[DE] Supreme Court issues Google “right to be forgotten” rulings

IRIS 2020-8:1/6

Christina Etteldorf
Institute of European Media Law

On 27 July 2020, the German *Bundesgerichtshof* (Federal Supreme Court – BGH) issued two decisions on the “right to be forgotten”, which gives people the right to have their personal information deleted by data processors such as search engine operators after a certain period of time. However, the right does not apply without restriction, but depends on a series of factors that need to be weighed up. This is demonstrated by both BGH decisions, in which one claim was rejected while the other was submitted to the Court of Justice of the European Union (CJEU).

The first procedure (no. VI ZR 405/18) concerned the managing director of a charity’s regional association. In 2011, the local daily press had reported that the organisation was around EUR 1 million in debt and that its managing director, whose name was specifically mentioned, had recently been signed off sick. These press articles can still be found by typing the former managing director’s name into Google’s Internet search engine. His request that the press reports should no longer be associated with his name in the search results had been rejected, initially by Google and subsequently by two courts. The BGH has now also rejected his claim, which was based on Article 17(1) of the General Data Protection Regulation (GDPR). It ruled that the claim, which required a comprehensive weighing up of fundamental rights, that is, the basic right to protection of personal data and informational self-determination on the one hand, and the public’s right to information and the interests of information providers on the other, was unfounded. In particular, on the provider side, it was necessary to take into account not only the largely economic interests of Google, but also the freedom of expression of the relevant content providers (in this case, the regional daily press). This applied, according to the BGH, even though the claim had not been made directly against the content providers themselves. Therefore, although when purely economic interests were weighed against personality rights, the latter usually took precedence, the fundamental rights relevant to this case should initially be considered equally important. However, in this particular case, the court decided that the interests of the public and the press took priority. In this context, it is interesting to note that the BGH did not expressly adhere to its pre-GDPR case law, but ruled that the requirement for an equally balanced weighing up process meant that search engine operators did not need to act if they became aware that a person’s rights had been breached in a clear and

obvious way.

Meanwhile, the second case (no. VI ZR 476/18) concerned the deletion of an article published on a US company's website from Google's search results. A complaint had been lodged by a married couple who held senior positions in the financial services sector and who had been named and pictured in several critical reports on investment models published on the aforementioned website. The plaintiffs claimed, *inter alia*, that the website had offered to delete the reports in return for a protection payment. Google refused to remove the articles from its search results, largely on the grounds that it was impossible to prove whether they were truthful or not. After the couple's initial complaint and subsequent appeal were both dismissed, the BGH has now referred the case to the CJEU for clarification. In a preliminary ruling, the CJEU will explain whether it is compatible with the right to privacy and protection of personal data, when carrying out the weighing up process required under Article 17(3)(a) GDPR, if the content to be deleted contains factual claims whose accuracy is disputed by the person concerned and which are crucial to the claim, to consider it a decisive factor whether the person concerned could reasonably – for example, through a temporary injunction – obtain legal protection against the content provider and thereby have the question of truthfulness at least provisionally clarified. Secondly, the BGH has asked whether, if a request is made to delete thumbnail photos that appear when entering a name into a search engine, the original context of the publication by the third-party content provider should be taken into account if a link is provided to the third-party website when the thumbnail is displayed by the search engine, but the website is not actually named and the resulting context is not displayed by the search engine.

Pressemitteilung des BGH Nr. 095/2020

https://www.bundesgerichtshof.de/SharedDocs/Pressemitteilungen/DE/2020/2020095.html?nn=10690868

Federal Supreme Court press release no. 095/2020