

**Case C-460/20**

**Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice**

**Date lodged:**

24 September 2020

**Referring court:**

Bundesgerichtshof (Germany)

**Date of the decision to refer:**

27 July 2020

**Applicants and appellants on a point of law:**

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**Defendant and respondent in the appeal on a point of law:**

Google LLC

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**Subject matter of the main proceedings**

Claim for de-referencing of particular links in search results that lead to online third-party articles identifying the applicants and featuring photographs of them, and for an order requiring the defendant to refrain from displaying those photographs in the form of preview images (thumbnails)

**Subject matter and legal basis of the request for a preliminary ruling**

Interpretation of EU law, Article 267 TFEU

**Questions referred for a preliminary ruling**

1. Is it compatible with the data subject's right to respect for private life (Article 7 of the Charter of Fundamental Rights of the European Union, OJ C 202 of 7 June 2016, p. 389) and to protection of personal data (Article 8 of the

Charter), if, within the context of the weighing-up of conflicting rights and interests arising from Articles 7, 8, 11 and 16 of the Charter, within the scope of the examination of his request for de-referencing brought against the data controller of an internet search engine, pursuant to Article 17(3)(a) of Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data and repealing Directive 95/46/EC (General Data Protection Regulation, GDPR, OJ L 119 of 4 May 2016, p. 1), when the link, the de-referencing of which the applicant is requesting, leads to content that includes factual claims and value judgements based on factual claims the truth of which is denied by the data subject, and the lawfulness of which depends on the question of the extent to which the factual claims contained in that content are true, the national court also concentrates conclusively on the issue of whether the data subject could reasonably seek legal protection against the content provider, for instance by means of interim relief, and thus at least provisional clarification on the question of the truth of the content displayed by the search engine data controller could be provided?

2. In the case of a request for de-referencing made against the data controller of an internet search engine, which in a name search searches for photos of natural persons which third parties have introduced into the internet in connection with the person's name, and which displays the photos which it has found in its search results as preview images (thumbnails), within the context of the weighing-up of the conflicting rights and interests arising from Articles 7, 8, 11 and 16 of the Charter pursuant to Article 12(b) and Article 14, first paragraph, (a) of 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 (Data Protection Directive, OJ L 281 of 23 November 1995, p. 31)/Article 17(3)(a) of the GDPR, should the context of the original third-party publication be conclusively taken into account, even if the third-party website is linked by the search engine when the preview image is displayed but is not specifically named, and the resulting context is not shown with it by the internet search engine?

### **Provisions of EU law cited**

Charter of Fundamental Rights of the European Union, Articles 7, 8, 11 and 16

Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC; Article 17, fourth recital

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; Articles 12 and 14

**Case-law cited:****- Case-law of the European Court of Justice**

judgment of 13 May 2014, *Google Spain and Google* (C-131/12, EU:C:2014:317)

judgment of 24 September 2019, *GC and Others (De-referencing of sensitive data)* (C-136/17, EU:C:2019:773)

judgment of 24 September 2019, *Google (Territorial scope of de-referencing)* (C-507/17, EU:C:2019:772)

judgment of 29 July 2019, *Spiegel Online* (C-516/17, EU:C:2019:625)

judgment of 14 February 2019, *Buivids* (C-345/17, EU:C:2019:122)

judgment of 7 August 2018, *Renckhoff* (C-161/17, EU:C:2018:634)

judgment of 8 September 2016, *GS Media* (C-160/15, EU:C:2016:644)

judgment of 16 February 2012, *SABAM* (C-360/10, EU:C:2012:85)

judgment of 24 November 2011, *Scarlet Extended* (C-70/10, EU:C:2011:771)

judgment of 16 December 2008, *Satakunnan Markkinapörssi and Satamedia* (C-73/07, EU:C:2008:727)

**- Case-law of the European Court of Human Rights**

judgment of 28 June 2018, *M.L. and W.W. v. Germany*, CE:ECHR:2018:0628JUD006079810

judgment of 4 December 2018, *Magyar Jeti Zrt v. Hungary*, CE:ECHR:2018:1204JUD001125716

judgment of 27 June 2017, *Satakunnan Markkinapörssi OY and Satamedia v. Finland*, CE:ECHR:2017:0627JUD000093113

judgment of 2 February 2016, *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v. Hungary*, CE:ECHR:2016:0202JUD002294713

judgment of 7 February 2012, *Axel Springer v. Germany*, CE:ECHR:2012:0207JUD003995408

judgment of 7 February 2012, *Von Hannover v. Germany (No 2)*, CE:ECHR:2012:0207JUD004066008

**Brief summary of the facts and proceedings**

- 1 The first applicant works in a position of responsibility, or is involved, in various companies which provide financial services. The second applicant was the first applicant's cohabiting partner and, until May 2015, held general commercial power of representation in one of those companies.
- 2 On 27 April 2015, 4 June 2015 and 16 June 2015, three articles appeared on the website [www.g-net.net](http://www.g-net.net) ('g-net') which criticised the investment model of several of those companies. The article dated 4 June 2015 also featured three photographs of the first applicant and one photograph of the second applicant. The articles prompted doubts as to the reliability of the investment model, while the images, in conjunction with the articles, suggested that the applicants were enjoying a life of externally financed luxury. The operator of the g-net website is G-LLC, according to the imprint. The corporate purpose of G-LLC is, according to its own statement, 'to contribute consistently towards fraud prevention in the economy and society by means of active investigation and constant transparency'. The business model of G-LLC has been criticised in various publications, including with the accusation that it attempts to blackmail companies by initially publishing negative reports and then offering to delete the reports or prevent negative reporting in return for protection money.
- 3 The defendant displayed in its search results the articles dated 4 June 2015 and 16 June 2015 when the applicants' first names and surnames were entered in its search engine, both separately and in conjunction with particular company names, and the article of 27 April 2015 was displayed when particular company names were entered in its search engine, and linked to them in each case. The defendant also displayed photographs of the applicants contained in the article dated 4 June 2015 as thumbnails in the list of results of its image search; this has no longer been the case since September 2017. Since 28 June 2018, the linked articles have no longer been available to view on g-net either.
- 4 The action by which the applicants sought to have the hits and thumbnails removed from the list of results by the defendant remained unsuccessful before the lower courts. The appellate court assumed that the processing of the applicants' personal data was carried out lawfully by the defendant and that no remedy could therefore be sought on the basis of Article 17 of Regulation 2016/679. It held that, within the scope of the pending consideration of conflicting rights and interests of the parties in accordance with Article 6(1)(f) of Regulation 2016/679, the specific working method and special significance of a search engine in making the internet usable must be weighted accordingly. It also stated that, as the search engine operator normally has no legal relationship with the authors of the content shown in the list of results, as the investigation and evaluation of all facts of the case are not possible without taking account of a statement from the content provider, and as only the names of the data subject were available to the search engine operator, the operator of a search engine would have specific duties to act only if it became aware of an obvious and clearly discernible infringement of rights as a result of a

specific notification from the data subject. Those principles, the court stated, applied correspondingly if the use of the search engine was limited to an image search.

- 5 It also stated that, in so far as the veracity of the alleged fact is concerned, the duty to state the facts and the burden of proof lies with the claimant, that is to say, the applicants. As the applicants have claimed that the facts reported about them and the stated value judgements are untrue, but have not proven this, it was not possible for the defendant to make a final judgement on the content it has linked to. For this reason, the defendant was not required to de-reference the search results in question according to the criterion of ‘obvious and clearly discernible infringement of rights’. The court stated that there is also no evidence of any rights infringement in respect of the images displayed in the form of thumbnails that is obvious and clearly discernible to the defendant.

### **Brief summary of the grounds for the request**

- 6 The successful outcome of the appeal on a point of law pending before the referring court depends on the interpretation of EU law. Regulation 2016/679 is applicable with respect to the time period, circumstances and geographical area covered by the links to the three articles mentioned. The applicants’ claim for permanent de-referencing from the search results to which they object is covered by Article 17(1) of Regulation 2016/679. Articles 12(b) and 14(1)(a) of Directive 95/46 are applicable with regard to the thumbnails, as the defendant has, in any event, no longer been displaying the thumbnails since 2017, prior to the entry into force of Regulation 2016/679. The referring court assumes that the conditions for de-referencing in accordance with the General Data Protection Regulation and the Data Protection Directive apply in parallel. For that reason, the referring court requests that the second question concerning the image source also be answered in relation to the General Data Protection Regulation.

### ***The first question referred***

- 7 Article 17(1) of Regulation 2016/679 is not, in accordance with Article 17(3)(a) thereof, applicable if the data processing carried out by the search engine operator is necessary for exercising the right to freedom of expression and information. As stated in recital (4) of the regulation, the right to the protection of personal data is not an absolute right; it must be considered in relation to its function in society and be balanced against other fundamental rights, in accordance with the principle of proportionality. This consideration of fundamental rights must be made on the basis of all relevant circumstances in an individual case, taking account of the severity of the infringement of the fundamental rights of the data subject (the applicants) on the one hand, and, on the other hand, the defendant’s fundamental rights, the interests of its users and the general public, and the fundamental rights of providers of the content shown in the results links which are the subject of objection.

- 8 The basis for weighing up is the procedure employed in the defendant's search engine. Specifically, this concerns its own act of data processing, which must also be evaluated separately in relation to the associated restrictions on fundamental rights. The question of whether the linking is lawful is separate from the question of whether publication of the linked articles by the content provider is lawful.
- 9 In the present case, the applicants base their request for de-referencing on the claim that the statements contained in the three linked articles are false. The defendant's view is that it is unable to appraise the veracity of the statements being objected to.
- 10 As the statements in question infringe the data subjects' fundamental rights to respect for private life and protection of personal data provided for respectively in Articles 7 and 8 of the Charter, the weighing-up requested in accordance with Article 17(3)(a) of Regulation 2016/679 depends on whether the factual claims contained in the linked articles are true. If they are true, a justified public interest in accessing information would exist, and the interests of the search engine operator, the content provider, and the users protected as fundamental rights would outweigh the applicants' interests protected under Articles 7 and 8 of the Charter.
- 11 The defendant has no information as to the veracity of the factual claims objected to by the applicants, and, within the scope of assessing the request for de-referencing, it was therefore unable to weigh up, as it is required to do, the conflicting rights and interests arising from Articles 7 and 8 of the Charter, on the one hand, and from Articles 11 and 16 of the Charter, on the other hand.
- 12 The question of whether the defendant ought to have complied with the applicants' request for de-referencing therefore depends on whether the applicants would have been required to prove the alleged falsehood of the claims to which they objected or to at least present specific evidence of falsehood, or whether the defendant should have taken the applicants' claim of falsehood of the factual claims to which they objected to be correct or should have investigated the facts of the matter.
- 13 In the view of the referring court, the conditions for possible de-referencing cannot disappear simply because the articles originally displayed by the defendant in the list of results ceased to be available for view on g-net from 28 June 2018. The articles could, after all, be posted online again.
- 14 There is no clarification in EU law regarding the key question of the legal dispute referred to in paragraph 12, regarding which obligations fall to which party in a case of a request for de-referencing when the veracity of the content displayed by the search engine is disputed.
- 15 A schematic solution which regards the obligation as resting with either the search engine operator or the data subject seems unjustifiable in view of the fact that, on the one hand, the data subject's right of objection does not exist unconditionally,

and, on the other hand, internet search engines play an essential role in making this medium usable. Rather, the conflicting rights and interests in such sets of circumstances arising from Articles 7 and 8 of the Charter, on the one hand, and from Articles 11 and 16 of the Charter, on the other hand, must be weighed up equally against one another.

- 16 If, in a case such as the present one, the data subject were held to be obliged to provide the search engine operator with evidence of the falsehood of the linked content, he would be required to declare to the search engine operator details of a potentially particularly sensitive nature that might affect personal rights, and would nevertheless bear the risk of the matter not being amenable to investigation. This risk would be especially relevant in the context of proving a negative fact; in other words, if the data subject were required to prove that he had not done something. The entitlement to de-referencing under Article 17(1) of Regulation 2016/679 would be practically rendered valueless in these cases.
- 17 By contrast, if the search engine operator were required to accept the data subject's claim of the falsehood of a fact as being correct when deciding on a request for de-referencing, there would then be a risk that true factual claims in which there would be a justified public interest in information and the publication of which would undoubtedly be permitted given the veracity of the factual claim would not be displayed by the search engine to a material extent and would be publicly accessible only with increased difficulty. This would result in a breach of the content provider's rights to freedom of expression that are protected under Article 11 of the Charter and the public interest in accessing such forms of expression.
- 18 For those reasons, the only option is a conciliatory solution instead of a schematic one. For example, the search engine operator could be requested to investigate and evaluate the true facts of a case within the scope of a notice and take down procedure, while obtaining the opinion of the responsible content provider as is normally required for such a procedure. However, the data subject himself could also be requested to arrange a review of the truth of the content displayed by the search engine operator, at least provisionally (in other words, by means of interim relief), but only if the bringing of proceedings for interim relief against the content provider is reasonable for the data subject, depending on the actual circumstances of the individual case.
- 19 The referring court tends towards the latter approach, specifically a claim against the content provider by the data subject to review the truthful nature of the linked content. The question of truth of the content can, in fact, be answered only within the relationship between the content provider and the data subject. Although the search engine operator is directly responsible under data protection law, it remains merely an intermediary with regard to the content to which it has provided a link. A prior claim against the content provider by the data subject would thus be limited to such sets of circumstances in which the question of truth of the information linked to by the search engine operator cannot be reviewed as part of

the handling of a request for de-referencing by the deciding court in the overall weighing-up of rights and interests arising from Articles 7, 8, 11 and 16 of the Charter in relation to the data subject and the search engine operator.

*The second question referred*

- 20 If the data controller of an image search engine, such as the defendant is in this case, displays thumbnails of images which it has found on the internet for the requested search term in a list of search results it has produced itself, this constitutes independently making those images accessible and independent data processing. The independent displaying of thumbnails in the search engine's list of results does not, by itself, indicate the context of the original publication; rather, the thumbnail in the results link is devoid of context.
- 21 Within the scope of Articles 12(b) and 14(1)(a) of Directive 95/46, and Article 17(3)(a) of Regulation 2016/679, the determining factor in the pending weighing-up of rights and interests arising from Articles 7, 8, 11 and 16 of the Charter is whether this context-neutral thumbnail alone or the original context of the image publication is to be taken into account.
- 22 With regard to the images, the referring court also expresses its view that the time-related conditions for the applicants' request for de-referencing have not ceased to apply.
- 23 In the first instance, the fact that the thumbnails ultimately concern a link to a third-party website favours a general consideration of the context of the original publication. It is clear to the perceptive average user of an image search engine that the thumbnails compiled by the search engine in the list of results have been filtered from third-party publications and have generally been published in a particular context.
- 24 The fact that the operations of a search engine data controller are regarded as independent supports the argument that the context of the original third-party publication should be ignored in any examination of the request for de-referencing. An internet search engine contributes towards the wider global dissemination of images that it has indexed by making them accessible to any internet user who carries out a search using the name of the person in question.
- 25 If a search engine operator is regarded as operating independently, it therefore becomes more relevant that the original context of the image publication is not stated when the thumbnail is displayed and is not otherwise visible either, even though it can be traced back through multiple links. With regard to the separate assessment of the search engine data controller's operations, account must be taken of the fact that a casual user of the image search engine will only consider the thumbnails in any case, without tracing back the origin of the images and their original context in any detail. The search engine data controller strips the images of their context by displaying them entirely as a thumbnail, and even shows them

in isolation as its own content on its webpage, abandoning its status as a mere intermediary. For this reason, it seems logical, in order to judge the lawfulness of the search engine data controller's data processing, to base the pending weighing-up only on the rights and interests apparent from the thumbnail itself.

- 26 In the opinion of the referring court, the latter view takes account of an individual's right to protection of his own image, as this right requires, in particular, that the data subject should determine how his own image is handled, including in particular the opportunity to oppose dissemination of the image.

WORKING DOCUMENT