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# HOW IS THE GDPR IMPACTING ON THE RIGHT TO BE FORGOTTEN & OTHER MEDIA CLAIMS?

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## GDPR AND THE MEDIA

- GDPR leaves it to Member States to balance data protection rights and freedom of expression:
  - Recital (153) “The processing of personal data solely for journalistic purposes ... should be subject to derogations or exemptions ... if necessary to reconcile the right to the protection of personal data with the right to freedom of expression and information”.
  - Article 85(2): exemptions from various provisions for journalistic processing “if they are necessary to reconcile the right to protection of personal data with freedom of expression and information”.
- Data Protection Act 2018 enacts “journalistic exemption” in largely same form as Data Protection Act 1998.
- Big difference: explicit “right to erasure” in Article 17.

## FORGETTING, DELISTING AND ERASURE

- *Google Spain*: search engines are data controllers – process data under Art 7(f) of the 1995 Directive (i.e., legitimate interests)
- Right to delisting based on 1995 Directive:
  - Article 12(b): right to rectification, erasure and blocking of data whose processing is not compliant with Directive
  - Article 14(a): right to object on compelling legitimate grounds relating to DS' particular situation, where PD processed because necessary for the purposes of the legitimate interests pursued by the data controller or a third party
- These articles & the Charter: search engine operators may be obliged to remove search results displayed following a search made on the basis of a person's name.
- The “right to be forgotten” or “right to delist”.

## THE RIGHT TO DELIST

- Article 29 Working Party Guidelines (2014).
- Very limited case law: only *NT1/2 v Google LLC* in England.
- More litigation in other European states (both under Art 8 and the *Google Spain* delisting right).
- ECHR recognised Art 8 encompasses such a right against both search engine operators and primary publishers (*ML and WW v Germany* [2018] ECHR 554).

## ARTICLE 17 GDPR: RIGHT TO ERASURE

- “*Right to obtain from the controller the erasure of personal data concerning him or her without undue delay*”.
- Applies to all data controllers (not just search engines).
- Grounds include:
  - Unlawful processing.
  - Art 21 – Right to Object route:
    - » Data subject may object on grounds relating to her particular situation. to the processing of personal data concerning her which is based on Article 6(1)(e) or (f) (task in public interest or “legitimate interests”).
    - » Processing must cease unless data controller demonstrates: “*compelling legitimate grounds for the processing which override the interests, rights and freedoms of the data subject ...*”.

## LIMITS TO THE RIGHT TO ERASURE

- Data controller can resist erasure on grounds contained in Art 17(3) GPDR.
- Right does not apply *to the extent necessary* inter alia:
  - For exercising the right to freedom of expression and information
  - For archiving purposes in the public interest, scientific or historical research purposes or statistical purposes in accordance with Article 89(1) in so far as the [RTE] is likely to render impossible or seriously impair the achievement of the objectives of that processing
- Journalistic purposes exemption (para 26, part V, Sch II to the DPA 2018 taken with Art 85 GDPR)

## ERASURE AND SEARCH ENGINES

- Expansion of the right to searches beyond names?
  - Erasure applies to *personal data concerning him or her*.
  - Question is whether individual identified or identifiable from the (i) search term and/or (ii) results generated.
- Art 29 WP Guidelines “*List of Common Criteria*” (includes: data subject a public figure? Data subject a minor? Inaccurate data? Professional life? Sensitive personal data? Prejudice to data subject?)
- No EDPB or ICO guidance on right to erasure in relation to search engines

# ERASURE AND SEARCH ENGINES: THE BALANCING EXERCISE (1)

CJEU in *Google Spain* [81] and [92].

“a fair balance should be sought in particular between [legitimate interest of internet users potentially interested in having access to the information] and the DS’ fundamental rights under Articles 7 and 8 of the Charter. [T]he DS’s rights protected by those articles ... override, as a general rule, that interest of internet users [and the economic interest of the operator of the search engine] ...

that balance may however depend, in specific cases, on the nature of the information in question and its sensitivity for the data subject’s private life and on the interest of the public in having that information, an interest which may vary, in particular, according to the role played by the data subject in public life”.

## ERASURE AND SEARCH ENGINES: THE BALANCING EXERCISE (2)

But – Warby J in *NT1/2 v Google* [2018] 3 WLR 1165 [132 -133]:

The "general rule" to which the court was referring was a descriptive, not a prescriptive one. One factor in that conclusion was that the economic interests of an ISE are not of equal inherent weight or value to the privacy or data privacy rights of an individual. But the Court was not saying the same thing about the rights of the public to receive information and opinions. That would seem to be at odds with principle and authority.

[T]he balancing process in any individual delisting case is ordinarily, as a matter of principle, to be entered into with the scales in equal balance as between delisting on the one hand and continued processing on the other. I say that on the basis that such cases will ordinarily engage the rights protected by Articles 8 and 10 of the Convention... with appropriate adaptation, the *re S* approach must be followed: neither privacy nor freedom of expression "has as such precedence over the other";

## ERASURE AND SEARCH ENGINES: THE BALANCING EXERCISE (3)

- The debate will continue in *NT1 v Google* (CA in December).
- Search engines don't have Art 10 ECHR / Art 11 CFR rights.
- No right to receive information from private entities.
- But Art 17(3) and Art 85 GDPR: “right to the freedom of expression *and information*” (Art 10 ECHR; Art 11 CFR “right to receive and impart information”).
- To what extent is any right to receive information engaged by delisting search results (cf. Right to Erasure against primary publishers)?
- *ML v Germany*: ECHR cited CJEU on the balancing exercise and stated that it may lead to different results for search engines and primary publishers [97].

## ERASURE AND PRIMARY PUBLISHERS

- Position clear: right extends to primary publishers under Art 17.
- No case in England & Wales (but have been cases in e.g., The Netherlands and Belgium).
- First erasure case in Strasbourg (*ML v Germany*):
  - Art 10 v Art 8 balancing exercise.
  - *Axel Springer* criteria apply.
  - Strong protection given to archiving under Art 10 ECHR.
- Art 10 ECHR / Art 11 CFR rights clearly stronger than in delisting cases.

# JOURNALISTIC PURPOSES EXEMPTION UNDER EU LAW

- Art 85 GDPR & Recital 153.
- Extends to processing in news archives & press libraries.
- In C-345/17 – *Buivids* AG Sharpston ([61] – [62]) (dealing with the journalistic purposes exemption under Art 9 of the 1995 Directive) endorsed:
  - Application of the ECHR balancing exercise when applying the journalistic purposes exemption: rights to be given “equal respect”.
  - Application of the *Axel Springer* criteria when applying the journalistic purposes exemption.

## JOURNALISTIC PURPOSES EXEMPTION: WHO MAY RELY ON IT?

- Potentially available to anyone who publishes information to the public and/or processes data for such purposes.
- C-345/17 – *Buivids* (on Art 9 of the Directive) [53].

*“[A]n individual who engages in what has been dubbed ‘citizens’ journalism’ by gathering and disseminating information in order to disclose to the public information, opinions or ideas may be considered to be processing personal data for journalistic purposes within the meaning of Article 9”.*

- But there are limits; *Warby J in NT1/2 v Google* [98]

*“[T]he concept is not so elastic that it can be stretched to embrace every activity that has to do with conveying information or opinions. To label all such activity as “journalism” would be to elide the concept of journalism with that of communication”.*

# DPA 2018 JOURNALISTIC PURPOSES EXEMPTION: THE TEST (1)

1. Processing is being carried out with a view to the publication by a person of journalistic material (including ongoing publication).

Broader than s.32 DPA exemption; “only” for journalistic purposes requirement gone. But note use of “solely” in Recital 153 – appears to be inconsistent with the GDPR

2. Data controller reasonably believes:

- that the publication of the material would be in the public interest, taking account of:

- the special importance of the public interest in the freedom of expression and information.

- codes of practice.

- the application of the relevant data protection provisions would be incompatible with journalistic purposes.

## DPA 2018 JOURNALISTIC PURPOSES EXEMPTION: THE TEST (2)

- Subjective and objective elements (similar to s.4 Defamation Act 2013 test; see Warby J comments in *NT1/2* [102]).
- *Buivids* (CJEU – AG) and *ML v Germany* (ECHR) and - balancing exercise applying *Axel Springer v Germany* criteria including:
  - Contribution to a debate of general interest.
  - Profile & conduct of the person.
  - Content, form and consequences of publication.
- *Springer* criteria (and A29 WP guidelines in Right to Erasure cases) may go to whether the belief was reasonable.

# PUBLISHER GROUNDS FOR RESISTING ERASURE (1)

Three common options:

## 1. **Journalistic purposes exemption under DPA 2018.**

- Advantage that it includes a subjective element.
- But involves examination of data controller's state of mind at the relevant time; evidencing a belief may not be straightforward (who? when? what? why?)

## 2. **Art 17(3)(a) – objective balancing exercise.**

- May be a more demanding test for the data controller.
- But helpful if data controller did not turn mind to the questions in the journalistic purposes exemption / cannot evidence belief.
- Scope for relying on matters post-dating decision?

## PUBLISHER GROUNDS FOR RESISTING ERASURE (2)

### 3. Public interest archiving ground built into Art 17.

Exacting requirements:

- Refusing to accede to the Right to Erasure must be *necessary for archiving purposes in the public interest*
- Query what “public interest” means in this context?
  - Maintenance of archives all any journalistic publications?
  - Archiving only of public interest journalism?
- Only applies in so far as the Right to Erasure likely is *to render impossible or seriously impair the achievement of the objectives* of that processing.

May be unnecessary as the journalistic purposes exemption covers processing for news archives & press libraries.

## PREVENTING SEARCH ENGINE INDEXING AS AN ALTERNATIVE?

- Primary publishers can take steps to prevent search engines from indexing particular pages or parts thereof.
  - Dutch case of *Nieuwenhuis v Erdee Media BV* in which this was required of a primary publisher.
- Results may remain searchable through primary publishers internal search function and available at the original URL.
- May strike an balance in some cases:
  - Provides DS with benefit of not having the results appearing on any search engine results (worldwide).
  - Avoids permanent erasure of article(s) concerned.
  - Doesn't undermine the journalistic archive.

## DEVELOPMENTS TO LOOK OUT FOR IN 2019

- EDPB guidance on the Right to Erasure.
- ICO guidance on the Right to Erasure.
- ICO guidance on the journalistic purposes exemption.
- Judgment of the Court of Appeal in *NT1 v Google LLC*.
- Outcome of the references to the CJEU in:
  - *Stunt v Associated* (s.32(4) DPA 1998).
  - C-507/17 *Google LLC v CNIL* (geographical scope of delisting).
  - C-136/17 *GC v CNIL* (processing of sensitive PD by search engine operators).

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