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Articles

Christoph Wagner – Impact of Digitalization and Convergence on Merger Control in the Media Sector 65

Gilberto Martins de Almeida – Cybersecurity Policy and Law Making in the EU, US and Brazil 71

Felix Hilgert/Philipp Sümmerrmann – Youth Protection in Virtual Reality Environments 75

Case Law

Spain: Google Spain Not Responsible for Google Search (Mis-)Use of Personal Data – Summary & Comment by *Lincke* 81

Canada: Confidentiality of Private Online Messages in Recipient's Account – *R. v. Craig* 82

USA: “Concrete and Particularized” Injury by False Data in Credit Reporting – *Spokeo Inc. v. Thomas Robins* 87

Updates

Ilay Yilmaz – Turkey: Long-Awaited Data Protection Act Adopted 91

Holger Lutz/Michaela Weigl – Germany: Official Guidance on Monitoring Emails and Internet Use of Employees 93



Case Law

Spain: Google Spain Not Responsible for Google Search (Mis-)Use of Personal Data

Directive 95/46/EC Art. 2, 4, 12, 14; Charter of Fundamental Rights of the European Union Art. 7, 8

Editor's Headnotes

1. Google Inc. is the sole data controller determining the purpose and means of the processing of personal data for the Google Search.

2. Google Spain is not involved in the processing of personal data for Google Search and, therefore, cannot be treated as data controller responsible for dealing with any claims brought by individuals seeking to exercise their 'right to be forgotten'.

Tribunal Supremo, decision of 14 March 2016 – 964/2016

Summary & Comment

Facts:

The Spanish Supreme Court (Tribunal Supremo) has issued an important ruling on the responsibility of Google Spain for the processing of personal data for Google Search.¹ This ruling follows and supplements the earlier "Google Spain" ruling by the Court of Justice of the European Union (CJEU) on 13 May 2014² and the earlier ruling by the Spanish High Court on 29 December 2014³.

Subject of the Spanish Supreme Court's decision was a claim of Google Spain against the Agencia Española de Protección de Datos (Spanish Data Protection Agency; 'the AEPD'), complaining that Google Spain shall not be obliged by the AEPD to adopt the measures necessary to withdraw personal data relating to Spanish citizens from its index and to prevent access to the data in the future.

A very similar constellation had been subject to the CJEU's decision in *Google Spain*. There, the CJEU dealt with a claim by Google Inc. and Google Spain SL, on the one hand, and the AEPD and a Spanish citizen, on the other, concerning a decision by the AEPD upholding the complaint lodged by the Spanish citizen against each of these two companies. The CJEU stated *inter alia* that "activities of the operator of the search engine [Google Inc] and those of its establishment situated in the Mem-

ber State concerned [Google Spain] are inextricably linked since the activities relating to the advertising space constitute the means of rendering the search engine at issue economically profitable and that engine is, at the same time, the means enabling those activities to be performed".⁴ The ruling concluded that both, Google Spain and Google Inc. were to be considered as data controllers.

Held:

The Spanish Supreme Court has controversially modified what the CJEU stated on 13 May 2014 and found that Google Spain will not be considered responsible for the processing of personal data regarding Google Search. All requests concerning the right to be forgotten should be submitted directly to Google Inc. headquartered in California, USA. The Supreme Court stated that Google Inc. was the sole data controller determining the purpose and means of the processing of personal data for the Google search.

Furthermore, the Supreme Court found that Google Spain could not be held responsible for dealing with any requests regarding removal of personal data from the search engine because Google Inc. would be held solely liable. The Supreme Court argued that indexing search results is a processing operation and the purposes and means of such operations are established by the search engine manager Google Inc. and not by Google Spain. Therefore, Google Spain is neither obliged nor able to address requests based on the right to be forgotten that are directed to Google Inc.⁵ The Supreme Court stated that when the CJEU referred to the provision of search engine services within Member States, it intended Google Inc. and other search engines outside the European Union to follow European regulations and in that particular case, the Spanish legislation on data protection. Google Inc. carries out activities directly linked to the indexing or storage of information or data contained on third parties' websites; not Google Spain. Consequently, the Supreme Court ruled that only Google Inc. is solely responsible for dealing with requests brought against Google Spain by individuals seeking to exercise their 'right to be forgotten'.

Comments:

This Judgment of the Spanish Supreme Court slightly modifies the 'right to be forgotten'⁶ as established by the CJEU's *Google Spain* judgment. This appears very controversial as this judgement has altered the original CJEU's ruling that both Google Spain and Google Inc. were to be considered as data controllers. It also leaves individuals with many doubts regarding their claims already brought against Google Spain wondering whether these claims will still be considered or whether they now

1 Tribunal Supremo, 964/2016, 14 March 2016: <https://www.abanlex.com/wup-content/uploads/2014/09/TSContencioso-6-Madrid-14.03.16-1380-15.pdf>.

2 CJEU, 13 May 2014, *Google Spain SL and Google Inc. v. Agencia Española de Protección de Datos (AEPD) and Mario Costeja González*, C-131/12, ("Google Spain judgment"), CRI 2014, 77–89 with remarks by Spelman/Towle from a US-perspective and by Tobin from an Irish perspective: http://curia.europa.eu/juris/document/document_print.jsf?doclang=EN&docid=152065.

3 Audiencia Nacional, 725/2010, 29 December 2014: https://www.agpd.es/portalwebAGPD/CanalDelCiudadano/derecho_olvido/common/SAN_29122014.pdf.

4 Paragraph 56 of the Google Spain judgment.

5 Comunicación Poder Judicial, <http://www.poderjudicial.es/cgpj/es/Poder-Judicial/Sala-de-Prensa/Notas-de-prensa/El-TS-estima-el-recurso-de-Google-Spain-contrareclamaciones-de-derecho-al-olvido-por-no-gestionar-el-motor-de-busqueda>.

6 Carmen Langhanke and Martin Schmidt-Kessel, Consumer Data as Consideration, EuCML 2015, 218.