

» **Mario Costeja vs. Google**
**How can freedom of expression,
right to privacy and management
of reputation coexist?**

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The European Court of Justice (ECJ) [finally resolved](#), on 13 May 2014, the preliminary ruling (Case C-131/12) referred by the Spanish National High Court by order of 27 February 2012.

The case dates back to 2010, when Mr. Costeja lodged a complaint to the AEPD (Spanish Data Protection Agency) against newspaper La Vanguardia and Google Spain and Google Inc. Mr. Costeja claimed that when a user looked for his name in the Google search engine, the list of results would show links to two pages of the newspaper La Vanguardia of 1998, in which there was an announcement of a foreclosure sale to satisfy the social security debts which Mr. Costeja had incurred. This, in his opinion, was clearly harmful to his reputation, since, unlike printed editions of the media, the Internet is a medium that stores the footprint of everything published. In the aforementioned context, past information that directly influences the reputation of people or companies can remain available (whether the data is still true or has lost its validity partially or totally).

Mr. Costeja requested that La Vanguardia were required to either remove the aforementioned links or use any tools

provided by the search engines in order to protect this information. He also requested that Google were required to remove his personal data from the search engines. The AEPD rejected the complaint against La Vanguardia, considering that the newspaper had lawfully published this information. However, the Association upheld the claim against Google, requesting the company to take any necessary measures in order to remove his personal information from the search engine's index and disable future access to the aforementioned data. Google Spain and Google Inc. appealed against the ruling to the Spanish National High Court, requesting the annulment of the Spanish Data Protection Agency's judgment.

At that time, the National High Court made a number of questions to the [European Court of Justice](#), namely:

- i. whether the search engines perform data processing;
- ii. whether the Spanish search engines' subsidiaries perform data processing as a result of their activities ; and
- iii. whether the interested party can contact the search engine to prevent the indexing of information regarding himself even if this information has been lawfully published by third parties.

The three main conclusions drawn from the ECJ ruling are:

- **Google is responsible for processing personal data:** The ECJ concluded that the activity carried out by a search engine shall be regarded as processing of personal data and considers the search engine to be responsible for this processing, regardless of the role played by the owner of the website subject to indexation.
- **Spanish law shall be the governing law:** Each Google establishment in a European country must comply with the obligations imposed by the national law governing such activities. When the Manager of the search engine establishes a subsidiary or branch to ensure promotion and advertising sales, the applicable law is the one of the territory where the subsidiary is located. In this case, the aforementioned data processing is considered to be carried out in Spain, not because the regulation requires the establishment itself to carry out this procedure, but because it is carried out in "the context of activities" of the establishment.



Mario Costeja. Source: El País

- **Under the Data Protection Directive, the so-called right to be forgotten is recognized:** The main novelty of the sentence is, that under the data protection regulation, the right to remove personal information from search engines is recognized, even if this data is true and lawful and it still remains on the site of origin. In any case, according to the ruling, there must be a weighting to establish whether keeping access to such data is in favor of public interest, particularly, taking into account the role that the affected person plays in public life.

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At least in the case of pardons, other requirements are also present. These events are characterized by their exceptionality, as they are conceived as a governmental amnesty measure, therefore justifying transparency and publicity. Criminal proceedings can also give place to extremely controversial situations. After a certain period of time, it could be considered that public interest ceases to exist and, therefore, the right to information would not be applicable anymore. What if someone who has committed serious corruption crimes decides to become a politician? Should not the citizens have the right to know the criminal past of a person if it might affect his performance as a politician?

However, the ECJ ruling raises a number of problems and questions, both from a technical-legal point of view and regarding future enforcement in relation to the management of reputation and its effects for the media:

- The ECJ concluded that search engines should not have the same protection as the media. The ruling distinguishes between the legal regulations applicable for journalistic activities and those applicable to search engine activities. This leads to a paradox: the interested party can exercise its rights to remove the information from the search engine Google, but not from the newspaper that published the news indexed by Google.
- The right to be forgotten must be carefully weighted in order to protect other fundamental rights of democratic societies, such as the right to information and freedom of expression. These rights cannot be restricted or limited by citizens that unfairly seek to remove true information from search engines basing their requests on the right to data protection.

These rights, protected by public interest, might be present, for example in case of pardons or administrative punitive resolutions. It is required by law (the rule that establishes that pardons must be published in the national gazette entered into force on 18 June 1870 and remains in force), and should not be considered an offence to honor or privacy, even though they might affect or be harmful to the reputation of the interested party.

- On the other hand, the execution might entail numerous problems on the technical level. How can we determine whether the information whose removal has been requested is related to a particular person if there are more people with the same name? (Think about the enormous amount of people sharing the same name and surname). How can Google detect that a document contains personal information? How long should Google comply with the removal requirements? Does this imply a future surveillance? Within which territory? How can Google ascertain whether or not the general interest prevails? For instance, can a doctor or a lawyer remove comments which demonstrate negligence? Does Google have to shoulder the responsibility of appraising the importance of the right to protection of personal data and the right to information?

Search engines could be bound to monitor the contents they offer, which would severely violate the provisions of Article 15 of the Electronic Commerce Directive 2000/31/EC, which prohibits States from imposing on search engines a general obligation to monitor and filter the data they transmit or store.

In addition, this could also contravene ECJ's ruling in relation to the Article 15 mentioned above. In its judgment of 24 March 2011, regarding case C-70/10 SCARLET/SABAM, it is claimed that Article 15 of Directive 2000/31 prohibits national authorities from adopting measures obliging a general monitoring of the data transmitted through the network and it states that any injunction requiring them to actively monitor all the data would be contrary to Article 15.

Moreover, the aforementioned judgment resolves that these filtering measures would imply a substantial violation of press freedom, given that a complex, burdensome and permanent system would be necessarily established exclusively at their own expense.

- In fact, search engines are based on key words and rules. Google cannot determine which of the millions of websites existing on the Internet contain the specific data concerning the people who claimed their right to be forgotten. All search engines do is index and show the published information on websites, in other words, they can neither publish information nor remove it. Only website owners can prevent a specific piece of information from being published on the Internet and, even prevent their website from being indexed through 'opt out' protocols. It is thus the task of website owners to allow or not search engines to index contents. Furthermore, removing some information from a search engine does not



mean that it cannot be found on the Internet, since that information would still be available on the website where it was published.

CONCLUSION

According to the judgment of ECJ, search engines must remove the data of a person from the search results under certain circumstances even though they are truthful. The right to be forgotten must be carefully weighed in order to preserve other fundamental rights of democratic societies, such as the right to information or freedom of expression. These rights cannot be unreasonably limited or undermined by citizens wishing to remove truthful information from search engines under the pretext of data protection.

Likewise, there is an understandable need to change the fact that a person is “tagged” with certain attributes, based or not on truthful information, but which also have a negative influence on this person’s personal or professional life. This fact is the basis of reputation management and it can be managed not only from the

standpoint of “removal” of prejudicial information but also through a two-pillar system:

- On one hand, creating a consistent digital identity (through an active management of its presence on the Internet and social networks) which provides a more objective overview of certain questions which are no longer actual characteristics of the person or company targeted, since they are temporary or irrelevant.
- On the other hand, promoting the desired presence on the Internet. A negative content on social networks can be neutralized and compensated with a good long-term planning of actions and contents, since the network will always tend to show the most relevant, shared and interesting results for users.

As stated above, the ruling creates legal uncertainties about its practical implementations and it is yet to be discovered how national courts will clarify them. As long as legal actions create these uncertainties, strategies for success in reputation management will have to include online communication actions as a complement to achieve the goals set.



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