Recent ECI decision supports the “Right to Be Forgotten”

On May 13th. 2014, the European Court of Justice issued a preliminary ruling on a series of questions addressed to it by the National High Court of Spain. This ruling was characterized as “landmark decision” on Internet Privacy, while the new Data Protection Regulation is still under discussion by the European Commission.

The Case

The case was initiated when Mario Costeja Gonzalez, a Spanish citizen, filed a complaint of privacy before the Spanish Data Protection Authority (“AEPD”) against the daily newspaper “La Vanguardia”, Google Inc. and Google Spain SL. Costeja complained about two articles of the newspaper “La Vanguardia” from 1998, which appeared in the results, when entering his name in Google Search. These articles were connecting Mr. Costeja to a real-estate auction for settlement of his social security debt. Mr. Costeja based his complaint on the grounds that the information was outdated and no longer relevant, as he had since settled his debt. AEPD found Costeja’s claim against Google Inc. and Google Spain SRL valid and ordered the two companies to remove data from their index and to block access to this data in the future. As such, Google Spain and Google Inc. brought two actions before the National High Court of Spain, claiming that the AEPD’s decision should be annulled. It is in this context that the Spanish Court addressed a series of questions to the Court of Justice with regards to the interpretation of the Directive 95/46/EC (“Directive”).

The Ruling

On the questions addressed by the Spanish Court, the Court of Justice ruled as follows:

a) The activity of a search engine consisting in (i) finding information published or placed on the internet by third parties, (ii) indexing it automatically, (iii) storing it temporarily and, finally, (iv) making it available to internet users according to a particular order of preference, must be classified as ‘processing of personal data’, when that information contains personal data. As such, the operator of the search
engine must be regarded as the ‘controller’ in respect of that processing, within the meaning of the Directive.

b) When a company, which is operating a search engine, has its registered seat in a country outside the EU but has an establishment in a Member State, the processing of personal data by this search engine is carried out ‘in the context of the activities’ of that establishment, provided that the establishment is intended to promote and sell in the Member State advertising space offered by the search engine, in order to make the service offered by the engine profitable. As such, the Court observed that Google Spain is a subsidiary of Google Inc. on Spanish territory and, therefore, an ‘establishment’ within the meaning of the Directive.

c) The operator of a search engine is obliged to remove links to web pages from the list of results displayed, following a search made on the basis of a person’s name, when these links contain information published by third parties, which relate to that person, even in the event (i) that the disputed name or information is not erased beforehand or simultaneously from those web pages, and (ii) that the publication on those pages is lawful.

d) Search engine providers shall determine whether the data subject has the right to request to have the information linked to his/her name removed from the list of the results displayed, following a search made on the basis of his/her name, regardless of whether such information causes damage to the data subject. The Court of Justice found that this fundamental right overrides, 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, the Court of Justice makes a distinction between public figures and common people by ruling that this principle is not applicable when the interference with the data subject’s fundamental rights is justified by the preponderant interest of the general public in having access to the data subject’s information.
The Greek Government’s Opinion

In view of the above, it is interesting to note that the Greek Government held a more flexible position on the matters discussed.

More specifically, the Greek Government expressed the opinion that the activity of search engines may constitute “processing”, but to the extent that the search engines merely provide intermediary services, the companies operating the search engines cannot be considered as “controllers”, unless they store the data in an ‘intermediate memory’ or ‘cache memory’ for a period of time, which exceeds the period that is deemed as technical necessary.

The Greek Government also argued that when the operator of a search engine sets up in a Member State a branch or a subsidiary, which is intended to promote and sell in such Member State advertising space offered by that engine, the processing of personal data is not carried out in the context of the activities of such branch or subsidiary of the controller on the territory of the Member State.

With respect to the scope of the data subjects’ statutory rights to access and to object to the processing of their personal data, the Greek Government agreed with the Austrian and the Polish Governments as well as with the Commission on the argument that the Directive grants the data subjects the above rights only in the event (a) that the processing in question is incompatible with the Directive or (b) that the exercise of these rights is considered imperative for legal reasons relating to the data subjects. As such, according to the opinion supported by the Greek Government, the above rights should not be exercised by the data subjects when they merely consider that such processing may cause them damage or just because they want these data to be forgotten. In view of this the Greek and Austrian Governments claim that the data subjects must address their claims to the owner of the website concerned.

Conclusion
Following the issuance of this preliminary ruling, complex questions have been raised globally over freedom of speech and the possible risks of a general establishment of ‘the right to be forgotten’. As such, each case of alleged defamation or disclosure committed on the internet is different and should be reviewed individually. The big question is whether the search engine providers will be able to grant the requests of users, who wish to be forgotten, in a reality of trillion postings being made every day by billion internet users from all over the world.

Nevertheless, Google has already responded to the Court of Justice’s ruling by launching a ‘right-to-be-forgotten’ webform for removal requests, empowering citizens to have certain links about them deleted from search results.