The “right to be forgotten” as the right to remove inconvenient journalism? An Italian perspective on the balancing between the right to be forgotten and the freedom of expression.

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This working paper*, while acknowledging the “multiple” meanings that the “right to be forgotten” displays in the Italian legal system after the Internet revolution, analyses, in the aftermath of the CJEU’s landmark decision in 2014 in Google Spain, how national courts and the Italian Data Protection Authority have thus far tried to find a fine tuned equilibrium between the right to be forgotten and freedom of expression, mostly confirming and even reinforcing that no right to be forgotten can be claimed for data for public interest. Still, a recent decision of the Italian Supreme Court appears going against the tide, reaching conclusions that could result in unprecedented constraints to news media, clearly disregarding the principles settled at supranational level both by the CJEU and the ECTHR.

The digital era has dramatically broadened and deepened the existential contradiction human beings experiment in their lives, as:

‘On the one hand, they aspire to immortality, and, knowing that they cannot have it, they try to leave the memory of themselves for as long as possible as the only way to prolong their life, or rather their memory into the future that they existed, and what they achieved. (...) Conversely, every person also has the terror that every negative act committed in the course of their existence can be remembered forever or at least while he is alive and so are the ones who have memory.’

From the intense legal, but also philosophical, debate that in recent years has tackled issues of paramount importance in the contemporary society, such as the role of oblivion in social interaction, the increasing amount of data and information available on the internet that shape individual identity, the ever growing role of private entities in gathering information for and about users, has made clear that under the label of “oblivion” and “forget”, there are two dimensions to be considered at the same time, the “right to forget” and the “right to be forgotten”, two different concepts. While the “right to forget” can be framed as the right not to be accountable for one’s conduct after a certain amount of time and beyond a given framework of relationships, the “right to be forgotten” encompasses the right not to see one’s past coming back forever (the longer the origin of the information goes back, the more likely personal interests prevail over public interests).

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These concepts, in particular the latter one, raise several sensitive questions, as it is highly questionable until when, to what extent, and by whom should our past be known, or should a person be accountable for past conduct or even should past conduct be made known, also to entities other than those entitled to know because of the specific tasks discharged and/or because of their relationships with the data subject. Striking a correct balance between privacy and freedom of expression has become an enigma increasingly problematic to be solved in the digital environment, also because the balancing between those competing rights and interests reflects values weighed and perceived differently at the global level, as clearly shown by the American approach considering preeminence the freedom of expression over the right to privacy, while for Europeans privacy is trump freedom of speech. In the “age of the algorithm” and the a-territorial dimension of the Internet, we are running into ever growing difficulties in defining the responsibilities of online service providers, in the multitude of terms that have been used in recent years in the legal literature (right to forget, right to erasure, right to delete, right to oblivion, right to social forgetfulness), the one that prevailed, the “right to be forgotten”, despite its catchy terminology, is quite a generic expression that often does not make justice to the concepts it means to carry, and can, indeed, be misleading if it is not grounded in a specific legal tradition and investigated through the looking glass of its judicial enforcement. This is the preliminary reason of interest for a deeper understanding of a “right to be forgotten” from the Italian perspective, bearing in mind that this right arose well before the emergence of Internet and developed before and independently from the adoption of the national legislation on personal data protection, which entered into force in Italy by the end of 1996 and continues to remain distinct from the right to data protection as based upon different conditions.

A further reason of interest rests also within the fact that Italy represents an anomaly in the European context, as data protection principles and legislation also apply to journalistic activities, though significant derogations from the standard requirements have been provided if the data are communicated or disseminated for journalistic purposes (in particular as to the processing of sensitive data), with the specification that anyway is allowed the data processing concerning circumstances or events that have been made known either directly by the data subject or on account of the latter’s public conduct (Art. 137 of the Italian Data Protection Code). Still, the Italian law provides that freedom of the press and the right to privacy and data protection are to be reconciled along a basic principle concerning the “materiality of the information with regard to facts of public interest” (Art. 136 of the Data Protection Code), requiring journalists to evaluate whether dissemination of a personal data contained in news is “material” – that is “pertinent” – by having regard to the public interest (thus requiring them to refrain from quoting a person’s name, publishing a photograph or reporting a highly personal item of information if not pertinent). This principle is also complemented by further general limitations and specific safeguards provided by a specific flexible tool, the “Code of conduct applying to journalistic activities”, an example of the co-regulation policy set out in the Italian data protection legislation, which was adopted in 1998 by the Board of Journalists (the official body representing Italian journalists) in cooperation with the Italian Data Protection Authority.

The working paper will thus consider, in the first instance, how the “right to be forgotten” is recognised and protected in Italy, so to clarify that the expression is nowadays used to reflect three different meanings, with the adjustment to its original understanding of two new dimensions that have been heavily influenced by the Internet revolution.

A special attention will then be devoted to consider, in the aftermath of the “Copernican revolution” brought

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about by the CJEU’s landmark decision in 2014 in Google Spain11 - a truly “Pandora’s Box” ruling according to some national courts and the Italian Data Protection Authority have thus far tried to find a fine tuned equilibrium between the right to be forgotten and freedom of expression, mostly confirming and even reinforcing that no right to be forgotten can be claimed for data for public interest.

Still, a recent decision of the Italian Supreme Court appears going against the tide, reaching conclusions that could result in unprecedented constraints to news media. In departing from the guiding principles assessed at supranational level, clearly misperceived by the Italian court, the question this ruling raises is quite a weird one: can the right to inform have an “expiry date”13?

Such issue obviously reveals the still ongoing need for a deeper reflection on how to reconcile, within the “Web’s memory” era, the right to be forgotten with freedom of the press so to prevent the “tyranny of values” of an absolute protection of the individual dimension undermining the right to seek, receive and impart information of public interest as a basic condition for democracy and political participation, together with the creation of a collective memory.

1. THE KALEIDOSCOPE OF THE “RIGHT TO BE FORGOTTEN” IN THE ITALIAN LEGAL SYSTEM.

a) The traditional concept

The concept of the right to be forgotten is not new from the perspective of the Italian case law and scholarship. The traditional concept of the “right to be forgotten” in the “offline environment” was conceived as a derivation of the protection of personal identity, as a specific safeguard arising in the context of the right to information14, to be granted when balancing the person’s rights with the conflicting freedom of information guaranteed by Article 21 of the Constitution. In a nutshell, the right to be forgotten has originally been construed as the individual’s right to avoid being perpetually stigmatised as a consequence of past actions, thus as the right of any individual to see himself represented in a way that is not inconsistent with his current personal and social identity. The aim is clearly not to prevent the publication of information, but an unjustified new publication of a piece of information which had already been lawfully disseminated in the past but at a certain moment lacking a public interest to further circulate it.

Although in the Italian legal order no specific legal provision foresees the right to be forgotten, since the mid-1990s courts and, later on also the Italian Data Protection Authority, recognized and protected the ‘diritto all’oblio’ – term borrowed and inspired by the corresponding French expression ‘droit a` l’oubli’- immediately deriving it from the provision set forth in Article 2 of the Italian Constitution15 interpreted as a clause recognizing “new fundamental rights” which are not expressly included in the Constitution.

Within this initial perspective, the term ‘right to be forgotten’ refers to the individual’s right to protect the own private sphere from the publication and dissemination of facts or news when there is no public interest for the news story to ‘lawfully circulate again, notwithstanding having been lawfully disseminated in the past’.

In the traditional “offline environment”, the passing of time makes the public interest to know a news story progressively fading and ultimately disappearing. This explains the paramount importance vested by the time factor within the original meaning of the right to be forgotten, as time lapse becomes a crucial parameter to taken into consideration for evaluating a lawful treatment of personal data16.

The test used by the Italian courts, for balancing the conflicting rights to privacy and personal identity with freedom of information, is based on the following parameters: a) the time lapsed since the first publication and the existence of the public interest in the informa-

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11. Google Spain Sl and Google Inc. v Agencia Española de Protección de Datos (AEPD) and Mario Costeja González, C-131/12 (ECJ, May 13, 2014).
15. Article 2 of the Italian Constitution states: ‘The Republic recognizes and guarantees the inviolable rights of the person, both as individual and in the social groups where human personality is expressed’.
16. As Biasiotti and Faro discuss, cit. nt. 6, ‘because the right to such protection arises when time has passed and, due to this elapsing, the dissemination of personal information might be of no more interest for the general public’, 7.
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As made clear in a decision of the Italian Supreme Court (Corte di cassazione) in the late 1990s, it is not lawful to disseminate again, after a substantial time, a news story that had been lawfully published in the past except when the facts previously published, due to other events that have occurred, again become current and a new interest in accessing such information arises even if not closely related to the simultaneity of the disclosure and the event.

In such cases, when the right to be forgotten is recognised as prevailing over freedom of information of the press, the individual is granted with a right to obtain from the courts the prohibition or the inhibition of the renewed dissemination of the information and the compensation for the damages suffered by the individual.

b) The new dimensions in the digital environment: the online archives and the “right not to be found/seen”.

The advent and the development of new technologies and Internet, with the drastic shift caused from a “default of forgetting” to a “default of remembering”, inevitably changed such scenario. The “Web’s memory” (making indefinitely accessible for an unlimited number of persons information and personal data published online), boosted by the concurrent action performed both by search engines (allowing any user to retrieve published information, even past or parts of those, regardless the actual location, and to aggregate those, often without contextualising them), and by big data processing techniques (capable to extract not only explicit knowledge, but also the implicit one) made evident the need for new protection measures against a misleading picture of the individuals, which may be sketched by past aspects never disappeared, no more consistent with the personal current identity, becoming potentially harmful.

As it has been precisely argued, “the time factor, so important in the original perception of the right to be forgotten, assumes a new meaning: the issue at stake now is that the publication of news is permanent and therefore the factor compressing the individual’s personal rights is not the renewal of the publication but the permanent duration of it together with its stable circulation”.

All this has become evident in Italy with the migration of newspaper archives onto the Web: online journalism and the rapidly expanding sector of historical archives of digital publications, accessible free of charge and, even sometimes, over a time span of decades, raised new challenges and the enlargement of the conflicting rights and interests at stake that need to be balanced. News characterized by their persistence on the web and their connected easy availability through search engines, also going a long way back in time, may contain information about individuals very delicate, and almost always negative. These news, even if initially justified by proper exercise of the freedom of the press, then surely legitimized in their conservation by historical memory needs ensuring study and research, “not infrequently reverberate (for an indefinite time) a negative and often conditioning influence on life and on the future expectations of many people”.

Thus, in the approach developed by the Italian Data Protection Authority in two leading cases in 2005 and 2008 concerning online archives, the right to be forgotten in the digital environment has been reframed as a “right not to be found” or as a “right not to be seen” (a

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21. Cecile de Terwangne, nt. 6, 115.
24. Italian Data Protection Authority, Decision Oblivion Rights, http://www.garanteprivacy.it/webquest/home/docweb/-/docweb-display/docweb/11336892; Decision December 11, 2008, ‘Archivi storici on line dei quotidiani: accoglimento dell’opposizione dell’interessato alla re-published and the formal fairness of the exposition respectful of the person’s dignity; c) the person’s role in the fact, whether a public figure or not.

tion, namely the social value of the news; b) the modalities utilized for the publication of individual’s information, namely the truth of the information to be re-published and the formal fairness of the exposition respectful of the person’s dignity; c) the person’s role in the fact, whether a public figure or not.
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concept lying at the bottom also of CJEU’s judgement in Google Spain), considering that in the digital environment the term “right to be forgotten” is misleading and actually, as it has been thoroughly argued, is quite impossible, from a technical point of view, to be enforced on the Web.

On the contrary, such “right not to be found”, according to the Italian DPA, is to be pursued by controlling and limiting the indexability of personal data by general search engines external to the newspaper websites, but leaving the news accessible from inside the newspaper website and archive by means of the specific search function.

In balancing the individual right with the freedom of expression, the freedom to exercise free historical research, the right to education and information as well as with the rules on protection of personal data, the Italian DPA held that there were legitimate grounds for publishing the contested publication, as the facts were still of public interest, and the personal data stored could not be deleted being part of an online newspaper archive that had to be safeguarded for historical research and news story aims. On the other side, the DPA argued that there were no legitimate grounds for personal data in online archives being retrievable through external search engines, thus requiring any archive’s web page containing personal data and news on the plaintiff’s personal sphere and identity to be de-linked from the external search engine function by the data provider (at that time the company acting as the content provider, i.e. the newspaper publisher). With this solution – making news in their integral version only accessible from inside the online archive using the specific searching tool – the Italian DPA have struck a reasonable balance among several concurring – but conflicting – values, as the preservation of the historical memory, the freedom of historical research and information and the protection of the personal sphere.

Still, the legal thinking on the right to be forgotten in the digital era has brought about a third new dimension of this right, according to the landmark decision adopted by the Italian Supreme Court in 2012, arising from a different perspective from the one initially discussed by the Italian DPA seen above.

It is interesting to observe that with this ruling the Italian Supreme Court overturned previous decisions on the same case held both by the Italian DPA and a lower court.

The case arose from a lawsuit launched by an Italian politician who in 1993 had been arrested charged of corruption but later acquitted. Years later, having discovered that the only article retrievable online in the search engine results made reference exclusively to his arrest without any further clarification as to the positive development and solution of the case, he requested first to the Data Protection Authority and then to the Regional Court of Milan the removal of the judicial data referring to him claiming the violation of his rights under the Italian Data Protection Code, complaining for the incomplete and non updated online news regarding him, which led him to ask that the news article regarding his arrest be removed from the online archive of the newspaper “Corriere della Sera”, which was still indexed by search engines or, in alternative, the insertion by the newspaper publisher of an updated link to the subsequent positive news or the transfer of the news item in a section of the newspaper website non indexed by external general search engines.

In the first instance the Italian DPA, as well as a lower civil court, in rejecting these requests, held that the online publication was lawful provided that the treatment of personal data without the consent of the subject were the exercise of the freedom of expression in the press. On the contrary, the Supreme Court came to a different conclusion. Actually the Court did not accept the claimant’s ground for libel, as it recognised that the article had reported true facts at the time of its publication, but in any case the Supreme Court acknowledged that it had to be granted a protection to the individual in the digital era to preserve his real and true identity, thus conceiving a new dimension of the “right to be forgotten” as “the right to a contextualised and updated information” or even – but only as long as “if there is no public interest in knowledge of the news” – a “right to data deletion”.

29. Italian Supreme Court, Third Civil Division, judgement no. 5525 of 2012.
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If then, for the individual, a right to updating the news has to be granted, otherwise - quoting the Supreme Court - “news become biased and inaccurate and therefore untrue” (emphasis added), which led some scholars to discuss over “a right to the truth at the present time”, a corresponding obligation has been imposed on online newspapers quite problematic, namely an obligation to update their online archives through equipping them with “an appropriate system designed to provide information (in the body of text or in the margin) on whether there exists a follow-up or any development to news items and if so what the content is (...) allowing users swift and easy access to the updated information”.

Thus, in deciding the specific case, the Supreme Court held that, being the right to privacy limited by the freedom of expression only to the extent that there is a public interest in the news (as precisely happened in the case, where the political figure of the claimant perpetuated the general relevance of his arrest), due to the fact that the news reported were to be considered incomplete in the light of subsequent events, a violation of the right to a coherent and updated identity of the person had to be recognized according to the provisions set forth in Articles 10 and 7 of the Italian Data Protection Code, requiring personal data to be accurate and, where necessary, kept up to date, therefore entitled the data subject to ask for their updating, rectification, integration, or otherwise their erasure, anonymization or blocking if processed unlawfully, including data whose retention is unnecessary for the purposes for which they have been collected or subsequently processed.

It is quite interesting also to observe that the Supreme Court, even if almost in passing, held that the search engine service provider had no role or responsibility in the matter, thus rejecting one of the arguments of the defendant, who had claimed his lack of locus standi in favour of Google. The Italian Court thus was anticipating the same conclusion the Advocate General would have supported one year later in the Google Spain case, a conclusion which as we know the Court of Justice completely overturned in its decision.

Now, the 2012 Italian Supreme Court decision on online archives has received opposing comments in the Italian legal literature. Few scholars have highlighted its innovative approach, for its taking into consideration both an individual and collective perspective as the Supreme Court tried to safeguard at the same time not only the right of the persons involved in the events to protect their own personal and moral identity, but also the right of users of online newspapers to receive accurate and complete information. Still, the majority of comments have heavily criticised it, not only for the huge economic duty de facto imposed on online newspapers archives providers – required to set up a constant updating system of all items published online –, but also for its “potentially explosive” conclusions from a legal standpoint in case of failure to comply with the said obligation, being exposed not only to civil actions for damages for prejudice suffered but also being at risk to be prosecuted at criminal level for unlawful personal data processing.

Subsequent rulings from lower courts, following the same rationale, provided further clarification in the field of online archives, reducing those burdens on publishers and owners of the archives. This is what clearly emerges from a ruling decided in February 2014 by the Court of Appeal of Milan enforcing such obligation to keep personal data updated through the insertion of a link apt to contextualize the news along the evolution of the events, derived from Article 7 of the Italian Data Protection Code, being shaped not as the obligation to update in general any information in the archive, but only upon a precise and specific request of the person concerned.

Notwithstanding such clarifications, this jurisprudence on online archives cannot be regarded as definitely settled, being on the contrary questioned recently by a problematic ruling adopted again by the Italian Supreme Court – this time in the post Google Spain case scenario – perceived as a real threat to the freedom of the press.

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32. Italian Supreme Court, Third Civil Division, judgement no. 5525 of 2012.

https://blogdroiteuropeen.com
2. THE IMPACT OF THE CJEU’S JUDGEMENT IN GOOGLE SPAIN ON THE ITALIAN LEGAL SYSTEM.

The Google Spain ruling adopted in May 2014 by the European Court of Justice clearly had a relevant impact on the Italian legal system, since until that decision courts and the Italian DPA had followed the same position expressed by the Advocate General in that case – the one precisely overturned by the CJEU - namely imposing directly on the source web page publishers the obligation to protect the “right to be forgotten” of individuals through appropriate measures for updating the news, while conceiving search engines as pure intermediaries not liable for personal data processing.

The new scenario brought about by the Google Spain judgement of search engines as data controllers, with their amounting to entities individuals can directly turn to not only for requests of delisting of search results but also for exercising their “right to be forgotten” as a “right to erasure” in order to obtain links to relevant pages be deleted in case personal data reported in the news are no more relevant (due to the long time passed or in case of absence of public interest or of an historical concern), has immediately led to a new perception of search engines as private entities actually displaying a sort of “para-constitutional role”37, with their being directly involved – as judges are – in balancing conflicting rights.

This new perception is well reflected in the immediate reaction the Italian DPA displayed shortly after the CJEU’s decision when, in July 2014, it not only imposed on Google an order to comply with the privacy measures it had set forth to protect Italian users’ privacy, but for the first time ever in Europe it actually reinforced such order through the adoption of a verification protocol focused on the practical implementation of such measures by Mountain View. With this, Google could be subject to regular checks by the Italian DPA to monitor the progress status of the actions taken to bring its platform into line with domestic legislation by the deadline of 15 January 201638. It is remarkable that the protocol, requiring Google among other measures to put in place a specific timeframe regarding data deletion from both online and back-up systems, foresaw also a continue exchange of information between Mountain View and the Italian DPA regarding Italian users’ delisting requests received by Google so as to monitor the implementing arrangements of the right recognised by the CJEU, so allowing a sort of “supervisory” role by the Italian DPA.

As already clarified, in the Italian legal system the solutions already acknowledged for balancing the freedom of information, the right to information, the right to be forgotten and the freedom to exercise free historical research, initially represented by orders for the “de-indexing” of the relevant article from general search engines while leaving it accessible by means of the internal website search function39 (something that can be accomplished by the source web page publisher independently without requiring the active participation of the search engine service provider), have been complemented – after the 2012 Italian Supreme Court’s ruling – also with decisions entailting a direct intervention on the source web page with orders for updating the concerned piece of news on the newspaper electronic archive to contextualise them along the subsequent events occurred upon a specific request40.

In any case, both the Italian DPA and lower courts giving specific implementation to the CJEU’s decision have reaffirmed that the right to be forgotten has to be weighed against the freedom of the press, excluding such right in case of recent data of public interest.

In deciding an appeal of a user against a Google decision not to de-indexing an article appearing in Google’s search results reporting an inquiry where the person had been involved in, regarded by the plaintiff as “extremely misleading and grossly prejudicial”, the Italian DPA in a decision enacted in December 2014 made clear, while rejecting the request, that users cannot invoke the right to be forgotten for events not only recent but also having a relevant public interest (like an important judicial enquiry), reporting facts respecting the essentialness of information, but it added that the user can ask the publisher to request a contextualisation of the article, through an integration of the news published. Furthermore, the Italian DPA stated an important principle re-

38. Italian DPA, Decision 10 July 2014, no. 3283078; Decision 20 February 2015, the protocol envisaged quarterly updates on progress status and empowers the DPA to carry out on-the-spot checks at Google’s US headquarters to verify whether the measures being implemented are in compliance with Italian law. Thus it enabled the DPA to continuously monitor the changes Google was required to make to the processing of personal data relating to users of its services – including its search engine, emailing, YouTube and social networking services.
39. Alessandro Mantelero, nt. 28.
40. See the orders requiring an updating of the news in the online archive issued by the Italian DPA to one of the main news magazine editor, the “Gruppo Editoriale L’Espresso”: decisions 24 January 2013, no. 31; 23 July 2015, [doc. web n. 4364422].
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Regarding the so-called “snippets”, the texts automatically displayed by Google complementing the search results, entitling those adversely affected to request for their deletion in the case those snippets were not consistent with the news reported in the web pages the links are referring to as being incomplete, because such snippets represent processing of personal data and thus they have to be relevant, correct and not misleading.

Again, more recently in another case the Italian DPA rejected the appeal filed by a former terrorist who in 2009, having served his sentence, had unsuccessfully already asked Google the de-indexation of web pages reporting serious crimes he had committed in the 1970’s and 1980’s and the removal of search suggestions associating his name with the term “terrorist”. The man had thus turned to the Italian DPA invoking the right to be forgotten assuming that he was not a public figure but a free citizen, harmed in his reputation by the permanence on the web of old news causing a misrepresentation of his actual life. The Italian DPA, in referring also to the 2014 Guidelines enacted by the European Privacy Authorities, held that no right to be forgotten could be recognised for information concerning serious crimes (an issue the European DPA had agreed upon to be dealt with more stringent evaluations on a case by case level) as all the news reported had gained historical value and almost being part of the collective memory still subject to a huge public interest as accomplished by the topicality of the references displayed by the same URL41. Assuming on the contrary the lack of an actual public interest, the Italian DPA in another recent case upheld the request of an Italian citizen asking the removal from Yahoo’s search engine of links to a US website reporting news of an old judicial misadventure that had occurred, thus leading him to call also for a monetary compensation due to the illegal treatment of his personal data. In recalling the CJEU’s judgement rationale, the Court of Rome rejected the plaintiff’s request as those news fell under the protection of freedom of expression, assuming that the right to be forgotten could only be granted when news are not recent and when lacking a public interest. For the court, the latter criterion in the context on the right to be forgotten leads to consider as “public figure” not only politicians, but also businesspersons and lawyers.

3. A RIGHT TO DE-LIST, TO UPDATE OR….. TO ‘FORGET’ THE NEWS? REFLECTIONS ON A RECENT DECISION BY THE ITALIAN SUPREME COURT.

A recent decision of the Italian Supreme Court44 seems to open an unprecedented and problematic path on grounds of right to be forgotten regarding both its extent and balance against the freedom of the press and the right to be informed about news that can be of public interest, calling into question – in the field of online archives – principles that appeared to be deeply consolidated in the Italian legal system.

The case, in fact, did not involve de-listing from Google search engine, or intermediary liability, nor the updating of news displayed to protect the “actual” true identity of the plaintiff, but it immediately addressed the issue whether the right to be forgotten should prevail over freedom of expression in records included in newspapers’ archives. The case arose from the request of the owners of an Italian restaurant to remove an article published in a local online newspaper, reporting a criminal proceeding regarding their restaurant in 2008. The plaintiffs in 2010 had already asked the publisher to remove the news item and, upon his refusal, as a reaction they filed a law suit claiming reputational damages and the violation of their privacy together with the violation of their right to be forgotten. What is striking in this case is that the plaintiffs were not contesting that the facts reported were true and the public interest for the whole story, but they filed their law suit simply on the grounds that they did not want any longer that news item still being accessible on the online archive of the newspaper and indexed by Google’s search engine, as detrimental to their reputation and to the image of their restaurant.

41. Italian DPA, Decision 31 March 2016, doc. web n. 4988654
42. Italian DPA, Decision 15 February 2017.
43. Court of Rome, First Division, 3 December 2015, no. 23771.
44. Italian Supreme Court of Cassation, Decision 24 June 2016, no. 13161.
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The first court’s decision, released in the pre-Google Spain scenario in 2013, recognised precisely the main argument raised by the plaintiffs, namely that after two and a half years from the events reported - and from when the article had been first published - the right to inform the public could not possibly be considered a legitimate ground to maintain in the online archive the news item as the article had already been kept online for a period considered suitable enough to guarantee the right of the public to be informed. Still, as the publisher in the meanwhile had already deleted the article from the online archive, the court could not order the removal of the article but in any case it awarded the plaintiffs with significant damages.

The Supreme Court, in a total surprising way, confirmed the same rationale of the first court’s ruling considering – in discretionary manner lacking a law provision in that sense – that after the lapsing of time of two and a half years (which was the time passed from the online publication until the formal request of removal addressed by the owners of the restaurant) and until when the article had been eventually deleted an illegal processing of personal data had occurred motivated by two reasons: the fact that “the news article was easily searchable and accessible” (thus retrievable with Google search function just by typing the name of the plaintiff and of the restaurant) and the “widespread readership of the local online newspaper” provided by its online publication.

So, being the time passed – two and a half years – considered suffice enough to satisfy the public interest as a guarantee of the right to be informed, at least since that “expiry date” (namely since the date when the formal notice of removal had been received by the publisher) the Court held that those data “could no longer be disclosed”. According to the Italian Supreme Court, such conclusion had to be based on Article 11 of the Italian Data Protection Code stating that “data must be kept in a form which allows identification for a period of time not beyond that which is necessary for the purposes for which they were collected”.

The decision has been severely criticized for its consequences on freedom of expression both by Italian legal scholars – ironically also noting that news articles now had an expiry date “just like milk, yogurt and a pint of ice cream”46 –, as well as by prominent European newspapers47 and eventually the World Association of Newspapers and News Publishers48 who, respectively, argued that the ruling paved the way in the last instance for providing a new meaning of the right to be forgotten as “the right to remove inconvenient journalism” or as “the right to forget the news”. These reactions clearly boosted the perceptions of those who had already argued that the right to be forgotten recognised in Europe could ultimately “corrupt history”49 or, even more harshly, assumed that “Europe is exporting censorship all over the world”50.

It is worth noting that this decision is not isolated among courts in Europe, as it appears to reflect the same reasoning underlying a two months earlier decision adopted by the Belgian Cour de Cassation (the highest Belgian tribunal) in the Le Soir case51: Here the newspaper “Le Soir”, having made freely available online its entire archive since 2008, had been ordered to modify, and thus alter, an article that had been published 22 years before, with the anonymization of the applicant’s name in the online version of the original article (in the said article, published in 1994, a car accident causing the death of two people had been reported together with the citation of the driver’s full name, who therefore asked the newspaper to remove the article or anonymize it).

What is even more worrying in the Italian Supreme Court’s judgement is that – contrary to the Belgian one where the facts at stake had occurred decades in advance – the case originating the decision was still at bar. So, neither the fact that the events reported were recent, nor the fact that under issue were highly sensitive data, since they included criminal charges, were duly taken into consideration by the Italian Supreme Court, which on the contrary recognized the “absolute supremacy” of the right to be forgotten of the plaintiffs thus recasting completely the terms of the issue, as it

45. Guido Scorza, nt. 13. See also the critical comments by Giovanni De Gregorio and Andrea Serena, nt. 33.
50. See P.H. v. O.G., C.15.0052.F (Belgian Supreme Court [Cour de Cassation], 29 April, <www.juricaf.org/arret/BELGIQUE-COURDECASSA TION-20160429-C150052F> (French only).
not clear anymore which is the rule and which is the exception.

The recent Italian Supreme Court’s decision, by failing to distinguish between source and search engine, is alarming indeed because it completely disregarded any journalistic exception – which on the contrary is clearly provided by the Italian law – through an obscure and even irrational motivation. On one side, in fact, the Court has considered that the persistent publication and dissemination on the local website of the news item was characterized by an objective and prevalent “informative goal”, which exceeded the mere data processing of news items for historical purposes.

But, on the other side, it has held that, in the absence of further updates of the news piece on the legal case and given the widespread accessibility of news piece published online, two and a half years had to be regarded as an appropriate length of time to guarantee the right of the public to be informed, thus recognising the right to privacy of an individual as prevailing over the right of the general public to be informed and the right of the press to inform.

Even if the impact of this judgement on future case law is still to be assessed (though, for the time being, it could not be excluded a chilling effect, as publishers may be led to consider seriously all takedown notices, removing also articles still relevant for the public), this decision is to be wholly criticized for, on one side, it is built on a wrong pre-comprehension severely affecting online journalism and, on the other side, it departs from the balancing test made clear at the supranational level.

To begin with, the Italian Supreme Court’s decision has made even more evident an issue which rests still not completely settled in the Italian case-law. The decision, in fact, moves from a distinction between online publication and paper publication as it links the illegal data processing to the keeping of the direct and easy access to the news article and to its dissemination through the web, which – contrary to the paper version of the same newspaper – are interpreted as leading within short time to the fading of public interest in the news item. Actually, it was precisely on this rationale that a former lower regional court’s decision in 2013, in granting the recognition of the right to be forgotten, had ordered the online archived article to be deleted considering on the contrary appropriate the storage of a single paper copy.

Here, again, the Supreme Court equates the keeping of the news item in an online archive to a permanent publication. This conclusion cannot be retained, as on the contrary the different notions of mere conservation of a news article in an online archive and the publication of the said article, even if on the newspaper website, are to be traced. The publication, in fact, consists in an offer to the public of a certain product for its dissemination and only to such publication a right to be forgotten can be recognised in case the news item has infringed the principles of truthfulness, continence and relevance. On the contrary, as already accomplished in 2014 by the Court of Appel of the same regional court previously mentioned, the insertion of an article in an online archive, while enhancing the access to its content, cannot be considered as a new publication being only equivalent to the physical access to the article (the online publication actually becoming relevant for defining higher amounts of damages in cases of defamation, due to the increased prejudice suffered caused by the capilarity of an online publication). One might argue, on the contrary, that the conservation of a news item in an online archive is something similar to an archiving operation, which follows different rules as the processing of personal data for historical purposes may be carried out also upon expiry of the period that is necessary for achieving the different purposes for which the data had been previously collected or processed (see in the Italian Data Protection Code, Article 99).

Now, both decisions adopted in 2016 by the Italian and Belgian Supreme Courts, quite surprisingly made specific reference, in their legal reasoning, to the Google Spain judgement to get to the conclusion that the right to privacy, embedding the right to be forgotten, should prevail over the freedom of expression justifying the removal of the news article from the online archive. But that conclusion is clearly based on a severe misunderstanding of the Google Spain’s reasoning, which is not about “deleting content” and information from the Internet as it merely recognises, after the passing of a reasonable long time (in Google Spain the time passed amounted to 16 years), a right to de-listing the links, thus a “right not to be seen/found” only affecting the
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results gathered from searches made when typing the person’s name and only provided that the person at stake does not cover a public role. The CJEU’s judgement, moreover, clearly mentioned an exception for “journalistic purposes” and expressly stated that the right to be forgotten cannot be exercised against the publisher of the webpage if the processing is carried out “solely for journalistic purposes” (par. 85), something which on the contrary precisely was enforced in the Italian case.

The Italian Supreme Court’s decision seems to have shaped a right to be forgotten as a sort of “absolute right of informational self-determination” and, what is even most alarming, empowering de facto individuals who features in a news story “to decide when the time has come to remove that story from the collective memory”54. Like a Leibnitzian monad, the right stemming from the approach followed by the Italian Supreme Court’s decision is solely built on the amount of time passed since the occurrence of the relevant facts, without any confrontation with the wider “world of balancing criteria” the European Data Protection Authorities, gathered in the Art. 29 Working Party, carefully defined in the “Guidelines” adopted in November 2014 for the implementation of the Google Spain’s judgement, precisely built to be read in the light of “the interest of the general public in having access to information”55. Those criteria, inevitably leading to the granting of a right to de-listing through a case-by-case approach, embrace a very wide scenario of relevant circumstances – thus justifying the Art. 29 WP’s conclusions that the impact of de-listing on freedom of expression and access to information would have been very limited56 – ranging from subjective criteria (referring to the data subject, whether public figure or playing a public role or a minor), to objective criteria (regarding the type of data processed, whether accurate, relevant, not excessive, sensitive data or referring to criminal charges), criteria referring to the consequential effects (prejudice/impact disproportionate, risks for the data subject) and eventually to criteria referred to the modality or the context of the publication (among these, the publication in the context of journalistic purposes)57.

Moreover it is to be stressed that with this ruling the Italian Supreme Court seems to have disregarded the duty of consistent interpretation to the Strasbourg Court’s jurisprudence stated by the Italian Constitutional Court in its decisions no. 239 of 2009 and 49 of 2015, the latter of which has better clarified that Italian courts are bound by a Strasbourg’s decision if it: a) decides precisely on the same case which is brought again before the Italian judge; b) is part of a well-established and consistent thread of European case law; c) is a pilot judgment58.

Now, on the subject matter of online archives in 2013 the European Court of Human Rights issued an important decision in the case Węgrzynowski and Smolczewski v. Poland59 that can be regarded as a direct precedent as it dealt with the question of deleting content violating privacy from Internet archives. In this ruling – one of those decisions reflecting the ever growing ECtHR self-perception of its own role as evolving into a peculiar European constitutional court60 – the ECtHR stressed that, although the Internet publications may generate a particular risk for the protection of private life, the Internet archives serve the public interest and are subject to the guarantees arising from the protection of freedom of expression (art. 10 ECHR) as they make a substantial contribution to preserving and making available news and information and they constitute important source for education and historical research (§ 59). While reminding 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 past been found, by judicial decisions, to amount to unjustified attack on individual reputations”, the ECtHR acknowledged however, that “it would be desirable to add a comment to the article on the website informing the public of the outcome of

54. See Guido Scorza, nt. 13.
56. See Guidelines, nt. 55, 11.
59. ECtHR judgment from 16 July 2013 Węgrzynowski and Smolczewski v. Poland (application no. 33846/07).
60. Guido Raimondi, the Vice-President of the ECtHR, said that the Court rules on single cases, but also feel as if playing a constitutional role, see “Corte di Strasburgo e Stati: dialoghi non sempre facili. Intervista a cura di Diletta Tega a Guido Raimondi”, Quaderni costituzionali, (2014), 468; in the same perspective, see the memoir of a well-known former President of the Court, J.P. Costa, ‘La Cour européenne des droits de l’homme. Des juges pour la liberté’, Paris, (2013)
the civil proceedings in which the courts had allowed the applicants’ claim for the protection of their personal rights” (§ 65).

Contrary to the precedents from the ECtHR and the CJEU, the Italian Supreme Court’s decision in 2016 chose an “absolutist” understanding of the right to be forgotten, through the removal of the information form the online archives, at the expense of competing rights of freedom of expression and the interest of the public to have access to the information. On the contrary, if it had followed the supranational case-law, the Italian Supreme Court would have been able to precisely meet the goal the Italian Constitutional Court requires national courts when applying the said case-law, namely that ‘national authorities have a duty to prevent the protection of certain fundamental rights – including from the general and unitary perspective of Article 2 of the Constitution – from developing in an unbalanced manner to the detriment of other rights also protected by the Constitution’ (emphasis added)\(^ 61\).

4. FINAL COMMENTS.

In the aftermath of the landmark decision in Google Spain, in the Italian legal system lights and shadows seem to accompany the newly emerging right to be forgotten in the online environment. While lower courts and the Italian Data Protection Authority have been heavily committed in trying to further clarify and reinforce the necessary balance between personal privacy interest and public interest in freedom of expression and access to information along the lines of the CJEU’s test in Google Spain, the latest Supreme Court case-law showed misperceptions regarding the extent of the right to be forgotten as regarding online archives.

To this regard, it might not be useless to stress that the said misperceptions might have been overcome if only the Italian court had referred the issue to the CJEU, just like as it did on the contrary in a previous case in 2015, the Manni case\(^ 62\), thus leading the CJEU to provide it with more clarity on the right to be forgotten\(^ 63\). Thus in the very recent ruling in Manni, where at stake was the relationship between the availability of personal data in public registers and the data subject’s right to limit this regime of full disclosure, the CJEU clearly reaffirmed that the right to be forgotten is not “absolute”, as it always needs to be balanced against other fundamental rights (in this case, as said, it was not at stake the freedom of expression but interests of third parties to gain information on particular persons holding a key position in the economic life\(^ 64\)), requiring a case-by-case assessment taking into account the type of information, its sensitivity for the individual’s private life as well as the interest of the public in having access to that information and the role played by the data subject.

In any case, these misperceptions presumably will be solved once the new General Data Protection Regulation\(^ 65\) will enter into force in May 2018, not only due to its provisions contained in Articles 17 and 18, replacing and better qualifying the provisions contained in the Data Protection Directive on erasure and blocking of data, but also because these new provisions, as being inserted in a regulation, will be directly applicable within the Member States legal frameworks thus providing for a higher degree of data protection harmonization within the European Union.

In fact it should not be underestimated that under Article 17 the right to erasure – even if labelled in this piece of legislation also as a “right to be forgotten” for political reasons to mark a distinction from the US legal tradition\(^ 66\) – has been framed with specific limits precisely aiming at encompassing reinforced safeguards for

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\(^{61}\) Italian Constitutional Court Decision no. 317/2009.

\(^{62}\) CJEU, Request for a preliminary ruling from the Corte suprema di cassazione (Italy) lodged on 23 July 2015, Case C-398/15 Camera di Commercio, Industria, Artigianato e Agricoltura di Lecce v Salvatore Manni.

\(^{63}\) For a thorough understanding of the case see Alessandro Mantelero, ‘Right to be forgotten and public registers. A request to the European Court of Justice for a preliminary ruling’ in EDPL - European Data Protection Law Review, 2016/2

\(^{64}\) Case C-398/15 (CJEU, 9 March 2017). The CJEU, following the Opinion of the AG Bot, clearly stated that no anonymization, deletion or blockage of the personal data contained in a Company Register could be allowed, considering that there is a prevailing public interest in the transparency, legal certainty and good functioning of markets, which the completeness of the Company Register’s records contributes to achieve.


\(^{66}\) See Franco Pizzetti, nt.1.
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sely aiming at encompassing reinforced safeguards for freedom of expression, along with a broader extent of the “media exception”. Seen from the Italian perspective, what is striking to stress is that Article 17 expressly states that a right to erasure – a right a data subject might exercise mainly when “personal data are no longer necessary in relation to the purposes for which they were collected or otherwise processed” – cannot be granted against controllers if they are “exercising the right of freedom of expression and information” or if the personal data processing is necessary “for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes” in so far the right to be forgotten “is likely to render impossible or seriously impair the achievement of the objectives of that processing,” (Art. 17, par. 3, GDPR).

Particularly useful, for a more gradual approach in the balancing between the contrasting rights and interests at stake, should also turn out to be the new “right to restriction of processing”, provided by Article 18, to be invoked when the data subject wants to contest the accuracy of personal data processed, thus pre-emptively restricting access to the news item pending the examination of its accuracy (with data controllers entitled only to store the personal data, but not further process it), and to be lifted up in short time as soon as such verification by data controllers is performed.

In the meanwhile that the GDPR will come to a practical application, for the Italian legal system it will be of the highest importance the solution that the CJEU will provide in the preliminary reference raised on February 24, 2017, by the French highest administrative court (the “Conseil d’Etat”). In this request for preliminary ruling, serious issues have been raised in the light of the European Court of Justice’s judgment in its Google Spain case, precisely “in relation with the obligations applying to the operator of a search engine with regard to web pages that contain sensitive data, when collecting and processing such information is illegal or very narrowly framed by legislation, on the grounds of its content relating to sexual orientations, political, religious or philosophical opinions, criminal offences, convictions or safety measures”.

67. Giancarlo Frosio, ‘Right to Be Forgotten: Much Ado About Nothing’ (January 31, 2017). 15(2) Colorado Technology Law Journal (2017 Forthcoming), available at SSRN: <https://ssrn.com/abstract=2908993>, last accessed 1 May 2017 notes (pp. 9-10) that “the “media exception” of the GDPR appears substantially broader than its equivalent in the earlier Data Protection Directive. The exception is no longer limited to data processing “carried out solely for journalistic purposes or the purpose of artistic or literary expression.” Rather, the exception aims more generally to reconcile data protection rights with “the right to freedom of expression and information, including the processing of personal data for journalistic purposes and the purposes of academic, artistic or literary expression”.