

Google's obligation to de-index Constitutional court decisions published in the Spanish Official Journal

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***Abstract:** This article examines both the premises and the effects of the landmark decision adopted in March 2012 by Spanish data protection authority (DPA), by which the DPA recognised itself as competent to require Google to de-index Constitutional Court judgments published in the Spanish official journal. Previously, Spanish citizens were usually unsuccessful in requesting Google to remove information included in the Spanish official journal, since the Spanish DPA believed that it was the Spanish Constitutional Court and not itself the competent authority to enforce such claim.*

1. Introduction

Today Google owns the biggest database in the world. It is not fully clear how big this company is,¹ but some studies state that Google has more than 33 trillion database entries, is subjected to 91 million searches per day, and collects trillions of bytes of data every day.² Although the advantages this search engine offers to the users are unquestionable –e.g. it expands the right of expression and the right of information among the society–, it may also raise concerns in terms of data protection and privacy. Particularly, contrary to the idea of how easy uploading and indexing personal information might be, trying to remove information from the net has increasingly become a nightmare for many users.

In this respect, Spain has been one of the top EU Member States as far as the number of litigations against Google is concerned. The Spanish Data Protection Authority (hereinafter, AEPD), as well the Spanish courts have been (quite successfully) enforcing the right to access, cancel, modify and object to personal information as enshrined in both Spanish and European laws. However, the AEPD has always had a thorn in its side regarding the index of the Spanish Constitutional Court's (hereinafter, TC) decisions, which were published in the Spanish official journal. Regarding those cases, the AEPD has always considered that the TC (and not the AEPD) was the only competent authority to decide whether such information could be removed from the Google Index or not. Surprisingly, this argumentation changed on 31 March 2012. For the first time the AEPD declared itself as competent to examine a case concerning the right to object against Google, particularly with the information requested to be de-indexed was: a) a TC judgment, and b) published in the official journal.

The following sections will analyse this decision, structuring the analysis in two sections. First, it will refer to previous cases in which the AEPD has achieved to de-index information from Google. Second, it will look at the limitations in the

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¹ See “Just How Big Is Google?”, *Infographic*, 24.05.2012. <http://theultralinx.com/2012/05/big-google-infographic.html>

² See “How big is Google's database”, bit.ly/SjAkbF

enforceability of the right to object in Constitutional court decisions, and how the AEPD decision caused a change in the former Spanish case-law.

2. The right to object to the processing of personal data in Spain

In Spain, any Spanish citizen has in principle a right to object to the processing of data relating to him/her. This principle was mentioned for the first time in Articles 6(4) and 30(4) of the Spanish Organic Law of Data Protection (hereinafter, LOPD).³ Subsequently, Articles 34 to 36 of the Regulation implementing the Spanish Organic Law of Data Protection (hereinafter, RLOPD)⁴ also developed this principle. Both the LOPD and the RLOPD implement Article 14 of Directive 95/46/EC.⁵ The AEPD has noted that this right permits a user, whose personal data are processed without his/her consent, to object to such processing. The AEPD adds that this request will be possible as long as it does not infringe on the existing laws, and when reasonable grounds on the specific personal situation are demonstrated.⁶ However, the enforcement of the right to object has often become controversial in cases where Spanish citizens request Google to de-index information affecting them. This is, in essence, due to the unclear law compelling search engines. In the next sub-sections, an analysis of the legal arguments pinpointed by both Google and the AEPD will be scrutinized.

2.1. Google argumentation

When a citizen claims his/her right to object before Google, the first argument that the company puts forward is that Spanish legislation falls outside the jurisdiction to which Google is subject. As a general rule, any company is subject to the Spanish jurisdiction -and to the Article 24.5 RLOPD- as long as it has its headquarters or an office processing personal data within the Spanish territory. Google provides two kinds of services, which need to be distinguished. First, Google is a platform used to advertise trade companies and other private entities. The search engine is paid for this service, which could be considered as its main economic source. Second, Google provides users the location of websites, whose content coincides with the search criteria they have previously chosen.⁷ In order to accomplish this last commercial activity, Google uses local promoters, for instance, Google Spain.

Google has always argued that Google Spain is not responsible for the provision of search services, since it is only a platform in charge with the management of online advertising.⁸ For this reason, Google has repeatedly stated that, since search services are provided by Google Inc., located in United States, neither Directive 95/46/EC nor the Spanish Organic Law 15/1999 (hereinafter, LOPD)⁹ are applicable.¹⁰ By this argument Google has found the way to ignore all Spanish applications requesting the right to object, and the AEPD initially admitted that, indeed, there was no infringement of such a right. Essentially, the problem affecting Spanish -and European- citizens lies in the

³ Ley Orgánica 15/1999, de 13 de diciembre, de Protección de Datos de Carácter Personal.

⁴ Real Decreto 1720/2007, de 21 de diciembre, Reglamento de Desarrollo de la Ley Orgánica 15/1999 de Protección de Datos de Carácter Personal.

⁵ 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.

⁶ Memoria de 2000 de la Agencia Española de Protección de Datos, p.139.

⁷ AEPD, R/01261/2011, p.2.

⁸ AEPD, R/01261/2011, p.2-3.

⁹ Ley Orgánica 15/1999, de 13 de diciembre, de protección de datos de carácter personal.

¹⁰ AEPD, R/01261/2011, p.3.

fact that the right to object is not enshrined in US laws, as there is no US federal law on data protection.

The second argument used by Google in order to skip the obligation to comply with the right to object is the unclear legal responsibility of search engines. Google has always stated: *“If you want to remove something from the web, you should contact the webmaster of the site and ask him or her to make a change”*.¹¹ This procedure seems easy when the site is a blog of a friend. However, the problem might arise in other cases such as an online newspaper or journal, when the information belongs to a court, or when it is located in a national official journal, among others. Also the Article 29 Data Protection Working Party (hereinafter, Art.29 WP) has responded the same way, stating that a search engine cannot be considered as a data controller of personal data processed according to the European legislation. It will be instead the webmaster of the site which will be exclusively responsible of the information included in such website.¹²

Despite Google’s convincing arguments, in numerous occasions the AEPD has found a way to oblige Google to de-index certain information. The next section analyses what reasons the AEPD has recently set out to make Google remove personal information from its index.

2.2 AEPD general reasoning to oblige Google to de-index information

The AEPD has found Google responsible of de-indexing information which infringes a user’s right to privacy. Particularly, Art. 3(c) RLOPD¹³ binds any data controller established outside the EU which uses means for the processing of personal data located within the Spanish territory. The only exception of this requirement would be that the means were only used for traffic purposes, but this is not the case with Google.

First of all, the agency notes that any user can opt to limit his/her search results to the documents located in the Spanish servers –by clicking *“páginas de España”*-. That means that Google has previously tracked and registered all websites located in Spanish web servers, which can only be achieved by using technical means located in Spain.¹⁴ Second, the website www.google.es is a site specifically addressed to users located in the Spanish territory. Third, Google uses systems of personalised advertising – AdWords and Google AdSense – which link Spanish-related searches and websites with online adverts also addressed to Spanish users.¹⁵ Finally, Google has established an office in Spain –Google Spain-, which carries out all or part of the activities in regards to the Spanish market.¹⁶

As a result, the AEPD has concluded that the search engine is collecting and processing data in Spain, which is not only used for traffic purposes, as argued by Google.¹⁷ Therefore, the agency has recently been able to enforce the Habeas data rights (access, modification, cancellation and objection) before Google Spain, when the indexing of users’ data infringes their fundamental rights.

¹¹ Google. Privacy Policy. Last accessed on 29 October 2012.

<http://www.google.co.uk/intl/en/policies/privacy/faq/>

¹² WP148.

¹³ It implements Art 4(c) Directive 95/46/EC.

¹⁴ AEPD, R/01261/2011, p.12.

¹⁵ AEPD, R/01261/2011, p.13.

¹⁶ AEPD, R/01261/2011, p.17.

¹⁷ AEPD, R/01261/2011,p.15.

3. Limitations in the enforceability of the right to object in Constitutional court decisions. The landmark case R/00645/2012.

3.1) Publication of name/surnames included in a court decision.

As Contracting-Party of the Council of Europe, Spain fulfills its duty of publishing court decisions, so that they are accessible to all citizens. This general rule is established in the Council of Europe Recommendation concerning the selection, processing, presentation, and archiving of court decisions in legal information retrieval systems.¹⁸ It states that “*full knowledge of the jurisprudence of all courts is an essential prerequisite for equitable application of the law*”, as well as “*the general public and the legal profession in particular should have access to these new means of information*”. Finally, the Recommendation notes that when the processing of personal data is involved, the Member States should adopt national legislation in line with Convention No. 108 on the Council of Europe.¹⁹

According to this legal framework, the Spanish government adopted Regulation 5/1995,²⁰ which was amended in 1997,²¹ by including Article 5(bis) on publication of the court judgements. In particular, paragraph 3 states that in the processing and diffusion of court decisions, personal data shall be deleted, in order to comply with the rights to honour and privacy.²² In the same way, the AEPD pointed out in the legal report of 2000 on sanctions data for medical malpractice²³ that the processing of data included in court decisions is contrary to the LOPD. The report added that the processing of personal data should be constrained to public administrations, preventing third parties from accessing such personal information. Therefore, the AEPD concluded that “*the diffusion of court decisions will not be possible without the consent of the affected person*”.

Nonetheless, the above-mentioned general rule of not publishing names and surnames of court decisions has an exception. This is the case-law issued by the Spanish Constitutional Court (hereinafter, TC), whose decisions shall be published with integrity. The reasons of this exceptional requirement are: i) the special nature of this Court, as supreme interpreter of the Constitution,²⁴ and ii) the existence of a legal obligation to fully publish constitutional judgments, as defined by the TC,²⁵ in Art. 9(1) of the Constitution, and in Art.5(1) of the LOPD.²⁶ Hence, the TC concluded in 2006 that the publication of names and surnames of the affected persons did not infringe any provision of the LOPD.²⁷ The same judgment established that the rules on diffusion and publication by the TC are not absolute, and that there could be exceptional cases in which the names and surnames are not published. Those cases are determined on a case-

¹⁸ Council of Europe, Committee of Ministers, Recommendation R (95)11, 11.09.1995.

¹⁹ Council of Europe, Convention 108 on the Protection of Individuals with regard to Automatic Processing of Personal Data, 28.01.1981

²⁰ Reglamento 5/1995, de 7 de junio, de los Aspectos Accesorios de las Actuaciones Judiciales.

²¹ Acuerdo de 18 de junio de 1997, del Pleno del Consejo General del Poder Judicial, por el que se modifica el Reglamento número 5/1995, de los aspectos accesorios de las actuaciones judiciales.

²² See also AEPD, Resolución: R/01135/2009, Procedimiento No PS/00685/2008, 27.04.2009, p.12.

²³ AEPD, Difusión de datos de sentencias condenatorias por negligencia médica - Año 2000, 14.01.2000.

²⁴ STC 114/2006

²⁵ *Ibid.*

²⁶ AEPD, R/00067/2012, p.20.

²⁷ STC 114/2006, 05.04.2006.

by-case basis, and to the extent that other fundamental rights and constitutional safeguards might come into conflict.²⁸

In the next section, the scope of both the TC and AEPD competences will be examined. A distinction is to be made between publishing a TC decision in a non-official journal site, and its publication in the Spanish Official Journal. With respect to the latter, personal data has only been successfully de-indexed once, as will be analysed below.

3.2) Rejection of de-indexing a Constitutional Court decision included in the Spanish official journal

In regards to the de-indexing of TC decisions which are not published in official journals, the AEPD has easily concluded that Google has the obligation to guarantee citizens the right to object. In particular, the AEPD has noted that non-public citizens should not have to resign themselves to having their personal data circulating on the net without being able to modify it.²⁹ Thus, in accordance with Art. 6(4) LOPD, the AEPD usually accepts applications concerning the right to object on specific information included in the search engine's index, "*in order to avoid that the search engine affects negatively and permanently against the user's will*"³⁰. Because there is no law in Spanish legislation that constrains the enforcement of this right against Google, the AEPD does not create any obstacle in enforcing the right to object if Google indexes a TC judgment.

Having said that, and considering that Art. 6(4) LOPD applies "*as long as it does not clash with any other legal provision*", the AEPD found an exceptional case, in which the right to object was not enforceable: The publication of a TC decision in the Spanish official journal. Particularly, the confusion arose as the publication of a TC judgment, including users' names and surnames, in the official journal is obligatory by law -and corroborated by jurisprudence-. In this sense, the AEPD initially believed that the action of de-indexing was directly affecting the general principle of publication of TC decisions. Consequently, the agency has for a long time considered -erroneously- that the TC was the only competent authority to decide about the de-indexing of TC judgments from Google. Concretely, the AEPD stated that it falls within the scope of the TC to "*determine whether it is appropriate to restrict the publicity of a TC judgment*", establishing that "*the decision corresponds exclusively to the TC, in accordance with the Spanish Constitution and the Organic Law of the Constitutional Court*".³¹ Therefore, the AEPD was never able to get into the substance of the question, when the right to object referred to information in the Spanish official journal.

However, as will be examined in the next section, in March 2012 the AEPD changed its previous argumentation, considering itself as competent to decide on the right to object regarding information included in the Spanish official journal.

3.3) The AEPD decision changing previous case-law

In July 2011, an individual, whose data was indexed in Google, called for his right to object regarding information linked in: i) <http://www.boe.es/boe>, ii) <http://www.tribunalconstitucional.es>, iii) <http://www.123people.es>. Normally, the

²⁸ *Ibid.*, p.10.

²⁹ AEPD, R/00598/2007, p.7

³⁰ AEPD, R/00067/2012, p.16

³¹ AEPD, R/00067/2012, p.27.

AEPD would have declared itself as incompetent to enforce such a right with respect to the information included in the Spanish official journal (www.boe.es). However, surprisingly, in March 2012 the AEPD released a decision³² (hereinafter, the AEPD decision) treating the information linked to a non-official journal the same way as in the Spanish official journal.

For the first time, the AEPD has recognised its competence to require Google to de-index TC judgments published in the Spanish official journal. Thus, from this judgment, it can be deduced that the AEPD does not undermine the general principle of publication of a TC judgment by requiring Google to de-index it from its platform. Google, as in previous cases, considered that it was not responsible for the content of the links, arguing that the data controller of the website is exclusively responsible – i.e. the TC and the Spanish official journal-. However, the AEPD quashed Google's defence once again and applied its regular line of argumentation (see 2.1 above), regardless of the fact that the TC judgment was published in the Spanish official journal.

This AEPD decision has great significance as it expands citizens' rights to object in cases which Google indexes TC judgments published in the Spanish official journal. Specifically, it draws a distinction between i) on the one hand, the general principle of publicity of TC decisions in the Spanish official journal and the subsequent doctrine;³³ and ii) on the other hand, the indexing of judgments by Google. In conclusion, the AEPD decision interprets the indexing by search engines as alien to the general principle of publicity of TC judgments and, hence, Art. 6(4) LOPD is applicable in all circumstances.

4. Conclusion

The AEPD decision will undoubtedly become a landmark case of the Spanish data protection doctrine. It guarantees that the right to object will be possible for citizens whose right to privacy is infringed, and they are seeking to de-index a TC judgment published in the Spanish official journal. This study has examined the AEPD decision in conjunction with other previous decisions, arriving to the conclusion that the agency is competent to require Google to de-index personal information from a TC judgment, regardless of whether it is published in the Spanish official journal or not. This is because Google's indexing does not contribute, in any case, to the aforementioned general principle of publicity.

The AEPD decision is released in a crucial moment due to the expected changes in regards to the EU data protection framework, which will clarify the obligations stemming from search engines like Google. On one hand, in January 2012 the Commission released the proposal for a General Data Protection Regulation, which reformulate and enhance the responsibilities of search engines within the EU. On the other hand, in March 2012 the *Audiencia Nacional* of Spain lodged a preliminary ruling before the Court of Justice of the EU on whether Google must delete personal information on request.³⁴

In conclusion, together with the imminent improvements previously discussed, the AEPD decision shows an aim of courts and lawmakers to enforce individual rights online, in response to the digital era that is emerging. Under the current EU legal

³² AEPD, R/00645/2012, 31.03.2012.

³³ Art. 164 of the Spanish Constitution and Art. 99(2) of the LOTC.

³⁴ OJ C165, 09.06.2012, p.11-12.

framework, there is still a lack of a clear regulatory framework in regards to search engines and their responsibilities. However, the AEPD decision will definitely contribute as a reference for future similar cases within the EU, and can be considered a step forward to the establishment of the forthcoming “right to be forgotten”.