

# media LAWs

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# Saggi

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# From the “right to delisting” to the “right to relisting”\*

Federica Giovanella

## Abstract

The Court of Justice’s *Google Spain* decision introduced a “right to delisting” that recognizes data subjects’ right to have search results for their names delisted. The lack of clarity characterizing the judgment has paved the way to millions of deindexing requests to search engines as well to a number of judicial cases in which courts strive in finding a fair balance between the rights at stake.

More recently, dealing with the issue of delisting data relating to offences and criminal convictions, the CJUE seemed to introduce a new way to deal with dereferencing, namely: relisting, that is to adjust the list of results to reflect the current legal position of the data subject.

The paper aims at understanding if relisting would make up for the shortcomings of the delisting. Building on existing literature and analysing recent legislation, the paper reaches the conclusion that relisting would be a better and fairer solution than delisting and that its adoption should be supported.

Nel caso *Google Spain* la Corte di Giustizia dell’UE ha introdotto il c.d. “diritto alla deindicizzazione” che permette all’interessato di vedere rimossi alcuni link presenti nella lista dei risultati della ricerca con il proprio nome. La mancanza di chiarezza della sentenza ha aperto la strada a milioni di richieste di deindicizzazione ai motori di ricerca, nonché a molti casi giudiziari in cui i tribunali faticano a trovare un giusto equilibrio tra i diritti in gioco.

Più di recente, trattando la questione della cancellazione dei dati relativi a reati e condanne penali la CGUE sembra indicare un nuovo modo di deindicizzare: il *relisting*, ossia l’adeguamento della lista dei risultati all’attuale posizione giuridica dell’interessato. Il contributo mira a capire se il *relisting* potrebbe compensare le carenze del *delisting*. Basandosi sulla letteratura esistente e analizzando la legislazione recente, l’articolo conclude che il *relisting* sarebbe una soluzione migliore e più equa del *delisting*, per cui la sua adozione dovrebbe essere sostenuta.

\* I am grateful to the suggestions received by the participants of the first edition of the Digital Legal Talks where this paper was first presented in 2020. I also want to thank the anonymous referees for their insightful comments. This research was supported by PRIN 2017 EC9CPX «Dis/Connection: Lavoro e Diritti nella Rivoluzione di Internet».

L’articolo è stato sottoposto, in conformità al regolamento della Rivista, a referaggio “a doppio cieco”.

## Summary

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## Keywords

diritto all’oblio - deindicizzazione - protezione dei dati personali - motori di ricerca - bilanciamento fra diritti

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## 1. Introduction

The seminal Court of Justice of the EU’s *Google Spain* decision<sup>1</sup> has paved the way to the applicability of a so-called right to be forgotten (RTBF) to search engine results<sup>2</sup>. Known as “right to delisting”, it recognizes data subjects’ right to have search results for their names delisted<sup>3</sup>. Yet the CJUE did not clearly state under which conditions such delisting must be carried out. This lack of clarity has opened the doors to a tremendous amount of deindexing requests to Google<sup>4</sup> as well as to an increasing

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<sup>1</sup> CJEU, C-131/12, *Google Spain SL and Google Inc. v Agencia Española de Protección de Datos (AEPD) and Mario Costeja González*, 2014 [hereinafter: *Google Spain*]. The case has had worldwide resonance not only among scholars but also in the public opinion. Among dozens of comments, consider: O. Lynskey, *Control over Personal Data in a Digital Age: Google Spain v AEPD and Mario Costeja Gonzalez*, in *The Modern Law Review*, 3, 2015, 522; J. Jones, *Control-Alter-Delete: The “Right to be Forgotten”--Google Spain SL, Google Inc v Agencia Española de Protección de Datos*, in *European Intellectual Property Review*, 9, 2014, 595; H. Hijmans, *Right to Have Links Removed. Evidence of Effective Data Protection: Case C-131/12 Google v. Agencia Española de Protección de Datos (AEPD) and Mario Costeja Gonzalez, Judgment of 13 May 2014*, in *Maastricht Journal of European and Comparative Law*, 3, 2014, 555; I. Spiecker, *A new framework for information markets: Google Spain*, in *Common Market Law Review*, 4, 2015, 1033; D.J. Stute, *Privacy Almighty? The CJEU’s Judgment in Google Spain SL v. AEPD*, in *Michigan Journal of International Law*, 4, 2015, 649.

<sup>2</sup> O. Lynskey, *Control over Personal Data in a Digital Age*, cit., 528 (noting how the label “right to be forgotten” is misleading as it is more simply a right to erasure as granted by the European legislation on data protection); see also M. Dulong de Rosnay – A. Guadamuz, *Memory hole or right to delist? Implications of the right to be forgotten on web archiving*, in *RESET*, 6, 2017; I. Cofone, *Google v. Spain: A Right To Be Forgotten?*, in *Chicago Kent Journal of International and Comparative Law*, 1, 2015, 7; I. Spiecker, *A new framework for information markets*, cit., 1040. For a summary of the differences, see A. Bunn, *The curious case of the right to be forgotten*, in *Comparative Law & Security Review*, 3, 2015, 337-339. I will nonetheless use this expression as its current understanding and its meaning are known. Consider also the historical account given by J. Ausloos, *The Right to Erasure in EU Data Protection Law*, Oxford, 2020, 91 ss.

<sup>3</sup> On the “surgical approach” taken by the CJEU see M. Peguera, *The Shaky Ground of the Right to Be Delisted*, in *Vanderbilt Journal of Entertainment & Technology Law*, 3, 2016, 549-550.

<sup>4</sup> E. Killoran – D. Gilbert, *Google May Drown from Takedown Requests Because of “Right to Be Forgotten” Ruling, Forcing Bulk Approvals*, *International Business Times* (May 14, 2013). Google and Bing publicly report the volume of RTBF requests: Google reports that since the *Google Spain* judgment the volume of requests for removal has been more than 4.5 million URLs so far (see <https://transparencyreport.google.com/eu-privacy/overview>), while Bing had around 149.000 requests (see <https://www.microsoft.com/en-us/corporate-responsibility/content-removal-requests-report>). As for Google consider the following research papers: T. Bertram et al., *Three years of the Right to be Forgotten* (2018); T. Bertram et al., *Five Years of the Right to be Forgotten*, in *CCS ‘19: Proceedings of the 2019 ACM SIGSAC*

number of judicial cases in which courts strive to find a fair balance between personal data protection on one side, and freedom of expression and the right to receive information on the other side<sup>5</sup> In September 2019, the CJUE decided two additional cases related to the RTBF: *Google v. CNIL*<sup>6</sup> and *GC et al. v. CNIL*<sup>7</sup>. While the former produced a strong echo, capturing also the attention of the press<sup>8</sup>, the latter did not receive enough attention. In *GC et al. v. CNIL* the CJUE qualified information relating to legal proceedings brought against an individual as data relating to “offences” and “criminal convictions” within the meaning of art. 8(5) of Directive 95/46 (and of art. 10 of Regulation 2016/679<sup>9</sup>). With regard to this data, the Court stated that in some specific cases the operator of a search engine might be required to adjust the list of results to reflect the claimant’s current legal position<sup>10</sup>.

Although this statement was an *obiter dictum*, it seems to introduce a new duty on search engine operators and a corresponding right of data subjects for data relating to criminal conviction. Has the Court introduced a “right to relisting”? Would such an approach allow for a better balance between the fundamental rights at stake?

Building on the existing literature on the right to delisting, this paper maintains that a right to relisting (and a corresponding duty to relisting) would make up for at least some of the shortcomings of the right to delisting as we currently know it.

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*Conference on Computer and Communications Security*, 2019, 967.

<sup>5</sup> The need to balance data protection and freedom of information is all but new; for an in-depth account of the interface between these two rights see generally: D. Erdos, *European Data Protection Regulation, Journalism, and Traditional Publishers: Balancing on a Tightrope?*, Oxford, 2019.

<sup>6</sup> CJEU, C-507/17, *Google LLC v. Commission nationale de l’informatique et des libertés (CNIL)*, 2019 [hereinafter: *Google v. CNIL*]. The case revolved around the “globalization” of the RTBF, meaning the duty of Google to delist on a global scale; see generally B. Martin, *Google v. CNIL and the Right to Be Forgotten: A Judgment of Solomon*, in *Global Privacy Law Review*, 1, 2020, 61; M. Zalnieriute, *Google LLC v. Commission Nationale de l’Informatique et des Libertés (CNIL)*, in *American Journal of International Law*, 2, 2020, 261; Y. Miadzvetskaya – G. Van Calster, *Google at the Kirchberg Dock. On Delisting Requests, and on the Territorial Reach of the EU’s GDPR (C-136/17 GC and Others v CNIL, C-507/17 Google Inc v CNIL)*, in *European Data Protection Law Review*, 1, 2020, 143; O.J. Gstrein, *Right to be Forgotten: EU-ropean Data Imperialism, National Privilege, or Universal Human Right?*, in *Review of European Administrative Law (REALaw)*, 1, 2020, 125.

<sup>7</sup> CJEU, C-136/17, *GC and Others v. Commission nationale de l’informatique et des libertés (CNIL)*, 2019 [hereinafter: *GC et al. v. CNIL*]. For a comment consider: S. De Conca, *GC et al v CNIL: Balancing the Right to Be Forgotten with the Freedom of Information, the Duties of a Search Engine Operator (C-136/17 GC et al v CNIL)*, in *European Data Protection Law Review*, 4, 2019, 561; C. Quelle, *GC and Others v CNIL on the Responsibility of Search Engine Operators for Referring to Sensitive Data: The End of ‘Right to be Forgotten’ Balancing?*, in *European Data Protection Law Review*, 2, 2019, 438; Miadzvetskaya – G. Van Calster, *Google at the Kirchberg Dock*, cit.. Currently, there is a case pending before the CJUE due to a request for a preliminary ruling from the *Bundesgerichtshof* lodged on 24 September 2020: Case C-460/20, *TU, RE v Google LLC*.

<sup>8</sup> For instance: L. Keilion, *Google wins landmark right to be forgotten case*, in *bbc.com* (Sep. 24, 2019); S. Marsh, *“Right to be forgotten” on Google only applies in EU, court rules*, in *The Guardian* (Sep. 24, 2019); B. Pagliaro, *Google non dovrà garantire il diritto all’oblio su scala globale*, in *repubblica.it* (Sep. 24, 2019); *Google muss nicht weltweit vergessen*, in *sueddeutsche.de* (Sep. 24, 2019).

<sup>9</sup> EU General Data Protection Regulation (GDPR): Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), OJ 2016 L 119/1.

<sup>10</sup> *GC et al. v. CNIL*, cit., § 78. See *infra* Sec. 3 for details.

To this end, the next section summarizes the *Google Spain* case and the right/duty to delisting while section C presents a summary and short analysis of *GC et al v. CNIL*. Section D explains what rights are at stake and what the conflict among them is about, while section E highlights the differences between delisting and relisting in terms of fairness in the balancing exercise. Section F delves further into the subject stressing the political and technological hurdles of relisting and trying to propose solutions. A few conclusions end the article.

## **2. The Birth of the Right/Duty to Delisting: *Google Spain***

As well known, *Google Spain* dealt with the request by a Spanish citizen for the removal of some results obtained by typing his name as a query in Google search engine. The results would include announcements about an auction of property based on social security debts, which dated back to 1998, and had been published in the Spanish newspaper *La Vanguardia* and later on its website, where they were still available.

The case reached the Spanish High Court (*Audiencia Nacional*)<sup>11</sup> that referred to the CJUE for a preliminary ruling. The main question was what obligations are imposed on search engines operators to protect personal data of persons who do not wish that that personal information be linked to them, be located, indexed, and made available to Internet users indefinitely<sup>12</sup>.

As far as this paper is concerned, two are the main operative outcomes of *Google Spain*. First, search engine operators process personal data in an indefinite number of ways and determine the purposes and means of the processing. Therefore, they qualify as data controllers<sup>13</sup> and are subject to the corresponding obligations arising from the Directive<sup>14</sup>. Second, requests made by data subjects under Arts. 12 and 14 directly to controllers oblige them to «duly examine the merits and, as the case may be, end processing of the data in question».<sup>15</sup> In this regard, the CJEU held that although «the data subject's rights protected by [Arts. 7 and 8 of the Charter] override, as a general rule, th[e] interest of Internet users»,<sup>16</sup> a balance should be determined taking into account the specificities of each case. If the conditions laid down in Arts. 12(b) and 14(1)(a) are met, the operator of a search engine is obliged to remove from the list of results displayed following a search made on the basis of a person's name, links to web pages, regardless of whether such information is not erased beforehand or simultaneously from those web pages, and even when the publication in itself on those

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<sup>11</sup> *Google Spain*, cit., §§ 14-18.

<sup>12</sup> *Google Spain*, cit., § 19.

<sup>13</sup> As defined in art. 2(b) of Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, OJ 1995 L 281/31.

<sup>14</sup> *Google Spain*, cit., §§ 21-41.

<sup>15</sup> *Google Spain*, cit., § 77.

<sup>16</sup> *Google Spain*, cit., § 81.

pages is lawful<sup>17</sup>.

With these sentences the CJUE acknowledged a so-called “right to delisting” for data subjects and a symmetrical “duty to delisting” for search engines. Such right/duty does not depend on an actual prejudice that the data subject may suffer from the publication of the information<sup>18</sup>.

The rationale behind the decision of the Court lies in the pivotal role played by search engines in our society. Search engines make it possible to reach and access information that would otherwise be very hard or impossible to find. «[E]asy retrieval transform digital memory into a powerful tool that extends human remembering»<sup>19</sup>. This means that information that is not retrievable through a search engine is *de facto* hidden by “practical obscurity”<sup>20</sup>. Therefore, processing carried out by search engines could significantly affect the fundamental rights of privacy and personal data protection of data subjects.

The disruptive effect of *Google Spain* was immediately apparent, but it has been amplified by the lack of clear guidance on how to balance conflicting rights. Although the CJUE enucleated some possible indicators<sup>21</sup>, it did not give a proper assessment of the same<sup>22</sup>, leaving many unsatisfied<sup>23</sup>. As a matter of fact, *Google Spain* opened the door to a high number of lawsuits, some of which reached the Court of Justice.

<sup>17</sup> *Google Spain*, cit., §§ 62-76 and 88 (and ruling n. 3).

<sup>18</sup> *Google Spain*, cit., § 99 (and ruling n. 4). It might simply be that the data subject does not want to have that information public anymore and/or that he or she wants to be forgotten.

<sup>19</sup> V. Mayer-Schönberger, *Delete: The Virtue of Forgetting in the Digital Age*, Princeton, 20019, 79.

<sup>20</sup> S. Kulk – F. Zuiderveen Borgesius, *Privacy, freedom of expression, and the right to be forgotten in Europe*, in J. Polonetsky – O. Tene – E. Selinger (eds.), *Cambridge Handbook of Consumer Privacy*, Cambridge, 2018, 17. The Authors refer to a US case mentioning this concept: *United States DOJ v Reporters Comm. for Freedom of Press*, 489 US 749, 762 (1989). It is not by chance that A. Slane, *Search Engines and the Right to Be Forgotten: Squaring the Remedy with Canadian Values on Personal Information Flow*, in *Osgoode Hall Law Journal*, 2, 2018, 358, describes the right arising from *Google Spain* as “the right to obscurity”. Consider also the categories of obfuscation and obstruction introduced by M. Leta Jones, *Crtl+Z The right to be forgotten*, New York, 2016, 93-94.

<sup>21</sup> For instance the nature of the information, its sensitivity for the data subject, the interest of the public in having that information which may vary depending on the role of the data subject in public life: Cf. *Google Spain*, cit., §§ 80-81. The fact that the CJEU labelled freedom of information as an interest has been criticized by human rights scholars. See E. Frantziou, *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*, in *Human Rights Law Review*, 4, 2014, 770-771. A different approach is adopted by the ECtHR that specifically enucleates the balancing criteria to be considered when dealing with cases involving a conflict between the right to privacy and freedom of expression; see ECtHR, *Axel Springer AG v. Germany*, App. no. 39954/08 (2012), §§ 89 ss.; more recently: ECtHR, *Biancardi v. Italy*, app. no. 77419/16 (2021), §§ 61 ss. It was argued that in referring to the ECtHR case law, the CJUE incorporated the former case law into its own case law: S. De Conca, *GC et al v CNIL*, cit., 566; the Author refers to G. Zanfir-Fortuna, *Key Findings From the Latest “Right To Be Forgotten” Cases*, in *Future of Privacy Forum* (Sep. 27, 2019).

<sup>22</sup> E. Frantziou, *Further Developments in the Right to be Forgotten*, cit., 770-771. A different approach is wished for by M. Tzanou, *The Unexpected Consequences of the EU Right to Be Forgotten: Internet Search Engines As Fundamental Rights Adjudicators*, in M. Tzanou (ed.), *Personal Data Protection and Legal Developments in the European Union*, Hershey, 2020, 279-301. I. Spiecker, *A new framework for information markets*, cit., 1050 believes instead that the choice of the CJEU of not giving specific guidelines ‘constitutes wise self-restraint’ and enables a gradual development.

<sup>23</sup> See *infra* Sec. 4 for further details.

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### 3. Building on *Google Spain*

In 2019 the CJUE decided two further cases related to the RTBF: *Google v. CNIL*<sup>24</sup> and *GC et al. v. CNIL*<sup>25</sup>. The former dealt with the “globalization” of the right to delisting and was a long awaited judgment, as the newspaper coverage also proves. On the contrary, *GC et al. v. CNIL* was largely overlooked.

*GC et al. v. CNIL* was based on a request for preliminary ruling made in proceedings between four individuals - GC, AF, BH and ED - and the *Commission nationale de l'informatique et des libertés* (CNIL), the French Data Protection Authority. The proceedings concerned four different decisions of the CNIL refusing to serve formal notice on Google to de-reference various links appearing in the lists of results displayed following searches of the claimants' names and leading to web pages published by third parties<sup>26</sup>.

Among the four applications, the case of ED is the most relevant for the purposes of this paper. The request made by ED concerned the dereferencing of links leading to two different articles reporting the criminal hearing during which he was sentenced to 7 years' imprisonment and an additional penalty of 10 years' social and judicial supervision for sexual assaults on children under the age of 15<sup>27</sup>.

Google denied the request made by ED and the CNIL refused to order the search engine operator to de-reference the links. The applicant referred to the *Conseil d'État* that, after joining ED's application with the other three, raised numerous questions to the CJUE.

The difference between these proceedings and the *Google* case is that the former involve the processing of special categories of data<sup>28</sup>. In this regard, the *Conseil d'État* asked:

- Is information relating to the investigation of an individual or reporting a trial and the resulting conviction and sentencing, data relating to offences and to criminal convictions under art. 8(5) of Dir. 95/46?
- Do prohibitions and exceptions laid down by art. 8 of Dir. 95/46 with regard to special categories of data apply to search engines operators? If so, how?
- What if the requests of dereferencing concerns sensitive personal data that are *a)* carried out (solely) for journalistic purposes and/or *b)* lawful but incomplete or inaccurate or that no longer reflect the current reality of the situation?

The CJEU qualified information relating to legal proceedings brought against an individual as data relating to offences and criminal convictions within the meaning of art. 8(5) of Dir. 95/46 (and of art. 10 GDPR), «regardless of whether or not, in the course of those legal proceedings, the offence for which the individual was prosecuted was shown to have been committed»<sup>29</sup>.

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<sup>24</sup> *Google v. CNIL*.

<sup>25</sup> *GC et al. v. CNIL*.

<sup>26</sup> *GC et al. v. CNIL*, §§ 24-28.

<sup>27</sup> *GC et al. v. CNIL*, § 28.

<sup>28</sup> *GC et al. v. CNIL*, § 31.

<sup>29</sup> *GC et al. v. CNIL*, § 72.



As search engines operators qualify as data controllers, they are subject to the prohibition and exceptions introduced by art. 8<sup>30</sup>. How search engines should apply such prohibition and exceptions depends on the interpretation of arts. 12(b) and 14(1)(a) of Dir. 95/46<sup>31</sup>, which the CJEU considered in light of their GDPR counterparts, namely arts. 17 and 21. art. 17 excludes the right to erasure when the processing is necessary for the exercise of the right of information, as guaranteed by art. 11 of the Charter<sup>32</sup>. In the words of the CJEU such exclusion implies that the right to protection of personal data is not an absolute right<sup>33</sup> but must be considered in relation to its function in society and be balanced against other fundamental rights, in accordance with the principle of proportionality<sup>34</sup>.

As in *Google Spain*, the Court stated that *as a general rule* data subject's rights under Arts. 7 and 8 of the Charter override the freedom of information of Internet users. Thus, based on art. 8 of Dir. 95/46 the operator of a search engine shall in principle give way to the requests of dereferencing of sensitive data<sup>35</sup>, but it can refuse to do so when it establishes that the links fall into the exceptions under art. 8(2)(e), provided that the processing satisfies any other condition of lawfulness<sup>36</sup>. An initially lawful processing can over time become incompatible with the Directive (or the GDPR)<sup>37</sup>, as it becomes «inadequate, irrelevant or no longer relevant, or excessive in relation to those purposes and in the light of the time that has elapsed»<sup>38</sup>.

This does not mean that that information *must* be erased, as the search engine operator needs to balance the rights at stake first<sup>39</sup>. To determine the correct balance, the key role both of information and of the press in democratic society must be taken into account, including the public's right to receive information not only about the present but also about the past<sup>40</sup>. The CJEU lists some non-exclusive conditions to be

<sup>30</sup> *GC et al. v. CNIL*, §§ 34-48.

<sup>31</sup> EDPB, *Guidelines 5/2019 on the criteria of the Right to be Forgotten in the search engines cases under the GDPR* (part 1), 2019, 7 ss.

<sup>32</sup> AG Szpunar also takes into account the wording of art. 17 GDPR that expressly introduces a limitation for the right to erasure/to be forgotten for reasons relating to freedom of expression and information and this applies also to sensitive data. See Opinion of Advocate General Szpunar, Case C-136/17, *GC and Others v. Commission nationale de l'informatique et des libertés (CNIL)*, 2019, § 91.

<sup>33</sup> For an analysis of the meaning of privacy as a non-absolute right: J.P. Mifsud Bonnici, *Exploring the non-absolute nature of the right to data protection*, in *International Review of Law, Computers & Technology*, 2, 2014, 131.

<sup>34</sup> *GC et al. v. CNIL*, § 57.

<sup>35</sup> See also Opinion of Advocate General Szpunar, Case C-136/17, cit., §§ 69 and 73.

<sup>36</sup> For instance, the operator should proceed with the dereferencing if the data subject has a right to object to the processing as per art. 14(a), see *GC et al. v. CNIL*, § 69.

<sup>37</sup> As explained by C. Quelle, *GC and Others v CNIL on the Responsibility of Search Engine Operators for Referring to Sensitive Data*, cit., 443-444.

<sup>38</sup> *GC et al. v. CNIL*, § 74, citing *Google Spain*, § 93.

<sup>39</sup> *GC et al. v. CNIL*, § 75.

<sup>40</sup> The Court of Justice cited a case decided by the ECtHR in which it was acknowledged that «the public [has] an interest not only in being informed about a topical event, but also in being able to conduct research into past events, with the public's interest as regards criminal proceedings varying in degree, however, and possibly evolving over time according in particular to the circumstances of the case» (*GC et al. v. CNIL*, § 76, citing ECtHR, *M.L. and W.W. v. Germany*, app. no. 60798/10 and

considered: The nature and seriousness of the offence in question; the progress and the outcome of the proceedings; the time elapsed<sup>41</sup>; the part played by the data subject in public life and his past conduct; the public's interest at the time of the request<sup>42</sup>; the content and form of the publication; the consequences of publication for the data subject<sup>43</sup>.

On top of these instructions, the Court specifies the duties of the operator of a search engine who finds that the inclusion of the link is strictly necessary for reconciling the data subject's rights with users' freedom of information. In such instances

«the operator is in any event required, at the latest on the occasion of the request for dereferencing, to adjust the list of results in such a way that the overall picture it gives the Internet user reflects the current legal position, which means in particular that links to web pages containing information on that point must appear in first place on the list»<sup>44</sup>.

This *obiter dictum* seems to introduce a “duty to relisting” for search engine operators that they have to fulfil *at the latest* when asked for dereferencing. Does ‘at the latest’ mean that search engine operators should proceed with relisting even *before* the request of dereferencing? In his opinion, Advocate General Szpunar did not even mention the possibility of *ex ante* delisting/relisting<sup>45</sup>; better: He explicitly pointed out the undesirability of “*ex ante* systematic control”, which he also qualifies as not possible<sup>46</sup>.

## **4. What Conflicting Rights?**

In every case on the RTBF there is an unavoidable conflict between different rights<sup>47</sup>. On one side, we have data subject's right to privacy and to personal data protection, even though some scholars argue that on one scale of the balance there would be a

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65599/10 (2018), §§ 80 and 100-102.

<sup>41</sup> See the interesting examination of time as a determinant factor to be considered in RTBF issues made by P. Korehon et al., *Timing the Right to Be Forgotten: A Study into “Time” as a Factor in Deciding About Retention or Erasure of Data*, in S. Gutwirth - R. Leenes - P. de Hert (eds.), *Reforming European Data Protection Law*, Berlin, 2015, 171; see also G. Sartor, *The Right to be Forgotten: Dynamics of Privacy and Publicity*, in L. Floridi (ed.), *Protection of Information and the Right to Privacy - A New Equilibrium?*, Berlin, 2014, 1.

<sup>42</sup> These are the so-called “communitarian reasons” enucleated by P.A. Bernal, *A Right to Delete?*, in *European Journal of Law and Technology*, 2, 2011, sec. 3.2.

<sup>43</sup> *GC et al. v. CNIL*, § 77.

<sup>44</sup> *GC et al. v. CNIL*, § 78.

<sup>45</sup> This defect in the judgement gave way to ‘a framework of balancing that is *a priori* unbalanced’ according to M. Tzanou, *The Unexpected Consequences of the EU Right to Be Forgotten*, cit., 4.

<sup>46</sup> Opinion of Advocate General Szpunar, Case C-136/17, cit., §§ 48-49 and 54. *Ex ante* de/relisting would once again raise the delicate and intricate question of filtering the Internet.

<sup>47</sup> “A rectangle of interests” as defined by I. Spiecker, *A new framework for information markets*, cit., 1045 ss. For an in-depth analysis of the various conflicts, see J. Ausloos, *The Right to Erasure in EU Data Protection Law*, cit., 332 ss.

more specific “right to be forgotten” that has gained its own autonomy and deserves to be considered as a fundamental right on its own<sup>48</sup>. I believe this does not really make a lot of difference. The RTBF has evolved as being a particular aspect of the right to privacy and data protection, which are themselves fundamental rights protected by the CFREU (Arts. 7 and 8) and the ECHR (art. 8). Hence, the “weight” of the RTBF as a fundamental right is unquestionable.

On the other side, there are freedom of expression and the right to be informed. They are affected at three levels<sup>49</sup>: 1) Journalists and publishers’ freedom of speech that is obviously limited by delisting; 2) Search engines operators also enjoy freedom of speech<sup>50</sup>, even if a reduced one; 3) Freedom of speech includes the freedom of the public to access information and to be informed, as per art. 11 of the Charter<sup>51</sup>. Unsurprisingly, the core of the criticism on Google Spain was exactly the excessively strong restriction of these rights<sup>52</sup>, let alone the fact that the Court did not take into account freedom of expression<sup>53</sup>.

Although delisting means that specific links are deleted only from the list of results following a search “based on the claimant’s name”<sup>54</sup>, this greatly impairs users’ ability to find information on the Internet<sup>55</sup>. People have the right to access information. There is more: They also have the right to access information that is correct and truth-

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<sup>48</sup> A. Bunn, *The curious case of the right to be forgotten*, cit., 339 ff and at 346. It seems that for the Italian Supreme Court the right to oblivion has gained the status of self-standing fundamental right: see Cass. Civ., 20 March 2018, n. 6919, in *Responsabilità Civile e Previdenza*, 2018, 631; Cass. Civ., 5 November 2018, n. 28084, in *Foro Italiano*, I, 2019, 227.

<sup>49</sup> S. Kulk – F. Zuiderveen Borgesius, *Privacy, freedom of expression, and the right to be forgotten in Europe*, cit., 20-21; S. Kulk – F. Zuiderveen Borgesius, *Google Spain v. González: Did the Court Forget about Freedom of Expression?*, in *European Journal of Risk Regulation*, 3, 2014, 392-393.

<sup>50</sup> Opinion of Advocate General Szpunar, Case C-136/17, cit., § 86 citing Opinion of Advocate General Jääskinen, C-131/12, *Google Spain SL and Google Inc. v Agencia Española de Protección de Datos (AEPD) and Mario Costeja González*, Case C-131/12, 2013, § 121.

<sup>51</sup> This is often stressed by the ECtHR under art. 10 of the Convention. Consider for instance, among the most recent judgements involving the conflict between privacy and freedom of speech: ECtHR, *Fuchsman v. Germany*, app. no. 71233/13 (2017), §§ 16-18 (and in the following case of *M.L. and W.W. v. Germany*, cit., §§ 101-105) the ECtHR also stressed the key role of the press not only in informing the public of current events, but also in preserving archives, so that the public can be informed about past events and contemporary history, in particular through the use of digital press archives: «[i]n addition to this primary function, the press has a secondary but nonetheless valuable role in maintaining archives containing news which has previously been reported and making them available to the public. In that connection the Court stresses the substantial contribution made by Internet archives» (ivi, § 90).

<sup>52</sup> M. Dulong de Rosnay – A. Guadamuz, *Memory hole or right to delist?*, cit., 15, are more cautious about the potential threat to freedom of expression.

<sup>53</sup> D. Erdos, *European Data Protection Regulation, Journalism, and Traditional Publishers*, cit., 281.

<sup>54</sup> G. Frosio, *The Right to Be Forgotten: Much Ado About Nothing*, in *Colorado Technology Law Journal*, 2, 2017, 326 ss. This means that with other keywords the same link could appear in the list of results, as pointed out by EDPB, *Guidelines 5/2019*, cit., 4.

<sup>55</sup> In addition, the information is erased only from the search engine that was asked to remove the links; although Google may seem to hold a monopoly, it is not yet so. T. Bertram et al., *Five Years of the Right to be Forgotten*, cit., 967 warn «[w]hile successful RTBF requests delist directory pages for individuals on Google Search, the public can still perform a direct search via any of the popular directory services if no additional RTBF action is taken on those sites directly. Discrepancies between search indexes can lead to possible privacy risks, such as *identifying requesters*» (emphasis added).

ful<sup>56</sup>. Without going as far as considering fake news, information should be accurate, which means also updated. People have a “right to be correctly informed”<sup>57</sup> and from this perspective, the idea of a right/duty to relist seems promising and more valid than delisting, as I will better explain below.

The process of balancing the mentioned rights is affected also by the characteristics and the quality of the personal data involved: As well known, data relating to criminal convictions under art. 10 GDPR enjoy a different processing regime than personal data. At the same time, data relating to criminal convictions has or might have a different effect on data subjects and their lives. In particular, the perpetual or recurring publication of criminal convictions data could significantly affect the so called “right to rehabilitation”. The core of such right lies in the chance for criminal offenders to «reintegrate into society as a useful human being»<sup>58</sup>: A convicted person shall have the chance to leave their past behind. This right, which should have a counterpart in the state’s duty to provide rehabilitation<sup>59</sup>, is gaining importance as an individual right, regardless its possible and actual effect on criminal policy concerns<sup>60</sup> and it has been at the center of some recent European Court of Human Rights’ decisions<sup>61</sup>. Although it is still questioned whether rehabilitation is a positive obligation for countries<sup>62</sup>, the judgements of the Strasbourg Court are increasingly going in this direction<sup>63</sup>, linking rehabilitation with the broader obligation to respect human dignity under art. 3 of the Convention<sup>64</sup>.

<sup>56</sup> See Italian Cass. Civ., 18 October 1984, n. 5259, in *Foro Italiano*, I, 1984, 2711.

<sup>57</sup> European Commission for Democracy through Law (Venice Commission), *Joint Report of the Venice Commission and of the Directorate of Information Society and Action Against Crime of the Directorate General of Human Rights and Rule Of Law (DGI) on Digital Technologies and Elections*, Opinion n. 925/2018 (2019), § 122.

<sup>58</sup> E. Rotman, *Beyond Punishment: A New View of the Rehabilitation of Criminal Offenders*, Westport, 1990, 6. Rehabilitation would be in line with art. 10(3), of the UN International Covenant on Civil and Political Rights.

<sup>59</sup> S. Lewis, *Rehabilitation: Headline or footnote in the new penal policy?*, in *The Journal of Community and Criminal Justice*, 2, 2005, 124.

<sup>60</sup> A. Martufi, *The paths of offender rehabilitation and the European dimension of punishment: New challenges for an old ideal?*, in *Maastricht Journal of European and Comparative Law*, 6, 2018, 675 ss.

<sup>61</sup> A. Martufi, *The paths of offender rehabilitation and the European dimension of punishment*, cit., 675 (who stresses the terminological ambiguity in the ECtHR’s case law with regard to the term “rehabilitation”).

<sup>62</sup> See generally S. Meijer, *Rehabilitation as a Positive Obligation*, in *European Journal of Crime, Criminal Law and Criminal Justice*, 2, 2017, 145. A. Martufi, *The paths of offender rehabilitation and the European dimension of punishment*, cit., 677 summarized the case law of the ECtHR with regard to the concrete measures that a state should adopt to reach the goal of rehabilitation. State should anyway offer rehabilitation, not impose it: S. Lewis, *Rehabilitation*, cit., 124 ss.

<sup>63</sup> ECtHR, *Harakechiev and Tolumov v. Bulgaria*, app. no. 15018/11 and 61199/12 (2014), § 264. See also generally: ECtHR, *Khoroshenko v. Russia*, app. no. 41418/04 (2015) and ECtHR, *Murray v. The Netherlands*, app. no. 10511/10 (2016), in which the ECtHR endorses a wider view of the right to rehabilitation compared to other older judgments, as mentioned by A. O’Loughlin, *Risk Reduction and Redemption: An Interpretive Account of the Right to Rehabilitation in the Jurisprudence of the European Court of Human Rights*, in *Oxford Journal of Legal Studies*, 2, 2021, 517.

<sup>64</sup> A. Martufi, *The paths of offender rehabilitation and the European dimension of punishment*, cit., 676-680 (who notes that the ECtHR invokes arts. 5 and 8 of the Convention too; respectively: right to liberty and right to family life).

The CJUE too has sometimes referred to the idea of rehabilitation, especially in the context of the European Arrest Warrant. The Luxembourg Court has emphasized the importance of the offender to preserve links with community, achieve integration, and prepare for a fruitful resettlement at the end of the imprisonment period<sup>65</sup>. In some Advocate Generals' opinions, there has been a more decisive approach, for instance stating that punishment has become something «necessary to allow the social rehabilitation of the convicted person»<sup>66</sup> and that «[t]he aim of the penalty, which is to ensure, ultimately, the rehabilitation and reintegration of the convicted person into society»<sup>67</sup>. Rehabilitation would implement some Charter provisions including art. 49(3) stating «The severity of penalties must not be disproportionate to the criminal offence»; art. 4 prohibiting torture and inhuman or degrading treatment or punishment; art. 6 promoting the right to liberty and security of person<sup>68</sup>.

Nonetheless, the actual recognition of an interest to rehabilitation by the CJUE is far from being full, as other interests often supersede it. Rehabilitation seems to be interpreted more as a state's interest than as a prisoner individual right<sup>69</sup>, in spite of the equivalence clause stated in art. 52(3) of the Charter that should synchronize the interpretation of equivalent right by the CJUE and the ECtHR<sup>70</sup>.

Some Member States recognize rehabilitation as a constitutionally protected right as well<sup>71</sup>. For instance, the German *Bundesverfassungsgericht* has stated that it would be contrary to the German *Grundnorm*, and in particular to human dignity, to deprive individuals of their freedom without offering the chance to regain their liberty<sup>72</sup>. Other examples are the Italian and the Spanish constitutions, both specifying that punishment shall aim at the rehabilitation and reeducation of the convicted<sup>73</sup>.

If rehabilitation is gaining momentum, stronger emphasis should be placed on it in the context of delisting information about crimes and criminal convictions. Whenever

<sup>65</sup> A. Martufi, *The paths of offender rehabilitation and the European dimension of punishment*, cit., 681 ss.

<sup>66</sup> Opinion of Advocate General Bot, Case C-171/16, *Trayan Beshkov v Sofijska rayonna prokuratura* (2017), § 48.

<sup>67</sup> Opinion of Advocate General Bot, Cases C-404/15 and 659/15, *Pál Aranyosi and Robert Căldăraru v Generalstaatsanwaltschaft Bremen* (2016), 143.

<sup>68</sup> S. Montaldo, *Offenders' Rehabilitation: Towards a new paradigm for EU criminal law?*, in *European Criminal Law Review*, 2, 2018, 227-228.

<sup>69</sup> A. Martufi, *The paths of offender rehabilitation and the European dimension of punishment*, cit., 684-686.

<sup>70</sup> Clearly, the situation reflects also the lack of EU competence in criminal matters, as noted by S. Montaldo, *Offenders' Rehabilitation*, cit., 228 and 230 ss.

<sup>71</sup> For a comparison with the US system see generally: E. Rotman, *Do criminal offenders have a constitutional rights to rehabilitation?*, in *The Journal of Criminal Law & Criminology*, 4, 1986, 1023.

<sup>72</sup> See War Criminal case 72 BVerfGE 105 (1986) and the previous Life Imprisonment Case, 21 June 1977, 45 BVerfGE 187. Switzerland also recognizes a right to rehabilitation: F. Werro, *The Right to Inform v. the Right to Be Forgotten: A Transatlantic Clash*, in A. Colombi Ciacchi et al. (eds.), *Haftungsecht im dritte Millennium*, Baden-Baden, 2009, 290-291. With regard to the RTBF and the right to rehabilitation, consider also the so-called "Right to be forgotten I" decision by the *Bundesverfassungsgericht*: 1 BvR 16/13, 6 November 2019.

<sup>73</sup> Art. 25(2), Spanish Constitution and art. 27(3), Italian Constitution. The Italian penitentiary system focuses on the 'progressive treatment' of the prisoner. If the prisoner takes part in the reeducation program and makes progress, then they can benefit from measures that are meant to ease the prisoner's resocialization. See generally ECtHR, *Marcello Viola v. Italy* (No. 2), App. no. 77633/16 (2019).

a person who was condemned for a crime aims to rehabilitate, the re-publication of a news on their past greatly undermines that person's chances to start a new life<sup>74</sup>. The perpetual availability of a past news itself on the Internet could pillory a person forever<sup>75</sup>. This is not to say that such news should be removed but that this kind of information should be treated more carefully. In particular, this aspect should be taken into account when dealing with delisting and relisting: As mentioned, nowadays search engines are by far the most used tools to retrieve information on the Internet. While delisting would not cancel the information to be retrieved with a search on the person's name, it would *de facto* shield it. Relisting would instead give a more appropriate picture of the current situation, providing updated information at the top of the list. It would in fact contextualize the information so that it does not harm the data subject as it would if it "expired."<sup>76</sup>

Very often personal data entails a degree of dynamism: While a person's life changes, personal information changes as well<sup>77</sup>. Therefore, also when not considering criminal information but only "normal information", a person might have a «legitimate moral interest in distancing themselves from commonplace misfortunes and errors», which could ruin that person's life<sup>78</sup>. In this sense, the RTBF can «retroactively create gaps or boundaries to promote emergent subjectivity and the dynamic self»<sup>79</sup>.

Delisting could be a way to synchronize new information with new life: Each individual should have the chance to develop their personality, identity, and reputation, and such development would be restricted if information about the past would remain perpetually accessible<sup>80</sup>. In this sense, relisting would be less effective than delisting. Before adventuring in the analysis of the effects that relisting may have on the conflicting rights, it is important to stress once more that the right to personal data pro-

<sup>74</sup> For a different opinion, in which information subjects should be accountable for their actions and interactions the exposure of which might work as a deterrent to others: M. Leta Jones, *Ctrl+Z The right to be forgotten*, cit., 121.

<sup>75</sup> «[H]umans can no longer successfully run away from their past», as noted by V. Mayer-Schönberger, *Delete*, cit., 96.

<sup>76</sup> «Expired information is that which is no longer an accurate representation of the state of the subject or communication. [It] occurs when the substance of the content changes but the information stays the same»: M. Leta Jones, *Ctrl+Z The right to be forgotten*, cit., 124. On contextualization as a limitation to digital perfect e-memory: V. Mayer-Schönberger, *Delete*, cit., 163 ss.

<sup>77</sup> A. Bunn, *The curious case of the right to be forgotten*, cit., 340 and J. Ausloos, *The "Right to be Forgotten" – Worth remembering?*, in *Computer Law & Security Review*, 2, 2012, 151 who refers to the "dynamic nature of "personal data"". The Italian "right to personal identity" entails this idea; it «can be described as the right everybody has to appear and to be represented in social life (especially by the mass media) in a way that fits with, or at least does not falsify or distort, his or her personal history», see G. Pino, *The Right to Personal Identity in Italian Private Law: Constitutional Interpretation and Judge-Made Rights*, in M. Van Hoecke – F. Ost (eds.), *The Harmonization of Private Law in Europe*, Oxford, 2000, 225. Consider also N. Nuno Gomes de Andrade, *Oblivion: The Right to Be Different...from Oneself. Reproposing the Right to Be Forgotten*, in *IDP. Revista de Internet, Derecho y Política*, 2012, 125-126.

<sup>78</sup> Anita L. Allen, *Dredging up the Past: Lifelogging, Memory and Surveillance*, in *University of Chicago Law Review*, 2008, 57.

<sup>79</sup> M. Leta Jones, *Ctrl+Z The right to be forgotten*, cit., 93.

<sup>80</sup> D. McGoldrick, *Developments in the Right to be Forgotten*, in *Human Rights Law Review*, 4, 2013, 765; J. Ausloos, *The "Right to be Forgotten"*, cit., 146: «[a] "right to be forgotten" [...] would strengthen the individual's control over his/her identity».

tection is by no means an absolute right. Recital 4 of the GDPR expressly states that this right «must be considered in relation to its *function in society* and be balanced against other fundamental rights, in accordance with the principle of proportionality.”<sup>81</sup> As the CJUE itself pointed out, the right to personal data protection *can* be limited by other rights<sup>82</sup>. In fact, in some cases it ought to be.

### 5. A Fair(er) Balance?

The next question to answer is whether a right/duty to relist allows for a fair balance or at least a fairer balance if compared to the solution given in *Google Spain*. Based on what above illustrated, the rights involved are on one side the right to privacy and the RTBF plus the right to rehabilitation, and on the other side freedom of speech and the right to be (correctly) informed.

Relisting seems to balance these rights better than delisting for the following reasons. First, freedom of expression could be less affected by relisting than by delisting. In fact, dereferencing cuts out from the results of a search the web links that include the information at the center of the dispute. As mentioned, this implies that such links and the corresponding pages are very hard to find and to reach (by using the data subject’s name as a query), so that in the current state of the Internet it is as if those pages disappeared. In this sense, dereferencing seems tantamount to censorship.

On the contrary, relisting would rearrange search engine results according to their timeliness, regardless of other characteristics. It would be just (*sic!*) a matter of choosing what criteria search engines should follow when re-organizing the list of results. Instead of relying on “arbitrary” criteria, search engines operators will be bound to something similar to a chronological order. In fact, the CJUE explicitly stated that «links to web pages containing information on [the current legal position of the data subject] must appear in first place on the list»<sup>83</sup>. This would clearly conflict with search engines operators’ freedom to conduct a business: It is obvious that the way they arrange results is strictly linked to their business choices and to the agreements they reach with their clients<sup>84</sup>. This drawback should be borne in mind when evaluating the pros and cons of relisting over delisting. It would also interfere with search engines’ (limited) freedom of speech, as above delineated

Consider now the right to be informed. In case of delisting, de-referenced pages become very difficult to reach; *de facto*, they disappear from the radar of Internet users. With relisting, search engine results would be rearranged according to their timeliness and – hopefully – correctness. Updated information means information closer to reality and to truthfulness: Relisting should enable users to obtain the information that

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<sup>81</sup> Emphasis added.

<sup>82</sup> As the same Court reiterates in *GC et al. v. CNIL*, § 57. Emphasis added.

<sup>83</sup> *GC et al. v. CNIL*, § 78.

<sup>84</sup> *Google Spain*, § 69. *Contra*: by J. Ausloos, *The Right to Erasure in EU Data Protection Law*, cit., 341. These are the so-called Search Engines Optimizations (SEO) techniques that are available only to wealthy clients: A. Slane, *Search Engines and the Right to Be Forgotten*, cit., 355.

better describes the situation or the person whose name was searched in *that* precise moment.

Relisting serves the right of the public at large to be correctly informed. Hence, it implements and enhances the function that personal data protection has in society<sup>85</sup>. Data protection prevents the «chilling of individual behavior»,<sup>86</sup> thus serving societal goals. In addition, in cases such as *GC et al. v. CNIL*, the enforcement of the data subject's right to personal data protection allows for a better informative Internet. Relisting has therefore two positive effects: One for the data subject and one for society. Everyone is better off when everyone has (access to) information that is updated and truthful.

As far as the rights to privacy and TBF are concerned, delisting would obviously accomplish the goal of falling into oblivion better than relisting. The more difficult it is to find a piece of news, the more protected is the right to privacy. Furthermore, only if and to the extent to which information cannot be found anymore or it is extremely difficult to reach, the RTBF is actually granted and enforced. As mentioned, this is the idea of practical obscurity.

Relisting would not grant the RTBF, as it would simply put the most updated information first. If, for the sake of argument, only the web pages at the center of the dispute existed, then there would be no updated information and in turn no way to grant a RTBF for the data subject. It is also true however that the right to data protection is not an absolute right and that there is no automatism in recognizing a *droit à l'oubli*. In line with the “guidelines” of the CJEU on the elements to be taken into account when deciding which right should prevail<sup>87</sup>, relisting could interiorize the exceptions related to journalism.

At the same time, the positioning of updated information among the first results of a search could at least implement data subject's right to rectification under art. 16 GDPR. Art. 16 in fact provides the right to obtain the rectification of inaccurate personal data as well as the right to have incomplete personal data completed, also through the introduction of supplementary statements. In line with these provisions, relisting would give a more accurate picture of the personality of the data subject. If and how such goals are achievable remains to be seen, as better explained below.

Finally yet importantly, the right to rehabilitation comes into play. There might be condemned people that prefer to be sure that information relating to their release and reintegration is easily accessible, so that anyone can be sure that justice made its course. Nonetheless, the vast majority of offenders would probably desire that others forget completely what happened in the past, so that they can reintroduce themselves in society relying on other people's ignorance or forgetfulness<sup>88</sup>. While the Internet

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<sup>85</sup> Recital 4, GDPR.

<sup>86</sup> O. Lynskey, *Control over Personal Data in a Digital Age*, cit., 532.

<sup>87</sup> *Google Spain*, §§ 80-81; see also Sec. 2 above.

<sup>88</sup> In the same vein consider the proposal of applying the RTBF in peace processes, by I.N. Cofone – C. Turriago Betancourt, *The Right to be Forgotten in Peace Processes*, in I.N. Cofone (ed.), *The Right to be Forgotten: A Canadian and Comparative Perspective*, London, 2020, 76.



seems to have introduced an “unforgivably accurate” e-memory<sup>89</sup>, where «forgetting has become the exception, and remembering the default»<sup>90</sup>, delisting would be the better way to serve the right to rehabilitation, as it works in the same way of human memory<sup>91</sup>. At the same time, it is also true that delisted information does not completely disappear: For instance, it might still be searched within archives of newspapers<sup>92</sup> or typing different queries. It becomes more difficult for a user to find a piece of information, but it remains possible.

Relisting entails instead a different approach: It gives publicity not only to the offender’s past, but also – and mostly - to their present. For this reason, it seems that it does not help rehabilitation, except when an offender prefers to have their entire story public.

Overall, relisting seems to be a more advisable solution than delisting, because it accomplishes better the goals of the majority of the rights involved. The only right that is worse off with relisting is the right to rehabilitation. Yet, we should look at the entire picture: Is rehabilitation given a primary role in the balancing of rights that takes place when a data subject asks for delisting? Considering that it has never been mentioned by the CJEU, the straightforward answer is “no”. Yet, if rehabilitation qualifies as a right, it should be taken into account. This does not mean that the outcome of the balancing made by courts would be different; it does only mean that the necessary consideration would (and should) be given to that right, to make the balancing exercise fairer than it has been thus far.

## 6. Further Reflections: The Feasibility of Relisting

If we maintain that relisting is a better solution than delisting, a remaining issue is how to proceed operationally with relisting. To make relisting feasible, at least three problems are to be solved: One is technological; the other two involve policy considerations, in terms of the power left to search engines operators and of the economic burden on them, concerning issues of business and market regulation.

As for the policy problems, questions remain about the convenience of the burden of enforcing law falling on search engine operators. Private actors should not be given the role of judges, let alone the role of judges that have to face the thorny task of balancing rights. AG Jääskinen in his Opinion in the *Google Spain* case raised exactly

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<sup>89</sup> G. Bell, J. Gemmill, *Total Recall: How the E-Memory Revolution Will Change Everything*, Dutton, 2009, 56; in similar terms: V. Mayer-Schönberger, *Delete*, cit., 125-126.

<sup>90</sup> V. Mayer-Schönberger, *Delete*, cit., 113.

<sup>91</sup> For an account of how human memory works, consider V. Mayer-Schönberger, *Delete*, cit., 16 ss. Some commentators believe that new and next generations will develop coping mechanisms, see *ivi*, 154.

<sup>92</sup> Art. 17(3)(d) of the GDPR expressly states that the right to erasure shall not be applicable when processing is necessary «for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes». On this topic, consider generally M. Dulong de Rosnay – A. Guadamuz, *Memory hole or right to delist?*, cit.; J. Ausloos, *The Right to Erasure in EU Data Protection Law*, cit., 253 ss., notices that art. 17(3) seems to introduce exemptions that as such will not necessitate a balancing exercise.

this issue<sup>93</sup>.

What is worse is that relisting would give search engine companies even more power than delisting, as they would decide not only which link should appear within the results, but also how to rearrange the results according to one or more specific criteria. In fact, the CJEU specified that «links to web pages containing information on [the current legal position of the data subject] must appear in first place on the list»;<sup>94</sup> this in turn means that the search engine operator should review the news to understand what is the current situation. This might not be a too burdensome task if carried out after the request for dereferencing, but it might be much more complicated to accomplish when it is done independently from a data subject's request. In fact, the Court stated that search engine operators should adjust results «at the latest on the occasion of the request for dereferencing», meaning that they should proceed even before any such request is made. Yet, given how troublesome relisting could be, it is plausible that search engines will not relist results, unless upon the request of a data subject. This consideration is consistent with AG Szpunar's opinion maintaining that *ex ante* control is undesirable.

From a market regulation perspective, imposing the mentioned burdens on search engines operators might be an economic barrier to prospective newcomers and/or an excessive cost for small incumbents resulting in a restriction of competition. The other side of the coin is that imposing these burdens on big search engine operators could mitigate the negative externalities they produce as *de facto* monopolists. If they update the information they offer and they put the updated information at the top of the list of indexed results, the indexed pages will reach the vast majority of users, because they rely on that “monopolistic” search engine.

With regard to the technological issue, it is not clear how search engines should implement relisting. Of course, the CJEU did not provide any indication on this matter, given also the fact that the duty to relist was just considered *en passant*. If the single factor to consider is the date a page was last modified, it might be difficult to distinguish the reasons why that modification took place. Indexing tools might not be able to determine whether the page was modified for an update of the facts or simply due to a trivial mistake, for example a misspelling in the title of the article. Clearly, it would depend on the meta-information tag that the author of each web page should choose<sup>95</sup>. Relisting does not entail that the data subject cannot ask for a delisting: On the contrary, it might happen that data subjects ask for delisting and instead are served with a relisting. If such rearrangement of results is not satisfactory – meaning: if the balancing carried out by the search engine operator is not pleasing – data subjects can still ask for dereferencing in front of the Data Protection Authority or in Court.

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<sup>93</sup> Opinion of Advocate General Jääskinen, C-131/12, cit., at § 133: «I would also discourage the Court from concluding that these conflicting interests could satisfactorily be balanced in individual cases on a case-by-case basis, with *the judgment to be left to the Internet search engine service providers*» (emphasis added). Consider also O. Lynskey, *Control over Personal Data in a Digital Age*, cit., 532; E. Frantziou, *Further Developments in the Right to be Forgotten*, cit., 770. For a partially different opinion, see E. Bougiakiotis, *The enforcement of the Google Spain ruling*, in *International Journal of Law and Information Technology*, 4, 2016, 321 ss.

<sup>94</sup> *GC et al. v. CNIL*, § 78.

<sup>95</sup> V. Mayer-Schönberger, *Delete*, cit., 179-180.

In any case, it would be appropriate and desirable that search engines that proceed with relisting – either before or after the data subject’s request – publish their internal guidelines on this topic. That is, search engine must be transparent on the criteria they follow to rearrange results. Transparency should include the display of notices saying that the results have been listed according to data protection law in Europe, as it happens for delisting.

It is important to stress that when there are no webpages containing updated information on the legal position of the data subject, relisting becomes particularly hard to obtain. In such cases, the balancing exercise is of utmost importance: If it is determined that data subject’s rights to data protection and to be forgotten overcome freedom of speech and the right to be informed, then delisting is the only possible way to enforce data subject’s rights. If, *vice versa*, freedom of speech and the right to be informed are considered more important than data subject’s rights, it might be impossible for the search engine operator to implement any solution. In fact, in such instances the only way to obtain the enforcement of data subject’s rights would be to ask for the modification of webpages directly to those who published the information. For instance, relying on their rights under art. 16, a data subject could ask a newspaper website to update news on a past crime. This would in fact be a «rectification of inaccurate personal data» or the completion of «incomplete personal data». If this would be the case, a newspaper website could put a disclaimer saying that the news was updated on a specific date and/or that the article is old<sup>96</sup>. It would give a (re)new(ed) context<sup>97</sup> allowing a better understanding of the information through an appropriate flow of personal information<sup>98</sup>. This is very important when the existing information regarding a criminal investigation ended up being completely untrue or ungrounded, such as in case of mistaken identities. Following the modification of the page where the information appears, relisting would become feasible.

## 7. First Regulatory Attempts

Lately, some countries have taken the courageous step of regulating delisting and relisting.

The first example is the choice made by the Canadian Province of Québec with the adoption of Bill 64 in September 2021. Section 113 of Bill 64 amends Section 28 of the “Québec Private Sector Act”<sup>99</sup> concerning the right to have one’s personal infor-

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<sup>96</sup> Consider for instance the disclaimer that *The Guardian* applies to its articles stating for instance “[t]his article is more than 2 years old” as in the case of the article by S. Marsh, “*Right to be forgotten*” on *Google only applies in EU, court rules*, cit.

<sup>97</sup> D. McGoldrick, *Developments in the Right to be Forgotten*, cit., 775.

<sup>98</sup> H. Nissenbaum, *A Contextual Approach to Privacy Online*, in *Dadalus, the Journal of the American Academy of Arts & Sciences*, 4, 2011, 45. Nissenbaum’s concept of contextual integrity supports a right to be forgotten according to M. Leta Jones, *Crtl+Z The right to be forgotten*, cit., 90.

<sup>99</sup> Complete title: “Act Respecting the Protection of Personal Information in the Private Sector”, CQLR P-39.1, adopted in 1993.

mation deleted<sup>100</sup>. The new text of Section 28 includes both delisting and relisting, called “de-index” and “re-index”, which can be granted «if the dissemination of the information contravenes the law or a court order». De-index and re-index can also be requested when specific conditions listed in the Section are met, that are:

«(1) the dissemination of the information causes the person concerned serious injury in relation to his right to the respect of his reputation or privacy; (2) the injury is clearly greater than the interest of the public in knowing the information or the interest of any person in expressing himself freely; and (3) the cessation of dissemination, re-indexation or de-indexation requested does not exceed what is necessary for preventing the perpetuation of the injury».

Section 28 does not stop here. It adds some specific conditions that shall be taken into account when assessing the three criteria; such as the fact that the data subject is a public figure; the time elapsed between the dissemination and the request for de-index or re-index; the inaccuracy and/or obsolescence of the information. Whenever the «information concerns a criminal or penal procedure, the obtaining of a pardon or the application» shall be considered.

It is easy to notice that the various conditions to be considered in assessing deindexing and reindexing are similar if not identical to those listed by the CJUE. While the approach adopted by the Province of Québec might not be the best possible one, it is still an encouraging sign of the increasing awareness of the need for more certainty. The lack of a specific regulatory framework for de/relisting adds on the already existing hurdles that search engine operators as well as courts have to face in balancing the conflicting rights. Delisting was introduced by “case law” and left many questions unanswered, as the previous pages might suggest. The crystallization of rules and criteria into law should partially answer the request for more clarity and should allow reaching better and more informed decisions by courts and operators. In other words, it would constitute guidance for anyone dealing with the RTBF.

Québec is not alone in attempting to clarify the landscape of the RTBF. Recently, the Italian parliament has adopted a law to reform partially the criminal code and the code of criminal procedure with the aim of both increasing efficiency and improving the situation of suspected or accused people<sup>101</sup>. The law devolves to the government the

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<sup>100</sup> Canadian provinces have the competence to adopt acts regulating data protection; whenever these acts are “substantially similar” to the Personal Information Protection and Electronic Documents Acts (PIPEDA - S.C. 2000, c. 5) they can be applied instead of the federal Act. At the Canadian federal level, there have been opinions by the Office of the Canadian Privacy Commissioner arguing that deindexing could be in line with PIPEDA but currently there has not been any case nor any legislative action to recognize such right. The case decided by the Federal court on July 8, 2021 recognizing the applicability of PIPEDA to Google as a search engine operator might be a first step toward the application of deindexing; see the reference by the Privacy Commissioner of Canada, 2021 FC 723. For an overview of the applicability of the right to be forgotten in Canada see generally: A. Slane, *Search Engines and the Right to Be Forgotten*, cit.

<sup>101</sup> L. 27 September 2021, n. 134 delegating the Italian government to adopt specific decrees that among other things shall improve efficiency of the criminal process; published in the Official Journal (Gazzetta Ufficiale) of 4 October 2021, p. 1.

adoption of the necessary decrees that will introduce a relevant novelty in the Italian code of criminal procedure: Deindexing of data relating to criminal offences<sup>102</sup>. More precisely, the governmental act shall provide that judicial decrees dismissing cases, decisions not to prosecute, and judgments of acquittal constitute title to obtain a measure granting the RTBF of the suspected or accused data subject. Such judicial decrees, decisions, and judgments will be notified to the Privacy Authority and will give to the data subject the right to obtain the dereferencing of the personal data relating to the criminal offence. Delisting will go from being a discretionary measure to be adopted by search engine operators after balancing the rights at stake, to being a duty that search engine operators cannot avoid and that must be simply obeyed.

This provision will not only enforce data subjects' right to data protection but it will also implement art. 27(2) of the Constitution, which guarantees that an accused person cannot be considered guilty until the final conviction.

At the time of this writing, the text of the decree introducing this provision is not known. Much of its actual effect will depend on its concrete wording. The fact that specific types of decrees and decisions are mentioned constitutes a double-edge sword. On the one hand, in case one of those kinds of decisions will be adopted, the data subject will enjoy a right to have the information delisted. On the other hand, other cases, such as the one at the core of *ED v. CNIL* decision, could suffer a negative effect. In fact, the legislator listed only some specific circumstances in which the data subject has the right to obtain the delisting of information. This could be seen as an exclusion of other cases or circumstances: Had the legislator intended to recognize a more general right to delisting, it would have not made that specific list. Suppose the Italian parliament meant to recognize a right to delisting for convicted people that have served their term of punishment, then it would (should) have adopted a different strategy. For instance, an approach close to the Québécoise one. Listing the precise conditions under which it is possible to obtain the delisting of information can be to the detriment of many other cases that would have deserved the same treatment.

Of course, the real effect of both the Italian and the Québécoise provisions remains to be seen. It is nonetheless commendable that some countries have started to take delisting and relisting seriously. These provisions could help to contain the troublesome phenomenon of trial by media<sup>103</sup> and are interesting examples and experiments that other countries may want to emulate<sup>104</sup>. Statutory regulation might also be com-

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<sup>102</sup> Art. 1(25), L. 134/2021, that will amend art. 154-ter of the Implementing provisions of the code of criminal procedure.

<sup>103</sup> On this topic, see generally: G. Resta, *Trial by media as a legal problem. A comparative analysis*, Napoli, 2009.

<sup>104</sup> The transposition of these models into other legal systems might be in fact more difficult than it seems, as the issues raised by delisting and the RTBF in general are inherently cultural specific. «Europeans and Americans have diametrically opposed approaches to the problem» according to J. Rosen, *The Right to Be Forgotten*, in *Stanford Law Review Online*, 88, 2012. See also M. Leta Jones, *Crit+Z The right to be forgotten*, cit., 137 ss. Consider the contributions in the recent book F. Werro (ed.), *The Right To Be Forgotten A Comparative Study of the Emergent Right's Evolution and Application in Europe, the Americas, and Asia*, Berlin, 2020. By the same author see also F. Werro, *The Right to Inform v. the Right to Be Forgotten: A Transatlantic Clash*, cit.

plementary to self-regulation<sup>105</sup>, so increasing self-responsibility of search engine operators.

Although the approaches differ and even though they may not be the best possible solutions, they have the merit of fostering delisting and relisting and of trying to increase certainty<sup>106</sup>.

## **8. Conclusions: In support of a “Right to Relisting”**

This paper focused on the conflict of rights that arises when data subjects ask for the dereferencing of their information and it compared the hurdles posed by delisting with those that would be posed by relisting. The analysis leads to the conclusion that relisting would be a better and fairer solution than delisting for the vast majority of cases. Nonetheless, to make relisting real, two main issues should be solved. In addition, action could be taken.

First, courts should start considering the right to rehabilitation when dealing with requests for dereferencing of data relating to offences and criminal convictions. The mere fact that courts will bear in mind that, at least in some cases a right to rehabilitation exists, would make the balancing exercise fairer than it has been so far.

This does not imply that offenders have always a RTBF because of their right to rehabilitation: Different situations necessitate different evaluations<sup>107</sup>. A murder or a case of pedophilia are very different from burglary or shoplifting<sup>108</sup>. Once again, it is a matter of circumstances and facts of the case. In addition, the likelihood to retrieve information on a person’s past crimes through search engines does not automatically entail and *per se* mean the impossibility of rehabilitation and of a fresh start. There are not pre-determined solutions: Courts must evaluate and decide on the single specific case. This makes RTBF disputes difficult and burdensome, both for the parties and for judges, but it is the only way to give a real value to every (fundamental) right at stake.

The second issue is that more and clearer indications on how to deal both with delisting (and relisting) requests are needed. Explanations on this topic are of utmost importance especially because many requests never reach courts and are carried out

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<sup>105</sup> D. Erdos, *European Data Protection Regulation, Journalism, and Traditional Publishers*, cit., 282-283.

<sup>106</sup> Clearly there are other examples of countries recognizing a right to rehabilitation and a linked right to be forgotten for criminal offenders. Consider for instance the Swiss system, where the Swiss Federal Tribunal has held in a number of cases that personal information of former criminals should not remain public in perpetuity and that the interest of the public in information related to persons facing criminal charges is limited to the time of the judicial proceeding; see F. Werro, *The Right to Inform v. the Right to Be Forgotten: A Transatlantic Clash*, cit., 290-291.

<sup>107</sup> «All information is not created equal, and even if it is, it does not remain equal» as noticed by M. Leta Jones, *Ctrl+Z The right to be forgotten*, cit., 114.

<sup>108</sup> This was highlighted also by Article 29 Working Party, *Guidelines on the implementation of the Court of Justice of The European Union judgment on “Google Spain and Inc v. Agencia Española de Protección de Datos (AEPD) and Mario Costeja González” c-131/12*, 2014, 20. Consider also EDPB, *Guidelines 5/2019*, cit., 8: among the criteria to be used to handle delisting requests the EDPB lists «the data relates to a relatively minor criminal offence that happened a long time ago and causes prejudice to the data subject».

by search engines operators<sup>109</sup>. Although the European Data Protection Board already issued two Opinions as Guidelines in RTBF cases<sup>110</sup>, there is room for improvement. For instance, there should be a stronger call for transparency<sup>111</sup>: The criteria upon which delisting and relisting are implemented shall be easily accessible for everyone. This call for transparency is all but new, and still it might be even more relevant in cases of relisting, due to their specificities. It should also increase certainty.

To solve or at least to alleviate these problems, legislators should take action. The efforts of Italy and Québec could work as examples. Both courts and citizens would profit from guidance given at the legislative level, as it would improve certainty.

Whether relisting will improve from being an *obiter dictum* to become the core of future decisions or even of a new law, remains to be seen.

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<sup>109</sup> As noted also by M. Peguera, *The Shaky Ground of the Right to Be Delisted*, cit., 559.

<sup>110</sup> Article 29 Working Party, *Guidelines on the implementation of the Court of Justice of The European Union judgment on “Google Spain and Inc v. Agencia Española de Protección de Datos (AEPD) and Mario Costeja González”* c-131/12, cit.

<sup>111</sup> Search engine operators have increasingly understood the importance of transparency and therefore have published specific reports. See Google and Bing reports, cit.

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