IN THE COURT OF JUSTICE OF THE EUROPEAN UNION

Case C-136/17

G.C.
A.F.
B.H.
A.D.

Applicants

V

COMMISSION NATIONALE DE L'INFORMATIQUE ET DES LIBERTES (CNIL)

Defendant

WRITTEN OBSERVATIONS OF IRELAND

Dated this 30th day of June 2017

To the President and Members of the Court of Justice of the European Union

Pursuant to Article 23 of the Protocol on the Statute of the Court of Justice of the European Union, Ireland, represented by Maria Browne, Chief State Solicitor, Osmond House, Little Ship Street, Dublin 8, acting as Agent, accepting service via e-Curia with an address for service at the Embassy of Ireland, 28 route d'Arlon, Luxembourg, assisted by Miss Margaret Gray, Barrister-at-Law, of the Bar of Ireland, has the honour of submitting these written observations.

1. This reference for a preliminary ruling under Article 267 of the Treaty on the Functioning of the European Union ("TFEU") was made on 24 February 2017 (lodged on 15 March 2017) by the Conseil d'État of the French Republic ("the Referring Court"). The referred questions concern the interpretation of certain provisions of Directive 95/46 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ L 281 p.31) ("the Directive"), in particular, Articles 8(1) and (5), 9, 12 and 14.

THE ORDER FOR REFERENCE

2. Ireland refers to the facts as described in the Order for Reference. In brief outline, in the four cases before the Referring Court, each of the applicants had requested Google Inc. to 'de-reference' various links to web pages appearing in the results displayed by its search engine in response to a search of their respective names. Google refused each request. The applicants complained to the French Data Protection Authority, the CNIL, seeking orders that Google 'de-reference' the links. The CNIL rejected the complaints. Before the Referring Court, the applicants sought orders for the annulment of the CNIL's decisions.

3. The Referring Court held (at paragraph 2) that the relevant French legislative provisions must be interpreted in light of the Directive, which they transpose. It further held that, in view of the judgment of the CJEU of 13 May 2014 in Case C-131/12 *Google Spain and Google,* a number of principles are relevant. First, the activity of a search engine must be classified as "processing of personal data" within the meaning of Article 2(b) of the Directive when that information contains personal data; and, second, the operator of the search engine must be regarded as the "controller" in respect of such processing, within the meaning of Article 2(d).

4. As regards each of the applicants:

    a. Ms C. requested 'de-referencing' of a satirical photomontage posted online, on YouTube, showing her at the side of the mayor of the municipality where she was head of office and explicitly conveying the intimate relationship between them, as well as that relationship's bearing on her own political career. The photomontage was posted

online during an electoral campaign in which she was a candidate. On the date when her request for 'de-referencing' was refused, she was neither elected, nor a candidate for elected office, and no longer served as head of the office of the municipality's mayor;

b. Mr F. requested 'de-referencing' of an article in Liberation posted on the website of the French Centre Against Mind Control, relating to the suicide of an advocate of the Church of Scientology in December 2006. Mr F. is mentioned in that article as the public relations officer for the church, but subsequently ceased working in public relations. The author of the article describes how he contacted Mr. F. to get his version of the facts and reports what he said during the interview;

c. Mr. H. requested 'de-referencing' of mainly press articles relating to the judicial inquiry into the financing of the French Republican Party in the course of which he, together with several businessmen and political figures, was placed under investigation. The proceedings against him were dismissed. Most of the links at issue lead to articles published when the investigation was opened, and make no reference to the outcome of the proceedings;

d. Mr. D. requests 'de-referencing' of two articles published in *Nice Matin* and *Le Figaro* reporting on the criminal court hearing during which he was sentenced to seven years' imprisonment and an additional ten years of socio-judicial supervision for sexual assault against minors aged 15. One of those reports reveals a number of intimate details about the applicant, which were disclosed during the trial.

5. In essence, the Referring Court seeks guidance on the interpretation of the scope of the prohibition on the processing of special categories of personal data laid down in Article 8(1) of the Directive and the restrictions on processing of data relating to offences, criminal convictions or security measures laid down in Article 8(5), as well as the scope of the exemptions or derogations for *inter alia* solely journalistic purposes laid down in Article 9. Although not expressly cited by the Referring Court, the Order for Reference also raises issues concerning the rights to rectification, erasure or blocking of data in Article 12(b) of the Directive, and the right to object under Article 14.

6. Having outlined the legal questions arising for determination, the Referring Court held that a number of issues arose which, in its view, were decisive to the outcome before it, and raised several serious questions of interpretation of EU law.

THE DIRECTIVE

7. Before addressing the questions posed by the Referring Court, and Ireland's responses to those questions, it is necessary, in the first instance, to consider the structure and content of the Directive, which must, moreover, be interpreted in light of relevant fundamental rights. Those rights include the following.

8. Firstly, Article 8 of the Charter of Fundamental Rights of the European Union ("the EU Charter"). Article 8 of the EU Charter provides for the protection of personal data concerning any individual and permits such data to be processed fairly for specified purposes and on the basis of consent or some other legitimate basis laid down by law. Such right to the protection of personal data is not, however, absolute: see, Case C-112/00 *Schmidberger* [2003]; and Joined Cases C-92/09 and C-93/09 *Volker und Markus Schecke GbR*. The right must be considered in relation to its function in society, and, under Article 52(1) of the EU Charter, may be limited by law where limitations are proportionate, provided that they also respect the essence of the rights and freedoms concerned, and are necessary and genuinely meet objectives of general interest recognised by the European Union and the need to protect the rights and freedoms of others (see *Volker und Markus Schecke GbR*, paragraph 50).

9. Second, Article 10 of the EU Charter, in essence, addressing freedom of expression, provides for the right to freedom of thought, conscience and religion.

10. Third, Article 16 of the EU Charter provides for the freedom to conduct a business, and more specific iterations of this right are codified, for example, in Articles 49 and 56 of the Treaty on the Functioning of the European Union ("TFEU") which provide for freedom of establishment and to provide services.

11. Turning, then to the Directive itself, one of its key objectives[1] is to ensure the *"effective and complete protection of the fundamental rights and freedoms of natural persons, and in particular their right of privacy, with respect to the processing of personal data"* (see, *Google Spain,* paragraph 53). The nature of those rights and the framework in which the Directive operates was recognised by this Court in Case C-362/14 *Schrems*, as follows:

> "*38. It should be recalled first of all that the provisions of Directive 95/46, in as much as they govern the processing of personal data liable to infringe fundamental freedoms, in particular the right to respect for private life, must necessarily be interpreted in the light of the fundamental rights guaranteed by the Charter.*
>
> *39. It is apparent from Article 1 of Directive 95/46 and recitals 2 and 10 in its preamble that the directive seeks to ensure not only effective and complete protection of the fundamental rights and freedoms of natural persons, in particular the fundamental right to respect for private life with regard to the processing of personal data, but also a high level of protection of those fundamental rights and freedoms. The importance of both the fundamental right to respect for private life, guaranteed by Article 7 of the Charter and the fundamental right to the protection of personal data, guaranteed by Article 8 thereof, is, moreover, emphasised in the case law of the Court."*

12. The fact that the provisions of the Directive must be interpreted in the light of the fundamental rights guaranteed by the Charter is reaffirmed by this Court in Case C-398/15 *Manni,* paragraphs 39 and 40.

13. The Directive emphasises, in Article 6(1)(a), that processing of personal data must be both fair and lawful. This is also particularly recognised by recital (28) which provides, *inter alia*, that "*any processing of personal data must be lawful and fair to the individual concerned; whereas, in particular, the data must be adequate, relevant and not excessive in relation to the purposes for which they are processed".* It is further recognised by recital (30) that the processing of data may be lawful where it is carried out *"as a*

[1] Another key objective being to facilitate the free movement of such data

legal requirement, or for the performance of a task carried out in the public interest or in the exercise of official authority, or in the legitimate interests of a natural or legal person, provided that the interests or the rights and freedoms of the data subject are not overriding".

14. The Directive also contemplates, under recital (37) and as then codified in Article 9, that *"the processing of personal data for purposes of journalism or for purposes of literary or artistic expression, in particular in the audiovisual field, should qualify for exemption from the requirements of certain provisions of this Directive in so far as this is necessary to reconcile the fundamental rights of individuals with freedom of information and notably the right to receive and impart information, as guaranteed in particular in Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms".*

15. To recall, Article 6 of the Directive establishes the principles that apply to Member States in relation to data quality. Member States and, in turn, controllers of data processing, are obliged to adhere to the principles set out in Article 6, as confirmed by this Court in Google Spain (at paragraph 72). Expressly, Article 6(1)(b) requires Member States to provide that personal data must be "*collected for specified, explicit and legitimate purposes and not further processed in a way incompatible with those purposes".*

16. Article 7 of the Directive sets the criteria according to which data processing may be legitimate (save for special categories of data, which are dealt with in Article 8). Article 7(f) permits processing where *"necessary for the purposes of the legitimate interests pursued by the controller or by the third party or parties to whom the data are disclosed, except where such interests are overridden by the interests [or] fundamental rights and freedoms of the data subject which require protection under Article 1(1)."* In that regard, consideration of whether or not Article 7(f) provides a basis for the justification of lawful processing of personal data may, in some instances, require the balancing of competing interests, being those of other interested parties against those rights of the data subject.

17. Article 8 provides for the processing of special categories of personal data, and, Article 8(1) lays down the following prohibition:

"Member States shall prohibit the processing of personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, trade-union membership, and the processing of data concerning health or sex life."

18. Article 8 paragraphs (2),(3) and (4) lay down certain grounds for derogating from the prohibition in Article 8(1). Article 8(5) of the Directive provides as follows:

"*5. Processing of data relating to offences, criminal convictions or security measures may be carried out only under the control of official authority, or if suitable specific safeguards are provided under national law, subject to derogations which may be granted by the Member State under national provisions providing suitable specific safeguards. However, a complete register of criminal convictions may be kept only under the control of official authority."*

19. As referred to above, Article 9 seeks to reconcile processing of personal data, on the one hand, and freedom of expression on the other, as follows:

"*Member States shall provide for exemptions or derogations from the provisions of this Chapter, Chapter IV and Chapter VI for the processing of personal data carried out solely for journalistic purposes or the purpose of artistic or literary expression only if they are necessary to reconcile the right to privacy with the rules governing freedom of expression."*

20. Article 12 deals with a data subject's right of access to data and certain remedies including, under Article 12(b), the right to obtain from the controller "*as appropriate the rectification, erasure or blocking of data the processing of which does not comply with the provisions of this Directive, in particular because of the incompatible or inaccurate nature of the data".*

21. Article 14, which is entitled 'The data subject's right to object', provides:

"Member States shall grant the data subject the right:

(a) at least in the cases referred to in Article 7(e) and (f), to object at any time on compelling legitimate grounds relating to his particular situation to the processing of data relating to him, save where otherwise

provided by national legislation. Where there is a justified objection, the processing instigated by the controller may no longer involve those data…".

QUESTIONS POSED BY THE REFERRING COURT

Question 1

22. By Question 1, the Referring Court asks the following:

"1. Having regard to the specific responsibilities, powers and capabilities of the operator of a search engine, does the prohibition imposed on other controllers of processing data caught by Article 8(1) and (5) of Directive 95/46, subject to the exceptions laid down there, also apply to this operator as the controller of processing by means of that search engine?"

23. It is apparent from the judgment in *Google Spain* that certain activities of an operator of a search engine, such as Google, fall within the scope of application of the Directive. This is clear from paragraph 41 of the judgment:

"…Article 2(b) and (d) of Directive 95/46 are to be interpreted as meaning that, first, the activity of a search engine consisting in finding 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' within the meaning of Article 2(b) when that information contains personal data and, second, the operator of a search engine must be regarded as the 'controller' in respect of that processing, within the meaning of Article 2(d)."

24. This Court did, however, distinguish operators of search engines in at least two ways. In the first instance, it indicated that the data processing carried out in the context of the activity of a search engine ought to be in addition to that carried out by, for example, publishers on websites. In the second instance, it expressly circumscribed the necessity for a search engine to act consistently with the Directive only within the framework of its

responsibilities, powers and capabilities. The Court put it this way (at paragraph 83):[2]

> *"… inasmuch as the data processing carried out in the context of the activity of a search engine can be distinguished from and is additional to that carried out by publishers of websites and affects the data subject's fundamental rights additionally, the operator of the search engine as the controller in respect of that processing must ensure, within the framework of its responsibilities, powers and capabilities, that that processing meets the requirements of Directive 95/46, in order that the guarantees laid down by the directive may have full effect."*

25. In view of that, it is logical that the specific, and expressly limiting, responsibilities, powers and capabilities of the operator of a search engine set it apart from other controllers of processing data who could be subject to the prohibition on the processing of special categories of personal data in Article 8(1), subject, of course, to the exceptions and derogations otherwise provided for in that article, or as set out in the Article 9 derogation where processing is solely for journalistic purposes or artistic or literary expression.

26. Ireland submits that the special position of an operator of a search engine, which this Court recognises as being different from that of, for example, a publisher, militates against the automatic application of the Article 8 prohibitions to such an operator, without giving due account to its limited responsibilities, powers and capabilities. A relevant factor in that regard is the manner in which search engines and publishers process personal data: while publishers release a timely piece of information about an individual, search engines organize and aggregate an individual's personal information in order to offer it in a structured fashion to users (see *Google Spain*, paragraphs 36-37).

27. The logical step from that conclusion is to recognise that an operator of a search engine has a lack of awareness that it is processing personal data (and that it would be impossible, otherwise, for it to act within the framework

[2] See also paragraphs 35 to 38 of the judgment in *Google Spain*

of its powers and capabilities to know that it was), and also has a lack of intentionality in its processing.

28. To hold an operator of a search engine presumptively liable for processing of special categories of personal data under Article 8(1) would be to introduce an unwarranted strict liability. In circumstances where compliance could be impossible, and where non-compliance could lead to potential liabilities and swingeing administrative fines,[3] Ireland submits that the starting point ought to be that a search engine operator ought not to be caught by the prohibition in Article 8(1) and (5) of the Directive. To hold otherwise, would be contrary to the fundamental principle of proportionality.

29. Alternatively, Ireland submits that if the prohibition on the processing of personal data in Article 8(1) and (5) does apply to an operator of a search engine, equally, such an operator must also benefit from any relevant exemptions laid down, at least, in that provision. Ireland submits that, if there was to be such an application of strict liability on the part of an operator of a search engine, then, again, the principle of proportionality militates in favour of such an operator taking advantage of any exemptions that the principal controller of the special categories of personal data benefits from.

30. Ireland submits that this gives proper effect to the intended scope of the Directive, and to the application of the principle of proportionality as guarding against *"an unfounded overextension of the material scope of the Directive over new technologies"* (see Opinion of Advocate General Jääskinen in *Google Spain*, paragraph 30). It is also consistent with the findings of the Working Party on the Protection of Individuals[4] which supported the need for proportionality in the consideration of whether a search engine should qualify as a controller at all:

> *"… the principle of proportionality requires that to the extent that a search engine provider acts purely as an intermediary, it should not be considered to be the principal controller with regard to the content*

[3] Under the new General Data Protection Regulation, non-compliance with this obligation could lead to fines of €20 million or 4% global annual turnover, whichever is higher (Article 83(5)(b), together with Article 17).

[4] *Opinion 1/2008 on data protection issues related to search engines* 00737/EN WP 148 (4 April 2008) p.14; see also Opinion of Advocate General Jääskinen in *Google Spain,* paragraph 88

related processing of personal data that is taking place. In this case the principal controllers of personal data are the information providers."

31. Further, Ireland submits that the special circumstances pertaining to an operator of a search engine as an intermediary, also militates in favour of its benefitting, when taking account of the nature of data as being special categories of personal data, from the Article 9 derogation for journalistic purposes.

32. It is acknowledged that, in its judgment in *Google Spain*, this Court discussed the potential application of Article 9 to operators of search engines. While the Court held that Article 9 would benefit the processing by the publisher of a web page, *"that does not appear to be so in the case of the processing carried out by the operator of a search engine"* (at paragraph 85 of the judgment). However, Ireland considers that it is perfectly appropriate to give a fresh consideration to the scope of application of Article 9 on the facts of this case. That is so because, firstly, this case concerns personal data falling within the Article 8 prohibition, rather than the Article 7 permission for processing in certain circumstances (including under Article 7(f), where the balancing exercise between the right to privacy and the other rights comes into play); second, the finding was, in any event, by way of an obiter dicta and did not form part of the necessary reasoning of the court or of the operative part of the judgment.

33. Further, Article 85 of the General Data Protection Regulation ("the Regulation") makes express the weight to be given in the balance to the right to freedom of expression. Article 85, which is entitled *'Processing and freedom of expression and information'* provides as follows:

"1. Member States shall by law reconcile the right to the protection of personal data pursuant to this Regulation with the right to freedom of expression and information, including processing for journalistic purposes and the purposes of academic, artistic or literary expression.

2. For processing carried out for journalistic purposes or the purpose of academic artistic or literary expression, Member States shall provide for exemptions or derogations from Chapter II (principles), Chapter III (rights of the data subject), Chapter IV (controller and processor),

Chapter V (transfer of personal data to third countries or international organisations), Chapter VI (independent supervisory authorities), Chapter VII (cooperation and consistency) and Chapter IX (specific data sanctions) if they are necessary to reconcile the right to the protection of personal data with the freedom of expression and information."

34. An aid to the interpretation of that provision is given in recital (153) of the Regulation which provides *inter alia* that:

"*… the processing of personal data solely for journalistic purposes, or for the purposes of academic, artistic or literary expression should be subject to derogations or exemptions from certain provisions of this Regulation if necessary to reconcile the right to the protection of personal data with the right to freedom of expression and information, as enshrined in Article 11 of the Charter. This should apply in particular to the processing of personal data in the audiovisual field and in news archives and press libraries. … In order to take account of the importance of the right to freedom of expression in every democratic society, it is necessary to interpret notions relating to that freedom, such as journalism, broadly." (emphasis added)*

35. While the Regulation is not yet in force, Ireland submits that, consistently with the EU principle of statutory interpretation that current obligations must be construed in such a way that they are consistent with and do not do damage to future obligations, a broad interpretation of the content and scope of application of Article 9 ought to be preferred.

Question 2

36. By Question 2, the Referring Court asks the following:

"2. If Question 1 should be answered in the affirmative:

– Must Article 8(1) and (5) of Directive 95/46 be interpreted as meaning that the prohibition so imposed on the operator of a search engine of processing data covered by those provisions, subject to the exceptions laid down by that directive, would require the operator to grant as a

matter of course the requests for 'de-referencing' in relation to links to web pages concerning such data?

– From that perspective, how must the exceptions laid down in Article 8(2)(a) and (e) of Directive 95/46 be interpreted, when they apply to the operator of a search engine, in the light of its specific responsibilities, powers and capabilities? In particular, may such an operator refuse a request for 'de-referencing', if it establishes that the links at issue lead to content which, although comprising data falling within the categories listed in Article 8(1), is also covered by the exceptions laid down by Article 8(2)(a) and (e) of the directive?

– Similarly, when the links subject to the request for 'de-referencing' lead to processing of personal data carried out solely for journalistic purposes or for those of artistic of literary expression, on which basis, in accordance with Article 9 of Directive 95/46, data within the categories mentioned in Article 8(1) and (5) of the directive may be collected and processed, must the provisions of Directive 95/46 be interpreted as allowing the operator of a search engine, on that ground, to refuse a request for 'de-referencing'?"

37. In essence, the Referring Court asks about the scope of the rights of a data subject and the concomitant obligations upon an operator of a search engine in the context of processing of special categories of personal data as it is regulated under Article 8 of the Directive, subject to the exemptions and derogations both in Article 8 itself and in Article 9. In short, the Referring Court asks whether such an operator may, in certain circumstances, refuse a request for 'de-referencing'.

38. Ireland submits that the answers to part 1 of Question 2 is that the operator of a search engine processing special categories of data covered by either Article 8(1) (personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, trade-union membership, and the processing of data concerning health or sex life) or Article 8(5) (data relating to offences) is not required, as a matter of course, to grant requests for 'de-referencing', and may refuse such requests.

39. This is so particularly given the express limitations upon an operator of a search engine to act compatibly with the directive, including its prohibitions, *"within the framework of its responsibilities, powers and capabilities."* Those limitations expressly contemplate the possibility that an operator of a search engine may, both, rely on substantive exemptions to the prohibition and, also, seek to justify on a case-by-case basis, the retention of links to personal data, rather than being required, without any consideration, to provide for the blanket 'de-referencing' where any such request was made.

40. In response to part 2 of Question 2, and as submitted in response to Question 1, the exceptions in Article 8(2)(a) and (e) ought to be interpreted and applied to an operator of a search engine analogously (given its role as an intermediary) to how they are so interpreted and applied to, for example, a web publisher. Ireland submits that to do otherwise would be to hamper unjustifiably the role of an operator of a search engine to further the public interest in disseminating such data that is substantively identified in those provisions as requiring processing, under certain circumstances. In that regard, an operator of a search engine may refuse a request for 'de-referencing' if it establishes that the links at issue lead to content which, although comprising data falling within the categories listed in Article 8(1), is also covered by the exceptions laid down by Article 8(2)(a) and (e) of the Directive.

41. In response to part 3 of Question 2, where data has been processed under the umbrella of Article 8(1) and (5), and, further, for solely journalistic purposes pursuant to the Article 9 exemption, Ireland submits that an operator of a search engine ought, in turn, to benefit from any Article 9 exemption and, consequently, refuse a request for 'de-referencing', subject to carrying out the balancing test between, in essence, the right to privacy with the rules governing *inter alia* freedom of expression. To hold otherwise would, in Ireland's submission, unduly restrict the right of an operator of a search engine to rely on the right to freedom of expression, which underpins the derogation in Article 9 of the Directive. Ireland submits that Article 9 is for the benefit of newspapers, journalists, web publishers and other such media, including operators of search engines. The right to freedom of expression exercised by web publishers etc. would be seriously

undermined if the derogation under Article 9 was not available to search engine operators insofar as members of the public rely on search engines to locate and access articles and other publications disseminated by web publishers.

42. The particular role of operators of search engines was recognised by this Court in its judgment in *Google Spain* (at paragraph 36) as follows:

> *"[I]t is undisputed that the activity of search engines plays a decisive role in the overall dissemination of those data in that it renders the latter accessible to any internet user making a search…"*

43. Put another way, if search engine operators are denied the right to rely on Article 9, this would undermine not only the rights of the web publishers concerned but also the ancillary rights of the public. Thus, the right to freedom of expression would be rendered nugatory if the public are denied the right to access journalistic, academic, artistic and or literary expression to which the right to freedom of expression applies. There would be a "chilling effect" on the dissemination of such data by the media.

44. Fundamentally, however, an operator must be permitted, once an individual exercises his right to request removal or other relevant remedy, to assess whether the personal information should no longer be linked to his name (*Google Spain*, paragraph 96). The balance of the fundamental rights comprises the right to privacy and the right to protection of personal data, on the one hand, and the right of freedom of expression, including the right of the general public to access of information (together with economic rights of the search engine). The operator can weigh in the balance the role that the data subject plays in public life (*Google Spain*, paragraphs 81 and 97).[5]

45. Given Ireland's response to Question 1, Question 3 does not arise for consideration.

Question 4

[5] Ireland points to the similarity of the balancing tests carried out under Article 9, on the one hand, and Article 7(f), on the other. Article 7(f) permits the processing of personal data where it is necessary for the purposes of the legitimate interests pursued by the third parties to whom the data are disclosed. The judgment in *Google Spain* (paragraph 74) confirms that the application of Article 7(f) "*necessitates a balancing of the opposing rights and interests concerned" – namely the rights of the data subject and the rights of the public."*

46. By Question 4, the Referring Court asks the following:

"4. Irrespective of the answer to be given to Question 1:

– whether or not publication of the personal data on the web page at the end of the link at issue is lawful, must the provisions of Directive 95/46 be interpreted as:

– requiring the operator of a search engine, when the person making the request establishes that the data in question has become incomplete or inaccurate, or is no longer up to date, to grant the corresponding request for 'de-referencing';

– more specifically, requiring the operator of a search engine, when the person making the request shows that, having regard to the conduct of the legal proceedings, the information relating to an earlier stage of those proceedings is no longer consistent with the current reality of his situation, to 'de-reference' the links to web pages comprising such information?

– Must Article 8(5) of Directive 95/46 be interpreted as meaning that information relating to the investigation of an individual or reporting a trial and the resulting conviction and sentencing constitutes data relating to offences and to criminal convictions? More generally, does a web page comprising data referring to the convictions of or legal proceedings involving a natural person fall within the ambit of those provisions?"

47. Again, Ireland's response is that an operator of a search engine is not, in any case, automatically obliged to grant a request for 'de-referencing', but must carry out the balancing exercise outlined above, as laid down in *Google Spain*. Ireland also submits that this balancing exercise must take account of the fact that, on a case-by-case basis, the public interest in having personal data made available will vary.

48. Ireland also emphasises that the balancing exercise ought not to become a vehicle for the vindication of the personal whim of a data subject; in other words, that the situations in which the erasure or blocking rights under Article 12(b) of the Directive or objection rights under Article 14 of the Directive are exercised are strictly interpreted, such that data should not,

for example, be subject to 'de-referencing' simply because of the subjective preference of the data subject.[6]

49. Bearing that in mind, and as regards the first query posed here by the Referring Court, Ireland submits that the reference to establishing that data is incomplete or inaccurate, or no longer up-to-date, is found in Article 12(b) of the Directive.

50. Firstly, Article 12(b) imports a degree of discretion for a Member State and, in turn, an operator of a search engine, to exercise when considering whether it ought to grant any remedies in respect of data which is incomplete or inaccurate, as it states clearly that a Member State shall grant such remedies "*as appropriate".*

51. Second, it must be borne in mind that there is a significant distinction between data, for example, in a web publication, which is incomplete or inaccurate, at the time of posting, and data which only becomes incomplete or inaccurate due to the passage of time. Ireland submits that it would be an unlawful interference to seek to correct what, at the time, was a complete and accurate statement of fact and that, equally, this ought to be borne in mind when an applicant is making such a claim.

52. Finally, it will be a matter of fact and degree for each case as to whether or not a data subject can, in fact, prove that such data is, for example, incomplete. For example, as regards Mr. H who sought 'de-referencing' on the grounds that the initial articles which had recorded that there had been investigations into his conduct where, allegedly, no longer accurate or complete because of the passage of time, Ireland submits that such a situation falls into the category of a situation rendered inaccurate or incomplete due to the passage of time and that to interfere in such a situation by way of requiring 'de-referencing' would be close to attempting to re-write history.

53. As regards the second query posed here, Ireland repeats its submissions above.

[6] See Opinion of Advocate General Jääskinen in *Google Spain,* paragraph 104

54. As regards the third query, Ireland considers that Article 8(5) of the Directive must be interpreted as meaning that information relating to the investigation of an individual or reporting a trial and the resulting conviction and sentencing does constitute data relating to offences and to criminal convictions. More generally, Ireland takes the view that a web page comprising data referring to the convictions of or legal proceedings involving a natural person falls within the ambit of that provision.

55. The fact that Article 8(5) creates a specific, lawful, basis for the processing of data relating to offences, criminal convictions or security measures creates a presumption that data of that nature ought to be capable of being processed lawfully.

56. Ireland points, in any event, to Article 9, which would provide a general basis for processing such data where carried out solely for journalistic purposes or the purpose of artistic or literary expression.

57. In conclusion, Ireland invites the Court to respond to the questions posed by the Conseil d'État of the French Republic on 24 February 2017 as follows:

(1) *If, contrary to Ireland's principal submission, the prohibition on the processing of personal data in Article 8(1) and (5) of Directive 95/46 does apply to an operator of a search engine, equally, such an operator must also benefit from any relevant exemptions laid down, at least, in that provision, as well as any exemptions pursuant to Article 9 of that directive.*

(2) *The operator of a search engine processing special categories of data covered by either Article 8(1) (personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, trade-union membership, and the processing of data concerning health or sex life) or Article 8(5) (data relating to offences) is not required, as a matter of course, to grant requests for 'de-referencing', and may refuse such requests.*

The exceptions in Article 8(2)(a) and (e) ought to be interpreted and applied to an operator of a search engine analogously (given its role as an intermediary) to how they are so interpreted and applied to,

for example, a web publisher. In that regard, an operator of a search engine may refuse a request for 'de-referencing' if it establishes that the links at issue lead to content which, although comprising data falling within the categories listed in Article 8(1), is also covered by the exceptions laid down by Article 8(2)(a) and (e) of the Directive.

Where data has been processed under the umbrella of Article 8(1) and (5), and, further, for solely journalistic purposes pursuant to the Article 9 exemption, an operator of a search engine ought, in turn, to benefit from any Article 9 exemption and, consequently, refuse a request for 'de-referencing', subject to carrying out the balancing test between, in essence, the right to privacy with the rules governing inter alia freedom of expression.

(3) *The provisions of Directive 95/46:*

– *do not require that the operator of a search engine, when the person making the request establishes that the data in question has become incomplete or inaccurate, or is no longer up to date, or, having regard to conduct of legal proceedings, is no longer consistent with current reality, must automatically grant the corresponding request for 'de-referencing', but, rather, must carry out the necessary balancing exercise taking account of the fact that, on a case-by-case basis, the public interest in having personal data made available will vary;*

– *specifically, Article 8(5), must be interpreted as meaning that information relating to the investigation of an individual or reporting a trial and the resulting conviction and sentencing constitutes data relating to offences and to criminal convictions, and a web page comprising data referring to the convictions of or legal proceedings involving a natural person falls within the ambit of those provisions.*

Dated this 30th day of June 2017

Signed: Gemma Hodge
On behalf of Maria Browne, Chief State Solicitor
Agent for Ireland

Signed: Tony Joyce
On behalf of Maria Browne, Chief State Solicitor
Agent for Ireland