Court of Justice of the European Union
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Press and Information

Advocate General's Opinion in Case C-131/12
Google Spain SL, Google Inc. v Agencia Española de Protección de Datos,
Mario Costeja González

Advocate General Jääskinen considers that search engine service providers are not responsible, on the basis of the Data Protection Directive, for personal data appearing on web pages they process

National data protection legislation is applicable to them when they set up an office in a Member State which orientates its activity towards the inhabitants of that State, so as to promote and sell advertising space, even if the technical data processing takes place elsewhere

In early 1998, a newspaper widely circulated in Spain published in its printed edition two announcements concerning a real-estate auction connected with attachment proceedings prompted by social security debts. A person was mentioned as the owner. At a later date an electronic version of the newspaper was made available online by its publisher.

In November 2009 this person contacted the publisher of the newspaper asserting that, when his name and surnames were entered in the Google search engine, a reference appeared linking to pages of the newspaper with these announcements. He argued that the proceedings had been concluded and resolved many years earlier and were now of no relevance. The publisher replied that erasure of his data was not appropriate, given that the publication was effected by order of the Spanish Ministry of Labour and Social Affairs.

In February 2010, he contacted Google Spain and requested that the search results show no links to the newspaper when his name and surnames were entered into Google search engine. Google Spain forwarded the request to Google Inc., whose registered office is in California, United States, taking the view that the latter was the undertaking providing the internet search service.

Thereafter he lodged a complaint with the Agencia Española de Protección de Datos (Spanish Data Protection Agency, AEPD) against the publisher and Google. By a decision on 30 July 2010, the Director of the AEPD upheld the complaint against Google Spain and Google Inc., calling on them to withdraw the data from their index and to render future access to them impossible. The complaint against the publisher was rejected, however, because publication of the data in the press was legally justified. Google Inc. and Google Spain have brought two appeals before the Audiencia Nacional (National High Court, Spain), seeking annulment of the AEPD decision. In this context, this Spanish court has referred a series of questions to the Court of Justice.

In today's Opinion, Advocate General Niilo Jääskinen addresses first the question of the territorial scope of the application of national data protection legislation[1]. The primary factor that gives rise to its application is the *processing of personal data* carried out in the context of the activities of an establishment of the controller[2] on the territory of the Member State. However, Google claims that no processing of personal data relating to its search engine takes place in Spain. Google Spain acts merely as commercial representative of Google for its advertising functions. In this capacity it has taken responsibility for the processing of personal data relating to its Spanish advertising customers.

[1] National legislation implementing the European Parliament and Council Directive 95/46/EC 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 (OJ L 281, p.31-50).
[2] According to the Data Protection Directive, the 'controller' is the person or body which alone or jointly with others determines the purposes and means of the processing of personal data.

The Advocate General considers that this question should be examined taking into account the business model of internet search engine providers. This normally relies on keyword advertising which is the source of income and the reason for the provision of a free information location tool. The entity in charge of keyword advertising is linked to the internet search engine. This entity needs a presence on national advertising markets and that is why Google has established subsidiaries in many Member States. Hence, in his view, it must be considered that an establishment processes personal data if it is linked to a service involved in selling targeted advertising to inhabitants of a Member State, even if the technical data processing operations are situated in other Member States or third countries. Therefore, Mr Jääskinen proposes that the Court declare that processing of personal data takes place within the context of a controller's establishment and, therefore, that **national data protection legislation is applicable to a search engine provider when it sets up in a Member State, for the promotion and sale of advertising space on the search engine, an office which orientates its activity towards the inhabitants of that State.**

Secondly, as for the legal position of Google as an internet search engine provider, Mr Jääskinen recalls that, when the Directive was adopted in 1995, the Internet and search engines were new phenomena and their current development was not foreseen by the Community legislator. He takes the view that Google is not generally to be considered as a 'controller' of the personal data appearing on web pages it processes[3], who, according to the Directive, would be responsible for compliance with data protection rules. In effect, provision of an information location tool does not imply any control over the content included on third party web pages. It does not even enable the internet search engine provider to distinguish between personal data in the sense of the Directive, which relates to an identifiable living natural person, and other data. In his opinion, the internet search engine provider cannot in law or in fact fulfil the obligations of the controller provided in the Directive in relation to personal data on source web pages hosted on third party servers.

Therefore, **a national data protection authority cannot require an internet search engine service provider to withdraw information from its index except in cases where this service provider has not complied with the exclusion codes[4] or where a request emanating from a website regarding an update of cache memory has not been complied with.** This scenario does not seem pertinent in the present case. A possible 'notice and take down procedure' concerning links to source web pages with illegal or inappropriate content is a matter for national civil liability law based on grounds other than data protection.

Thirdly, **the Directive does not establish a general 'right to be forgotten'. Such a right cannot therefore be invoked against search engine service providers on the basis of the Directive, even when it is interpreted in accordance with the Charter of Fundamental Rights of the European Union[5].**

The rights to rectification, erasure and blocking of data provided in the Directive concern data whose processing does not comply with the provisions of the Directive, in particular because of the incomplete or inaccurate nature of the data. This does not seem to be the case in the current proceedings.

The Directive also grants any person the right to object at any time, on compelling legitimate grounds relating to his particular situation, to the processing of data relating to him, save as otherwise provided by national legislation. However, the Advocate General considers that a subjective preference alone does not amount to a compelling legitimate ground and thus the Directive does not entitle a person to restrict or terminate dissemination of personal data that he considers to be harmful or contrary to his interests.

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[3] See footnote 2.

[4] The publisher of a source web page can include 'exclusion codes', which advise search engines not to index or store a source web page or to display it within the search results. Their use indicates that the publisher does not want certain information on the source web page to be retrieved for dissemination through search engines.

[5] In particular, the rights of respect for private and family life (Article 7) and protection of personal data (Article 8) versus freedom of expression and information (Article 11) and freedom to conduct a business (Article 16).

It is possible that the secondary liability of the search engine service providers under national law may lead to duties amounting to blocking access to third party websites with illegal content such as web pages infringing intellectual property rights or displaying libellous or criminal information. In contrast, requesting search engine service providers to suppress legitimate and legal information that has entered the public domain would entail an interference with the freedom of expression of the publisher of the web page. In his view, it would amount to censorship of his published content by a private party.

NOTE: The Advocate General's Opinion is not binding on the Court of Justice. It is the role of the Advocates General to propose to the Court, in complete independence, a legal solution to the cases for which they are responsible. The Judges of the Court are now beginning their deliberations in this case. Judgment will be given at a later date.

NOTE: A reference for a preliminary ruling allows the courts and tribunals of the Member States, in disputes which have been brought before them, to refer questions to the Court of Justice about the interpretation of European Union law or the validity of a European Union act. The Court of Justice does not decide the dispute itself. It is for the national court or tribunal to dispose of the case in accordance with the Court's decision, which is similarly binding on other national courts or tribunals before which a similar issue is raised.

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