Chapter 15
New Boundaries for the Right to Be Forgotten?
An Analysis of Italian Jurisprudence

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ABSTRACT

The right to be forgotten has come to the forefront of the academic debate as a reaction to Court of Justice's decision in case C-507/17 Google LLC c. CNIL concerning the issue of geographical extension of the delisting obligation. Along with the development of CJEU jurisprudence, national courts have developed their own caselaw interpreting and adapting the right to be forgotten, now included in art 17 of the General Data Protection Regulation, to the pre-existing legal framework. Italian courts, and in particular the Italian Supreme Court, have addressed in several occasions the features and facets of the right to be forgotten, and the recent decision of the Grand Chamber (n. 19681, 22 July 2019) is the last though not the least. Starting form this decision, the chapter will analyse how the Supreme Court has attempted to systematise the right to be forgotten distinguishing what is called the traditional application of the right from the ones emerging in the digital context.

INTRODUCTION

The right to be forgotten has come again in the spotlight after the recent intervention of the Court of Justice of EU (hereinafter CJEU), triggering a new wave of academic debates addressing its content and boundaries. The trigger was, obviously, the decision in C-507/17 *Google LLC v. Commission nationale de l'informatique et des libertés* (French Data Protection authority, hereinafter CNIL case) addressing the scope of application of the obligation of de-indexing for Internet service providers, and (re)propos-

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ing the dilemma regarding the geographical boundaries applicable to the protection of data subjects' rights in the global dimension and the effective enforcement of such rights. The CNIL case stems from the landmark decision of the CJEU in case C-131/12 Costeja v. Google Spain in 2014, which for the first time qualified the right to be forgotten in EU law.[1] The decision in Google Spain case, addressed the requests of a Spanish individual against the search engine with specific regard to the search results provided when the name and surname of Mr Mario Costeja were typed as keywords (Kranenborg, 2015; Martinez, 2015; Haga, 2017; Finocchiaro, 2015; Pollicino, 2014, 2949; Resta and Zeno Zencovich, 2015).

The CNIL case is one of the few cases that reached the CJEU, though it is not the only case addressing the implementation of the right to be forgotten, as a large number of cases were decided by national courts since 2014. As a matter of fact, in the aftermath of the CJEU decision in Google Spain case, many courts had the difficult task of interpreting the national legal provisions implementing EU data protection legislation in the light of the CJEU decision (Kulk and Zuiderveen Borgesius, 2015; Friedl, 2019).[2]

This was not as easy as it may seem, because in some countries, such as Italy, the jurisprudence addressing the interplay between the persistence of personal data in press articles and in online archives and the protection of individual privacy was already well-established, both at First instance and at Supreme court level.[3] As a matter of fact, since 2014, many decisions of the Italian Supreme court addressed cases falling into the application of the right to be forgotten trying to identify a set of reasonable criteria, that lower courts may be able to adopt in order to provide a coherent approach.[4] Although the (then) Art 29 Working party provided for guidelines concerning the implementation of the Google Spain judgment, national courts were asked to adapt these general criteria to the real cases, ensuring consistency and coherence, as well as compliance with EU law.

In Italy, in particular, the Supreme court provided for several decisions addressing the right to be forgotten where it tried as much as possible to identify additional criteria applicable to the different factual circumstances. The latest decision of the Grand Chamber of the Italian Supreme Court n. 19681, 22 July 2019, was supposed to provide such criteria in a clearer manner. It must be underlined that the request for a decision of the Grand Chamber is a specific procedure aimed at granting the coherence of jurisprudence: any Chamber of the Supreme Court, when deciding a dispute, can raise a question to the Grand Chamber in order to receive a clarification on a certain point of law or, in case of a potential conflict of interpretation between different Chambers of the Supreme Court, to solve such conflict. Then, the decision of the Grand Chamber acts as an authoritative precedent to be followed not only by the recurring court, but by all courts (De Amicis, 2017).

As a matter of fact, the case decided by the Grand Chamber was interesting as it addressed the application of the right to be forgotten to printed press, and would have allowed to clarify how far the criteria identified by the CJUE in Google Spain case would be applicable to such factual circumstances. However, the court did not evaluate the right to be forgotten as a single concept, but rather it provided for a set of distinctions which resulted in different *rights* to be forgotten. As a result, this classification may barely fit with the EU approach and potentially hinder the harmonisation objective aimed at by the GDPR.

In order to verify the interplay between European and national jurisprudence, the contribution first assess how the right to be forgotten has been defined by the European jurisprudence and legislation (par. 2), then highlights the jurisprudence of Italian courts before and after the CJEU decision in Google Spain (par. 3). In par. 4, the recent decision of the Grand Chamber of the Italian Supreme Court is analysed presenting the issues that were still left open by the decision. Concluding remarks will follow.