking of forgetting: Analysis of possible non-EU responses to the right to be forgotten and speech exception," *Telecommunications policy* 38, 8-9 (2014): 801.
[113] See Directive 95/46/EC (supra, note 110).
[114] ibid.
[115] See Regulation 2016/679 (*supra*, note 37).
[116] ibid.

Actually, above mentioned norms are not absolutely new and somehow repeat the current article 14 subparagraph (a) of the Directive 95/46/EC and accordingly, there are exceptions when an individual whose interests has been infringed can object the processing of his/her data and public interest should not prevail there. This article states that "at any time on compelling legitimate grounds relating to his particular situation to the processing of data relating to him, save where otherwise provided by national legislation an individual has such opportunity at least in the cases referred to in Article 7 subparagraphs (e) and (f)."[117] Nevertheless, article 14 subparagraph (a) does not give a data subject any rights over and above as already set out in Article 12 (b), but simply directs the data controller or the regulatory authority to make more specific account of the data subject's situation when determining the legitimacy of processing based on Article 7 subparagraphs (e) and (f).[118]

Interestingly, that to differ from article 14 subparagraph (a), article 17(1)(c) reversed the burden of proof regarding the right balance between conflicting terms from subject to data controller who should prove that the data cannot be deleted because it is still needed or relevant.

Also, article 17(3) of the GDPR prescribes situations when erasure of data should not proceed including "exercising the right of freedom of expression and information, when the data in question is proceed due to a legal obligation under the EU Member State law, for reasons of public interest in the area of public health, public interest, scientific, historical research or statistical purposes which would be rendered practically impossible to achieve their objectives without the processing involves the establishment on defiance of legal claims."[119] Still, as some authors claim, it is hard to define what kind of information will have significance in future.

In addition, there are several more things GDPR aims to change:

1) avoid any contradictions as to the responsibility of non-European companies which propose services to European customers and oblige such legal entities to adhere European rules irrespective of "physical location" of company's server which is used for processing of data;

2) impose an obligation on a data controller who disclosed the personal data to take justified steps to inform third parties of the individual's desire to delete the data. In addition, in situations where a court or regulatory authority based in the EU has ruled as a final decision that the data should be erased, controller would be obliged to provide the erasure of information;

[117] See Directive 95/46/EC (supra, note 110).
[118] ibid.
[119] ibid.

3) permit supervisory data protection authorities to impose administrative sanctions on legal entities which do not abide with the right of the citizens, including the right to be forgotten.[120]

Finally, the request for erasure has to be defined on a case-by-case principle. Neither right to freedom of expression nor the right to erasure are absolute and thus, fair balance should be sought between the legitimate interest of internet users and the person's fundamental rights. Such balance may depend on the nature of the information, its sensitivity for private life of an individual and on the public interest in having access to such information. As an example of Google Spain case although the court ruled to delist information from search results it did not confirm a right to change historical facts contained in online archive of the newspaper. Respectively, Google will have to assess deletion requests on a case-by-case basis and to apply criteria mentioned in the EU law and CJEU judgment.

2.2 The Rulings of the Court of Justice of the European Union

2.2.1. Google Spain sl. and Google inc. v Agencia Espanola de Proteccion de Datos (AEPD) and Mario Costeja Gonzalez.

The right to be forgotten has recently been introduced into practice in the EU by the judgment of the Court of Justice of the European Union in Google Spain v. AEPD and Mario Costeja Gonzalez, C-131/12 (hereinafter – Google Spain decision). This decision made a substantive contribution into a possibility of data subjects to request under certain conditions from a search engines to delete the links appearing in the search results based on a person's name.

As to the facts, 19 January and 9 March 1998 Spanish newspaper "La Vanguardia" published two announcements mentioning Mr Costeja González's name appeared for a real-estate auction related to proceedings for the recovery of social security debts. An online version of the newspaper also contained published advertisement. If somebody tried to find the information about Mr Costeja González, Google addressed to La Vanguardia's pages.[121]

On 5 March 2010, Mr Costeja González filed a complaint with the Spanish Data Protection Agency *(Agencia Española de Protección de Datos)* against La Vanguardia Ediciones SL and against Google Spain and Google Inc. In his complaint he requested from La Vanguardia

[120] "Factsheet on the "Right to be forgotten" ruling (C-131/12), accessed 2018 March 30, https://www.inforights.im/media/1186/cl_eu_commission_factsheet_right_to_be-forgotten.pdf

[121] "Google Spain SL and Google Inc. v Agencia Española de Protección de Datos (AEPD) and Mario Costeja González", *CURIA*, accessed 2018 March 30, http://curia.europa.eu/juris/document/document_print.jsf?doclang=EN&docid=15206

to remove or modify references to his personal data on newspaper's pages. In addition, he demanded from Google Spain and Google Inc. to remove or hide the personal data relating to him so that they stop including links to the La Vanguardia site in the search results. Plaintiff stated that the disputes had been fully resolved several years ago and that the reference to him is absolutely irrelevant.[122]

By its decision of 30 July 2010, Spanish Data Protection Authority (hereinafter –AEPD) rejected the complaint on the grounds that the publication of the information in the La Vanguardia was legally justified as it was issued by Ministry of Labour and Social Affairs and aimed to attract maximum publicity to the auction in order to increase the amount of purchasers.[123]

On the contrary, the complaint against Google Spain and Google Inc. was upheld. The AEPD considered that search engine are subject to data protection legislation given that they carry out data processing, for which they are responsible and act as intermediaries in the information society.[124] AEPD believes that it is empowered to limit the access to certain data by the operators of search engines and withdraw the data when it considers that the proliferation of data might discredit fundamental right to data protection and the dignity of person in the broad sense and this would also encompass a demand of an individual to exclude such data from access to third parties.

Therefore, Google Spain and Google Inc. appealed against the AEPD decision before Audiencia National (National High Court) in order to annul the decision. After that, Spanish National High Court referred the matter to the CJEU and referred several questions to interpret the Directive 95/46/EC.

The *first question* was in relation to the Directive's territorial scope and whether Google's search engine, based in the United States, was subject to Directive 95/46/EC. Although Google Inc. runs its search engine from California, its subsidiary Google Spain, functions in Spain and sells advertising space on the Google search engine.[125]

Second issue was whether Google's search engines activities must be classified as "processing of personal data" and if so whether Google is a data controller in relation to processing of personal data within the meaning of "controller" as natural or legal person, pubic authority or any other body which alone or jointly with others determines the purpose and means of processing of personal data set up Article 2 (d) of Directive 95/46/EC.[126] Lastly, if the answer affirmative, whether Google would be obliged to comply with all of the obligations under European data protection rules.

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[122] ibid, (*supra*, note 121): paragraphs 14-15.
[123] ibid, (*supra*, note 121): paragraph 16.
[124] ibid (*supra*, note 121): paragraphs 16-17.
[125] ibid (*supra*, note 121): paragraph 20, subparagraph 1.
[126] ibid, paragraph 20, subparagraph 2.

The *third one* was devoted to the measure of search engine operator's liability and whether Google is obliged to remove links to particular web pages of third parties containing data relating to individual when plaintiff considers that it might be prejudicial to him or her wishes it to be consigned to oblivion, nonetheless, the information has been lawfully posted by third parties. Additionally, the court considers the issue whether data subject has a right to be forgotten, in particular right to erasure and blocking of data under Article 12 (b) and the right to object under subparagraph (a) of article 14 of Directive 95/46/EC.[127]

For the **first question** the court held that according to paragraph 49 of Google Spain decision, "Google Spain engaged in the effective and real exercise of activity through stable arrangements in Spain including separate legal personality and thus constitutes a subsidiary of Google Inc. on Spanish territory and establishment within the meaning of article 4(1)(a) of Directive 95/46/EC."[128] The court points out in paragraphs 52 and 54 that

> *"article 4(1)(f) of Directive 95/46/EC does not require the processing of personal data in question to be carried out "by" the establishment concerned itself, but only that it be carried out "in the context of the activates of the establishment. For this, the European Union legislature sought to prevent individuals from being deprived of the protection guaranteed by the directive and that protection from being circumvented, by prescribing a particular broad territorial scope."*[129]

Lastly, the Court in paragraph 56 and 57 states that nevertheless Google Spain activity was more relating to the activities relating to the advertising space and sales, all this activities undergone by Google Spain were "inextricably linked" to Google's Inc. search engine, contributing directly to its profitability. Also, "since the display of the results accompanied, on the same page, by the display of advertising linked to the search terms, it is clear that the processing of personal data in question is carried out in the context of the commercial and advertising activity of the controller's establishment on the territory of a Member State, in this instance Spanish territory."[130]

As for the **second question**, the CJEU notes that "there is no doubts that the data found, indexed and stored by search engines and made available to their users include information relating to identified or identifiable individual constitutes personal data in the meaning of Article 2(a) of Directive 95/46/EC."[131] In paragraph 28 of the judgment, the Court states that "the processes of the search engine connected with its data including collecting, retrieving, recording, storage, disclosure and organization within framework of its programs must be considered as "processing"

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[127] ibid (*supra*, note 121): paragraph 20, subparagraph 3.
[128] ibid, paragraph 49.
[129] ibid, paragraph 52, 54.
[130] ibid, paragraph 56, 57.
[131] Herke Kranenborg, "Google and the Right to be forgotten," *European Data Protection law Review* 1, 1 (2015): 71, https://edpl.lexxion.eu/data/article/7245/pdf/edpl_2015_01-014.pdf

regardless of the fact that the operator of the search engine also carries out the same operations in respect of other types of information and does not distinguish between the latter and the personal data."[132] In addition, the above mentioned do not influence in the fact that information which has already been published on the Internet and are not modified by the search engine.

Since it is the engine operator which determines the purposes and means of that activity and thus of the processing of personal data that it itself carries out within the framework of that activity and which must, consequently, the Court states that Google Spain should be regarded as the "controller" in respect of that processing pursuant to Article 2(d).[133] However, Google Spain and Google Inc. argued that it could not be recognized as such due to the fact that it has no knowledge of the information actually and does not exercise control over the data. In contrast, the CJEU rejected this argument stating in paragraph 34 that "it would be contrary not only to the clear wording of that provision but also to its objective — which is to ensure, through a broad definition of the concept of "controller", effective and complete protection of data subjects — to exclude the operator of a search engine from that definition on the ground that it does not exercise control over the personal data published on the web pages of third parties."[134]

Moreover, the Court distinguished the processing of personal data carried out in the context of its activity by search engine and publishers of the website and emphasized that search engines plays a crucial role in the overall spreading of those data and an opportunity to find individual's data allows users to establish a more or less complete picture of data subject.

Finally, as CJEU declared in comparison to publishers of website, search engine as a public entity who determines the aim and means of the activity is responsible as it influence significantly and thus, must abide the legislative framework of the Directive 95/46/EC in the context of protection of data subjects in their right to privacy. Furthermore, publishers of website have an option to indicate search engines by way of particular protocols that they wish to exclude partially or wholly some sort of information on their websites, but they can also withhold from doing so and search engine would not be released from liability for the processing of personal data that it carries put in the context of search engine's activity.[135]

Considering the **third question**, the Court first of all, remind that in relation to Article 12 (1)(b) of Directive 95/46/EC all processing of personal data must in principle comply with the principles relating to data quality as set out in Article 6 of Directive 95/46/EC and must meet one of the criteria for making the processing of personal data legitimate as listed in Article 7 of

[132] See Google Spain v. AEPD (*supra*, note 121).
[133] ibid, paragraph 32.
[134] Ibid, paragraph 34.
[135] Ibid, paragraphs 38, 39.

Directive 95/46/EC.[136] For instance, activities of Google could be covered by the article 7(f) which permits "processing of personal data where it is necessary for the purposes of the legitimate interests pursued by the controller or by the third party or parties to whom the data are disclosed, expect occasions where such interests are overridden by the interests of fundamental rights and freedoms of the data subject."[137] Moreover, a request of data subject could be based on article 12 (b) and in certain circumstances, claimant can rely on right to object prescribed in Article 14 (1)(a). As stated in paragraph 76 of judgment, "the balancing to be carried out under subparagraph (a) of the first paragraph of Article 14 thus enables account to be taken in a more specific manner of all the circumstances surrounding the data subject's particular situation."[138]

The Court subsequently deals with the balance to be made in the case at hand. It emphasizes that the activities of the search engine are "liable to affect significantly the fundamental rights to privacy and to the protection of personal data" and states that the effect of the interference with those rights "is heightened on account of the important role played by the internet and search engines in modern society, which renders the information contained in such a list of results ubiquitous."[139] Consequently, as a general rule interests of data subject prevail over interests of internet users, but in certain circumstances depending on the nature of information, its sensitivity for data subject's private life and public interest to this information or role of data subject in public life, that balance may be changed.

Also, Court notes that grounds that could justify the activity of search engines do not always coincide with grounds which could prove the publication of personal data on a website. While weighing of interests, the outcome may depend on whether processing was carried by search engine or by the publisher of the web page as the legitimate interests justifying the processing might differ from the results of processing for data subject's private life.[140] Actually, "since the inclusion in the list of results, displayed following a search made on the basis of a person's name, of a web page and of the information contained on it relating to that person makes access to that information appreciably easier for any internet user making a search in respect of the person concerned and may play a decisive role in the dissemination of that information, it is liable to constitute a more significant interference with the data subject's fundamental right to privacy than the publication on the web page."[141]

[136] See Kranenborg (supra, note 131): 72.
[137] See Google Spain v. AEPD (*supra*, note 121): paragraph 74.
[138] See Google Spain v. AEPD (*supra*, note 121).
[139] See Kranenborg (supra, note 131): 72-73.
[140] See Google Spain v. AEPD (*supra*, note 121): paragraph 86.
[141] See Google Spain v. AEPD (*supra*, note 121), paragraph 87.

The final question considered by the CJEU concerns the right to be forgotten. As regards Article 12 (b), the Court considers that it follows from the article 6(1)(c) that the list of results displayed on the website and published lawfully including information about individual may in course of time, become incompatible with the Directive 95/46/EC where those data are no longer necessary in light of the purposes for which they were collected and processed. A fact of such inconsistency means that upon request such links and information containing into search results must be erased. "So far as concerns requests as provided for by Article 12(b) of Directive 95/46 founded on alleged non-compliance with the conditions laid down in Article 7(f) of the directive and requests under subparagraph (a) of the first paragraph of Article 14 of the directive, it must be pointed out that in each case the processing of personal data must be authorized under Article 7 for the entire period during which it is carried out."[142]

Therefore, the CJEU notes in paragraph 96 that Article 12 (b) and Article 14(1)(a) must

> *"when appraising such requests made in order to oppose processing such as that at issue in the main proceedings, it should in particular be examined whether the data subject has a right that the information relating to him personally should, at this point in time, no longer be linked to his name by a list of results displayed following a search made on the basis of his name. In this connection, it must be pointed out that it is not necessary in order to find such a right that the inclusion of the information in question in the list of results causes prejudice to the data subject."*[143]

According to the CJEU judgment,

> *"the data subject establishes a right that that information should no longer be linked to his name by means of such a list. Accordingly, since in the case in point there do not appear to be particular reasons substantiating a preponderant interest of the public in having, in the context of such a search, access to that information, a matter which is, however, for the referring court to establish, the data subject may, by virtue of Article 12(b) and subparagraph (a) of the first paragraph of Article 14 of Directive 95/46, require those links to be removed from the list of results."*[144]

The CJEU adds that the data subject's privacy and data protection rights "override, as a rule, not only the economic interest of the operator of the search engine but also the interest of the general public in having access to that information upon a search relating to the data subject's name."[145] However, the CJEU in paragraph 99 concentrates on significant caution that the data subject's right should not prevail "if it appeared, for particular reasons, such as the role played by the data subject in public life, that the interference with his fundamental rights is justified by the

[142] ibid, paragraph 95.
[143] ibid, paragraph 96.
[144] ibid, paragraph 98.
[145] ibid, paragraph 97.

preponderant interest of the general public in having, on account of its inclusion in the list of results, access to the information in question."[146]

Eventually, if after a data subject request, the search engine operator decides not to delist search results, the data subject may bring the matter before the supervisory authority or the judicial authority so that it carries out the necessary checks and orders the controller to take specific measures accordingly.[147]

2.2.2. Road map of Application of the Right to be Forgotten in the Context of the Google Spain Decision

To start with, the CJEU judgment in Google Spain decision has changed substantially the practice of search engine's activity. Nowadays, such legal entities must effectively review their search results composed by their algorithms as data subjects might realize their right to be forgotten as formal recognition of the right to be forgotten in the EU imposed new standards of data protection to all the entities functioning in its internal market. Lastly, in situations when all conditions set out in the Directive 95/46/EC would be met, internet users would be able to use a direct instrument for protection of reputation and interests.

On 26th of November 2014, the Working Party set up under article 29 of Directive 95/46/EC prepared Guidelines on the implementation of the CJEU judgment on Google Spain decision. "It also contains the list of common criteria which the DPAs will apply to handle the complaints, on a case-by-case basis, field with their national offices following refusals of delisting by search engines."[148] During the decision-making process, DPAs could use those criterions as flexible working tool, although the application of criteria will be accompanied with corresponding national legislation.

Mostly, those criteria applied in complex and in light of the principles established by the CJEU and including the idea that "the interest of the general public in having access to data".

The **first one** devoted to the issue whether the search result relate to a natural person and does the search result arise against a search on the data subject's name.[149]

The **second one** considers the role of the subject in public life or belonging to public figures. As an example, politicians, senior public officials, business-people and public officials

[146] ibid, paragraph 99.
[147] ibid.
[148] "Guidelines on the implementation of the Court of Justice of the European Union Judgment on Google Spain and Inc. v. Agencia Espanola de Proteccion de Datos (AEPD) and Mario Costeja Gonzalez C-131/12." Official web site of the European Commission. http://ec.europa.eu/justice/article-29/documentation/opinion-recommendation/files/2014/wp225_en.pdf.
[149] ibid.

always considered to fulfill a role in public life. As to category of "public figures", generally, individuals who due to their commitments have an increased level of media publicity belong to this category. More practical explanation could be found in the Resolution 1165 of the Parliamentary Assembly of the Council of Europe on the right to privacy in paragraph 7 as "persons holding public office and/or using public resources and, more broadly speaking, all those who play a role in public life, whether in politics, the economy, the arts, the social sphere, sport or in any other domain."[150]

Supporting this idea in case Minelli v. Switzerland decision no.14991/02 "whilst a private individual unknown to the public may claim particular protection of his or her right to private life the same is not true of public figures."[151] As stated in case of von Hannover v. Germany (no.2) "a fundamental distinction needs to be made between reporting facts capable of contributing to a debate in a democratic society, relating to politicians in the exercise of their official functions for example, and reporting details of the private life of an individual who does not exercise such functions."[152]

The **third criteria** connected with the age requirements in particular, whether data subject is a minor. Also, the concept of the "best interests of the child" has to be taken into account by the DPAs.

The **fourth one** relates to accuracy of the information. In data protection law the concepts of accuracy, adequacy and incompleteness are closely related as DPAs will be more likely to consider that de-listing of a search result is appropriate where there is inaccuracy as to a matter of fact and where this presents an inaccurate, inadequate or misleading impression of an individual.[153]

The **fifth criteria** considers the excessiveness and relevance of access to the data contained in a search result according to the need of the general public in obtaining such information. Three main questions should be posed:

> *1) "Does the data relate to the working life of the data subject?;*
> *2) Does the search result link to information which allegedly constitutes hate speech or slander or libel or similar offences in the area of expression against the complainant?*;
> *3) Is it clear that the data reflect an individual's personal opinion or does it appear to be verified fact?"*[154]
>
> *Regarding the first issue, as a rule, if data subject does not actively participate in public life, facts, which are relating to private life would be irrelevant. More appropriate would be data relating to data subject's work and legitimate interest of the public in having access to such information. For the*

[150] "Right to privacy", Parliamentary Assembly debate on 26 June 1998 (24th Sitting), accessed 2018 April 3, http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=16641&lang%20=en.
[151] See Guidelines (*supra*, note 148).
[152] ibid.
[153] ibid.
[154] ibid.

> *second issue, DPAs are generally not empowered and not qualified to deal with information that is likely to constitute a civil or criminal offence against the complainant. Lastly, DPAs mainly concentrates on delisting of search results containing data that appears to be verified fact.*[155]

The **sixth** one is about sensitivity of data within the meaning of Article 8 of the Directive 95/46/EC.

The **seventh** devoted to the updating of data and availability for no longer than is necessary for purpose of processing.

The **eighth** considers whether the data have disproportionately negative privacy impact on the data subject and cause prejudice to the individual.

The **ninth** criteria is about whether links to data in the search result puts the data subject into a risk. "In such cases, where the risk is substantive, DPAs are likely to consider that the de-listing of a search result is appropriate."[156]

The **tenth** criteria is about obstacles when the information was published based either on consent or voluntarily.

The **eleventh** circumstance is whether original content was published for journalistic purposes. "However, this criterion alone does not provide a sufficient basis for refusing a request, since the ruling clearly distinguishes between the legal basis for publication by the media, and the legal basis for search engines to organize search results based on a person's name."[157]

The **last two obstacles** speaks about belonging of data to criminal offences or to some sort of information which must be published due to legal obligation to make certain info about individuals publicly available.

One more point for discussion is resent research paper report published by Google called: "Three years of the Right to be forgotten" for more precise understanding how primary search engine of the world deals with requests from European users.

The very first step that was made by Google has been the creation of a webpage containing a form by means of which affected individual or its representative can request the removal of a search result. Interestingly that a requester has to disclose the documents, identifying him and provide a copy of it in order to confirm that the removal is requested by an empowered person, but the request does not guarantee the automatic removal of the search result.

In broad terms, the reviewers consider four criteria that weigh public interest versus the requester's personal privacy:

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[155] ibid.
[156] ibid.
[157] ibid.

> *1) "The **validity of the request**, both in terms of actionability and the requester's connection to an EU/EEA country;*
> *2) The **identity of the requester**, both to prevent spoofing or other abusive requests, and to assess whether the requester is a minor, politician, professional or public figure;*
> *3) The **content referenced by the URL**. For example, information related to a requester's business may be of public interest for political customers. Similarly, content related to a violent crime may be of interest to the general public. Other dimensions of this consideration include the sensitivity, private nature of the content and the degree to which the requester consented to the information being made public;*
> *4) The **source of the information**, whether it is a government site or a blog or forum."*[158]

The main ground for delisting is a result pages for queries containing a requester's name on either on Google's European country search service or main domain name google.com, for demands performed from geolocations that match the requestor's country.[159] However, in 2015 French Data Privacy Regulator (*CNIL*) asked Google to enlarge the scope of delisted URLs globally and not only inside Europe, but, Google logged an appeal on this decision and the issue is under consideration by the CJEU.[160]

Overall, Google reports about delisting nearly 2.4 million URLs in case of the right to be forgotten company. There are two dominant intents for the right to be forgotten delisting requests: "33% of requested URLs related to social media and directory services that contained personal information, while 20% of URLs related to news outlets and government websites that in a majority of cases covered a requester's legal history and the remaining 47% of requested URLs covered a broad diversity of content on the internet."[161]

As an example, "individuals from France and Germany frequently requested to delist social media and directory pages, while requesters from Italy and the United Kingdom were 3x more likely to target news site, but only 43% of URLs meet the criteria for delisting."[162]

A majority of requested URLs – 84,5%-were from private individuals, minors filed 5,4% of all requested URLs while government officials and politicians generated 3,3% of requested URLs and had a lower delisting rate than private individuals.[163]

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[158] Theo Bertram "Three years of the Right to be Forgotten", the Verge, accessed 2018 February 28, https://www.theverge.com/2018/2/27/17057356/google-eu-url-removal-requests-right-to-be-forgotten-laws-europe.
[159] Peter Fleischer, "Adapting our approach to the European right to be forgotten", 2016, https://www.blog.google/topics/google-europe/adapting-our-approach-to-european-rig/.
[160] "Google Inc. v Commission nationale de l'informatique et des libertés (CNIL) (Case C-507/17)", *CURIA*, http://curia.europa.eu/juris/document/document.jsf?text=&docid=195494&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=1368192.
[161] See Bertram (*supra*, note 158).
[162] ibid.
[163] ibid.

The most popular hostnames requested for delisting from May 2014-Dec 2017 are Facebook, YouTube, Google+ and Google Groups and Twitter. As to the categories of sites, requesters from Italy and the United Kingdom were far more likely to eliminate news media in their claims (32,5% and 25,2% of requested URLs respectively), while requesters from Italy and the United Kingdom are more inclined to bring into light the identity of individuals in relation to articles covering offences in contrast to Germany and France where news sources tend to anonymize the parties covering crimes, at the same time in Spain approximately 10.6% of requested URLs targeted government recodes.[164] Usually, it connected with legislative requirement to inform missing individuals about decision that directly influence on them.

At the whole, two prevailing categories of the right to be forgotten requests could be identified: deletion of personal information based on social media and directory sites and delisting of legal history and professional information announced in news or governmental sites. The majority of requests were requested by private individuals, in particular about 85% compared to 33,937 URLs requests by politicians and government officials while 41,213 URLs were requested by non-governmental public figures.[165]

2.2.3. Camera di Commercio, Industria, Artigianato e Agricoltura di Lecce v Salvatore Manni.

Not long ago, the CJEU has been considered one more important decision "Camera di Commercio, Industria, Artigianato e Agricoltura di Lecce v Salvatore Manni" (hereinafter – Manni case) which without any doubts shed further light on the definition of the right to be forgotten. Briefly, the Court recognized that there is no right to be forgotten in relation to personal data in the companies register as there was a public interest to such data for third parties. However, the CJEU had agreed that in exceptional cases upon expiry of a relatively long period of time after termination of the company, Member States are allowed to restrict access to such data by third parties.

To be more precise, the facts of the cases were that Mr. Salvatore Manni was a sole director and liquidator of a legal entity (*Immobiliare Salentina)* which had been declared insolvent in 1992 and was wound up in 2005. Later, plaintiff being a director of a new company won a construction contract of a tourist complex in Italy, however the properties in the complex were not sold due to the fact that it was clear from the company's register that he was linked with previous

[164] ibid.
[165] ibid.

legal entity recognized as insolvent. As a result, on 12 December 2007 Mr. Manni failed a petition against Lecce Chamber of Commerce.[166]

"In that action, plaintiff alleged that the personal data concerning him, which appear in the companies register, had been processed by a company specialized in the collection and processing of market information and in risk assessment, and that, notwithstanding a request to remove it from the register, the Lecce Chamber of Commerce has not done so."[167] In addition, Mr Manni required to erase, anonymize or block the data connecting him with information about dissolution of previous company and seek compensation of damage by reason of harm to business reputation.

In 2011, by its judgment, the Court of Lecce (*Tribunale di Lecce*) uphold the claim and ordered the Lecce Chamber of Commerce to anonymise the data linking Mr Manni to the liquidation of first company and to pay compensation for damage suffered by claimant.[168] The arguments for such decision was that

> *"it is not permissible for entries in the register which link the name of an individual to a critical phase in the life of the company (such as its liquidation) to be permanent, unless there is a specific general interest in their retention and disclosure" including the fact that "after an appropriate period" from recognition of the decay of a company as well as its removal from the register stating the name of the person who was sole director of that company at the time of the liquidation ceased to be "necessary" and "useful". In that situation public interest of this fact became a "historical memory" and could be as well archived."*[169]

However, the Lecce's Chamber of Commerce brought an appeal against this judgment before the Italian Court of Cassation (*Corte suprema di cassazione*) which later decided to stay the proceeding and to refer the following questions to the CJEU.[170] The question was *whether the Article 6(1)(e) of Directive 95/46/EC and the Article 3 of* First Council Directive on co-ordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, with a view to making such safeguards equivalent throughout the Community (hereinafter - Directive 68/151/EEC*) allow data subjects to request from authorized authorities for maintaining companies register to preclude any person without any time limit from accessing to personal data regarding them in that register after certain period of time.*

[166] "Camera di Commercio, Industria, Artigianato e Agricoltura di Lecce v Salvatore Manni", CURIA, accessed 2018 April 2, http://curia.europa.eu/juris/celex.jsf?celex=62015CJ0398&lang1=en&type=TXT&ancre=
[167] ibid, (*supra*, note 166): paragraph 25.
[168] ibid, paragraph 27.
[169] ibid, paragraph 28.
[170] ibid, paragraph 29.

Firstly, the Court starts from reminding its previous case law, in particular, judgments of 16 July 2015, *ClientEarth and Pan Europe v EFSA, C-615/13 P*, paragraph 30, *Commission* v *Bavarian Lager, C-28/08 P*, paragraphs 66 to 70 and *Worten, C-342/12*, paragraphs 19 and 22 stating that "the fact that information was provided as part of a professional activity does not mean that it cannot be characterized as personal data."[171]

Moreover, storage and granting of access to such data on request of third parties means "processing of personal data" according to Article 2(b) and (d) of Directive 95/46 and carried out in the public interest within the meaning of Article 7 (e) of Directive 95/466/EC.

Secondly, as CJEU accepts in paragraph 45 of the judgment, "According to Article 6(1)(e) of Directive 95/46, Member States are to ensure that personal data are kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which the data were collected or for which they are further processed while if the data are stored for longer periods for historical, statistical or scientific use, Member States must lay down appropriate safeguards."[172]

In my opinion, the primary idea the CJEU considers as an element of the right to erasure, block or restrict access to data in the companies register after a certain period of time is aim of disclosure of the information. In its decision the CJEU made a conclusion that disclosure was connected with defense of "the interests of third parties in relation to joint stock companies and limited liability companies, since the only safeguards they offer to third parties are their assets"[173] in addition to granting "legal certainty in relation to dealings between companies and third parties in view of the intensification of trade between Member States"[174] as stated in paragraph 49 and 50 of the decision.

Thirdly, in its judgment CJEU made a conclusion that nowadays it is hard to identify a maximum time limit for erasure of data after dissolution of a legal entity as well as hard to predict when such data would no longer be essential. Consequently, the CJEU in paragraph 56 notes that "Member States cannot, pursuant to Article 6(1)(e) and Article 12(b) of Directive 95/46/EC, guarantee that the natural persons referred to in Article 2(1)(d) and (j) of Directive 68/151/EEC have the right to obtain, as a matter of principle, after a certain period of time from the dissolution of the company concerned, the erasure of personal data concerning them, which have been entered in the register pursuant to the latter provision, or the blocking of that data from the public."[175]

Correspondingly, the CJEU found that disclosure of data in proportion to Directive 68/151/EEC did not incommensurable interference into individual's right to private life and their

[171] ibid, paragraph 34.
[172] ibid, paragraph 45.
[173] ibid, paragraph 49
[174] ibid, paragraph 49.
[175] ibid, paragraph 56.

right to protection of personal data. Foremost, disclosure refers only for a limited classes of information. Secondly, individuals participating in trade through Joint Stock Company or Limited Liability companies were aware that they were required to make data relating to their identity and functions public. At last, the CJEU confirmed that as a need "to protect the interest of third parties in relation to joint-stock companies and limited liability companies and to ensure legal certainty, fair trading and thus the proper functioning of the internal market."[176]

Nonetheless, the CJEU commented in paragraph 60 that there "may be *specific situations in which the overriding and legitimate reasons relating to the specific case of the person concerned justify exceptionally that access to personal data entered in the register is limited, upon expiry of a sufficiently long period after the dissolution of the company in question, to third parties who can demonstrate a specific interest in their consultation."*[177]

Lastly, the final decision on such limitations of access to personal data is a matter for the national legislatures and case by case assessment. In respect to Mr. Manni's request, the CJEU in paragraph 63 ruled that "the mere fact that […] potential purchasers of those properties have access to […] data in company register, cannot be regarded as constituting such a reason, in particular in view of the legitimate interest of those purchasers in having that information."[178]

2.3 Distinctive Approach in Decisions of the European Court of Human Rights

An analysis had shown that the ECHR as well deals with concrete aspects of the right to be forgotten in its court practice. Thereupon, interestingly would be to emphasize the ECHR's arguments and approach in defining the opportunity to realize the right to be forgotten by individuals.

The first example would be case of "**Wegrzynowski and Smolczewski v. Poland**".

As to the facts, two journalists from a daily newspaper *Rzeczpospolita* had published both printed and online version of the article claiming that two lawyers, in fact applicants, were involved in suspicious business transactions in which Polish politicians were implicated in. Consequently, two lawyer had failed a defamation claim against journalists before the Warsaw Regional Court for publishing the article in the print version of their newspaper.[179]

In 2002, the Warsaw Regional Court recognized the authors of the article liable as they had failed to verify the facts which had been used as a background of printed article and "ordered

[176] ibid, paragraph 60.
[177] ibid.
[178] ibid, paragraph 63.
[179] "Case of Wegrzynowski and Smolczewski v. Poland", HUDOC, accessed 2018 April 4, https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-122365%22]}.

the journalists and the editor-in-chief to jointly pay PLN 30,000 to a charity and to publish an apology in the printed newspaper."[180]

Subsequently, in 2004 the same lawyers sued against the newspaper on the fact that they had found out impugned article available on the newspaper's website and that it was easily detected by the Google search engines. Lawyer's claimed that the article's continued availability on the Internet had breached their right in the same manner as printed one's and sought removal of the article from the newspaper's webpage, publication of written apology regarding the infringement of their rights and monetary compensation for non-pecuniary damage.[181]

As a result, the Warsaw Regional Court dismissed applicants' claim and noted that "removal of the article bereft any practical purpose and would amount to censorship and rewriting history."[182] Thereafter, in 2006 the Warsaw Court of Appeal dismiss the lawyer's appeal on the grounds that they could not file a new claim based on the factual circumstances "which had already existed prior to this judgment in the first proceedings."[183] In addition, later applied appeal to the Supreme Court was unsuccessful.

Afterwards, both lawyers filed an application to the ECHR, claiming that the dismissal of civil lawsuit connected with online article infringed their rights to respect of private life and reputation under Article 8 of the European Convention on Human Rights (hereinafter – Convention) and that the national courts failed to apply the law correspondingly so as to effectively defend their right.

In this respect, the ECHR starts from mentioning that main object of the right to respect for private life under Article 8 of the Convention is to "protect the individual against arbitrary interference by public authorities," however, the ECHR also highlights that a fair balance between the right to respect for private life and the right to freedom of expression should be found including the fact that both of which require equal respect.[184]

In paragraph 59 of the judgment, the ECHR states that article 10 covers maintaining of internet archives by the press and its value for society cannot be underestimated. Moreover, the court stated that "notice of a newspaper that a libel action has been initiated in respect of that same article published in the written press, did not constitute a disproportionate interference with the right to freedom of expression and that […] "the view that such an obligation in respect of an Internet archive managed by a publisher of a newspaper itself was not excessive."[185]

[180] ibid, (*supra*, note 179): paragraph 6-7.
[181] ibid, paragraph 9.
[182] ibid, paragraph 11.
[183] ibid, paragraph 16.
[184] ibid, paragraph 53.
[185] ibid, paragraph 59.

Also, the ECHR observes that the first group of proceedings before Polish courts "[…] did not create for the applicants a legitimate expectation to have the article removed from the newspaper's website", but the court likewise underlines that "[…] the domestic courts found that the article had been published on the newspaper's website simultaneously with the print edition", but "no arguments had been submitted so prove the applicant's failure to "[…] to ensure that the scope of the first defamation claim included the presence of the article online."[186] Additionally, the ECHR states that domestic law did not exclude the lawyers' chance to bring fresh claims concerning online article under Article 8 of Convention.

Finally, the ECHR admits that "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."[187] What is more important, the court emphasized on the opportunities available under domestic law in the form of "a comment to the article on the website informing the public of the outcome of the civil proceedings in which the courts had allowed the applicants' claim for the protection of their personal rights claim"[188] and realized by the newspaper eventhough lawyers filed to submit a specific request for such remedy during the second proceeding.

In summary, the ECHR did not find a violation of Article 8 of the Convention, and noted that the remedies demanded by the lawyers in the second proceedings would impose a disproportionate limitation on the right to freedom of expression so as to protect the right to respect for private life and reputation.

Next judgment of the ECHR more connected on correlation between freedom of speech and freedom of expression, although leaving a possibility to file a claim in the scope of the right to be forgotten. The case is **Rolf Anders Daniel PIHL against Sweden**.

The facts of the case are that in 2011 a small non-profit organization owning a blog was involved into occasion connected with publication made by anonymous user on its website stating that plaintiff is a "real hush-junkie."[189] After that, Mr. Pihl asked the legal entity to immediately remove both the blog post and the comment due to its libel and defamatory nature. Fortunately, the organization deleted the content the day after receiving the notification and added a post recognizing the falsity of the data in addition to public apology. However, claimant stated that he could still find this post associated with his name through the Internet and consequently, filed a

[186] ibid, paragraph 61.
[187] ibid, paragraph 65.
[188] ibid, paragraph 66.
[189] "Case of Rolf Anders Daniel PIHL against Sweden", HUDOC, accessed 2018 April 6, https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-172145%22]}

lawsuit at first on the national level, but Linkoping District Court dismissed the claim on the basis of freedom of expression granted by the national legislation, but recognized third-party commentary as defamatory and later the Swedish Court of Appeal upheld that decision while the Supreme Court refused in appeal.[190]

As a fact, plaintiff brought an action before the ECHR claiming that instituting responsible for slanderous statements had violated his right to private life and that State had failed in its positive obligation under Article 8 of Convention. However, the Chancellor of Justice "rejected his application […] noted that protection against defamatory statement fell within the scope of the Article 8 of the Convention, and that in situation like present one the applicant's rights under that Article had to be balanced against the right to freedom of expression under Article 10."[191]

First of all, the ECHR considers whether the comment had met the criteria of seriousness required invoke the protection of Article 8 of the ECHR. The obvious condition for application of the Article 8 is that "the attack on personal honor and reputation must attain a certain level of seriousness and must have been carried out in a manner causing prejudice to personal enjoyment of the right to respect for private life."[192]

In exact case, the ECHR supports the arguments of the domestic courts' regarding the fact that the comment on the blog was defamatory due to the context in which it had been made. As a result, Mr. Pihl was authorized to invoke the protection of Article 8 of the Convention, but the court noted that the comment "did not amount to hate speech or incitement to violence."[193]

As the ECHR noticed the key issue of the case was whether the State "has achieved a fair balance between the applicant's right to respect for his private life under Article 8 and the association's right to freedom of expression guaranteed by Article 10 of the Convention."[194]

The ECHR concluded that

> *"there had been no violation of Article 8 of the Convention after considering a number of relevant factors when considering cases of intermediary liability, namely consideration of (i) the context of the comments, (ii) the measures applied by the company in order to prevent or remove defamatory comments, (iii) the liability of the actual authors of the comments as an alternative to the intermediary's liability, and (iv) the consequences of the domestic proceedings for the company."*[195]

[190] ibid, (supra, note 189): paragraph 8-9.
[191] ibid, paragraph 16.
[192] ibid, paragraph 24.
[193] ibid, paragraph 25.
[194] ibid, paragraph 29.
[195] "Case of Rolf Anders Daniel PIHL against Sweden", Global freedom of Expression Columbia University, accessed 2018 April 6, https://globalfreedomofexpression.columbia.edu/cases/pihl-v-sweden/

Furthermore, the ECHR indicated the slight and confined character of the organization oriented on a limited scope of readers. Thus, all the statements posted in this blog were the sole responsibility of the users and the fact that the association removed the post and the comment one day after receiving notification by the applicant about the nature of the post and his demand to delete the content. Lastly, the court also noted that "expecting the association to assume that some unfiltered comments might be in breach of the law would amount to requiring excessive and impractical forethought capable of undermining the right to impart information via internet."[196]

As to the possibility to find the comment through the search engines, the ECHR underlines the possibility to file a separate claim for erasure of data in context of the Google Spain decision.

Finally, taking into account all the above mentioned, the "domestic courts acted within their margin of appreciation and struck a fair balance between the applicant's rights under Article 8 and the association's opposing right to freedom of expression under Article 10"[197] and found no violation of the Article 8.

In conclusion, this Chapter was concentered on numerous issues connected with the development of the concept of the right to be forgotten in the EU.

From the point of legislative regime, the right to erasure is not definitely new as it was granted by article 12 and 14 of the Directive 95/46/EC, however, the new GDPR will provide more solid and specified background for its application including broaden list of conditions when the controller obliged to remove the data immediately and reversed burden of proof from data subject to data controller.

From practical standpoint, several main judgments of the CJEU have been analyzed. The turning point for the "birth" of the right to be forgotten considered the Google Spain decision, which had raised three key issues including the responsibility of the subsidiaries of the main institution operating in other states, processing of data and status of data controller as well as formulation of criteria required for filing a request for erasure of data. Also, in Manni case the CJEU rejected applicant's request for removal of information regarding his business activity from public register as this data might be weighty for third parties, in fact participants on commercial market, however, the court noted that in particular situations access to personal information entered into register may limited to interested parties.

To compare, the ECHR's practice underlines that the court should not rewrite the history through modification of articles in internet archives, however quite important is to make a footnotes explaining the further development and final solution of the case.

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[196] See PIHL against Sweden (*supra*, note 189), paragraph 31.
[197] ibid, paragraph 37.

Afterwards, this section paid attention to advisory rules adopted by working parties for practical implementation of the right to be forgotten by courts and data protection authorities in various countries.

3. EXTENSIVE SPECTRUM OF INTERPRETATION OF THE RIGHT TO BE FORGOTTEN AMONG STATES

This Chapter revolves around the issue of explanation and application of the right to be forgotten by local courts after approval of Google Spain decision in various countries. As a fact, some of them are differs considerably from the landmark case while others sustain the same approach. Lastly, a heavy debates on adaption of the relevant legislation in South America demands the further clarification of court practice so as to understand the current situation in that region.

3.1 Analytical Review of Cases Amongst European Jurisdictions

The first case "***A and B v. Ediciones El Pais***" deals with one of the modern uncertainties regarding the removal or modification of the articles from the internet archive as the court practice varies a lot amongst countries.

The facts of the case are that in 2007 *El Pais* made public their digital newspaper library on their website and it became possible to find through the search engines such as Google and Yahoo! the information about the applicants who previously had been convicted of drug offences both being drug addicted however, later they were released and overcame their predisposition and started a new life.[198]

In 2009 the claimants requested *El Pais* to stop processing their personal data on its webpage or to hide their names by using initials and take relevant technical measures to ensure that these pages were not indexed by search engines, but the demand was rejected. As a result, plaintiffs brought an action before the Court of First Instance claiming violation of right to privacy and honor and were awarded compensation of damages while the Court noted that "economic interests of *El Pais* could not prevail over the privacy and data protection rights of the applicants, who are not public figures and have overcome their addiction problems."[199]

What is more, the Court imposed on *El Pais* an obligation "to enter no index instruction the webpage so that the articles did not appear in the results of search engines when the applicants' name were entered."[200] By the way, the news remained available in their digital archive.

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[198] Hugh Tomlinson "A and B v Ediciones El Pais, Newspaper archieve to be hidden from internet searches but no "re-writing of history," The international forum for responsible media blog, 2015, https://inforrm.org/2015/11/19/case-law-spain-a-and-b-v-ediciones-el-pais-newspaper-archive-to-be-hidden-from-internet-searches-but-no-re-writing-of-history-hugh-tomlinson-qc/

[199] ibid.

[200] ibid.

Later, the Court of Appeal rejected *El Pais'* appeal and stated that the newspaper should not process their names or identifying data.

The most important part of this case is the reasoning of the Supreme Court. They used the argumentation of the CJEU in Google Spain decision and underlined that

> *"it was necessary to perform a balancing of the rights and legal interests a stake in order to decide whether the processing of personal data for the applicants as a result of the digitation of the El Pais archive was lawful. It noted that the ECHR had made it clear in case of "Wegrzynowski and Smolczewski v. Poland" that digital newspaper archives fall within the scope of the protection of Article 10 of the Convention. The applicants were not public figures and the facts in the newspaper articles were not of historical interest […] the general and permanent advertising of their involvement in those events was a disproportionate interference with their honor."*[201]

The Court confirmed that the conditions of adequacy, relevance, excessiveness under Directive 95/46/EC were not met "in relation to the processing of data in search engine request again their names that allows indiscriminate access to information more than 20 years after the event occurred."[202] "The damage to their rights to honor and privacy was so disproportionate than it was not covered by the exercise of freedom of information involving the digital newspaper library."[203]

Finally, the Supreme Court supported the arguments of the lower court and noted that *El Pais* should adopt technical measures to exclude the news story from public access through an internet search, but rejected the requirement of removal the applicants' names from the archive and their availability on the *El Pais* site and thus, certified the integrity of the historic archive.

Another interesting case from Belgian court practice "***Oliver G. v Le Soir***" connected with the issue of "spent convictions" based on the Article 8 of Convention rather than on the reasoning of the CJEU mentioned in the Google Spain decision.

As to the facts, in 1994 being a practitioner a plaintiff caused serious car accident in which two people died, consequently, the Belgian newspaper *Le Soir* had published an article containing the full name of the driver. He was convicted of drunk driving, but was rehabilitated in 2006.

In 2008, *Le Soir* made publicly available part of it archives online including article about claimant. General search through the *Le Soir's* webpage and website of search engines produced links to the article.

[201] ibid.
[202] ibid.
[203] ibid.

In 2010, applicant filed a lawsuit against *Le Soir* to the Belgium court of First instance and requested to anonymize his name. In 2013 the Court granted "to replace the applicant's name with the letter "X" in the article."[204]

Later, in 2014, the Court of Appeal in Leige dismissed the newspaper's appeal stating that "both parties enjoyed fundamental rights: *Le Soir* had a right to freedom of expression under Article 10 and the applicant had a right to respect for private life under Article 8."[205] Also the Court underlined that the right to be forgotten was an unalienable part of the right to respect for private life using such arguments like: absence of news value in case of disclosure of data, no public functions performed by the applicant, removal of the plaintiff's full name does not influence on the nature of the information, absence of public interest in identification of a person and applicability of request to online version rather than to paper one's.[206]

Finally, a matter of interest is the decision of the Court of Cassation. First of all, the Court balanced the Article 10 of the Convention as a right of the press to online public archives and right of public to access to these archives against Article 8 included the right to be forgotten. It was noted that "twenty years after the accident, the rights of the rehabilitated offender – who was not a public figure – prevailed and […] the anonymisation of the online version of the article complained of was ordered."[207] As a result, this would cause to plaintiff the disproportionate damage compared to the benefits to abided the freedom of expression in current situation.

Finally, the main value of this case is that in comparison to the previously discussed case of *El Pais*, the Court ordered to anonymise the information in the newspaper rather than adopt measures to not index the data by search engines. In other words, the Court confirmed the rewriting of historical facts by changing the name of the offender rather than excluding from further dissemination of information by search engines.

The last one is the **case from Irish courts**. In this case former local election candidate, Mark Savage at first complained to the Data Protection Commissioner (hereinafter Commissioner) that website "reddit.com" contained the insulting statements presenting him as homophobe without any elaborations due to the fact that previously Goggle had rejected his request on the ground of publicity of his activity.[208]

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[204] Hugh Tomlinson "Oliver G v Le Soir "Right to be forgotten" requires anonymisation of online newspaper archive," The international forum for responsible media blog, 2016, https://inforrm.org/2016/07/19/case-law-belgium-olivier-g-v-le-soir-right-to-be-forgotten-requires-anonymisation-of-online-newspaper-archive-hugh-tomlinson-qc/

[205] ibid.

[206] ibid.

[207] ibid.

[208] Gavin Woods and Gemma O'Farrell, "The right to be forgotten - a decision from the Irish Circuit Court," *Privacy and Data Protection* 17, 3(2017): 14.

In its decision, Commissioner concluded that there had been no breach of his rights under Irish Data Protection Acts 1988 and 2003 and indicated that the text reflects to an individual personal opinion and not a verified fact and "added that public interest and freedom of expression outweighed the right to privacy in case."[209] In particular, the Commissioner used the criteria adopted by Article 29 Data Protection Working Parties for instance, "does the data subject play a role in public life? Is the data subject a public figure? Is the data accurate? Is the data relevant and not excessive? Is it clear that the data reflects an individual's personal opinion, or does it appear to be verified fact? In what context was the information published? Was the content voluntarily made public by the data subject?"[210]

Later, Mr. Savage appealed the Commissioner's decision to the Circuit Court. He claimed that nowadays due to the nature of forums users of internet will rely on this information as a verified and accurate fact without any qualification of its accuracy and adequacy. Taking it into consideration,

> *"the Court turned on the interpretation of "accurate" and how that impacted on the content contained in the URL. The Court's concern was that the interpretation given by the DPC left open "the possibility of elevating a statement of opinion from the body of any such discussion forum to the status of accurate data, by merely accurately transposing the data from the body of the posting or thread to a URL heading, in the absence of any indication that it is actually requoting such a view."*[211]

Consequently, the Court found that the fundamental rights and interests of Mr. Savage had been infringed.

However, recently, the High Court nullified the Circuit Court judgment and stated that "the Circuit Court had not applied the required legal test and had not identified any serious error of fact or law in how the Commissioner approached her decision-making and did not give that decision "appropriate curial deference."[212] He also noted that "Google does not carry out editing functions in respect of its activities and to mandate it to place quotation marks around a URL heading would oblige it to engage in an editing process not envisaged by the Google Spain decision."[213]

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[209] Philip Nolan and Jevan Neilan, "First Irish "Right to be Forogtten" case," MONDAQ, 2017, http://www.mondaq.com/ireland/x/575986/Data+Protection+Privacy/First+Irish+Right+to+be+Forgotten+Case

[210] ibid.

[211] See Woods and O'Farrell (supra, note 208).

[212] Mary Carolan, "Data Commissioner, Google win appeal over right to be forgotten," The Irish Times, 2018, https://www.irishtimes.com/news/crime-and-law/courts/high-court/data-commissioner-google-win-appeal-over-right-to-be-forgotten-1.3395053.

[213] ibid.

3.2 Case law Studies in Latin America Countries

The main feature of the development of the right to be forgotten on this territory is absence of relevant provisions regulating this issue and thus, possibility to erase the data mostly based on case law or decisions of administrative authorities.

Firstly, the case of **Plaintiff X v. Google Inc. or Google Perú S.R.L.** will be analyzed.

Starting from the facts, a plaintiff filed a complaint against Google Peru S.R.L. and Google Inc. regarding removal of data and news pieces about his previous criminal offences from Google search engines after being released from prison. However, Google Peru S.R.L. refused stating that Google search engine was run by Google Inc. from the U.S. which was different legal entity. As a result, claimant brought an action before General Directorate of Protection of Personal Data (hereinafter – GDPD) "claiming that both entities had not complied with his right to have his personal data cancelled."[214] Also, claimant stated that he had lost two job opportunities due to the fact that employers found information about dismissed investigation against him.

While analyzing Peruvian data protection legislation, the GDPD noted that "in order to provide search engine services to the Peruvian market, Google visited web pages located on Peruvian servers in order to register and index information and processed personal data of Peruvian citizens without their consent"[215] and on the basis of such grounds like tracking of information containing personal data of Peruvian citizens and geographic location functions concluded that Google through its local subsidiary was bound by national data protection legislation for processing in Peru.

As to the applicant's request the Court underlined that

> *"applicant's fundamental right to the protection of his personal data could not be limited just because the administrators of the websites had not provided means of communication that would enable him to exercise his right of cancellation directly nor simply because of Google Peru S.R.L's claim that it is not the right holder of the data over which protection is being claimed."*[216]

In order to proof, the court noted the argumentation used in Google Spain decision explaining that "the data processing that the respondent performs in Peruvian territory is the same that it performs in Spanish territory as well as in any country of the European of Union or any other place in the world where it has a presence."[217]

[214] Case of Plaintiff X v. Google Inc. or Google Perú S.R.L.", Global freedom of Expression Columbia University, accessed 2018 April 9, https://globalfreedomofexpression.columbia.edu/cases/peru-google-google-inc-plaintiff-x/
[215] ibid
[216] ibid.
[217] ibid.

The GDPD also added that the claimant's right to privacy had been violated as Google excluded the possibility to use by the applicant his right to request the erasure of information through the mechanism established by Google.

Finally, the GDPD "ordered Google to block, within 10 days of the decision, all information concerning the dismissed investigation so it could not be found through a search against the individual's name and surname" and imposed a notable fine.[218]

Another **case of José Ramón Baustista Pérez Salazar** connected with the issue of request of erasure of personal data after certain period of time.

In short, the applicant requested an erasure of data from commercial database specialized on providing information about involvement of an individual into any judicial proceedings. Due to the fact that *DataJuridica*, current data bank, based its statements on information from governmental sources, plaintiff emphasized on removal of such data as they appeared in search results and influenced badly on applicant's name and reputation adding to this violation of his right to privacy and honor.[219]

However, District court of Mexico dismissed his request on the basis of Article 8 of the American Convention on Human Rights "noted that publishing of the names of persons who bring forward writs of *amparo* was necessary so third parties who might be interested in intervening in the proceedings could have the opportunity do so" and […] "considered that the applicant had not proven the harm he had allegedly suffered because of the publication of his data on the official notices."[220]

Hence, being dissatisfied with the result, the petitioner failed a writ of *habeas data* to Data Protection Committee (hereinafter – Committee). The main question was whether publication of his personal information into official catalogues correspond to applicant's right to deletion as he requested erasure of his personal data from public records of proceedings available in paper form at the District Court or in electronic version rather than deletion of his data from actual case files with limited access.[221]

The Committee noted that "in accordance with the law applicable to *amparo* proceedings" it is obvious to identify the participants involved in cases of public notification without obtaining their consent as it allows interested parties to follow the progress of the trial, but the Committee emphasized that "once the communicative purpose of the notices had come to an end and the proceedings had concluded, "it is no longer necessary to maintain the personal data of the parties

[218] ibid.
[219] Case of José Ramón Baustista Pérez Salazar, Global freedom of Expression Columbia University, accessed 2018 April 9, https://globalfreedomofexpression.columbia.edu/cases/case-jose-ramon-baustista-perez-salazar/
[220] ibid.
[221] ibid.

published, as the publication of the list has fulfilled its purpose and therefore, the holder of the data protection rights has the right to be forgotten."[222]

Additionally, the Committee highlighted that data protection legislation supports constraining from electronically disclosure of personal data in situations when right holders exercise their right to prevent the publication. The arguments were that "in contrast to physical lists, information published electronically has a greater risk to an individual's private life since it can be misused for purposes distinct from those for which it was generated and it can be more susceptible to public diffusion". As a result, the Committee was off the opinion of the District Court and "ordered the suppression of the applicant's data from both the physical and the electronic versions of the District Court notices."[223]

The last example, will describe the current situation and case judgments regarding the right to be forgotten in Chile.

Chilean law as well as most of Latin American countries does not prescribe the right to be forgotten and in order to succeed in defense of rights and freedoms contained in Article 19 of the Constitution only two of them most closely connected with the right to forget, in fact, the right to privacy and the right to honor. However, three bills which propose to implement into data protection legislation of the right to forget had been adopted, but still neither of them had been approved.[224]

Chiefly, "constitutional actions directed against Google have been rejected by national Court of Justice, with different types of both formal and substantive grounds."[225]

The only action taken by the Supreme Court on the right to be forgotten was "**Graziani Le-Fort, Aldo vs. Empresa El Mercurio S.A.P.**"

The facts of the case was that claimant asked the *Company El Mercurio S.A.P*. to eliminate the publication from the newspaper which was originally adopted in 2004, but later, in 2015 it became available through the Internet search engine on the webpage operated by the news's agency. Applicant claimed that the mentioning him in this article breached "his right to psychological integrity, due to the development of current life together with technology, so that if third parties want to hear from you, the publication will appear, which is aggravated."[226] On the other side, "the newspaper demanded valid documents proving the dismissal, acquittal or other and the signing of a termination of resignation of any legal action against the media or director,

[222] ibid.
[223] ibid.
[224] See Anguita (supra, note 36): 4.
[225] See Anguita (supra, note 36): 5.
[226] See Anguita (supra, note 36): 7.

response, which for the appellant, generated a conflict."[227] The media added that it is impossible to delete such news firstly, because doing so without justified grounds would be contrary to principle of freedom of information.

Later, the Court of Appeal considered that it was impossible to characterize as "arbitrary or illegal the publication of the journalistic news of which the appellant was subject, even though more than 10 years have elapsed since this occurred in the exercise of freedom of information without prior censorship, being a fact of public knowledge by various means of communication."[228] Furthermore, as noted in the judgment of the Appellate Court, "the information currently maintained by the site emol.com, corresponds to a real and certain news, confirmed by the actor himself in his libel, regarding an unlawful act that he committed and was investigated in the context of the Spiniak case and for which it was put under trial."[229] The Court rejected the request and noted that plaintiff did not confirmed any change of circumstances which could indicate on further modification of notes and found that the defendant did not infringed his right to physical integrity equality before the law, honor and privacy as it was recognized as valid by the claimant himself.[230]

However, the Supreme Court of Chile found the decision of the Court of Appeals void.

Firstly, the court emphasized on the fact that

> *"in the event of a conflict between the right to forget about the judicial past-penal precedents and past convictions and the right to information access to said information, the time factor has a criterion decisive, prevailing the right to information in case the information has a journalistic interest, due to its relevance. Otherwise, the right to forget will prevail over the right to information, being able to accede to the sentence, but without the names of those involved."*[231]

The Supreme Court of Chile expressed the opinion that

> *"if the penal law, which is the most serious in affecting individual rights, has a specific length of time for punishment, and also allows it to be eliminated from all public records once it has been complied with, even more so, the social media should act coherently with the intention of giving the prisoner the possibility of developing a life in accordance with the respect of their constitutional guarantees, after the time of conviction."*[232]

What is quite valuable is that the Court underlined that in case of collision between constitutional rights, a right to social reintegration of an individual who had committed a crime and right to maintain a private life as well as the right to honor and integrity of family life should

[227] See Anguita (supra, note 36): 7.
[228] ibid.
[229] See Anguita (supra, note 36): 7-8.
[230] See Anguita (supra, note 36): 8.
[231] ibid.
[232] ibid.

prevail. Finally, the Supreme Court of Chile revoked the judgment of the Court of Appeals and ruled to erase the digital version of the news that had affected the applicant's interests confirming by arguments that "[…] more than ten years from the date of the news - sufficient time […] and was more than enough to resolve provisionally and cautiously of the aforementioned constitutional guarantees, that the computer «oblivion» of the records of said news must be procured."[233]

In conclusion, modern approach to the interpretation of the right to be forgotten in some aspects coincide while in others they differs. Among European counties we could find differences in court judgments regarding the way of removal of requested data from newspaper archives or databases. I agree with judges who ruled on anonymization of information through using various technical measures so as to stop indexing sensitive information about applicants from appropriate sources rather than interrupt into integrity of historical fact by allowing changes into original content.

In addition, another important issues considered in its rulings by judges both European and Latin American countries is a balance between public interest, freedom of expression of publishers and right of individual to privacy and intimacy of family life. The key point is to find when privacy of human being override the freedom of publishing of news available for wide scope of readers or vice versa public character or public activity allow reviewers to no facts which in other situation might be secret. In this occasions, an important factor is time length from the moment the accident had happened and whether it is proportionate to impose such burden on claimant for his past faults.

Finally, South American states often face to hardships of subsidiaries liability for actions of head companies. Also, due to the lack of rules for regulation of the right to be forgotten in data protection legislation of Latin American countries they mostly use such constitutional instruments like *recurso de amparo* or *habeas data* so as to defend their right and freedoms.

[233] ibid.

CONCLUSIONS

1. Uncontrolled public access to information about individual's previous activity might impose disproportionate burden on normal wellbeing of human being at the modern society. By virtue of Internet's perfect memory, modern tendencies to openness and technological breakthrough anyone could obtain systematized information about particular matter, therefore, some dangers to our fundamental values arise, and consequently, people should have a right to control their personal data. A respective reply to this question was at first development of related notions like right to oblivion, right to deletion and others which in result formed relevant framework for acceptance of the right to be forgotten in its modern legislative understanding.

2. An analysis of scientific sources allows to conclude that scholars mostly include three elements into the concept of the right to be forgotten: removal of publication of information about previous offences of former criminals and notion of "clean slate", request for elimination of data as a response for modern directions of usage of information freely circulated in the Internet by third parties and erasure of data after certain time length owing to its irrelevance, inaccuracy and excessiveness in relation to the aim its was processed. General understanding of the right to be forgotten connected with "forgetfulness" of old information, however this concept could have broader definition irrespective of the time frame criteria. Based on this idea, it is better to apply the notion "forget" as human might pose control on information which available in real time.

3. There are practical obstacles in the implementation of the right to erasure as it unavoidably leads to conflict with freedom of expression including defamation claims, protection of reputation and dignity, right to privacy including physical integrity, public's right to information and other legal interests. In that situation a balancing test and principle of proportionality used by corresponding DPA or court instance to find where this fine line is undergo and which value should prevail.

4. In the context of historical development of the right to be forgotten French and especially Italian doctrine were among the first whose courts bodies and public authorities dealt with issues of the right to be forgotten. In comparison, French approach mostly belong to rehabilitation of convicted criminals and deletion of records about their previous activities while for Italian's one of the major issue for consideration was removal of articles from newspaper archives which end up a conclusion that information should be contextualized and updated rather than removed. In German doctrine of personality rights, informational control in the Internet might be realized through right to informational self-determination which granting individual's right to decide the destiny of their personal data without deletion of the old ones. Respectively, in non-EU

countries like Argentina or Brazil, the rulings on the right to be forgotten strongly depend on judge's balancing test and can varies considerably from case to case.

5. In search of right to be forgotten the CJEU adopted two landmark judgments which identify the direction in modern court practice. In Google Spain case judges used such criteria as 1)stable conjunctions between subsidiary and head company expressed through separate legal personality and providing of services on the national market, 2)activities like collecting, storage and disclosure as processing of personal information by controller due to its role in dissemination of data and 3)recognition of the data subject's right to erase of the data when it is no longer necessary for its primary target and obligation of controller to balance the interests of individual and internet user on a case by case assessment. Although, in Manni case the Court denied applicant's right to erasure of data from company's register on the ground of especial general interest for third parties, limited scope of information disclosed and affirmation of legal certainty, nevertheless, confirmed that upon exclusive circumstances after expiry of a relatively long period of time such restrictions might be granted.

6. In the ECHR doctrine, right to be forgotten mostly analyzed in context of balance between Article 8 and Article 10. In the sphere of data protection the infringement of this legal values begins when distribution of information influence negatively on social life, physical and moral integrity and on relationships with other humans. Analysis of Article 8 of Convention allows to deduce that this article may include the right to be forgotten as an element of informational solution due to the fact that this provision could be violated even in situations when information about a person is not private for example, comments of users or information which had been publicly available in advance for a certain period of time. In one of its decision the ECHR admitted that courts should note rewrite the history by breaching the integrity of online archives, but underlined the possibility accessible on national level such as adding of comment explaining the final outcome of the proceeding.

7. The main problems in current interpretation process amongst Latin America countries are absence of separate provisions implemented into special data protection legislation and liability of branch of main companies on the territory where the claimant sued. From the practical standpoint both European and non-European states while analyzing the case take into account such aspects as historical interest of the information, role in society of data subject, in fact whether he or she performs public functions and whether interference into privacy and honor is proportionate. During balancing of rights and values such instruments of adequate control over information as anonymization and deindexation of links were used.

RECOMMENDATIONS

1. Amend the Article 2 part 1 of the Law of Ukraine "On the protection of personal data" and formulate the notion of "personal data" as follows:

"Personal data – is an information or compilation of information ~~regarding natural person, which is identified or could be particularly identifiable~~ **relating to identified or identifiable natural person including a name, an identification number, location data, online identifier or one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person**."

2. Amend the Article 8 part 2 subparagraphs 5, 6, 7 of the Law of Ukraine "On the protection of personal data" and formulate it as follows:

"5) **The data subject shall have the right to request from data controller the erasure of personal data regarding him or her without excessive postponement and data controller is obliged to delete personal data without undue delay in case one of the following grounds applies:**

- **when personal data is no longer necessary for the purposes they were previously collected and proceed;**
- **withdrawing of consent by data subject and where there is no other legal grounds for processing;**
- **objection of data subject regarding the processing of his or her data when his interests, rights and freedoms prevail over controller's duty including processing for direct marketing purposes and when there are no other overriding grounds for such activity;**
- **unlawful proceeding of data."**

~~6) produce motivated request concerning amendments or deletion of claimant's personal data by its owner, controller or in case such information is unlawfully proceed or inaccurate;~~

~~7) to protect his or her personal data in case of unlawful proceeding, accidental loss, erasure, intentional conceal, denying in access as well as protection against unfaithful, defamatory information which infringe honor, dignity and business reputation of individual.~~

3. Add to the Article 15 part 5 of the Law of Ukraine "On the protection of personal data" and formulate it as follows:

"5. Right of individual to require the erasure of data shall not apply if the processing is necessary:

a) **for realization of the right of freedom of expression and information;**

b) **for compliance with provisions of the national law when the data controller is subject or for the performance of a task carried out in the public interest or in the exercise of official authority imposed on the controller;**

c) **in case of public interest in the field of public health;**

d) **for archiving purposes in the public interest, scientific, historical or statistical research aim or if it creates danger to the final achievement of the targets of that processing.**

e) **for application, performance or defense of legal claims."**

4. In order to identify, whether an individual has a right to be forgotten in particular situation, courts should use such criteria like time frame between appealed occasion and its actuality today. In that situation the Court should make a balance between the aim of general public interest in having access to such data and burden imposed on personality right of the plaintiff, in fact whether they are proportionate considering the role of human being in that circumstances.

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ABSTRACT

Recently, due to the rapid development of the European data protection legislation and approval of the GDPR, the right to be forgotten has become under the spotlight of scholars and public officials especially in Europe as well as a basis for heavy debates in Latin America countries. This paper presents comprehensive analysis of the nature of the right to be forgotten from both scientific and practical point of view. The first part will be devoted to the theoretical framework including definition of terms, its correlation as well as balance with other fundamental values like and historical development amongst various jurisdictions. The second part focuses on current and planned data protection legislative regime practical and applicability of the concept of the right to be forgotten by the CJEU and the ECHR. Finally, third part mainly concentrates on wide scope of interpretation and description of criteria used by courts to apply the right to be forgotten in different states.

As result, the paper concludes by proposing balanced understanding of the right to be forgotten including its elements, criteria of identification and application by judges and modern challenges on its path.

Key words: data protection, fundamental rights, privacy, right to be forgotten, search engines.

SUMMARY

Master thesis “The right to be forgotten: theory and practice” presents a modern approach to the understanding of this instrument by scholars describing its nature from the scientific point of view and underlines directions as well as particular criteria of its application by national and supranational court instances and respective data protection authorities.

First of all, this paper seeks to find the most appropriate definition among numerous propositions developed by scientists. To achieve the target, comparative analysis amongst related notions like the right to oblivion, right to delete, right to erasure and the right to be forgotten had been done. After that, based on scientific and legislative research a balanced understanding of a term has been achieved as a right of data subject to request the removal of his personal information when the data is inadequate, irrelevant, and excessive in relation to the aim of the processing or kept longer than required for the processing unless it is required for scientific, historical or statistical purposes as well as when individual has withdrawn his or her consent or objects to the processing of personal data concerning him or her.

Secondly, in this paper analyzed a balance of right to be forgotten and main legal values including, freedom of speech, freedom of expression and right to privacy. Correlation between fundamental rights and newly adopted concept influence on finding the corresponding balance between public interest and burden imposed on data subject during the case by case assessment.

After that, this work mentions the evolution of the right to be forgotten both in European and non-European states. The founders of this right in Europe are Italian and French doctrine which primarily applied this concept to former convicted criminals and later to modern challenges arising during consideration of particular case like the removal of an article from newspaper archives. Quite interesting is German’s personality right doctrine adopted by Federal Constitutional Court, which includes the right to informational self-determination that grants individual’s control over their information. At the same time, courts in Argentina and Brazil mostly used balancing test between the fact of public access to particular kind of information and right of a plaintiff to request to erase the data.

The main focus of this paper is on the identification of the criteria used by the CJEU, the ECHR and national courts through deep analysis of their practice. The touchstone for the recognition of the right to be forgotten as an effective instrument became Google Spain case and later acceptance in General Data Protection Regulation. By this decision, the CJEU underlined that claimants can require erasure of data about the past events spreading nowadays and influence negatively on individual’s normal social life as well creating a danger to his reputation. In its recent judgment in Manni case, the CJEU applied practical guidelines for removal of data in situations

which had been occurred in the business environment when a head of new enterprise wanted to delete information connected with his previous unsuccessful entrepreneurial activity from the companies register. In contrast, decisions of the ECHR seeking to find a balance between Article 8 and Article 10.

Finally, as to the interpretation of the right to be forgotten there are two main problems: lack of stable court practice in European jurisdiction and absence of appropriate legislation in Latin American states. Consequently, the final result of the case can differ dramatically depending on the interpretation of criteria used by particular court instance.

In conclusion, results of the research expressed in the list of criteria including time frame, public interest, the role of an individual in concrete obstacles, role of claimant in public life and others used by judges as well as empowered authorities in different jurisdictions while resolving a particular dispute.

HONESTY DECLARATION

07/05/2018

Vilnius/Kyiv

I, Vladyslav Daruha, student of Mykolas Romeris University and Taras Shevchenko National University of Kyiv (hereinafter referred to University), Faculty of Law, Institute of Private law, Private Law Programme confirm that the Master thesis titled "*The Right to be Forgotten: Theory and Practice"*:

1. Is carried out independently and honestly;
2. Was not presented and defended in another educational institution in Lithuania, Ukraine or abroad;
3. Was written in respect of the academic integrity and after becoming acquainted with methodological guidelines for thesis preparation.

I am informed of the fact that student can be expelled from the University for the breach of the fair competition principle, plagiarism, corresponding to the breach of the academic ethics.

Vladyslav Daruha