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CJEU Advocate General sides with Google in data protection dispute

Christina Angelopoulos (CIPIL, University of Cambridge) · Wednesday, July 3rd, 2013

"AG Jääskinen declined to classify Google as a "controller" of the data included on the pages indexed by its search engine within the meaning of article 1(d) of the Data Protection Directive."

The CJEU's Advocate General Niilo Jääskinen issued an Opinion on 25 June advising the Court to refrain from allowing citizens the right to require Google to block links to content they find embarrassing and declining the existence of a "right to be forgotten" in existing EU legislation.

The case concerned the publication in 1998 in the printed edition of a widely circulated Barcelona newspaper of two announcements concerning a real estate auction in connection with proceedings related to social security debt. The announcements included the name of the owner. When the newspaper launched an electronic version, the announcements began appearing as search results in Google's search engine when the owner's name and surnames were entered as search terms. After the newspaper's refusal to take down the announcements on grounds that the publication was effected by order of the Spanish Ministry of Labour and Social Affairs, the owner contacted Google Spain requesting removal of the relevant links from the search results for his name. Google Spain forwarded the request to Google Inc., as the latter was the operator of the search engine.

The owner subsequently filed a complained with AEPD, the Spanish Data Protection Agency. On 3 July 2010, the Director of the AEPD rejected the owner's complaint against the newspaper, declaring that publication in the press was legally justified, but upheld the claims against Google Spain and Google Inc. and ordered the de-indexing of the data. The case wound its way to the Spanish National High Court (Audiencia Nacional), which proceeded to refer a series of preliminary questions to the EU Court of Justice for clarification.

The first question concerned the jurisdictional scope of national data protection legislation. Google claimed that Spanish legislation on data protection does not apply, as the processing of the personal information in question did not take place in Spain; instead, Google Spain merely acts as the commercial representative of Google for its advertising functions. The Advocate General refused this logic, suggesting instead that the most relevant factor is the search engine's business model. This relies primarily on keyword advertising, Google's main source of income. According to the AG, if a company is selling advertising space targeted at the inhabitants of a Member State, even if the technical data processing operations take place in other Member States or third countries, it should be viewed as processing personal data in the territory of that Member State. Accordingly, national data protection legislation is applicable.

The tide turned in Google favour with the second question concerning search engines' legal position within the 1995 Data Protection Directive . AG Jääskinen declined to classify Google as a "controller" of the personal data included on the pages indexed by its search engine within the meaning of article 1(d) of said Directive, as the provision of an information location tool does not imply any power over the content on third party websites. The search engine provider is therefore not equipped to fulfill the obligations of such a controller as set out in the Data Protection Directive – it cannot even be expected to distinguish between personal and other kinds of data. As a result, it is not subject to national data protection law and cannot be ordered to expunge content from its index, except in cases where the provider has not complied with "exclusion codes" that advise search engines not to index or store a source web page or to display it within the search results or where a website requests an update of the cached memory of its pages.

Finally, AG Jääskinen stated that, in its current form, even when interpreted under the light of the Charter of Fundamental Rights of the European Union, the Directive does not provide for a general "right to be forgotten". The Directive only allows for the rectification, erasure and blocking of incomplete or inaccurate data, which was not the case in the current proceedings. The Directive also grants any person the right to object at any time, on compelling legitimate grounds relating to his particular situation, to the processing of data relating to them, but the AG considered that a subjective preference alone justify for such a move: according to the Court's statement on the Opinion, "the Directive does not entitle a person to restrict or terminate dissemination of personal data that he considers to be harmful or contrary to his interests."

AG Jääskinen did point out that national law may impose duties of care on search engines requiring the removal of illegal content, e.g. defamatory material or content infringing intellectual property rights, such as within the framework of a "notice and take down" procedure. However such requirements cannot be imposed with regard to legal information that has entered the public domain and would interfere with the publisher's right to freedom of expression. This would, according to the AG, amount to privately-enforced censorship.

Google's freedom of expression expert, William Echikson, expressed satisfaction with the Opinion: "This is a good opinion for free expression," he said. "We're glad to see it supports our long-held view that requiring search engines to suppress legitimate and

legal information would amount to censorship." AEPD declined to comment on the Opinion, but noted that its recently quite aggressive practice of requesting Google to delete information on behalf of Spanish citizens was not meant to suppress free expression or alter the historical record.

It has been hypothesised that the Opinion could inform the debate on the before the new proposal for a revised Data Protection Directive currently before European Parliament and the Council. The proposal foresees a new "right to be forgotten" that would allow EU citizens far greater control over the online display of personal information. However, existing and future legislation should not be conflated: the Opinion could have the opposite effect, drawing European legislator's notice to the current vulnerabilities of EU citizens and encouraging them to adopt the proposal.

Unfortunately, the full Opinion is not currently available on the CURIA website. It should be noted that although the Opinions of Advocate's General are not binding, the Court of Justice follows their recommendations in roughly three-quarters of all cases. A final decision is expected by the end of the year.

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