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 Recent Developments



Further Developments in the Right to be Forgotten: The European Court of Justice's Judgment in Case C-131/12, *Google Spain, SL, Google Inc v Agencia Espanola de Proteccion de Datos*

Eleni Frantziou*

PhD Candidate, University College London, UK

*Corresponding author: Email: eleni.frantziou.12@ucl.ac.uk

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1. INTRODUCTION

The idea of 'the right to be forgotten' has attracted international interest, particularly within the context of the European Union (EU).¹ In May 2014, a major jurisprudential development occurred. In its judgment in *Google Spain SL and Google Inc v Agencia Española de Protección de Datos (AEPD) and Mario Costeja González*² ('Google judgment'), the Court of Justice (CJEU) affirmed the existence in the EU of a right to have personal data deleted from search engines on request—in other words, a right to have that data forgotten.

The judgment has a potentially significant impact on the operation of the Internet and, in particular, of what has become, for many Internet users, one of its most important components: the Google search.³ The judgment directly impacts the

1 See McGoldrick, 'Developments in the Right to be Forgotten' (2013) 13 *Human Rights Law Review* 761.

2 Case C-131/12, 13 May 2014, unreported.

3 In order to comply with the judgment, Google has launched a form allowing individuals to request to have links to pages containing personal data that they do not wish to make available to the general public erased from the results of Google's search engine: see Google Legal Department, 'Search removal request under European Data Protection law', available at: support.google.com/legal/contact/!r_eudpa?product=websearch [last accessed 29 June 2014].

degree of access to data that Internet users have in respect of specific individuals. Further, as regards its business impact, it does not affect Google alone. Its broad construction of the concept of ‘control’ over personal data means that it is capable of shifting responsibility for breaches of privacy in respect of information available on the Internet towards a broad range of Internet operators, and of imposing on them obligations relating to Articles 7 and 8 of the EU Charter of Fundamental Rights (‘Charter’).⁴ Thus, the judgment has important implications for the adjudication of fundamental rights in the EU, affecting both the way in which certain aspects of privacy rights are understood, as well as their enforcement.

This article seeks to assess the impact of the judgment on fundamental rights and to highlight, from that perspective, some of its main shortcomings. On the one hand, it is argued that the judgment signals an important step forward in thinking about the way in which the right to privacy can be protected in the Internet era, as well as in recognising the role of private actors in the application of fundamental rights standards. On the other hand though, the judgment appears to dismiss important considerations that can conflict with the right to be forgotten, such as the rights to freedom of expression and access to information, thus raising serious doubts as to whether this development will signal a positive step in the overall protection of fundamental rights. Particular attention is given to the lack of an assessment of the reach of Articles 7 and 8 of the Charter, as well as to the CJEU’s failure to recognise the structural role of the European Convention on Human Rights (ECHR) and of the Strasbourg Court’s (ECtHR) case law in the development of fundamental rights in the EU.

2. FACTUAL AND LEGAL BACKGROUND

The case concerned a reference for a preliminary ruling made by the Spanish High Court to the CJEU, which arose out of a dispute between Google Inc and Google Spain on the one hand, and Mr Costeja González and the Spanish Data Protection Agency on the other. The dispute began when Mr Costeja González lodged a complaint with the Spanish Data Protection Agency against a daily newspaper, *La Vanguardia*, as well as against Google Inc and its Spanish subsidiary, Google Spain, for failure to protect his privacy. The basis for Mr Costeja González’s complaint was that, whenever a Google search of his name was carried out, the top results listed linked the Internet user to two property auction notices for the recovery of social security debts that Mr Costeja González had owed 16 years earlier, which still appeared on *La Vanguardia*’s website. The applicant sought to obtain an order to the effect that the newspaper should alter, delete, or protect this information, and that Google should either delete or conceal the links to those pages.

The Data Protection Authority dismissed his complaint against the newspaper, finding that the latter was justified in maintaining this data on its website, as it had been advertised lawfully and for a legitimate purpose.⁵ However, it upheld the complaint vis-à-vis Google, finding that search engine operators are responsible for the

4 Bing has now followed Google, creating a similar form. See Bing, ‘Request to Block Bing Search Results in Europe’, available at: www.bing.com/webmaster/tools/eu-privacy-request [last accessed 7 August 2014]. See also House of Lords European Union Committee, ‘EU Data Protection Law: “A Right to be Forgotten?”’, Second Report of Session 2014-15, HL Paper 40, 30 July 2014, at paras 40–2.

5 This was to attract more bids for the auctions by order of the Ministry of Labour and Social Affairs.

dissemination of data and that when specific information ‘was liable to compromise the fundamental right to data protection and the dignity of persons in the broad sense’, which encompassed ‘the mere wish of the person concerned that such data not be known to third parties’, then search engine operators had a direct obligation to erase the data, irrespective of whether that data remained in place on any other website.⁶ Google appealed this finding to the Spanish High Court, which considered the matter a question of EU law and stayed the proceedings, pending a reference to the CJEU for a preliminary ruling. Before discussing the questions referred though, as well as the Court’s answers, it is necessary to outline briefly the legal framework applicable to privacy and the protection of personal data in the EU.

Articles 7 and 8 of the Charter, which form part of EU primary law,⁷ protect privacy and personal data, respectively. Article 7 of the Charter provides that ‘everyone has the right to respect for his or her private and family life, home and communications’. Article 8 goes further, providing:

1. Everyone has the right to the protection of personal data concerning him or her.
2. Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified.
3. Compliance with these rules shall be subject to control by an independent authority.⁸

It is therefore clear that there is a broad fundamental rights obligation to protect personal data under the Charter.⁹ Some conditions restricting the manner in which personal data are processed can—and indeed must—be imposed by the Member States, and data subjects must be able to access the data and have it corrected.

EU secondary law, however, has not entirely caught up with these obligations. While a Regulation addressing these issues has been the subject of negotiations for some time, no agreement has been reached to date¹⁰ and this field is still governed by Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data.¹¹ The Directive dates back to 1995, and therefore long predates both the Charter and the Internet as we

6 *Google*, supra n 2 at paras 17–18.

7 Article 6(1) TEU grants the Charter the ‘same legal value as the Treaties’.

8 *Ibid.*

9 It is noteworthy that Article 1(1) of the UK and Polish protocol does not provide an exemption from the obligations imposed by the Charter’s provisions and certainly not from those set out in Articles 7 and 8: see C-411/10 and C-493/10, *NS v Home Secretary* and *ME v Refugee Applications Commissioner* [2011] ECR I-13905, para 120. The only title of the Charter mentioned in Article 1(2) of that Protocol, and where a case could be made for an opt-out from those protections, is Title IV: ‘Solidarity’.

10 See European Commission, Proposal for a Regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data, General Data Protection Regulation, 25 January 2012, COM(2012) 11 final.

11 Directive 95/46/EC [1995] OJ L 281/31.

know it today. It requires Member States to legislate to ensure that personal data are ‘processed fairly and lawfully’.¹² The ‘controller’ of the data must ensure that it is only collected for ‘specified, explicit and legitimate purposes’;¹³ that no more is collected than what is necessary for these stated purposes;¹⁴ crucially, that the data are accurate and kept up to date, taking ‘every reasonable step’ to ensure rectification or erasure if it is not;¹⁵ and that the data are only kept for as long as necessary.¹⁶ The Directive defines the ‘processing’ of personal data as meaning

any operation or set of operations which is performed upon personal data, whether or not by automatic means, such as collection, recording, organisation, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, blocking, erasure or destruction.¹⁷

The ‘controller’ of data, for the purposes of the Directive, is

the natural or legal person, public authority, agency or any other body which alone or jointly with others determines the purposes and means of the processing of personal data.¹⁸

Additionally, the Directive grants data subjects—that is, parties whose personal data have been processed—the right to require the controller to rectify, erase, or block any data the processing of which does not comply with the provisions of the Directive,¹⁹ as well as to object to the processing of data relating to them.²⁰ The Directive does however allow Member States to make an exception to these basic rules, insofar as this would be necessary, in order to reconcile the right to privacy with the freedom of expression and, particularly, with journalistic, artistic, or literary expression.²¹

Against this background, the Spanish court referred three questions to the CJEU, concerning the interpretation of Directive 95/46/EC and fundamental rights more broadly. The first question was whether a search engine operator like Google, primarily established outside of the EU but having subsidiaries within the EU, selling its services, orientating its activities towards the inhabitants of EU Member States, and willingly collaborating with the parent company, fell within the territorial scope of the Directive. The national court’s second question concerned the material scope of the Directive. In particular, it asked whether Google’s activities of automatically indexing, temporarily storing, and finally making available the relevant information,

12 Article 6(1)(a) Directive 95/46/EC.

13 Article 6(1)(b) Directive 95/46/EC.

14 Article 6(1)(c) Directive 95/46/EC.

15 Article 6(1)(d) Directive 95/46/EC.

16 Article 6(1)(e) Directive 95/46/EC. An exception is made for historical, statistical or scientific use.

17 Article 2(b) Directive 95/46/EC.

18 Article 2(d) Directive 95/46/EC.

19 Article 12(b) Directive 95/46/EC.

20 Article 14 Directive 95/46/EC.

21 Article 9 Directive 95/46/EC.

amounted to ‘processing of data’ and, if so, whether a search engine operator could be considered the ‘controller’ of that data, within the meaning of the Directive. The court’s third and final question was the most relevant in respect of the existence of a right to be forgotten and indeed the only one that made reference to this right as such. It asked whether the Directive should be read as extending to individuals a right to address search engine operators directly, asking them to erase data about them, on the basis that they do not wish to make that data available to Internet users—or, to use the Spanish court’s own terms: that they want it to be ‘consigned to oblivion’.²²

3. THE JUDGMENT

The CJEU answered these questions as follows. First, it found that the activities carried out by a search engine like Google squarely fell within the concept of ‘processing of personal data’ enshrined in the Directive.²³ The Court then decided that Google could be classified as the ‘controller’ of the data. Interpreting the Directive in light of its purpose, which was to ensure the ‘effective and complete’ protection of data subjects, justified a broad construction of the concept of ‘controller’.²⁴ Similarly, the Court held that, as a stable subsidiary with separate legal personality, Google Spain fell within the territorial scope of the Directive.²⁵

As regards the extent of the controller’s responsibility, the CJEU explicitly put fundamental rights on the agenda. It noted that the Directive sought to protect fundamental rights and, particularly, rights relating to privacy.²⁶ It therefore decided that its provisions ought to be interpreted in the light of the fundamental rights to private life and the protection of personal data enshrined in Articles 7 and 8 of the Charter.²⁷ The Court then found that the processing of personal data tailored to an individual’s name through a search engine such as Google was capable of affecting these rights significantly, because

it enables any internet user to obtain through the list of results a structured overview of the information relating to that individual that can be found on the internet — information which potentially concerns a vast number of aspects of his private life and which, without the search engine, could not have been interconnected or could have been only with great difficulty — and thereby to establish a more or less detailed profile of him.²⁸

The CJEU then stated that ‘the data subject may, in the light of his fundamental rights under Articles 7 and 8 of the Charter, request that the information in question no longer be made available to the general public by its inclusion in such a list

22 *Google*, supra n 2 at para 20.

23 *Ibid.* at paras 26–8; see also Case C-101/01 *Criminal proceedings against Bodil Lindqvist* [2003] I-12971 at para 25.

24 *Google*, supra n 2 at paras 32–4.

25 *Ibid.* at paras 49–52, 59.

26 *Ibid.* at paras 66–7.

27 *Ibid.* at paras 68–9.

28 *Ibid.* at para 80.

of results'.²⁹ It thus affirmed the existence of a right to be forgotten in the EU, as a matter of principle.

The CJEU clarified that this right does not amount to an obligation on data controllers to remove data outright. Rather, the controller is under an obligation to seek 'a fair balance' between the 'interest' of Internet users in having access to the data in question 'and the data subject's fundamental rights under Articles 7 and 8 of the Charter'.³⁰ At the same time though, the Court laid down an important presumption in favour of the rights to privacy and the protection of personal data. It held that

[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.³¹

This presumption could only be rebutted

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.³²

It is noteworthy that the Court's analysis differed greatly from the Advocate General's Opinion, on several grounds. For example, the Advocate General had found that search engines should not be regarded as 'controllers' of information for the purposes of the Directive, because they process 'files containing personal data and other data in a haphazard, indiscriminate and random manner',³³ and thus do not make an intentional distinction between data which is personal and data which is not, in order to offer the protection required by the Directive.³⁴ Additionally, the Advocate General had found that a right to be forgotten, in the sense of a right to the erasure of personal data that an individual does not wish to make available to the general public, did not follow either from the wording of the Directive³⁵ or from the Charter.³⁶ More specifically, the Advocate General had warned against inferring the existence of such a right from the rights to privacy enshrined in the Charter, as this would raise serious questions of compatibility with other fundamental rights, such as freedom of expression and information.³⁷ It follows not only that the judgment sits in stark contrast with the Opinion, but also that it leaves unsettled many of the important problems highlighted therein.

29 Ibid. at para 97.

30 Ibid. at para 81.

31 Ibid. at paras 81, 99 (emphasis added).

32 Ibid. at paras 97, 99.

33 Opinion of Advocate General Jääskinen delivered on 25 June 2013 in Case C-131/12 *Google Spain SL, Google Inc v Agencia Española de Protección de Datos (AEPD), Mario Costeja González*, 13 May 2014, unreported, at para 81.

34 Ibid. at para 82.

35 Ibid. at para 108.

36 Ibid. at para 136.

37 Ibid. at paras 126–33.

4. ANALYSIS

The *Google* judgment raises a host of legal issues, but this commentary will focus on those aspects of the ruling that concern human rights. Two main lines of critique will be advanced. First, despite the importance that the CJEU places on fundamental rights and, more specifically, on Articles 7 and 8 of the EU Charter, the judgment almost entirely refrains from engaging with the content of these rights and the degree of protection they offer. The judgment thus fails properly to define the reach of the right to be forgotten. This can have important implications for the protection of other fundamental rights and, particularly, freedom of expression (comprising access to information and freedom of the press), as well as for the responsibilities of private Internet operators beyond Google. The second criticism of the judgment concerns its consistency with the ECHR, to which the EU is soon to accede.³⁸ It will be argued that the CJEU's reluctance to refer to the ECHR and to the Strasbourg Court's case law is particularly problematic, both in light of the EU's pending accession and, more broadly, because it risks upsetting the sensitive constitutional balance struck in the European fundamental rights landscape to date, in which the European Convention has played a crucial part.

A. Fundamental Rights and the Right to Be Forgotten: How Much is Too Much Protection of Privacy?

In its judgment, the CJEU is clear about the fundamental rights basis of a claim to have personal data deleted.³⁹ In itself, the Directive could not, as the Advocate General had noted in his opinion, have meant all of the things that the Court attributes to it in this judgment, taking account of its 1995 drafting context.⁴⁰ The exponential increase of the material available on the Internet and the expansion of search engines are relatively new phenomena that could not, at the time of the Directive's enactment, have been foreseen.⁴¹ But this does not necessarily mean that the CJEU was wrong in applying Directive 95/46 to the facts of this case. Rather, it further highlights the significance of the fundamental rights argument in the Court's ruling. As shown above, despite the absence of specific legislation regulating the flow of information in the Internet era, the Court was not faced with an absence of relevant rules altogether. The constitutional status⁴² of the provisions enshrined in the Charter places an obligation on the CJEU to take them into account, as indeed it

38 Article 6(2) TEU; and Final report to the CDDH (including the draft agreement on the accession of the European Union to the European Convention on Human Rights), 10 June 2013, 47+1(2013)008rev2, available at: [www.coe.int/t/dghl/standardsetting/hrpolicy/accesion/Meeting_reports/47_1\(2013\)008rev2_EN.pdf](http://www.coe.int/t/dghl/standardsetting/hrpolicy/accesion/Meeting_reports/47_1(2013)008rev2_EN.pdf) [last accessed 29 June 2014]. The CJEU has been asked to deliver an Opinion on the compatibility of the Draft Agreement with EU law: Opinion 2/13, *Request for an opinion submitted by the European Commission pursuant to Article 218(11) TFEU*, pending.

39 *Google*, supra n 2 at paras 62–99.

40 *Google Opinion*, supra n 33 at paras 25–30.

41 *Ibid.* See also www.searchenginehistory.com/ [last accessed 29 June 2014]: While some primitive search engines existed prior to the Directive's entry into force, popular, widely used search engines as we know them today did not appear until after its entry into force. Google itself was not launched until 1998.

42 Article 6(1) TEU. See Kokott and Sobotta, 'The Charter of Fundamental Rights of the European Union After Lisbon', *EUI Working Paper 2010/6* at 6, available at: cadmus.eui.eu/handle/1814/15208 [last accessed 29 June 2014].

does at paragraphs 65–68 of its judgment, because the higher normative validity of these rights affects the interpretation of all other legislation.⁴³

However, one of the main problems present in the judgment is that despite the emphasis placed on fundamental rights in justifying the application of rules regarding the erasure of personal data, the CJEU actually engaged in very little fundamental rights reasoning. Thus, the basis for the application of the Directive appears to be a mere appeal to fundamental rights, rather than a real assessment of the rights to privacy and protection of personal data.⁴⁴ While the Court convincingly explains that the processing of personal data tailored to an individual's name through a search engine such as Google is likely to affect 'a vast number of aspects' of an individual's private life generally,⁴⁵ it fails to explain precisely how the operation of a search engine is also likely to *infringe* Articles 7 and 8 of the Charter as concrete legal rights.⁴⁶ Such an assessment was necessary in the circumstances. First, while Articles 7 and 8 of the Charter suggest the creation of some obligations for EU institutions and Member States, they do not specify what the role of private actors such as Google should be in the enforcement of the relevant standards, or what limitations to these rights are acceptable and how they ought to be balanced against other, equally fundamental, rights.

Indeed, in the context of a constantly evolving medium such as the Internet, the shared meaning of concepts such as privacy and data protection is limited.⁴⁷ In the ever-expanding realm of the information available online, it is difficult to understand what is meant by obligations flowing from a need to respect private life generally, without first clarifying what the 'institutionally-defined rights to privacy' enshrined in Articles 7 and 8 of the Charter actually guarantee and assessing which specific aspects of them a particular set of actions affects.⁴⁸ In other words, in order to ascribe the existence of a right to be forgotten to the fundamental rights mentioned in the judgment in any meaningful way, the Court needed first to interpret the content and reach of these rights and to define them in light of the changed circumstances to which they apply.⁴⁹ This exercise is strikingly absent from the judgment.

The CJEU then went on to set out a presumption in favour of the right to privacy, under its assessment of what a 'fair balance' between the rights to privacy and the general interests of the economic operator and the public should be.⁵⁰ This part of the judgment is problematic. First of all, it is important to avoid over-using the term 'balancing', when it comes to rights on the one hand and general policies or interests on the other.⁵¹ Suggesting that a balance must be reached in such circumstances

43 See Article 6(1) TEU; and Article 51 Charter. See also Alexy, 'Constitutional Rights, Balancing, and Rationality' (2003) 16 *Ratio Juris* 131 at 137.

44 See *Google*, supra n 2 at paras 80, 97.

45 *Google*, supra n 2 at para 80.

46 See Scanlon, 'Adjusting Rights and Balancing Values' (2004) 74 *Fordham Law Review* 1477 at 1478–81.

47 See McGoldrick, supra n 1 at 775.

48 Scanlon, supra n 46 at 1478–81.

49 *Ibid.*

50 *Google*, supra n 2 at para 81.

51 Habermas, *Between Facts and Norms* (W Rehg tr) (Cambridge: Polity Press, 1996) 259. See also Waldron, 'Security and Liberty: The Image of Balance' (2003) 11 *Journal of Political Philosophy* 191 at 196–7.

leaves the Court open to accepting any arguments, interests, or policies, as potential justifications for infringing a fundamental right.⁵² This would be incompatible with the very nature of balancing, which necessarily involves the equal promotion of two entitlements of equal constitutional value. As Scanlon explains, the primary concern should be the ‘development and full exercise’ of the two valid rights.⁵³ It follows that, to the extent that the Court seeks to weigh up what it considers a fundamental right with economic interests or, even, with a legitimate *interest* of the public in having access to information, then its quest for a ‘fair balance’ is misplaced.

Nevertheless, it is also important to delve a little deeper and to question the Court’s use of the interests/rights terminology. What the CJEU labels an ‘interest’, namely the public’s interest in accessing information, is also substantively guaranteed by a fundamental right, the right to freedom of expression and information. This is enshrined in Article 11 of the Charter and thus constitutes a norm equivalent to those that justify the right to be forgotten in the judgment (Articles 7 and 8 of the Charter). Indeed, it is clear that the operation of search engines has not only made each one of us more exposed and more vulnerable to the judgment of others, but has also brought undeniable and concrete benefits. As the Court itself notes, search engines provide a structured overview of the information regarding a particular subject, linking it together in novel ways that were not available in the past.⁵⁴ Thus, in addition to potentially interfering with the right to privacy, search engines arguably make a distinct and substantial contribution to the existing knowledge base, which positively adds to the public’s *right* to access information under Article 11 and can be considered as creating a novel subset of protected expression.⁵⁵ The Court’s approach is therefore problematic, not only because seeking to balance rights against interests is questionable as a matter of principle, but also because the use of these terms has important practical implications in this case. The judgment mislabels a widely protected fundamental right as an ‘interest’, subjects it to a presumption of non-applicability and hence fails to take account of its equal weight in the ‘fair balance’ discussion.

It follows that the CJEU’s strong stance *vis-à-vis* the rights to privacy and protection of personal data can entail lowered protection *vis-à-vis* the right to freedom of expression and information, especially when it is unaccompanied by an analysis of both rights, underpinned by the principle of proportionality.⁵⁶ In the absence of a clear assessment of what the individual fundamental right that needs to be protected actually provides and *how* it ought to be balanced against an equally valid obligation to safeguard other rights, it will often be difficult to reach an overall outcome that serves both rights.⁵⁷ Lack of clarity regarding the balancing of these rights, especially when addressed to private undertakings primarily intended to generate profit, risks being met not with more careful balancing of competing rights but, rather, with the option

52 Habermas, *ibid.* at 258–61.

53 Scanlon, *supra* n 46 at 1478–81.

54 *Google*, *supra* n 2 at para 80.

55 See *Editorial Board of Pravoye Delo and Shtekel v Ukraine* Application No 33014/05, Merits, 5 May 2011, at paras 63–4. The ECtHR’s position on Internet data is further discussed *infra* at Section B.

56 Alexy, *supra* n 43 at 135–9.

57 See Scanlon, *supra* n 46 at 1478–81.

that best serves the primary goals of these undertakings, that is, the method which is most cost-effective.⁵⁸

In this case, the lack of clear guidelines regarding the steps that need to be followed to ensure that both the right to privacy and the right to freedom of expression and information are safeguarded, risks incentivising undertakings to simply remove the information that a particular individual wants to have deleted.⁵⁹ While the forms created by Google and, more recently, Bing, in order to comply with the ruling, make clear that these companies will seek to balance individual rights to privacy with the rights to freedom of expression and access to information, in reality it will be impossible to monitor whether this is the case in each of the thousands of requests that have already been filed,⁶⁰ or indeed that the same balance will be reached by all companies now offering this right.⁶¹ Rather, in light of the numerous claims that have followed the ruling, the necessary implication appears to be that, in the absence of further legislation or case law, the companies on which an obligation to delete data has been imposed will in fact dictate the standard of when a right to be forgotten exists. In other words, as the Advocate General had persuasively explained in his Opinion, affected Internet operators will be deciding what constitutes a fair balance between the competing rights on a case-by-case basis. It is highly debatable whether the conditions exist within the EU fundamental rights landscape for such a development to take place, without at the same time risking lowering the protection for fundamental rights.⁶² Thus, in practice, the judgment's general presumptions in favour of privacy⁶³ and unconvincing discussion of the factors that need to be taken into account in assessing claims to have data removed,⁶⁴ are likely to result in no real balancing at all. Rather, the judgment creates significant risks for the protection of the right that is at the other end of the said presumption.

The second main problem that the Court's lack of fundamental rights reasoning poses relates to the reach of the obligations imposed on the controller of the data, as set out in the Directive and interpreted in the CJEU's judgment. This problem can be summarised with one short question: 'What makes you Google'? More specifically, should operators other than Google assume that they will be held to the same

58 Habermas, *The Theory of Communicative Action: Volume 2* (trans. T McCarthy) (Boston: Beacon Press 1984) at 318, 356–67, 374–5.

59 *Google Opinion*, supra n 40 at para 133.

60 Google has so far received over 91,000 requests for the removal of such data and the media have started questioning whether its handling of the issue indeed reaches the right balance: see Owen, 'Google Removes Links to Notorious Criminals' Wikipedia pages', *The Independent*, 6 August 2014, available at: www.independent.co.uk/life-style/gadgets-and-tech/news/google-removes-links-to-notorious-criminals-wikipedia-pages-9652516.html [last accessed 6 August 2014]; Cuthbertson, 'Google Approves 50,000 'Right to be Forgotten' Requests', *International Business Times*, 25 July 2014, available at: www.ibtimes.co.uk/google-approves-50000-right-be-forgotten-requests-1458273 [last accessed 6 August 2014].

61 Compare, for example, the Bing form to request the removal of data, supra n 4, with that launched by Google, supra n 2. While the two forms appear to take into account similar considerations, it is unclear whether the two companies will give these considerations the same weight.

62 *Google Opinion*, supra n 33 at paras 133–4; see also HL Report, supra n 4 at para 36.

63 *Google*, supra n 2 at paras 81, 97.

64 *Ibid.* at para 99.

standard and, if not, what distinguishes undertakings that have to meet that standard from those that do not?⁶⁵

One of the most positive aspects of the Court's ruling is that it signals an important step forward in relation to the fundamental rights obligations of private corporations in the EU, by holding a powerful undertaking responsible for the fundamental rights implications of its actions. It is indeed important to acknowledge that, in a climate of increasing privatisation, the 'private authority relationship' can also give rise to violations of fundamental rights.⁶⁶ Some private actors, such as large multinational corporations, are accumulating vast amounts of power, thus challenging the monopoly of states in violating fundamental rights.⁶⁷ In the information society in particular, the collection and storage of information by an entity with an important Internet presence such as Google gives rise precisely to these concerns.⁶⁸

Nonetheless, while recognising that an obligation to remove personal data on request may be imposed on an undertaking like Google, vested with the power and resources to make a difference in respect of privacy in the context of the Internet,⁶⁹ the fact that the judgment rests on a broad construction of the concept of 'controller' in the Directive means that it can also apply to a much broader set of entities. The Court emphasised the goal of 'effective and complete protection of data subjects' and mentioned that the liability of search engines is 'additional' to that of publishers of websites.⁷⁰ The judgment therefore suggests that, as a matter of principle, all webpage owners that exercise some degree of control over the data that appears on their pages may be liable to suit for failing to remove unwanted information, unless they benefit from the Directive's specific exception regarding journalistic expression.⁷¹ But is it necessary that all potentially affected entities are in a position to violate fundamental rights, and should they have to balance rights based on the same considerations as Google? Should the Directive apply, for instance, to search engines of a smaller scale; websites unrelated to the news business; amateur blogs; or an unfortunate post on Facebook from several years ago?⁷²

It can hardly be argued that all these scenarios generate the same degree of control and therefore should give rise to the same kind of fundamental rights obligations as those imposed on Google. While a shift in the concept of responsibility for breaches of privacy rights may be justifiable—and perhaps desirable⁷³—if it is

65 As noted earlier, Bing appears to consider itself bound by the ruling. However, questions arise as to whether it should apply to smaller undertakings. In its recent report on the judgment, the House of Lords European Union Committee considered that the ruling will 'be binding on all search engines, large and small': HL Report, supra n 4 at para 31.

66 Brysk, *Human Rights and Private Wrongs: Constructing Global Civil Society* (Abingdon: Routledge 2005) at 24; see also Clapham, *Human Rights Obligations of Non-state Actors* (Oxford: Oxford University Press 2006) at 438.

67 Knox, 'Horizontal Human Rights Law' (2008) 102 *American Journal of International Law* 1 at 19; see also Ratner, 'Corporations and Human Rights: A Theory of Legal Responsibility' (2001) 111 *Yale Law Journal* 443.

68 McGoldrick, supra n 1 at 762.

69 See HL Report, supra n 4 at paras 27–9.

70 *Google*, supra n 2 at para 38.

71 *Ibid.* at para 85; and Article 9 Directive 95/46.

72 Cf *Google Opinion*, supra n 33 at para 134. See HL Report, supra n 4 at paras 40–1.

73 See Clapham, supra n 66 at 533–4.

accepted that the changed circumstances of the Internet era and added risks for privacy posed by the Internet ought to be effectively addressed, it is essential both for data subjects and for website owners to be able to understand where the limits of that responsibility are placed. The judgment's failure to define the goals and content of the rights enshrined in Articles 7 and 8 of the Charter, and of the right to be forgotten that is inferred therefrom, leaves the question of limits open and raises concerns about legal certainty in the meantime.

B. The EU Right to be Forgotten and the ECHR

In addition to the deficiencies evident in the Court's analysis of privacy and data protection in the EU context, discussed above, the judgment raises important concerns regarding the role of the ECHR in the EU's fundamental rights commitments. The ECHR was the dog that did not bark in the judgment which did not make any mention of the Convention system, any of its specific provisions, or of the Strasbourg court's case law. This is problematic.

Despite the fact that the ECHR only protects data under the right to respect for private and family life, the home and correspondence, enshrined in Article 8 thereof, and does not contain the specific provisions regarding the protection of personal data addressed in Article 8 of the Charter, the ECtHR's case law has previously discussed the protection of personal data in the context of the Internet.⁷⁴ In particular, in its own 'right to be forgotten' ruling in *Węgrzynowski and Smolczewski v Poland*⁷⁵—which did not however establish such a right at the ECHR level—the Strasbourg Court reached a different balance in its account of the Article 10 right to freedom of expression, comprising access to information. It noted that 'particularly strong reasons must be provided for any measure limiting access to information which the public has the right to receive'.⁷⁶ Further, while the ECtHR generally recognises that the rights of others, including the right to reputation,⁷⁷ places limits on the right to access information, in this case it was particularly sceptical about attributing to judicial authorities the role of 'rewriting history'.⁷⁸ This aspect of the right to be forgotten, crucial in the ECtHR's assessment of the compatibility of such a right with the freedoms of expression and information, is starkly missing from the CJEU's judgment in *Google*.

74 See *Editorial Board of Pravoye Delo*, supra n 55 at para 63. The current state of affairs in respect of this issue under the ECHR is explained in detail in McGoldrick, supra n 1, and therefore is not reproduced in detail here.

75 Application No 33846/07, Merits, 16 July 2013. The facts of the case concerned a slightly different set of circumstances. In that case, two lawyers, who had previously won defamation suits against a newspaper, sought to have the articles containing the defamatory material removed from the newspaper's archives, which were in turn available on its website. The Court dismissed one of the claims as it was filed out of time and, in respect of the second claim, found (at para 67) that Polish law had offered adequate protection of the applicant's reputation. However, while it may be distinguished from *Google* on the facts, the Court's discussion of freedom of expression is particularly relevant.

76 Ibid. at para 57; see also *Timpul Info-Magazin and Anghel v Moldova* Application No 42864/05, Merits, 27 November 2007, at para 31.

77 See *Tammer v Estonia* ECHR Reports 2001-I at para 62; and *Dalban v Romania* ECHR Reports 1999-VI at para 49.

78 *Węgrzynowski and Smolczewski*, supra n 76 at para 65.

Furthermore, despite the differences that can be identified between the protections of privacy enshrined in the EU and ECHR systems, such divergences are not likely to be wide-ranging and referring to the ECHR standard could have been useful at the EU level. The Charter's Explanations clarify that Article 7 of the Charter ought to be read as corresponding to, and having the same limitations as, Article 8 of the ECHR.⁷⁹ Additionally, while there is no provision at the ECHR level that is designed specifically to protect against the processing of personal data, like Article 8 of the Charter, the Explanations state that the Charter provision is also premised, among other things, on Article 8 of the ECHR.⁸⁰ Moreover, Article 52(3) of the Charter stipulates that, where possible, the same meaning is to be given to its provisions as to the provisions of the ECHR. In line with both that provision and the Charter's Explanations, the only divergence from the Convention standard allowed under the Charter relates to situations where a higher level of protection has specifically been provided for.⁸¹ Finally, EU fundamental rights law has traditionally placed 'special significance' on the ECHR, even prior to the entry into force of the Charter.⁸² As Advocate General Tizzano has noted, writing extrajudicially, 'the Court came to de facto integrate the Convention, as well as the jurisprudence of its Strasbourg counterpart, in the Community legal order through its general principles'.⁸³

Thus, despite the fact that the EU's accession to the Convention is still pending, there is a clear and direct need to engage with the ECHR and with the Strasbourg Court's case law now:⁸⁴ not only is there an obligation to accede to the ECHR,⁸⁵ but the Convention is also already structurally embedded in both the Charter and the EU's fundamental rights tradition more broadly.⁸⁶

That being said, the CJEU has also made clear in its judgments in *Kamberaj* and *Fransson* that it is the Charter and not the ECHR that governs the minimum level of

79 Explanations Relating to the Charter of Fundamental Rights [2007] OJ C 303/17 at 33. While the Explanations are not binding, they have a high interpretative value in respect of the Charter: see Lenaerts, 'Exploring the Limits of the EU Charter of Fundamental Rights' (2012) 8 *EU Constitutional Law Review* 375 at 402; see also Article 6(1) TEU.

80 Explanations, *ibid.* at 20.

81 *Ibid.* at 34; and Lenaerts, *supra* n 79 at 394–7.

82 Case C–36/02, *Omega Spielhallen- Und Automatenaufstellungen v Oberbürgermeisterin Der Bundesstadt Bonn* [2004] ECR I–9609 at para 33. See also Case 4/73, *Nold v Commission* [1974] ECR 491 at para 13; Case 44/79, *Hauer v Land Rheinland-Pfalz* [1979] ECR 3727 at paras 15–17; and Case C-260/89, *Elliniki Radiofonia Tileorassi AE (ERT) v Dimotiki Etairia Pliroforissis and Others* [1993] ECR I-2925 at para 41.

83 Tizzano, 'The Role Of The ECJ In The Protection Of Fundamental Rights', in Arnulf et al. (eds), *Continuity and Change in EU Law: Essays in Honour of Sir Francis Jacobs* (Oxford: Oxford University Press, 2008) 128.

84 Explanations, *supra* n 79 at 33.

85 Article 6(2) TEU. See also Final report to the CDDH (including the draft agreement on the accession of the European Union to the European Convention on Human Rights), 10 June 2013, 47+1(2013)008rev2, available at: [www.coe.int/t/dghl/standardsetting/hrpolicy/accesion/Meeting_reports/47_1\(2013\)008rev2_EN.pdf](http://www.coe.int/t/dghl/standardsetting/hrpolicy/accesion/Meeting_reports/47_1(2013)008rev2_EN.pdf) [last accessed 29 June 2014].

86 See in particular, *Bosphorus Hava Yollari Turizm v Ireland* 42 EHRR 1, at para 165; Joined cases C-402/05 P and C-415/05 P, *Kadi and Al Barakaat International Foundation v Council and Commission* [2008] ECR I-06351, at paras 283–4; Case C-617/10, *Åklagaren v Hans Åkerberg Fransson*, 26 February 2013, unreported, at para 44; and the case law cited at *supra* n 82.

protection of fundamental rights in the EU.⁸⁷ However, even in those cases, the CJEU expressly referred to the Convention threshold and only opted for additional protections where it considered these protections compatible with ECHR rules.⁸⁸ Therefore, while these cases can be criticised for insisting on a somewhat illusory sense of exclusivity in the interpretation of fundamental rights, the lack of any reference to the ECHR in *Google* is particularly striking. While the *Google* judgment is not necessarily incompatible with the ECHR,⁸⁹ the Strasbourg Court's judgment in *Węgrzynowski and Smolczewski* suggests that such incompatibility cannot be ruled out either. In particular, as *Google* offers no discussion of how it meets the Convention's relatively high standard in respect of freedom of expression,⁹⁰ even despite the fact that EU legislation on Internet regulation is currently the subject of an Article 10 case pending before the Strasbourg Court's Grand Chamber,⁹¹ the case marks a potential break from the ECtHR's previous reasoning.

This is troubling. The CJEU's failure to refer to the ECHR in *Google* suggests that its judgment is premised on a fundamental assumption that recognising a right to be forgotten necessarily affords a higher level of protection for human rights altogether than the ECHR minimum threshold requires. However, as noted above, the Court's failure both to define the reach of the obligations enshrined in Articles 7 and 8 of the Charter and, where need be, to balance them with the need to protect Article 11 of the Charter, means that that assumption remains, for the time being, unsubstantiated. Indeed, the Court can be criticised for a manifest disregard of the important fundamental rights issues regarding the right to be forgotten noted above, which have not only been previously discussed in the ECHR context, but were also clearly presented to the CJEU in the Advocate General's Opinion.⁹² These issues were relevant, for the reasons set out above, in the discussion of the fundamental rights enshrined in EU law and, hence, for the interpretation of Directive 95/46/EC.

On this occasion, the CJEU's puzzling stance towards the international standard may be driven by a need to respond to an even more complicated internal conflict: some Member States already recognise a right to be forgotten through an increased protection of rights to the development of personality and to dignity, while others do not.⁹³ Interpreting the Charter by strictly following the minimum standards set

87 Case C-501/10 *Kamberaj*, 24 April 2012, unreported, at paras 62–3, 80; and Case C-617/10 *Fransson*, *ibid.* at para 44. These cases concerned, *inter alia*, the question of whether EU law regulated the relationship of Member States with the ECHR, finding that, while it did not, ECHR standards were nonetheless embedded in the EU Charter.

88 See *Fransson*, *ibid.* See also Joined Cases C-92/09 and C-93/09, *Schecke and Eifert v Land Hessen* [2010] ECR I-11063, at paras 51–2.

89 See *Delfi AS v Estonia* Application No 64569/09, Merits, 10 October 2013, at para 76 (currently pending before the Grand Chamber).

90 See, for example, *Sunday Times v United Kingdom (No1)* A30 (1979); 2 EHRR 245 at para 65, where the ECtHR established a strict standard for the application of the margin of appreciation in freedom of expression cases.

91 *Delfi AS*, *supra* n 89 (referral 17 February 2014). While the legislation in question in this case is Directive 2000/31/EC on electronic commerce, the appeal concerns the question of control over offensive comments posted on a news portal and may therefore be of particular relevance to the right to be forgotten.

92 *Google Opinion*, *supra* n 33 at paras 120–37.

93 Such rights are recognised, for example, in Spain and Germany, while they are currently not similarly protected in the UK.

out in Strasbourg case law could have created an equally—if not more—problematic situation, whereby the level of protection of privacy in some Member States would need to be lowered. This is due to the fact that, as the *Melloni* ruling made clear, the Charter's level of protection is not a minimum standard of fundamental rights protection but, rather, a binding standard that requires observance across the Union.⁹⁴ Nevertheless, one does not necessarily need to criticise the judgment's outcome in order to take issue with the CJEU's failure to relate to the existence of Convention standards on the right to be forgotten. It is important to acknowledge that EU fundamental rights cannot be interpreted in a conceptual vacuum and that a sensitive balance must be struck between EU and non-EU standards.⁹⁵ In the past, both international and Member State based analyses of these rights have meaningfully contributed to the development of EU fundamental rights, in a two-fold way: first, a degree of accommodation for national and international legal regimes has been necessary both for the legitimacy and for the smooth operation of the EU's supranational order; and, at the same time, responses to clashes amongst these orders have been instrumental in the development of EU fundamental rights standards themselves.⁹⁶ As Besselink puts it:

It would therefore be a mistake to see the European area of fundamental rights only as an EU area of fundamental rights. Also in the field of fundamental rights, Europe is composed of mutually dependent and interacting orders, together forming one encompassing constitutional order.⁹⁷

It follows that the CJEU's disregard for the case law of the ECtHR in the *Google* judgment is regrettable. First of all, there are important lessons to be learnt from the Strasbourg Court's case law in this field, which has tackled balancing issues between freedom of expression and the right to private life for a long time. Secondly, Convention considerations are not questions that can be left to be regulated in the distant future, or indeed, upon the EU's accession to the ECHR: they are already requirements under EU law, and their disregard risks upsetting a sensitive and delicate equilibrium not only internationally, but also internally, within the EU.

5. CONCLUDING REMARKS

The creation of a 'right to be forgotten'—albeit a limited one—in the *Google* case suggests that the erasure of irrelevant or unwanted data is a necessary part of forgetting. What is more, it is a necessary part of achieving privacy, as expressed in the fundamental rights to the protection of private life and of personal data enshrined, respectively, in Articles 7 and 8 of the EU Charter. It is true that, in the information society in which we currently live, a simple search will likely lead an

94 Case C-399/11, *Melloni v Ministerio Fiscal*, 23 February 2013, unreported, at paras 57–61.

95 See Besselink, 'General Report. The Protection of Fundamental Rights Post-Lisbon: The Interaction Between the Charter of Fundamental Rights of the European Union, the European Convention on Human Rights and National Constitutions' (XXV FIDE Congress, Tallinn, 30 May–2 June 2012) at 47.

96 Eeckhout, 'Human Rights and the Autonomy of EU Law: Pluralism or Integration?' (2013) 66 *Current Legal Problems* 169 at 171–2.

97 Besselink, *supra* n 95 at 47.

Internet user to a lengthy set of links containing data about any particular individual, which may be untrue, fanfare, or simply outdated. Indeed, in Mr Costeja González's case against Google, the publication of the auction of his property 16 years earlier meant that anyone searching his name online was immediately directed towards one incident in his life—in this case a very unpleasant one—which came to define his Internet presence, more than any of his personal characteristics, achievements, or life choices. This has understandably caused him distress, and has potentially had an adverse impact on his personal and professional relationships. He has reasonably sought to rectify this undesirable situation. Yet, the CJEU's affirmation of his right to do so is more wide-ranging than the facts of this case; it indicates a renewed and vehement commitment to the protection of privacy more broadly.

Nevertheless, it is worth pondering a little more upon the implications of granting individuals a right to have their personal data deleted/forgotten/consigned to oblivion. The immense technological changes that have marked the last two decades have fundamentally altered the concept of privacy.⁹⁸ It is becoming increasingly clear that our lives today are not public versus private, and that it is difficult to distinguish between the things that belong to the public realm and the things that belong to the private realm.⁹⁹ On the one hand, as this article has already argued, acknowledging private responsibility for breaches of fundamental rights is one way of addressing these changed circumstances. On the other hand though, it is important to respond to these changes also by reassessing the affected rights and by retelling their story in light of a shifting social context: what goals are they intended to serve today and where should their limits be set?

The *Google* judgment fails to carry out this necessary process of reassessment. Appeals to rights and to a fair balance between competing interests lack grounding in a 'why' and a 'how' in the judgment, while relevant discussions in the ECHR forum are also, puzzlingly, left outside of the CJEU's analysis. It could be argued that omitting to discuss these issues is yet another instance of the Court moving forward 'half a case at a time', and that the Court is hoping to clarify and establish the new right gradually.¹⁰⁰ However, this is unsatisfactory. Deciding that a right to be forgotten follows from the obligations enshrined in Articles 7 and 8 of the Charter that Directive 95/46 seeks to protect has vast and immediate implications for many private Internet operators, as well as for Internet users seeking to access information. Moreover, a right to make others forget us has existential implications: should we/can we regulate what is remembered or forgotten?¹⁰¹ If so, to what extent

98 McGoldrick, *supra* n 1 at 775.

99 See Habermas, *The Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society* (trans. Frederick G Lawrence) (Cambridge, MA: MIT Press, 1989) at 27.

100 See Sarmiento, 'Half a Case at a Time: Dealing with Judicial Minimalism at the European Court of Justice', in Claes et al. (eds), *Constitutional Conversations in Europe: Actors, Topics and Procedures* (Cambridge: Intersentia, 2012) 17.

101 See HL Report, *supra* n 39 at para 15, explaining that the concept of a 'right to be forgotten' in the context of the erasure of personal data is in fact misleading, as it does not necessarily mean that the data is in fact banished from archives, rather than simply concealed. It has also been argued that the EU legislature should step in and set out the appropriate balancing framework as soon as possible: see Pannick, 'European Court Wrong to Tear up Part of Index to the Internet Library', *The Times*, 29 May 2014, available at: www.thetimes.co.uk/tto/law/columnists/article4102402.ece [last accessed 6 August 2014].

should/can a right to have certain data deleted really impact our abilities to remember and to forget, collectively or individually? Thus, both at a conceptual and at a practical level, important issues regarding the regulation of the Internet and the operation of a right to be forgotten in the EU remain to be addressed, even in the aftermath of the *Google* judgment.