

“THE RIGHT TO BE REMEMBERED?”: THE CONTEMPORARY CHALLENGES OF THE “STREISAND EFFECT” IN THE EUROPEAN JUDICIAL REALITY

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Summary: The protection of human privacy is one of the most disputable topics of European human rights law. That is why the judicial practice of the European Supranational Courts is rich in numerous decisions in this area, since human privacy is one of the most violated human rights, especially in the context of the development of digital technologies. Trying to find protection of their rights through institutional mechanisms of human rights (in particular, through the CJEU and the ECtHR), the applicant often finds himself/herself in a more difficult position: he/she becomes even more an object of public discussion. This phenomenon is especially vividly illustrated by the judicial practice of the European Supranational Courts in the field of protection of the right to be forgotten, which will be paid attention to in this research. At the same time, some suggestions will also be put forward to strengthen the effectiveness of protecting the confidentiality of applicants in the judicial decisions of the Courts.

Keywords: the right to be forgotten, human privacy, Streisand effect, Internet, personal data.

1 Introduction

The right to be forgotten is one of the most discussed human rights in the digital world. In the legal literature, there is a large number of works devoted to the analysis of the *Google Spain* case, which laid the foundation for the fur-

ther development of this right in EU law.¹ It is correctly emphasized that: “Even though the right to erasure had already been included in Article 12 of the Data Protection Directive since 1995, the concept of being ‘forgotten’ on the Internet was catapulted to the forefront of public and academic debate in 2014 by the Google Spain judgment of the Court of Justice of the European Union (CJEU).”² Such interest on the part of lawyers and researchers in the field of human rights has a rational explanation. The fact is that with the development of digital technologies, the protection of human privacy and its relationship with freedom of expression and information has become even more problematic than it was before the advent of the Internet (i.e. in the “offline” world). So, if before the development of digital technologies, information was mainly published in newspapers or shown on TV (i.e. distributed among a geographically limited circle of people), and after a certain period of time people often forgot about the information received, then in the age of digitalization information about a person can be obtained by any Internet user from different parts of the world and in conditions when “(t)he Internet does not forget”.³

It turns out that information can already be stored, displayed and/or processed perpetually by third parties (even those we may not know about), which in turn infringes on the privacy and dignity of a person in the digital world. “*Errare humanum est*” – said the Romans, but digital technologies take away from us our natural right to make a mistake (even unintentional), and often such digital technologies become a “weapon” against ourselves, for example, through news websites, forums and/or other social networks (for example, Facebook, Instagram, Twitter, etc.).⁴ In such conditions, when digital technologies are rapidly

- 1 For example, see: JONES, Meg Leta. *Ctrl + Z: The Right to Be Forgotten*. New York: NYU Press, 2016, 256 p. Available at: <http://www.jstor.org/stable/j.ctt1803zhx>. See also: LAMBERT, Paul. *The Right to Be Forgotten*. London: Bloomsbury Professional, 2019, 544 p. Available at: <https://www.bloomsburyprofessional.com/uk/right-to-be-forgotten-9781526521958/>; KOCHARYAN, Hovsep; VARDANYAN, Lusine; HAMULÁK, Ondřej; KERIKMÄE, Tanel. Critical Views on the Right to Be Forgotten After the Entry Into Force of the GDPR: Is it Able to Effectively Ensure Our Privacy? *International and Comparative Law Review*, 2021, vol. 21, no. 2, pp. 96–115. <https://doi.org/10.2478/iclr-2021-0015>; HAMULÁK, Ondřej, VARDANYAN, Lusine, KOCHARYAN, Hovsep. The Global Reach of the Right to be Forgotten through the Lenses of the Court of Justice of the European Union. *Czech Yearbook of Public and Private International Law*, 2021, vol. 2021, no. 12, pp. 196–211; ANDRAŠKO, Jozef and MESARČÍK, Matúš. Those Who Shall Be Identified: The Data Protection Aspects of the Legal Framework for Electronic Identification in the European Union. *TalTech Journal of European Studies*, 2021, vol. 11, no. 2, pp. 3–24. <https://doi.org/10.2478/bjes-2021-0012>.
- 2 LIEVENS, Eva & VANDER Maelen, Carl. A Child's Right to be Forgotten: Letting Go of the Past and Embracing the Future? *Latin American Law Review*, 2019, no. 2, pp. 61–79. Available at: <https://revistas.uniandes.edu.co/doi/pdf/10.29263/lar02.2019.03>.
- 3 MARKS, Demi. The Internet Doesn't Forget: Redefining Privacy Through an American Right to Be Forgotten. *UCLA Entertainment Law Review*, 2016, vol. 23, no. 1, pp. 41–64. Available at: <https://escholarship.org/uc/item/4n00j4j3>
- 4 For example, in the case of *Einarson v. Iceland* the ECtHR held that the publication of a

developing, we willy-nilly become “perpetual slaves” of what we ourselves have said and/or done, or what third parties have told us and/or done. Of course, this phenomenon also existed before the development of digital technologies, but in the “offline” world information did not have such a wide and cross-border availability as it is nowadays. Moreover, in the “offline” world even the most up-to-date information was usually subjected to moral aging and was often forgotten after a certain period of time. This is precisely the socio-psychological prerequisites for the formation and development of the right to be forgotten: it strives to become a “lifeline” for human privacy and reputation in the conditions of the “unforgettable” Internet, however it faces various obstacles on its way, which negates its privacy-protective potential. Moreover, the case of *Google Spain* itself, which laid the foundations of the right to be forgotten in the EU’s legal reality, caused a number of questions and uncertainties regarding the essence and nature of this right. As F. Ahmed notes: “(...) the ECJ has given rise to many questions regarding the implementation, applicability and effectiveness of the RTBF. There has been a significant change in the RTBF landscape and new issues have arisen which need to be sufficiently addressed in order to ensure proper implementation and application of the RTBF”.⁵ One of such obstacles is created by the judicial decisions of the European Supranational Courts themselves, which will be analyzed in more detail and disclosed on the example of such cases as, for example, *GC and Others v. CNIL*, *Khalili v. Switzerland*,⁶ *M.L. and W.W. v. Germany*,⁷ etc.

2 How does the CJEU inadvertently protect the “right to be remembered”?

As already noted above, in the age of digitalization, information becomes easily accessible to anyone, anywhere and at any time, since the “bottomless” space of the Internet endlessly stores various kinds of personal data. As Van Hoboken correctly notes, the advent of the Internet has “(...) given rise to new services that contribute to the public information environment and facilitate access to information and ideas and provide platforms for socialization, discussion and debate. Search engines have a particular role in these discussions of course, since they help users to retrieve information about individuals posted online, regardless of whether it is still relevant, correct, or favorable for the particular individuals

photo on Instagram violated article 8 of the ECHR (i.e. the right to respect for private life), since a published photo on a publicly accessible website may reach a large number of Internet users (See: Case of Egill Einarsson v. Iceland (Application No. 24703/15) Judgment Strasbourg 7 November 2017, Final 07/02/2018.

- 5 AHMED, Farhaan Uddin. Right to be forgotten: a critique of the post-Costeja Gonzalez paradigm. *Computer and Telecommunications Law Review*, 2015, vol. 21, no. 6, pp. 175–185. 2015. Available at: <https://www.repository.cam.ac.uk/handle/1810/253527>
- 6 Case of *Khalili v Switzerland* (Application no. 16188/07) Judgment Strasbourg 18 October 2011.
- 7 Case of *M.L. and W.W. v. Germany* (Applications nos. 60798/10 and 65599/10) Judgment Strasbourg 28 June 2018.

involved”⁸ Today, more than ever, human privacy is under serious threat, and EU law is trying to provide protection opportunities for data subjects, for example, through the same right to be forgotten. The CJEU is so aware of the seriousness and urgent need to protect human privacy and personal data in the digital age that it extends the right to be forgotten beyond the EU’s territorial borders, which can be seen when analyzing the cases of *Google v. CNIL*⁹ and *Eva Glawischnig-Piesczek v. Facebook Ireland Limited*¹⁰. Although some scholars, such as J. Kaganoff, argue that: “(t)he right to be forgotten does have boundary limitations (and) (t)he recent European Court of Justice case, *Google v. CNIL*, restricted the delisting obligation to the European Union and did not extend it to Google’s worldwide operations”¹¹, nevertheless, we do not agree with such a position as the case of *Eva Glawischnig-Piesczek v. Facebook Ireland Limited* clearly showed that the right to be forgotten is “a floor not a ceiling”¹², when in the cases of defamation the Court extended the application of this right worldwide.

It should be noted that the policy of extraterritoriality of the CJEU in the cases concerning the right to be forgotten has a fairly simple explanation: the EU is the guarantor of the protection of the right to privacy and personal data enshrined in the EU Charter on Fundamental Rights (hereinafter – the “CFR”), and the Court accordingly applies all the steps necessary for the effective protection of these rights in the digital age. The CJEU clearly understands that in conditions of unlimited Internet it is impossible to link data with any specific geographical territory, therefore the Court develops its interpretation in line with extraterritoriality.¹³ Moreover, the EU is trying to strengthen its position in the digital world as a guarantor of the rights of its own citizens, and the right to be forgotten thereby becomes one of the foundations for the formation and development of its digital sovereignty.¹⁴ However, despite the fact that the CJEU itself, through its own case

8 VAN HOBOKEN, Joris V.J. *The Proposed Right to be Forgotten Seen from the Perspective of Our Right to Remember Freedom of Expression Safeguards in a Converging Information Environment*. Luxembourg: Publications Office of the European Union, 2013, 30 p. Available at: <https://publications.jrc.ec.europa.eu/repository/handle/JRC86747>.

9 Case C-507/17 *Google LLC, successor in law to Google Inc. V Commission nationale de l’informatique et des libertés (CNIL)*, ECLI:EU:C:2019:772.

10 Case C-18/18 *Eva Glawischnig-Piesczek v Facebook Ireland Limited*, ECLI:EU:C:2019:821.

11 KAGANOFF, Jay. Send the Word Over There: An Offshore Solution to the Right to Be Forgotten. *Northwestern Journal of International Law & Business*, 2021, vol. 41, no. 2, pp. 245–271. Available at: <https://scholarlycommons.law.northwestern.edu/njilb/vol41/iss2/4>

12 SAMONTE, Mary. *Google v CNIL Case C-507/17: The Territorial Scope of the Right to be Forgotten Under EU Law*. *European Law Blog*, 29 October 2019. Available at: <https://europeanlawblog.eu/2019/10/29/google-v-cnll-case-c-507-17-the-territorial-scope-of-the-right-to-be-forgotten-under-eu-law/>.

13 See: EICHENSEHR, Kristen. Data Extraterritoriality. *Texas Law Review*, 2017, vol. 96, pp. 145–160. Available at SSRN: <https://ssrn.com/abstract=3009774>.

14 See: FABBRINI, Federico and Edoardo CELESTE. The Right to Be Forgotten in the Digital Age: The Challenges of Data Protection Beyond Borders. *German Law Journal*, 2020, vol. 21, no. S1, pp. 55–65. DOI: <https://doi.org/10.1017/glj.2020.14>.

law, gradually draws the contours of the right to be forgotten, nevertheless, it itself turns this right into an instrument unsuitable for the protection of human privacy in the digital world. The problem lies in the very wording that the Court uses in its judicial decisions concerning the right to be forgotten. For example, as indicated in the Court's decision: "(...) when an internet user entered Mr. Costeja González's name in the search engine of the Google group ('Google Search'), he would obtain links to two pages of *La Vanguardia's* newspaper, of 19 January and 9 March 1998 respectively, on which an announcement mentioning Mr. Costeja González's name appeared for a real-estate auction connected with attachment proceedings for the recovery of social security debts."¹⁵ That is, as one can already notice, the CJEU itself directly indicates the information that the data subject tried to hide from third parties when applying to the Court in order to protect his privacy and reputation. Thus, Mr. Costeja, who became a "new celebrity" due to the negligent disclosure of the facts by the CJEU, got into an even more difficult situation: now his name is associated with the same information that he tried to hide, no matter how ironic this phenomenon may sound, and gradually more and more this situation aggravates. The problem of Mr. Costeja is that the right to be forgotten is a very controversial tool for the protection of human privacy and reputation, therefore the number of scientific publications dedicated to the topic of the right to be forgotten are growing exponentially. In this context, any researcher who conducts research on the problematic aspects and existing challenges of this right, first of all, studies the story of Mr. Costeja.

At the same time, this phenomena is not new in judicial practice and is known in legal literature as a manifestation of the "Streisand effect", which, in turn, means a paradox when information that is being hidden from third parties attracts even more attention.¹⁶ Various examples can be given to show how the negligence of the Court can lead to the ineffectiveness of the protection of human privacy and reputation in the digital age, and even more – to failure for the plaintiff himself/herself, regardless of the outcome of such a case.¹⁷ Moreover,

15 Case C-131/12 *Google Spain SL and Google Inc. v Agencia Española de Protección de Datos (AEPD) and Mario Costeja González*, ECLI:EU:C:2014:317.

16 See: CARTER, Edward L. The Right To Be Forgotten. *Oxford Research Encyclopedia of Communication*, 22 November 2016. Available at: <https://oxfordre.com/communication/view/10.1093/acrefore/9780190228613.001.0001/acrefore-9780190228613-e-189>.

17 For example, one of the manifestations of "Streisand effect" is the case of Robert Šlachta. In July 2016, the Czech national court imposed a fine of 8000 CZK on an activist with the pseudonym Tomáš Zelený for insulting the police. He called the former head of the ÚOOZ, Robert Šlachta, an "eared tractor driver" ("*ušatý traktorista*") and mocked the police officers. The event would not have come to wider awareness if it had not been for the fine and the statement of Robert Šlachta, who stated as follows: "Firstly, I never drove a tractor, but a combine harvester, and secondly, the person we investigated spoke this way not only about me, but also about the entire unit". On social networks, jokes and funny collages on the theme of a tractor and a combine harvester immediately began to arise. Available at: <https://domaci.hn.cz/c1-65402980-zdar-utvare-nebo-usaty-traktorista-slachta-soud-bude-resit-pokutu-pro-aktivistu-za-urazku-policie>.

the *Google Spain* case clearly illustrates that the “Streisand effect” is able to turn even a little-known person into a real celebrity, regardless of the will of the latter, not to mention the celebrities themselves. Moreover, it is possible that the right to be forgotten can be used as a means of PR, and the “Streisand effect” seems to be the basis for conducting such PR, which makes it possible to attract the attention of third parties to one’s personality. For example, one can analyze the same case of *Streisand v. Adelman*¹⁸ from this angle. It is likely that Ms. Streisand filed a lawsuit against the journalist, who photographed her house in Malibu, not because of the desire to remove the photo from the website, but precisely because of the desire to be in the spotlight as a celebrity, regardless of the success of the case itself. If so, then the plaintiff’s PR was successful: the number of views of the photo of Ms. Streisand’s house increased sharply after the American court considered the above case. Of course, this is not a fact, but just an assumption, not devoid of rational explanation. The example we have given shows that the right to be forgotten may be abused and used not for its purpose by those applicants who are trying to be in the public spotlight. Of course, this should not be allowed, since every human right has its own purpose, and any abuse of human rights should be prohibited. Therefore, the courts, including the CJEU, should be careful in describing the factual circumstances of the case under consideration in order to prevent not only violations of human privacy and reputation, as in the case of *Google Spain* through the “Costeja paradox”, but also to prevent the use of the right to be forgotten for the PR purposes.

The “Streisand effect”, which is associated with the name of Mr. Costeja and, is far from the only case in the judicial practice of the CJEU. For example, the same phenomenon can be seen in the case of *Eva Glawischnig-Piesczek v Facebook Ireland Limited*, where the negligence of not the CJEU itself, but the Advocate General, who did not conceal information of a defamatory nature in his opinion, is already striking: “On 3 April 2016 a user (...) also published (...) an accompanying disparaging comment about the applicant accusing her of being a ‘lousy traitor of the people’, a ‘corrupt oaf’ and a member of a ‘fascist party’. (...) namely that the applicant was a ‘lousy traitor of the people’ and/or a ‘corrupt oaf’ and/or a member of a ‘fascist party’.”¹⁹ As it is possible to notice, Ms. Eva Glawischnig-Piesczek got into the same predicament as Mr. Costeja in the *Google Spain* case. However, the problem here is even more complex: if we assume that in the case of Mr. Costeja the newspaper of *La Vanguardia* just mentioned an undesirable fact of objective reality for the plaintiff regarding his “proceedings for the recovery of social security debts”, then in the case of Ms. Eva Glawischnig-Piesczek, we can see a comment that has no connection with objective reality, but shows only the subjective opinion of the Internet user in a rude and indecent form through such expressions

18 *Barbara Streisand vs. Kenneth Adelman Et. Al.*, Case No. SC077257, Superior Court of California, County of Los Angeles.

19 Opinion Of Advocate General Szpunar delivered on 4 June 2019 Case C-18/18 *Eva Glawischnig-Piesczek v Facebook Ireland Limited*, ECLI:EU:C:2019:458, para 12, 14.

as “lousy traitor of the people”, “corrupt oaf” and “a member of a ‘fascist party’”. That is, based on the analysis of the above cases, we can say that the “Streisand effect” is possible not only in the case of truthful but undesirable information, but also in the case of defamatory information, which further aggravates the problem we are considering. Of course, we understand that the personal rights of public figures are being more seriously attacked, and such a person should bear a greater burden and show greater tolerance, as, for example, it was indicated in the case of *Lingens v. Austria*²⁰, but nevertheless such public figures are also need to protect their privacy, reputation and dignity, so the greater burden and tolerance does not mean that they do not need to be protected from the “Streisand effect”. It turns out that in the digital world, a person can even be associated with information that is just a product of subjective and/or “groundless” fantasy and/or opinion of any Internet user, regardless of whether the Court considered it as a defamation or not. This shows how far even incorrect information is ready to go in the digital world, and therefore it is necessary to change the approach of formulating factual circumstances both on the part of the CJEU and on the part of other participants in the judicial process (such as, for example, Advocate General) in order to avoid the above cases in the future.

In this regard, the third case, which we will consider below, differs from the previous cases considered. In particular, the Court’s judgment in the case of *GC and Others v. CNIL*²¹ deserves special attention. In accordance with this case, the Court had to consider the complaint of four applicants (GC, AF, BH and ED), each of whom demanded to remove links in the list of results displayed by the Google search engine in response to a search by their names, leading to web pages published by third parties, which Google, in turn, refused to do. This information can be found in more detail in the paragraphs 25–28 of the case under consideration. So, in accordance with the circumstances of the case “GC requested the de-referencing of a link leading to a satirical photomontage placed online pseudonymously on 18 February 2011 on YouTube, depicting her alongside the mayor of a municipality whom she served as head of cabinet (...) during the campaign for the cantonal elections in which GC was then a candidate. (...)”. In his turn, another person “AF requested de-referencing of links leading to an article in the daily newspaper *Libération* of 9 September 2008, (...), concerning the suicide of a member of the Church of Scientology in December 2006. AF is mentioned in that article in his capacity as public relations officer of the Church of Scientology (...)”. As for the third applicant “BH requested the de-referencing of links leading to articles, mainly in the press, concerning the judicial investigation opened in June 1995 into the funding of the *Parti républicain* (PR), in which he was questioned with a number of businessmen and political personalities (...)”. At last, the fourth applicant “ED requested the de-referencing of links leading to two articles published

20 Case of *Lingens v. Austria* (Application no. 9815/82). Judgment Strasbourg, 8 July 1986.

21 Case C-136/17 Judgment of the Court of 24 September 2019. *GC and Others v Commission nationale de l’informatique et des libertés (CNIL)*. ECLI:EU:C:2019:773.

*in Nice Matin and Le Figaro reporting the criminal hearing during which he was sentenced to 7 years' imprisonment and an additional penalty of 10 years' social and judicial supervision for sexual assaults on children under the age of 15".*²²

Based on the above, it is easy to see that the distinctive feature of the case under consideration is the anonymity of the applicants. Of course, if we compare with the description of the factual circumstances of the previous two cases, then in this case the applicant's confidentiality is protected much more effectively, since it is impossible to find out who exactly the case concerns. However, there are still circumstances that leave some "clues" for identifying the identity of the applicants themselves and information on the Internet. For example, if we assume that the abbreviated names of applicants are most likely only the first letters of their first and last names and the CJEU does not hide their gender, and the information that applicants would like to delete is in specific links indicating the date of publication of such information (for example, "*on 18 February 2011 on YouTube*" or "*in the daily newspaper Libération of 9 September 2008*"), then the possibility of identifying such persons still remains. That is, the approach of the Court in hiding the applicants' names against the background of the two previous judicial precedents may be considered as commendable, but it still seems to us that there is a room for the Court to refine its practice. We believe that the most effective way to protect the applicant's privacy would be, firstly, indicating not the first letters of their first and last name, but to use a random letter or a combination of letters, which is typical for the judicial practice of the ECtHR in cases concerning the protection of the privacy and confidentiality of their applicants, such as in the case of *X, Y and Z v. The United Kingdom*²³ or *A and B v. Croatia*²⁴, or renaming applicant with frequently occurring names, for example, *John and George v. CNIL*, and, secondly, hiding references to publication dates and sources, where the information that is the subject of the case is specified, indicating, for example, not "*in the daily newspaper Libération of 9 September 2008*", but only "*in the newspaper*" or deliberate distortion of facts that do not affect the merits of the case, or indicating, for example, not "*in the daily newspaper Libération of 9 September 2008*", but "*in the daily newspaper of 11 April 2013*". Of course, this does not mean that the CJEU should hide all the information from the factual circumstances when considering cases of this nature, since in this case it will be impossible to understand on the basis of which facts the Court came to a certain conclusion. It seems to us that the Court should indicate them in such a way that it is impossible to identify the applicant's identity, but without "damaging" the essence of the case at the same time. In other words, the Court should think about the policy of *aurea mediocritas*²⁵ to ensure an effective *status*

22 Ibid, para. 25–28.

23 Case of *X, Y and Z v. The United Kingdom*, 75/1995/581/667, Council of Europe: European Court of Human Rights, 22 April 1997.

24 Case of *A and B v. Croatia* (Application no. 7144/15) Judgment Strasbourg 20 June 2019.

25 Aristotle, *Nicomachean Ethics* II.1

quo between the presentation of the facts and the protection of confidentiality of the applicants.

Moreover, we should not forget that the CJEU is the main “creator” of the right to be forgotten, which has the potential to protect human privacy and reputation in the digital world. However, the risk of the “Streisand effect” may negatively affect the judicial practice of the CJEU. As M. Mach correctly notes: “(...) an increase in judgments can be expected over the next few years due to the right having existed for longer and been used more, and parallel with this the Streisand effect could appear in more cases”.²⁶ Consequently, it is important to avoid “Streisand effect” in such new cases, otherwise nobody will apply to the Court for protection of his/her privacy and the right to be forgotten will remain an abstract and vague instrument, without prospects for further development in the dynamic digital world. In this context, as correctly noted by N. Culik and C. Döpke: “In order to prevent negative side effects, like the Streisand effect, requests for deletion must be dealt with confidentially”.²⁷

3 [...] But is the CJEU the only “PR manager”?

Based on the analysis of the above-mentioned judicial precedents, a logical question arises: why in the first two analyzed cases all information about the applicants is publicly available, but in the last case (i.e. in the case of *GC and others v. CNIL*) some measures are applied to protect the confidentiality of the applicants? The answer to this question will allow us to understand that the “culprits” in violating the confidentiality of the applicants are not only the CJEU or the AG, but also the courts of the EU member States. This is explained by the fact that the basis of the three analyzed cases is the request for a preliminary ruling under Article 267 TFEU, providing that: “*The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning: (a) the interpretation of the Treaties; (b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union; Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon*”. This means that the factual circumstances of the case became known to the CJEU from the materials transmitted by the national courts dealing with the aforementioned cases, which in turn did not themselves take measures to protect the confidentiality of the applicants before sending their preliminary requests to the Court. Moreover, the national laws of EU Member

26 MACH, Martin. Streisand Effect in the Context of the Right to be Forgotten. *European Studies – the Review of European Law, Economics and Politics*, 2022, vol. 9, no. 1, pp. 110–121, DOI: 10.2478/eustu-2022-0005.

27 CULIK, Nikolai; DÖPKE, Christian. About Forgetting and Being Forgotten. In HOEREN, Thomas, KOLANY-RAISER, Barbara (eds). *Big Data in Context – Legal, Social and Technological Insights*. Cham: Springer, 2018, pp. 21–28. https://doi.org/10.1007/978-3-319-62461-7_3

States provide for mechanisms to protect the confidentiality of their applicants. In particular, article 232 (§3) of the Spanish Organic Law 6/1985 on the Judiciary, which provides that: «3. *Under exceptional circumstances, for motives of public order and the protection of freedoms and rights, Judges and Courts may, via a ruling providing grounds, limit the scope of public access and order all or part of the proceedings to be secret in nature*». In such circumstances, if in the *Google Spain* case the Spanish national court had followed the above provision even before sending the preliminary request to the CJEU, the name of Mr. Costeja Gonzales would not have received such a great resonance.

In this context, the French national court in the case of *GC and others v. CNIL* was even more far-sighted than the national courts of Spain and Austria in the cases of *Google Spain* and *Eva Glawischnig-Piesczek v. Facebook Ireland Limited*. In particular, the French national court clearly understood that when referring a number of questions for a preliminary ruling concerning the right to be forgotten to the CJEU, the protection of the applicants' privacy and reputation is important in order to avoid a new "Costeja paradox" in the future. Before the judicial proceedings, the French Council of State also noted that during the consideration of the case, the names of the applicants will be anonymized *ex officio*, stressing that any party may request anonymization of their data during proceedings in the CJEU.²⁸

This means that a mere change in the CJEU's case-law is not sufficient to achieve the desired result: a change in the judicial practice of the national courts of the EU Member States themselves is also important and necessary.

4 What about the ECtHR's judicial approach on the right to be forgotten?

Although we refer to the ECtHR's case law as an example in some places of our research when analyzing the CJEU's case law, this does not mean that the above deficiencies do not occur in the ECtHR's judicial practice: it is enough to pay attention, for example, to the presentation of the factual circumstances in the cases of *Khalili v. Switzerland*²⁹ and *M.L. and W.W. v. Germany*³⁰.

Thus, based on the circumstances of *Khalili v. Switzerland* case, the applicant, Ms. Sabrina Khalili, is a French national, who was born in 1959 and lives in Saint Priest (France). During a police check in Geneva in 1993, the police found Ms. Khalili to be carrying calling cards which read: "*Nice, pretty woman, late thirties,*

28 See: REES, Mark. Droit à l'oubli : l'effet Streisand peut être évité dans les décisions de la CJUE". *Nextimpact.com*, 14 March 2017. Available at: <https://www.nextinpact.com/article/25880/103671-droit-a-oubli-effet-streisand-peut-etre-evite-dans-decisions-cjue?fbclid=IwAR3KQQEmXTXq8ifKNeNl8y26xOAta-IfQHUrMkvzYfd5oJPrGD4ncBFzLLg>

29 Case of *Khalili v. Switzerland* (Application no. 16188/07) Judgment Strasbourg 18 October 2011.

30 Case of *M.L. and W.W. v. Germany* (Applications nos. 60798/10 and 65599/10) Judgment Strasbourg 28 June 2018.

would like to meet a man to have a drink together or go out from time to time. Tel. no. (...).” In 2001 two criminal complaints of threatening and insulting behaviour were lodged against Ms. Khalili and in 2003 she found out from a letter issued by the Geneva police that the word “prostitute” still figured in the police files, which she demanded to delete from the police records.³¹ As one can see, there are a number of similarities in the manner of non-confidential description of factual circumstances between the specified case and, for example, the cases of *Google Spain* or *Eva Glawischnig-Piesczek v Facebook Ireland Limited*.

Another example is the case of *M.L. and W.W. v. Germany*, where the applicants were half-brothers sentenced to life imprisonment by German courts for the murder of a famous German actor. In 2007, they filed a lawsuit against the *Deutschlandradio* radio station, the weekly magazine *Der Spiegel* and the daily newspaper *Mannheimer Morgen*, demanding the removal of their personal data on the respective Internet websites where information about the applicants’ crime had been posted, which was later rejected by the German Federal Court. The German court justified its judgment by the fact that one of the aims of the mass media is to participate in the formation of democratic opinion by making available to the public old news that has been preserved in their archives, so the applicants appealed to the ECtHR on the basis of Article 8 of the European Convention on Human Rights (the right to respect for private life). However, when considering the case, the ECtHR makes the same mistake as the CJEU did in *GC and Others v. CNIL*. In particular, if one pay attention to the paragraph 7 of the Court’s judgment, it is possible to notice, how this judicial decision, though hiding the names of the applicants, but at the same time contains the facts, allowing to easily identify the applicants. In particular, the Court specifies the following: “The applicants are half-brothers. On 21 May 1993, following a criminal trial based on circumstantial evidence, they were sentenced to life imprisonment for the 1991 murder of W.S., a very popular actor. They lodged an appeal on points of law which was dismissed in 1994. On 1 March 2000 the Federal Constitutional Court decided not to entertain their constitutional appeals (nos. 2 BvR 2017/94 and 2039/94) against the decisions of the criminal courts. An application to the Court lodged by the applicants concerning those proceedings (no. 61180/00) was rejected on 7 November 2000 by a three-judge committee on the grounds that the applicants had not lodged their constitutional appeals in accordance with the procedural rules laid down by the Federal Constitutional Court Act (unpublished decision)”.³² Of course, based on the facts of the case, in particular the abbreviation “W.S.” and the case numbers in the German courts’ judgments, we can easily determine that the case is related to information about the murder of the famous German actor *Walter Sedlmayr*. Since we were able to find information about the victim of the crime, it is also easy to determine who the applicants of the case are: just the simple search for “*Walter Sedlmayr’s murder*” in the Google search engine

31 See: Press release issued by the Registrar of the Court ECHR 195 (2011), 18. 10. 2011.

32 *M.L. and W.W. v. Germany*. Para. 7

allows to identify the applicants. So, the search shows the following information, which can be found on the English version of Wikipedia: “On 21 May 1993, two half-brothers, *Wolfgang Werlé* and *Manfred Lauber*, former business associates of Sedlmayr, were found guilty of his murder and sentenced to life in prison. The killers were released from prison in 2007 and 2008”.³³ Thus, as a result of a careless approach in describing the factual circumstances on the part of the ECHR, it became possible to easily identify the identity of the applicants in the specified case: if “M.L.” is *Manfred Lauber*, then “W.W.” is *Wolfgang Werlé*. As we can see, hiding the names of the applicants does not guarantee that they cannot be identified, so both the CJEU and the ECtHR should be very careful in presenting the facts of the cases in the future.

There are other cases in the case law of the ECtHR when the Court does not protect the applicants’ data and thereby puts them at risk of a new “Streisand effect”. In particular, such court cases include the cases of *Fuchsman v. Germany* и *Węgrzynowski and Smolczewski v. Poland*, to which M. Mach also drew attention in his scientific publication.³⁴ Indeed, when studying these cases, we receive too much information about the applicants, while they applied to the Court in order to protect their privacy and reputation. So, when analyzing the case of *Fuchsmann v. Germany*, one can see that: “*The applicant, Boris Fuchsmann, is a German national who was born in 1947 and lives in Düsseldorf (Germany). He is an internationally active entrepreneur in the media sector and runs the company Innova Film*”.³⁵ As we can see, it is already clear who the applicant is in this case. Further, the Court describes the factual situations of the case as follows: “*Mr Fuchsmann, who was one of the owners of a broadcasting company in Kiev, had ties to Russian organised crime, according to the FBI and European law enforcement agencies. The article further reported: that a FBI report had described Mr Fuchsmann as an embezzler, whose company in Germany was part of an international organised crime network; that he was barred from entering the United States; and that his company Innova was part of a Russian organised crime network, according to U.S. and German law enforcement agencies*”.³⁶ In this case, the Court did not find a violation of Article 8 of the ECHR (i.e. the right to private life), but we affirm that regardless of whether the Court found a violation or not, in cases concerning the right to private life there is a serious problem of protecting the applicant’s confidentiality. By ensuring the applicant’s confidentiality when considering such cases, the Court, as a guarantor of human rights, will itself show its respect for the human rights that it protects. We believe that such

33 Available at: https://en.wikipedia.org/wiki/Walter_Sedlmayr.

34 MACH, Martin. Streisand Effect in the Context of the Right to be Forgotten. *European Studies – the Review of European Law, Economics and Politics*, 2022, vol. 9, no. 1, pp. 110–121, DOI: 10.2478/eustu-2022-0005.

35 See: Case of *Fuchsmann v. Germany* (Application no. 71233/13). Judgment Strasbourg, 19 October 2017. Final 19/01/2018, Recital 7. See also: Press Release issued by the Registrar of the Court, ECHR 313 (2017) 19. 10. 2017.

36 *Ibid.*

a practice will in no way upset the balance between freedom of expression and information and the right to private life in favor of the right to private life. At the same time, it is possible to simultaneously protect the confidentiality of the applicant and describe the factual circumstances in such a way that anyone who wants to read the judicial decision can get acquainted with the circumstances of the case and understand the legal reasoning of the Court. This is the way the ECtHR should move when describing the factual circumstances of the case in its judicial decision.

In another similar case, in the case of *Węgrzynowski and Smolczewski v. Poland*³⁷, the applicants' confidentiality is also not protected. We will find out their names, place of residence as well as the name of the newspaper where the article was published. At the same time, the Court hides the data of journalists in its judicial decision. And here the question arises: why does the Court hide the data of journalists, realizing the importance of ensuring their confidentiality, but does not hide other important data, for example, the names of the applicants or information on the newspaper, etc.? In this context, the logic of the Court is not entirely clear on the description of the factual circumstances of this case. We believe that the Court most likely does not have a uniform policy on how to effectively ensure the applicants' confidentiality, and therefore, in various cases, the Court takes different approaches to describing the factual circumstances. Such a difference can be noticed when studying the cases, we have indicated in this research.

As you can see, the above cases are capable of weakening the principle emerging from the observations of ECtHR that the right of privacy (art 8 of the ECHR) and right for freedom of expression (art 10 of the ECHR) should be treated equally and the legal solutions should balance the rights, which, in turn, was emphasized by the Court in such cases as, for example, *Axel Springer AG vs. Germany*, *Von Hannover vs. Germany* (nr 2), *Delfi AS vs. Estonia* and *Pauliukienė and Pauliukas vs. Lithuania*.³⁸ This practice is the natural consequence of the fact that from the very beginning the Court did not properly take care of protecting the applicant's privacy and hiding information that was the subject of the dispute in the case under consideration. The problem is that a lot of unnecessary information is disclosed in court cases, which makes it easy to identify both the applicants and the information they wanted to hide. That is, in this case, freedom of information prevails over the protection of the applicant's privacy and reputation, while the Court must ensure their effective coexistence.

37 Case of *Węgrzynowski and Smolczewski v. Poland* (Application No. 33846/07) Judgment Strasbourg 16 July 2013 Final 16/10/2013.

38 See: *Axel Springer AG vs. Germany*, para 87; *Von Hannover vs. Germany* (nr 2), para 106; *Delfi AS vs. Estonia* para 82; *Pauliukienė and Pauliukas vs. Lithuania*, EIKo 5.11.2013, nr 18310/06, para 51.

5 Conclusion

Based on the analysis of the judicial practice of the CJEU and the ECtHR in cases concerning the right to be forgotten, including the practice of national courts on the example of French, Austrian and Spanish national courts, we can conclude that at the moment the protection of the applicant's privacy and reputation in the judicial proceedings is not effective enough. Moreover, both the CJEU and the ECHR equally carelessly describe the factual circumstances and face the same problems. In particular, the practice shows that the applicants, who have applied to the CJEU and the ECtHR for the removal of unwanted information, have often become even more connected with such information in the digital world. At the same time, the Courts should clearly understand that the relationship between privacy and freedom of expression and information has always been and remains a painful topic for the human rights law in general. For the effective coexistence of these two fundamental rights, it is necessary that the Courts carefully describe the factual circumstances of the cases in their judicial decisions concerning the implementation of the right to be forgotten. Otherwise, we will witness new cases of the "Streisand effect", which will leave its negative imprint on the further development of the case law of the European Supranational Courts.

We believe that the best solution on the part of the Courts will be to adhere to the policy of the "golden mean" when describing the factual circumstances in the judicial decisions. That is, on the one hand, the Courts must ensure the protection of the applicants' confidentiality, so that it is not possible to identify the applicants and their data and, on the other hand, the Courts should indicate the factual circumstances in such a way that it is clear from which facts the Courts developed their legal reasoning. It is possible to ensure these two steps at the same time: one does not contradict the other, otherwise it would be impossible to simultaneously protect both the right to privacy and freedom of expression and information, as the EU protects in the CFR, and the Council of Europe – in the ECHR.

We believe that the solution to the problem we are considering lies in finding a proportionate and adequate balance between the confidentiality of the applicants and the description of the main factual circumstances of the case. The practice that we have indicated above should be applicable in any case where the subject of the case is the right to be forgotten. Moreover, this practice should be applicable regardless of the results of the case. This will help to avoid future cases of the "Streisand effect" and at the same time ensure both respect for a person's private life by the Courts and prevent abuse of this right (for example, as a means of PR). Thus, the Courts will arouse even greater confidence in the eyes of applicants as guarantors of human rights protection, and will not make them afraid of defending their rights in the Courts.

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