

The principle of an open court: does Google's procedure relating to the right to be forgotten meet the international standard?

Rector Magnificent distinguished faculty, dear colleagues and friends, ladies and gentlemen:

Getting a doctor honoris causa is an extraordinary and touching moment in the scientific career and the personal life of a professor. For me, the honorary doctoral degree awarded by your distinguished university is not only a personal merit. First and foremost it reflects the cooperation between proceduralists from Greece and from Germany in Europe. This mutual exchange goes back to the 19th century. Today, it is lived by our academic institutions, by mutual lectures, conferences and common seminars in Greece, Germany and Luxembourg. Furthermore, this cooperation is based on personal relations and friendship. When I worked as an assistant with Professor Peter Schlosser in the 1980s and 1990s, Professor Pelayia Yessiou Faltsi often came to Munich and we discussed Article 6 of the European Convention of Human Rights. When I started my professorship in Heidelberg I made close contacts with Professor Athanassios Kaissis with whom I share common interests in arbitration, international dispute resolution and comparative procedural law. When the Max Planck Institute in Luxembourg started, President Vassilios Skouris was a strong supporter. However, this cooperation and exchange was never confined to the professors. It includes academia in its entirety, especially students and young researchers. Just to give you one example: last December, Stavroula Angoura who graduated from the International University started writing her PhD in the IMPRS on Successful Dispute Resolution in Luxembourg. Among my doctoral students and collaborators are many Greek scholars who helped to set up the Institute.

Ladies and Gentlemen, since 1945 the collaboration between Greek and German proceduralists in Europe has been backed and reinforced by common values and fundamental rights. Fundamental human rights form the basis of the European legal order. Today, the Council of Europe and the European Union provide for a framework of procedural guarantees which have also become the backbone of our academic collaboration. In the comments that follow, I will try to demonstrate how procedure matters in our common legal culture and I would equally like to demonstrate that these fundamental guarantees matter for ordinary people – and therefore for all of us.

Ladies and gentlemen , I would like to explain this issue by a current case which originated in Luxembourg: On 13 May 2014, the European Court of Justice gave a landmark decision in the case *Google v. Spain*.¹ The case concerned data protection and the protection of privacy. The Spanish data protection authorities had ordered that the Californian Data Processor remove some links in its search engines on the basis of European data protection law. Google challenged the decision, and the Spanish court requested a preliminary reference from the European Court of Justice. (When Google challenged the decision, In its response to the reference from Spain, the CJEU determined that Google was subject to European data protection law, defined how—a data processor should be understood and **ruled** that individuals domiciled in the Union have the right to request that their personal data be removed from search results (i.e. the "right to be forgotten"). However, the CJUE also said that this "right to be forgotten" is not unlimited; it has to be counterbalanced against the interests of the public in having access to information.² As a result, websites addresses retrieved by a search engine have to be removed when they are considered to be irrelevant, outdated or otherwise inappropriate. This is especially the case when the information provided is old and the applicant is not a public figure.³

How is this right to be implemented? According to the CJEU's judgment, search companies must establish procedures to be implemented when requests for information to be deleted are received and reviewed and where the conflicting interests are to be weighed. Google has established a team of about 50 paralegals and senior legal officers operating at its European headquarters in Ireland. Requests are submitted by an online form to the legal team, and applicants must specify the online information to be deleted and state why it is irrelevant, outdated or otherwise inappropriate. Once the request has been submitted, the applicant receives an automatic response acknowledging receipt and advising that he will get an answer

¹ CJEU, 5/13/2014, case C-131/12, *Google Spain*, EU:C:2014:317, see *Kuner*, The Court of Justice of the EU Judgment on Data Protection and Internet Search Engines: Current Issues and Future Challenges, in Hess & Mariottini, *Protecting Privacy in Private International and Procedural Law and by Data Protection. European and American Developments* (2015), p. 10 ff.

² The Grand Chamber held that "a fair balance should be sought in particular between that interest and the data subject's fundamental rights." However, "those rights override, as a rule, not only the economic interest of the operator of a search engine but also the interest of the general public in finding that information" This balance varies on a case-by-case basis and depends on "the nature of the information in question and its sensitivity for the data subject's private life" and the public's interest in the information. The public's interest, in turn, may vary depending on whether the individual is a public figure, CJEU, 5/13/2014, case C-131/12, *Google Spain*, EU:C:2014:317, paras 89 - 98.

³ In *Google Spain*, the underlying application was based on the fact that, when an user entered the name of the applicant in the search engine of the Google, he would obtain links to two pages of a local newspaper of 1998, on which an announcement mentioning the name of the applicant appeared for a real-estate auction connected with attachment proceedings for the recovery of social security debts. The applicant held that this information was outdated and irrelevant as the underlying debts had been paid long ago, CJEU, 5/13/2014, case C-131/12, *Google Spain*, EU:C:2014:317, paras 14 and 15.

asap. The procedure is straightforward: clear cases are decided by the paralegals, and the more sophisticated ones by the senior officials. Nevertheless, the decisions are not reasoned; applicants are only informed whether their request is successful or not. In the former case, the applicant is told that he or she can challenge the decision, but Google does not indicate who the competent court or data protection authority is. In case of a successful request, the link to the information is removed, but the removal is shown to have been made. The relevant website where the information appeared is also notified of the decision made by Google, but cannot challenge it.⁴ Since mid-2014, more than 1.4 million requests have been filed; Google has passed judgment in approximately 418.000 cases – roughly between 570 and 1.000 per day.⁵ All figures can be found in a so-called “transparency report” available at Google’s website.

Google’s procedures have been severely criticized because of its “closed door policy”. Notwithstanding the “transparency report”, the procedures are highly opaque: Until today, no one has been permitted to meet the legal team - even its composition has not been disclosed – and the procedures are not published. The same applies to the decision-making process: The balancing of interests is a sensitive legal issue; however, the decision-makers (i.e., Google) do not provide reasons for their findings. It is therefore unknown whether decisions are taken according to general criteria or guidelines; whether a standing practice has been established; whether a kind of case-law exists.

From a procedural point of view, Google’s dispute resolution mechanism does not correspond to the traditional leitmotiv of the judiciary where the court sits in a public hearing and gives motivated decisions.⁶ It does not even correspond to minimum standards of arbitration in respect of a fair trial and the equal treatment of the parties⁷; or to the standards of alternative consumer dispute settlement.⁸ However, one might argue that the procedure is a “private one” as Google is not subject to the fundamental rights to a fair trial and a public hearing guaranteed by article 6 of the European Convention of Human Rights and article 47 of the Charter of Fundamental Rights. Yet, this line of argument seems me to be too simplistic. The request for t

⁴ The procedure is described by *Haber*, Privatization of the Internet, 40 Seattle U.L.Rev (forthcoming September 2016), at p. 22 ff.

⁵ New York Times, April 19, 2016, “Europe Tried to Rein In Google. It Backfired”, p. A 1 and B6.

⁶ *Haber*, Privatization of the Internet, to be published in 40 Seattle U.L.Rev (forthcoming September 2016), at p. 25 ff.

⁷ *Kaissis*, Internet-Schiedsgerichtsbarkeit, in Gottwald (ed), Effektivität des Rechtsschutzes vor staatlichen und privaten Gerichten (2006), p. 221 ff. available at: <http://www.peacepalacelibrary.nl/plinklet/index.php?ppn=338299564>

⁸ Hess, Prozessuale Mindestgarantien in der Verbraucherschlichtung, Juristenzeitung 2015, 548 ff. (addressing procedural minimum standards of the Directive 2013/11/EU).

removal is the first procedural step in a process to implement the constitutional privacy rights of the individual; there is a consensus that constitutional rights are implemented and that public interests like free speech and freedom of information, are at stake.⁹ Of course, the decision of the information engine can be challenged by national authorities responsible for data protection, and individuals can initiate civil proceedings. However, less than 1% of all cases are reviewed by data protection authorities and individual lawsuits have so far remained exceptional.¹⁰

Against this backdrop, the dispute resolution system provided by Google (and other search engine providers) does not guarantee an efficient enforcement of the right to be forgotten. Safeguards for fundamental procedural fairness and transparency are missing. Of course, nobody would require that the search engine sets up a kind of individualized “mini-court” system. The number of requests per day implies that both a standardized approach and a written procedure are necessary. But even a “private dispute resolution system” must guarantee procedural minimum standards (right to be heard, assessment of facts, reasoned decisions) and provide for minimum levels of transparency.¹¹ Otherwise, the procedure is not legitimate. This problem is currently debated in a different area of law: namely, investment arbitration where the appointment of arbiters, the transparency of the procedure and the consistency of the awards given has become a major issue of the political debate. I would not totally subscribe to the critique pronounced in this respect, but it seems to me necessary to

⁹ The fundamental guarantees of articles 7 and 8 CFR were highlighted by CJEU, 5/13/2014, in case C-131/12, *Google Spain*, EU:C:2014:317, paras 66 ff.

¹⁰ A laudable exception is the lawsuit filed by the Austria internet activist (a law student) against Facebook Ireland currently pending at the District Court of Vienna. In this lawsuit, the plaintiff allegedly represents more than 25.000 persons whose personality rights were (allegedly) infringed by the defendant. Accordingly, 25.000 claims for damages (of 500 € each) were assigned to the plaintiff. The claimant bases the jurisdiction of the Austrian Court on Articles 15 and 16 of the Brussels I Regulation as Facebook usually establishes contractual relations with its users. Yet, this head of jurisdiction only applies to his personal claim, but not to the claims of other consumers assigned to him. Initially, the District Court Vienna dismissed the lawsuit because the plaintiff had not demonstrated that he was using his Facebook account solely for private purpose. This finding seems to be incorrect as the plaintiff in his student capacity is a private person. The Court of Appeal permitted the claim of the activist but held that he could not bring the parallel lawsuits in Austria. A second appeal is currently pending.

¹¹ It must be noted that the procedural enforcement of the right to be forgotten (art. 17) has not been sufficiently addressed by the new Regulation 2016/679 on Data Protection (OJ 2016 L 119). Only Recital 59 addresses the issue: “Modalities should be provided for facilitating the exercise of the data subject's rights under this Regulation, including mechanisms to request and, if applicable, obtain, free of charge, in particular, access to and rectification or erasure of personal data and the exercise of the right to object. The controller should also provide means for requests to be made electronically, especially where personal data are processed by electronic means. The controller should be obliged to respond to requests from the data subject without undue delay and at the latest within one month and to give reasons where the controller does not intend to comply with any such requests.” It should be mentioned that the Directive on the Protection of Consumers’ Rights (2013/11/EU, supra fn. 8) is much more explicit in this respect.

underline the need for fair, balanced and transparent procedures for the settlement of disputes regardless of their “private” or “public” nature. Without an efficient procedural remedy there is no right. Unfortunately, the new EU Regulation on Data Protection which was enacted a couple of days ago does not address this issue and does not provide for clear instructions for the engines. Therefore, we need another “Google vs. Spain” decision of the European Court of Justice in order to improve the implementation of the right to be forgotten.

Rector Magnificent, distinguished Faculty, ladies and gentlemen. I hope that this example has demonstrated that procedural law matters and that it is an important part of our legal order. The collaboration between scholars from different European jurisdictions in a common academic tradition is an important part of this common culture which is the backbone of a peaceful and united Europe. Thank you for your attention. . I’m most grateful for the distinction I’m being awarded today.