Short Symposium on the Right to Be Forgotten

Privacy in Europe After Regulation (EU) No 2016/679: What Will Remain of the Right to Be Forgotten?

Francesco Di Ciommo*

Abstract

Regulation (EU) no 2016/679 (hereinafter 'GDPR'), which will become applicable throughout the EU from next May and will replace Directive 95/46/EC, contains the first legislative embodiment of the right to be forgotten. In other words, the personal right that, thanks also to the well known *Google Spain* case, has captured the attention of operators and academics alike. However, from a close examination of the new legislation it is arguable that the right to be forgotten could well end up being somewhat diminished once the GDPR takes effect. Indeed, many issues concerning the right in question have not been addressed, despite the fact that both case law and scholars in various Member States have much contributed in this debate recently. This work seeks to analyse the impact that the new legislation will have on the right to be forgotten, in particular having regard to how that right has been conceived in the Italian legal system in light of the Personal Data Protection Code and the most significant case law on the matter. The goal of the research is to demonstrate that even after the entry into force of the GDPR a crucial role in the actual definition of the concept of the right to be forgotten and the mechanics of protecting it will necessarily have to be played by the courts.

I. The GDPR Between 'Right to Erasure' and 'Right to Be Forgotten'

Effective 25 May 2018 the GDPR will replace Directive 95/46/EC, ie the cornerstone of the current European legislation on data protection.[1] The GDPR will make numerous and substantial changes to legislation governing the processing of personal data and, more in general, personality rights. Among the most significant developments, the introduction of an express reference to the

* Full Professor of Private Law, LUISS University, Rome.

[1] Regulation (EU) 2016/679 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data was issued on 27 April 2016 by the European Parliament and the Council and published in issue no 119 of the Official Journal of the European Union of 4 May 2016. On the topic, in similar terms to those set out in this work, see F. Di Ciommo, 'Il diritto all'oblio (oblito) nel regolamento Ue 2016/679 sul trattamento dei dati personali' *Foro italiano*, V, 315 (2017); and Id, 'Il diritto all'oblio nel regolamento UE 2016/679. Ovvero, di un 'tratto di penna del legislatore' che non manda al macero alcunché', being published in *Corriere giuridico*; but see also A. Thiene, 'Segretezza e riappropriazione di informazioni di carattere personale: riserbo e oblio nel nuovo regolamento europeo' *Nuove leggi civili commentate*, 410 (2017). More generally, among the first Italian comments on the GDPR, see the contributions of various authors published on 1 *Nuove leggi civili commentate* (2017).

 DOI 10.23815/2421-2156.ITALJ ISSN 2421-2156

right to be forgotten is of utmost importance. It is the very first time that European legislation has recognised the existence of such a right, which so far has been rooted in case-law.[2]

The reference in question can be found in the heading of Art 17, where immediately after the words 'right to erasure' one can read in round brackets the expression 'right to be forgotten'. Therefore, in the English language version Art 17 is headed 'Right to erasure ("right to be forgotten")'. The expression 'right to be forgotten' is also used in three recitals of the GDPR, namely 65, 66 and 156.

Also, it is important to clarify that Art 17 is included in Chapter III of the GDPR headed, in the English language version, 'Rights of the data subject' (in Italian, '*Diritti dell'interessato*') and in particular in Section 3 of that chapter headed, again in the English language version, 'Rectification and erasure' (in Italian, '*Rettifica e cancellazione*').

By including the reference to the right to be forgotten solely in brackets and in a provision on the erasure of personal data, the EU legislator seems to have wanted to tie the right to be forgotten to the notion of 'erasure' that a data subject may obtain in certain cases. The latter is a classic theme for those well versed in the right to privacy given that the legislation of all the Member States implementing Directive 95/46/EC recognises the right to erasure of personal data in certain circumstances as one of a data subject's fundamental rights.[3]

Indeed, during the *travaux préparatoires*, the wording of the GDPR was different and Art 17 was headed 'right to be forgotten or right to erase'. However, in the end that wording was dropped in light of the concerns expressed by various European MEPs and American commentators that it was not crystal clear from the heading whether the right to be forgotten and the right to erase were one and the same.[4]

Even apart from those details, in the final analysis the result obtained regarding the right to be forgotten by the GDPR would appear in general to be disappointing. This is not only because, amongst other things, there is no definition of the notion of the right to be forgotten or there are not specific rules on it despite the uncertainty in this regard emerging in the most recent judgments

[2] Art 8 of the 1950 European Convention on Human Rights (ECHR) enshrines the right to respect for private and family life, understood as a fundamental right, but makes no mention – not even an implied one – to the right to be forgotten. The same can be said for the 1981 Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (ETS No 108) and Directive 95/46/EC. So much so that on 4 November 2010 the European Commission, in the context of setting out a 'strategy to strengthen EU data protection rules', stated that citizens should have a right to be forgotten (see the document in question available online at https://tinyurl.com/yd999ubm (last visited 25 November 2017).

[3] See, for example, Art 7 of decreto legislativo 30 June 2003 no 196, ie the Italian Data Protection Code.

[4] See, amongst others, M.L. Ambrose, 'Speaking of Forgetting: Analysis of Possible Non-EU Responses to the Right to Be Forgotten and Speech Exception' 38(8) *Telecommunications Policy*, 800-811 (2013).

handed down by courts in the EU and the different approaches adopted in this respect outside the EU.[5] But also and above all because further to the new legislation, if not interpreted correctly, there is a risk that the very concept of the right to be forgotten may end up becoming deprived of any meaning (at least partially).

In other words, in light of how the right to be forgotten is currently construed in continental European legal systems, if that right is held to be a mere expression of the right to erasure of data or in any event is encompassed in the latter, then the right to be forgotten will be diminished as regards its current framing. And it is precisely on the basis on that typical framing that courts have recently recognised that a data subject also has (at the very least) a right to obtain delisting by Internet search engines in connection with content considered to be unlawful, a right to anonymisation of data (which are thus no longer personal) and a right to the correct contextualisation of data that are no longer accurate but are made available to the public.[6]

That (though just partial) hollowing out of the right to be forgotten by the GDPR would lead to concrete consequences. Suffice it to recall that the great importance attached in recent years to the right to be forgotten is due to the fact that on the Internet all material not only remains in cyberspace essentially forever but can also easily be retrieved at any time by anybody using a search engine. Therefore, it is not sufficient to grant the data subject the right to request the erasure of the data by the single controller in order to resolve the problem and hence effectively safeguard the interest of the data subject but at the very least it is necessary that the right to request delisting is deemed to be part and

[5] See, in addition to the scholarly opinions cited later on in this work, S. Martinelli, *Diritto all'oblio e motori di ricerca. Memoria e privacy nell'era digitale* (Milano: Giuffrè, 2017); and F. Di Ciommo, 'Quello che il diritto non dice. Internet e oblio' *Danno e responsabilità*, 1101 (2014). Regarding the cultural differences between the North American and European approaches to the topic of the protection of privacy and in particular the right to be forgotten, see amongst others Q. Whitman, 'The Two Western Cultures of Privacy: Dignity Versus Liberty' 113 *Yale Law Journal*, 1151-1208 (2004); F. Werro, 'The Right to Inform vs. The Right to be Forgotten: A Transatlantic Clash', in A. Colombi Ciacchi et al eds, *Liability in the Third Millennium* (Baden-Baden: Nomos, 2009), 294; J. Rosen, 'The Right to be Forgotten' 64 *Stanford Law Review Online*, 88 (2012); and R.K. Walker, 'The Right to Be Forgotten' 64 *Hastings Law Journal,* 257 (2012).

[6] Scholars express conflicting views about the relationship between the right to be forgotten and the right to erasure of personal data. Some commentators have expressly stated that the right to erasure is capable of also encompassing situations concerning the right to be forgotten: see A. Bunn, 'The Curious Case of the Right to Be Forgotten' 51 *Computer Law and Security Review*, 336 (2015). Other writers have stressed that the powers exercisable on foot of the 'right to be forgotten' are numerous and hence different from the right to erasure: see amongst many B. Koops, 'Forgetting Footprints, Shunning Shadows. A Critical Analysis of the 'Right to Be Forgotten' in Big Data Practic' *Tilburg Law School Legal Studies Researcher Paper Series*, 8/2012 (but see also D. Lindsay, 'The 'Right To Be Forgotten' by Search Engines Under Data Privacy Law: A Legal and Policy Analysis of the Costeja Decision', in A.T. Kenyon ed, *Comparative Defamation and Privacy Law* (Cambridge: Cambridge University Press, 2016).

parcel of the right to erasure.[7] This would not seem to be something one can take for granted in light of the provisions of the GDPR.

1. Arts 16, 17, 18 and 21 of the GDPR and the Right to Be Forgotten as a Reinforcement of the Right to (Dynamic) Identity

It follows from the very wording of Art 17 that, while simply setting out the rules governing the erasure of data without any further clarification, the GDPR does not seek to specifically regulate the right to be forgotten.

Framed in those terms, the right to be forgotten would appear at first glance to have been relegated from an individual right to just an ancillary interest linked to obtaining the erasure of an individual's data. Such an interpretation of the wording of the GDPR would also explain why the words 'right to be forgotten' are, as already mentioned before, used solely in parenthesis following the words 'right to erasure'.

However, the confusion that the GDPR creates by ambiguously equating (although solely in the heading of Art 17) the notion of the right to be forgotten with the erasure of data undoubtedly diminishes how the concept of the right to be forgotten has developed since the 1990s and the importance attached thereto as a personal right.

As noted above, courts have recently (*infra*) confirmed that when the right to be forgotten is claimed in respect of a publication in paper form, a request to merely erase personal data is absolutely inappropriate to protect the data, ie ensuing that the data subject avoids suffering or continuing to suffer harm. This is because once the publication has been created and disseminated, mere erasure is simply not effective.

Indeed, that holds equally true as regards the publication of news on the Internet, given that online the right to erasure is rarely capable of striking the best balance between the various interests at stake – the right to be forgotten, freedom of the press, freedom of information, right to be informed, etc. Indeed, as the Italian Supreme Court has recently remarked, updating or rectifying news often safeguards the right to be forgotten much more than erasure actually does without the need to affect the rights of individuals to unfettered access to information.

The point just made above is backed up by the most recent case law (more precisely domestic case law),[8] to the effect that in the Internet age the concept of right to be forgotten is so wide-ranging that the boundaries between it and what is often defined as the right to personal identity are often extremely blurred.

[7] On this specific aspect see, amongst others, M. Crockett, 'The Internet (Never) Forgets' 19 *SMU Science & Technology Law Review*, 151 (2016).

[8] By criticising the European approach even before the Regulation, R. Pardolesi, 'L'ombra del tempo e (il diritto al)l'oblio' *Questione Giustizia*, 76 (2017), observes that the right to be forgotten 'has two souls, both with their origins in case law, one shaped by the EU and the other domestic in nature'.

This is because of the ever increasing importance that the right to personal identity has been given as regards both its traditional version and its electronic/ digital version.[9]

For this reason – also for the purposes of avoiding an undue fragmentation of personal rights – rather than a pure and simple right to be forgotten (ie a right that any piece of news concerning the data subject is made no longer available to the public), at this stage it would appear more correct to talk about (and hence reason in terms of) a right to so-called 'dynamic identity' of the data subject. In other words, a right to have one's own identity, made public through the media, permanently and regularly consistent with reality and hence not only up to date but possibly also protected through the removal of information that is no longer accurate or of public interest.[10]

In this regard it should be clarified that in truth, irrespective of the headings and hence the taxonomy of the legislative provision in question, the rules set forth in the GDPR as regards the right to be forgotten are not limited to those contained in Art 17. Indeed, also (at the very least) Arts 16, 18 and 21 of the GDPR could potentially come into play whenever one claims the right to be forgotten, especially if construed in a broad sense as a reinforcement of the right to dynamic identity.[11]

Indeed, further to Art 16, headed 'Right of rectification', every data subject has the right to obtain without undue delay from the controller the rectification of inaccurate personal data concerning him or her as well as the right to have incomplete personal data completed (which could occur in situations where the relevant circumstances have evolved and the data are not up to date). While pursuant to Art 18, headed 'Right to restriction on processing', the data subject has the right to obtain from the controller restriction of processing where one of the conditions set out in the article applies.

Moreover, pursuant to the first para of Art 21 of the GDPR, headed 'Right to object', the data subject has the right to object, on grounds relating to his or her particular situation, at any time to processing of personal data concerning him or her which is based on point (e) or (f) of Art 6(1), including profiling

[9] In that regard it is worth bearing in mind that decreto legge 14 August 2013 no 933, passed by Parliament into legge 15 October 2013 no 119, introduced the concept of 'digital identity' into the Criminal Code for the first time. See amongst many F. Di Ciommo, 'Diritti della personalità tra media tradizionali e avvento di Internet', in G. Comandè ed, *Persona e tutele giuridiche* (Torino: Giappichelli, 2003), 3; and D. Messinetti and F. Di Ciommo, 'Diritti della personalità', in S. Martuccelli and V. Pescatore eds, *Diritto civile* (Milano: Giuffrè, 2012), 598.

[10] On the concept of right to dynamic identity, see F. Di Ciommo and R. Pardolesi, 'Dal diritto all'oblio in Internet alla tutela dell'identità dinamica. E' la Rete, bellezza!' *Danno e responsabilità*, 701 (2012).

[11] But in other terms see, amongst others, F. Pizzetti, *Privacy e il diritto europeo alla protezione dei dati. Il regolamento europeo 2016/679* (Torino: Giappichelli, 2016), II, in particular 76; and V. D'Antonio, 'Oblio e cancellazione dei dati nel diritto europeo', in S. Sica, V. D'Antonio and G. M. Riccio eds, *La nuova disciplina della privacy* (Milano: Giuffrè, 2016), 220.

based on those provisions. In that case the controller may no longer process the personal data unless it demonstrates compelling legitimate grounds for the processing which override the interests, rights and freedoms of the data subject or for the establishment, exercise or defence of legal claims.

Even considering the right to be forgotten as completely independent of the right to personal identity, rather than asking for erasure a data subject might well feel that in some cases it is more convenient to exercise other rights like obtaining rectification and/or completion of the data involved (Art 16), restrictions on processing (Art 18) or the blocking of processing (Art 21). Which confirms that the right to be forgotten, even if construed in narrow terms, is covered also by other provisions of the GDPR and not just Art 17.

2. Outline of Aspects of the Right to Be Forgotten Not Addressed by the GDPR

As explained in the previous section, the GDPR does not contain specific provisions on the right to be forgotten.

This is surprising if one considers the various approaches to this issue in the various Member States and the fact that the EU decided to adopt a regulation rather than a directive precisely with a view to achieving strict uniformity throughout the EU.[12]

The GDPR fails to address the most crucial points that both practice and recent case law have brought to light in connection with the right to be forgotten, especially in light of the new information technologies and in particular the Internet.

Ever apart from the mentioned absence of any definition of the right to be forgotten, the GDPR is silent as regards the length of time of personal data processing that could make the right to be forgotten enforceable (in short, the new rules do not offer any criteria by which one can assess whether a piece of information is no longer current or of public interest). Neither does the GDPR address the role played in the processing of online data by search engines or the hosting providers, other than the original source of the information, that the data in question are equally available online in as much as copied from the source site. Again, the GDPR does not tackle the thorny question of the storage of information in public registries[13] or the subject of delisting content on the

[12] For a valuable recent speculation that *inter alia* addresses the 'labour pains of the European legislation in its search for uniform rules on privacy', see G. Palazzolo, 'La banca dati e le sue implicazioni civilistiche in tema di cessione e deposito alla luce del reg. (UE) n. 2016/679' *Contratto e impresa*, 613, and also 629 (2017).

[13] The Supreme Court, in its order 21 July 2015 no 15096, *Nuova giurisprudenza civile*, I, 70 (2016), (on which see the comment by A. Mantelero), requested a preliminary ruling from the European Court of Justice (receiving a substantially negative reply) regarding how the right to be forgotten applied to historical data contained in public registries like the Register of Enterprises maintained by chambers of commerce (see also A. Mantelero, 'Diritto all'oblio e

Internet, issues that both courts and legal scholars have recently addressed in connection with the right to be forgotten.[14]

3. Art 17(2) of the GDPR and the New Obligation for the Controller to Communicate the Data Subject's Request for Erasure to the Other Controllers

An interesting element introduced by the GDPR in connection with the right to erasure of data and hence affecting also the right to be forgotten lies with the second para of Art 17. According to that provision,

> '(w)here the controller has made the personal data public and is obliged pursuant to para 1 to erase the personal data, the controller, taking account of available technology and the cost of implementation, shall take reasonable steps, including technical measures, to inform controllers which are processing the personal data that the data subject has requested the erasure by such controllers of any links to, or copy or replication of, those personal data'.

The rule thus provides for an additional obligation over and above that currently binding on a controller who has made the personal data of others public. An obligation – it is worth stressing – entailing, in cases of a data subject's request for erasure, an obligation for the controller that made the said data public to relay the request to the other controllers who are processing that same personal data so that the latter can proceed to erase any links to, or copy or replication of the data concerned.

The provision could have a great impact although in practice it risks remaining a dead letter or generating confusion because the GDPR does not state what exactly is meant by other 'controllers' for the purposes of Art 17, para 1. Therefore, it is not clear who exactly are the 'controllers' that must be informed of the data subject's request for erasure.

To avoid any risk of confusion and therefore in an attempt to interpret the obscure wording, it would seem logical to look for guidance in the reference that the provision makes to the concept of 'links to, or copy or replication of, those personal data'. That reference leads one to suppose that the law wishes to oblige a processor who has made the data public to relay the request for erasure to all those who process the same data obtained precisely from its own publication

pubblicità nel registro delle imprese' *Giurisprudenza italiana*, 2651, 2660 (2015). The issue is not addressed in the GDPR, not even in Art 89, headed 'Safeguards and derogations relating to processing for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes', and the associated recital 156.

[14] For analogous considerations see F. Pizzetti, 'Le autorità garanti per la protezione dei dati personali e la sentenza della Corte di Giustizia sul caso Google-Spain: è tempo di far cadere il 'Velo di Maya' ', in G. Restaand and V. Zeno-Zencovich eds, *Il diritto all'oblio dopo la sentenza Google Spain* (Roma: RomaTre Press, 2015), 255. For a partially contrary view, see S. Martinelli, n 5 above, 291-292.

thereof. If that were not so, there is no reason why the scope of application of the rule should be limited to controllers who are able to erase 'links to, or copy or replication of' the personal data in question. And above all there is no reason why whoever has made personal data public should be obliged to relay the request for erasure to all those who process the data concerned even though they may have obtained them independently from its own publication thereof.

Therefore, it would seem that Art 17 para 2 seeks to impose liability on controllers by virtue of their having made the data public. An obligation to inform others thus derives from that liability. The limits to that liability and the relevant obligation, in the absence of contrary indications in the wording of the GDPR, cannot but be the good faith of the processor. It follows that the latter must relay the request for erasure to all those who process – through 'links to, or copy or replication' – the personal data that it has made public, provided of course that it is data processing that the processor is aware of (or should be aware of exercising due care).

Therefore, the provision does not require strict liability. That said, in case of an action brought by a data subject the onus would still be on the processor to prove that it was not aware of the continued processing engaged in by a controller to whom it had not relayed the request for erasure. Or proving that it was not able, despite the efforts made, to identify the controller of the further processing and hence inform it. And here a very serious problem of application of the rule arises because in many cases, especially as far as the online processing of personal data is concerned, it is not always easy to obtain correct contact details for the controller.[15]

In any case and irrespective of the problem described above, it is evident that if correctly interpreted the rule in question could have interesting consequences on a practical and operational level even though its scope of application would appear to be limited by the legislator to requests for erasure and hence not also to other requests made by the data subject for rectification and/or completion of the data (Art 16), restriction (Art 18) or stopping the processing (Art 21). Which is difficult to explain in light of the aim of better safeguarding data subjects, and indeed ends up being contradictory if not actually a (serious) oversight on the part of the legislator.

4. Restrictions on the Exercise of the Right to Erasure of Personal Data. The Relationship Between the Right to Be Forgotten and 'Freedom of Information'

[15] According to a report published by European Network and Information Security Agency (ENISA) in November 2012 (called '*The right to be forgotten – between expectations and practice*' and available at https://tinyurl.com/yanlna5b (last visited 25 November 2017)), precisely due to the impossibility of obtaining the erasure of online data by controllers who very often remain anonymous, steps would need to be taken to prevent the unauthorised duplication of information.

The third para of Art 17 lists the situations where the exercise of the right to erasure under the preceding paragraphs is excluded.

Just as was the case with the first para of Art 17,[16] the limitations set out in the third paragraph are not new compared to the current pre-GDPR legislation and case law.

The provision essentially reiterates that data subjects may not exercise a right to erasure when the processing of the personal data is necessary: a) for exercising the right of freedom of expression and information; b) for compliance with a legal obligation or for the performance of a task carried out in the public interest or in the exercise of official authority; c) for reasons of public health; d) for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes; and e) for the establishment, exercise or defence of legal claims.

In short, the provision states that in view of the need to strike a balance between competing interests, the right to be forgotten – or to be more precise, the right to erasure of personal data which, as said above, protects legal situations different from those under the scope of the right to be forgotten – must yield when there are other compelling interests at stake, ie those set forth in the third paragraph, that prevail over and counterbalance a data subject's possible request for erasure.

However, in view of the extremely concise manner in which the provision in question addresses such complex issue, it is necessary to make the following points in order to correctly interpret the extent of those 'higher-ranking interests' and the way in which a balance needs to be struck in this context. This is all the more necessary in order to avoid the false impression, based on a superficial reading of the GDPR, that the right to be forgotten must always step back when it actually conflicts with 'freedom of expression and information' (point a) of the third para of Art 17). Because, as is obvious, if that were the case the right to be forgotten would simply not exist.

Indeed in recital 153 and in the first paragraph of Art 85 the GDPR provides that Member States shall by law reconcile the right to the protection of personal data pursuant to the GDPR with the right to freedom of expression and information, including the processing for journalistic purposes and for purposes of academic, artistic or literary expression.[17] The above is provided while however

[16] The most important novelty regarding the first paragraph of Art 17 would seem to be the fact that the provision twice stresses that, when one of the relevant grounds apply, the controller must 'without undue delay' continue with erasure.

[17] Furthermore, the second paragraph of Art 85 provides that '(f)or processing carried out for journalistic purposes or the purpose of academic artistic or literary expression, Member States shall provide for exemptions or derogations (…) if they are necessary to reconcile the right to the protection of personal data with the freedom of expression and information' while the third paragraph states that '(e)ach Member State shall notify to the Commission the provisions of its law which it has adopted pursuant to para 2 and, without delay, any subsequent amendment law or amendment affecting them'.

neglecting that such a delegation of authority could be risky because it is likely to lead to differences at national level on a crucial point like the relationship between the personal rights falling within the sphere of privacy and freedom of expression and information.

So it is worth pointing out that not only the right to be forgotten but all the rights falling within the sphere of privacy are already subject to limitations – ever apart from the GDPR – whenever freedom of information is at stake, so much so that in such cases the data subject's consent is not even considered necessary to publish his or her personal data.[18]

Indeed, as is known, not every exercise of freedom of information will be deemed capable of overriding the right to privacy and hence also the right to be forgotten. The relevant Italian case law on the matter – also in view of the provisions of the Italian 'Code of Conduct for the Processing of Personal Data for Journalistic Purposes'[19] – requires the following specific conditions being met: the truthfulness of the news, the essentiality of the processing of the personal data for the purposes of informing the public and finally the fact that the news must be reported in an objective manner and hence devoid of suggestion or hyperbole in light of the information aims pursued.[20]

Recently, some judgments (that will be more in detail explored *infra*) have laid down a fourth condition that must be met in order to lawfully publish personal data in the exercise of freedom of information. That precondition requires that the public interest in the information is current, in other words, that there be a present public interest in having access to the news that involves the processing of the personal data in question.

The above applies also owing to the fact that in laying down specific data processing obligations Art 11 of the Italian Data Protection Code (decreto legislativo no 196 of 2003) provides that the data collected must be *inter alia*:

> '*c)* accurate and, when necessary, kept up to date; *d)* pertinent, complete and not excessive having regard to the purposes for which they are collected or subsequently processed*; e)* kept in a form which permits identification of the data subject for no longer than is necessary for the purposes for which the data were collected or subsequently processed'.

Also, it should not be neglected that as regards the right of access**,** Art 12 of the said Code provides that the data subject may obtain the rectification, the erasure or blocking of data that have been processed unlawfully, in particular

[18] In this regard see Arts 136 *et seq* of the Personal Data Protection Code (decreto legislativo no 196 of 2003).

[19] The Code was issued by Data Protection Authority decision of 29 July 1998, published in Official Gazette no 179 of 3 August 1998.

[20] Among the most important provisions of the Code in this regard it is worth citing Art 6, headed 'Essentiality of the information', and Art 8, headed 'Protection of personal dignity'.

due to the incomplete or inaccurate nature of the data. Moreover, Art 6 of the Code provides that the processing of out-of-date data is unlawful while Art 14 in such circumstances grants a right to object, ie the data subject may object to the processing of data.[21]

The emphasis on the precondition (or prerequisite) that the news has to be topical or, to be more precise, that the same has to be of public interest, essentially guarantees the data subject that an event is forgotten or the relevant data are erased when there is no longer any societal interest in having access to the information.

In short, it is arguable that the right to be forgotten makes freedom of information take a step back because in order for the latter to be exercised through the use of personal data, that data must concern current events or in any case events that are still relevant to date for the public. In other words, once freedom of information is exercised in relation to certain personal data, that exercise is not lawful forever but only for as long as there is a public interest, hence a current interest (more details on which are provided in the sections below where case law in that matter will be discussed).

On the basis of the above observations, one can conclude that the creation of the right to be forgotten – initially developed in case law but now underpinned in a clear legislative provision contained in Art 17 of the GDPR – has affected the concept of freedom of information and thus also that of freedom of the press. In that light, the derogation in the third para of Art 17 can be correctly interpreted as meaning that if the news is not current (or if none of the other preconditions mentioned above is fulfilled), there can be no exercise of the right of information and therefore the derogation to the exercise of the right to erasure does not apply.

The discussion in this section leads one to maintain that undoubtedly the limits listed in the third para of Art 17 of the GDPR are to be interpreted in light of already existing European and national rules. It follows that the limits need to be read together with the principles laid down in the relevant case law. Moreover, the balance that must be struck on a case by case basis between the right to be forgotten and the limits in question is one that is impliedly – since the law does not state so in express terms – a matter for the courts to address.

Moreover, the Italian case law (including the most recent judgments) that has dealt with the topic has showed no hesitation in affirming the necessity on a case by case basis to strike the right balance between the need to protect the data subject's interest in being forgotten and the need for publication, dissemination or conservation.[22]

[21] Moreover, Art 3 of the Code of Journalists' Duties, as per the version approved on 27 January 2016, provides *inter alia* that 'journalists shall: a.) respect the right to personal identity and avoid referring to details relating to the past unless they are essential for completeness of the information'.

[22] In this regard it is worth citing the recent Corte di Cassazione judgment 26 June 2013

II. The Historical and Cultural Origins of the Right to Be Forgotten

Legal uncertainty and the shortcomings in the GDPR make it necessary for the purposes of fully understanding the right to be forgotten to provide a rigorous although brief historical and cultural overview of the origin of the concept before moving on to examine the most recent European and Italian case law on the matter.

The expression 'right to be forgotten' refers to an individual right that arose from case law,[23] initially in the United States and thereafter in Europe in the late 1980s and early 1990s.[24] Said right consists of a claim that information – concerning the holder of that right and somewhat harming to that person's image or other protected interests despite being true and appropriately presented – not be the focus of attention by the mass media.[25] And therefore it includes

no 16111, *Danno e responsabilità*, 271 (2014), concerning a case where the defendant was an Italian citizen who many years before had belonged to a well known terrorist group and the plaintiff was a newspaper that nineteen years later mentioned the circumstance in reporting on other matters. In its decision the Supreme Court held that: 1) in the case before it there had been an undoubted 'infringement of privacy' due to 'the data subject's lack of consent, the absence of any public interest in disseminating the news and the arbitrary link' between the current news and the reference to circumstance dating back in time; and 2) in application of the constitutionally protected freedom of expression (Art 21 of the Constitution) and right to privacy (Art 2 of the Constitution), publication is lawful after many years only where the information is essential, there is actual public interest in that information and the code of conduct of journalists is complied with.

[23] Among the earliest Italian cases see, in particular, Corte di Cassazione 9 April 1998 no 3679, *Foro italiano*, I, 1834 (1998). But see also the older Corte di Cassazione 18 October 1984 no 5259, *Giurisprudenza italiana*, 762 (1985), as well as the Tribunale di Roma 15 May 1995, *Diritto dell'informazione e dell'informatica*, 427 (1996). Also worth citing amongst many is Corte di Cassazione 24 November 2009 no 45051, *Studium Iuris*, 577 (2010), with note by C. Castaldello. Initially the judgments that since the 1970s addressed the enforcement of the right to be forgotten basically considered the question as a facet of protecting privacy while the first affirmation of the right to be forgotten as an independent right can be found in the Tribunale di Roma 21/27 November 1996, *Diritto d'autore*, 372 (1997) (for the relevant references see M. Mezzanotte, *Il diritto all'oblio. Contributo allo studio della privacy storica* (Napoli: Edizioni Scientifiche Italiane, 2009), especially 114). More recently, it should be noted that in correcting the misconception that the right to be forgotten has no legislative basis, the Data Protection Authority (in its decision of 7 July 2005) stated that the right in question has its grounds in Art 11, para 1, subpara *e*), of decreto legislativo no 196 of 2003 pursuant to which personal data subject to processing must be 'kept in a form which permits identification of the data subject for no longer than is necessary for the purposes for which the data were collected or subsequently processed'.

[24] The earliest references to the right to be forgotten in the United States are by common consensus to be found in *Melvin v. Reid* (112 Cal. App. 285, 297 P. 91, 1931), and *Sidis v. FR Publishing Corp.* (311 U.S. 711, 61 S. Ct. 393, 85 L. Ed. 462, 1940). See amongst many L. M. Friedman, 'The Red Kimono: The Saga of Gabriel Darley Melvin', in Id, *Guarding Life's Dark Secrets: Legal and Social Controls over Reputation, Propriety, and Privacy* (Redwood City: Stanford University Press, 2007), 217-225.

[25] The best known court cases in the past decades concerned the press and the most recent ones mainly the Internet, but in theory the issue relates also to radio, television and any other means of communication.

the right not to be brought to the public's attention again after a certain amount of time has elapsed since its initial publication or the occurrence of the events that the news refers to.

The above applies provided of course that there was no actual or potential widespread current interest in the news in question because in that case – as maintained here in this work – the right to information (understood as a whole and hence the right to inform and to be informed) would prevail over the right to be forgotten.[26] And provided that in the case of news that was false or otherwise defamatory or in any event damaging, it would not be a question of the right to be forgotten as such but of protecting other personal rights like the right to personal identity, reputation or honour.

It was a typical judicial response to the 'information society',[27] in other words, a right that emerged when people began to realise that a true piece of news originally published in an accurate way could well be damaging for them with the lapse of time because their image is today the result not so much of what they are or do but how they appear in the eyes of others through the prism of the mass media.[28]

[26] There are events that are so serious that their recalling by the mass media is by definition of public interest. For example, crimes against humanity, regarding which permitting their perpetrators to exercise a right to be forgotten would actually be contrary to educational purposes. But also in relation to other significant events it could definitely occur that after many years there is still a public interest in revisiting certain news, for example, because a crime that evokes one from past has now been committed or because the person concerned by the news is actually under investigation for a crime similar to one that he was convicted of previously.

[27] This expression is used in EU law and in the national legislation of many countries (including Italy) to describe the body of activities that are engaged in through the Internet. In this regard reference should be made to Directive 2000/31/EC 'on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market', transposed in Italy by decreto legislativo 9 April 2003 no 70. The literature on the directive in question is vast. For an early comment, See F. Di Ciommo, 'Internet (responsabilità civile)' *Enciclopedia giuridica* (Roma: Treccani, 2002); and Id, *Evoluzione tecnologica e regole di responsabilità civile* (Napoli: Edizioni Scientifiche Italiane, 2003).

[28] In the Italian literature, as regards the right to be forgotten, see also: G. Mina, 'La tutela del diritto all'oblio' *Danno e responsabilità*, 374 (2017); M. Rizzuti, 'Il diritto all'oblio' *Corriere giuridico*, 1077 (2016); A.L. Valvo, 'Il diritto all'oblio nell'epoca dell'informazione digitale' *Studi sull'informazione europea*, 347 (2015); E. Vigevani, 'Identità, oblio, informazione e memoria in viaggio da Strasburgo a Lussemburgo, passando per Milano' *Danno e responsabilità*, 731 (2014); M.G. Daga, 'Diritto all'oblio: tra diritto alla riservatezza e diritto all'identità personale' *Danno e responsabilità,* 274 (2014); F. Pizzetti, *Il caso del diritto all'oblio* (Torino: Giappichelli, 2013); L. De Grazia, 'La libertà di stampa e il diritto all'oblio nei casi di diffusione di articoli attraverso Internet: argomenti comparativi' *Rivista dell'associazione italiana dei costituzionalisti*, 1 (2013); G. Citarella, 'Aggiornamento degli archivi online, tra diritto all'oblio e rettifica 'atipica' ' *Responsabilità civile e previdenza*, 1155 (2012); L. Ferola, 'Dal diritto all'oblio al diritto alla memoria sul Web. L'esperienza applicativa italiana' *Diritto dell'informazione e dell'informatica*, 1001 (2012); G. Finocchiaro, 'L'identità personale su Internet' *Diritto dell'informazione e dell'informatica*, 388 (2012); Id, 'La memoria della rete e il diritto all'oblio' *Diritto dell'informazione e dell'informatica*, 392 (2010); M. Mezzanotte, *Il diritto all'oblio. Contributo allo studio della privacy storica* (Napoli: Edizioni Scientifiche Italiane, 2009). For less recent works see G.B. Ferri, 'Diritto all'informazione e diritto all'oblio' *Rivista di diritto civile*, 801 (1990); and T.

Thus, this is a right that aimed to complete that range of newly coined individual rights – labelled as personal rights[29] – that came to prominence in the 20th century precisely because of the need felt by contemporary man to protect his image, honour and reputation and likewise his privacy, personal identity and of course the right to be forgotten in the context of a reality where information can shape key values and human behaviour.

1. An Internet-Proof Right to Be Forgotten

The scenario depicted thus far was shaken to its very foundations by the advent and fast expansion of the Internet, which originated towards the end of the 20th century as a means of connecting computers and swiftly became so pervasive as to revolutionise the way in which people relate with others, things and even themselves.

The topic has been the subject of study and analysis for years by scholars in all fields. A common perception is that man will never be the same again after the Internet and that everybody – cybernauts or not – is inevitably caught up in a perpetual flow of information without it being possible to distinguish who augments that flow from who simply uses it.[30]

For the purposes of this work suffice it to say that the Internet (no longer accessible through the traditional desktop computer only but also through laptops, tablets, smartphones, MP3 players, household appliances, office equipment and various intelligent machines that interact with man and other machines remotely) has significantly and radically altered the world of information and the relationship between information, facts and individuals because *inter alia*: 1) today it is no longer possible to really distinguish between those who create information and those who use information because on the Internet anybody can post and normally does post information, including of personal nature, concerning himself/herself or others; 2) up to recently people used to keep abreast of current affairs through reading newspapers or watching/listening to the news on television or radio whereas now the majority of people obtain their news in real time simply by being online, which per se assures that they will continuously receive information of all types; 3) today it is extremely easy for any user to search for current or outdated information on the Internet about any circumstance, person or curiosity because the pre-Internet sources of information have essentially been superseded, although a few of them remain (for how long is anybody's guess) as specialist reference material; 4) the Internet is not constrained by geographic

Auletta, 'Diritto alla riservatezza e 'droit à l'oubli' ', in G. Alpa and M. Bessone eds, *L'informazione e i diritti della persona* (Napoli: Jovene, 1983), 127. But it is also worth citing a very early work dating back in time: P. Rescigno, 'Il diritto di essere lasciati soli', in V. Arangio-Ruiz ed, *Synteleia* (Napoli: Jovene, 1964), IV, 4944.

[29] Amongst others, see D. Messinetti and F. Di Ciommo,'Diritti della personalità' n 9 above.

[30] Of this view and for further observations, see D. Messinetti and F. Di Ciommo, 'Diritti della personalità' n 9 above. F. Di Ciommo and R. Pardolesi, n 10 above.

distance, local or national boundaries, physical barriers and the like since any user can access with the same ease information published on the Internet by anybody, in any way and in any part of the world.[31]

As result of the foregoing, today the Internet is an unrestricted database or, to be more precise, a series of databases continuously augmented by the millions of items of information uploaded to the Internet every second around the world without interruption by whosoever wishes to do so. This includes information of every type and form, ranging from that published by professional journalists on news portals to institutional information (for example, published by government bodies and universities) and from commercial information (published mainly by businesses on their own websites) to the information posted by mere users on a variety of websites and especially on social media, where users upload all sorts of news (without taking privacy too seriously), photographs, announcements and whatever concerning themselves and others.

In this vast flow of information, news, data, images, video etc – for the most part processed online nonchalantly by the persons concerned – it is just a pious illusion that it is still possible to talk about right to be forgotten, identity, privacy and confidentiality in the same terms as used to be done in the second half of the 20th century.[32] This claims would most likely clash daily with the clear and elementary reality to the contrary.

Once any piece of data has been uploaded to the Internet for public consumption, the author or person who posted it online loses exclusive control of it because the data concerned can be copied and stored by others and ultimately retrieved by search engine.[33] In short, the content may essentially be

[31] See, also for the literature cited therein, F. Di Ciommo, 'La responsabilità civile nell'era di Internet', in G. Ponzanelli ed, *La responsabilità civile. Tredici variazioni sul tema* (Padova: CEDAM, 2002), 179; and Id, 'Evoluzione tecnologica e categorie civilistiche', in E. Russo ed, *Interpretazione della legge civile e 'ragione giuridica'* (Padova: CEDAM, 2003), 141; Id, 'Internet e crisi del diritto privato: globalizzazione, dematerializzazione e anonimato virtuale' *Rivista critica del diritto privato*, 117 (2003); Id, 'La responsabilità civile in Internet', in A.C. Amato Mangiameli ed, *Parola chiave: informazione. Appunti di diritto, economia e filosofia* (Milano: Giuffrè, 2004), 77; Id, 'La responsabilità civile in Internet. Prove tecniche dell'anarchia tecnocratica' *La responsabilità civile*, 548 (2006); Id, 'Civiltà tecnologica, mercato ed insicurezza: la responsabilità del diritto' *Rivista critica del diritto privato*, 565 (2010); Id, 'L'accesso ad Internet tra diritto e responsabilità' *Comunicazione digitale*, 29 (2014); and again Id, 'Dal diritto di accesso alla Rete al diritto alla accessibilità delle informazioni presenti in Rete: Internet e uomo, evoluzione di un rapporto', in L. Ruggeri ed, *Internet e diritto civile* (Napoli: Edizioni Scientifiche Italiane, 2015), 77.

[32] In this regard see amongst others G. Finocchiaro, 'Il diritto all'oblio nel quadro dei diritti della personalità', in G. Resta and V. Zeno-Zencovich eds, *Il diritto all'oblio su Internet dopo la sentenza Google Spain* n 14 above, 29, and *Diritto dell' informazione e dell'informatica*, 591 (2014); G. Resta, *Dignità, persone, mercati* (Torino: Giappichelli, 2014); M. Nisticò and P. Passaglia, *Internet e costituzione* (Torino: Giappichelli, 2014); E. Bertolini, V. Lubello and O. Pollicino, *Internet, regole e tutela dei diritti fondamentali* (Roma: Aracne, 2013); and G. De Minico, *Internet, regole e anarchia* (Napoli: Jovene, 2012); and S. Rodotà, 'Una costituzione per Internet?' *Politica del diritto*, 337 (2010).

[33] In its November 2012 report cited above (see fn 15), ENISA highlighted that on the

(more or less) freely used by any other user, who – subject to effective means of protecting copyright or security of payments – may not only use it but also copy it and in turn post it on any part of cyberspace without being hindered by local or national boundaries.

And that the above may occur not just for a day, a week or even a year but forever or better up to when, from a technical standpoint, it will be possible and hence for as long as the Internet remains what it is today.

Therefore, the problem that somebody could draw the public's attention to some outdated news without that being necessarily covered by the public interest simply does not arise in the Internet age. Because on the Internet it is quite rare for one to find out about something because another person informs a great number of users about it. On the contrary it is generally the case that one goes to search for the information or in any case conducts a search focused on a person or event. But also because as the Internet is a huge archive of information, whoever implements the archive cannot certainly be accused of having not respected the right to be forgotten of another simply because many years later a user accesses the archive and retrieves the information.[34]

III. Recent European and Italian Case-Law on the Right to Be Forgotten on the Internet

1. The CJEU Judgment in the *González* v *Google Spain* Case

The impact of the Internet on the enforcement of the right to be forgotten was at the heart of a landmark judgment of the European Court of Justice, issued on 13 May 2014 in the very well known '*González* v *Google Spain*' case (case C-131/12, *Mario Costeja González and AEPD* v *Google Spain and Google Inc.*).[35]

Internet everyone can access the personal data of others and make copies also on offline media like a DVD or pen drive, so that the same data can then be uploaded to the network and disseminated at a later stage, including offline. For ENISA, in a system of communication that is so open and global, it is therefore impossible to locate all of the personal data concerning a data subject and erase them.

[34] See S. Vitali, 'Premessa', in L. Giuva et al eds , *Il potere degli archivi. Usi del passato e difesa dei diritti nella società contemporanea* (Milano: Mondadori, 2007); as well as Id, 'Archivi, memoria, identità', in C. Binchi and T. di Zio eds, *Storia, archivi, amministrazione* (Roma: Direzione generale archivi, 2004), 337. On the relationship between archives and memory, there is by now significant literature, especially at international level: see amongst others B.L. Craing, 'Selected Themes on the Literature on Memory and Their Pertinence to Archive' 45(2) *The American Archivist*, 276 (2002); L. Millar, *Evidence, Memory and Knowledge: The Relationship between Memory and Archives*, paper presented at the International Congress on Archives, Vienna 2004; and P. Ricoeur, *La memoria, la storia, l'oblio*, edited by D. Iannotta (Milano: Cortina Raffaello, 2000).

[35] The judgment has been commented on by many authors including A. Palmieri and R. Pardolesi, 'Dal diritto all'oblio all'occultamento in rete: traversie dell'informazione ai tempi di Google' *Nuovi Quaderni del Foro Italiano. Quaderno n. 1*, 1-16 (2014). For detailed speculation

The judgment in question addresses, in particular, the issue regarding the possibility for the data subjects who wish to enforce their right to be forgotten to require search engines not to direct users to a given link containing certain personal information (ie specific webpages). In light of the impossibility of either preventing news from being published on the Internet or obtaining the removal of the news from the Internet, whoever claims the right to be forgotten has no choice but to ask the search engines to not allow Internet users to find the relevant news.[36]

The complex issue was tackled from essentially three different perspectives. Further to its reasoning the Court (*inter alia* disagreeing with the opinion given by the Advocate General) came up with solutions that were so innovative as to spark a global debate on the right to be forgotten in the Internet and on the role played by search engines and in particular Google.

In the first aspect directly concerned the processing of the personal data. Google, asked to remove links from its index, maintained that it did not engage in any processing of personal data being merely an information society services provider that adopted a 'neutral' approach in respect of the indexed content, which is and remains stored in the so-called 'source' website.[37]

The Court did not agree on this point and indeed, citing a few of its earlier precedents,[38] held that the activity of a search engine consisting in retrieving information published or placed on the Internet by third parties, indexing it automatically, storing it temporarily and, finally, making it available to Internet users according to a particular order of preference must be classified as 'processing of personal data'. Therefore, the operator of the search engine had to be regarded as the 'controller' in respect of that processing (para 41 of the judgment).

The second aspect tackled concerned the applicability of Spanish law and hence European law to an organisation based in the United States, namely Google. In that regard, the Court grounded on the notion of branch or subsidiary to hold that, when there is an establishment in Europe, the organisation is subject to European law even through it operates online and its principal place of

by a group of commentators, see also G. Resta and V. Zeno Zencovich eds, *Il diritto all'oblio su Internet dopo la sentenza Google Spain* n 14 above.

[36] It was exactly in these terms that the previously mentioned (see fn 15) ENISA report of November 2012 expressed itself.

[37] In all likelihood Google's defence strategy sought to leverage on the principle laid down by the CJEU on cases C-236/08 and C-238/08 *Google France and Google Inc.* v *Louis Vuitton Malletier SA and others*, Judgment of 23 March 2010, available at www.eurlex.europa.eu, concerning the concept of 'neutral' provider referred to in Directive 2000/31/EC. In that regard see also the CJEU's case C-70/10 *Scarlet Extended SA v Société belge des auteurs, compositeurs ed éditeurs SCRL*, Judgment of 24 November 2011, [2011] ECR I-11959.

[38] In particular, on this point the judgment cites the earlier cases C-101/01 *Lindqvist*, Judgment of 6 November 2003, EU:C:2003:596, para 25, and C-73/07 *Tietosuojavaltuutettu* v *Satakunnan Markkinapörssi Oy and Satamedia Oy*, 16 December 2008, [2008] EU:C:2008:727, paras 48 and 49.

business lies outside the EU (para 60).

The third and final aspect concerned mainly the obligation to enforce the right to be forgotten that the Court recognises in favour of a user who has an interest in requiring that certain harmful content is no longer available on the search engine.

In that regard the Court maintained that it could resolve the conflict between the various interests at stake solely by carefully balancing them: it concluded that it was more practical to order a search engine to no longer index the relevant webpages rather than to require the website 'source' to not publish or to remove the news (para 88 of the judgment).

Continuing its reasoning the Court concluded (in para 99) that Art 12(b) and subparagraph (a) of the first para of Art 14 of Directive 95/46/EC are to be interpreted as meaning that the right to be forgotten overrides not only the economic interest of the search engine service provider but also the interest of the general public in having access to that information upon a search relating to the data subject's name. However, that would not be the case if it appeared, for particular reasons, such as the role played by the data subject in public life, that the interference with his fundamental rights is justified by the prevailing interest of the general public in having, on account of its inclusion in the list of results, access to the information in question.

The above, in a nutshell, is the judgment that gave rise to heated debate among scholars and has forced Google over the past three years to deal with hundreds of thousands of requests from data subjects asking that some content concerning them on the Internet were no longer indexed.[39]

2. The ECtHR Judgment in the *Węgrzybowski and Smolczewski* Case

In its judgment of 16 July 2013 (in *Węgrzybowski and Smolczewski* v *Poland*, application no 33846/2007), the European Court of Human Rights addressed the issue of balancing freedom of expression, the individual interests affected by the exercise of that freedom and the public interest in knowing certain information.

[39] Among many see T.E. Frosini, 'Google e il diritto all'oblio preso sul serio', in G. Resta and V. Zeno-Zencovich eds, n 14 above, 1; S. Sica and V. D'Antonio, 'La procedura di de-indicizzazione', ibid, 147; G.M. Riccio, 'Diritto all'oblio e responsabilità ei motori di ricerca', ibid, 199. It is useful to note that the Court of Justice of the European Union has repeatedly endorsed, with regard to the processing of personal data, the highly protective orientation *vis-à-vis* the rights of those concerned. For example, with the ruling issued on (joined cases C-293/12 and C-594/12 *Digital Rights Ireland, Seitlinger and others*, Judgment of 8 April 2014, available at www.eurlex.europa.eu) the Court declared invalid the Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006, on the retention and communication of data by providers of electronic communication services accessible to the public or a public communication network. And this because – according to the Court – it, by requiring data retention and allowing access to the competent national authorities, allows serious interference with fundamental rights to respect for private life and protection of personal data.

Indeed, the right to be forgotten was not to the fore in the case because the national court had already found the news to be defamatory and the applicants claimed that it should be removed from the Internet precisely because of that and not because it infringed their right to be forgotten. However, the judgment is of particular significance for the purposes of this work because it did not recognise the data subject's right to obtain removal of the news (though defamatory) published online. This because the Court felt that obliging the editor of the website to publish an online note updating the news would be the best way to strike a balance between preservation of the news on the Internet and protection of the data subject's personal identity. That note must allow the public to immediately contextualise the news in light of the events occurred after the delivery, for example, of a judgment finding the news to be defamatory.[40]

In discarding the other remedy proposed consisting of an order mandating the removal of the unlawful content from the Internet, the Court pointed out that the overall removal of a journalistic article published online does not fall within the realm of judicial powers. On that point the Court addressed the merits of the matter by observing that

> 'it is not the role of judicial authorities to engage in rewriting history by ordering the removal from the public domain of all traces of publications which have in the past been found, by final judicial decisions, to amount to unjustified attacks on individual reputations'.

As has been noted,[41] the principle is corroborated by the protection afforded by Art 10 of the European Convention of Human Rights to the public interest in accessing news archives on the Internet. Accordingly, the remedy of removal of a defamatory article published in the online version of a newspaper aimed at safeguarding one's reputation under Art 8 of the Convention would be disproportionate.

3. The Approach Adopted in Some Recent Italian Case Law

The issue addressed by both the CJEU and ECtHR has also been the subject of some significant judgments in Italy, which however have opted for a different approach compared to those adopted by the European courts (which in themselves

[40] The principle appears to be consistent with US judicial precedents, commencing from Case *George Firth* v *State of New York* [2002], Court of Appeals of the State of New York 98, N.Y. 2d 365 (2002). See, amongst others, E. Cooper, 'Following in the European Union's Footsteps: Why the United States Should Adopt its Own 'Right To Be Forgotten' Law for Crime Victims' *John Marshall Journal of Information Technology & Privacy Law*, 185 (2016).

[41] See L. Nannipieri, 'La sopravvivenza online di articoli giornalistici dal contenuto diffamatorio: la pretesa alla conservazione dell'identità e la prigione della memoria nel cyberspazio. Osservazioni interno a Corte CEDU, IV Sez., sentenza 16 luglio 2013' (Eur. Court H.R., *Węgrzybowski and Smolczewski* v *Poland*, Judgment 16 July 2013, application [2007] no 33846), available at https://tinyurl.com/yb2lhzao (last visited 25 November 2017).

varied).

In its judgment no 5525 of 5 April 2012[42] the Supreme Court (Civil Section III) held that in seeking to protect their right to be forgotten data subjects had to address their grievances not to the search engine but directly to the owner of the so-called 'source' website. The latter would then be obliged, if it wishes to keep the information online, to update that information in order to make it accurate and complete.

The case arose out an application lodged initially with the Data Protection Authority and subsequently before the Civil Court of Milan seeking to have an article published many years before either moved to an area of the 'source' website not indexed by search engines or alternatively updated with the addition of news about the events occurred thereafter.

In particular, the applicant complained that while the article correctly reported on his arrest and might be of public interest, it did not mention the separate and subsequent news that the proceedings actually ended up with his acquittal. Therefore, it was not, technically speaking, a 'right to be forgotten' case but rather one concerning the data subject's different need that incomplete and out-of-date news are no longer available online. Specifically, the applicant alleged that by not mentioning the acquittal, the article 'gave rise to an intolerable whiff of scandal surrounding him, victim of a veritable pillorying in the media'.[43]

The real issue for decision in that case was therefore establishment of whether a single person's individual right that information available online concerning them must always and constantly be updated so that the data subject's personal identity is faithfully portrayed as it dynamically evolves, ie also in relation to more recent events.

Contrary to what the Data Protection Authority and the first instance court had decided, the Supreme Court recognised that such a right exists but clarified that it could not be interpreted as requiring the removal from the Internet of outdated news. A correct balance between the interests at stake, including the community's interest in keeping a record of past news, required the person responsible for the archive containing the news or the website publishing the news to devise

> 'a system suited to signalling (in the body or in the margins) the occurrence of subsequent events and developments in the story and what they are, which rapid and easy access must be given to so as to enable a closer look'.

The Court also highlighted in detail the existence of an obligation to add to

[42] The judgment is reported in, amongst others, *Danno e responsabilità*, 747 (2012). For a critical note see F. Di Ciommo and R. Pardolesi, n 10 above.

[43] See G. Finocchiaro, 'La memoria della rete e il diritto all'oblio' *Il diritto dell'informazione e dell'informatica* , III, 392 (2010).

or update news that is no longer accurate, which has become 'history' and included in the archives, but at the same time potentially damaging and likely to infringe the 'social protection of the personal identity' of the data subject. And this because, again according to the Court, even when – as in that case there is a public interest in *continuing to know about an event that occurred in the past and hence the data subject's request to protect its right to be forgotten cannot be granted* –

> *'it proves* necessary, in safeguarding the current social *identity of the person that the news concerns, to afford the latter contextualisation and the updating of the past news that concerns him or her'*.[44]

As already pointed out,[45] the judgment's reasoning is potentially far reaching: every website or online archive should devote economic and technical resources to developing and managing a system capable of regularly updating all online content. And in case of failure to implement such a system, the relevant operator will be liable for any damage caused, and for the unlawful processing of the personal data of the data subject. The distance between this stance and the two approaches adopted by the European courts referred to in the previous sections, especially the CJEU in the *Google Spain* case, is plain to see.

Likewise, the distance between those approaches and that espoused in another significant recent Italian case, namely in Supreme Court (Criminal Section III) judgment no 5107 of 3 February 2016[46] in what has become known as the 'Google/Vivi Down' case is very clear. There the Supreme Court held that where users (so-called uploaders) upload text, audio, video and other content to a website that provides hosting services in the absence of a general obligation for a service provider to monitor that content, the users and not the service provider are the controllers of the personal data of the third parties concerned. The Court further held that the offences under Art 167 of the Personal Data Protection Code must be interpreted as a crime specific to controllers only and not applicable to other persons having to handle the processed data without any decision-making power in that respect.

The two aforesaid Supreme Court decisions substantially deny, as regards

[44] According to the Court that updating must be granted through *'linking the news to other information subsequently published concerning developments*' given that '*the data must be "accurate" and "kept up to date" having regard to the purposes for which they are processed*', failing which '*the news that was originally complete and true is no longer up to date and hence becomes partial, inaccurate and thus substantially untrue*'. The judgment does not explain how this result is to be achieved but seems to imply that the obligation to update arises solely following a formal request from the data subject consistent with the principle that the provider is not liable until the moment a 'notice and take-down' procedure is triggered.

[45] Again, in F. Di Ciommo and R. Pardolesi, n 10 above.

[46] The judgment is reported, amongst others, in *Foro italiano*, II, 346 (2014), with a comment by F. Di Ciommo, *Google/Vivi Down, atto finale: l'hosting provider non risponde quale titolare del trattamento dei dati*.

the sphere of application of the rules governing the processing of personal data, that any important role is played by providers who only provide Internet hosting services for the materials of third parties or a search engine available to Internet users. However, that approach, which clearly contrasts with the CJEU's position in the leading case of *Google Spain*, would not seem to take the Italian case law of these past few years into account.

Indeed, the Court of Milan (in its order of 28 September 2016)[47] has gone so far as to rule that search engines provide 'information that is different from and much more invasive that that furnished by the source sites'. The Court of Naples North (in its order of 10 August 2016)[48] has acknowledged that since hosting providers do not intervene in 'the user generated content that they temporarily store (as occurs with Google Web Search) they are not liable for that content' but has also clarified that that is the case under decreto legislativo 9 April 2003 no 70 (transposing Directive 2000/31/EC on electronic commerce) solely on condition that they act to remove or disable access to such content as soon as they obtain 'actual knowledge' of the fact that: (i) the information at the initial source of the transmission has been removed from the network or access to it has been disabled by operator of the source site or (ii) or that a court or an administrative authority has ordered such removal or disablement.

Another very recent and definitely significant decision on the right to be forgotten is the Supreme Court (Criminal Section V) judgment no 38747/2017 of 3 August 2017 holding that there could be a public interest in displaying certain news dated even thirty years ago. This means that the processing of the personal data in question could be lawful if so required by the balance of the interests at stake that the court must strive to achieve.[49]

So, the Italian courts case law would seem to favour the line of protecting as much as possible freedom of information, the right to inform and the right to be

[47] Tribunale di Milano 28 September 2016, *Foro italiano*, I, 3594 (2016).

[48] Tribunale di Napoli Nord 10 August 2016, available at www.foroitaliano.it.

[49] The case concerned a complaint about a well known national newspaper's publication in 2007 of an article recalling events that have always been shrouded in mystery and that involved a young German citizen losing his life in 1978 after Prince Vittorio Emanuele of Savoy had fired shots from a rifle. In a passage of the disputed art the journalist referred to Vittorio Emanuele as 'the guy who casually fired a rifle on the island of Cavallo, killing a man'. In both civil and criminal proceedings the courts ruled that the statement in question could not constitute a tort or a crime, and as regards the right to be forgotten the Supreme Court, upholding the appeal judgment, clarified that from a subjective standpoint, amongst other things, 'Vittorio Emanuele of Savoy is the son of the last King of Italy and self-proclaimed heir to the throne of Italy', thereby meaning that events concerning him are objectively of public interest. The Supreme Court concluded by holding that 'the right to be forgotten regarding one's personal affairs (…) must take account of the community's right to be informed and kept up to date regarding events that shape their personal convictions even if that may discredit the holder of the right to be forgotten such that Vittorio Emanuele of Savoy cannot complain about the recalling of events that are certainly apt to shape public opinion'. For a first comment see https://tinyurl.com/ybyqtoby (last visited 25 November 2017).

informed and therefore seeks to guarantee the utmost freedom of expression of those dedicated to informing the public (an activity that in the Internet age is not a prerogative of journalists only).

In this regard and wrapping up the issue under discussion, it is worth mentioning the Court of Rome (Civil Section I) judgment no 23771/2015,[50] which has classified the right to be forgotten as a specific expression of the right to privacy and one's legitimate interest in not remaining indefinitely exposed to an outdated portrayal of one's image stemming from the repeated publication of news harmful to one's own reputation and privacy. Moreover, consistent with the CJEU's judgment in *Google Spain*, the Court clearly held that the data subject is entitled to request the provider that operates the Internet search engine to erase (or to be more precise, delist) the online content that provides an outdated representation of the personality of the data subject. The Court further pointed out that the right to obtain the removal of information from the Internet must be balanced with freedom of information,[51] so that two conditions must be jointly fulfilled for a person to ask for the erasure (or delisting) of data: a) the facts that the news concerned must not be recent; and b) the facts in question must be of no or limited public interest.

Then, everything seems to be clear now, but only apparently. This is because, on the contrary, it is still unclear when news is to be considered as no longer recent and which are the parameters for assessing whether there is a public interest in having access to certain news.

Let's consider, for example, the Supreme Court (Civil Section I) judgment no 13161 of 24 June 2016[52] stating that news published on the Internet in the aftermath of the crime reported on could be viewed as already outdated once a period of 'about two and a half years' had elapsed. The Court took the view that 'the persistent publication' of news 'going beyond' the

> 'online storage of journalistic news for historical or editorial purposes

[50] The judgment was issued on Tribunale di Roma 3 December 2015 no 23771 and is reported in amongst others: *Foro italiano*, I, 1040 (2016), with a note by P. Pardolesi; *Danno e responsabilità*, 299 (2016), with a note by F. Russo; and *Responsabilità civile e previdenza*, 583 (2016), with a note by G. Citarella. In a nutshell, a lawyer asked Google to delist fourteen URLs appearing among the results of a search that he made of his name with reference to proceedings that he had been involved in. The news was dated 2012/2013 and concerned events that implicated the lawyer, members of the clergy and persons associated with the so-called 'Magliana criminal gang' in allegedly unlawful business activities. The search engine denied the delisting and was sued before the Court of Rome, which rejected the application because the news was both relatively recent and of public interest.

[51] The latest Italian case law pays a lot of attention to protecting freedom of expression and online information. Examples of this approach are given by the Tribunale di Roma (prima sezione civile - Judge C. Pratesi) order of 8 June 2017 and Tribunale di Trani (Judge G. Labianca) order of 28 August 2017, and the Tribunale di Roma judgment of 27 September 2017.

[52] Corte di Cassazione 24 giugno 2016 no 13161, the judgment is reported in amongst others *Foro italiano*, I, 2729 (2016), with a note by R. Pardolesi.

could be considered as a breach of the right to privacy when, in view of the time that has passed, there is no longer any public interest in the news'.

In light of these last observations it is evident that protection of the right to be forgotten is still influenced by grave uncertainty at a practical level and this will continue to be so even after the GDPR becomes fully applicable. This makes it necessary for courts to protect the right to be forgotten in a balanced way without excessively undermining the competing interests and above all without neglecting to defend and uphold the principle of equality of all citizens before the law, avoiding situations where 'two and half years' is sufficient to make news 'outdated' for some but not for others.[53]

[53] More recently, in the ruling that decided the Eur. Court H.R., *Fuchsmann* v *Germany*, Judgment of 19 October 2017, available at www.hudoc.echr.coe.it, the Court ruled that where a balancing exercise has been undertaken by the national authorities in accordance with the criteria laid down in the Court's case law, the Court would require strong reasons to change its own view for adopting that of the domestic courts; and also that strong reasons are lacking when the national Court struck a reasonable balance between the competing rights and acted within the margin of appreciation afforded to it.