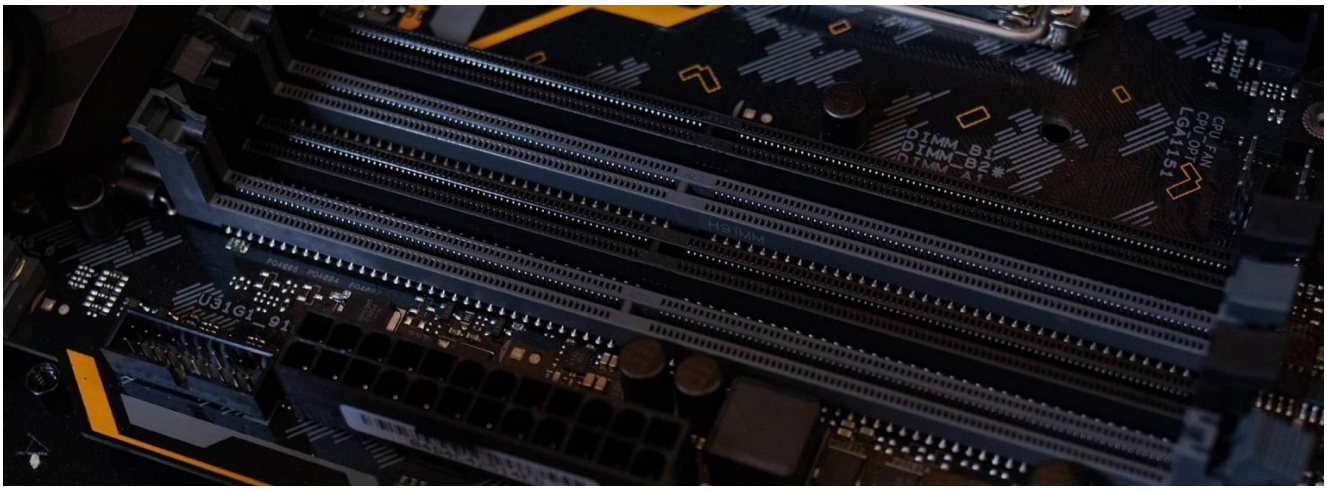

Right to be forgotten: Recent jurisprudential developments and artificial intelligence

Positions of the Court of Justice of the EU and the Hellenic Data Protection Authority on the scope of the right to be forgotten; thoughts on the role of artificial intelligence.

The Court of Justice of the EU (CJEU) and the Hellenic Data Protection Authority (DPA) have confirmed in recent judgements that the right to be forgotten presents an ongoing challenge, especially considering that artificial intelligence systems evolve rapidly and do not "forget".

The right to be forgotten was established by virtue of the judgment of the CJEU in Case C-131/12 dated 13.05.2014 (Costeja judgment), and further defined in the Guidelines of the Article 29 Working Party, as the right of a person to have information relating to them cease to be associated with their name, provided that this information has become inappropriate, irrelevant or no longer related to the matter in question, or excessive in relation to the purpose behind it being publicly available or in relation to the time elapsed. The right to be forgotten is included in the General Data Protection Regulation (GDPR) as the right to erasure (Article 17), from which exceptions are provided, implying that it is not absolute, but that it must be balanced with other fundamental rights, on the basis of the principle of proportionality (*see* CJEU judgment dated 24.09.2019 on case C-136/17, para. 57; CJEU judgment dated 08.12.2022 on case C-460/20, para. 56).

The scope where the right to be forgotten is applied appears to be the online environment of search engines. This article deals with two recent judgements in the context of search engine removal requests: CJEU judgement dated 08.12.2022 on case C-460/20 (A) and Hellenic DPA judgement 1/2023 (B). The article concludes with some thoughts on the role of the rapidly evolving artificial intelligence (AI), which is currently trending as a burning issue.

A. CJEU judgement of December 8, 2022 on case C-460/20: TU, RE v. Google LLC.

Facing a preliminary ruling request on a case with respect to a request to remove data from Google search engine, the CJEU was called upon to rule on the influence of the applicant's claim of inaccuracy of the information referenced by the search engine, on the one hand, and on the other hand, on a request to remove photographs displayed on the search engine in the form of thumbnails.

On the issue of the allegations of inaccuracy, the Court reiterated the principle that the search engine

is not to be held responsible for the display of personal data on a webpage, but only for the referencing of that webpage in a specific search results list presented following a search carried out on the basis of an individual's name (para. 52). However, the question of the accuracy of the information contained in a referenced website is crucial for the assessment of a request to remove the URL leading to the webpage in question from the search engine's results list (paras. 64-65). Nevertheless, if the applicant of the removal request invokes this inaccuracy as a justification for the request, the Court is not responsible to assess the accuracy of the information contained in the referenced website (para. 70). On the contrary, it is the applicant bears the burden of proving it by submitting evidence, as the search engine is not required to investigate facts in the direction of proving the accuracy or inaccuracy of information; only in case the inaccuracy occurs by the evidence submitted, the search engine in required to remove the requested URLs (paras. 68, 71). Therefore, in the case where the applicant provides "*relevant and sufficient evidence capable of substantiating his or her request and of establishing the manifest inaccuracy of the information found in the referenced content* […] *of that information, the operator of the search engine is required to accede to that request for de-referencing. The same applies where the data subject submits a judicial decision made against the publisher of the website, which is based on the finding that information found in the referenced content* […] *is, at least prima facie, inaccurate*" (para. 72).

In relation to a request to remove photographs from the search results of images published as an article accompaniment and appearing in those results as thumbnails, the CJEU considered whether, in assessing such requests, only the informational value of the thumbnails in the neutral context of the list of results should be taken into account, or if the original context of the publication of the photographs should also be taken into account. Considering the direct effect of the image as "*one of the chief attributes*" of an individual's personality and "*one of the essential components of personal development*" and, thus, the depth of the interference with their private life and personal data that the display of the image of a person on the internet entails (paras. 94-95), the Court concluded that the informational value of the photographs in question must be assessed irrespective of the context of their publication on the website from which they originate, but taking into account any textual element which directly accompanies the appearance of the photographs in the search results and which may clarify the informational value of the photographs (para. 108).

B. Hellenic DPA judgement no. 1/2023.

The Hellenic DPA, also faced with a dispute arising from a request to remove URLs from the Google search engine results, was requested to assess whether search results relating to the professional life of an applicant were to be removed. Although the judgment refers the matter to the plenary session, its reasoning addresses the issue of data protection of legal entities. In principle, the GDPR does not apply to legal entities, but the Authority draws attention to the considerations of the European Commission and the Article 29 Working Party, according to which information about single member companies may constitute personal data where it is possible to identify individuals, and certain data protection rules may in some cases apply implicitly to information relating to undertakings or legal entities, such as cases where the name of the entity is derived from the name of an individual (paras. 5-6 of DPA judgement).

In lieu of an epilogue

According to the Geneva Internet Platform's Digital Watch observatory, artificial intelligence is expected to be a facilitator for managing removal requests based on the right to be forgotten. On the contrary, the current capabilities of these technologies are proving to be inadequate in evaluating complex data and, ultimately, in making decisions on such requests. At the same time, there is absence of capacity to "forget" in the AI systems themselves, also known as the problem of unlearning, which requires further

development of the systems in question, but also an enhancement of the regulatory framework.

Studying recent case law shows that the criteria to be taken into account when assessing requests for removal of data before search engines are general guidelines that acquire meaning when applied ad hoc. Considering the identified weaknesses of artificial intelligence, the concerns expressed in this regard, and the adoption of the European Regulation on Artificial Intelligence (AI Act), concerns arise as to whether the regulatory framework can cope with the speed of technological developments by mitigating these weaknesses. The fact that memory in the online environment seems to be perpetual raises the question of whether the right to be forgotten can in essence ever be accomplished.

TMT & IT
M&A
Arbitration & DR
Employment & Pensions
Corporate
Chara Daouti
Partner
C.Daouti@lambadarioslaw.gr

TMT & IP

Georgia Bamia
Associate
G.Bamia@lambadarioslaw.gr