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CRITICAL VIEWS ON THE RIGHT TO BE FORGOTTEN AFTER THE ENTRY INTO FORCE OF THE GDPR: IS IT ABLE TO EFFECTIVELY ENSURE OUR PRIVACY?

Hovsep Kocharyan

Faculty of Law, Palacký University Olomouc, Czech Republic

hovsep.kocharyan01@upol.cz

Lusine Vardanyan

Faculty of Law, Palacký University Olomouc, Czech Republic

lucyrossetti77@gmail.com

Ondrej Hamuľák

Faculty of Law, Palacký University Olomouc, Czech Republic

ondrej.hamulak@upol.cz

Tanel Kerikmäe

Faculty of Law, TelTech Law School, Estonia

tanel.kerikmae@taltech.ee

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Summary: This scientific paper is devoted to the critical analysis of the right to be forgotten after the entry into force of the GDPR, including the analysis of the existing case-law of the Court of Justice of the European Union (hereinafter – the CJEU) on the above right, as well as the legislative experience of the EU member States. The main research questions of this paper are as follows: Does the right to be forgotten effectively protects human privacy? What are the main shortcomings of the right to be forgotten in law enforcement practice? How can such shortcomings be corrected in order to improve the effectiveness and practicality of the right to be forgotten? The authors try to find reasonable solutions to the practical issues related to the realization of the right

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to be forgotten and offer their vision of improving the effectiveness of this right in the European legal practice.

Keywords: the right to be forgotten, personal data, controller, data subject, privacy, reputation.

1 Introduction

The right to be forgotten (or as it is called in the scientific literature "*the right to erasure*", "*the right to oblivion*" or "*the right to delist"*) is a "product" of the judicial activism of the CJEU.[1] The emergence and development of the right to be forgotten in the European legal practice is mainly connected with the unprecedented case of *Google Spain* (or the "*Costeja case*")[2], This judgment brought to the fore a lot of new questions about the legal essence and nature of the right to be forgotten and the scope and limits of application of this right in the European legal practice. At the same time, some scholars have been critical of the emergence of a right to be forgotten in law enforcement practice. As E. Lee points out: "The EU right to be forgotten is a new privacy right (or a new application of privacy to Internet search engines) that has sparked great controversy around the world. The major concern among critics of the decision is that it will lead to censorship of information on the Internet by making it difficult, if not impossible, to find relevant articles associated with a person."[3] In turn, N. Andrade adheres to the position that: "The criteria for applying the right to be forgotten would concern the occurrence of an incorrect representation of one's identity, that is, the verification of a mismatch between the identity conveyed by outdated information and the one the individual now wishes to convey".[4]

Despite the critical approaches of different scholars and experts regarding the right to be forgotten and the judgment of the CJEU in the case of *Google Spain*, other scholars considered the emergence of the right to be forgotten in the European legal practice on the positive side, arguing that this right can coexist with freedom of expression and information and in the conditions of reasonable delineation of their borders and effective balancing of their coexistence, the right to be forgotten can provide the data subject with an opportunity to perform his/her privacy protection on Internet, which "doesn't forget".[5] For example, L. Cook

1 See e.g. PAVELEK, Ondřej and ZAJÍČKOVÁ, Drahomíra. Personal Data Protection in the Decision-Making of the CJEU Before and After the Lisbon Treaty. TalTech Journal of European Studies, 2021, vol. 11, no. 2, pp.167–188. https://doi.org/10.2478/bjes-2021-0020.

2 C131/12 Google Spain SL and Google Inc. v Agencia Española de Protección de Datos (AEPD) and Mario Costeja González, EU:C:2014:317.

3 LEE, Edward. The Right to Be Forgotten v. Free Speech. *I/S: A Journal Of Law And Policy For The Information Society*, 2015, vol. 12, no.1, p. 110.

4 De ANDRADE, Norberto. Oblivion: The Right to Be Different from Oneself – Reproposing the Right to Be Forgotten. *IDP. Revista de Internet, Derecho y Política*, 2012, no. 13, pp. 122–137.

5 See MARKS, Demi. The Internet Doesn't Forget: Redefining Privacy Through an Ameri-

notes: "The right to be forgotten represents a positive shift in cyberspace law and policy because it increases individuals' control over personal information, and restores the balance between free speech and privacy in the digital world"[6], in the conditions when "(...) the Internet has robbed individuals of both privacy and autonomy in a sense that we no longer have the choice to keep certain information private, nor do we have the freedom not to speak"[7].

It should be noted that the growing interest in the right to be forgotten is because nowadays ensuring the protection of the right to privacy as one of the fundamental human rights in the EU is one of the most important tasks of the EU human rights law. In this context, the emergence of the phenomenon of the right to be forgotten in the EU law can be understood as a confident step forward in the process of ensuring the human privacy protection of the data subject in the digital age, because as S. Alessi correctly states: "Once information is uploaded, the Internet stores it permanently, in what has been called "digital eternity". Hence, when personal information is uploaded online, our most embarrassing or painful moments may acquire lasting significance and haunt our lives. The Internet is an integral part of our lives to collect information, manage finances, socialize, and shop. Thus, it risks infringing upon individuals' right to privacy"[8]. In turn, J. Rosen also argues that: "(...) the right to be forgotten addresses an urgent problem in the digital age: it is very hard to escape your past on the Internet now that every photo, status update, and tweet lives forever in the cloud".[9]

However, despite its focus on the protection of human privacy, the right to be forgotten is not without serious shortcomings, the presence of which significantly weakens its privacy-protective potential in the digital world. In this context, the following question naturally arises: What are the main shortcomings of the right to be forgotten in the law enforcement practice, and how can such shortcomings be corrected to improve the effectiveness and practicality of the right to be forgotten in the digital age? We will try to find out the answers below.

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can Right to Be Forgotten. *UCLA Entertainment Law Review*, 2016, vol. 23, p. 41; see also: RAZMETAEVA, Yulia. The Right to Be Forgotten in the European Perspective, *TalTech Journal of European Studies*, 2020, vol. 10, no. 1, pp. 58–76 or SINGLETON, Shaniqua. Balancing A Right To Be Forgotten With A Right To Freedom Of Expression In The Wake Of Google Spain v. AEPD. *The Georgia Journal of International and Comparative Law*, 2015, vol. 44, no. 1, pp. 165–193.

6 COOK, Lyndsay. The Right to be forgotten: a step in the right direction for cyberspace law and policy. *Journal of Law, Technology & the Internet*, 2015, vol. 6, pp. 121–132.

7 Ibid

8 ALESSI, Stefania. Eternal Sunshine: The Right to Be Forgotten in the European Union after the 2016 General Data Protection Regulation. *Emory International Law Review*, 2017, vol. 32, no. 1, pp. 145–171.

9 ROSEN, Jeffrey. The right to be forgotten. *Stanford Law Review Online*, 2012, vol. 64, pp. 88–92.

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2. The right to be forgotten: a "vague" right for the EU purposes?

The specified right remains as a "vague concept"[10] and insufficiently developed in law enforcement practice, which requires its improvement, although the GDPR establishes certain criteria and guidelines for the implementation of this right. This is primarily explained by the fact that the main burden of determining the guidelines and standards for the implementation of the above-mentioned right, as a rule, lies on the judicial activism of the CJEU, which, based on a case-by-case analysis, gradually explains and outlines the contours of this right. In particular if we look at the evolution of the case-law of the CJEU on the right to be forgotten, we can see that if in one case the Court recognizes the existence of such a right, in another it outlines the territorial scope of its application by the EU borders, in the third, it establishes the possibility of exercising the right to be forgotten outside the EU in the case of defamation, etc. As we can see, the very right to be forgotten as such is mainly "created" through evolutionary law-making on the part of the CJEU, regardless of its consolidation in the GDPR. Consequently, S. Kulk and F. Zuiderveen Borgesius rightly note that: "We can expect much more case law on delisting requests. More case law will hopefully lead to more guidelines for deciding delisting requests."[11] The emergence of such "vague" right, which develops almost exclusively as a result of the law-making of the CJEU in conditions when "digital imperialism" becomes the goal of many developed countries, becomes a kind of tool for asserting its digital power for the EU far beyond its borders (*See the case of C-18/18 Eva Glawischnig-Piesczek v Facebook Ireland Limited*). Of course, on the one hand, it may be considered as an advantage, but on the other hand, if we take into account that the rulings of the CJEU, which are "aimed" at extending their rules to the global digital order, will face the risk of not being able to ensure the "coercive force" of its rulings, this may be considered a disadvantage. This means that making judgments that are not destined to become reality can significantly reduce the credibility of the CJEU itself, which in turn need an effective solution in the law-enforcement practice.

3... or a legal mean for privacy protection?

Often considering questions about the right to be forgotten, we intuitively "slip" into the sphere of privacy. And maybe not just intuitively. Even if article 16 (1) of the TFEU states that "Everyone has the right to the protection of personal data concerning them" and the CFR in its Article 8(1) indicates the emergence

10 AUSLOOS, Jef. The 'Right to be Forgotten' – Worth Remembering? *Computer Law & Security Review*, 2012, vol. 28, no. 2, pp. 143–152.

11 KULK, Stefan; ZUIDERVEEN BORGESIUS, Frederic. Privacy, Freedom of Expression, and the Right to Be Forgotten in Europe. In Selinger, E.; Polonetsky, J. & Tene, O. (eds.), *The Cambridge Handbook of Consumer Privacy*, Cambridge University Press, 2018, pp. 301–320.

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of an independent right to personal data protection, separate to that of privacy[12], the Directive 2002/58/EC[13] or the Directive 2006/24/EC[14] continued to maintain this connection. It is also noticeable in the text of the Directive 95/46/EC (hereinafter – DPD), where the word "privacy" is repeated many times. That is why the consideration by the CJEU of new cases concerning the implementation of the right to be forgotten as a mean of privacy protection is inevitable. This is evidenced even by the rate of Internet users contacting Google with requests to delist their personal data from the Internet: The Big Data Company during the three years of the existence of the right to be forgotten, having considered about 2.3 million URL removal requests from Internet users, of which the vast majority (about 90 percent) were individuals, satisfied only 43% of such requests.[15] Such an interest of Internet users in protecting their privacy has even led to the emergence of such companies, whose business activities are based on the provision of services for the implementation of the right to be forgotten.[16] However, during its existence, the right to be forgotten has already managed to show its "Achilles' heel" in the law enforcement practice, which requires new and effective approaches to increase its privacy-protective potential. The central question when analysing further the relationship between the right to be forgotten and privacy is the motivation of the individuals for seeking protection. It may be a case of another study to find out the categories of claims presented by those who are concerned about the information being publicly available both by private data managers as well as public authorities. The report of the Estonian Ombudsman, for example, reveals that the main reason for taking action has been the fear to lose (or not find) a position or job due to the published data (such as criminal records available)[17].In this framework it is important to emphasize that "a clearer picture of the actual objective of a new fundamental right is necessary. The proclamation of a right to be forgotten as such does not suffice. It recalls the myth of Pandora's box: Impelled by her natural curiosity, Pandora opened the box and all the evils contained in it escaped."[18] To understand how the right to be

12 DE HERT, Paul. The Right to Protection of Personal Data. Incapable of Autonomous Standing in the Basic EU Constituting Documents? *Utrecht Journal of International and European Law*, 2015, vol. 31, no. 80, p. 2.

13 Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector.

14 Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC.

15 BERTRAM, Theo; BURSZTEIN, Elie; CARO, Stephanie et al. *Three years of the right to be forgotten*, online 2018.

16 GESENHUES, Amy. *The Inevitable Happened: First Company Provides "Right To Be Forgotten" Removal Service*, online 2014.

17 See the Report of Estonian Ombudsman 2019, online.

18 WEBER, H. Rolf. The Right to Be Forgotten: More Than a Pandora's Box? *JIPITEC – Jour-*

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forgotten should be developed to "unlock" its privacy-protective potential, it is necessary to pay attention to the main shortcomings of this right, which will be discussed below in more detail.

3.1 Judicial neglecting of data confidentiality

One of the shortcomings of the right to be forgotten is connected with the very jurisprudence of the CJEU. So, if one pay attention to the rulings of the CJEU in cases concerning the right to be forgotten, one can see that the Court itself or the Advocate Generals (hereinafter – AG), making decisions or opinions on such cases, often neglect the rules for maintaining the confidentiality of personal data subjects who have requested the deletion of their data from the Internet.

For example, in the case of *Google Spain SL and Google Inc. v Agencia Española de Protección de Datos (AEPD),* in particular, in paragraph 14, the Court describes in detail the subject of the case under consideration without preserving the confidentiality of the data subject: "(...) 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."[19] Of course, on the one hand, one can understand this approach of the Court, since the case of Mr. Costeja González was unprecedented in the Court's case-law, but despite this fact, the Court should have thought about carefully describing the factual circumstances and its consequences for the applicant, so as not to create such a "paradox".[20] It turns out that the CJEU's judgment in the *Costeja* case had an opposite effect on the data subject – instead of the right to be forgotten, his right to be remembered was realized. It is correctly noted that: "For Mr. González the decision has resulted in something of a curious irony: his bid not to be indefinitely linked through Google search to information concerning his debts was successful, but as a result of that success he is likely to be linked to the information he wished forgotten for a long time to come".[21]

Another similar example is the case of *Eva Glawischnig-Piesczek v Facebook Ireland Limited.* So, if we pay attention to paragraphs 12 and 14 of *the Opinion of AG Szpunar* in the above-mentioned case, it can be noted that the applicant's data, as well as the subject of the case under consideration, are not kept confiden-

nal of Intellectual Property, Information Technology and E-Commerce Law, 2011, vol. 2, no. 2, pp. 121–130.

19 C131/12 Google Spain SL and Google Inc. v Agencia Española de Protección de Datos (AEPD) and Mario Costeja González, EU:C:2014:317, para 14.

20 SCHECHNER, Sam. Google Defends 'Right to Be Forgotten' Response. The Wall Street Journal, online 19/11/2014.

21 BUNN, Anna. The curious case of the right to be forgotten. *Computer Law & Security Review*, 2015, vol. 31, no. 3, pp. 336–350.

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tial here as well. In these paragraphs, it is noted that: "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'. The content placed online by that user could be consulted by any user of the platform in question. (...) As Facebook Ireland did not remove the comment in question, the applicant brought an action before the Handelsgericht Wien (Commercial Court, Vienna, Austria) and requested the court to issue an injunction ordering Facebook Ireland to cease publication and/or dissemination of the photographs of the applicant if the accompanying message disseminated the same allegations and/or 'equivalent content', namely that the applicant was a 'lousy traitor of the people' and/or a 'corrupt oaf' and/or a member of a 'fascist party'.[22]

Naturally, in the circumstances mentioned above, it is impossible to talk about the effectiveness of the right to be forgotten, when the CJEU in its judgment or the AG in his/her opinion does not preserve the confidentiality of the data subject when considering the cases on the right to be forgotten. It turns out that even if the applicant, who applied to the Court regarding the performance of his right to be forgotten, achieves the removal of his unwanted personal data, such personal data will still be publicly available (for example, on the official websites http://curia.europa.eu or https://eur-lex.europa.eu), and everyone can get to know them. Such a practice undoubtedly seriously weakens the effectiveness of the right to be forgotten, and this is one of the reasons why this right turns into just a useless tool for the data subject in the context of his/her privacy protection. This situation appears to weaken 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[23].

In our view, the most sensible approach that will be able to enhance the effectiveness of the right to be forgotten and to protect the legitimate interests of the participants of the case is the preservation of the rules of confidentiality in matters regarding the implementation of the right to be forgotten so that those scholars or experts interested in the analysing of the case-law of the CJEU will not able to get access, for example, to the name and surname of the data subject and other personal data concerning him/her that are the subject of this case. Of course, this in no way means that the Court should not mention these factual circumstances in its decision at all, otherwise this practice will create difficulties for scholars in researching the case-law of the Court in cases concerning the implementation of the right to be forgotten. The bottom line is that the Court in

22 AG Opinion, C-18/18 Eva Glawischnig-Piesczek v Facebook Ireland Limited, EU:C:2019:458, para 12, 14.

23 See, for example, Axel Springer AG vs. Germany, p 87; Von Hannover vs. Germany (nr 2), p 106; Delfi AS vs. Estonia p 82; Pauliukienė and Pauliukas vs. Lithuania, EIKo 5.11.2013, nr 18310/06, p 51.

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its judgment and the AG in his/her opinions should indicate the factual circumstances of the case, taking into account the legitimate interests of the data subject, while noting his/her data as vaguely and superficially as possible, or hiding such data from public access.

3.2 No *ex ante* protection and shared burden between data subjects and data controllers

Another disadvantage of the right to be forgotten is that it, like other rights enshrined in the GDPR, is an *ex post* right by its nature. In other words, the right to be forgotten can only be applied when the personal data is already being processed and the data subject requests the controller to delete it. This, in turn, significantly reduces the potential of the right to be forgotten as the protection of privacy of a person, as from the date of publication of personal data on the Internet until its removal at the request of the subject's data may take a reasonable time in which an unlimited number of Internet users can find data given, and some of them may even engage in the collection, processing, and storage of these data in their benefit even before the mentioned data will be deleted by the controller, what the data subject itself naturally may not know. As J.A. Cannataci, B. Zhao and others rightly note: "Within technical and commercial environments that involve functionalities that rely upon the collection, storage and/or processing of data, which often present constant threats to privacy, it is not difficult to abuse and misuse personal data for purposes not desired and/ or consented to by the relevant data subjects. (...) Such collected information (data) can be used, abused and misused by government bodies, business institutions and individuals for any number of purposes, without the knowledge of the data subjects".[24] In addition, if we consider the wording of the provision, specified in part 1 of Article 17 of the GDPR, which establishes the right to be forgotten, we can notice the use of the term "*without undue delay*", where the question naturally arises: what exactly is the period meant in this provision? It should be noted that the CJEU in its case-law also does not provide for a specific time frame for determining *"without undue delay"*. For example, in the case of *C-443/18 European Commission v Italian Republic* the Court held that the concept "*without undue delay*", given its usual meaning in the ordinary language, corresponds to a period of several weeks or even several months.[25] In another case, *C-151/98 P Pharos SA v Commission of the European Communities*, the Court pointed out that the concept of *"without delay"* gives a *"certain degree of latitude"* in the question of determining such a period.[26] As we can see, the concept of "*without undue delay*" is evaluative and remains at the discretion of the data controller, in which it is

24 CANNATACI, Joseph; ZHAO, Bo et.al. Balancing Privacy and Transparency and Redefining Their New Boundaries in the Internet Ecosystem. *UNESCO Internet Study*, 2016.

25 C-443/18 European Commission v Italian Republic, EU:C:2019:676, para 38.

26 C-151/98 P Pharos SA v Commission of the European Communities, EU:C:1999:563, para 25.

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not known when the data will be deleted and how many Internet users can get acquainted with such data within such a period.[27]

All of the above points to the inability and impracticability of the right to be forgotten as a mean of protecting human privacy in the digital age. As M. Cunningham rightly points out: "In the long term, the right to be forgotten will not realize the goal of ensuring privacy to Europeans who seek to remove their personal information from public access (...) Until the EU conforms its policy-making to the Internet's architecture, ongoing regulatory efforts will promote, if anything, unintended anti-trust consequences rather than privacy objectives."[28]. This requires the EU legislator, first of all, to develop a new policy and strategy to improve the effectiveness of the application of this right. In our opinion, an effective solution can serve, for example, the development of the possibility of implementing the right to be forgotten *ex ante*, which will allow the data subject, who wants to avoid the processing of certain unwanted data concerning him/her in the future (even before their processing), as well as who wants to hide certain data concerning him/her from the Internet public, to request the data controller to delete such data as soon as they appear on the Internet. In this case, the data subject will be able to exercise its right to be forgotten not only as an *ex post* but also as an *ex ante*, where the burden of detecting the processing of such data and controlling its deletion will lie not only on the data subject but also on the data controllers. In turn, the data controller, upon detection of such processing, guided by the data subject's request, as well as by the criteria and restrictions outlined in Article 17 GDPR and developed by the case-law of the CJEU will either promptly delete the information, or inform the data subject about the impossibility of removing such information notifying the reasons and legal ground of such refusal. In any case, regardless of the decision, the controller will be obliged to provide the data subject with an electronic link to the website where such data was published and processed, to ensure that the data subject has the right to be informed about the processing of their data. This approach, of course, will to some extent increase the effectiveness of the right to be forgotten, since it will allow the data subject to exercise this right before processing his/her personal data on the Internet.

Of course, if we proceed from the logic of the case of *C136/17 GC and Others v Commission nationale de l'informatique et des libertés (CNIL)*, it will turn out that restrictions and prohibitions regarding data processing cannot be applied *ex ante*: the specified restrictions and prohibitions apply "(...) to that operator only by reason of that referencing and thus via a verification, under the super-

27 See also new problems related to e-identification in 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.

28 CUNNINGHAM, McKay (2017) Privacy Law That Does Not Protect Privacy, Forgetting the Right to be Forgotten. *Buffalo Law Review*. 2017, vol. 65, p. 502.

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vision of the competent national authorities, on the basis of a request by the data subject."[29] The above-mentioned circumstance is also stated by J. Globocnik, noting that: "Against this backdrop, the prohibitions and restrictions of Art. 9 GDPR cannot apply to a search engine operator *ex ante* and systematically, but rather by way of an *ex post* verification (...) Therefore, in an attempt to be given the 'privilege' of only *ex post* application of prohibitions and restrictions enshrined in Art. 9 GDPR, companies in comparable situations, i.e. those not able to *ex ante* and systematically assess and control what data will be processed by them (e.g. different web scrapers), might be able to refer to the judgment in *GC and Others* in similar legal proceedings."[30] Nevertheless, we should not forget that the right to be forgotten as a pure *ex post* right also does not justify itself in the effective protection of human privacy in the digital age, and accordingly, a new approach is more than necessary.

Even though the possibility of *ex ante* application of the right to be forgotten will help to increase the level of protection of the data subject's privacy, we should not forget about the business interests of the data controllers, since this approach will create an additional burden for such controllers, putting them in a difficult position in the context of finding an effective balance between their business and the data processing obligation. First of all, *AG Jääskinen* did not agree with this policy, stating in the Opinion that: "(...) the internet search engine service provider cannot in law or in fact fulfill the obligations of controller provided in Articles 6, 7 and 8 of the Directive concerning the personal data on source web pages hosted on third-party servers. Therefore, a reasonable interpretation of the Directive requires that the service provider is not generally considered as having that position. An opposite opinion would entail internet search engines being incompatible with EU law, a conclusion I would find absurd. (...)"[31]. However, in the Google Spain case, the CJEU decided to take a different approach, ruling that "(...) it is clear that it cannot be justified by merely the economic interest which the operator of such an engine has in that processing. However, (...) a fair balance should be sought in particular between that interest and the data subject's fundamental rights under Articles 7 and 8 of the Charter. (...) It is the search engine operator which determines the purposes and means of that activity and thus of the processing of personal data that it carries out within the framework of that activity and which must, consequently, be regarded as the 'controller' in respect of that processing pursuant to Article 2(d)."[32] In this context, D. Hoffman cor-

29 C136/17 GC and Others v Commission nationale de l'informatiqueet des libertés. Judgment of the Court, EU:C:2019:773, para 47.

30 GLOBOCNIK, Jure. The Right to Be Forgotten is Taking Shape: CJEU Judgments in GC and Others (C-136/17) and Google v CNIL (C-507/17), *GRUR International – Journal of European and International IP Law*, 2020, vol. 69, no. 4, pp. 380–388.

31 AG Opinion C-131/12 Google Spain SL Google Inc. v Agencia Española de Protección de Datos (AEPD) Mario Costeja González, EU:C:2013:424, para 89, 90.

32 C131/12 Google Spain SL and Google Inc. v Agencia Española de Protección de Datos (AEPD) and Mario Costeja González, EU:C:2014:317, para 33, 81.

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rectly notes that this kind of policy will require Big Data companies: "(...) to invest significant time and resources to comply with the decision. It also requires them to play the role of front-line adjudicators for the right to delisting. (...) Each company—Google, Yahoo, Bing, Facebook, others—must review the facts of the request and determine whether they meet the vague standard established by the court. (...) This process puts an unfair burden on the internet companies, while at the same time delivering unpredictable results for the individuals (the information may be delisted by one search engine and not another)."[33]

It appears to us that although in the case of *C136/17GC and Others* the Court referring to paragraph 48 of the case of *Volker und Markus Schecke and Eifert, C92/09 and C93/09*[34] held that: "(...) Regulation 2016/679, in particular Article 17(3)(a), (...) expressly lays down the requirement to strike a balance between the fundamental rights to privacy and protection of personal data guaranteed by Articles 7 and 8 of the Charter, on the one hand, and the fundamental right of freedom of information guaranteed by Article 11 of the Charter, on the other",[35] the above-mentioned approach of the Court can put the freedom of speech and information on the Internet in a risky situation. This can be explained by the fact that the GDPR provides for huge fines for violations of the data processing conditions, and in this context, J. Rosen rightly notes that: "the prospect of ruinous monetary sanctions for any data controller that "does not comply with the right to be forgotten or to erasure"—a fine up to 1,000,000 euros or up to two percent of Facebook's annual worldwide income — could lead data controllers to opt for deletion in ambiguous cases, producing a serious chilling effect".[36] This will lead to the fact that Big Data companies such as Facebook or Google, to avoid huge fines under the GDPR, at the request of the data subjects will delete any information directly or indirectly, fully or partially related to such a data subject, regardless of the source of such information, which will lead to the removal of a very significant amount of data from the Internet. This is the main argument of critics of the right to be forgotten, who are convinced that "it will lead to censorship of information on the Internet by making it difficult, if not impossible, to find relevant articles associated with a person"[37]. In this context, the co-founder of Wikipedia J. Wales refers to the judgment of the CJEU in the *Google Spain* case as "one of the most wide-sweeping internet censorship rulings that (he's) ever

33 HOFFMAN, David. Creating an Internet Obscurity Center: Reducing the Burden of Google Spain on Businesses, *LawFare online*, 2016.

34 Joined Cases C92/09 and C93/09 Volker und Markus ScheckeGbR and HartmutEifert Land Hessen, EU:C:2010:662, para 48.

35 C136/17GC and Others v Commission nationale de l'informatique et des libertés (CNIL), EU:C:2019:773, para 57, 59.

36 ROSEN, Jeffrey. The right to be forgotten. *Stanford Law Review Online*, 2012, vol. 64, pp. 88–92.

37 LEE, Edward. The Right to Be Forgotten v. Free Speech. *I/S: A Journal Of Law And Policy For The Information Society*, 2015, vol. 12, no.1, p. 110.

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seen",[38] indicating that "History is a human right and one of the worst things that a person can do is attempt to use force to silence another", in the connection of which the right to be forgotten is presented to him as a "deeply immoral" right, which can lead to a situation when the Internet will be "riddled with memory holes".[39]

In our opinion, the EU legislator, considering the above, should think not only about the possibility of the implementation of the right to be forgotten as an *ex post* right but also to consider the option of *ex ante* application of this right, so that it was based on already existing criteria and limitations provided for in Article 17 GDPR and following the standards developed by the CJEU's and ECtHR's case-law. This, of course, does not mean in any way that the data controller undertakes to always delete such information as soon as the data subject exercises its right to be forgotten: it should be not forgotten that the right to personal data protection is not unlimited. At the same time, a review of the implementation of the right to be forgotten is not enough: it is necessary to think about a new effective system for monitoring the implementation of such a right, which will help to avoid a collision of this right with other fundamental human rights, such as, first of all, freedom of speech and information. Naturally, when processing data, the companies in most cases will be guided by their business interests, which will violate the currently existing fragile *status quo* between freedom of speech and information and the right to privacy in favour of the latter to avoid fines under the GDPR. To save the data subject from the need to constantly monitor his/her data, and the Big Data companies from the additional burden of data processing, the most effective solution is to create special data control agencies (accountable to the national DPAs) that will take over the function of the main data controller and directly consider the requests of Internet users, and based on the principles of legality, objectivity, and impartiality and taking into account the national DPA's guidelines and recommendations, take all necessary measures. By several authors, rather journalistic independence is in danger, and "a new, more precise framework is required that will sufficiently and efficiently support journalistic autonomy and editorial independence and prevent further non-transparent digital manipulation of the past"[40].

3.3 Limitless scope of application?

According to part 1 of Article 17 of the GDPR: "The data subject shall have the right to obtain from the controller the erasure of personal data concerning

38 LEE, Dave. Google ruling 'astonishing', says Wikipedia founder Wales, *BBC News*, 14/05/2014.

39 CURTIS, Sophie and PHILIPSON, Alice. Wikipedia founder: EU's Right to be Forgotten is 'deeply immoral, The Telegraph online, 06/08/2014.

40 MILOSAVLJEVIĆ, Marko; POLER, Melita; ČEFERIN, Rok. In the Name of the Right to be Forgotten: New Legal and Policy Issues and Practices regarding Unpublishing Requests in Slovenian Online News Media, Digital Journalism, 2020, vol. 8, no. 6, 780–796.

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him or her without undue delay and the controller shall have the obligation to erase personal data without undue delay (...)", and according to the part 1 of the Article 4 of the GDPR: "'personal data' means any information relating to an identified or identifiable natural person ('data subject'); an identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person". As D. McGoldrick notes: "the right to be forgotten is complex to formulate in legal terms because its ambit encompasses a wide range of different matters. Some are closely related to traditional aspects of privacy but some go much wider".[41] Based on the above wording of the GDPR provisions, it can be noted that the right to be forgotten gives the data subject a very wide scope of application, and extends its effect to all personal data, as they are enshrined in the GDPR, in which the implementation of an incorrect policy of balancing the above rights by the EU legislator may jeopardize freedom of speech and information, as was noted in more details above.

At the same time, we believe that not all data should be included in the scope of application of the right to be forgotten and be deleted from the Internet. For example, the deletion of a particular entrepreneur's data may affect the accuracy and ability of the financial institutions to conduct, for example, AML/CFT due diligence or risk assessment procedures. Another example can be the deletion of data about the employee (for example, in connection with the presence of a criminal record, if, of course, this is not false information), that will not allow the employer to duly and properly collect information about the candidate before hiring him/her.

The ambiguity of the scope of application of this right is also expressed in the "vague" nature of its relationship with freedom of speech and information at the EU level. Thus, according to the paragraph "a)" of Part 3 of Article 17 of the GDPR, 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", while according to the part 2 of the Article 85 of the GDPR: "For processing carried out for journalistic purposes or the purpose of academic artistic or literary expression, Member States shall provide for exemptions or derogations from (...), Chapter III (rights of the data subject), (...) if they are necessary to reconcile the right to the protection of personal data with the freedom of expression and information." As we can see, the GDPR itself does not provide clear guidelines and standards for the relationship between the right to be forgotten and freedom of speech and information, but only leaves their provision to the discretion of the EU Member States themselves. It seems to us that this approach

41 McGOLDRICK, Dominic. Developments in the Right to be Forgotten, *Human Rights Law Review*, 2013, vol. 13, no. 4, pp. 761–776.

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of the EU legislator cannot be considered as a correct solution, since the protection of fundamental human rights should not lie on the EU Member States, but on the EU itself. We should not forget that from the moment when the EU Charter on fundamental rights (the "CFR") became one of the binding primary sources of the EU law, the EU has thereby become the primary guarantor of the protection of fundamental human rights, including the right to protection of personal data and the right to privacy and freedom of expression and information. Moreover, if the EU legislator at the EU level does not properly regulate and balance the relationship between the right to be forgotten and freedom of speech and information, but leaves it to the discretion of the EU Member States, then what is the effectiveness, practicality, and meaning of the right to be forgotten as a mean of human privacy protection at the EU level, when, as a rule, the personal data of a person is affected precisely in the framework of the implementation of freedom of speech and information on the Internet, and, in particular, in journalistic activities? Despite the specified circumstances, such an EU policy has its supporters, noting that "The ruling and the European Commission have made it clear that the right to be forgotten should not be applied for journalistic work", that "must not be touched; it is to be protected".[42] However, in our opinion, such a policy is not without drawbacks. As N. J. Reventlow rightly points out in her research: "Article 85 refers to journalism, academia, art, and literature as examples of circumstances in which such exemptions would be necessary, resulting in a broader scope for exemption from GDPR rules. This broader scope allows for exemptions to apply to free speech contexts other than journalism, but also gives EU member states such flexibility that free speech protections can differ significantly between jurisdictions (...) However, the exact nature of the journalistic exemption is left to the individual member states to define. This poses two risks: first, that certain states will adopt national legislation that does not offer the same level of protection to the right to freedom of expression and freedom of the press that international law does; and second, that certain states will fail or be slow to adopt any legislation at the national level providing for a journalistic exemption to the data protection obligations under the GDPR."[43]

If we conduct a comparative analysis of some EU member states' settlement of the issue of the relationship between the right to be forgotten and freedom of speech at the level of their national legislation, then each legislator in its own way exercises the margin of appreciation granted to them under the part 2 of the Article 85 of the GDPR. For example, the legislators of some EU member States, such as Austria or Sweden, take the position of prioritizing freedom of speech and information over the right to be forgotten, in particular for journalistic, artistic, or literary purposes. Thus, paragraph 9 of the Austrian Data Protection

42 PALEIT, Andreas; FONTANELLA-KHAN, James; PICKARD Jim. Google's removal of BBC article raises censorship fears. *CNN Business Online*, 03/07/14.

43 REVENTLOW, Nani Jansen. Can the GDPR and Freedom of Expression Coexist? *AJIL Unbound*, 2020, vol. 114, pp. 31–34.

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Act provides that: "To the extent necessary to reconcile the right to protection of personal data with freedom of expression and information, (...) Chapter III (rights of the data subject) (...) do not apply to processing carried out for scientific, artistic or literary purposes"[44] and Section 7 of the Swedish Data Protection Act provides that: "the GDPR and the Data Protection Act shall not be applied to the extent that it would breach the laws on freedom of expression. The Data Protection Act provides that articles 5–30 and 35–50 of the GDPR shall not apply to the processing of personal data for journalistic purposes or purposes of academic, artistic, or literary expressions."[45]

It seems to us that the above-mentioned policy of the legislators is not quite true: when part 2 of article 85 of the GDPR provides discretion for Member States of the EU, such discretion is *"to reconcile*" right to be forgotten and freedom of expression and information through the use of *"exemptions"* or *"derogations"*, but not to completely exclude one of these rights to enforce the other one. Moreover, as a rule, on the Internet, a person's personal data is affected when carrying out journalistic activities as the main method of implementing freedom of speech and information, and if the EU member States completely exclude the application of the right to be forgotten in such cases, it is possible to say that the right to be forgotten does not apply in the case of the implementation of freedom of speech in general.

In turn, the legislators of other EU Member States, such as, for example, Slovakia, adhere to the position that: "personal information may be processed without a data subject's consent for journalistic, academic, artistic and literary purposes. However, such processing must not breach a data subject's right to personality protection and privacy."[46] Of course, unlike the above cases, the Slovak legislator tries to find a balance between the right to be forgotten and freedom of speech for journalistic, academic, artistic, and literary purposes, but still, this provision is also ambiguous and "vague". In this context, N. J. Reventlow adds that: "It is difficult to imagine how a reporter would be able to escape this circular reasoning when investigating a potential case of corruption".[47]

Taking into account the above, it seems to us that at the level of EU legislation, more specific grounds and circumstances should be clearly provided for when the right to be forgotten prevails over freedom of speech and information, and vice versa. It should be not forgotten that: "In principle, privacy and freedom of expression have equal weight in Europe – which right prevails depends on

44 BundesgesetzzumSchutznatürlicherPersonenbei der Verarbeitungpersonenbezogener Daten (Datenschutzgesetz – DSG) StF: BGBl. I Nr. 165/1999 (NR: GP XX RV 1613 AB 2028 S. 179. BR: 5992 AB 6034 S. 657.) [CELEX-Nr.: 395L0046].

45 Swedish Personal Data Act (1998:204); issued 29 April 1998.

46 See Zákon 18/2018 Z. z. z 29. novembra 2017 o ochrane osobných údajov a o zmene a doplnení niektorých zákonov (§ 78).

47 REVENTLOW, Nani Jansen. Can the GDPR and Freedom of Expression Coexist? *AJIL Unbound*, 2020, vol. 114, pp. 31–34.

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the circumstances of a case".[48] Of course, it will be practically impossible to find such a border between the above-mentioned rights that will be able to ensure the simultaneous and full realization of these rights without limiting each other, but nowadays a clear and reasonable delineation of these rights in the European legal practice is still more than necessary. This is because, on the one hand, unbalanced protection of freedom of expression will negate the right to be forgotten, which will endanger the privacy and reputation of the individual who will be deprived of the opportunity to protect his/her rights, but on the other hand, the abuse of the right to be forgotten will devalue freedom of expression and information and will lead to history rewriting.[49] In this regard, it seems to us that the EU legislator should think not about leaving the application of the right to be forgotten in the implementation of freedom of speech and information at the discretion of the EU Member States, but about the possibility of finding a reasonable and objective balance between these rights at the level of EU law, for example, by adopting a new EU Regulation that can properly resolve problematic issues of the relationship between privacy and freedom of speech and information on the Internet, taking into account the existing guidelines and standards of judicial practice of the CJEU and the ECtHR. We believe that the codification and unification of such principles, standards, and guidelines will allow us to better navigate in the application of the GDPR provisions and the right to be forgotten in particular, than when the main burden of such delineation lies on the judicial activism of the CJEU and the ECtHR and the case-by-case principle.

4 Conclusion

We seem to be far away from the transnational and cross-border application of the right to be forgotten. As David Erdos has mentioned "most concrete action on the right to be forgotten will ultimately remain focused at the national or, in the case of the EU, also the regional level"[50]. However, this makes the EU even more under the pressure to find a pathway that leads the right to be forgotten to be more defined and structured. Taking into account the questions of this research, it can be stated that the right to be forgotten in its current regulation is not able to properly and effectively protect human privacy on the Internet: it remains just as a "vague" right, but not as a real mean for privacy protection, although it may have such potential in the future if its main shortcomings are corrected. The essential deficiencies that weaken the privacy-protective potential of the specified rights the authors see, first of all, in the following circumstances, in particular: 1) viola-

48 KULK, Stefan; ZUIDERVEEN BORGESIUS, Frederic. Privacy, Freedom of Expression, and the Right to Be Forgotten in Europe. In Selinger, E.; Polonetsky, J. & Tene, O. (eds.), *The Cambridge Handbook of Consumer Privacy*, Cambridge University Press, 2018, pp. 301–320.

49 MAYES, Tessa. We have no right to be forgotten online, The Guardian Online, 18/03/2011.

50 ERDOS, David. The 'right to be forgotten' beyond the EU: an analysis of wider G20 regulatory action and potential next steps, Journal of Media Law, 2021, vol. 13, no. 1, p. 5.

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tion of the rules of confidentiality on the part of the CJEU and other participants of the judicial process; 2) application of this right as a mean of subsequent protection (ex post), but not as a mean of preventive protection (ex ante); 3) improper and ineffective burden-sharing of data control between the big data companies (data controllers) and data subjects in ensuring the protection of the privacy of the latter, and, finally, 4) lack of clear, specific, reasonable and effective balance between the right to be forgotten and freedom of speech and information at the EU level. Consequently, we adhere to the position that the adoption of the following measures can positively affect the effectiveness of the right to be forgotten, such as 1) ensuring the data confidentiality by the CJEU and other participants of the judicial process in the cases regarding the implementation of article 17 of the GDPR; 2) providing the data subjects with the possibility of applying the right to be forgotten not only as an ex post but also as an ex ante right; 3) creating a new system for sharing the burden of data processing control, eliminating the burden of control for both data subjects and companies; and 4) providing of more specific and clear grounds and circumstances when the right to be forgotten prevails over freedom of speech and information, and vice versa at the EU level. We believe that only in this case, the right to be forgotten can potentially serve as an effective legal mean for privacy protection in the digital world without compromising other fundamental rights.

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