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The impact of *Google v CNIL* to dereferencing from search engines under Article 17 of the General Data Protection Regulation

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ABSTRACT

In 2014, the Court of Justice of the European Union (CJEU) delivered a judgement that has not been forgotten. Living in digital era, where Google dominates the search engine market, dissemination of information and gathering of data, the CJEU established the famously known ”right to be forgotten” (RTBF). The right includes an obligation for search engine operators to remove search results related to individual’s name who exercises their RTBF, empowering data subjects’ control over their personal data. Most importantly, *Google Spain* judgement led to the codification of the RTBF to Article 17 of the General Data Protection Regulation (GDPR), which has a contoversial reputation as an embodiment of high standards for individiuals’ data protection in the European Union (EU).

Extraterritoriality regarding the RTBF has caught attention in recent years. The thesis focuses on the developments of the CJEU introduced in the case *Google v CNIL* and its impact to national case law by transferring jurisdiction for global application of RTBF. The research is conducted on qualitative and empirical method, including content analysis based on the EU legislation, the CJEU’s case law and literature, and selected national case analyses after *Google v CNIL.* The research question is whether balancing the data subject’s right to privacy and right to protection of personal data and public’s right to freedom of information and expression can result to global dereferencing in national level. The hypothesis is that global dereferencing has not been practiced, due to the novelty of the RTBF and *Google v CNIL* and the lack of guidance for national authorities. The balancing tests of the national cases indicate that dereferencing of search results has been conducted in the European Economic Area (EEA), not globally.

Keywords: EU, GDPR, data subject’s rights, right to be forgotten, global dereferencing

LIST OF ABBREVATIONS

AEPD	Agencia Española de Protección de Datos
APD/GBA	Autorité de protection des données/Gegevensbeschermingsautoriteit
CFR	Charter of Fundamental Rights of the European Union
CJEU	Court of Justice of the European Union
CNIL	Commission nationale de l'informatique et des libertés
DPA	Data Protection Authority
DPD	Data Protection Directive 95/46/EC
EEA	European Economic Area
EU	European Union
GDPR	General Data Protection Regulation 2016/79
GHAMS	Gerechstof Amsterdam
RBAMS	Rechbank Amsterdam
IP	Internet Protocol
LIBE Committee	Committee on Civil Liberties, Justice, and Home Affairs
PVN	Personvernnemnda
RBTF	Right To Be Forgotten
WP29	Article 29 Working Party

INTRODUCTION

The verb "*to google*" was added to the Oxford English Dictionary in 2006[1], and has ever since become a synonym for "to search" by Google dominating the search engine market with an over 92% share.[2] By organizing world's information and make it universally accessible and useful [3], Google creates value to their core business by building it around promotion of right to freedom of expression and information.[4] Google's advanced algorithms have made it possible to offer users high quality and accurate searches, where the search engine's dominance derives from. [5] With billions of searches daily [6], Google's success is based on the ability to anticipate users' intensions with the amount of data users generate to Google from using their free services. [7] Google's business model demonstrates how data plays an important asset to businesses in the digital age. Moreover, Google's role as disseminator of information and tool for exersicing freedom of expression and information cannot be emphasized enough, thus it should carry a "special responsibility" in society as a dominant company: not only does Google process a huge amount of personal data, but makes it available through its search results globally, thus it's justified to pay special attention, and impose special obligations, because their business both promote and interefere with individual's rights. [8]

One of the European Union's (EU) core values is the respecting and promotion of human rights, which is defined in the Article 2 and supported by Article 3 of Treaty on the European Union

[1] Heffernan, V. (2017) *Just Google It: A Short History of a Newfound Verb*. Retrieved from:https://www.wired.com/story/just-google-it-a-short-history-of-a-newfound-verb 15 March 2022
[2] Statcounter Search (2022) *Engine Market Share Worldwide*. Retrieved from: https://gs.statcounter.com/search-engine-market-share 24 March 2022
[3] *Our approach to Search.* Google. Retrieved from: https://www.google.com/search/howsearchworks/our-approach/ 15 March 2022
[4] Jørgensen, R. (2018) Human Rights and Private Actors in the Online Domain. In M. Land & J. Aronson (Eds.), *New Technologies for Human Rights Law and Practice*. 243-269. p.246
[5] Moore, M., & Tambini, D. (Eds.). (2018). *Digital dominance: the power of Google, Amazon, Facebook, and Apple.* New York, USA: Oxford University Press. p. 35
[6] Minaev, A. (2022) *Internet Statistics 2022: Facts You Need-To-Know*. Retrieved from: https://firstsiteguide.com/internet-stats/ 24 March 2022
[7] Moore, M., & Tambini, D. (Eds.). (2018) *supra nota* 5, p.35
[8] *Ibid.* p.187

(TEU). Especially, the EU is known for its high standards for protection of individuals' personal data, which has been depicted as practicing "imperialism" by unilaterally imposing data protection regulations over the borders of its territory to ensure effective enforcement data protection rules.[9] The European Court of Justice's (CJEU) role in the phenomenon must be highlighted, since the case law has recognized the potential impact of U.S. based tech companies to data subject's individual rights. [10] The case law has supported the development of data protection in the EU by taking a stand as a human rights court[11] by interpreting the data protection legislation in favour of data subjects' rights that are based on fundamental rights set up in the Charter of Fundamental Rights of the European Union (CFR). [12]

The Right To Be Forgotten (RTBF) was established to EU law by the CJEU's case *Google Spain* [13] in 2014.[14] The RTBF enables a data subject to request a removal of their personal data from the data controller. [15] *Google Spain* categorized search engine operators to fall under the definition of "data controller", which created a new obligation to search engine operators under EU law. [16] The judgement concluded that search engine operators are required to remove search results based on the name of the data subject from the search engine when a data subject requests the removal.[17] In practice, the RTBF in search engine operators cases means that the original publication of the indexed website is not removed, but the hyperlinks in the search results.[18] Therefore, dereferencing from search engines is an essential part of the RTBF.

The judgement led to codification of the RTBF in the the General Data Protection Regulation (GDPR) in 2018.[19] *Google Spain* determined the EU data protection law to reach non-EU

[9] Pollicino, O. (2021) Data Protection and Freedom of Expression Beyond EU Borders: EU Judicial Perspectives. In Celeste, E., Fabbrini, F., Quinn, P. Bocconi (Eds.) *Data Protection beyond Borders*. *Transatlantic Perspectives on Extraterritoriality and Sovereignty. (1-20)* Oxford: Hart Publishing. p.5
[10] Moore, M., & Tambini, D. (Eds.). (2018) *supra nota* 5, p.187
[11] Celeste E., Fabbrini, F.,(2020). The Right to Be Forgotten in the Digital Age: The Challenges of Data Protection Beyond Borders. German Law Journal, 21, 55–65. p.57,
[12] European Union Agency for Fundamental Rights (2018) *Handbook on the European data protection law: 2018 edition.* Luxembourg: Publications Office of the European Union. p.225
[13] Court decision, 13.5.2014, *Google Spain*, C-131/12, EU:C:2014:317
[14] 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 L 281, 23.11.1995
[15] European Union Agency for Fundamental Rights (2018), *supra nota* 12, p.223
[16] *Google Spain*, *supra nota* 13, para 38
[17] Quinn, J. (2021) Geo-location technology: restricting access to online content without illegitimate extraterritorial effects. *International Data Privacy Law*, 11(3), 294-306. p.298
[18] *Ibid.*
[19] 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 L 119, 4.5.2016

establishments, but it did not answer the question whether the RTBF was applicable outside the EU. *Google v CNIL*[20] was assumed to clarify the legal status of the RTBF, when another case regarding a dereferencing request for Google was referred to the CJEU in 2017. In 2019, Google and freedom of expression organisations called the ruling of *Google v CNIL "a victory for global freedom of expression"*,[21] which defined that dereferencing of search results does not have a global scope.[22]

The the essence of the research is *Google v CNIL* not ruling out the possibility of global application of the RTBF in derefencing cases for national authorities.[23] The approach is linked to the Article 85 of the GDPR, which constituted exemptions and derogations for Member States to reconcile national laws to balance these opposing rights.[24] Due to the single paragraph, the legal status of RTBF can be questioned, which is supported by the fact that another preliminary ruling regarding Article 17 has been referred to the CJEU in 2020.[25] The recognition of national variances on fundamental right weighting has raised concerns of fragmentation of data subjects' rights, since these rights are laid down by a regulation that was designed to unify the data protection legal framework in the EU and ensure the equivalent level of protection of the rights and freedoms of natural persons in all Member States.[26] Moreover, transferring jurisdiction for global dereferencing for national authorities and not prohibittig global dereferencing has been likely to cause legal uncertainty regarding the territorial scope of the RTBF, which *Google v CNIL* was assumed to solve after the controversial *Google Spain*.[27]

The RTBF has stirred debate, but the literature does not contemplate an empirical analysis on the impact of the case on national case law after the CJEU declaring the global applicability being an option under national law. This research is intended to fill the gap. The research question is whether balancing the data subject's right to privacy and right to protection of personal data and public's right to freedom of information and expression can result to global dereferencing from Google Search in national cases. The purpose is to clarify the uncertainty around global dereferencing and

[20] Court decision, 24.9.2019, *Google v CNIL,* C-507/17, EU:C:2019:772
[21] Article 19 (2019) *Google win in right to be forgotten case is victory for global freedom of expression*. Retrieved from: https://www.article19.org/resources/google-win-in-right-to-be-forgotten-case-is-victory-for-global-freedom-of-expression/ 24 March 2022
[22] *Google v CNIL, supra nota* 20, para 73, 74
[23] *Ibid.*, para 72
[24] *Google v CNIL, supra nota* 20, para 67
[25] Court decision, 21.12.2020, *Google v TU and RE,* C-460/20, not published
[26] Samonte, M. (2020) GOOGLE V CNIL: Territorial Scope of The Right To Be Forgotten Under EU Law. *European Papers - A Journal on Law and Integration*, 4 (3). 839-851. p.848-849
[27] Quinn, J. (2021) *supra nota* 17, p.301

potential fragmentation of level of protection of data subjects' rights after *Google v CNIL* judgement under Article 17 of the GDPR. The thesis is both theorethical and empirical. The methodological approach is qualitative, including content analysis based on the EU legislation, mainly the DPD, the GDPR, and the CFR, the CJEU's case law and literature. Selected national case analyses after *Google v CNIL* bring empirical aspect to the research. With the help of standard legal and doctrinaire comparative and interpretative standards, the scholarly writings and the EU's policy documents, are evaluated. Even though the Article 17 is applicable to all data controllers, the thesis focuses on search engine operators and data subject's requests to dereferencing, since it serves the purpose of the research. With these methods, the thesis achieves its aims.

The hypothesis is that the global derefencing has not been practiced since the judgement is novel and the RTBF is still taking shape as well as the GDPR in whole. In addition, there is a lack of guidance for national authorities. The balancing of the RTBF with freedom of expression and information was left as a regulatory task for Member States to implement EU law.[28] Even though the EU adopted a unified general data protection law framework, there were national laws and a directive existing before the GDPR, which the the GDPR was intended to enhance, not totally unify.

The thesis is divided in three chapters. The first introduces the evolution of the RTBF, which shows the important role of the CJEU's case law regarding the development of the right with the interpretation of EU's data protection legal framework and covers the legislative background. By covering Article 17's important notions on the applicability to search engine operators and demonstrating the relation to Article 85 of the GDPR and freedom of expression and information, and how the legislator has tried to strike balance between these rights, which was one of the determinating factors of excluding global application of the RTBF. It suggests debate that has followed the CJEU's decisions and EU's data protection legislation. The second chapter presents national dereferencing cases against Google and whether the global dereferencing has been examined. It demonstrates how the right to protection of personal data and the right to freedom of information and expression are weighted in Google Search cases and whether there's variation whose interests are given more weight. The last concludes the discussions presented.

[28] Wagner, J., & Benecke, A. (2016). National Legislation within the Framework of the GDPR. *European Data Protection Law Review*, 2(3), 353-361. p.356

1. EVOLUTION OF THE RIGHT TO BE FORGOTTEN IN EUROPEAN UNION LAW

The EU has a strong constitutional basis for protection of fundamental rights and protection of personal data particularly under the CFR, Article 16 of Treaty on the Functioning of the European Union (TFEU) and Article 6 of TEU. [29] The CFR includes the right to privacy in Article 7, but technological innovation has brought new aspects to the right. The EU recognizes the right to protection of personal data as a separate right under Article 8 of the CFR to respond the developments in society, which shows the EU's commitment towards the protection of their citizens' right to personal data protection. [30] The Article 8 of the CFR is a continuation of the standards set by the DPD, many years before the Lisbon Treaty came into force in 2009.[31]

Under EU law, GDPR is secondary legislation derived from the primary law, thus the RTBF is an implication of data subject's fundamental rights granted in the Articles 7 and 8 of the CFR. The chapter describes the legal background of the RTBF and demonstrates the CJEU's case laws role in shaping the RTBF to and what aspects of the RTBF the court has tried to clarify in its judgements. Due to the purpose of the thesis, the chapter focuses on the RTBF in the light of dereferencing from search engines.

1.1. Data Protection Directive and *Google Spain* – Establishment

To enhance the EU citizens' right to protection of personal data, the EU has served as a global forerunner in regulating data protection, firstly with the DPD in 1995.[32] The legal history of the RTBF in the EU dates to 2010, when in the famous case of *Google Spain,* the CJEU established the RTBF under the DPD. The case dealt with a Spanish applicant's request for the removal of his personal data from Google search engine which appeared in the search results as links to the third

[29] European Union Agency for Fundamental Rights (2018) *supra nota* 12, p.28
[30] *Ibid.*
[31] *Ibid.*
[32] *Ibid.* p.3

party websites when entering applicant's name to Google search engine. [33] The applicant argued that the links containing outdated information of him infringed his right to privacy and right to protection of personal data, because the information was no longer relevant in the situation at the time as the legal case on which the news article based had already been settled in court. [34] After the refusal of Google Spain, the applicant filed a complaint against both Google Spain and Google Inc. [35]

The Spanish Data Protection Authority (DPA), Agencia Española de Protección de Datos (AEPD), referred three preliminary questions to the CJEU on the interpretation of the DPD: whether the DPD was applicable to search engines, whether the DPD could be applied to a U.S. based company that had a subsidiary in the EU with commercial activity and whether links containing personal data of the data subject who has requested the dereferencing could be removed from the search engine. [36]

Google Inc. – nowadays Google LLC – was declared be the data controller under Article 2(d), since the search engine results containing personal data were interpreted to constitute as grounds for processing of personal data in the meaning of Article 2(b). [37] The CJEU argued that the search engine operator's algorithm collects data with indexing which *"retrieves"*, *"records"* and *"organizes"* data and *"stores"* personal data on their servers and then *"discloses"* the personal data to the public with the list of search results to internet users. [38] Google being identified as a data controller in the case, the scope of Article 4 of the DPD was fulfilled by having an establishment in the EU *"which is intended to promote and sell advertising space offered by that engine and which orientates its activity towards the inhabitants of that Member State."* [39] Hence, the Spanish national data protection law and DPD were applicable to the search engine operator under Article 4(1). This meant that the CJEU applied EU data protection legislation to Google Inc, which had servers in the U.S., but an establishment in the EU and extended the application EU data protection law, including data protection rights, over its territorial borders. The broad

[33] *Google Spain*, *supra nota* 14, para 15
[34] *Ibid.*
[35] *Ibid.* para 14
[36] Kieseberg, P., Li, T., Villaronga, E. F., (2018) Humans forget, machines remember: Artificial intelligence and the Right to Be Forgotten. *Computer Law & Security Review*, 34. 304-313. p.305
[37] Svantensson, D.B., (2015) Limitless Borderless Forgetfulness? Limiting the Geographical Reach of the "Right to be Forgotten". *Oslo Law Review*, 2, 116-138. p.117
[38] *Google Spain*, *supra nota* 14, para 28
[39] *Ibid.*para 55

interpretation of "data controller" by the CJEU was intended for the ensurement of effective realization of data subjects' rights. [40]

Lastly, the CJEU determined that the links should be removed from Google Search, when the data related to the applicant is inaccurate, inedaquate, irrelevant, or excessive for the data processing purposes, found from the Article 12(b) and the 14(a) of the DPD. [41] This marked as the establishment of the RTBF which was a combination of right to erasure in Article 12 (b) and right to object in Article 14 (a). [42] Article 12(b) obliges Member States to guarantee all data subjects the right to obtain from the data controller the rectification, erasure or blocking of data processing, when the processing is generally contrary to the Directive. [43] The right to erasure can be exercised, when it's seen appropriate, and particularly, when the personal data is incomplete or inaccurate in nature.[44] Followed by Article 14(a), the data subject has the right to object at any time of the processing of their personal data, when there are legitimate grounds for objecting the processing in a particular situation, if the national law does not state otherwise.[45] If justified objections exist, the processing of the personal data that was objected must be suspended by the controller and the data should be erase under Article 12(b). [46]

By applying the conditions set by these Articles, the CJEU concluded that individuals shall have the right to request for removal of their personal data from online search engine results, if the information is inaccurate, inadequate, irrelevant, or excessive for the data processing purposes.[47] This applies also to cases when the name of the requesting applicant or data is not erased before or simultaneously from those web pages, even if the original publication on the third party's website was lawful. [48] Since the obligation of removal concerns only the search engine operator in question, the data can still be found online on its original webpage. The removal did not mean a complete erasure, or forgetting in its literal sense, but removal of the data from the *"active memory"* of the internet [49], which Google Search represent with its accessibility around the clock.

[40] *Google Spain*, *supra nota* 14, para 34
[41] European Union Agency for Fundamental Rights (2018) *supra nota* 12, p.224
[42] Bygrave, L.A., Docksey, C., Drechsler, Kuner, C., (2020) *The EU General Data Protection Regulation: A Commentary*. New York, USA: Oxford University Press. p. 515
[43] Data Protection Directive 95/46/EC, *supra nota* 16, Art. 12
[44] *Ibid.*
[45] *Ibid.* Art 14(a)
[46] *Ibid.,* Art 12(b)
[47] European Union Agency for Fundamental Rights (2018), *supra nota* 12, p.225
[48] *Google Spain*, *supra nota* 14, para 88.
[49] McCarthy, H. (2016) *All the World's a Stage*: The European right to be forgotten revisited from a US perspective. *Journal of Intellectual Property Law & Practice*, 11 (5), 360-371. p.479

The case having a fundamental right aspect, the CJEU emphasized that the RTBF is not absolute and has limitations to it and applied the same elements to the RTBF as the right to protection of personal data carries.[50] Open-ended definitions of "appropriateness" of the right to erasure and "justified objection" in Articles 12 and 14 were interpreted so that competing interests should be taken into account, when the request of dereferencing is made.[51] The balancing test considers the nature of the information and its sensitivity to the data subject, and interest of the public to gain that information. [52] The CJEU clarified that generally, the rights of the data subject prevail, but the role of the data subject in public life can create an exception to the geneal rule and leas to a justified reason for data processor and public's interests to take precedence. [53] This balancing between right to privacy and protection of data protection in the one hand and in one hand, right to freedom of information and expression should be done case-by-case basis, following the principle of proportionality of EU law[54] and doctrine of the European Court of Human Rights. [55]

The judgement was widely criticized. Firstly, The CJEU was critized for giving more weight to individual's data protection than public's right to freedom of information and publishers' freedom of expression, thus threating the rights' existance online. The interests of the publishers were not examined in the ruling, raising concerns on disempowerment of publishers [56] and search engine operator gaining more power as "gatekeepers" of information by disseminating and controlling access to information with algorithms which are not responsible for publishing and producing the actual indexed content, hence excluding publishers out of the equation. [57] Additionally, the Advocate General (AG) Jääskinen had a dissenting opinion about the classification of search engine operator as a controller and the RTBF in general. [58] He argued that the obligation imposed to search engine operator to dereference third party content leads to interference of publishers' right to freedom of expression and potential censorship, which creates weak legal protection for

[50] *Google Spain*, *supra nota* 14, para 81
[51] Klinefelter, A., Wrigley, S. (2021) *Google CCL v CNIL:* The Location-Based Limits of the EU Right to Erasure and Lessons for U.S. Privacy Law. *North Carolina Journal of Law & Technology* 22(4). 681-734. p. 692
[52] Gumzej, N. (2021) "The Right to Be Forgotten" And the Sui Generis Controller in the Context of CJEU Jurisprudence and the GDPR. *Croatian Yearbook of European Law and Policy, 17,* 127-158. p. 129
[53] *Google Spain*, *supra nota* 14, para 99
[54] General Data Protection Regulation 2016/679, *supra nota* 19, Recital 4
[55] Miadzvetskaya, Y., & Van Calster, G. (2020). Google at the Kirchberg Dock. On Delisting Requests, and on the Territorial Reach of the EU's GDPR. *European Data Protection Law Review*, 6(1), 143-151. p. 147
[56] Floridi, L. (2015) "The right to be forgotten": a philosophical view. *Annual Review of Law and Ethics*, 23. 163-179. p. 176
[57] Yaish, H. (2019) Forget Me, Forget Me Not: Elements of Erasure to Determine the Sufficiency of GDPR Article 17 Request. *Journal of Law, Technology, and the Internet*, 10 (1), 1-30. p.6
[58] Opinion of Advocate General, 25.6.2013, C-131/12, ECLI:EU:C:2013:424, para 138(2)

the infringed party, when there's no effective remedy in place against another private party. [59] The trend of privatization of legal rules has raised concerns for leading to a governance gap by giving out too much quasi-regulatory power to private entities, which operate on internal policies and soft law rules that have as much validity as traditional legal rulesm, which impose human right derogations against other private entities. [60] search engine opeator's business model has a high impact on human rights, but no direct human right obligations, [61] while states' authorities have a positive obligation to ensure human rights. Enforcement of the RTBF has been left in the hands of Google. [62]

Secondly, the application of EU data protection rules to U.S based company caused debate between American and European constitutional systems by revealing the tension between the First Amendment's freedom of speech, aiming to ensure development of technological innovation and a thriving market economy, and on the other hand the right to protection of personal data in the EU, aiming to ensure the protection of EU citizens' data exploitation by the tech giants.[63] The unilateral application of EU data protection legislation has been interpreted as "data imperialism" for EU not respecting international comity and diversity of legal systems. [64] Another problem is regarding the borderless nature and global reach of the Internet, where the traditional view of territoriality of legal rules and jurisdictions does not apply, hence the EU is decipted of trying to bring its own standards and rules to the Internet. [65] Such "hyper-regulation" is likely to cause fragmentation on the regulation of the internet, thus problems for engaging activities online, making the legal compliance of internet users, especially with EU's high standards, and enforcement of the laws almost impossible. [66]All in all, EU's data protection legislation has been described to be another manifestation of the "Brussels effect" with the objective to set up a global standard for data protection rules with extraterritorial application. [67]

[59] Opinion of Advocate General, *supra nota* 58, para 134
[60] Jørgensen, R. (2018) *supra nota* 4, p.245
[61] *Ibid.*
[62] Chaparro, E., Powles, J., (2015) How Google determined our right to be forgotten. *The Guardian*. Retrieved from: https://www.theguardian.com/technology/2015/feb/18/the-right-be-forgotten-google-search 9 March 2022
[63] McCarthy, H. (2016) *supra nota* 49, p.360
[64] Celeste E., Fabbrini, F.,(2020). *supra nota* 11, p. 56
[65] Kuner C. (2017) The Internet and the Global Reach of EU Law. *LSE Law, Society, and Economy Working Papers*, 4. p.5
[66] Svantensson, D. B. (2018). European Union Claims of Jurisdiction over the Internet – An Analysis of Three Recent Key Developments. *Journal of Intellectual Property, Information Technology and Electronic Commerce Law*, 9(2), 113-125. p. 114
[67] Gstrein O., Zwitter, A. (2021) Extraterritorial application of the GDPR: Promoting European values or power? *Internet Policy Review*, 10 (3). 1-30. p.4-5

1.2. The General Data Protection Regulation – Codification

To strengthen the data protection legal framework to tackle further challenges of the digital age, the GDPR entered into force in 2018.[68] The world's strictest data protection regulation increased both the EU citizens' control over their personal data and businesses and organizations' liability on collecting and processing personal data.[69] The RRBF has been described to be a novelty by the GDPR and an example of modernisation of the EU's data protection law. [70] However, the right to erasure is not a new concept, since it was part of the right to access in Article 12(b) of the DPD, as seen in the reasonings of *Google Spain*. The GDPR amended the Article by specifying and in fact evolving the right to erasure by adding "right to be forgotten" in the brackets of the title but keeping the basic elements of the right. [71]

1.2.1. Article 17 of the GDPR

In the GDPR proposal by the Commission, Article 17 was formulated as "*right to be forgotten and to erasure"*, which included an obligation for data controllers to ensure the removal of internet link or copy of the data as part of taking responsibility for making the data publicly available in any situation. [72] In the report by Committee on Civil Liberties, Justice, and Home Affairs of the European Parliament (LIBE Committee) wanted the title to be merged as "right to erasure", since they saw the RTBF to be only a continuation to the right to erasure and rectification.[73] The Albrecht Report by LIBE Committee, named after the rapporteur Jan Philipp Albrecht, argued that the title was misleading and it didn't take into account the situations when an individual has given a consent to disclose data to the public, which is a lawful ground for data processing under Article 6 of the GDPR. [74] Therefore, the obligation described in the proposal text was not legitimate or realistic.

[68] General Data Protection Regulation 2016/679, *supra nota* 19
[69] Friesen, J. (2021). The Impossible Right to Be Forgotten. *Rutgers Computer and Technology Law Journal*, 47(1), 173-196. p. 180
[70] Bygrave, L.A., Docksey, C., Drechsler, Kuner, C., (2020), *supra nota* 42, p.477
[71] *Ibid.*
[72] 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) COM 2012/011 final
[73] *Ibid.*
[74] Committee on Civil Liberties, Justice, and Home Affairs of the European Parliament (2012) Draft Report on the proposal for a regulation of the European Parliament and of the Council on the protection of individual with regard to the processing of personal data and on the free movement of such data. Retrieved from: https://www.europarl.europa.eu/meetdocs/2009_2014/documents/libe/pr/922/922387/922387en.pdf 31 March 2022

[75] The obligation was later limited to respond more realistic situations with the requirement of proportional efforts taken by the data processor to inform third parties, when request of removal of data has been asked by the data subject. [76] Lastly, the LIBE Committee agreed with the Proposal that the Article 17 should be balanced with freedom of expression and remain as an exception to the RTBF and the Council did not object these changes.[77] The RTBF was then codified to Article 17 of the GDPR. By demonstrating how the proposed Article was shaped, the Commission wanted the obligation to be stronger as being applicable in all situations, but the final text reduced the scope desired. The reasoning of *Google Spain* influenced the text that was adopted, showing the role of the CJEU in the evolvement.

Article 17(1) lists six general principles when the RTBF can be exercised by the data subject and the removal of personal data must be done without an undue delay by the data processor, if one of the following situations applies. [78] In three situations, the basis for erasure is the lack of grounds for the processing: when the personal data are no longer necessary for the purposes they were collected or processed in the first place, [79] the consent for the data processing is withdrawn by the data subject,[80] and the personal data are processed on unlawful grounds [81], the personal data must be removed. If the data subject exercises their right to object under Article 21(1) when there are no overriding legitimate grounds for the processing, the data controller needs to demonstrate the necessity of the data processing with existing compelling legitimate grounds exist [82] or performing a task carried out in public interested or exercising official authority [83]and if the data controller fails to demonstrate, the removal must be done. Also, when the personal data erasure must be done in order to comply with a legal obligation.[84] Removal by request should be done when the objection is made under Article 21(2) in case of direct marketing purposes,[85] or when of information society services were offered directly to a minor who gave a consent for personal data processing without the approval of the holder of parental responsibility.[86] It must be emphasized that the request can

[75] Committee on Civil Liberties, Justice, and Home Affairs of the European Parliament (2012) , *supra nota* 74, p.95
[76] Bygrave, L.A., Docksey, C., Drechsler, Kuner, C., (2020), *supra nota* 42, p.23
[77] *Ibid.*
[78] General Data Protection Regulation 2016/679, *supra nota* 19Art. 17(1)
[79] *Ibid.* Art. 17(1)(a)
[80] *Ibid.* Art. 17(1)(b)
[81] *Ibid.* Art 17(1)(d)
[82] *Ibid.* Art. 6(1)(f)
[83] *Ibid.* Art. 6(1)(e)
[84] *Ibid.* Art 17(1)(d), Recital 65
[85] *Ibid*. Art 17(1)(c)
[86] *Ibid*. Art 17(a)(e), Art. 8(1)

be done, when the data subject is no longer a child, since they have not been aware of the risks which include data processing.[87]

Article 17(2)[88] applies, when one of the situations is fulfilled and the controller in question had made the data public and none of the exemptions in Article 17(3) apply. The second paragraph of the Article defines the controller's obligation which is to take reasonable steps to inform other controllers on the data subject's request to remove links to or copy or replication of their personal data. The steps should be technical, considering existing technological equipment and costs, so that they do not become impossible to implement.

In cases of dereferencing requests made to a search engine operator under Article 17, more grounds may apply in one situation, since usually data subject refers to their right to object and sees that the personal data are no longer necessary for the processing. [89] Therefore, Articles 21 and Article 6 are related to Article 17. Additionally, some grounds are invalid in requesting delisting from a search engine operator, for example, withdrawal of consent, since the data processing by search engine operator is related to the technical aspect of the algorithm, mostly to indexing. [90] The obligation to information under 17(2) should not be applicable to search engine operators, because the obligation was designed to increase the responsibility of original data controllers and limit multiple requests of the same matter by data subjects according to the European Data Protection Board (EPDB). [91] The predecessor of the EPDB, the Article 29 Working Party (WP29) informed after *Google Spain* judgement that the search engine operators should not inform webmasters of the dereferncings, since EU's data protection law does not include legal basis for such communication.[92] For instance, the Swedish DPA has interpreted Google's practice of notifying website operators before dereferencing links to be a violation of Article 17 in accordance

[87] General Data Protection Regulation 2016/679, *supra nota* 19, Recital 65
[88] *Ibid.* 17(2)
[89] The European Data Protection Board (2019) *Guidelines 5/2019 on the criteria of the Right to be Forgotten in the search engines cases under the GDPR (part 1).* The European Data Protection Board. Retrieved from: https://edpb.europa.eu/sites/default/files/consultation/edpb_guidelines_201905_rtbfsearchengines_forpublicconsultation.pdf 16 March 2022
[90] *Ibid.*
[91] *Ibid.*
[92] Article 29 Data Protection Working Party (2014) WP29 Guidelines on the Implementation of the CJEU Judgment on 'Google Spain and Inc v. Agencia Espanola de Proteccion de Datos (AEPD) and Mario Costeja Gonzalez' C-131/12. WP 225. 26 November 2014. Retrieved from: https://ec.europa.eu/newsroom/article29/items/667236/en 5 April 2022

with aforementioned WP29's guidelines and the Gothenburg Court of Appeal has upheld a fine of 4.8 million euros. [93]

1.2.2. Exemptions to Article 17 and relation to Article 85 GDPR

The exemptions to Article 17 are laid down in the third paragraph. Article 17 does not apply, when the processing is necessary for exercising right to freedom of expression and information [94], complying with a legal obligation, or performing a task carried out in the public interest or exercising official authority vested in the controller [95], reasons of interests of public health in accordance with certain provisions of special categories of sensitive data [96], archiving purposes in the public interest, scientific or historical research purposes or historical research or statistical purposes, if the RTBF *"is likely to render impossible or seriously impair the achievement of the objectives of the processing"*[97] or establishing, exercising or defending legal claims.[98]

In respect the thesis, the Article 17(3)(a) is in the focus, which exempts exercising the RTBF, when the personal data is necessary for the freedom of expression and information, thus for public to access the information related to the data subject. As mentioned in *Google Spain* and the GDPR, the right to privacy in Article 7 of CFR and right to protection of personal data in Article 8 are not absolute rights, which must be balanced with right to freedom of information and expression of Article 11 of the CFR. [99]

Google Spain did not directly mention Article 11, but discussed internet users' interest on accessing information. Instead, the legislator made a clear balance with the wording of Article 17(3)(a). This exemption is linked to Article 85, which obliges Member States to reconcile the right to protection of personal data with the right to freedom of expression and information in national law, when it comes to processing data for purposes of journalistic, academic, artistic, or literary. [100] The Member States have an obligation to notify the supervising Commission on derogations or

[93] The Court of Appeal in Gothenburg (2021) *Googles rutin strider mot GDPR.* Retrieved from: https://www.domstol.se/forvaltningsratten-i-stockholm/nyheter/2020/11/googles-rutin-strider-mot-gdpr/ 7 April 2022
[94] General Data Protection Regulation 2016/679, *supra nota* 19, Art. 17(3)(a)
[95] *Ibid*. Art. 17(3)(b)
[96] *Ibid*. Art. 17(3)(c)
[97] *Ibid.* Art.17(3)(d)
[98] *Ibid.* Art.17(3)(e)
[99] *Ibid.* Recital 4
[100] *Ibid.* Art 85(1)

exemptions to any of the chapters of the GPDR as listed in the 85(2).[101] Article 85 is a continuation to what was set up already in Article 9 of the DPD. [102] The requirement of reconciliation between right to privacy and freedom of expression by national law existed before the GDPR, thus variations on reconciliations already existed between Member States. [103] It can be demonstrated that it has not been an intention to unify national laws by the legislator, neither in the DPD or the GDPR. This approach is questionable in the light of aim of achieving more coherent framework for the protection of individual's data protection rights through a regulation in the EU, which was intended to address problems that the DPD's harmonization failed to achieve.[104]

1.3. *Google v CNIL* – Territorial Scope

Google Spain caused debate and uncertainty in which direction the RTBF would go, since there were unsolved questions regarding the territorial applicability of the RTBF. [105] In 2015, right in between Google Spain judgement and enforcement of the GDPR the French DPA, Commission nationale de l'informatique et des libertés (CNIL), required Google France SARL to remove links to third party websites globally from Google Search linked to French national's personal data. It should be highlighted that the existing data protection legislation was the DPD at the time and the GDPR was in drafting stage, when the case was pending. (The order chosen to present the evolution in this research is due to the fact that *Google v CNIL* was delivered in 2019, after the enforcement of the GDPR.) Therefore, the case was decided under both the former data protection framework the DPD and the upcoming GDPR.

The CNIL's complaint was filed after Google had removed links from the French language extension instead of globally, which also declared that Google LLC was the data controller instead of the French subsidiary, because Google France SARL's commercial activities were *"inextricably linked"* to Google LLC which is interpreted as one single data processing under EU law and the territorial application of EU data protection legislation is fulfilled.[106] Google did not agree with

[101] General Data Protection Regulation 2016/679, *supra nota* 19, Art. 85(2), 85(3)
[102] Data Protection Directive 95/46/EC, *supra nota* 16, Art. 9
[103] Bygrave, L.A., Docksey, C., Drechsler, Kuner, C., (2020), *supra nota* 42, p.1205
[104] Klinefelter, A., Wrigley, S. (2021) *supra nota* 49*,* p.702-703
[105] Bygrave, L.A., Docksey, C., Drechsler, Kuner, C., L., Tosoni, L. (Eds) (2021) *The EU General Data Protection Regulation: A Commentary/Update of Selected Articles.* New York, USA: Oxford University Press. p.94
[106] *Google v CNIL, supra nota* 20, para 35

global dereferencing, stating that it would infringe global freedom of expression, information and press and go against international comity and respect of non-intenference of sovereign states' legal systems and suggested dereferencing the links from the EU's domains[107] by using geo-blocking technology which limits internet users' access to the delisted content from Internet Protocol (IP) addresses within the EU.[108] CNIL saw geo-blocking insufficient, since the French citizens could still access delisted content with a foreign Wi-Fi connection, when travelling abroad, virtual private network to artifically locate their IP address outside France or if livign on the border territory of France, connect themselves to a telephone network server that's located outside France[109] and ordered Google to remove the links globally.[110] CNIL argued that Google's measure would not meet the objective on effective enforcement of the RTBF in full, if the protection was depended on the geographical origin of the internet user and therefore, imposed a fine of 100 000 euros for non-compliance of EU's data protection legislation.[111] In this argumentation, CNIL followed WP29's guidelines which suggested that an effective RTBF can be only reached with a global application.[112]

Since *Google Spain* judgement did not clarify the territorial applicability of the RTBF, Google consested the view of obligation to global dereferencing and appealed to *Conseil d'État*, the supreme administrative court of France, which referred preliminary ruling to the CJEU on interpretation of territoriality of Article 12(b) and Article 14 of the DPD and Article 17 of the GDPR: should the search engine operator carry out a global dereferencing, EU-wide dereferencing, or local dereferencing from the language version corresponing the Member State where the request was made? [113] *Conseil d'État* added remark on the geo-blocking strategy used by Google and asked whether such technological measure could be required on top of the dereferencing if the CJEU interpreted the obligation to dereferencing to concern Member State's territory or the EU in whole.[114]

[107] *Google v CNIL, supra nota* 20,.para 38
[108] Quinn, J. (2021) *supra nota* 17. p.296
[109] Padova, Y. (2019) Is the right to be forgotten a universal, regional, or 'glocal' right? *International Data Privacy Law*, 9 (1). 15-29. p. 28
[110] *Ibid.* para 38
[111] Hamulak, O., Kocharyan, H., Vardanyan, L. (2021) The Global Reach of the Right to be Forgotten through the Lenses of the Court of Justice of the European Union. *Czech Yearbook of Public & Private International Law*, 12. 196-211. p.202
[112] Article 29 Data Protection Working Party (2014) *supra nota* 92
[113] Globocnik, J. (2020) The Right To Be Forgotten is Taking Shape: CJEU Judgments in GC and Others (C-136/17) and Google v CNIL (C-507/17). *GRUR International*, 69(4). 380-388. p. 202, see also *Google v CNIL, supra nota* 20, para 39(1), 39(2)
[114] *Google v CNIL, supra nota* 20, para 39(3)

The CJEU agreed with the French DPA's views that the commercial activity of Google LLC's French subsidiary consitutes data processing within the EU in the meaning of the DPD and the GDPR, which triggers the applicability of EU's data protection rules to Google LLC, as established in *Google Spain*. [115] The CJEU approached the reasoning of the dereferencing's territoriality with admitting that global dereferencing would be the most effective way to enforce the right, since without global dereferencing, the bordlerless nature of internet gives access to content for users located outside the EU that is related to EU data subjects which could affect the data subject's rights in a globalized world, even though data subjects central interests were within the EU. [116]

Neverthless, the CJEU interpreted the data protection legislation by respecting the will of the legislator, finding "… *it (was) no way apparent from the wording of the (articles)… "* that the legislator intended to struck the balance between freedom of expression and information and right to personal data protection outside the EU altough having the possibility to regulate the matter so in Article 17(3)(a).[117] They imposed a more restrictive interpretation than in *Google Spain,* recognizing the fact that there are many third States that may not have legal basis for RTBF, which would make the enforcement of the right hard.[118] Another viewpoint, critized as "political",[119] was that there might be a different approach to the RTBF world wide, which can be intrerpreted as a reference to authoritarian or totalitarian regimes where the RTBF could be used in purposes other than the protection of the individual and for engaging intentional censorship and limiting the access to information. [120] Therefore, the CJEU concluded that under EU law there's no obligation for search engine operators to perform global dereferencing in all its search engine extensions, when data subject exercises their RTBF by requesting the removal of personal data from the search engine in question. [121]

When global dereferencing was excluded from the territorial application, the question was in between EU-wide and local dereferencing. The upcoming GDPR was enacted in a form of regulation which is directly applicable in all Member States, thus the dereferencing should be

[115] *Google v CNIL, supra nota* 20. para 52
[116] *Ibid*. para 55- 58
[117] *Ibid.* para 60-62
[118] Bygrave, L.A., Docksey, C., Drechsler, Kuner, C., (2020), *supra nota* 42, p.94
[119] Klinefelter, A., Wrigley, S. (2021) *supra nota* 49, p. 708
[120] Celeste E., Fabbrini, F. (2020) *supra nota* 11, p.65
[121] *Google v CNIL, supra nota* 20, para 64

carried out within the EU for the enhancement of consistency of the data protection legal framework and high level of protection of fundamental rights throughout the EU. [122] Therefore, as the *ratio legis* suggests, the dereferencing should not be performed only in the Member State where the request was done, but EU-wide. [123] When the competent authority determines EU-wide dereferencing, it must cooperate with other supervisory authorities in the EU under 56 and Article 61 and consult them in form of exchanging relevant information in order to consider the public interests of other Member States and their citizens' right to freedom of information and have a consistent application of the GDPR throughout the EU. [124]

Additionally, the Court required that the search engine operator must *"effectively prevent"* or *"seriously discourage"* internet users in the EU to gain access to dereferenced links to third party websites, which is interpreted to mean that geo-blocking would meet this requirement: EU residents who try to access content from non-EU domains are re-directed to EU-domain based on the internet user's IP address where there's no access to the delinked content [125]

The most interesting part of the ruling is at the end. In paragraph 72, the CJEU clarifies that global dereferencing is not in fact prohibited under Member State's law. [126] It's stated that "*when appropriate"*, national competent authorities can request global dereferencing as a result of weighting up right to privacy and right to protection of personal data with right to freedom of expression and information under the national fundamental rights. [127] The CJEU recognizes that the balancing test established in *Google Spain* may result in different outcomes in different Member States, respecting the constitutional traditions of Member States and referencing to reconciliations of Article 9 of the DPD Article 85 of the GDPR. [128] The analogy for establishing a margin of appreciation derives from the CJEU's previous case law, *Åkerberg Fransson*[129] and *Melloni*[130] , that under Article 51 and 53 of CFR Member States' *"national authorities and courts remain free to apply national standards of protection of fundamental rights"* in situations where they are implementing EU law, as long as the level of protection of the CFR and the principle of

[122] *Google v CNIL, supra nota* 20, para 66
[123] *Ibid.*
[124] *Ibid*. para 63, 69
[125] Samonte, M. (2020), *supra nota* 26, p.843
[126] *Google v CNIL, supra nota* 20, para 72
[127] *Ibid.*
[128] *Ibid.* para 67
[129] Court decision, 23.2.2013 *Åklagaren v Åkerberg Fransson*, C-617/10, EU:C:2013:105
[130] Court decision, 26.3.2013, *Stefani Melloni v Ministerio Fiscal*, C-399/11, EU:C:2013:107

primacy of EU law, unity and effectiveness are met. [131] In the case of data protection legislation, Article 9 of the DPD and Article 85 the GDPR are implementations of EU law, leaving the reconciliatiation of protection of personal data with right to freedom of expression and information to national authorities, as described in the Chapter 1.2.2.[132]

The CJEU did not provide criteria or guidance for national authorities, what the "appropriate" cases for global applicability could be [133] nor has the EDPB. The absence of guidance in the matter has created an uncertaint environment, since it's unsure what kind of practice to expect from national authorities in the future after such open-ended reasoning. [134] For instance, CNIL informed in their press release after *Google v CNIL*, that it has interpreted the judgement so, that it has an authority to require search engine operators to conduct global dereferencing in cases, whenever it's possible. [135] The judgement raised concerns on the fragmentation of the level of protection of the data subjects' rights and coherent application of the GDPR within the EU, if national authorities start to enforce RTBF differently. [136] Such trend could lead to forum shopping for data subjects wanting to exersice their RBTF in a Member State that's more favorable towards data subject's rights by enforcing global delreferencing, which would be contrary to the objective of the GDPR's objectives. [137]

[131] *Melloni, supra nota* 130, para 60
[132] Greib, M., Iacovides, M. (2020) Fundamental Rights Protection in Germany: The *Right to Be Forgotten* Cases and the Relationship between EU and German law. *Europarättslig Tidskrift*, 3, 441-450. p.448
[133] Hamulak, O., Kocharyan, H., Vardanyan, L. (2021) *supra nota* 111, p. 206
[134] Samonte, M. (2020), *supra nota* 26, p. 848
[135]CNIL (2019) "*Right to be forgotten: the CJEU ruled on the issue"*. Retrieved from: https://www.cnil.fr/en/right-be-forgotten-cjeu-ruled-issue May 1 2022
[136] Samonte, M. (2020), *supra nota* 26, p.849
[137] Gstrein, O. (2019, September 25) The Judgment That Will Be Forgotten: How the ECJ Missed an Opportunity in Google vs CNIL (C-507/17*),* [Blog post], Retrieved from: https://verfassungsblog.de/the-judgment-that-will-be-forgotten March 10 2022

2. NATIONAL DECISIONS ON RIGHT TO BE FORGOTTEN IN GOOGLE SEARCH

As *Google v CNIL* appointed, the global dereferencing on search engine could be possible under Member State's national law and transferred the jurisdiction to Member States. The chapter 1.2.2. introduced the Article 85 of the GDPR, which laid down exemptions or derogations to RTBF, when processing personal data in journalistic, academic, artistic, or literary expression purpose. *Google v CNIL* recognized these reconciliations made by national law, which is linked to the Article 17(3)(a), thus Article 11 of CFR. The following national jurisdictional authorities have case law in the RTBF cases against Google. At the end, the author makes notices and comparative analysis from the decisions regarding the weighing of fundamental rights in different Member States. The chapter analyses Member States cases to the extent in which they concern Article 17 of the GDPR and its fundamental right elements and seeks to find an anwser to the research question whether global dereferencing has been practiced on national level after *Google v CNIL*.

2.1. Norway – PVN 2020-14 (19/00110)

Norway enacted the GDPR as part of their legal system, when the EEA countries agreed to adopt the GDPR in 2018. [138] The case was delivered by the Norwegian Privacy Appeals Board, Personvernnemnda, ("PVN") in 2020. [139] The plaintiff requested for a removal of a news article link dating back to 2012 from Google Search engine, which contained information regarding her resignation from a former position as a head of an educational institution. [140] Google sought assistance from the Norwegian DPA, Datatilsynet, on the matter. When a sata subject exercises their the RBTF, the authority must perform the balancing test to the interests related to the desired dereferenced links. Datailsynet balanced between consesting rights of the public and the data subject. [141] Datailsynet rejected the request for the following reasons: the personal data appears in

[138] Decision of the EEA Joint Committee, 154/2018
[139] Personvernnemnda, 2020-14 (19/00110), 10.11.2020
[140] *Ibid.*
[141] *Ibid.*

journalistic purposes and is connected to the plaintiff's profession as a manager, which has public value and is in the public's interest to know about the history and structure of a company's management. [142] The plaintiff submitted an appeal to the PVN in 2019.

PVN confirmed that the data controller is Google in the case, supported by *Google Spain* and *Google v CNIL's* interpretation of search engine operator's status as data controllers. [143] They pointed out that Datailsynet using the term "deindexation" is not proper, and in the PVN's opinion, "deletion of search results" corresponds to reality, since the links are not deindexed from the whole search engine.[144] The PVN agreed that journalistic purposes of the link and having access to educational insitutions' information speaks in favor of maintaining it, but the age of the article and its limited content do not. [145] In their opinion, there was not much about information of the reasoning regarding the resignation of the plaintiff. [146]

The greatest emphasis was given to the negative impact of the search results to the plaintiff, who argues that her personal life and recruiment processes have suffered due to the article, when it's commonly employers search information about the plaintiff based on her name. [147] It's been stated in the CJEU's case law that if sufficient grounds for the negative impact of search results exist, they should be considred in RTBF cases.[148] PVN saw objectively that the search results have likely to cause an unreasonable burden to the plaintiff, but rather based its view on the applicants personal life. [149] Under these circumstances, PVN reversed the Datailsynet's decision by seeing that there are no justifiable grounds for dismissing data subject's rights and ruled Google to remove the links related to plaintiff's personal data. [150] The judgement did not contain any information of the territoriality of the dereferencing.

[142] Personvernnemnda, s*upra nota* 139
[143] *Ibid.*
[144] *Ibid.*
[145] *Ibid.*
[146] *Ibid.*
[147] *Ibid.*
[148] *Ibid.*
[149] *Ibid.*
[150] *Ibid.*

2.1. Belgium - APD/GBA 37/2020

The decision of the APD/GBA 37/2020[151] was given on 14th of July 2020. The handler of the case is the Litigation Chamber of the Belgian DPA, Autorité de protection des données/Gegevensbeschermingsautoriteit („APD/GBA"). In 2019, a Belgian data subject exercised his RTBF against Google Belgium SA. The plaintiff requested global removal of several links from Google Search, which lead to news articles that were damaging to him due to his role in public life.[152] On a special notice, the plaintiff claimed that two of these articles linked to his personal data, which exposed his political opinions and should be identified as special category of data and be prohibited under Article 9(1). [153] Other articles related to a harassment complaint from 2010 that was outdated information due to the fact that the proceedings were dismissed. [154] Google Belgium SA had refused the plaintiff's request, which followed the plaintiff's appealment to the APD/GBA.

The APD/GBA started from the examination whether they had jurisdiction on the case, which is interlinked to the question whether Google Belgium SA or Google LLC is the respondent, thus the data controller, in the case. [155] The APD/GBA applied the argumentation of CJEU from *Google Spain* and *Google v CNIL* to state that the subsidiary's activity in Belgium, is *"inextricably linked"* to Google LLC.[156] They recognised that the general territorial scope of the GDPR under Article 3.1, *"the processing of personal data in the context of the activities of an establishment of a data controller in the Union"*[157], constitutes the same conditions for EU data processing for U.S. based Google LLC as Article 4(1)(a) of the DPD in *Google Spain*, which were confirmed by *Google v CNIL* reasoning in the light of the the GDPR.[158] The APD/GBA dismissed Google Belgium SA's claim that Google Ireland Ltd was responsible of the data processing activities in the case because of being Google's main establishment within the EU. They continued that Google LLC is the operator of Google search engine in which activities Google Ireland Ltd is not involved and the delisting request was appointed for Google Belgium SA, who is the handler of the request containing personal data, thus the data processor in the matter. [159] With this broad interpretation of

[151]Autorité de protection des données/Gegevensbeschermingsautoriteit, *APD/GBA 37/2020*, 14.7.2020
[152] *Ibid.* para 1-2.
[153] *Ibid.* Art. 9(1)
[154]*Ibid*. para 3-4.
[155] *Ibid.* para 14-15
[156] *Ibid.* para 44
[157] *Ibid*. Art. 3(1)(a)
[158]*Ibid*. para 38, 43
[159] *Ibid*. para 24-31

controller established by the CJEU, the Belgian authorities concluded to have jurisdiction and Google Belgium SA to be the respondent. [160]

When exercising the RBTF, the court must perform the balancing test to the interests related to the desired dereferenced links. Since the plaintiff's public role is an important factor in the balancing, the APD/GBA noted in the case that the plaintiff has hold many high level public offices in the past twenty years, including in both public and private sector, and continues to play public role in Belgium, which have made him a subject to media exposure. [161] Affiliation with political party does not constitute application of Article 9, since it does not automatically disclose the plaintiff's political stand, when it's connected to the plaintiff's career. [162] Due to these facts, the APD/GBA viewed that the delisting request related to the links "exposing political opinions" should be assessed according to Article 17 and balanced in accordance with Article 17(3)(a), finding that the news articles are necessary for the public to exercise their right to freedom of expression and information. The reasoning behind this was that the plaintiff's role in the Belgian public life justified the information to be available, since the political affiliations are *"related to transparency in the appointment and exercise of public office"* and seen important to democratic society. [163]

The second set of links were about the allegation of harassment, which the plaintiff claimed to consist outdated information. The APD/GBA pointed out three arguments in favor of the plaintiff: the information in the articles was irrelevant and outdated, because the proceedings never took place, the events related to the allegation were over decade old, thus "not recent", and the links would have potential negative impact on plaintiff both professionally and personally. [164] For these reasons, the right to privacy and protection of personal data were given more weight in this assessment and Google had breached the GDPR, since no legitimate compelling grounds for the plaintiff's rights were justified. [165]

The plaintiff had requested for a global dereferencing, which the APD/GBA began assessing with plaintiff's centre of vital interest, which were determined on the basis of his career and habitual residence that were in Belgium. [166] The APD/GBA continues that there's no legal basis for global

[160] Autorité de protection des données/Gegevensbeschermingsautoriteit, *supra nota* 151, para 51-55
[161] *Ibid.* para 107
[162] *Ibid.* para 114-122
[163] *Ibid.* para 124-145
[164] *Ibid.* para 150-155
[165] *Ibid*. para 155
[166] *Ibid.* para 83-84

removal according to the CJEU's judgement *Google v CNIL* and Belgium's national data protection laws. [167] Therefore, global dereferencing can not be required, altough the APD/GBA thrrew attention to Article 85 in reasoning in *Google v CNIL*. The APD/GBA had pointed out that the centre of vital interests where in Belgium, it considered an EU-wide dereferening and highlighted *Google v CNIL*'s argumentation on public's interest to access information from other Member States. [168] Internet users' access to the articles via Google Search could impact his working life, if his business contacts would find negative information about the plaintiff by using Google Search from other European extensions. [169] Accordingly, the most effective way to protect the plaintiff's data protection rights were by conducting dereferencing in the EEA. [170] To conclude, the APD/GBA ordered a dereferencing in all language extensions, when they are accessing Google Search in the territory of the EEA, including the EU. [171]

2.2. The Netherlands - Hoge Raad 20/02950

The case Hoge Raad 20/02950 [172] was delivered by the Dutch Supreme Court in February 2022, which marked as the first RTBF case regarding doctor's medical negligence. [173] The dispute arose when a Dutch data subject, a plastic surgeon, exercised her RTBF and requested removal of Google Search results from all languge extensions, a global dereferencing, containing her personal data in 2017. The links concerned two websites. The first led to a website that operates a "Black list of doctors" who have had disciplinary producers against them. The plaintiff's name, photo, her registered Dutch healthcare profession number, the disciplinary decision's number and text and summary of the procedure were mentioned in the article which had been cited by two other websites. The other one contained short description of a news article published on the matter. [174] Due to the disciplinary decision, the plaintiff was suspended from the register for a probitationary period for the lack of after care of the patient. [175]

[167] Autorité de protection des données/Gegevensbeschermingsautoriteit, *supra nota* 151, para 85
[168] *Ibid.* para 86
[169] *Ibid.* para 91
[170] *Ibid.*
[171] *Ibid.* para 166
[172] Hoge Raad, 20/02950, 25.2.2022
[173] Boffey, D. (2019) *Dutch surgeon wins landmark "right to be forgotten" case.* Retrieved from: https://www.theguardian.com/technology/2019/jan/21/dutch-surgeon-wins-landmark-right-to-be-forgotten-case-google May 2 2022
[174] Rechbank Amsterdam, C/13/636885 / HA RK 17-301, 18.12.2018
[175] *Ibid.* 2.6

The plaintiff argued that the decision should be interpreted as a "criminal conviction", whereby the processing of personal data should be only in the hands of official authorities under Article 10 of the GDPR and Dutch national law, hence the data processing by Google should be regarded as unlawful. [176] Google's refusal of removing the links was based on respecting the public's interests, such as future clients, to access the information related to the surgeon's professional life. They overrided the data subject's right to protection of personal data and privacy and stating that the links do not contain criminal personal data. [177] The plaintiff appealed the decision of the Dutch DPA, Autoriteit Persoonsgegevens, to the Amsterdam District Court, Rechbank Amsterdam ("RBAMS").

The case was handled in the first court of instance, the RBAMS, in 2018. The RBAMS did not make notions on the jurisdiction nor the respondent on the case. They agreed with Google on the argument that the personal data in the links are not categorized as "criminal" and the request removal should be assessed according to Article 17 of the GDPR instead of Article 10. [178] Article 17 includes the balancing test of the public's right to freedom of expression and information and the search engine operaotr's economic interests against the data subject's right to privacy and protection of personal data, taking into account the nature of the information and its sensitivity to the data subject and the public's interest to gain the information of the data subject in question, [179] as Chapter 1.1. explained.

As a general rule, the data subject's rights prevail, but the role of the data subject in public life must be considered in addition to the aforementioned. [180] In the case, the plaintiff can be "*regarded as a public figure to a certain extent"*. Nonethless, the RBAMS argued that the discplinary decision should not be a subject to a public debate, as representing only a single event, that had been settled already. The potential patients should not be at great risk, when being treated in the plaintiff's clinic, since there had been only a temporary suspension at place.[181] Additionally, there's a public register of the disciplinary decisions setted up according to the law, which all potential patients can access, when consulting the registry administrations, thus gaining information about the

[176] Rechbank Amsterdam, *supra nota* 174, *para* 3.2
[177] *Ibid.* Para 2.10
[178] *Ibid.* para 4.3, 4.5
[179] *Ibid.* 4.8
[180] *Ibid.*
[181] *Ibid.* para 4.14.

plaintiff. [182] The RBAMS concluded that the personal data in these links are irrelevant and excessive, since the unofficial *"Black list"* and the content of the web page have a negative impact to plaintiff's profession, when being the first thing that is displayed after searching the plaintiff's name on Google Search. By following the reasoning of *Google Spain*, the plaintiff's rights overrule the public's interests.[183] Regarding the scope of dereferencing, the RBAMS ordered the removal of the links from language extensions of EEA countries under Google's policy, altough the plaintiff had requested for a global dereferencing, but neither did the Court or plaintiff object Google's stand. [184]

Google appealed the judgement to Amsterdam Court of Appeal, Gerechstof Amsterdam ("GHAMS"), since the processing was necessary for the legitimate interests by the controller or a third party under Article 6(1)(f) of the GDPR[185] and the plaintiff has not invoked a sufficient RTBF, since the conditions of Article 17(1)(a) and 17(1)(d) are not met. Google argued that the personal data is accurate and correct and still relevant for the data processing purposes it was collected, which is to make it available for internet users and the processing is lawful due to that Article 10 is not applicable in the case.[186] Google filed a question regarding whether the search results were incorrect or was the purpose of the processing irrelevant or excessive as the RBAMS argued?

The GHAMS also saw that Article 10 was not the correct legal basis here and agrees with the RBAMS that Article 17 of the GDPR was applicable. As a consequence of applying Article 17, the data subject's right object data processing defined in Article 21(1) of the GDPR has to be evaluated in connection to Article 6(1)(f), since the compelling legitimate grounds opposing data subject's rights must be justified with balancing the interests of the stakeholders. [187] The GHAMS mentions that Article 17(3)(a) lays down an exemption to data subject's rights stating that RTBF is not absolute and needs to be weighted against fundamental rights of the public according to the *GC v Others*[188] and *Google v CNIL* judgements, [189] but evaluates the case under 21(1).

[182] Rechbank Amsterdam *supra nota* 174, para 4.16.
[183] *Ibid.* para 4.16.
[184] *Ibid.* 4.18
[185] General Data Protection Regulation 2016/679, *supra nota* 19, Art. 6(1)(f)
[186] Gerechstof Amsterdam, 200.248.187/01, 6.7.2020. para 2.11
[187] *Ibid.* 2.12
[188] Court decision, 24.9.2019 *GC v Others*, C-136/17, EU:C:2019:773
[189]Gerechstof Amsterdam, *supra nota* 186, para 2.8

The information related to the plaintiff was recent on the *"Black list"* due to the five-year visibility period in the official disciplinary register, relevant for the public to obtain, factual according to the authoritativs and non-defamatory. [190] The RBAMS's argument regarding consulting the registrars was found poor in practice, since the decisions are anonymized in the register and therefore not accessible compared to the search engine links. [191] The judges agree that the "Black list" has a negative nuance to it, but a reasonable internet user understands from the websites appearance for it not to be an official source. [192] Additionally, the GHAMS pointed out to take legal action against the website operator, if the plaintiff desires the removal of the content on the website, which the search engine operator is not responsible of. [193]

Most importantly, the information does not concern the plaintiff's private life and the plaintiff has made herself in fact a subject to public debate with actively seeking publicity by selling controversial treatments and nutritional supplements. [194] In their opinion, the information of the plaintiff should be available, so that patients, when considering the plaintiff's services, would be aware of the facts related to her treatments and disciplinary decision and be able to make a prior consideration on the methods used by her. [195] Considering the aforementioned reasoning, the GHAMS resulted in different conclusion than the first instance and ruled in favor of Google and the public by viewing that the right to freedom of expression and information take precedence in the case instead of the plaintiff's right to privacy and right to protection of personal data under Article 17 and 21 of the GDPR. [196] The plaintiff's primary basis for the request of removal was Article 10, but the personal data processed in disciplinary decision didn not fall under the definition of criminal conviction or offence. [197]

The plaintiff obtained a right to appeal to the Supreme Court, Hoge Raad. [198] The main argument was that the GHAMS had failed to consider whether the links were *"strictly necessary"* for the right to freedom of expression and information in the light of Article 10 of the GDPR, which

[190] Gerechstof Amsterdam, *supra nota* 186, para 2.13
[191] *Ibid*. 2.14
[192] *Ibid.* 2.15
[193] *Ibid.*
[194] *Ibid.* para 2.16
[195] *Ibid.*
[196] *Ibid.* para 2.17
[197] *Ibid*. 2.18
[198] Hoge Raad, *supra nota* 172

should be conisdered when limitations and derogations are placed to fundamental rights according to Article 52(1) of CFR. [199]

The Supreme Court refers to CJEU's interpretation on Article 10 [200] and viewed that the GHAMS was in accordance of the reconciliation of Articles 7 and 8 CFR and Article 11 of CFR in the light of current standards in EU law.[201] The GHAMS's interpretation on the importance and necessity of the information to the public was correct, when weighting the proportionality to the aim pursued. Also, processing of special categories of data respecting requires respecting an providing for suitable and specific measures for the data subject's rights to substantial public interest, when taking into account the public status of the plaintiff. [202] The Supreme Court saw these conditions to be fulfilled. However, the Supreme Court held the GHAMS's judgement by agreeing that there were no grounds for the request to be assessed under Article 10. [203] If that were the case, the GHAMS's reasoning would have resulted in the same outcome, thus the appealment failed and dereferencing was not conducted on the links concerning the plaintiff. [204] Hence, territoriality did not have to be examined.

2.4. Discussion

The reasonings of the courts show how the balancing of right to privacy and protection of personal data to right to freedom of information and expression is performed, when a data subject exersices their RTBF on the search engine operator under Article 17 of the GDPR. The balancing test created by *Google Spain* has served as a guideline to national authorities when reconciliating these fundamental rights.

In particular, the role of the data subject in public life has been a decisive factor when assessing the necessity of the data processing for the search engine operator. The personal data in question were related to the plaintiffs' professions and not their personal life, thus the information was held in the public display in the APD/BPA and Hoge Raad cases. Additionally, the plaintiffs' arguments on sensitive data related to their professions were not upheld. In contrary, the links that had

[199] Hoge Raad, *supra nota* 172, para 3.1.1
[200] Court decision, 22.6.2021, *Saeima*, C-439/19, EU:C:2021:504
[201] Hoge Raad, *supra nota* 172, para 3.1.2
[202] *GC v Others*, *supra nota* 153, para 68
[203] Hoge Raad, *supra nota* 172, para 3.1.2.
[204] *Ibid.*

potential negative impact to plaintiffs' personal life, were required to be removed from Google Search.

Another remark found from the national decisions is considering the age of the dereferenced content and relevancy of personal data for the data processor in Article 17(1)(a). PVN noted that public's interests can weaken over time. Both the APD/BPA and PVN ruled for dereferencing older content, news articles near or over 10 years of age, since the relevancy to data processing had diminished and the data was excessive due to plaintiff's current position at the time of dereferencing. Relevancy can also be contextual: the APD/BPA ruled dereferencing on links that lead to news articles that contained information of allegations of events that were dismissed by a public authority.

The territorial scope of dereferencing was declared by the ADP/BPA and the RBAMS. In Hoge Raad case, it was stated that they followed Google's policy. Hence, it seems that Google has developed the standards that authorities follow, which is a representation of Google's quasi-regulatory power.

CONCLUSION

The research question was whether balancing the data subject's right to privacy and right to protection of personal data and public's right to freedom of information and expression can result to global dereferencing from Google Search in national cases. The aim of the thesis intended to clarify the uncertainty around global dereferencing in practice and potential fragmentation of level of protection of data subject's rights after *Google v CNIL*. Due to the novelty of *Google v CNIL* and the RTBF and lack of guidance from the EU level, the hypothesis was that global dereferencing has not been practiced. Given the global reach of the Internet, Google's impact on fundamental rights and the CJEU and WP29 recognition, such practice would be the most effective way to enforce data subject rights.

To anwser the research question with the empirical findings on the national cases selected, there has not been global dereferencing conducted in national case law after *Google v CNIL* decision. Belgian authority was the only one to consider global dereferencing, but did not find a legal basis from EU or national law. Moreover, the concerns raised on the fragmentation of enforcement of data subjects rights does not seem to be relevant, when the CJEU's well established balancing test was followed by all authorities and no inconsestencies were discovered among these authorities. However, it's noted that Belgian APD/GBA assesses the case under RTBF of Article 17, PVN under national law, and the GHAMS under right to object of Article 21, thus all having different legal basis for the balancing test. This also demonstrates the obscurities EU's data protecion legislation faces, when national law, DPD and GDPR have created a maze of legal framework. Altough the reasoning of the national courts was merely based on CJEU's standards, *Google v*

CNIL notions in paragraph 72 were considered only by the ADP/BPA. According to the cases, EEA dereferencing appears to be a standard among the national authorities. Therefore, the hypothesis has been proved to be true, and the impact of *Google v CNIL* is not observable. However, the case is novel and exclusion of global dereferencing from EU law which the RTBF is based on places a threshold for conducting such obligation under national law. The author does not expect global dereferencing to be a reality before an exlicipit legal basis.

The CJEU did not prohibit the removal of dereferencing worldwide, but neither it gave any guidance on conducting it. The APD/BPA case demonstrated that dereferencing option from *Google v CNIL* has been acknowledged on national level, but there is no current legal tools in place to implement such obligation. If there is will to global dereferecing to be carried out in practice by national authorities, guidance should be provided by the EDPB.

Also, the exclusion of global deferencing by the CJEU demonstrated the need for global standards for data protection law and especially data subject's rights. The CJEU nor AG Sprunaz[205] refrained from interpretating the general territorial scope of the GDPR in Article 3, which could have led to global removal from the search engine. Such global removal has been recognized to be necessary in the light of the global reach of electronic commerce and is applicable under EU law to defamatory content generated by users in Facebook.[206] The author agrees that effective data subject's rights do not exist without global enforcement, when the internet has a global impact and the largest players in the digital economy industry are established outside the EU. To a greater extent, third states have begun to enact their own data protection laws and most of these G20 countries would have a legal basis for the RTBF. [207] Moreover, Turkey codified the RTBF as part of their legislation just recently. [208] An initiative for framework of data protection rights standard with other international organisations and privacy authorities could be lead by EDPB, which woul enchance data subject's rights around the world, clarify legal expectations for commerical actors in an online sphere and reduce unilateral application of data protection legislation.

[205] Opinion of Advocate General, 10.1.2019, C-507/17, EU:C:2019:15
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[207] Erdos, D., Gartska, K. (2019) The "Right to be Forgotten" Online within G20 Statutory Data Protection Frameworks. *University of Cambridge Faculty of Law Research Paper,* 31. 1-26. p.10
[208] CMS. (2022) *Turkey guarantees right to be forgotten in Data Protection Authority guidelines*. Retrieved from: https://www.cms-lawnow.com/ealerts/2022/02/turkey-guarantees-right-to-be-forgotten-in-data-protection-authority-guidelines 7 April 2022

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