

**UiO** : **Faculty of Law**  
University of Oslo

# The right to be forgotten under the GDPR: analysis of case law for effective enforcement

Candidate number: 7012

Submission deadline: 01 December 2018

Number of words: 17 479



## **Acknowledgements**

I would like to express my deepest appreciation to my supervisor, Nancy Yue Liu, for her valuable comments and encouragement throughout the writing process. She always provided me with patient feedback whenever I had a question about my research or writing. I am also grateful to my families: my parents, my husband and my daughter for supporting me spiritually and my everyday life in general throughout writing this thesis.

## Table of contents

<b>1</b>	<b>INTRODUCTION.....</b>	<b>1</b>
1.1	Background .....	1
1.2	Research question .....	2
1.3	Methodology .....	3
1.4	Structure .....	3
<b>2</b>	<b>THE LEGAL BASIS FOR THE RIGHT TO BE FORGOTTEN.....</b>	<b>5</b>
2.1	A broad conceptualization of the right to be forgotten .....	5
2.2	The legal basis pursuant to the directive.....	6
2.2.1	Article 12(b) incorporates the right to erasure.....	6
2.2.2	Blocking, relevance assessment and the first form of ‘oblivion’ .....	7
2.2.3	A specific form: the ‘erasure’ based on the passage of time .....	7
2.2.4	The role of article 7(f) in changing a right to object to a right to erasure .....	8
2.2.5	The balancing test and the second form of ‘oblivion’ .....	9
2.2.6	The cascade under the directive.....	9
2.3	How the analogous provisions under the GDPR differ from the directive .....	10
2.3.1	The framing of the right to be forgotten has diminished.....	10
2.3.2	Creating a wrong impression about the accuracy assessment .....	11
2.3.3	Greater obligation on original publishers and non-general obligation on other controllers .....	11
2.3.4	A broader freedom of expression exemption .....	13
2.4	The real innovative and revolutionary change under article 17 of the GDPR.....	13
<b>3</b>	<b>THE GOOGLE SPAIN JUDGMENT.....</b>	<b>15</b>
3.1	The main facts of the decision .....	15
3.2	The criteria and approach employed .....	15
3.2.1	The starting point: the serious interference with privacy right.....	16
3.2.2	Search engine operators cannot rely on the media exemption .....	16
3.2.3	Two sets of criteria for ‘relevance’ .....	16
3.2.4	The fundamental approach: balancing test .....	18
3.3	The right of oblivion established by this decision .....	19
3.4	Assessment of the criticisms of this judgment.....	20
3.4.1	Paradox regarding the relevance assessment.....	20
3.4.2	Critical reaction to the balancing test .....	21
3.4.3	Criticisms arise from the general obligation imposed .....	22

<b>4</b>	<b>THE BALANCING APPROACH FOR THE RIGHT TO BE FORGOTTEN AT THE NATIONAL LEVEL .....</b>	<b>23</b>
4.1	Backgrounds of the national cases involved .....	23
4.2	The rationality for balancing test: the proportionality principle .....	24
4.3	The parameters of the ‘proportionality’ established by national courts for balancing on the right to be forgotten.....	26
4.3.1	The role of margin of appreciation .....	26
4.3.2	The level of intrusion.....	27
4.3.3	The legitimate purpose pursued.....	28
4.4	The common rule and distinct focus for balancing test .....	28
4.5	The relevance assessment for balancing the right to be forgotten .....	29
4.5.1	The criterion for the relevance assessment.....	30
4.5.2	The parameters of relevance assessment .....	32
4.6	Main points of the relevance assessment .....	33
<b>5</b>	<b>HOW TO REGULATE THE RIGHT TO BE FORGOTTEN MORE EFFECTIVELY UNDER THE GDPR .....</b>	<b>35</b>
5.1	Comparison on the balancing test .....	35
5.1.1	Coherence regarding the margin of appreciation .....	35
5.1.2	Inconsistency on the relevance criterion .....	36
5.2	The compatibility on the freedom of expression exemption.....	36
5.3	Inconsistency regarding the definition.....	37
5.3.1	The rationale for dealing with the problems of digital eternity .....	37
5.3.2	The definition weakness for addressing the problems of digital eternity.....	38
5.4	The distance on the general obligation for delisting.....	39
5.5	Proposal for dealing with the definition weakness: reintroducing the ‘oblivion’ .....	40
5.5.1	The way to achieve the ‘reintroducing’ .....	40
5.5.2	Advantages of the proposal .....	41
<b>6</b>	<b>CONCLUSION.....</b>	<b>43</b>
6.1	The improved effectiveness in view of softening the disparity .....	43
6.2	The effectiveness due to the coherence.....	44
	<b>TABLE OF REFERENCE .....</b>	<b>46</b>

# 1 Introduction

## 1.1 Background

It is a consensus among the commentators that the right to be forgotten originates from the notion of ‘right of oblivion’ recognized by case law throughout the EU.<sup>1</sup> The right of oblivion refers to the claim that data, concerning the data subject and somewhat harming to his or her image or other protected interests despite being true, not be the focus of attention by the mass media.<sup>2</sup> It is important to underline that the balancing between privacy interest and the freedom of expression of the press lies centrally in the court practice for the interpretation of the right of oblivion.<sup>3</sup> However, the role of the mass media has reduced under the recent debates concerning the right to be forgotten, especially after the Google Spain judgment. The Google Spain has highlighted the causal relationship between the development of the search engine technology and the protection of privacy in view of the increasing important role of the search engine operator in facilitating the accumulation and accessibility to personal data concerning individual’s digital negative past. The European court of justice (the ECJ) in this judgment has defined the balance between the right of oblivion and public interest and between the ‘oblivion’ and the legitimate economic interest of search engine operator in the light of article 12(b) and 14(a) of Directive 95/46/EC (the directive). In the meantime, the national courts have implemented the Google Spain judgment at the national level to delineate the limits to the right to be forgotten or the freedom of expression by the balancing approach.<sup>4</sup> Thus, the parameters of the right to be forgotten have, to a large extent, been shaped by the court practice.

It is worth pointing out that the Google Spain case and many European national cases<sup>5</sup> on the right to be forgotten have occurred or been determined in circumstance where the directive regime is going to be below the horizon, with the dawn of the EU general data protection regulation (the GDPR) already appeared. However, article 17 of the GDPR has embodied the

---

<sup>1</sup> Regarding this consensus, see Mantelero, “The EU proposal for a general data protection regulation,” 229; Di Ciommo, “Privacy in Europe after regulation,” 634; Weber, “The right to be forgotten,” 121.

<sup>2</sup> See note 1, Di Ciommo, 634.

<sup>3</sup> In this respect, Werro has presented how the Swiss courts had carved out the boundary between the right to be forgotten and the freedom of the press through the balancing test. Werro, “The right to inform,” 287-291.

<sup>4</sup> These cases, for example, including the British NT1 and NT2 v. Google LLC [2018] EWHC 799 (QB); the Irish Mark Savage v. Data protection commissioner and Google Ireland limited [2018] IEHC 122; the Dutch claimant v. Erdee media bv [2015] HA ZA 14-413; the Dutch claimant v. Google Inc C/13/575842/KG ZA 14-1433; the Dutch plaintiff v. the Federation C18/155241/KG ZA 15-73.

<sup>5</sup> Ibid.

right to be forgotten from the perspective of the right of erasure instead of considering from the traditional ‘oblivion’ prospect. Thus, there exists skepticism concerning the extent to which the GDPR is inconsistent or coherent with the case law or the directive in regulating the right to be forgotten. One argument is article 17 of the GDPR does not purport to represent the existing law, but a legal innovation.<sup>6</sup> A second view regards the new right to be forgotten as a modest expansion of existing data privacy rights.<sup>7</sup> Underlying this division is the doubt as to the effectiveness of the GDPR in regulating the right to be forgotten when compared to the existing law.

## **1.2 Research question**

In view of the above observations, the essential aim of this thesis is to answer the following question:

*How to regulate the right to be forgotten more effectively under the GDPR, especially in the context of the processing of the search engine operator?*

To achieve the essential aim, this thesis will evaluate the following sets of sub-questions:

1. What is the definition of the right to be forgotten? What is the legal basis for the right to be forgotten?
2. What is the character of the right established in the Google Spain? What are the central approaches and criterions used by the ECJ to establish the right?
3. How does the Google Spain been applied at the national level? What are the parameters established by the national courts?
4. What are the coherence and inconsistencies between the GDPR and the case law frameworks? Are the inconsistencies satisfactory? How to soften the inconsistency that is not satisfactory?

---

<sup>6</sup> The opinion of advocate general Jääskinen on case C-131/12, paragraph 110.

<sup>7</sup> Rosen, “The right to be forgotten.” 88.

### **1.3 Methodology**

Generally, this thesis has used the traditional three-step normativist<sup>8</sup> analysis for conducting the research. Identifying of the current right to be forgotten-relevant law is the first step. While the legislative embodiment of the right to be forgotten has been included under the GDPR, the directive also caters for it through some rights of data subjects. Regarding the case law, there are sufficient court decisions on the right to be forgotten. At the EU level, the landmark Google Spain is a good example on point. Due to the language barrier, this thesis will mainly study one British case and three Dutch cases at the national level. The second step is the interpretation or examination of the laws identified. Therefore, the analysis of the first three-set sub-questions is closely linked with the above-mentioned two steps. The final step corresponds to the discussion of the fourth set of sub-questions, which concerns the investigation of the coherence and inconsistency within the legal system of the right to be forgotten and further propose solution for effectively filling gap.

The sources for this thesis consist of: legislations, case laws, academic journals and interpretative works, such as the opinion of advocate general on the Google Spain and opinion issued by the Article 29 Working Party. In addition, these sources are mainly collected on the internet. Some digital databases and websites have played significant role in this respect, such as De Rechtspraak (the website of the courts, and the Supreme Court of the Netherlands), the Westlaw Next.

### **1.4 Structure**

This thesis is mainly supported by four pillars which are constituted by the handling of the above-mentioned four sets of sub-questions. Specifically, the first pillar attempts to discuss how the EU legislations embody the right to be forgotten (see chapter two). This discussion builds upon an analysis of the ways in which the directive and the GDPR incorporate the right to be forgotten. Generally, this discussion seeks to explore the essential differences between the directive and the GDPR in terms of the manner in which they forms the legal basis for the right to be forgotten.

---

<sup>8</sup> According to the normativist model, the set of rules that belong to a legal system and its further systematization should be described. The activity of describing legal rules can be summarized as identification, interpretation and testing the validity of the norms. Moreover, the term 'systematization' means finding the solution to the logical flaws of the legal system: resolving antinomies and filling gaps. See Núñez Vaquero, "Five models of legal science." Section 2.1, paragraph 30, 32, 36.

On the basis of the analysis of the definition and legal basis for the right to be forgotten, the aim of the study in relation to the second pillar (see chapter three) is to assess whether the right established in the Google Spain judgment can be classified into the right to be forgotten. The study is followed by the examination of criteria established by the ECJ to balance the diverse interests involved in the context of the processing by the search engine operator. The second-pillar study not only served as the foundation for assessing the application of the Google Spain at the national level, but also provides insight into the application of the traditional ‘oblivion’ to new digital environment.

The aim of the research of the third pillar (see chapter 4) is to explain how the balancing approach as envisaged under the Google Spain has been carried out at the national level by focusing on four recent national cases in Britain and Netherlands. Discussion of the national cases helps to reveal the underlying rationality of the balancing approach since more concrete criteria for weighing the diverse interests have been established through national courts. The analysis of the third pillar therefore supplements the second pillar to form a more holistic landscape of the balancing regarding the right to be forgotten in the case law.

The fourth pillar mainly uses the definition difference and the balancing test framework as foundations for examining the coherence or inconsistency between the GDPR and the case law. The ultimate goal for the analysis is to answer the central research question by proposing suggestion to soften the inconsistency that is not satisfactory. The focus of this part is illustrations of the way the proposal would work and the reasons why it is superior to current possibility of the right to be forgotten pursuant to the GDPR.



## 2 The legal basis for the right to be forgotten

This chapter will examine how the right to be forgotten has been embodied in the EU data protection law (mainly the directive and the GDPR). The difference between the directive and GDPR is the focus of this chapter. And the discussion on the legal basis of the right to be forgotten is preconditioned by the analysis of the definition of it.

### 2.1 A broad conceptualization of the right to be forgotten

Werro conceptualizes “the right to be forgotten” from the perspective of rights of the personality.<sup>9</sup> He highlights the right to be forgotten for the criminal, namely, they may have the right to preclude press and public from identifying them in relation to their criminal *past after a certain time has passed*.<sup>10</sup> Koops presents two methods of defining the right to be forgotten: one is that personal data should be *deleted* in due time;<sup>11</sup> the second perspective is “clean slate”, meaning that individuals may have that *outdate* negative information is not used against them.<sup>12</sup> Ambrose observes that the right to *oblivion* and the right to *delete* information are two implications of the right to be forgotten. They oppose the convergence of the right to oblivion and the right to erasure within the conception of the right to be forgotten.<sup>13</sup> In contrast to Ambrose’s view, Bunn proposes that the right to be forgotten can involve the right to oblivion and the right to erasure simultaneously.<sup>14</sup>

Some clues about the right are available from the above discussion: first, the right of criminals to against the media and the right on a “clean slate” are preconditioned by ‘the passage of time’. This alludes to the reality that the right to be forgotten derives from the right of oblivion which intrinsically involves the notion of time. Second, the right to be forgotten has, to some extent, been recognized in relation to the right to erasure. Moreover, the relationship between the ‘oblivion’, the ‘erasure’ and the right to be forgotten is a dispute point. Many

---

<sup>9</sup> Werro refers the right to be forgotten as one part of the rights of personality, and could arguably include the right of internet users to keep their activity trails private. See note 3, Werro, 285. This view has been shared by Weber who agrees that the right to be forgotten has basis in the right of personality. See note 1, Weber, 121.

<sup>10</sup> Ibid, Werro, 290.

<sup>11</sup> Koops, “Forgetting footprints, shunning shadows,” 237.

<sup>12</sup> Ibid, 250.

<sup>13</sup> Ambrose, Meg Leta, and Jef Ausloos, “The right to be forgotten,” 1-2.

<sup>14</sup> Bunn expresses that the right not to be indefinitely linked to information about one’s past is the notion of oblivion. Whilst a right of erasure can be exercised in various situations which may or may not involve the passage of time. Bunn, “The curious case of the right to be forgotten” 338.

scholars propose criterion to distinguish them, such as the category of data,<sup>15</sup> the subjective preferences of data subject,<sup>16</sup> and the factor of time.<sup>17</sup> The first two criteria have little merit. The criterion of ‘the category of data’ is too narrow to protect the data subject. There are no legal and court practice to support the criterion of ‘the subjective preferences’. Although there is the circumstance where the feature ‘deletion’ and ‘the passage of time’ coexist within the right of erasure,<sup>18</sup> ‘the factor of time’ does amount to the real difference between the ‘oblivion’ and ‘erasure’ according to the above-mentioned review of the conception of the right to be forgotten. Accordingly, a broad definition of the right to be forgotten which can encompass both the ‘oblivion’ and ‘erasure’ aspects seems to be more reasonable, as they both have specific legal basis pursuant to the EU data protection law. This is the essential reason for adopting the broad definition of the right to be forgotten.

## **2.2 The legal basis pursuant to the directive**

### **2.2.1 Article 12(b) incorporates the right to erasure**

The essence of the right to erasure is deleting the data. This seems straightforward regulated under article 12(b) of the directive which states that:

Data subject shall have the right to obtain from the controller, as appropriate the rectification, erasure or blocking of data the processing of which does not comply with the provisions of the directive, in particular because of the incomplete or inaccurate nature of the data.

The application of this article is subject to data processing that is contrary to the terms of the directive. Question here is how to interpret the words ‘in particular’? The ECJ has expressed that ‘in particular’ indicates the non-exhaustive nature.<sup>19</sup> Thus, the application of the right to erasure shall not be limited to situations where data is incomplete or inaccurate. The ECJ

---

<sup>15</sup> The right to erasure specifically applies to data released by data subject herself in the context of ‘big data’. See note 13, Ambrose, Meg Leta, and Jef Ausloos, 14.

<sup>16</sup> Someone argues that the right to be forgotten means that data subject could request the deletion of data based on a whim or preference. It is not necessary to prove that such data or processing of data is harmful or unlawful. See Cofone, “Google v. Spain,” 8. This criterion has been confirmed by the advocate general opinion of the Google Spain case, which expresses that the subjective preferences of data subject alone cannot restrict the dissemination of personal data under the directive. Data subject can terminate the processing of data only when it is harmful or contrary to his interest under the directive. Thus, the directive does not provide for a right to be forgotten. See note 6, the opinion of advocate general Jääskinen on case C-131/12, paragraph 108.

<sup>17</sup> The right to oblivion allows information to be less accessible with time, while the right to erasure does not include such factor. See note 13, Ambrose, Meg Leta, and Jef Ausloos, 15.

<sup>18</sup> A detailed discuss on this point will be exercised in section 2.2.3.

<sup>19</sup> CJEU case C-131/12, paragraph 70.

continues to confirm that the non-compliant nature of data processing with article 6 and 7 of the directive can lead to the application of the right to erasure under article 12(b).<sup>20</sup> In addition, there are no generic exemptions for the right to erasure under article 12(b).

### 2.2.2 Blocking, relevance assessment and the first form of ‘oblivion’

As already explained, the right of oblivion often applied in the context of the criminals to against the press not to publish facts about their past. This thesis will extend the right of oblivion to all situations where the data controller cannot process data about the past of data subjects. The right of oblivion is therefore not limited to the right of offender to prevent controller from processing their past conviction or criminal data. The extent to which article 12(b) incorporates the right of oblivion is qualified. As the factor of time is the prime feature of the ‘oblivion’, the question is how can we read ‘the passage of time’ into article 12(b)? At the first glance, article 12(b) does not specifically refer to it. However, the blocking of irrelevant data arguably connects ‘the factor of time’ to article 12(b). In accordance with the ECJ, data subjects can claim blocking of data if the data processing violates the ‘relevance’ under article 6(1) (c) or (e) of the directive. And the starting point for the data about one’s past to be ‘irrelevant’ is the passage of time. As the ECJ has stated, even initially lawful processing of accurate data may, *in the course of time*, become incompatible with the directive where those data appear to be inadequate or irrelevant.<sup>21</sup> Consequently, we can read the right of oblivion into the right of blocking under article 12(b). It is worth mentioning that the ‘blocking’ differs from ‘erasure’ in the sense that it does not entail the deletion of data. It just entails stopping or preventing the processing of data. From this perspective, the right of oblivion based on the right of blocking is distinct from the right of erasure.

### 2.2.3 A specific form: the ‘erasure’ based on the passage of time

In accordance with article 12(b), data subject can obtain erasure or blocking of data from the controller. As explained already, we can read ‘the passage of time’ into article 12(b) by the relevance assessment. Accordingly, data subjects can obtain the erasure of data in circumstance where data about his past that has been processed by the controller are irrelevant. From this perspective, the feature of deletion of data and the feature of the passage of time coexist within the right of erasure. Thus, ‘the deletion of irrelevant data based on the passage of time’ exists as one specific form between the right of oblivion and the right to erasure.

---

<sup>20</sup> Ibid, paragraph 71.

<sup>21</sup> Ibid, paragraph 93.

Moreover, the coexistence of the two features within one concept does not affect the fact that they were originally the characteristics of two distinct rights. As concluded above, the factor of time does amount to the real difference between the ‘oblivion’ and ‘erasure’.

#### 2.2.4 The role of article 7(f) in changing a right to object to a right to erasure

Article 14(a) stipulates that data subjects can object data processing based on her compelling legitimate grounds. The application of this article is restricted to situations where the data processing is necessary in the public interest, or for the legitimate interests pursued by the controller.<sup>22</sup> Especially, article 14(a) takes more account of data subjects’ particular situation when deciding the lawfulness of data processing based on article 7(e) or (f) than article 12(b). Moreover, article 14(a) places burden of proof on data subjects to establish the ‘compelling legitimate grounds’. Here, the first question is whether the right to object incorporates the right to erasure? This question is highly connected to the difference between the right to object and erasure. First, the right to erasure arises in the context of the non-compliance nature of the data processing with the directive, especially where the data is irrelevant or outdate. This means the data processing is not legitimate. Compared to this, the rationale for the right to object is that legitimate data processing can also cause harm to data subject.<sup>23</sup> A right to erasure focusing on outdate data does not address that concern, and this is alleviated somewhat by the right to object because of a compelling interest.<sup>24</sup> Thus, the right of object arises in the context of the legitimate data processing. And a balancing between the interests of data subject and the data controller is inherent to the right of object. If the consequence of the balancing is data subject’s interests override data controller’s interests in processing based on article 7(e), data controller or regulatory authority may only provide the data subject with the remedy of ceasing the data processing not necessarily the erasure of data. In this sense, it may be not possible to claim the right of erasure under article 14(a) because the data processing is not contrary to the provisions of the directive. Only when data subject’s interests override data controller’s interests in processing based on article 7(f), data subject’s claim for erasure of data can be necessarily supported. This is because the balancing of interests is

---

<sup>22</sup> Article 14(a) of the directive.

<sup>23</sup> See note 11, Koops, 244.

<sup>24</sup> Ibid.

expressly built in the provision of article 7(f).<sup>25</sup> In this case, interests of controller can be overridden by data subject's right is equivalent to that the processing of controller has the nature of non-compliance with conditions laid down in article 7(f). *Thus, the right of object incorporates the right of erasure only when the processing is based on article 7(f) rather than 7(e).*

### 2.2.5 The balancing test and the second form of 'oblivion'

The question is to what extent, the application of the right to object takes specific account of 'the factor of time'? As explained already, the balancing of interests is the essence of the right to object. Arguably, the age of the data or the data processing is an important criterion to make the balance biased towards data subject's interests. However, other criteria also need to be taken into consideration when balancing the conflicting interests. As Werro has illustrated that publishing the name of someone with a criminal record may be allowed after time has elapsed only if the information remains newsworthy.<sup>26</sup> Here, Werro emphasizes that the criterion of 'public interest in accessing the data' may prevail the factor of time. *Thus, the right to object can embody the right of oblivion only if no other criterion prevail 'the passage of time' in the balancing test.* It is worth mentioning that the right of object does not necessarily entail the deletion of data. In this situation, the data controller can only stop processing or limit the accessibility to the data. *Thus, the 'oblivion' can exist as a distinct form from the 'erasure' under the right to object.* This is because 'erasure' necessarily entails deleting data, while the 'oblivion' not. Moreover, this form of 'oblivion' arises in the context of the legitimate processing. While the first form of 'oblivion' arises in the context of the non-compliance nature of the data processing with the directive.

### 2.2.6 The cascade under the directive

One commentator proposes a cascade which leads to the decaying of data.<sup>27</sup> The cascade is a chain of legal obligations; it starts with the least intrusive measure and ends with the most intrusive measure.<sup>28</sup> According to it, the more intrusive measure can apply only if the less intrusive measures fail. In the cascade, the least intrusive measure is the right to

---

<sup>25</sup> Article 7(f) states that processing is necessary for the purposes of the legitimate interests of the controller, except where such interests are overridden by the interests for fundamental rights and freedoms of the data subject.

<sup>26</sup> See note 3, Werro, 291.

<sup>27</sup> Josef Gstrein, "The cascade of decaying information," 43-45.

<sup>28</sup> Ibid.

rectification.<sup>29</sup> The question is whether there is the cascade under the directive? And whether the application of the right of erasure or oblivion is subject to the failure of the right to rectification in protecting the data subject? In accordance with article 12(b), data subject shall obtain from the controller, *as appropriate* the rectification, erasure or blocking of data. The words ‘as appropriate’ actually afford the court or data protection authority a *margin of appreciation* regarding the application of remedy. It is evident from this provision that the court has discretion to apply the remedy of rectification instead of the erasure in accordance with the specific circumstances of the case even the data is inaccurate. Data subjects can directly claim the right to erasure in circumstances where data is not accurate. Nevertheless, the court may reject his claim as the less intrusive remedy of rectification would be justified. From this perspective, there exists the cascade under the directive.

## **2.3 How the analogous provisions under the GDPR differ from the directive**

### **2.3.1 The framing of the right to be forgotten has diminished**

As explained above, the right to object does not necessarily entail the deletion of data under the directive. Data subjects are entitled to obtain the erasure of data only if the data processing being objected is based on article 7(f). This has been completely changed under the GDPR. Article 17(1) (c) of the GDPR is significant on this point. The essence of Article 17(1) (c) is that data subjects’ claim to erasure of data shall be necessarily supported where data subjects successfully object under article 21(1) of the GDPR, irrespective of whether the legal basis for the processing is article 6(1)(f) or not.<sup>30</sup> The GDPR establishes a stronger link between the right to object and erasure of data. This change repeals the difference among the right to object, the right of blocking and the right to erasure. Originally, the data processing that can be objected is legitimate, and the processing that involves in the enforcement of the right of erasure has the nature of non-compliance with the directive. Now under the GDPR, data subjects can obtain the erasure of data even if the processing is legitimate and based on article 6(1)(e)<sup>31</sup> which may be contrary to the principle of proportionality. Moreover, as discussed above, the first and second form of the right of oblivion do not necessarily entail the deletion of data. *However, the GDPR seems to tie the right to be forgotten and the right to object to*

---

<sup>29</sup> Ibid.

<sup>30</sup> The comparable provision to article 7(f) of the directive under the GDPR is article 6(1) (f).

<sup>31</sup> The comparable provision to article 7(e) of the directive under the GDPR is article 6(1) (e).

*the notion of 'erasure'.*<sup>32</sup> Consequently, the first and second forms of 'oblivion' have been deprived of the legal basis as a right to be forgotten. The definition of the right to be forgotten has diminished.

### 2.3.2 Creating a wrong impression about the accuracy assessment

The right of rectification and the right to erasure have been incorporated into one provision under the directive, namely article 12(b). And there is cascade under the directive in applying the two rights in situations where the data is incomplete or inaccurate. The GDPR has created separate provisions in coping with the right of rectification and the right to erasure.<sup>33</sup> The question is whether data subjects can obtain the erasure of data in accordance with article 17 when the data has inaccurate or incomplete nature? Lindsay holds that rather than treating the possibility of erasure within the same provision, the right to be forgotten under article 17 and the rectification right under article 16 are subject to different limitation.<sup>34</sup> The answer to the question will be negative if we are in line with Lindsay's view. In that case, the assessment of whether the data is inaccurate or incomplete is irrelevant to the right to be forgotten. And data subjects have been deprived of one classic ground to claim the deletion of data. This may create plight for the protection of data privacy. However, article 17(1) (d) stipulated that the data subject can claim the erasure of data if the data have been unlawfully processed. If the data processing is contrary to the accuracy principles regulated under article 5(d) of the GDPR, the data can be regarded as unlawfully processed. Thus, data subject can still claim deletion of data in circumstances where the data is inaccurate or incomplete. However, the GDPR does give a wrong impression that the accuracy assessment is only relevant to the right to rectification.

### 2.3.3 Greater obligation on original publishers and non-general obligation on other controllers

The removal of data from one digital source has limited effect if the information remains readily accessible from others.<sup>35</sup> The directive and the GDPR cope with this challenge by imposing obligation on controller to communicate with third parties. This obligation does not apply automatically under the directive. Article 12(c) of the directive just grants data subjects a right to request controllers to inform third parties of any rectification or erasure. The GDPR

---

<sup>32</sup> See article 17(1) of the GDPR.

<sup>33</sup> The former is regulated under article 16, the latter is stipulated under article 17 of the GDPR.

<sup>34</sup> Lindsay, "The right to be forgotten," 314.

<sup>35</sup> Ibid, 316.

goes beyond this in that it applies automatically where data subjects successfully claim the right to erasure.<sup>36</sup>

First, the controller who relay the erasure request to others is the one who himself makes the data public in accordance with article 17(2) of the GDPR. In other words, the data that has been processed by other controllers is obtained exactly from him. It seems article 17(2) imposes notification obligation on the original publisher of the data. This differs from the directive which does not specifically attribute responsibility to the original publisher regarding the third party processing.

Second, who are other controllers? Compared to the directive, article 17(2) of the GDPR specifically refers to the concept of ‘any links to, or copy or replication of, those data’. In addition, the GDPR stipulates that it does not apply to the processing of personal data by a natural person in the course of a purely personal or household activity.<sup>37</sup> The two conditions lead one to suppose that other controllers are corporations which are active in search engine or marketing services.

Third, as Mantelero holds, article 17(2) of the GDPR does not impose a general obligation on third parties, but requires only third parties that been informed to delete any links, copy or replication.<sup>38</sup> In contrast with this, the search engine company has been imposed general obligation to delete links to the original web pages under the Google Spain judgment pursuant to the directive.<sup>39</sup> Fourth, the GDPR further establish the criterion of ‘reasonableness’ to restricts the notification obligation of the original publisher.<sup>40</sup> Many academics see a serious problem of applying the ‘reasonableness’ criterion.<sup>41</sup> This arguably left the courts a large margin of appreciation in various contexts to establish what the ‘reasonable steps’ actually are.

---

<sup>36</sup> Ibid.

<sup>37</sup> Article 2(2) (c) of the GDPR.

<sup>38</sup> See note 1, Mantelero, 234.

<sup>39</sup> A detailed analysis on this point will be exercised in chapter 3.

<sup>40</sup> In this regard, article 17(2) states that controller, taking account of available technology and the cost of implementation, shall take reasonable steps to inform other controllers.

<sup>41</sup> For example, Di Ciommo thinks it is difficult to obtain correct contact details for informing other controllers. See note 1, Di Ciommo, 630. Others see the vagueness of a obligation to ‘all reasonable steps’ is worrisome, because of the regulation’s sterner penalties. See note 13, Ambrose and Ausloos, 12.



### 2.3.4 A broader freedom of expression exemption

Article 17(3) sets five circumstances where the exercise of the right to erasure is limited. The right to erasure may not always step back when the conflicting interests under the five circumstances are involved. From this perspective, the essence of article 17(3) is still the balancing between the right to be forgotten and other fundamental interests. Apart from article 85 of the GDPR, the right of freedom of expression is directly taken into account by article 17(3) (a), which is different from the directive. It is worth pointing out that the freedom of expression is not restricted to processing that has been carried out solely for journalistic purposes under the GDPR.<sup>42</sup> Thus, the exception of freedom of expression under the GDPR appears substantially broader than its equivalent of the ‘media exception’ under the directive.<sup>43</sup> Accordingly, the question whether the search engine operator has the right to rely on the journalism exemption under the directive has changed into whether it can benefit from the ‘freedom of expression and information exemption’ pursuant to the GDPR. However, the answer may not change correspondingly from no to yes even the GDPR has embraced a broader perspective.<sup>44</sup>

## 2.4 The real innovative and revolutionary change under article 17 of the GDPR

As mentioned above, article 17 of the GDPR has been labeled as legal innovation.<sup>45</sup> Meanwhile, it also has been regarded as a modest expansion of existing data privacy rights.<sup>46</sup> I do not agree with the two views. Article 17(1) sets some novel circumstances where the data subjects can claim the erasure of data. For example, article 17(1) (b) establishes the ground of consent withdrawal. However, the central grounds incorporated under article 17(a) and (d) still pertain to data quality principles already regulated under the directive. From this perspective, article 17 does not represent a novel change to the rules of the directive. Nevertheless, article 17 does establish some innovative rules in relation to digital methods of disseminating data, such as the greater obligation on original publishers to relay the claim of erasure and the non-general obligation on search engine operator to erasure links. These rules represent the real innovation of the GDPR. More importantly, the right of oblivion has been

---

<sup>42</sup> In this respect, article 85(1) of the GDPR states that the right to freedom of expression *including* processing for journalistic purposes.

<sup>43</sup> Frosio, “The right to be forgotten,” 318.

<sup>44</sup> A more detail discussion on this point is exercised in chapter 5.

<sup>45</sup> See note 6, the opinion of advocate general Jääskinen on case C-131/12, paragraph 110.

<sup>46</sup> See note 7, Rosen, 88.

deprived of the legal basis as a right to be forgotten under the GDPR as discussed above. This aspect seems to represent a revolutionary change to the directive.

### **3 The Google Spain judgment**

Having examined the legal basis of the right to be forgotten, the aim of this chapter is to discuss how the ECJ's judgment in Google Spain applies the right of oblivion which has basis under the directive. This judgment has arisen in the context of the search engine technology prevalent in today's society. Accordingly, the analysis of ECJ's criteria and approach which enables the application of the traditional 'oblivion' to the modern digital technology is the focus of this chapter.

#### **3.1 The main facts of the decision**

This decision mainly concerned a proceeding between, on the one hand, Google Spain and Google Inc. and, on the other Mr. Costeja about the removing of links to third parties' web pages from the list of results displayed by Google Inc. Following a search made on the basis of Mr. Costeja's name. On 1998, the newspaper of La Vanguardia published an announcement with Mr. Costeja's name connected with attachment proceedings for the recovery of social security debts.<sup>47</sup> On 2010, Mr. Costeja lodged with the Spanish data protection agency (AEPD) to request Google Spain or Google Inc. to exclude his personal data from the search results to La Vanguardia on the basis that reference to his financial dispute on La Vanguardia was no longer relevant after a number of years.<sup>48</sup> The complaint was upheld by AEPD and Google Spain and Google Inc. brought an action against AEPD's decision before the national high court which forwarded this case to the CJEU.<sup>49</sup>

#### **3.2 The criteria and approach employed**

The questions forwarded to the CJEU can be classified into three groups. Firstly, whether the search engine provider, like Google can be classified as data controller?<sup>50</sup> The second one is regarding the territorial scope of EU data protection legislation.<sup>51</sup> The third one is concerning how to interpret the rights under article 12(b) and article 14(a) of the directive to define the scope of search engine operator's responsibility and data subject's right to be forgotten.<sup>52</sup> For the purpose of this work, a thorough analysis of the third-group question is performed below.

---

<sup>47</sup> CJEU case C-131/12, paragraph 14.

<sup>48</sup> Ibid, paragraph 15.

<sup>49</sup> Ibid, paragraph 17-19.

<sup>50</sup> Ibid, paragraph 20.

<sup>51</sup> Ibid.

<sup>52</sup> Ibid.

### 3.2.1 The starting point: the serious interference with privacy right

The ECJ in this decision forms the view that the search engine operator can be regarded as data controller.<sup>53</sup> This formulation is largely dependent on the fact that search engine facilitates the ubiquitous access to structured overview of the data relating to an individual.<sup>54</sup> The ECJ thus holds that the processing of search engine can affect significantly the fundamental rights to privacy.<sup>55</sup> This is the starting point for ECJ to analyze the responsibility of Google and the scope of data subject's rights under the directive.

### 3.2.2 Search engine operators cannot rely on the media exemption

This decision establishes a dichotomy between Google and the original publisher. A question raised in this decision is whether the search engine operator is obliged to remove links to third party websites even in a case where personal data is not erased beforehand or simultaneously from those web pages.<sup>56</sup> The ECJ has confirmed that the activity of search engine can be distinguished from that carried out by publishers of websites due to the decisive role played by search engine in the overall dissemination of personal data and the potential seriousness of its interference to privacy.<sup>57</sup> One factor that contributes to the dichotomy is that publishers of web pages may benefit from the media exemption by virtue of article 9 of the directive, while search engine operators cannot rely on the media exemption.<sup>58</sup> The data processing that can benefit from the media exemption under article 9 is the one carried out solely for journalistic purpose. Although the processing of Google facilitates the dissemination of information, the ECJ seems to support a narrow version of 'journalistic purpose' and attempt to restrict it to processing 'with a view to' publication for media purpose.

### 3.2.3 Two sets of criteria for 'relevance'

The general logic of this decision is applying article 12(b) and article 14(a) of the directive to examine Google's obligation to remove links from the list of search results. One question mooted concerning article 12(b) is how to interpret the phrase 'in particular because of the

---

<sup>53</sup> Ibid, paragraph 41.

<sup>54</sup> Ibid, paragraph 37.

<sup>55</sup> Ibid, paragraph 38.

<sup>56</sup> Ibid.

<sup>57</sup> In this regard, the ECJ observed that the search engine enables internet user to obtain through the list of results a structured overview of the information relating to that individual that can be found on the internet and establish detailed profile of data subject. Without the search engine there may be great difficulty for internet users to find the information. Paragraph 36, 80-81 of the CJEU case C-131/12.

<sup>58</sup> Ibid, paragraph 85.

incomplete or inaccurate nature of the data'. The ECJ has affirmed that the right of access under article 12(b) is not restricted to cases where the processing of personal data is not in line with article 6(1) (d) of the directive.<sup>59</sup> And the right of access under Article 12(b) can arise if Google's processing of personal data is incompatible with other conditions of lawfulness than article 6(1) (d).

Thus, whether the data is relevant is another possibility to rely on the rights referred to in Article 12(b). Question here may be relevant to what? And what are the criteria to assess the relevance of personal data? In this respect, the ECJ identifies that even initially lawful processing of accurate data may, in the course of time, become incompatible with the directive, in particular where they appear to be inadequate, irrelevant or no longer relevant, or excessive in relation to those purposes for which they were collected or processed and in the light of the time that has elapsed.<sup>60</sup> Further, the ECJ stresses that the purposes of the processing of the search engine operator is the consideration for determining whether the data is relevant or not.<sup>61</sup> *Therefore, it seems from the ECJ that the 'relevance assessment' is to assess whether the information included in the search results is relevant to the processing purpose of search engine.*

However, the ECJ also underlines the importance of factor of time in this aspect as mentioned in paragraph 93 of the judgment. The fact that the initial publication of the financial problem regarding Mr. Costeja on the newspaper had taken place 16 years earlier is one of the decisive factors for the ECJ to rule in Mr. Costeja's favor.<sup>62</sup> Specially, the ECJ emphasized that 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.<sup>63</sup> *Thus, the ECJ attempts to establish that the 'relevance assessment' is to assess whether the data included in the search results is relevant to public's interest in having access to third party's publication.* From this perspective, this ruling has established two sets of criteria for the 'relevance assessment'.

---

<sup>59</sup> The ECJ states that the non-compliance with article 6(1) (d) is just stated by way of example and is not exhaustive. Ibid, paragraph 70.

<sup>60</sup> Ibid, paragraph 93.

<sup>61</sup> Ibid, paragraph 94.

<sup>62</sup> Ibid, paragraph 98.

<sup>63</sup> Ibid.

### 3.2.4 The fundamental approach: balancing test

The ECJ considers two alternatives for the data subject to request the remove of links from the list of search results. Data subject can rely on article 12(b) to do the request where the processing of search engine operator is not compliant with article 6 or 7 of the data protection directive.<sup>64</sup> And the court recognizes article 7(f) of the directive as the legal basis for the processing carried out by the search engine operator.<sup>65</sup> The function of article 7(f) is that processing of personal data is lawful if it is necessary for the legitimate purpose or interest of the controller, except where such interests are overridden by the interests for fundamental rights and freedoms of data subject. As such, the question whether the processing of search engine operator has the nature of non-compliance with article 7(f) is equivalent to whether the economic interests of Google can be overridden by data subject's right to prevent online link being displayed in the list of search results. Obviously, what underlies this question is the balancing test between the economic interests of Google and data protection interests.

In addition, the depending on article 7(f) as legal ground for Google's processing brings article 14(a) into the court's consideration. Article 14(a) intrinsically embraces the balancing test in that it allows data subject to object on compelling legitimate grounds to the processing relating to him. It is clear that the two alternatives for the data subject to request delisting have fundamentally converged in the balancing test.

Questions here may be what are the interests that need to be balanced? And what are the salient factors to strike the balance? In this aspect, ECJ rules that the fundamental rights to privacy under the Charter override, as a rule, not only the economic interest of the operator of the search engine but also the interest of the general public in finding that information upon a search relating to the data subject's name.<sup>66</sup> Correspondingly, the court found that Mr. Costeja's privacy right overrides the economic interests of Google and public's interests in conducting search on Mr. Costeja's name in this case. The decisive factors in striking the balance are that the sensitivity of the information and a great deal of time has elapsed.<sup>67</sup> Nonetheless, the court does identify that the balance would be struck otherwise in some

---

<sup>64</sup> Ibid, paragraph 70-71.

<sup>65</sup> Ibid, paragraph 73.

<sup>66</sup> Ibid, paragraph 97.

<sup>67</sup> Ibid, paragraph 98.

circumstances, such as the significant role played by the data subject in public life, the preponderant interest of the general public in having the information.<sup>68</sup>

### **3.3 The right of oblivion established by this decision**

Academics have expressed conflicting views about whether this judgment has established the right to be forgotten.<sup>69</sup> This decision has established that the data subject can claim the right to request the remove of links from the list of search results on the ground that he wishes the information to be ‘forgotten’ after a certain time as long as there is no preponderant public interest in having access to that information through the search engine. The right established by the ECJ has the following features: first, this right is not about personal data being deleted or erased from the internet. As article 29 working party has explained, the right only affects the results obtained from searches made on the basis of a person’s name, the original information will still be accessible using other search terms, or by direct access to the publisher’s original source.<sup>70</sup> Second, this judgment is actually based on the right of blocking under article 12(b) and the right to object under article 14(a) to establish the above-mentioned right. The ECJ observes that the right can be established according to article 12(b) due to a non-compliance nature of the processing with article 7(f) in this case.<sup>71</sup> Since the essence of the right is limiting accessibility to the data, it would be more appropriate to rely on the right of blocking than the right of erasure under article 12(b) to establish the right. Third, the essential factors that lead to the establishment of this right are that a great deal of time has elapsed and there is no preponderant public interest in accessing the data.<sup>72</sup> It is followed that there are no other criterions prevail ‘the passage of time’ in the balancing test. The reasoning of the ECJ to establish the right thereby emphasizes the notion of time which is at the centre of the ‘oblivion’.

---

<sup>68</sup> Ibid.

<sup>69</sup> Some commentators hold that this ruling has acknowledged the right to be forgotten. For example, one article writes that the Google Spain case has recognized the so-called “right to be forgotten”. Voss, “After Google Spain and charlie hebdo,” 281. Another argument is that the ruling just addresses one aspect of the right to be forgotten and does not amount to a comprehensive recognition of the right. Iglezakis, “The right to be forgotten in the Google Spain case:” 10-12. While many scholars express that the judgment does not establish a right to be forgotten but a right to delisting. For example, Bygrave holds this type of view. Bygrave, “A right to be forgotten?” 35.

<sup>70</sup> Article 29 data protection working party Guidelines on the implementation on ECJ case C-131/12, 3.

<sup>71</sup> CJEU case C-131/12, paragraph 95.

<sup>72</sup> Ibid, paragraph 98.

### 3.4 Assessment of the criticisms of this judgment

The criticisms to this decision were overwhelmingly, some commentators even refer it as a notorious judgment.<sup>73</sup> For the purpose of this work, the following sets of oppositions will be assessed.

#### 3.4.1 Paradox regarding the relevance assessment

One of the attacks on this decision is related to the ECJ's relevance assessment. Some scholars highlight the Court's failure to discuss what made the search engine results about Mr. Costeja no longer relevant in this case.<sup>74</sup> Similarly, some scholars argue that it should not be the ECJ to centrally decide whether the information indexed by Google is relevant or not, and this question should be decided by internet users who looking for the data or the person who publish the data.<sup>75</sup> I agree with these criticisms that the relevance assessment of the ECJ is a clear shortcoming of this decision. However, the fact that the ECJ establishes two sets of criteria for the 'relevance' is the root of this problem. As analyzed above, the ECJ consider the criteria for the relevance assessment in the light of the purposes of the processing of the search engine operator. As many academics has argued, the links in the search results would never be irrelevant in relation to the purposes of the processing of the search engine operator as the purpose of search engine is map the internet and provide access to information.<sup>76</sup> It seems the ECJ's criterion for determining whether the data is relevant or not represents a paradox. Moreover, the ECJ's final ruling is not based on Google's non-compliance with the data quality criteria (data relevance) under article 6 of the directive.<sup>77</sup> Rather, it is on the basis of the other relevance criterion. In this aspect, the ECJ establishes that the data included on third party's publication is too old and outdated to be relevant to public's interest in having access to it.<sup>78</sup> Unlike the criticisms presented above, the ECJ does discuss what made the search engine results no longer relevant in this case, it is the fact that too much time had elapsed. For this reason, the establishing of the relevance criteria in relation to the purpose of

---

<sup>73</sup> Lytras, "Right to be forgotten: Europe's Cutting Edge Weapon," 2.

<sup>74</sup> Berzins, "The right to be forgotten after Google Spain," 283.

<sup>75</sup> See note 16, Cofone, 9.

<sup>76</sup> Bunn, "The curious case," 343. See also Gryffroy, "Delisting as a part of the decay of information," 154.

<sup>77</sup> The ECJ only expresses that *if* it is found that the inclusion in the list of results of links is incompatible with article 6 of the directive because that information appears to be inadequate, irrelevant or excessive in relation to the purposes of the processing of Google, the information and links must be erased (emphasis added). CJEU case C-131/12, paragraph 94.

<sup>78</sup> The ECJ stresses that the initial publication of the announcements had taken 16 years earlier. Ibid, paragraph 98.



the controller is misleading and confusing in demonstrating the real criterion for evaluating the relevance, i.e. the public interest.

### 3.4.2 Critical reaction to the balancing test

Many scholars criticize this decision for its balancing test. One argument is that this decision has the effect to boost the data protection right over the right to freedom of expression and general public's right to access information.<sup>79</sup> I just agree with this argument partially. Admittedly, ECJ's rhetoric renders an impression that it promotes the privacy right over other related fundamental rights.<sup>80</sup> However, as analyzed above, this judgment does not lead to the erasure of any content on the internet. Arguably, the impairment to the public's interest is limited. Moreover, the ECJ does emphasize that the right of general public should override the data protection right in some circumstances, such as the preponderant interest of the public to access information.<sup>81</sup> Even though these circumstances arise in the form of 'exception', the word 'preponderant interest of the public' is sufficiently vague to reverse the weights of rights and interests being balanced. Thus, the argument that the ECJ does not pay equal attention to the right of expression fails to consider the essence and vagueness of this decision.

Some critics propose that the ECJ does not offer any explanation as to why the interest of search engine operator is merely economic when doing the balancing test.<sup>82</sup> This argument is based on the opinion of the Advocate-General for this decision. Specifically, he expresses that an internet search engine provider lawfully exercises both his freedom to conduct business and freedom of expression when he makes available internet information location tools relying on a search engine.<sup>83</sup> It is not disputed that Google's interest goes beyond the economic ones and facilitates the dissemination of information. However, as Lindsay has observed, the ECJ approaching the issue from the perspective of the data subject, focused on the consequences of ease of access to personal data for the right to privacy.<sup>84</sup> In this regard,

---

<sup>79</sup> For example, Kulk and Borgesius argue that the ECJ's 'rule' that privacy and data protection rights override the right to receive information of searchers implies an unfortunate departure from the case law on balancing by the ECtHR, which says that freedom of expression and privacy have equal weight. Kulk, Borgesius, "Google Spain v. Gonzales: did the court forget," 7-8.

<sup>80</sup> The ECJ expressed that the data protection right override, *as a rule*, not only the economic interest of the operator of the search engine but also the interest of the general public (emphasis added). CJEU case C-131/12, paragraph 97.

<sup>81</sup> Ibid.

<sup>82</sup> See note 14, Bunn, 344.

<sup>83</sup> See note 6, paragraph 132.

<sup>84</sup> Lindsay, "The 'right to be forgotten' by search engines," 173.

the ECJ establishes the significant interference of dissemination of information by search engine with the data subject's fundamental right to privacy.<sup>85</sup> And this is the reason why the ECJ rules that the search engine operator's economic interests alone cannot justify the interference with data subject's fundamental right under article 7 and 8 of the Charter.<sup>86</sup>

### 3.4.3 Criticisms arise from the general obligation imposed

Some commentators propose that turning the decision into practice has revealed unanswered questions and some outright flaws in the Court's decision.<sup>87</sup> For example, there will be puzzle on transparency, namely, how can Google report that a search on someone's name is missing in a way that is not self-defeating.<sup>88</sup> Other scholar presents that the decision resulted in a transfer of public functions to private entities that would not be in a position to properly fulfill these responsibilities.<sup>89</sup> Although it will beyond the purpose of this thesis to assess these criticisms, the appearance of the criticisms can be attributed to the fact that the Google Spain decision has imposed a general obligation on the search engine operator to delist. The ECJ's emphasis that this obligation would not be conditioned by the erasure of data from the original website represents the 'general' character of this responsibility. However, the GDPR may depart from the 'general' nature and conceive the delisting obligation differently.<sup>90</sup>

---

<sup>85</sup> CJEU case C-131/12, paragraph 87.

<sup>86</sup> Ibid, paragraph 81.

<sup>87</sup> The future of the internet, "Righting the right to be forgotten."

<sup>88</sup> Ibid.

<sup>89</sup> See note 74, Berzins, 276.

<sup>90</sup> A full analysis on this point will be exercised in chapter 5.

## **4 The balancing approach for the right to be forgotten at the national level**

As explained above, the ECJ considers article 12(b) and 14(a) as two alternative legal bases for the right to be forgotten. And the two alternatives have converged in the balancing test which is therefore the essential approach under the Google Spain judgment. Thus, the parameters for the balancing test established by the national courts are the focus of this chapter. Further, this chapter will analyze the rationality for the balancing approach at a higher level.

### **4.1 Backgrounds of the national cases involved**

Three national cases are relevant in this section. The first is the British NT1 and NT2 case.<sup>91</sup> In the late 1990s, NT1 was convicted of a false accounting conspiracy (the first conspiracy) and sentenced to a term of imprisonment.<sup>92</sup> He was indicted in respect of another dishonest conspiracy (the second conspiracy), but he was not convicted of the second conspiracy.<sup>93</sup> Consequently, these matters became the subjects of media reports and a book extract.<sup>94</sup> Links to these online publications were made available by Google search.<sup>95</sup> After his conviction became spent under the 1974 Act, NT1 asked Google to remove these links.<sup>96</sup> After Google's rejection for removing most of the links, NT1 brought the suit before the court.<sup>97</sup>

The second case is the Dutch Erdee media case. This case was not directly against Google. The Erdee media published three articles about a business conflict between the claimant and his client in 2005.<sup>98</sup> Among the three articles, the client especially accused the claimant of dishonest practices in the first article (article one).<sup>99</sup> In 2006, the Erdee published the fourth article (article four) about solution of the conflict.<sup>100</sup> Article four mainly stated that

---

<sup>91</sup> NT1 and NT2 v. Google LLC [2018] EWHC 799 (QB). The NT2 case is quite separate from the NT1 case, and this paper will only analyze the NT1 case.

<sup>92</sup> Ibid, paragraph 5.

<sup>93</sup> Ibid, paragraph 70.

<sup>94</sup> Ibid, paragraph 5, 6.

<sup>95</sup> Ibid.

<sup>96</sup> Ibid.

<sup>97</sup> Ibid, paragraph 6.

<sup>98</sup> The claimant v. Erdee media bv [2015] HA ZA 14-413, paragraph 2.1-2.7. There is no official English version of this judgment. The English version referred to in this paper is translated by the online browser.

<sup>99</sup> Ibid, paragraph 2.4.

<sup>100</sup> Ibid, paragraph 2.8.

accusations against the claimant had been withdrawn which brought an end to the conflict.<sup>101</sup> The online archive of Erdee's newspaper can be found on refdag and digbron websites.<sup>102</sup> The link to article four can only be found on the website of refdag, but not on the website of digbron.<sup>103</sup> Later, the claimant requested the court to rule that the first three articles were published unlawfully.<sup>104</sup> In addition, the claimant asked the court to oblige Erdee to protect the first three articles from being indexed by search engines.<sup>105</sup>

The third is the Dutch Federation of survivors of violence victims case (the Federation case). The plaintiff in the Dutch case was convicted for murdering his wife in 2007.<sup>106</sup> The imprisonment was followed by a forced hospital order for mental treatment.<sup>107</sup> After the termination of the compulsory treatment, the plaintiff requested Google to delete links which refer to his conviction online when the search is made on the basis of his name.<sup>108</sup> Google had complied with his request.<sup>109</sup> In order to circumvent plaintiff's delisting, the Federation published the delisting request of the plaintiff and other information about the conviction of the plaintiff on its website.<sup>110</sup> Consequently, linking to these publications appeared in the list of search results again when searching for the name of the plaintiff.<sup>111</sup> The plaintiff therefore sued the Federation for its refusal of erasure these publication before the court.<sup>112</sup>

#### **4.2 The rationality for balancing test: the proportionality principle**

One of the aims of this chapter is to illustrate that the balancing test on the right to be forgotten at the national level has been largely subjected to parameters of the proportionality principle. This observation is not unexpected and reflects the fact that the application of the proportionality principle has contributed significantly under the EU law to achieve the balance between data protection right and other fundamental rights. The ECJ has ruled on the

---

<sup>101</sup> Ibid.

<sup>102</sup> Ibid, paragraph 2.3.

<sup>103</sup> Ibid, paragraph 2.10.

<sup>104</sup> Ibid, paragraph 3.1.

<sup>105</sup> Ibid.

<sup>106</sup> The plaintiff v. the Federation C18/155241/KG ZA 15-73, paragraph 2.3. There is no official English version of this judgment. The English version referred to in this paper is translated by the online browser.

<sup>107</sup> Ibid.

<sup>108</sup> Ibid, paragraph 2.6.

<sup>109</sup> Ibid.

<sup>110</sup> Ibid, paragraph 2.7-2.9.

<sup>111</sup> Ibid.

<sup>112</sup> Ibid, paragraph 2.9.

application of the proportionality principle in relation to the balancing test in many case laws. For example, the ECJ held under the Lindqvist case that the national courts shall in accordance with the principle of proportionality to take account of all the circumstances of the case before it to ensure a fair balance between the right of freedom of expression and the right of data protection.<sup>113</sup> Under the Lindqvist case, the ECJ emphasizes the flexibility nature of the rules of the directive.<sup>114</sup> The ECJ thus stresses that the fair balance between conflicting rights in the light of the proportionality principle must be established at the stage of the application at national level of the legislation implementing the Directive in individual cases.<sup>115</sup> The Satamedia case is another decision of the ECJ on the relationship between the proportionality principle and the balancing test. The ECJ provides that the derogations and limitations in relation to the data protection under the directive must apply only in so far as is strictly necessary in order to achieve a balance between the conflicting rights.<sup>116</sup> Here, the ECJ highlights the crucial influence of the necessity test on the balancing approach.

The questions begged may be what the proportionality principle is and why it is important. Regarding the proportionality principle, the ECJ has stipulated that:

By virtue of the proportionality principle, the lawfulness of an activity is subject to the condition that the measures are *appropriate* and *necessary* in order to achieve the *objectives* legitimately pursued by the legislation in question; when there is a choice between several appropriate measures recourse must be had to the least onerous, and the disadvantages caused must *not be disproportionate* to the aims pursued.<sup>117</sup>

Thus, the proportionality principle under EU law has three components which involve the evaluation of the suitability, necessity and proportionality of a measure *stricto sensu* for its objective.<sup>118</sup> In addition, the necessity requirement enshrined in article 8(2) of European convention on human rights (the ECHR) has been regarded as legal basis by the European court of human rights (the ECtHR) for determining whether the interference with the data

---

<sup>113</sup> CJEU Case C-101/01, paragraph 89, 90.

<sup>114</sup> Ibid, paragraph 83.

<sup>115</sup> Ibid, paragraph 85.

<sup>116</sup> CJEU Case C-73/07, paragraph 56.

<sup>117</sup> CJEU Case C-331/88, paragraph 13.

<sup>118</sup> Tranberg, "Proportionality and data protection," 239.

protection and privacy right can be justified.<sup>119</sup> In other words, the proportionality principle has significant role in deciding the lawfulness of the interference of other rights with the data protection and privacy rights. From these perspectives, the essence for determining the weights of the data protection right and other interests or rights on the balance lies primarily in the proportionality principle.

### **4.3 The parameters of the ‘proportionality’ established by national courts for balancing on the right to be forgotten**

#### **4.3.1 The role of margin of appreciation**

Under the British NT1 case, one of NT1’s grounds to claim the removing is that the information in the third-party publication is inaccurate in breach of the fourth data protection principle.<sup>120</sup> The court thus was asked to assess whether the words or phrases from the underlying publications are accurate to the criminal facts of claimants. Specifically, NT1 complained that the headlines of these publications suggested that he had been convicted of the second conspiracy.<sup>121</sup> The court essentially uses a balancing approach to determine the accuracy of data. The court first underlined that the data protection law gives significant weight to literal accuracy with its wider range of remedies (block, erase or rectify).<sup>122</sup> The court continued to express that the data protection law is so flexible that even where data are found to be inaccurate the court has a toolbox of discretionary remedies that can be applied according to the circumstances of the individual case.<sup>123</sup> Regarding NT1’s case, the court actually admitted the inaccuracy of the headlines literally. However, the court affirmed that these articles gave a clear enough account of what NT1 was convicted of when read as a whole.<sup>124</sup> More importantly, the court considered that blocking or erasure would be excessive, having regard to the immaterial nature of the inaccuracy and the effect of blocking on the

---

<sup>119</sup> Article 8(2) of the ECHR states that there shall be no interference with the privacy right except such as is in accordance with the law and is *necessary in a democratic society* in the interests of ... the protection of the rights and freedoms of others. And for example, the ECtHR has held that the lawfulness of the interference is closely related to the question whether the “necessity” test has been complied with. See the ECtHR Case of Szabó and Vissy v. Hungary, paragraph 58.

<sup>120</sup> See note 91, paragraph 54.

<sup>121</sup> Ibid, paragraph 93.

<sup>122</sup> Ibid, paragraph 87.

<sup>123</sup> Ibid, paragraph 86.

<sup>124</sup> Ibid, paragraph 93(1).

public and Google.<sup>125</sup> The court therefore held that the lesser remedy than blocking might be a more appropriate course and rejected NT1's claim for blocking of the inaccuracy data.<sup>126</sup>

It is clear from the court's reasoning that the excessive or disproportionate nature of the remedy of 'block' in the given case does not tilt the balance in the favor of the right to be forgotten. The court thus placed more weight on the right of freedom of expression of the public and Google in the light of the proportionality principle. In addition, the flexibility nature of the data protection law does give the national court a large extent of margin of appreciation in determining the remedy for inaccuracy data according to situations of individual cases. From this perspective, the presupposition for the proportionality or balancing test lies largely in the margin of appreciation of the national court.

#### 4.3.2 The level of intrusion

The dimension that the past data been 'kept up to date' in order to make it accurate has more application in the Dutch Erdee media case. In this case, the court did not support claimant's claim that the contents of the first three articles are unlawful or contained inaccuracies.<sup>127</sup> However, the court determined that the publication of article one on the online archive website of digibron was unlawful or inaccurate, as long as no reference to article four was included.<sup>128</sup> The court thus obliged Erdee to add a link to article four on its digibron website to avoid the false impression of the data subject from a reader.<sup>129</sup>

The court arrived at the judgment on the basis of the balancing between Erdee's interests regarding its archiving function in respect of article one under article 10 of ECHR and data subject's privacy interests under article 8 of ECHR.<sup>130</sup> Specially, the court found that there would be unnecessary violation of the data protection right without such a reference to article four.<sup>131</sup> More importantly, the court took the view that the inclusion of such a link is only a minor restriction to the Erdee's archiving function which was only slightly affected.<sup>132</sup> For this reason, the court granted a lesser remedy than erasure even though the claimant had not

---

<sup>125</sup> Ibid, paragraph 86, 93(1).

<sup>126</sup> Ibid, paragraph 86.

<sup>127</sup> See note 98, paragraph 4.1, 4.2.

<sup>128</sup> Ibid, paragraph 4.6.

<sup>129</sup> Ibid, paragraph 5.1.

<sup>130</sup> Ibid, paragraph 4.6.

<sup>131</sup> Ibid.

<sup>132</sup> Ibid.

requested such a remedy of adding a link to article four in this case. Thus, the core issue of the balancing test in this case is the remedy's level of intrusion of Erdee's fundamental right in archiving function. It is clear that this parameter is consistent with the essence of the proportionality principle.

#### 4.3.3 The legitimate purpose pursued

Under the Dutch Federation case, the court also adopted the balancing approach to weight the right to be forgotten of the plaintiff with the right of freedom of expression of the Federation. One essential question that the court asked is whether the publication of the conviction information about the plaintiff by the Federation on its website was proportionate to its legitimate purpose pursued. The court found that the Federation's use of the right of freedom of expression in this case is not excessive.<sup>133</sup> Specifically, the freedom of expression had been used for the following motivations: first, to inform the public of the plaintiff's gruesome crime and personality.<sup>134</sup> Second, the publications aimed to making the society been aware of that the plaintiff's mental illness had not been cured and he could still threaten.<sup>135</sup> The court thus concluded that the interests of the Federation in the freedom of expression carried more weight than the plaintiff's right to be forgotten. It is clearly followed from the court's reasoning that the Federation's compliance with the proportionality principle in relation to its purposes pursued is the decisive factor for the court to place more weight on the freedom of expression.

#### 4.4 The common rule and distinct focus for balancing test

As the ECJ has underlined that the objective of data protection and privacy right cannot be pursued without having regard to the fact that those fundamental rights must be reconciled with the fundamental right to freedom of expression.<sup>136</sup> Thus, the right to be forgotten is not an absolute right with regard to other fundamental interests or rights. The key approach to determine the extent of these fundamental rights depends mostly on the balancing test. And the application of the balancing test requires the principle of proportionality being met. It is worth mentioning that the principle of proportionality targets not only the balancing regarding the right to be forgotten, but also balancing pertaining to all the rights falling within the scope

---

<sup>133</sup> See note 106, paragraph 4.11.

<sup>134</sup> Ibid, paragraph 4.5, 4.10.

<sup>135</sup> Ibid.

<sup>136</sup> See note 116, Case C-73/07, paragraph 53.



of data protection and privacy. Thus, the principle of proportionality exists as the rationality or general rule for balancing between the right to be forgotten and other fundamental rights.

Despite the proportionality principle is the common rule for the balancing regarding the right to be forgotten, different circumstances of cases have driven the national courts to concentrate on distinct parameters to achieve the balance. The core issue under the British NT1 case is the margin of appreciation derived from the flexibility nature of the data protection rules. It is largely compatible with ECJ's interpretation of the proportionality in the Lindqvist case which establishes that the balancing between conflicting rights shall take place in the national level of implementation of the directive due to its degree of flexibility.<sup>137</sup> In addition, the 'cascade' that is inherent to article 12(b) of the directive is characterized by the nature of flexibility which allows the national courts a degree of discretion to apply the remedy of rectification instead of the erasure or blocking in individual case even data subject claim the blocking or erasure and the data is actually inaccurate. Therefore, the British NT1 case is an example of using the balancing test to apply the 'cascade' at the national level.

The 'level of intrusion' and the 'legitimate purpose pursued' are two typical parameters for assessing whether the interference with the fundamental rights is proportionate. Under the Dutch Federation case, the Federation's use of freedom of expression for legitimate purpose is the essential reason for justify its interference with the right to be forgotten. However, the legitimate nature of the purpose shall be combined with the necessity requirement to justify the interference with the data protection and privacy rights in accordance with article 8(2) of ECHR. Arguably, the necessity assessment is not absent from this Dutch case. The court did consider the necessity requirement through its relevance assessment which alluded to the fact that the necessity requirement had been met.<sup>138</sup>

#### **4.5 The relevance assessment for balancing the right to be forgotten**

The relevance criterion is enshrined in article 6(c) of the directive and article 5(c) of the GDPR. The essence of the relevance criterion is that the data shall be relevant to the purposes for which they are processed. Thus, the purpose of processing of the data controller is the criterion for assessing the 'relevance' of the data. However, the ECJ establishes the other criterion of 'public interests' for the 'relevance' under the Google Spain judgment. More

---

<sup>137</sup> See note 113, Case C-101/01, paragraph 83, 85.

<sup>138</sup> A detailed analysis on this point will be exercised in the following section.

importantly, the question whether the data is relevant to the public's interests is an important parameter for ECJ's balancing of the right to be forgotten and the right of freedom of expression under the Google Spain. From this perspective, the relevance assessment is a vital component of the balancing test.

#### 4.5.1 The criterion for the relevance assessment

##### 4.5.1.1 *The tension regarding the criterion at the national level*

The relevant cases in this section are the British NT1 case and the Dutch KPMG partner case. The claimant in this Dutch case was a partner of KPMG which is a business service provider.<sup>139</sup> In 2014, the claimant wanted to prevent Google from indexing some articles reporting his conflict with his contractor about the bills for constructing his farmhouse.<sup>140</sup> The conflict and the media reporting occurred in 2012.

Google rejected to delete links referring to these articles when the search queries are based on the name of the claimant.<sup>141</sup> In Google's view, even though these articles were related to the private dispute, they were published in a broader context of financial affairs regarding KPMG and were thus relevant to the public.<sup>142</sup> Consequently, the relevance assessment is the essential part of this case.

Under the Dutch KPMG partner case, the court emphasized that the right to be forgotten concerns the relevance of search results found, rather than the relevance of the content of publications found through a search.<sup>143</sup> From this perspective, the court pointed out that the URLs found are relevant as search result for searches for the name of claimant.<sup>144</sup> In addition, the court expressed that the search results were recent as they have appeared in the period 2012-2014.<sup>145</sup> In view of the two factors, the court concluded that the search results are relevant.<sup>146</sup> And this is the important ground for the court to refuse the requested deleting of search results. It is clear from the court that the decisive criterion for the relevance assessment

---

<sup>139</sup> The claimant v. Google Inc C/13/575842/KG ZA 14-1433, paragraph 2.1. There is no official English version of this judgment. The English version referred to in this paper is translated by the online browser.

<sup>140</sup> Ibid, paragraph 2.1-2.6.

<sup>141</sup> Ibid, paragraph 2.8.

<sup>142</sup> Ibid, paragraph 4.6.

<sup>143</sup> Ibid, paragraph 4.5.

<sup>144</sup> Ibid, paragraph 4.6.

<sup>145</sup> Ibid.

<sup>146</sup> Ibid.

is whether the search results fulfils Google's purpose or function for indexing and caching of the internet.<sup>147</sup>

The relevance assessment is also an important part of the British NT1 case. In assessing NT1's claim to delete the links, the court has to assess whether Google's processing complies with the relevance requirement. Contrary to the approach of the Dutch court, the British court affirms that relevant assessment is to assess whether the data is relevant to interest of general public in having access to the data.<sup>148</sup> The tension regarding the criterion for relevance assessment therefore becomes apparent when the British court addresses the relevance of public interest.

#### *4.5.1.2 The real criterion: relevant to the public interest*

Ultimately, the contrasting approaches can be traced to the paradox in relation to the relevance assessment of ECJ under the Google Spain judgment. As explained already, ECJ establishes two sets of criteria for 'relevance'. On the one hand, it rules that the 'relevance assessment' is to assess whether the information included in the search results is relevant to the processing purpose of search engine (criterion one). On the other hand, it establishes that 'relevance assessment' is to assess whether the data included in the search results is relevant to public's interest in having access to it (criterion two). As explained above, article 6(c) of the directive and article 5(c) of the GDPR request the courts to assess the 'relevance' of the data in the light of the purpose of data controller's processing. However, this criterion of 'purpose of the processing of data controller' lacks suitability for assessing the relevance of the data in the context of the processing of search engine operators. As the search engine is characterized by the automated or indiscriminate nature of processing and the purpose of the processing lies in indexing and caching of third-party source web pages, the links or data would never be irrelevant in relation to the Google's purpose or function. It followed that the criterion of 'purpose of the processing of Google' does not leave margin for granting of the right to be forgotten. Thus, the basis reason for the paradox of the establishing of criterion one lies largely in ECJ's rigid or inflexible application of relevance criterion enshrined in the data protection legislation to the search engine operator. In this vein, the real criterion for the relevance assessment in the context of the processing of search engine operator is the interest of the general public in having access to the data.

---

<sup>147</sup> See note 76, Gryffroy, 163.

<sup>148</sup> See note 91, paragraph 143.

#### 4.5.2 The parameters of relevance assessment

The question in this section is which parameters are essential to the assessment of the relevance of the data to the interest of the public in the balancing test. The cases concerned in this section are the British NT1 case and the Dutch Federation case.

##### 4.5.2.1 *The factor of time*

The ECJ takes ‘the passage of time’ as the starting point of assessing whether the data remains relevant. ‘The passage of time’ therefore exists as an important factor for balancing the right to be forgotten of the data subject with other competing interest under the Google Spain. Acknowledging the close relationship between ‘the passage of time’ and the relevance of data about one’s past to the public interest is still the default position of national courts. Under the British NT1 case, the court basically ruled that relevance is closely related to the age of the data.<sup>149</sup> The data that was published a long time ago might be less relevant than data that was published recently.<sup>150</sup> Likewise, one of the reasons under the Dutch Federation case for the court to reject plaintiff’s delisting claim is that the crime event took place only less than 10 years ago.<sup>151</sup> Thus, the court still stressed the passage of time as the starting point for assessing the relevance of the data. The consistency regarding the parameter of time in the relevance assessment at the national level mirrors the essential feature of the right of oblivion, namely, the right to be forgotten for the data subjects becomes weightier as the negative event fades in time.

##### 4.5.2.2 *The present state of data subjects*

‘The passage of time’ *per se* is not an absolutely preponderant parameter for establish that the data is irrelevant to the interest of the public. The parameter of ‘present state of data subjects’ has decisive influence on the assessment of whether the data is relevant to the public interest. Under the British NT1 case, the court applies the balancing approach to assess whether Google’s processing of crime and punishment data was legitimate. One end of the scale is justified reasons regarding the special situation of data subject to no longer be linked with his past conviction. The other end of the scale is the relevance of the criminal conviction data to the interest of public. Regarding NT1’s case, the court found that the criminal conviction data remains relevant to the public’s interest. The basic reasoning of the court is that these data

---

<sup>149</sup> Ibid.

<sup>150</sup> Ibid.

<sup>151</sup> See note 106, paragraph 4.10.

remains relevant in relation to NT1's present state even though much time has passed. In this respect, the court emphasized that what has changed with the passage of time is an additional parameter for the relevance assessment.<sup>152</sup> In essence, this criterion equates what the present state of the data subject is. Thus, two facts relating to NT1's present state directed the attention of the court. First, NT1 had still engaged in the business career since leaving prison.<sup>153</sup> Second, NT1 had attempted to re-write his history by posting misleading information on blog and social media in recent years.<sup>154</sup> Based on the two facts, the court found that the crime and punishment data was still relevant for the public's assessment of NT1.<sup>155</sup>

As mentioned above, the court also adopted the approach to balance the privacy right of the plaintiff with the right of freedom of speech under the Dutch Federation case. The court considered that whether the offender has paid off his 'debt' to society is the additional criterion for assessing his right to be forgotten.<sup>156</sup> With regard to this criterion, the court paid attention to the following facts about the plaintiff. First, the sentence for the plaintiff still existed albeit in the form of a conditional measure.<sup>157</sup> Second, the compulsory treatment for his mental illness ended as the plaintiff did not cooperate.<sup>158</sup> These facts undoubtedly indicated that the present state of the plaintiff could still pose threat to the society. The court therefore established that the dissemination of the criminal data by the Federation had close relationship with public's assessment of plaintiff's present state or lifestyle. From this perspective, the court's reasoning alluded that the interference of the Federation with the plaintiff's right to be forgotten was necessary in the interest of public.

#### **4.6 Main points of the relevance assessment**

Making the relevance assessment a weighty party of the larger balancing test is probably where the impact of the Google Spain judgment at the national level becomes most apparent.

---

<sup>152</sup> See note 91, paragraph 143.

<sup>153</sup> NT1's post-prison business career included lending money to business, and providing consultancy services for a private company. Ibid, paragraph 121, 122.

<sup>154</sup> Ibid, paragraph 169. In this aspect, NT1 caused online postings to be made which spoke positively about his business experience, standing and integrity. These postings clearly promote the idea that NT1 is a man of unblemished integrity. Ibid, paragraph 124.

<sup>155</sup> Ibid, paragraph 169. The court pointed out that NT1's criminal past was especially relevant to anybody who read his postings on the blog and deal business with him. Ibid, paragraph 168.

<sup>156</sup> See note 106, paragraph 4.10.

<sup>157</sup> Ibid.

<sup>158</sup> Ibid.

In a nutshell, the parameters of 'length of time' and the 'present state of data subject' have assumed a central relevance in the light of public interest. It follows that the relevance criterion embodies the essential feature of the right of oblivion when compared with proportionality principle which functions as the general rule for balancing the right to be forgotten.

## **5 How to regulate the right to be forgotten more effectively under the GDPR**

Having contoured the right to be forgotten pursuant to the case law in the light of the directive, the following question is to what extent the case law framework is coherent or inconsistent with the GDPR? The fundamentally goals of the analysis of this question is to reveal the weakness or inefficiency of related inconsistency and propose suggestion for a more effective regulation on the right to be forgotten under the GDPR.

### **5.1 Comparison on the balancing test**

The Google Spain judgment and the national rulings illustrated in the previous chapters provide an overview of how can the clash between the right to be forgotten and the right of freedom of expression been balanced with each other. As explained already, the balance between the two conflicting rights is achieved through two important mechanisms: the principle of proportionality and the relevance criterion. Thus, the following part will assess how the GDPR caters for the two mechanisms which support the balancing test. The coherence or inconsistency between the GDPR and the case law in this respect is the focus of this section.

#### **5.1.1 Coherence regarding the margin of appreciation**

The principle of proportionality is present under article 17(3) of the GDPR. Article 17(3) (a) reiterates that the right to be forgotten shall not apply to the extent that processing is *necessary* for exercising the right of freedom of expression and information. The necessity criterion enshrined in this provision denotes that the right to be forgotten does not always have to step back in circumstances where it clashes with the freedom of expression. Striking a balance between the conflicting rights and interests is the essence of this provision in view of the necessity criterion. It is worth mentioning that this provision regulates on this crucial point in an concise manner and does not present any specific criterions for the balancing test, it is necessary that it has to be read in the context of the existing case law on the balancing test. For this reason, article 17(3) arguably allows a large extent of margin of appreciation to the courts to strike the balance on a case by case basis. In view of these observations, it is clear that the GDPR and the case law are coherent in the role of margin of appreciation in the proportionality and balancing test.

### 5.1.2 Inconsistency on the relevance criterion

Article 5(1) (c) of the GDPR can be considered to establish the criterion for evaluate whether the data is relevant. This provision requires that personal data shall be relevant to the purposes for which they are processed. However, dependency on the specified purpose of the controller to assess the relevance of the data has little enforcement in practice in the context of the processing of the search engine operators. The relevant case law therefore has laid down a second criterion for the relevance assessment, i.e. relevant to the current public interest. It is evident that the GDPR contrasts with the case law when it comes to the relevance criterion. As explained already, the crucial role in balancing on the right to be forgotten will necessarily have to be played by the courts even after the entry into force of the GDPR. The courts thus can use the margin of appreciation to enforce a more appropriate relevance criterion than that enshrined in the GDPR in practice.

### 5.2 The compatibility on the freedom of expression exemption

One question faced the courts in practice is whether Google can rely on the journalism exemption. The court under the British NT1 case, for example, forms the view that this question is equivalent to whether processing by Google is undertaken *only or with a view to* publication for journalistic purposes.<sup>159</sup> The court concluded that the processing of Google fails for this threshold question.<sup>160</sup> The reasons for this conclusion are as following: first, Google's processing does not undoubtedly refer to journalistic material published by third parties. Facilitating access to journalistic content is purely accidental to Google's purpose of providing automated access to third party content of whatever nature it may be.<sup>161</sup> Second, Google's larger purpose is of commercial nature which is separate and distinct from the journalistic purpose.<sup>162</sup> Thus, the automated nature of Google's processing for economic purpose prevent it from relying on the journalism exemption.

Whereas the GDPR has embedded a broader freedom of expression exemption under article 17(3) compared to the journalism exemption. The indiscriminately nature of Google's processing undoubtedly does not constitute obstacle in a broader context of freedom of

---

<sup>159</sup> See note 91, paragraph 98. Actually, this conclusion of the court is in accordance with article 32(1) of the British Data protection Act 1998 (the DPA) which is authorized by article 9 of the directive. Article 32(1) of the DPA essentially stipulated that data processing *only* for the special purposes of journalistic, literary or artistic are exempt from any provision to which article 32(1) relates.

<sup>160</sup> Ibid, paragraph 98.

<sup>161</sup> Ibid, paragraph 100.

<sup>162</sup> Ibid.



expression than the journalism. The question begged therefore is whether the notion of ‘the right of freedom of expression and information’ can stretch to Google’s commercial purpose activity that connected to convey information to public. As mentioned above, the essence of the freedom of expression exemption under article 17(3) lie largely in the balancing between conflicting rights. The question thus in other words is whether Google’s economic interest *alone* can override the right to be forgotten of the data subject. In this regard, the ECJ in the Google Spain has already found that the economic interest of Google *alone* cannot justify the interference with data subject’s right to be forgotten in view of the ‘potential seriousness’ of the interference.<sup>163</sup> And the real interest that overrides the right to be forgotten throughout the case law is public interest in having access to the data.

From this perspective, the broader freedom of expression notion *per se* does not lead to Google’s capability of relying on this exemption automatically. This question will come back to the crucial point on the balancing test in which Google’s societal role has been evaluated closely with public interest in having access to the data.<sup>164</sup> Thus, the question whether search engine can benefit from the freedom of expression exemption under the GDPR is compatible with the case law through the balancing test which is inherent in article 17(3) of the GDPR.

### **5.3 Inconsistency regarding the definition**

In this section, this thesis will attempt to analyze the inconsistency regarding the definition of the right to be forgotten between the GDPR and the ECJ or the directive. Specifically, this thesis will explain the potential weakness of the definition under the GDPR in relation to address the problems of digital eternity.<sup>165</sup>

#### **5.3.1 The rationale for dealing with the problems of digital eternity**

The notion of ‘informational self-determination’ connotes that people should be able to exercise control over what happens with their personal data.<sup>166</sup> Many scholars illustrate the

---

<sup>163</sup> CJEU case C-131/12, paragraph 81.

<sup>164</sup> Some scholars, like Kulk, highlights the important societal role of search engine service in finding information. See Kulk, “Freedom of expression and ‘right to be forgotten’,” 122. However, this paper thinks that the public interest constitutes the real parameter for search engine’s societal role which has not been assessed separately from the public interest under the case law.

<sup>165</sup> The problems of digital eternity has been proposed by Lindsay. As he has mentioned, the debate for the right to be forgotten have arisen from the problems of digital eternity. Specially, the storage of increasing amounts of personal data online and their ready accessibility make people feel threatened by their digital past. See note 34, Lindsay, 293.

<sup>166</sup> Koops, “The trouble with European data protection,” 251.

rationale for the right to be forgotten from the perspective of the informational self-determination.<sup>167</sup> Another rationale that underpins the right to be forgotten is the rehabilitation. The essence of this argument is that the right to be forgotten can bestow a right on individuals to retroactively “erase” that which might harm them if we cannot find a way to protect privacy *ab initio*.<sup>168</sup> More importantly, the Google Spain judgment sheds light on data subject’s exercising of control over data that is in the context of the processing of search engine operator. The Google Spain judgment essentially seeks to address the persistent digital past problem that is exacerbated by the developments of search engine service. In this case, the ECJ emphasizes that search engine facilitates the ubiquitous access to structured overview of the data relating to an individual,<sup>169</sup> and the processing of it can affect significantly the fundamental rights to privacy.<sup>170</sup> This fundamental privacy concern evoked by the search engine service exists as the initial justification for the ECJ’s establishment of the right to be forgotten that the data may no longer be linked to the name of a data subject through the search engine after a certain time has passed. Therefore, dealing with the privacy concerns regarding the ready accessibility to digital personal data, especially in the context of search engine service, constitutes a recent rationale for the right to be forgotten.

### 5.3.2 The definition weakness for addressing the problems of digital eternity

As explained already, the right to be forgotten does not coincide entirely with the right to erasure. The right of oblivion constitutes the other aspect of the right to be forgotten from a historical view. While not expressly stated, the directive has already incorporated the right of oblivion through two rights which do not entail the erasure of data: the right of blocking under article 12(b) and the right to object under article 14(a). Arguably, the ECJ in the Google Spain focuses on the right of oblivion rather than the right to erasure by reference to ‘block’ under article 12(b) and ‘object’ under article 14(a). Such a conclusion is due to the fact that the data subject’s right of delisting featuring the passage of time and no personal data being erased from the internet. More importantly, the Google Spain judgment has led to a major national

---

<sup>167</sup> For example, Frosio poses that the right to be forgotten empowers individuals against data processing entities by guaranteeing the authority of the individual to decide for himself about data processing. See note 43, Frosio, 314. Another example is Graux who presents that the right to be forgotten would strengthen the individual’s control over his identity, providing a more effective check on the purpose limitation principle and improve the accountability of data controllers. Graux, Ausloos, Valcke "The right of forgetting," 102.

<sup>168</sup> Eltis, “Breaking through the tower of babel,” 84.

<sup>169</sup> CJEU case C-131/12, paragraph 37.

<sup>170</sup> Ibid, paragraph 38.

ruling<sup>171</sup> on the right of delisting which takes the right of oblivion as legal basis. In this vein, the right of oblivion does have important practical merits in coping with the problems of digital eternity which has been aggravated by the search engine service. However, the GDPR is awkward in this aspect in embracing the notion of ‘erasure’ to the definition of the right to be forgotten. The absence of the right of blocking and fastening the ‘object’ to the ‘erasure’ under the GDPR create a vacuum devoid of the right of oblivion. Thus, the GDPR does have crippling weakness in defining the right to be forgotten since the effective addressing of the digital eternity problem in the context of search engine service cannot be achieved through the right of erasure only.

#### **5.4 The distance on the general obligation for delisting**

As discussed already, article 17(2) of the GDPR imposed a greater notification obligation on the original publisher who has made personal data public to relay data subject’s request for erasure of any links to the data to search engine operators. Therefore, the search engine operators are obliged to delist links to the personal data only in circumstance where they are informed by the original publisher. It is clear from this observation that the search engine operator has not been assumed a general responsibility to delist links under this provision. However, the Google Spain judgment has classified the search engine operator as the data controller and imposed a general obligation on it to delist links to the personal data.

One argument in this respect is that article 17(2) of the GDPR seems to consider internet search engine service provider more as third parties than as data controllers in their own right.<sup>172</sup> This argument suggests that the request for delisting can be achieved through two manners under the GDPR: the first option is obliging the original publisher to give search engine operator instructions that prevent the personal data from appearing in the search results in view of article 17(2). The second option is directly requesting the search engine operator to delist in the light of the right to be forgotten enshrined in the GDPR. Underlying this argument is the assumption that article 17 of the GDPR can be regarded as the legal basis for delisting in the context of the search engine service. However, the definition difficulty of the GDPR in addressing of the digital eternity problem in the context of search engine service leads to the conclusion that article 17 is failed to be the legal basis of the delisting. From this perspective, the delisting can only be achieved through the original publisher’s instruction to

---

<sup>171</sup> See note 4.

<sup>172</sup> Paragraph 110 of the opinion of advocate general Jääskinen on case C-131/12.

the search engine operator. The distance between this stance and the ECJ's establishment of general responsibility for Google to delist is plain to see.

## **5.5 Proposal for dealing with the definition weakness: reintroducing the 'oblivion'**

The above analysis in section 5.3 demonstrates the fact that the GDPR suffers a lack of efficiency in dealing with the problems of digital eternity due to the definition difficulty. Furthermore, the inconsistency concerning the general obligation discussed in section 5.4 can also be attributed to the definition weakness of the GDPR. Therefore, a more effective definition in responding to modern digital technology is needed. This thesis proposes that this effectiveness can be achieved through the reintroducing of the right of oblivion into the GDPR.

### **5.5.1 The way to achieve the 'reintroducing'**

The GDPR establishes a strong link between the 'object' and 'erasure' by article 17(1) (c) which essentially stipulated that the outcome of a successful object is the erasure of data. However, the question what are the consequences of successful objects should be determined by the courts according to the circumstances in individual cases. The erasure of data may not be the most appropriate way to enforce the right of object, especially regarding the restricting access to personal data in the context of search engine service. Thus, the overregulation regarding the outcomes of the 'object' does not leave room for the courts to exercise the margin of appreciation.

Reintroducing of the 'oblivion' entails the repeal of article 17(1) (c) to disconnect the link between the right to object and erasure of data. In this vein, the right of oblivion can be incorporated in the right of object under article 21 of the GDPR.

It is worth mentioning that a separation of the right of oblivion from the right to be forgotten under article 17 will be generated in this situation. To avoid this separation, the proposal would also affect the taxonomies of the rights under the GDPR. The taxonomy of the right to be forgotten would accordingly be repealed. This thesis does not suggest that the right to be forgotten shall be repealed under the GDPR. Contrarily, what suggested is that by removing the heading of 'the right to be forgotten' from article 17, the GDPR would no longer regulate it specifically with the right of erasure.

### 5.5.2 Advantages of the proposal

Methodologically speaking, the proposal adopts a more principled approach than the overregulation to stipulate the right to be forgotten. Focusing fully on defining rights and duties in a single statutory comprehensive framework is one fallacy which would lead to the problem of enormous disconnecting between the law and reality.<sup>173</sup> The problem caused by the overregulation does occur with the right to be forgotten stipulated under the GDPR. Compared with the directive, the GDPR has taken more new circumstances into account and created more complex new rights and taxonomies.<sup>174</sup> However, no rights under the GDPR are well-suited to accommodate the new challenges in addressing the problems of digital eternity associated with the search engine service. Thus, the approach of comprehensively regulating cannot keep up with challenges prompted by new technologies.

In terms of content, this proposal can reflect the fundamental objective of the GDPR better. Repealing of the taxonomy of the right to be forgotten into the right of erasure makes the boundary between the right to be forgotten and other rights blurry. The right to object, rectification or the right to restriction of processing<sup>175</sup> may come into play as the legal basis for enforce the right to be forgotten as long as ‘the factor of time’ can be read into it<sup>176</sup>. Arguably, this point has been backed up by the Dutch Erdee media case which has been explained in chapter 4. The court in that case has confirmed that the rectification of adding a link to update the data, instead of erasure of data, is able to strike the best balance. This would broaden the range of legal basis for the right to be forgotten, avoiding the circumstance where the right of erasure ill-adapted to delisting claim associated with search engine technology. This proposal therefore could reinforce the right to be forgotten in the online environment which is the objective of the GDPR.<sup>177</sup>

---

<sup>173</sup> See note 166, Koops, 256.

<sup>174</sup> The GDPR has created more far-reaching rights, such as the right to restriction of processing under article 18. Even within article 17, the GDPR has envisaged more circumstances to apply the right to be forgotten.

<sup>175</sup> Article 18(1) (b) of the GDPR states that the data subject shall have the right to restriction of processing where the processing is *unlawful* and *the data subject opposes the erasure* of the data. This provision has potential ability to be the legal basis for the ‘oblivion’, as the factor of time can be read into this provision in circumstance where the processing of data about individual’s *past* is not relevant. In this case, the processing would be unlawful due to the relevance criterion has been violated. In addition, this provision in its current form is not appropriate to be the legal basis for the delisting right. This is because the essence of delisting is not data subject’s opposition of erasure.

<sup>176</sup> The factor of time is the essential feature of the right of oblivion.

<sup>177</sup> This objective has been expressed under recital 66 of the GDPR.

Structurally, this proposal would not introduce new right. Instead, it seeks to fine-tune the rules concerning the right to be forgotten under the GDPR. It is relatively moderate in accommodating the ‘oblivion’ within the existing rights of the GDPR.

## 6 Conclusion

This thesis has discussed the central research question: how to regulate the right to be forgotten more effectively under the GDPR, especially in the context of the processing of the search engine operator? To answer this question, the problem of the GDPR in regulating the right to be forgotten needs to be defined. This requires considering not only the efficacy of the existing case law frameworks in the light of the directive in regulating the right to be forgotten, but also the disparity between the GDPR and this efficacy. In addition, the question to what extent the GDPR is coherent with this efficacy is also helpful in formulating answer to the research question.

### 6.1 The improved effectiveness in view of softening the disparity

The questions ‘what does the right to be forgotten look like?’ and ‘what is the legal basis for it?’ contributes to explaining the basic disparity between the two bodies of law. The directive has embraced two visions of the right to be forgotten: the ‘oblivion’ and ‘erasure’. The vision of ‘oblivion’ can be effected through the right of blocking, as well as the right to object. This observation is partly due to the fact that the ‘blocking’ and ‘object’ can embody the notion of time through the balancing test<sup>178</sup>, but also partly due to the state that the ‘blocking’ and ‘object’ do not necessarily involve the erasure of data.

The ECJ has established a right in the form of ‘oblivion’ in the Google Spain decision by applying the right of blocking or object existed under the directive in the context of processing of the search engine operator. Specifically, the right established has two characters: first, the limitation defined by the ECJ to the freedom of expression is conditioned by the factor of time, i.e. the period of time in which the public has prioritized interest in having access to the personal data has elapsed. Second, the essence of the right established is to restrict public’s accessibility to data about the negative past of the data subject, rather than deleting the data from the internet. Although the right established involves the removing of data from search engine index, it would miss the essential point to label it as the right of erasure.

The directive thus has established the sound legal basis to support the ‘oblivion’ vision of the right to be forgotten. More importantly, the ECJ has applied it in practice to the modern

---

<sup>178</sup> As argued above, the balancing requirement is intrinsic in the right to object, and is intrinsic in the right of blocking in circumstance where the legal basis for the processing is article 7(f) of the directive.

search engine technology. However, the GDPR has suffered a lack of legal basis for the right of oblivion through linking the right to be forgotten and the right to object with the notion of ‘erasure’. The definition gap constitutes the main disparity between the two bodies of law.

Furthermore, two additional issues arise in relation to this fundamental disparity. First, the right to be forgotten enshrined in the GDPR cannot be counted as the appropriate legal basis for requiring or considering the de-listing in the context of the search engine service since the ‘oblivion’ has been deprived of basis under the GDPR. This deviation from the ‘oblivion’ represents the weakness of the GDPR in dealing with the problems of digital eternity that is intensified by the search engine technology. From this perspective, the shifting from the two-vision right to be forgotten to the sole ‘erasure’ is not satisfactory in responding to the novel threat caused by the modern digital technology.

Second, the above observation leads one to suppose that the effective de-listing after the GDPR can only be achieved through the instruction relayed from the original publisher to the search engine operator in accordance with article 17(2). Undoubtedly, this observation contrasts with the ECJ’s finding that the search engine operator has to bear general responsibility in relation to delisting, rather than informed by the original publisher.

The potential problem of the GDPR concerning the definition signifies that a more effective regulating on the right to be forgotten cannot be achieved without the right of oblivion. This represents the necessity to reintroducing the right of oblivion into the GDPR to address the problem. The aim for the ‘reintroducing’ is fulfilling the need to adapt to new digital technology in a more principled way than comprehensively regulating. This thesis has proposed that the link between the ‘object’ and ‘erasure’ should be disconnected based on how excessive the ‘link’ is in regulating the right to be forgotten. The core of the proposal is the repealing of the taxonomies of the right to be forgotten under the GDPR in the light of the potential suitability of other rights than the ‘erasure’ to be the legal basis for the right to be forgotten.

## **6.2 The effectiveness due to the coherence**

The coherence between the two bodies of law may be attributed to the approach to balance the intrinsic tension in the right to be forgotten, i.e. the tension between it and other legitimate interests, especially the freedom of expression. Principally, the fundamental approach employed by the ECJ in the Google Spain is the balancing test. This decision has established the relevance assessment as the important component of the balancing test. The Google Spain



has further established the public interest as the criterion for assessing the relevance of the data.

The national courts have chiefly applied the Google Spain through shaping more concrete parameters concerning the balancing test according to the specific context. The parameters pertaining to the proportionality principle, which is highly important in the interpretation of the balancing test, have derived largely from the national case law. These parameters include the margin of appreciation, the level of intrusion and legitimate purpose pursued. The GDPR has enshrined the balancing test in article 17(3) through the form of 'exception'. Some of the parameters regarding the proportionality, especially the 'margin of appreciation' can be read into this provision. For this reason, the two bodies of law are coherent with respect to the balancing test. This coherence demonstrates that the effective regulating on the right to be forgotten under the GDPR cannot be achieved only at the abstract level. Instead, it relies largely on the specific-context balancing test.

## **Table of reference**

### **Statutes (chronological order)**

European Convention on Human Rights (3 September 1953) (The ECHR)

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. (The directive)

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) (The GDPR)

### **List of judgments (chronological order)**

#### **European Court of Justice**

Case C-331/88 (13 November 1990), *The Queen v The minister for agriculture, fisheries and food and the secretary of state for health*.

Case *Bodil Lindqvist* C-101/01 (6 November 2003).

Case C-73/07 (16 December 2008), *Tietosuojavaltuutettu v Satakunnan Markkinapörssi Oy, Satamedia Oy*.

Case C-131/12 (13 May 2014), *Google Spain SL, Google Inc. v Agencia Española de Protección de Datos (AEPD), Mario Costeja González*.

#### **Court of Amsterdam**

Case C / 13/575842 / KG ZA 14-1433 SP / LO (12 February 2015), *claimant v Google Inc.*

Case C / 13/563401 / HA ZA 14-413 (11 March 2015), *claimant v Erdee media bv.*

#### **Court of the Northern Netherlands**

Case C / 18/155241 / KG ZA 15-73 (1 May 2015), claimant v Association for safety, respect and Solidarity (VVRS), association Parents of a childed child, stichting 'attention does speak'.

### **European court of human rights**

Case 37138/14 (12 January 2016), Szabo and vissy v. Hungary

### **British Royal Courts of Justice**

Case [2018] EWHC 799 (QB) (13 April 2018), NT1, NT2 v. Google LLC.

### **Publications from authorities (chronological order)**

Opinion of advocate general Jääskinen on Case C - 131/12 Google Spain SL, Google Inc. v. Agencia Española de Protección de Datos (AEPD), Mario Costeja González. (25 June 2013)

Article 29 data protection working party opinion on Guidelines on the implementation of the court of justice of the European Union judgment on "Google Spain and INC V. Agencia Española de Protección de Datos (AEPD), Mario Costeja González." C-131/12. (26 November 2014)

### **Chapter in book**

Lindsay, David. "The 'Right to Be Forgotten' in European Data Protection Law." In *Emerging Challenges in Privacy Law: Comparative Perspectives*, edited by Normann Witzleb et al. 290-337. Cambridge University Press, 2014.  
<https://www.cambridge.org/core/books/emerging-challenges-in-privacy-law/right-to-be-forgotten-in-european-data-protection-law/71F6B8CA5F4D1918AD6B66DC92252B21>

### **Articles in electronic journals – with DOI (alphabetical order)**

Bygrave, Lee A. "A right to be forgotten?" *Communications of the ACM* 58, no.1 (2015): 35-37. doi: 10.1145/2688491.

Di Ciommo, Francesco. "privacy in Europe after regulation (EU) No 2016/679: what will remain of the right to be forgotten?". *The Italian law journal* 03, no.02 (2017): 623-646. doi: 10.23815/2421-2156.ITALJ.

Núñez Vaquero, Álvaro. "Five models of legal science." *Revus. Journal for Constitutional Theory and Philosophy of Law* 19 (2013): 53-81. doi: 10.4000/revus.2449.

Koops, Bert-Jaap. "Forgetting footprints, shunning shadows: A critical analysis of the right to be forgotten in big data practice." *SCRIPTed* 8, no.3 (2011): 229-256. doi: 10.2966/scrip.080311.229.

#### **Articles in electronic journals – without DOI (alphabetical order)**

Ambrose, Meg Leta, and Jef Ausloos. "The right to be forgotten across the pond." *Journal of Information Policy* 3 (2013): 1-23.  
<https://www.jstor.org/stable/pdf/10.5325/jinfopoli.3.2013.0001.pdf>

Berzins, Christopher. "The Right to be forgotten after Google Spain: is it coming to Canada?" *Canadian Journal of Administrative Law & Practice* 28, no. 3 (2015): 267-290.  
[https://search.proquest.com/docview/1722626733?rfr\\_id=info%3Axri%2Fsid%3Aprimo](https://search.proquest.com/docview/1722626733?rfr_id=info%3Axri%2Fsid%3Aprimo)

Bunn, Anna. "The curious case of the right to be forgotten." *Computer Law & Security Review* 31, no. 3 (2015): 336-350.  
<https://www.sciencedirect.com/science/article/pii/S0267364915000606>

Cofone, Ignacio. "Google v. Spain: a right to be forgotten?" *Chicago-Kent Journal of International and Comparative Law* 15, No.1 (2015):1-11.  
[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2548954](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2548954)

Eltis, Karen. "Breaking through the Tower of Babel: a right to be forgotten and how trans-systemic thinking can help re-conceptualize privacy harm in the age of analytics." *Fordham intellectual property, media and entertainment law journal* 22, no.1 (2011): 69-95.  
<https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?referer=https://scholar.google.com/&httpsredir=1&article=1597&context=iplj>

Frosio, Giancarlo F. "The right to be forgotten: much ado about nothing." *J. on Telecomm. & High Tech. L.* 15 (2016): 307-336.  
<https://www.heinonline.org/HOL/Index?index=journals%2Fjtelhltel&collection=journals>

- Graux, Hans, Jef Ausloos, and Peggy Valcke. "The right of forgetting in the internet era." *Fundación Telefónica* 36 (2012): 93-106. <https://core.ac.uk/download/pdf/34564767.pdf>
- Gryffroy, Pieter. "Delisting as a part of the decay of information in the digital age: a critical evaluation of Google Spain (C-131/12) and the right to delist it has created" *Computer and telecommunications law review* 22, no.6 (2016): 149-169. <https://1.next.westlaw.com/Document/I5F70C530640C11E686DDDC313F4E3032/View/FullText.html?>
- Josef Gstrein, Oskar. "The cascade of decaying information: putting the "right to be forgotten" in perspective". *Computer and telecommunications law review* 21, no.2 (2015): 40-48. <https://1.next.westlaw.com/Document/I73A6A0E0AD2611E4B51BB252DFAF85E2/View/FullText.html?>
- Koops, Bert-Jaap. "The trouble with European data protection law." *International Data Privacy Law* 4, no. 4 (2014): 250-261. <https://doi.org/10.1093/idpl/ipu023>
- Kulk, Stefan, and Frederik Zuiderveen Borgesius. "Freedom of expression and right to be forgotten cases in the Netherlands after Google Spain." *European Data Protection law review* 1, no.2 (2015): 113-125. <https://heinonline.org/HOL/Page?name=&public=false&handle=hein.journals/edpl1&page=113&collection=journals>
- Lytras, Christopher. "Right to be Forgotten: Europe's Cutting Edge Weapon to fight Google?" *European Public Law: EU eJournal* 12, no.106 (2015): 1-13. [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2668479](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2668479)
- Lindsay, David. "The 'right to be forgotten' by search engines under data privacy law: A legal analysis of the Costeja ruling." *Journal of Media Law* 6, no. 2 (2014): 159-179. <https://www.tandfonline.com/doi/abs/10.5235/17577632.6.2.159>
- Mantelero, Alessandro. "The EU proposal for a general data protection regulation and the roots of the 'right to be forgotten'". *Computer Law & Security Review* 29, no.3 (2013): 229-235. <https://www.sciencedirect.com/science/article/pii/S0267364913000654>

Rosen, Jeffrey. "The right to be forgotten." *Stan. L. Rev. Online* 64 (2011): 88-92.  
<https://review.law.stanford.edu/wp-content/uploads/sites/3/2012/02/64-SLRO-88.pdf>

Tranberg, Charlotte Bagger. "Proportionality and data protection in the case law of the European Court of Justice." *International Data Privacy Law* 1, no. 4 (2011): 239-248.  
<https://academic.oup.com/idpl/article/1/4/239/731508>

Voss, W. Gregory. "After google Spain and Charlie Hebdo: the continuing evolution of European Union Data Privacy Law in a time of change." *Business Lawyer* 71, no. 1 (2015): 281-292.  
[https://www.researchgate.net/profile/W\\_Voss/publication/287196500\\_After\\_Google\\_Spain\\_and\\_Charlie\\_Hebdo\\_The\\_Continuing\\_Evolution\\_of\\_European\\_Union\\_Data\\_Privacy\\_Law\\_in\\_a\\_Time\\_of\\_Change/links/5a3a93d5aca272563a7f56f5/After-Google-Spain-and-Charlie-Hebdo-The-Continuing-Evolution-of-European-Union-Data-Privacy-Law-in-a-Time-of-Change.pdf](https://www.researchgate.net/profile/W_Voss/publication/287196500_After_Google_Spain_and_Charlie_Hebdo_The_Continuing_Evolution_of_European_Union_Data_Privacy_Law_in_a_Time_of_Change/links/5a3a93d5aca272563a7f56f5/After-Google-Spain-and-Charlie-Hebdo-The-Continuing-Evolution-of-European-Union-Data-Privacy-Law-in-a-Time-of-Change.pdf)

Werro, Franz. "The right to inform v. the right to be forgotten: a transatlantic clash". *Georgetown Public Law Research Paper* No.2 (2009): 285-300.  
[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1401357](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1401357)

Weber, Rolf H. "the right to be forgotten more than a pandora's box?" *Journal of Intellectual Property, Information Technology and E-Commerce Law* 2, no.2 (2011): 120-128.  
<https://pdfs.semanticscholar.org/929d/d69453db64e86875a17f6f22da7653fa1ae0.pdf>

### **Others/Web pages (alphabetical order)**

Future of the internet. "Righting the right to be forgotten." Published 14 July, 2014.  
<http://blogs.harvard.edu/futureoftheinternet/2014/07/14/righting-the-right-to-be-forgotten/> (accessed August 20, 2018).

Iglezakis, Ioannis. "The right to be forgotten in the Google Spain Case (case C-131/12): A clear victory for data protection or an obstacle for the internet?" (2014): 1-17.  
[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2472323&download=yes](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2472323&download=yes) (accessed July 7, 2018).

Kulk, Stefan and Frederik Zuiderveen Borgesius. "Google Spain v. González: did the court forget about freedom of expression?: case C-131/12 Google Spain SL and Google Inc. v.

Agencia Española de Protección de Datos and Mario Costeja González” (2014): 1-13.  
[https://www.researchgate.net/profile/S\\_Kulk/publication/265420384\\_Google\\_Spain\\_v\\_Gonzalez\\_Did\\_the\\_Court\\_Forget\\_about\\_Freedom\\_of\\_Expression/links/59e647a4a6fdcc0e88248456/Google-Spain-v-Gonzalez-Did-the-Court-Forget-about-Freedom-of-Expression.pdf](https://www.researchgate.net/profile/S_Kulk/publication/265420384_Google_Spain_v_Gonzalez_Did_the_Court_Forget_about_Freedom_of_Expression/links/59e647a4a6fdcc0e88248456/Google-Spain-v-Gonzalez-Did-the-Court-Forget-about-Freedom-of-Expression.pdf)  
(accessed July 7, 2018).