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Online archive and right to be forgotten: from the approach of the Italian Privacy Authority to the last decision of the Italian Supreme Court

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1. *The first approach of the Italian Privacy Authority.*

In the field of online archives, the first approach adopted by the Italian Privacy Authority consisted in balancing the freedom of expression, which consists in the storage of the articles in the online archive for informative and historic purposes, and the right of privacy. In particular, notwithstanding the Authority had recognized the possibility to eliminate that

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news which was indexed by search engines in the cases in which the articles had ceased to satisfy an actual public interest, there was also an interest to storage that news for historic purpose, as expressed by the Italian Authority in different occasions (*ex multis*, Italian Privacy Authority, 11 December 2008, doc. web No. 1582866; 8 April 2009, doc. web No. 1617673; 25 June 2009, doc. web No. 1635966).

2. *The approach of the Italian Supreme Court in the case No. 5525/2012.*

In 1993 the plaintiff, an Italian politician, was arrested and a criminal trial started, for which eventually he was acquitted. Nonetheless, the only news article that could be retrieved online was that of the arrest, which did not contain any reference to the positive ending of the proceedings. Hence, it claimed violation of its rights under the Italian Data Protection Code (d.lgs. 196/2003, hereinafter IDPC), and resorted to the Italian Privacy Authority, which held that the publication was lawful as long as the treatment of personal data without the consent of the subject followed the exercise of the freedom of expression in the press. The claimant appealed the decision with a civil action, which went up to the Supreme Court.

The Court held that according to art. 10 and 7 IDPC, personal data should always be up to date in order to be coherent with the current personal and moral identity of the individual, and that the subject has the right to ask for modification or cancellation of its data if it is no more the case. Further, the right to privacy is limited by the freedom of expression (art. 21 Italian Constitution), only to the extent that there is a public interest in the news, otherwise the subject is now entitled to the right to be forgotten. In the present case, although the news of the arrest still had some general relevance inasmuch as related to a political figure, there was still a violation of the right to a coherent and updated identity of the subject under art. 10 IDPC. The Court also suggested that, due to the technical nature of the Web, the simple

online availability of the second article on the plaintiff's acquittal was not sufficient and argued that a viable solution could be to order the website owner to signal into the first article the existence of a development or update. Consequently, the Supreme Court concluded that in those kind of circumstances, the subject is entitled to ask for a "contextualization" of the personal data.

Following this approach, the Italian Privacy Authority started issuing those orders to newspapers' editors, making direct reference to the judicial decision (one of the first and most relevant is cases is that against Gruppo Editoriale L'Espresso, No. 31, 24 January 2013).

3. *The decision of ECtHR in the case Węgrzynowski and Smolczewski v. Polonia.*

The relevance of this issue was confirmed also by the decision of the ECtHR in the case Węgrzynowski and Smolczewski v. Polonia[1]. The background of this decision consists in the publication on a Polish newspaper of an article about two Polish lawyers, who found it inaccurate and filed a libel suit before the national authorities. Eventually, they won the case, as the court recognised the defamatory nature of the article and ordered the journalists and the editor to publish a public apology. Subsequently, having noticed that the article was still available on the newspaper's website, the applicants sought an order to have the article removed by the newspaper's website, but the Polish judge dismissed the case, on the ground that such a removal would have resulted in censorship. Then, the two lawyers resorted to the ECtHR, claiming violation of art. 8 (right to privacy) of the Convention by Poland. The ECtHR recognised that the facts at hand required to balance the reasonable privacy expectation of the claimants together with the public interest of accessing online archives protected by art. 10 of the Convention (freedom of expression). On that issue, the Court held that Poland had struck a fair balance because it considered a not proportional censorship to

[1] Case n. 33846/07, dated 16/07/2013.

remove the whole article, but it also suggested that the applicants should have asked to add a reference of the libel judgement on the webpage, hence recognising the importance of correct online information in order to protect the rights of the individual.

4. *The Google Spain decision and the right to be forgotten.*

The landmark case given in May 2014 by the CJEU has its roots in a request to Google from a Spanish citizen, Mr. Gonzàles, to remove from the search engine's results a link to a newspaper's article on Gonzales' bankruptcy. In a preliminary ruling referred from the Spanish Supreme Court, the CJEU addressed whether Google was subject to the 95/46/CE Data Protection Directive and whether Gonzales was entitled to such a right to be forgotten.

For the first question, it was held that the retrieval and organization of online information by means of an algorithm accounted for processing of personal data, which made Google subject to the provisions of the Directive. Moreover, although Google had its headquarters outside the EU, according to the Directive the processing shall be deemed to have taken place where marketing activities are carried out, i.e. at its subsidiary Google Spain, which is inside the EU and then liable for the obligations stated in the Directive.

For the second question, the Court argued that the subject has the right to obtain that the links to the relevant pages are deleted when they do not correspond to a fair processing under the Directive, for instance when the personal data (here, the news) is no more relevant. The said relevance of the processing should be assessed looking at how old is the news, and whether it has a public or historical interest or not. In that case, a right to be forgotten arisen, and it limits the freedom of expression and freedom of economic initiative of the search engine.

Concluding, the CJEU judge stated that the person entitled to such a right can ask directly the search engine to remove the relevant links, and in case of denial can then resort to the competent administrative authorities or to the judiciary.

5. *After Google Spain.*

The first Italian case of the post-Google Spain era concerns a request sent to Google to remove 14 links related to a criminal trial started in 2012 and involving a lawyer, who argued that he was entitled to the right to be forgotten in relation to those links[2]. The Court dismissed the case on the ground that an essential aspect of such a right is the passage of time and the lack of a public interest in the news, namely whether it relates to a "public figure" or not. In the context of the right to be forgotten, the Court held that the meaning of "public figure" should be broad enough to include not only politicians, but also businessmen and lawyers. Hence, in the present case the right to be forgotten could not be enforced as it concerned a news which is both recent and of general interest, thus falling under the protection of freedom of expression. Obiter, the Court also added that had the claimant provided documentation on the outcome of the said criminal proceedings, at least he could have had his personal data updated, in accordance with the Italian Privacy Code.

With reference to that issue, following the decision of the Italian Supreme Court in 2012, owners of online archives are obliged to integrate and keep updated the information stored in order to protect the reputation of the subjects concerned over the time. The Supreme Court has considered the information still not updated as amounting to a false information. In other words, the criterion of contextualization should be applied in the field of the online archive of newspapers, imposing to publishers and owners of the archives an obligation to update the articles in order to represent the events following the original publication of the news.

In this field, there are two conflicting interests of different nature: on one hand, there is the private interest of the subject which intends to protect its identity during the time, on the other hand, there is the public interest to the diffusion of the news which, nowadays, are also gathered in online archives. Moreover, although online news includes personal data, their

[2] Court of Rome, No. 23771/2015.

storage constitutes not only a channel to enhance the possibilities for the public to be informed, but also pursue an historical objective. In both cases, according to the Italian Data Protection Law, the data controller is not obliged to require the data subjects the consent for the processing of their personal data.

In 2013, the Court of Milan[3] has applied the approach identified by the Supreme Court in 2012. In particular, the judge has recognized the violation of the right to be forgotten which was considered predominant in respect of all the other rights at stake. In particular, the Court has maintained that the facts represented by the article at stake were not completely true and the person concerned did not cover a public role. For these reasons, the storage of the article during the time was not justified by the public interest to the news.

Moreover, the Court, recalling the hypothesis of the Supreme Court related to the possibility to impose the removal of the content to the publisher and owner of the archive, have ordered the elimination of the online archived article, considering sufficient the storage of a single paper copy in the archive of the journal. This decision has interpreted the principle established by the Supreme Court in a narrow manner, clearly increasing the burden for online journals.

However, in 2014, a decision of the Court of Appeal of Milan[4] has contributed to clarify some aspects in the field of online archives. In particular, the inclusion of an article in the online archive, although enhances the possibility to access this content, does not create a new publication, but it is equivalent to the physical access to the article. For this reason, it seems that the only obligation which applies to online newspaper consists in the updating (i.e. contextualization) of the news of the online archive in order to represent the evolution of the events related to the past information. The only relevance of the online publication is related to the amount of damages in cases in which the article published is defamatory because the online publication increase the prejudice suffered by the injured party. Moreover, differently

[3] Court of Rome, No. 23771/2015.
[4] Court of Appeal of Milan, February 2014.

from the previous rulings, the publisher and the owner of the archive are not obliged in general to update the information by inserting a link that allow users to be informed about the new events, but only after a specific request of the person concerned. According to the Court of Appeal, this obligation is based on two references: the first is Article 7 IDPC which attributes to the data subject the right to require to the data processor the update of his/her data, the second is related to the need to not produce an unjustified harm to the reputation of a person who could also be harmed by a subsequent conduct, also chronologically in respect to the publication of the defamatory article, which can be produced not only as consequence of the online publication but also by the publication of the article in the newspaper.

In other words, the Court of Appeal has enforced the obligation to keep data updated based on Article 7 IDPC, but it has specified that there is not a general obligation for the publisher and the owners of the archive to amend the news without a request of the person concerned.

In June 2016, the Italian Supreme Court[5] has delivered a new decision in this field, ruling that the storage of an online article, after a period of two years from publication, constitutes unlawful processing of personal data, which is detrimental to the privacy and reputation of the subjects which are mentioned in the article[6].

The Supreme Court has upheld the request of the owners of an Italian restaurant to delete an article, published in a local online journal, Primadinoi.it (hereinafter, Primadinoi), related to a criminal proceeding regarding their restaurant in 2008. In particular, in October 2010, the owners of the restaurant asked Primadinoi to remove the news related to their involvement in the criminal proceedings. When the local online journal refused, the owners brought a legal action, claiming reputational damage, privacy infringement and violation of the right to be forgotten.

[5] Italian Supreme Court, No. 13161 of 24 June 2016.

[6] Moreover, in this case, the Supreme Court recognized that the article included also sensitive data related to a criminal judicial proceeding and such data was unlawfully processed due to lack of the express consent of the data subject as required by Article 20 IDPC.

Therefore, Primadinoi removed the article in May 2011 after the first ruling of the Court of Chieti (Ortona) on 20 January 2011, which ordered the online journal to delete the article from the online archive. After two years, on 16 January 2013, the Court of Chieti[7] (Ortona) delivered its second ruling, however, without recognizing the right of the owners to obtain the elimination of the article because Primadinoi had already eliminated the news from its online archive. Against this decision, the online journal appealed to the Italian Supreme Court in Rome.

Notwithstanding such news was correct, based on true facts and not going beyond the limits of law, the Supreme Court ruled that an article about a stabbing in a restaurant should have been deleted from the online news archive because such article had caused damage to the applicants. The Court confirms the unlawful nature of the processing, at least for the period of more than eight months from September 2010 - when the applicant had sent a request for removal - to May 2011 - when the article was eventually deleted. According to the Italian Supreme Court, the illegal processing consisted both in the «*presence of the direct and easy access*» to the service and in its online diffusion. In particular, the Court based this assumption on the fact that an online search of the applicant's name was sufficient to find the link to the article at stake in the home page. In other words, according to the Supreme Court, online contents need a different treatment because, even if archived, they are «*consultable simply by typing the name of the claimant and the name of the restaurant into the Google search engine*».

In this case, the Supreme Court has reintroduced the differences between archived online articles and paper publication, as in the above mentioned case before of the Court of Milan in 2013. Therefore, in this case, it is possible to hold that the Supreme Court has suggested that the easy access to the online news, which have a stronger impact than printed newspaper, constitutes one of the criteria for assessing the public relevance of an online article, introducing again a difference among online and atomic publication which, as expressed by

[7] Court of Ortona No. 3/2013.

the previous Court of Appeal of Milan in 2014, is not relevant, except in the cases in which the article is defamatory due to the fact that online publication constitutes an element to take in account in the definition of the amount of damages. In other words, in order to assess the public interests related to an article, this decision introduces a fourth criterion which should be taken in account together with the other three criteria – truthfulness, continence and relevance - already identified by the Italian Supreme Courts in many cases[8].

However, the Supreme Court has not based its decision on Article 7(3)(b) of the IDPC[9] but rather on Article 11 IDPC, confirming the interpretation of the Court of Ortona above mentioned. In particular, Article 11(1)(e) IDPC establishes that «*data must be kept in a form which allows identification for a period of time not beyond that which is necessary for the purposes for which they were collected*».

In these cases, the two Courts have balanced two fundamental rights - the freedom of expression and the right to privacy, clearly considering the latter predominant, due to the exhaustion of the public interest to the news. The rights of privacy and the freedom of expression are enshrined both by the European Convention of Human Rights (ECHR)[10] and by the European Convention of fundamental freedoms and human rights (ECFHR)[11] and it is not a novelty that these two rights usually conflict each other.

However, when the Court of Ortona delivered its decision, the Court of Justice had not still ruled on the right to be forgotten and, for this reason, national courts cannot rely, in their decisions, on a EU interpretative path. Instead, the recent decision of the Supreme Court could be based on the Google Spain case[12], which constitutes the ECJ landmark decision in the field of the right to be forgotten. In fact, the Italian Supreme Court has not ignored this

[8] *Ex multis*, Italian Supreme Court, No. 6902 of 8 May 2012.
[9] However, also this rules should be interpreted in the light of the decisions of the Italian Privacy Authority which has recognized that the online archive has the aim to gather historical information which allow the storage and the processing of personal data without time limits and without the consent of the data subject.
[10] Article 8, 10 ECHR.
[11] Article 7,8,11 ECFHR.
[12] C-131/2012.

decision, mentioning both the Google Spain case and the application guidelines of Art. 29 Data Protection Working Party (WP29).

However, although the Google Spain decision deals with a different case related to the de-listing request to search engines, the Supreme Court interpretation seems far from the principles of the EU right to be forgotten.

First of all, it is possible to underline that the EU right to be forgotten refers to events where are involved subjects which do not cover public functions and, for this reason, the elapsed time justifies the de-listing of links related to the information to be forgotten. However, in the Google Spain case, such de-listing occurred after 16 years which is a longer period than that identified by the Italian Supreme Court.

Moreover, in the same case, the ECJ has ruled that every subject has the right to request the removal of links from search engines of news related to information which involves these subjects but it has not established the removal of the content from a website which, in this case, consists in the deletion of a news from an online archive of a local journal.

In other words, the Google Spain decision does not establish the obligation for websites or search engines to remove after a period of time the contents, assessing automatically their public interest, but it obliges search engines to de-list the links and not the contents from the search result after the request of the party who exercise its right to be forgotten. Also the guidelines of WP29 refer to de-listing and not to the removal[13].

According to Google Spain decision, the assessment shall be carried out only after the request of the individual which intends to exercise his right to be forgotten, clearly prohibiting ex ante censorship.

However, the resulting interpretation of the Supreme Court could lead to the situation in which online journals should generally monitor their contents during the time, bearing the risk to be liable of unlawful processing of personal data. The result could lead to an ex ante

[13] «*Results should not be de-listed if the interest of the public in having access to that information prevails. But even when a particular search result is de-listed, the content on the source website is still available and the information may still be accessible through a search engine using other search terms*».

selection and publication only of those contents with low risk of privacy infringement. Moreover, smaller online newspapers would not have the resources to regularly monitor their contents over the time, while, big newspapers would deal with an enormous number of articles which would require additional resources. Consequently, the Italian interpretation of the right to be forgotten would lead to the removal of inconvenient journalism from archives after two years, allowing everyone to demand deletions from news websites, hindering online journalism which, nowadays, has become one of the main source of information for the entire society.

The main concerns derive from the future application of the right to be forgotten by Italian courts which could be based on the interpretation of the Supreme Court. As already expressed, the Court has established that after 2 years an article stored in an online archive should be eliminated due to the fact it has exhausted its public function. This interpretation risks to generally reduce freedom of expression, promoting ex-ante censorship. Moreover, this decision is not based on the law, arbitrary disposing of fundamental rights which involve not only the right to privacy and freedom of expression, but also economic and historical freedoms which could be hindered by the limitations caused by this decision.

However, concerns can be mitigated by analysing the new rules established by General Data Protection Regulation (GDPR)[14] which will be entered into force in May 2018, repealing the Directive 95/46/EC. Article 17 provides the "Right to erasure", or right to be forgotten. According to this Article, the data subject shall have the right to obtain from the data controller the erasure of personal data concerning him or her without undue delay and the controller shall have the obligation to erase personal data without undue delay. But, Article 17(3) carves out two exceptions which limit the scope of the right to be forgotten. In particular, the Regulation provides that the right to be forgotten does not apply in cases which involve the exercise the right of freedom of expression and information[15] and for

[14] Regulation (EU) No. 2016/679.
[15] Article 17(1)(a) GDPR.

archiving purposes in the public interest, scientific or historical research purposes or statistical purposes in accordance with Article 89(1) in so far as the right to be forgotten is likely to render impossible or seriously impair the achievement of the objectives of that processing[16].

In the balance between freedom of expression and right to privacy, the system of exceptions provided for by GDPR constitutes a clear EU standpoint in favour of the freedom of expression in the EU.

Freedom of expression constitutes the basis of a democratic society, and, although it is necessary to balance this freedom with other conflicting fundamental rights, it is necessary to adopt a uniform interpretation in order to avoid ex-ante censorship.

[16] Article 17(1)(d) GDPR.