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AN EXAMPLE OF ROMANIAN CASE LAW ON THE DIGITAL RIGHT TO BE FORGOTTEN

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Abstract: *After CJEU's decision in the case C‑131/12, Google Spain and Inc., the national courts of the Member States have begun to rule on litigations on the digital right to be forgotten. Romanian courts were no exception regarding this new right of the data subjects. As such, this article aims to provide an example of the Romanian case law which involves a data subject who played a role in public life and the information in question was at the boundary between public and private life. In these circumstances, the Court has concluded that for its decision two aspects are essential, namely if the data is accurate and has actual relevance, and based the ruling on their analysis. This ruling might not be the most relevant one but it offers a glimpse into the Romanian case law on the digital right to be forgotten.*

Key words: *data protection, right to be forgotten, right to digital oblivion, right to be delisted, right to de-indexing, Directive 95/46/EC.*

1. Introduction

The right to be forgotten is inferred by interpretation from *the right of the individual to privacy*, which in its turn finds its consecration in the international conventions [art. 8 paragraph (1) European Convention on Human Rights], The Charter of Fundamental Rights of the EU (art. 7), constitutions [e.g. art. 26 paragraph (1) of the Romanian Constitution], etc., at the level of the *European Union*, the *digital right to be forgotten (the right to digital oblivion)* being an *praetorian creation* of the Court of Justice of the European Union (CJEU), which it later retrieved its consecration in a secondary law of the EU with direct effect, namely the *General Data Protection Regulation* which shall apply from 25 May 2018.

In the case C-131/12 - Google Spain and Google, CJEU decided that the *Directive 95/46/EC of October 24th 1995* on the protection of individuals with regard to the processing of personal data and on the free movement of such data (transposed into national law by *Law no. 677 of 21st of November 2001* on the Protection of Individuals with Regard to the Processing of personal Data and the Free Movement of Such Data) must be interpreted in the sense that „*the operator of a search engine is obliged to remove from the list of results* displayed following a search made on the basis of a

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person's name *links to web pages, published by third parties* and containing information relating to that person, also in a case where that name or information is not erased beforehand or simultaneously from those web pages, and even, as the case may be, *when its publication in itself on those pages is lawful*".

Likewise, CJEU added that „As the data subject may, in the light of his *fundamental rights under Articles 7 and 8 of the Charter* [Respect for private and family life and Protection of personal data – our note], request that the information in question no longer be made available to the general public on account of its inclusion in such a list of results, *those rights override, as a rule, not only the economic interest of the operator of the search engine but also the interest of the general public in having access to that information upon a search relating to the data subject's name*. However, that would not be the case, if it appeared, for particular reasons, such as *the role played by the data subject in public life*, that the interference with his fundamental rights is justified by the preponderant interest of the general public in having, on account of its inclusion in the list of results, access to the information in question".

2. Google Inc. v. The Romanian National Supervisory Authority for Personal Data Processing

By means of two petitions registered at The Romanian National Supervisory Authority for Personal Data Processing, H.F.I., the data subject, brought into attention that personal data, namely photos, false and defamatory information, were published on several web pages by an unknown person. These data referred to alleged accusations of a relationship between the petitioner and a female person from the virtual environment, who pretended to be a student and who would have solicited some help related to obtaining a false diploma, accusations which caused serious damage to his image and which, subsequently, through the Ethics Commission Report of the University of Oradea, turned out to be unreal, unfounded and unproven.

Previously, H.F.I. had addressed Google Inc. with the request to erase their personal data from the search engine, for some links having been sent an answer through which it was communicated that they had been working on blocking the links referring to the name of the petitioner, for the others, the request having been rejected on the ground that the press articles published in the search engine are related to issues of public interest in relation to his personal life, and the information is of public interest.

Since the petitioner had previously addressed Google Inc. to eliminate from the search list URL addresses, but the demand was not met, The Romanian National Supervisory Authority for Personal Data Processing, in exercising the attributions of control established according to art. 27 paragraph (1) from the Law no. 677/2001, by means of the address no. 0024627 from October 7th 2015, requested Google Inc. to meet the petitioner's request, in the shortest possible time, being invoked the decision CJEU in the case Costeja from May 13th 2014, as well as *The Guidelines on the Implementation of the Court of Justice of the European Union Judgment in case no. 131/12*, adopted on November 26th 2014.

By means of the request to sue filed at the Bucharest Court of Appeal - VIIIth Section for administrative and fiscal litigation, Google Inc. formulated in a contradictory way with The Romanian National Supervisory Authority For Personal Data Processing an

appeal against the address issued by The Romanian National Supervisory Authority For Personal Data Processing, through which its annulment was filed for.

Google Inc. invoked, in sustaining its position of not complying with the required appealed address, that information can still be displayed in the list of results following a search conducted on the basis of the solicitor's name, taking into consideration that *the published information is closely linked to the quality of the person's public person.* Likewise, Google Inc. invoked the informative, respectively journalistic character of the results of the search, the petitioner's status of public and politically involved figure and the fact that the petitioner performs an activity of public interest.

Bucharest Court of Appeal dismissed the claim as unfounded for the reasons presented below.

First of all, the Court concluded that the provisions of art. 11 from the Law no. 677/2001 establish a series of *exceptions and conditions regarding the data processing by the media,* the article establishing that the provisions of articles 5, 6, 7 and 10 do not apply to the situation in which the data processing is carried out exclusively for *journalistic purposes*, or if the processing regards personal data that were expressly made public in a specific manner by the data subject or which are closely related to the *public status of the data subject* or the public character of the events that had taken place.

As a result, the personal data may be disclosed *solely for journalistic purposes,* in the absence of the consent of the person concerned, only under the above conditions respectively, the data have been manifestly made public by the data subject or they are closely connected to the quality of public person of the data subject or to the public character of the facts in which he is involved.

Furthermore, in order to verify the application of this exception, the Appeal Court analyzed *the Guidelines on the Implementation of the CJEU Judgment in the case C-131/12*, adopted on 26th November 2014.

The Court retained that, in what concerns the balance between the interests that can legitimate the processing performed by the search engine, according to the decision of CJEU, the rights of the data subject, as a general rule, *prevails over the economic interest of the search engine*, taking into consideration the potential gravity of this interference with the fundamental rights to privacy and data protection. Likewise, these rights *prevail over the interests of the Internet users* to have access to the personal data through the search engine starting from the data subject. However, there must be a *balance between different rights and interests,* and the result may depend on *the nature of the information and the sensitivity of the processed data,* as well as *the public interest* to have access to the specific information, interest which may vary especially depending on the role played by the data subject in the public life.

On the one hand, according to article 12 letter b), the Member States guarantee every data subject the right to obtain from the controller the rectification, erasure or blocking of data the processing of which does not comply with the provisions of this Directive, in particular because of the incomplete or inaccurate nature of the data. On the other hand, art. 14 grants the data subject the right to object at any time on compelling legitimate grounds relating to his particular situation to the processing of data relating to him, save where otherwise provided by national legislation. Where there is a justified

objection, the processing instigated by the controller may no longer involve those data. In the case in which the conditions established through article 12 *(right of access)* and 14 *(right to object)* from the *Directive 95/46/EC* are fulfilled, the data subjects have the right to request and to obtain the delisting of the links, to the web pages published by third parties which contain information regarding them, from the list of results displayed as a consequence of a conducted search starting from the person's name.

The Court pointed out that *the legal grounds of the original editors* and the ones of *the search engines* are *different*. The search engine should analyze the different elements (public interest, public relevance, the nature of the data, the actual relevance) based on its own *legal ground which derives from its own interest and from that of the users* who have access to the information by means of the search engines by using the name as the search term. Even when the continuous publishing conducted by the initial administrator is legal, *the universal distribution and the accessibility of the information through the search engine together with other data referring to the same person may be illegal,* taking into consideration the disproportionate impact on private life.

Thus, the applicant, as a search engine, cannot invoke in favour of maintaining the information on the links from the present case, the journalistic interest of its proceeding, the mentioned Guide clarifying the fact that *the interest of the search engines in processing personal data is one of economic nature,* not one of journalistic nature. Thus, the exception regulated by art. 5 paragraph (2) letter e) from Law no. 677/2001, according to which the data subject's consent is not required when the processing is necessary in order to accomplish a *legitimate interest of the data controller or of the third party to which the data is disclosed*, on the condition that this interest does not prejudice the interests, or the fundamental, is not applicable.

Nevertheless, it is shown in the same Guide that *the results must not be delisted, if the public interest to have access to the information prevails*, the topic being about a data subject who plays a role in public life. The public personalities are persons who, due to their functions/responsibilities, have a degree of media exposure. Although it is not possible to establish with certainty the type of role in public life which a person must have to justify the access of the public to the information which regard him/her through the result of the search, as an example, the politicians, senior civil servants, business men and the members of regulated professions can be usually considered as fulfilling a role in public life. There is, thus, an argument in favour of the public in order to search for relevant information for their activities and their public roles.

Regarding the qualification of the petitioner as a person with a role in public life, the Appeal Court concluded that there are two hypotheses that are susceptible to fit it into this category: on the one hand, the quality of *university professor,* on the other hand, that of the *candidate for the position of mayor* of the City of Oradea, as well as the *senator dignity* in the Parliament of Romania.

Since none of the parties proved that those qualities were actual at that time, representing qualities that the petitioner used to have in the past, the Court found that, strictly theoretically, the petitioner falls into the *category of the persons who had a role in public life,* but at the moment of hearing the case, the role was not proven to have been perpetuated.

In what concerns the nature of the information whose delisting was solicited, the Court found that this is *border information between public and private life* due to the circumstances in which the facts were alleged to have been committed – within the university in relation to his activity as a professor – so that the arguments relating to the character of the information were not eloquent to unravel the situation.

The Court considered two aspects to be essential to solve the problem, respectively, if the data whose delisting was requested are *accurate* and if they *have actual relevance*.

In what concerns the *accuracy of the data* whose delisting was requested, the Court concluded that it is retained in the above-mentioned Guide that, when a data subject opposes the result of a search because these results are inaccurate, for the protection of the data, the authorities can solve this type of request if the petitioner presents the necessary information to establish if the data are really inaccurate. Or, through the Report of the Ethics Commission of the University of Oradea (the Decision no. 182 from 05.11.2012, remaining definitive through non-contestation) the accusations brought to the data subject have proven to be unreal, unfounded, and unproven. Thus, based on the solution reached by the decision-making force of the University of Oradea, the applicant was required to comply with the petitioner's request to erase those links, because the data subject proved to be innocent. In addition, the data subject has already suffered image damage by the fact that the media, before the decision of a decision-making body on his guilt or innocence, published in the virtual environment, some news that have already led to the damage of the petitioner's intimate, family and private life. Or, to the extent to which the data subject had proven that he was not guilty of the accusations that were brought against him, and even the media published information regarding the Report of the Ethics Commission of the University of Oradea, there is no good reason that the information in question to be infinitely exposed in the online environment, without taking the measure of their removal.

In what concerns *the accuracy of the data* whose delisting was requested, the Guide indicates the necessity to check if the data is not available for a longer period than the one necessary to fulfil the process of processing. As a general rule, to protect the data, the authorities will address this factor in order to ensure that the information that is not reasonably up-to-date and has become inaccurate because it is no longer up-to-date, is delisted. Likewise, the Guide indicates that such an evaluation would depend on the purpose of the initial processing.

Thus, if at the moment of the publishing of the information, the petitioner had the quality of university professor, as well as the one of candidate for the Mayor's Office and the dignity of senator in the Parliament of Romania, at the time of the judgement these qualities no longer existed according to what was proven in the case and from the time of occurrence of the alleged events, namely the year 2012, had passed more than 3 years, so *the need to inform the public after that time no longer appears to be that justified.*

Finally, the information is not in the category of the ones made manifestly public by the data subject, such as the one from his CV or the image made public in the context of the electoral elections in 2012, therefore it is no longer justified to keep it in the search engine tracking system. The Appeal Court pointed out that, by being published on the

Internet, the personal data become accessible to an indefinite number of persons and in these conditions the data subject is not aware of the entities that, subsequently, get the information about their person and about the way in which they use it further.

In addition, the potential impact of the means of communication used has a significant importance, thus publishing the news in the online environment has a greater impact than its publishing in the written press, having a faster and stronger effect in what concerns disseminating and retrieving information by different entities. Therefore, the *interest of the data subject to obtain the erasing of the personal data disclosed on the Internet prevails over the economic interest of the operator to publish the data,* as CJEU retained in the case C-131/12.

3. Instead of a Conclusion

Although, the results must not be delisted, if the public interest to have access to the information prevails, when a data subject plays a role in public life, in our case, the data subject fell into the category of people who had a role in public life, but at the time of the trial this role was no longer up-to-date. Since the nature of the information whose delisting was required bordered between public and private life, nor did the arguments relating to the nature of the information have been considered relevant for the resolution of the case. That is why, the Bucharest Appeal Court considered essential, for the resolution of the case, two aspects, respectively, if the data whose delisting was required are *accurate* and if they have *actual relevance*.

On the one hand, it was pointed out that the data were no longer accurate, thus, there is no good reason that the information in question to be infinitely exposed in the online environment, without taking the measure of their removal, and on the other hand, because the data were no longer up-to-date, and from the occurrence of the alleged events had passed more than 3 years, the Court considered that the necessity to inform the public after all this time is no longer justified, consequently Google's action was dismissed on the proven grounds.

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