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**THE RIGHT TO BE FORGOTTEN
IN THE EUROPEAN UNION AND
RUSSIA: COMPARISON AND
CRITICISM**

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THE RIGHT TO BE FORGOTTEN IN THE EUROPEAN UNION AND RUSSIA: COMPARISON AND CRITICISM

On 14 July, 2015 the Russian President signed Law No. 264-FZ which grants Russian citizens the right to request the delisting of search results which link to inaccurate or irrelevant information about them (“the right to be forgotten”).

This paper discusses the decision of the Court of Justice of the EU in *Google Spain v. Agencia Española de Protección de Datos (AEPD) and Mario Costeja González*, the case which inspired Law No. 264-FZ, and compares implementation of the right to be forgotten in the EU and Russia. It is found that the Russian law was created as a *sui generis* right, and fails to account for the right of the general public to find and access information online. Other discrepancies include a wider scope of the right to be forgotten, rigid requirements for processing removal requests and the prohibition to disclose any information about such requests.

Keywords: Costeja, European Union, Google Spain, information intermediaries, internet, internet service provider liability, internet service providers, personal data, the right to be forgotten.

JEL Classification: K39

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Introduction

On 14 July, 2015 the Russian President signed Federal law 264-FZ² which from 1 January, 2016 will grant Russian citizens the right to request the delisting of certain search results in specific circumstances, the right which is somewhat misleadingly known as “the right to be forgotten”. The explanatory note related to the law specified that this law is consistent with “general European practice”³. Supporters of the law made a case for its adoption referring to the judgment of the Court of Justice of the European Union (CJEU) in the case *Google Spain v. Agencia Española de Protección de Datos (AEPD) and Mario Costeja González*.^{4,5} The new law is intended to grant Russian citizens the right the CJEU granted EU citizens.

The decision in *Google Spain v. AEPD and Mario Costeja González* itself sparked major controversy. Some claim that the right to be forgotten will empower citizens of the EU by providing them with better control over the use of their personal data online.⁶ Others argue that the decision of the CJEU is “deeply flawed”⁷ and the right to be forgotten is “misguided in principle and unworkable in practice”.⁸ Larry Page, the CEO of Google, expressed a concern that the right to be forgotten could empower repressive governments in censoring the internet.⁹

Considering the sharp debate around the right to be forgotten it would be beneficial to compare its implementation in Russia with the judgment of the CJEU in *Google Spain v. AEPD and Mario Costeja González* and instructive to reveal how faithful the Russian law is to the principles provided in the judgment of the CJEU.

² Federal law 264-FZ, dated 13 July 2015, “O vnesenii izmenenij v Federal'nyj zakon "Ob informacii, informacionnyh tehnologijah i o zashhite informacii" i stat'i 29 i 402 Grazhdanskogo processual'nogo kodeksa Rossijskoj Federacii” [“On amendments to the Federal law “On information, information technologies and protection of information” and articles 29 and 402 of the Civil Procedure Code of the Russian Federation”], *Sobranie zakonodatel'stva RF*, 20.07.2015, N 29, p. 4390.

³ Explanatory note to the draft federal law “O vnesenii izmenenij v Federal'nyj zakon "Ob informacii, informacionnyh tehnologijah i o zashhite informacii" i stat'i 29 i 402 Grazhdanskogo processual'nogo kodeksa Rossijskoj Federacii” [“On amendments to the Federal law “On information, information technologies and protection of information” and sections 29 and 402 of the Civil Procedure Code of the Russian Federation”], [http://asozd2.duma.gov.ru/main.nsf/\(ViewDoc\)?OpenAgent&work/dz.nsf/ByID&A652DE4594260D7643257E58002BE6C5](http://asozd2.duma.gov.ru/main.nsf/(ViewDoc)?OpenAgent&work/dz.nsf/ByID&A652DE4594260D7643257E58002BE6C5).

⁴ Case C-131/12, *Google Spain v. AEPD and Mario Costeja González* [2014] ECLI:EU:C:2014:317, <http://curia.europa.eu/juris/document/document.jsf?text=&docid=152065&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=53949>.

⁵ Olga Churakova, Anastasiya Golitsina, “Zakonoproekt o «prave na zabvenie» mogut prinjat' do konca ijunja” [“The draft law on the right to be forgotten can be adopted by the end of June”], <http://www.vedomosti.ru/technology/articles/2015/06/11/596188-zakonoproekt-o-prave-na-zabvenie-mogut-prinyat-do-kontsaiyunya>.

⁶ Martine Reicherts, “Commission response to Committee's report on EU Data Protection law: a 'right to be forgotten'”, <http://www.parliament.uk/documents/lords-committees/eu-sub-com-f/righttobeforgotten/311014-Right-to-be-forgotten-Commission.pdf>.

⁷ The Advisory Council to Google on the Right to be Forgotten, Final Report, <https://drive.google.com/file/d/0B1UgZshetMd4cEI3SjlvV0hNbDA/view>, p. 27.

⁸ House of Lords European Union Committee, EU Data Protection law: a 'right to be forgotten', <http://www.publications.parliament.uk/pa/ld201415/ldselect/ldcom/40/4002.htm>, para 62.

⁹ Samuel Gibbs, “Larry Page: 'right to be forgotten' could empower government repression”, <http://www.theguardian.com/technology/2014/may/30/larry-page-right-to-be-forgotten-government-repression>.

This paper reviews the judgment in *Google Spain v. AEPD and Mario Costeja González*, identifies differences between the judgment and the Russian law and discusses criticism of the right to be forgotten.

The European Union

In 1998 *La Vanguardia*, the Spanish newspaper, published an announcement mentioning Mr Costeja González's name in a real-estate auction in connection with attachment proceedings for the recovery of social security debts. After 12 years Mr Costeja González submitted a complaint to the Spanish data protection authority requesting *La Vanguardia* to remove all pages with the auction announcement and Google to delist links to such *La Vanguardia* pages from search results.

In connection with these proceedings the Spanish national court referred a set of questions on the implementation of the EU law to the CJEU in the case of *Google Spain v. AEPD and Mario Costeja González*. These questions can be broken down into three categories: (A) how provision of web search results can be regulated by data protection legislation; (B) whether citizens of the EU have the right to claim delisting of search results containing their personal data; and (C) whether the foreign operator of a search engine can be subjected to Spanish data protection law. These three points will be treated in turn.

(A) In order to impose the full set of obligations contained in data protection legislation on a search engine operator it is necessary to establish that a search engine “processes” personal data and that its operator is the “controller” in relation to such processing.

With regard to the first issue the CJEU explained that in order to provide the search service the operator automatically searches (“crawls”) websites available on the internet, retrieves, indexes and makes the information available on these websites available to users. The search engine indexes all available information, which could contain personal data. This means that the search engine operator “collects”, “retrieves”, “records” and “organises” in its search index, “stores” on its servers, “discloses” and “makes available” to its users personal data together with other information. In accordance with article 2(b) of the Data Protection Directive¹⁰, all such activities qualify as the “processing” of personal data.¹¹ It is irrelevant that a search engine processes personal data as a part of all other information or that this processing is

¹⁰ 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 (Data Protection Directive), Official Journal L 281, 23/11/1995, p. 0031 – 0050.

¹¹ Case C-131/12, *Google Spain v. AEPD and Mario Costeja González*, para 28.

carried out automatically. In fact, article 3(1) of the Data Protection Directive specifically mentions that processing can be carried out by automatic means.

The court also established in paragraph 33 of the decision that since the operator of a search engine determines the purposes and means of the processing (the search engine operator regulates how webpages are crawled, the information is organised, stored and then made available in search results), the operator is effectively a “controller” in respect to the processing of personal data. It is immaterial that the operator of a search engine does not process personal data selectively or that personal data is already available on third party websites. The CJEU further mentioned in paragraph 35 of the judgment that the processing of personal data by search engine operators is additional to and separate from the processing undertaken by website publishers.

The court’s decision to classify search engine operators as controllers with respect to the processing of indexed personal data is problematic for at least two reasons.

First, search engine operators in practice cannot comply with all the obligations imposed on data controllers. For example, the Data Protection Directive imposes strict requirements on processing of sensitive categories of personal data (such as information concerning health, sex life, political opinions, religious or philosophical beliefs). Such personal data can usually be processed only with the data subject’s consent. It is not possible in practice for search engine operators to receive such consent from all data subjects whose personal data may be indexed by a search engine.

Second, if such a wide interpretation of “processing” and “a data controller” is adopted, virtually everyone can be deemed a controller. For example, internet users who search for information on Google can be data controllers, since they retrieve personal data.¹² Indeed, even carrying around a newspaper may arguably involve the “storing” of the personal data of the individuals named in the newspaper.

By recognising that search engine operators process personal data and are controllers in respect to such processing, the CJEU extended the obligations contained in the Data Protection Directive to operators. However, at the same time the CJEU suggested in paragraph 73 of the judgment that the processing of personal data by search engine operators pursues legitimate

¹² Case C-131/12, *Google Spain v. AEPD and Mario Costeja González*, Opinion of Advocate General Jääskinen, delivered on 25 June 2013, ECLI:EU:C:2013:424, <http://curia.europa.eu/juris/document/document.jsf?text=&docid=138782&pageIndex=0&doclang=en&mode=lst&dir=&occ=firt&part=1&cid=53949>.

interests.¹³ Although the court did not elaborate on what particular interests are facilitated, the Advocate General, who advised the court on this case, in his opinion explained that a search engine (i) makes information more easily accessible for internet users; (ii) renders the dissemination of the information uploaded on the internet more effective; and (iii) enables various internet services that are ancillary to the search engine, such as the provision of keyword advertising. These activities facilitate the freedom of information, the freedom of expression and the freedom to conduct business respectively.¹⁴

(B) Although the provision of an online search service can be underpinned by legitimate interests, in certain cases the legitimate interests of the operator can be overridden and individuals can ask a search engine operator to cease processing their personal data.¹⁵

If a search of the person's name is carried out, a search engine can provide "through the list of results a structured overview of the information relating to that individual that can be found on the internet — information which potentially concerns a vast number of aspects of his private life and which, without the search engine, could not have been interconnected or could have been only with great difficulty — and thereby establish a more or less detailed profile of him"¹⁶. This "profiling" can significantly interfere with the rights to privacy and to the protection of personal data.

In such circumstances the economic interest of the search engine operator and the interests of the general public in having access to this information will be overridden by the interests of a data subject.¹⁷ A data subject can request the operator of a search engine "to remove from the list of results displayed following a search made on the basis of a person's name links to web pages, published by third parties and containing information relating to that person"¹⁸. In accordance with paragraph 92 of the judgment such a removal can be requested when the processing of personal data does not comply with the Directive, in particular if the processed data are inaccurate inadequate, irrelevant or excessive in relation to the purposes of the processing.

¹³ Case C-131/12, *Google Spain v. AEPD and Mario Costeja González*.

¹⁴ Case C-131/12, *Google Spain v. AEPD and Mario Costeja González*, Opinion of Advocate General Jääskinen, delivered on 25 June 2013, para 33, 95-96.

¹⁵ Case C-131/12, *Google Spain v. AEPD and Mario Costeja González*, para 76-77, 94.

¹⁶ *Ibid.* para 80.

¹⁷ *Ibid.* para 81.

¹⁸ *Ibid.* para 88.

Following the receipt of such a request the search engine operator will have to comply unless “for particular reasons, such as the role played by the data subject in public life”¹⁹, the data processing is justified by “the preponderant interest of the general public in having, on account of inclusion in the list of results, access to the information in question”²⁰.

This requirement means that the operator of a search engine will have to carry out a balancing exercise and weigh the data subject’s right to privacy and the protection of personal data against the right of the general public to access the information in question.

The court did not elaborate on what constitutes “a role in public life” or what other circumstances can justify interference with the data subject’s right to privacy.

Some guidance was provided by the data protection authorities of the EU Member States (collectively represented by the Article 29 Working Party)²¹, and by a council of data protection experts established by Google in order to provide advice on the judgment of the CJEU (the Advisory Council).²²

Although it is fairly difficult to establish the meaning of “a role in public life”, the data protection authorities state that an individual will usually have a role in public life if having access to the particular information would protect the public against improper public or professional conduct.²³ The Advisory Council distinguished three kinds of cases related to a role in public life: (i) individuals with clear roles in public life (such as politicians, CEOs, celebrities, religious leaders, sports stars, performing artists) — because of their role, the interest of the general public in having access to information on them will usually prevail; (ii) individuals with no discernible role in public life — their delisting requests will usually be granted; and (iii) individuals with a limited or context specific role in public life (such as persons who unintentionally got caught in the public eye) — in their cases there would be no presumption because the assessment of their delisting requests will heavily depend on the information subject to delisting).²⁴

¹⁹ Ibid. para 97.

²⁰ Ibid.

²¹ 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-131/121, http://ec.europa.eu/justice/data-protection/article-29/documentation/opinion-recommendation/index_en.htm.

²² The Advisory Council to Google on the Right to be Forgotten, Final Report.

²³ 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-131/121, p. 13.

²⁴ The Advisory Council to Google on the Right to be Forgotten, Final Report, pp. 7-8.

While the court refrained from providing a more detailed explanation, there are a multitude of factors, other than the individual's role in public life, which can affect the result of this balancing act.²⁵

The Advisory Council broke such factors into three groups: (i) the factors related to the nature of the information access to which is sought to be restricted; (ii) the source of the information; and (iii) the age of the information.²⁶

(i) Information on an individual's intimate or sex life and other information which is deemed sensitive under the Data Protection Directive ("special categories of data"²⁷), information related to minors, information prejudicial to the individual, personal financial information, private contact or identification information, false or misleading information²⁸, information which puts the individual at risk, information in the form of an image or video (in comparison with a text) may weigh in favour of delisting. On the other hand, information relevant to the professional conduct of the individual, information published with the individual's consent, information published in accordance with the prescription of a law, information relevant to political discourse or governance, information relevant to religious or philosophical discourse, information that relates to public health and consumer protection, information related to criminal activity, information that contributes to a debate on a matter of general interest, information that is factual and true, information integral to the historical record, information integral to scientific inquiry or artistic expression have less chance of being delisted.

(ii) Information published as a result of a journalistic inquiry²⁹, government publications, information published by the individual him- or herself may evidence the existence of legitimate public interest in access to such information.

(iii) In accordance with paragraph 93 of the court's decision "even initially lawful processing of accurate data may, in the course of time, become incompatible with the directive where those data are no longer necessary in the light of the purposes for which they were

²⁵ See The Advisory Council to Google on the Right to be Forgotten, Final Report, pp. 9-14, 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-131/121, pp. 15-20, Information Commissioner's Office, Internet search results, <https://ico.org.uk/for-the-public/online/internet-search-results/>.

²⁶ The Advisory Council to Google on the Right to be Forgotten, Final Report, pp. 9-14.

²⁷ Data Protection Directive, article 8.

²⁸ The Guidelines of the Article 29 Working Party mention that data protection authorities will not usually rule on the information which allegedly constitutes hate speech, slander, libel or similar offences, such cases should be referred to the courts or police.

²⁹ The Advisory Council aptly notes that the demarcating line between professional journalism and blogging is blurred and in some cases information published by bloggers may be treated more favourably.

collected or processed”³⁰. Time may be an important factor in assessing the balance of the interests. With the course of time circumstances related to the publication of information may change and the information may become irrelevant. For example, the individual may cease to play a role in public life. It may be difficult to lay down precise timelines in connection with the relevance of information. In *Google Spain v. AEPD and Mario Costeja González* the initial publication of the auction announcement took place 16 years earlier — the CJEU deemed that this time could be sufficient to make the information irrelevant.³¹

(C) When answering the question about jurisdiction the CJEU explained that a foreign web search operator can be subjected to Spanish data protection regulations in cases where this search engine operator has a local subsidiary incorporated in Spain which promotes and sells advertising offered by that search engine and which orientates its activity towards Spanish residents. The CJEU reasoned in paragraph 55 of the judgment that although the personal data is processed by a foreign search engine, the data is processed “in the context of the activities” of the local company which sells advertising offered by the search engine, since sale of advertising is meant to make the search service profitable and thus supports the search engine.³² Considering that the promotion and sale of advertising is usually carried out by locally established companies, this effectively means that any search engine which sells advertising for clients in an EU country has to comply with this country’s data protection regulations.

The court’s decision was issued on 13 May, 2014. On 30 May, 2014 Google launched a web form which citizens of EU Member States can use to submit data protection delisting requests to Google. By 26 July, 2015 Google received more than 288,000 delisting requests and processed more than 1 million URLs. Of these 1 million URLs Google removed 41.3 per cent.³³ Google accepts delisting request for its Web Search, Image Search and Google News.³⁴

When complying with a request Google delists URLs on all European country code top level domains (e.g. google.de, google.fr, google.co.uk), but not on its other websites (e.g. google.com). Google maintains that delisting from EU domains is sufficient for adequate protection of EU Member States citizens’ right to private life as only 5 per cent of its European users use the google.com website.³⁵ The Advisory Council agreed with Google and noted that

³⁰ Case C-131/12, *Google Spain v. AEPD and Mario Costeja González*.

³¹ *Ibid.* para 98.

³² *Ibid.*

³³ Google Transparency Report, European privacy requests for search removals, <http://www.google.com/transparencyreport/removals/europeprivacy/>.

³⁴ Google’s response to Article 29 Working Party’s Questions, <https://docs.google.com/file/d/0B8syaai6SSfT0EwRUFyOENqR3M/preview>.

³⁵ *Ibid.*

delisting on non-EU domains may come in conflict with a right of non-EU users to access the information on name-based searches, since non-EU countries may not recognise the right to be forgotten.³⁶ The EU data protection authorities strongly disagreed with this practice and demanded delisting on all domains where EU citizens can make search requests (or at least use geo-blocking to prevent EU citizens from gaining access to the delisted URLs).³⁷ However, Google took a principled stand in not delisting search results from its non-EU websites.³⁸

When delisting URLs Google can show a notification at the bottom of the search results when users search for the name in relation to which the URLs were delisted.³⁹ Since the delisting of search results can reduce traffic to websites, Google also notifies webmasters of the websites affected by delisting.⁴⁰ When providing both notifications Google does not disclose the name of the individual who requested delisting.

In the EU a reform of the data protection legal framework is underway.⁴¹ The purpose of the reform is to adopt EU data protection legislation to the use of new technologies. When this reform is implemented the Data Protection Directive (which was adopted in 1995 when Google did not yet exist) will be replaced by the General Data Protection Regulation. The right to be forgotten was included by the Commission in the first draft of the General Data Protection Regulation⁴² and was supported with some changes by the European Parliament⁴³ and the Council of Ministers.⁴⁴ Considering that the majority of the Member States also support the right to be forgotten, it is likely that the General Data Protection Regulation will contain this right, although its precise scope and implementation are subject to debate.⁴⁵

The Russian Federation

³⁶ The Advisory Council to Google on the Right to Be Forgotten, Final Report, p. 19.

³⁷ See Stephanie Bodoni, "Google Faces French Ultimatum Over Right to Be Forgotten", <http://www.bloomberg.com/news/articles/2015-06-12/google-is-issued-french-ultimatum-over-right-to-be-forgotten>.

³⁸ Peter Fleischer, "Implementing a European, not global, right to be forgotten", <http://googlepolicyeurope.blogspot.ru/2015/07/implementing-european-not-global-right.html>.

³⁹ Google's response to Article 29 Working Party's Questions.

⁴⁰ Ibid.

⁴¹ See "Reform of the data protection legal framework", http://ec.europa.eu/justice/data-protection/review/index_en.htm.

⁴² European Commission, Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation), COD 2012/0011, <http://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX:52012PC0011>.

⁴³ European Parliament, European Parliament legislative resolution of 12 March 2014 on the proposal for a regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation), C7-0025/2012, <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2014-0212+0+DOC+XML+V0/EN>.

⁴⁴ Council of Ministers, Proposal for a Regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation), <http://data.consilium.europa.eu/doc/document/ST-9565-2015-INIT/en/pdf>.

⁴⁵ Simon Hughes, Government response to Committee's report on EU Data Protection law: a 'right to be forgotten', p. 4.

In Russia draft legislation meant to introduce the right to be forgotten was introduced into the parliament on 29 May, 2015.⁴⁶

The first draft of the bill contained the right to be forgotten in its most radical form and was criticised by Russian IT companies.⁴⁷ For example, the bill did not require individuals to provide URLs subject to removal and left it to the operators of search engines to locate and delist all URLs containing information provided in the removal request. Furthermore, the first draft provided for the removal of true and accurate information which is more than 3 years old (except for information about criminal activity) and did not limit the delisting to searches of the individual's name.⁴⁸

After the introduction of the bill into the parliament, members of parliament and the presidential administration held several meetings with internet companies to discuss possible amendments to the bill.⁴⁹ Some of the proposed amendments were introduced into the draft law for the next parliamentary hearing. The bill quickly went through all of the readings and was signed by the president on 13 July, 2015 and adopted as Law No. 264-FZ.

Law No. 264-FZ introduced into Russian law a definition of a search engine. A search engine is understood as an information system which, on a user's demand, searches for information and provides information on URLs for third-party websites.⁵⁰ The first draft of the bill did not contain the "third-party websites" limitation and the definition potentially applied to any website which has a search feature (including media websites which provide an internal search feature).

An individual can request the removal of URLs for searches of his or her name if such URLs link to the following information on him or her: (i) information distributed in breach of Russian laws; (ii) inaccurate information; (iii) irrelevant information or (iv) information which has lost its meaning for the individual because of subsequent events or actions of the individual.⁵¹

⁴⁶ See the first draft of law, <http://asozd2.duma.gov.ru/main.nsf/%28Spravka%29?OpenAgent&RN=804132-6>.

⁴⁷ See, for example, "Zabvenie prava na poisk" ["Oblivion of the right to search"], <https://blog.yandex.ru/post/96625/>.

⁴⁸ Ibid.

⁴⁹ The Russian Association for Electronic Communications (RAEC), "Po itogam tret'ego chtenija zakonoproekta "Pravo na zabvenie" – uchteno bolee 80% predlozhenij internet-otrasli" ["In the third reading of the draft law "Right to be forgotten" – more than 80% of proposals of internet industry were taken into account"], <http://raec.ru/times/detail/4292/>.

⁵⁰ Federal law 149-FZ, dated 27 July 2006, "Ob informacii, informacionnyh tehnologijah i o zashhite informacii" ["On information, information technologies and protection of information"], *Sobranie zakonodatel'stva RF*, 31.07.2006, N 31, p. 3448, article 2.

⁵¹ Federal law 149-FZ, dated 27 July 2006, "Ob informacii, informacionnyh tehnologijah i o zashhite informacii" ["On information, information technologies and protection of information"], article 10.3(1).

The only exceptions are (i) information on events which contain signs of crimes the term of prosecution for which has not lapsed and (ii) information about the commitment of a crime in respect of which the conviction has not lapsed.⁵²

The operators of a search engine have to process delisting notifications within 10 business days (the first draft of the law gave the operators only 3 calendar days).⁵³ The operators are allowed to request clarification of the information provided by an individual, and to request the individual's passport. However, the operators have the right to request only one such clarification.⁵⁴ The operators are also prohibited from disclosing information about the receipt of a delisting request.⁵⁵

The delisting obligation contained in the new law applies to all search engines which provide advertising directed at consumers residing in Russia.⁵⁶ This approach is reminiscent of the CJEU, which established that the incorporation of a local subsidiary brings national data protection laws into play where this subsidiary promotes and sells advertising for the search engine. However, the Data Protection Directive lists other possible cases where a foreign company may be caught by national data protection regulation — for example, in cases where a foreign company is not established in the Member State, but for purposes of processing makes use of equipment situated on the territory of the said Member State.⁵⁷

Another piece of draft legislation was introduced to supplement Law No. 264-FZ.⁵⁸ If enacted, this draft legislation will establish administrative fines for the failure of a search engine operator to comply with a legitimate removal request (a 100 000 ruble fine) and failure to comply with a court judgment prescribing the removal of URLs from search results (a 3 000 000 ruble fine). This draft law was recently criticised by the Russian Supreme Court.⁵⁹ The Supreme Court stated that the fines may be disproportionate and the inability of the courts to lower the amount of the fine will not allow to take into account the different circumstances of individual cases.

⁵² Ibid.

⁵³ Ibid.

⁵⁴ Ibid. article 10.3(3).

⁵⁵ Ibid. article 10.3(8).

⁵⁶ Ibid. article 10.3(1).

⁵⁷ Data Protection Directive, article 4(c). See also Article 29 Working Party, Opinion 1/2008 on data protection issues related to search engines, http://ec.europa.eu/justice/policies/privacy/docs/wpdocs/2008/wp148_en.pdf, p. 10.

⁵⁸ Draft law No. 804140-6 “O vnesenii izmenenij v Kodeks Rossijskoj Federacii ob administrativnyh pravonarushenijah (v chasti ustanovlenija administrativnoj otvetstvennosti operatorov poiskovyh sistem)” [“On amendments to the Code of Administrative Offences (concerning establishment of administrative liability of search system operators)”], [asozd2.duma.gov.ru/main.nsf/\(ViewDoc\)?OpenAgent&work/dz.nsf/ByID&925C6C651F1A4EDA43257E5800384BCD](http://asozd2.duma.gov.ru/main.nsf/(ViewDoc)?OpenAgent&work/dz.nsf/ByID&925C6C651F1A4EDA43257E5800384BCD).

⁵⁹ Marija Makutina, “Verhovnyj sud raskritikoval zakon o «prave na zabvenie»” [The Supreme Court criticised the law on “the right to be forgotten”], <http://top.rbc.ru/politics/04/08/2015/55c0ba059a7947ba34f83d6c>.

On face value Law No. 264-FZ grants to Russian citizens a right similar to the one granted to EU citizens by the CJEU in *Google Spain v. AEPD and Mario Costeja González*. However, closer scrutiny reveals a number of important differences which could render Law No. 264-FZ significantly different from the right provided by the CJEU.

(i) The CJEU based its conclusions on the Data Protection Directive and principles governing processing of personal data in the EU.

In Russia the right to be forgotten was introduced as a *sui generis* right which has no express connection to data protection (Law No. 264-FZ did not amend Russian data protection legislation).

On the one hand, the independent nature of the Russian right to be forgotten circumvents the problems resulting from the recognition of search engine operators as data controllers: namely, imposing obligations with which search engine operators cannot comply and an impractical widening of the meaning of the term “data controller” which could create problems for entities other than search engine operators, for example, internet users.

On the other hand, the extent of the applicability of personal data regulations to search engine operators remains unknown in Russia. If, at a later point, a Russian court or data protection authority finds that the search engine operators can be deemed data controllers in relation to provision of web search services, Law No. 264-FZ may overlap with data protection regulations.

(ii) The CJEU granted data subjects the right to request the delisting of URLs from search results only in a specific set of circumstances — if their personal data processed by search engine operators are inaccurate, inadequate, irrelevant or excessive.

The Russian parliament created a “general purpose” right. Russian citizens will not only be able to request delisting of inaccurate or irrelevant information, but also any other information on themselves which is disseminated contrary to Russian laws. Such information could include instructions on manufacturing drugs, information about committing suicide, information on gambling⁶⁰, and even pornography,⁶¹ and information on bitcoins.⁶² Although Russian courts can already order internet access providers to restrict access to such information online, Law No.

⁶⁰ Federal law 149-FZ, dated 27 July 2006, “On information, information technologies and protection of information”, Article 15.1.

⁶¹ Vladimir Zykov, “Roskomnadzor vneset srazu 136 pornosaitov v chernyi spisok” [“Roskomnadzor will add the whole 136 porn websites to the black list”], <http://izvestia.ru/news/585309>.

⁶² “Portal o bitkoinakh popal v spisok zapreshennykh v Rossii saitov” [“Portal on Bitcoins was added to the list of websites banned in Russia”], <http://lenta.ru/news/2015/01/13/bitcoin/>.

264-FZ created a new instrument for the control of the dissemination of information online — the delisting of URLs from search results. It is not yet clear in what circumstances, other than the publication of inaccurate or irrelevant information, individuals will be able to exercise their delisting right, since in order to request the delisting of URLs linking to information which is prohibited from dissemination by Russian laws, such information must also relate to the individual.

(iii) In the EU search engine operators have to delist URLs only if there is no preponderant interest of the general public in having access to the information. This is an important general limitation to the right to be forgotten. In practice this means that search engine operators will have to consider many factors when making a delisting decision. The operators will be able to assess every situation based on the particular set of facts.

Law No. 264-FZ, on the other hand, contains a fundamental misinterpretation of the decision in *Google Spain v. AEPD and Mario Costeja González*. Instead of creating a general “public interest” exception for delisting, Russian parliament require that search engine operators will have to remove URLs if the information “has lost meaning for the applicant because of subsequent events or actions of the applicant”⁶³. Instead of protecting the public interest, this provision appears to serve solely the interests of the applicant.

The only other exception contained in Law No. 264-FZ covers information on criminal activity. However, as mentioned above, signs of criminal activity are only one of the many factors which EU data protection authorities (and search engine operators) will weigh when making a delisting decision.

(iv) The judgment of the CJEU does not specify whether search engine operators can notify online publishers or internet users about the delisting of URLs. Equally, the decision does not mention whether search engine operators can publish statistics on delisting requests.

It may be assumed that search engine operators can do these things as long as they do not reveal the personal data which were subjected to the delisting request. The publishing of statistical information on delisting requests is vital for a better understanding of the effect of the right to be forgotten. EU data protection authorities agree that in some cases contacting online

⁶³ Federal law 149-FZ, dated 27 July 2006, “Ob informacii, informacionnyh tehnologijah i o zashhite informacii” [“On information, information technologies and protection of information”], Article 10.3(1).

publishers can be instrumental in making the correct decision when assessing a delisting request, since publishers can know details which search engine operators do not have.⁶⁴

Law No. 264-FZ specifically mentions that search engine operators cannot disclose information about receiving removal requests.⁶⁵ Such an all-encompassing restriction bars search engine operators not only from notifying website publishers and internet users about delisted URLs, but also from publishing anonymised statistics on the processing of delisting requests (since such statistics will essentially disclose the facts of receiving delisting requests).

If this restriction is applied rigorously by Russian courts, the application of the right to be forgotten in Russia will be kept out of public oversight.

(v) The CJEU did not provide a definition of a search engine in its judgment. It is possible that the delisting obligation applies to all search engines other than “internal” search engines which look for information on a single website, because internal search engines do not provide a detailed profile of a data subject.⁶⁶ An example of such a search engine could be a search tool on a news website which only indexes its own web pages.

The obligation to process delisting requests provided in Law No. 264-FZ applies only to search engines which provide advertising directed at consumers residing in Russia.⁶⁷ In accordance with a literal interpretation of this provision, search engines which do not provide advertising will not be subject to the new law. Although targeted advertising is currently the primary monetisation instrument of search engines, it is not entirely unthinkable that in the foreseeable future search engine operators will use other means to generate revenue, such as a subscription fee⁶⁸ or affiliate programs⁶⁹. This could mean that the right to be forgotten created by Law No. 264-FZ may apply to fewer search engines.

(vi) The judgment in *Google Spain v. AEPD and Mario Costeja González* leaves it to search engine operators to process delisting requests and to protect the legitimate interests of the general public by balancing conflicting rights on a case-by-case basis. It is for the Member

⁶⁴ 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-131/121, p. 10.

⁶⁵ Federal law 149-FZ, dated 27 July 2006, “On information, information technologies and protection of information”, Article 10.3(8).

⁶⁶ 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-131/121, p. 8.

⁶⁷ Federal law 149-FZ, dated 27 July 2006, “Ob informacii, informacionnyh tehnologijah i o zashhite informacii” [“On information, information technologies and protection of information”], Article 10.3(1).

⁶⁸ For example, Google is testing website subscription for ad-free browsing, see <http://www.bloomberg.com/news/articles/2014-11-20/google-testing-website-subscriptions-for-ad-free-browsing>.

⁶⁹ For instance, DuckDuckGo receives revenue from affiliate programs, see <https://duck.co/help/company/advertising-and-affiliates>.

States' legislators and data protection authorities to further regulate the processing of delisting requests by search engine operators, provided that the general principle established by the CJEU is heeded and search engine operators can weigh competing interests before deciding whether to delist URLs.

Law No. 264-FZ contains a more detailed regulation of the processing of delisting requests by search engine operators. For example, as mentioned above, the law provides that a search engine operator must process a delisting request within 10 business days.⁷⁰ When processing a request, a search engine operator can request additional information from an individual, but the search engine operator can only do this once per a request.⁷¹ There is room for the argument that in complex cases a search engine operator could need more than 10 business days and more than one clarifying request before deciding on a removal request.

(viii) Since the right to request the delisting of certain URLs established in *Google Spain v. AEPD and Mario Costeja González* is based on data protection legislation, data subjects can submit such requests directly to search engine operators or to data protection authorities.⁷²

Since the similar right provided by Law No. 264-FZ is not based on data protection laws, Russian citizens can apply to search engine operators or courts, but not to data protection authorities. Addressing delisting requests to courts rather than data protection authorities may be a better option as the courts have more investigative powers than data protection authorities.

Conclusion

While Law No. 264-FZ which introduced the right to be forgotten in Russia is claimed to be consistent with the practice adopted in the EU, it is in fact quite different from the decision of the CJEU in *Google Spain v. AEPD and Mario Costeja González*.

Law No. 264-FZ does not develop the right to be forgotten from data protection. Instead, the right to be forgotten was created as a *sui generis* right. The critical shortcoming of the Russian law (which also distinguishes it from the CJEU's judgment) is the failure to account for the right of the general public to find and access information online. Other discrepancies include a wider scope of the right to be forgotten, the rigid requirements for processing removal requests and the prohibition to disclose any information about such requests.

⁷⁰ Federal law 149-FZ, dated 27 July 2006, "Ob informacii, informacionnyh tehnologijah i o zashhite informacii" ["On information, information technologies and protection of information"], Article 10.3 (5).

⁷¹ Ibid. Article 10.3(3).

⁷² Case C-131/12, *Google Spain v. AEPD and Mario Costeja González*, para 78.

The implementation of the right to be forgotten is now up to search engine operators and Russian courts. Their actions will determine whether the new law will be used to empower Russian citizens or to censor the internet.

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