Reports of Cases

OPINION OF ADVOCATE GENERAL
PITRUZZELLA
delivered on 7 April 2022 [1] [i]

Case C-460/20

TU,
RE
v
Google LLC

(Request for a preliminary ruling from the Bundesgerichtshof (Federal Court of Justice, Germany))

(Reference for a preliminary ruling – Protection of personal data – Request for de-referencing of allegedly false information and removal of preview images (thumbnails))

I. Introduction

1. By the request for a preliminary ruling which is the subject of this Opinion, the Bundesgerichtshof (Federal Court of Justice, Germany) referred two questions to the Court of Justice on the interpretation of Article 17(3)(a) of Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) [2] ('the GDPR') and Article 12(b) and Article 14, first paragraph, point (a) of Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, [3] read in the light of Articles 7, 8, 11 and 16 of the Charter of Fundamental Rights of the European Union ('the Charter'). These questions were raised in connection with an action brought by TU and RE (together, 'the applicants') against Google LLC ('Google' or 'the defendant'), seeking to obtain, first, the de-referencing of certain links displayed in the results of searches made using the search engine operated by the defendant, which lead to articles published online by a third party in which the applicants are identified, and, second, an order requiring the defendant to cease to display the photographs featured in one of those articles in the form of preview images (thumbnails).

2. It is common knowledge that a search engine does not merely host content produced by others online but has an active role in the dissemination of information. The 'wealth of the web' would be nothing more than potential if the user were unable to access the information which he or she

1 Original language: Italian.

2 OJ 2016 L 119, p. 1.

3 OJ 1995 L 281, p. 31.

needed by means search engines and, in the vast ocean of information produced on the internet, so much information would remain virtually inaccessible without the intermediation of those search engines. When the search engine allows the user to make a search on the basis of certain keywords, such as the name of a person, it makes choices as to the sites to include in the search results and the order in which to list them, which has an enormous impact on the dissemination of information. These choices are made by the algorithm used and thus depend on the selection criteria which the operator of the search engine chose during the programming activity. Further choices are made on a large scale as part of the content moderation policies implemented by the platform according to the standards which it adopted, for instance to defend its business model, to protect certain sensitivities among users or to fulfil legal obligations. These activities involve decisions on the content not to be published in the results of the searches made by users.

3. The search engine therefore acts as an information 'gatekeeper', an expression used to designate entities whose activity is necessary to allow opinions or information produced by third parties to enter the circuit of democratic communication. That function of controlling the 'gates' through which the flow of information passes, which is performed by search engines such as Google, has significant consequences both for the freedom of expression and information, enshrined in Article 11 of the Charter, and the rights to respect for private life and protection of personal data, laid down in Articles 7 and 8 of the Charter. In particular, the inclusion, in the list of results which appears following a search made on the basis of a person's name, of a web page and the information contained in it relating to that person, makes it considerably easier for any internet user to access that information and can play a decisive role in the dissemination of that information and thus the exercise of freedom of expression and information. For the same reason, that inclusion is liable to constitute a more significant interference with the data subject's fundamental right to private life than the publication by the publisher on that web page, as the Court has had occasion to specify in its case-law. [4]

4. In the request for a preliminary ruling which is the subject of this Opinion, what is at issue is the specific feature of the function performed by search engines, and the tension that this creates between the fundamental rights laid down in Articles 7, 8 and 11 of the Charter, in a scenario which has not yet been examined by the Court, that is to say a situation in which the data subject challenges the truth of the processed data and requests, for that reason, the de-referencing of links to the content published by third parties in which those data appear.

II. Legal framework

5. In addition to Articles 7, 8, 11 and 16 of the Charter, which set out respectively the right to respect for private life, the right to protection of personal data, freedom of expression and information and freedom to conduct business, of relevance for the purposes of this analysis are, in particular, Article 12(b) and Article 14, first paragraph, point (a) of Directive 95/46, to the text of which I will merely refer, and Article 17 of the GDPR. The latter article lays down, in paragraph 1, the right of the data subject to obtain the erasure of personal data concerning him or her, inter alia where those data have been unlawfully processed, and the corresponding obligation on the controller to effect that erasure. Paragraph 3(a) of that article specifies that paragraph 1 is not apply to the extent that processing is necessary 'for exercising the right of freedom of expression and information'. The other provisions of Directive 95/46 and the GDPR relevant to the examination of the request for a preliminary ruling will be referred to in the course of the analysis.

[4] See, in particular, points 14 and 15 of this Opinion.

III. The dispute in the main proceedings and the proceedings before the Court

6. TU works in a position of responsibility, or is involved, in various companies which provide financial services. RE was TU's cohabiting partner and, until May 2015, held general commercial power of representation in one of those companies. On 27 April 2015, 4 June 2015 and 16 June 2015, the website www.g … net ('the g-net website') published three articles which expressed critical opinions and doubts as to the reliability of the investment model of several of those companies. The article dated 4 June 2015 also featured four photographs – three of TU and one of RE – in which the applicants were shown driving luxury cars, in a helicopter and in front of a charter plane. Together with the articles, those images suggested that the applicants were enjoying a life of externally financed luxury. The operator of the g-net website is G-LLC, according to the imprint. The corporate purpose of G-LLC is, according to its own statement, 'to contribute consistently towards fraud prevention in the economy and society by means of active investigation and constant transparency'. However, various publications have criticised the business model of G-LLC, accusing that company, among other things, of attempting to blackmail companies by initially publishing negative reports and then offering to delete the reports in return for so-called protection money. The articles dated 4 June 2015 and 16 June 2015 were displayed in the list of search results produced when the applicants' first names and surnames were entered in the search engine operated by Google, both on their own and in conjunction with particular company names, and the article of 27 April 2015 was displayed when particular company names were entered in its search engine. These results contained a link to the articles in question. Google also displayed the photographs of the applicants contained in the article dated 4 June 2015 as thumbnails in the overview of results of its image search.

7. The applicants requested the defendant, on the one hand, to de-reference the articles in question, which, in their view, contain a number of incorrect allegations and defamatory opinions based on false statements, and, on the other, to remove the thumbnails from the list of search results. They claimed to have been victims of blackmail by G-LLC. The defendant refused to comply with that request, referring to the professional context in which the articles and images at issue are set and invoking its ignorance as to the allegedly false nature of the information contained therein. The action was dismissed at first and second instance.

8. It is in that context that the Bundesgerichtshof (Federal Court of Justice) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Is it compatible with the data subject's right to respect for private life (Article 7 of the Charter …) and to protection of personal data (Article 8 of the Charter), if, within the context of the weighing-up of conflicting rights and interests arising from Articles 7, 8, 11 and 16 of the Charter, within the scope of the examination of his or her request for de-referencing brought against the data controller of an internet search engine, pursuant to Article 17(3)(a) of [the GDPR], when the link, the de-referencing of which the applicant seeks, leads to content that includes factual claims and value judgements based on factual claims the truth of which is denied by the data subject, and the lawfulness of which depends on the question of the extent to which the factual claims contained in that content are true, the national court also concentrates conclusively on the issue of whether the data subject could reasonably seek legal protection against the content provider, for instance by means of interim relief, and thus at least provisional clarification on the question of the truth of the content displayed by the search engine data controller could be provided?

(2) In the case of a request for de-referencing made against the data controller of an internet search engine, which in a name search searches for photos of natural persons which third parties have introduced into the internet in connection with the person's name, and which displays the photos which it has found in its list of search results as preview images (thumbnails), within the context of the weighing-up of the conflicting rights and interests arising from Articles 7, 8, 11 and 16 of the Charter pursuant to Article 12(b) and Article 14, first paragraph, point (a) of Directive [95/46] and Article 17(3)(a) of the GDPR, should the context of the original third-party publication be conclusively taken into account, even if the third-party website is linked by the search engine when the preview image is displayed but is not specifically named, and the resulting context is not shown with it by the internet search engine?'

9. Written observations were submitted in this case by the parties to the main proceedings, the Greek, Austrian and Romanian Governments and the Commission. At the hearing held before the Court on 24 January 2022, the parties to the main proceedings and the Commission presented oral observations.

IV. Analysis

10. Before turning to consider the questions referred for a preliminary ruling, I should recall the Court's case-law on the obligations incumbent on the operator of a search engine where its activity involves the processing of personal data, in particular where the data subject's right to have data concerning him or her erased is at issue. As will be seen below, those obligations are commensurate, to use the Court's words, with the 'responsibilities, powers and capabilities' of the operator of the search engine,[5] which in turn are inextricably linked to the role which it plays in the internet ecosystem, as briefly described in the introduction to this Opinion.

A. The Court's case-law

11. Four points emerge from the Court's case-law on the processing of personal data in the context of the activity of search engines.

12. The first concerns the classification of the activity of search engines and its subsumption within the scope of the application of European Union legislation on the protection of personal data.

13. In its judgment of 13 May 2014, *Google Spain and Google*[6] ('judgment in *Google Spain*'), the Court held that 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) of Directive 95/46 when that information contains 'personal data'.[7] This interpretation is not affected by the fact that the data have already been published on the internet and are not altered by the search

[5] See point 15 of this Opinion.

[6] C-131/12, EU:C:2014:317.

[7] That is to say information relating to identified or identifiable natural persons and thus 'personal data' within the meaning of Article 2(a) of that directive.

engine.[8] The corollary of that classification of the activity of search engine is the second finding contained in the judgment in *Google Spain*. The operator of a search engine, as the person determining the purposes and means of the activity of that search engine, must be regarded as the 'controller', within the meaning of Article 2(d) of Directive 95/46, of the data which that activity involves.[9] In that regard, the Court stated that to exclude the operator of a search engine from the definition of 'controller' on the sole ground that it does not exercise control over the personal data published on the web pages of third parties, would be contrary to the objective of that provision, which is to ensure, through a broad definition of that concept, effective and complete protection of data subjects.[10]

14. The second point which emerges from the Court's case-law concerns the potential serious interference with the fundamental rights of the data subjects that arises from the operation of a search engine.

15. As I have already had occasion to point out, the internet exponentially increases the risks of infringement of the fundamental rights to respect for private life and protection of personal data because of the ways in which information is produced and distributed online. Well aware of this reality, the Court stated in the judgment in *Google Spain* that the processing of personal data 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, consisting in loading those data on an internet page.[11] Moreover, it pointed out that processing of personal data carried out by the operator of a search engine 'is liable to affect significantly the fundamental rights to privacy and to the protection of personal data when the search by means of that engine is carried out on the basis of an individual's name, since that processing enables any internet user to obtain through the list of results a structured overview of the information relating to that individual that can be found on the internet – information which potentially concerns a vast number of aspects of his private life and which, without the search engine, could not have been interconnected or could have been only with great difficulty – and thereby to establish a more or less detailed profile of him'. The effect of the interference with those rights of the data subject is, furthermore, 'heightened on account of the important role played by the internet and search engines in modern society, which render the information contained in such a list of results ubiquitous'.[12] Therefore, in the view of the Court, 'inasmuch as the activity of a search engine is therefore liable to affect significantly, and additionally compared with that of the publishers of websites, the fundamental rights to privacy and to the protection of personal data, the operator of the search engine as the person determining the purposes and means of that activity must ensure, within the framework of its responsibilities, powers and capabilities, that the activity meets the requirements of Directive 95/46 in order that the guarantees laid down by the directive may have full effect and that effective and complete protection of data subjects, in particular of their right to privacy, may actually be achieved'.[13] In its judgment of 24 September 2019, *GC and Others (De-referencing of sensitive data)*[14] ('judgment in *GC*'), the Court reiterated the full applicability to the operator of a search engine of all the obligations on the 'controller' of personal data under Directive 95/46 and the GDPR, including the prohibitions and restrictions on the processing of sensitive data laid down in Article 8(1) and (5) of that directive and Article 9(1) and Article 10 of the GDPR. In that

8 See judgment in *Google Spain*, paragraphs 28 and 29 to 31.

9 See judgment in *Google Spain*, paragraphs 32 and 33. (Section not relevant to the English version).

10 See judgment in *Google Spain*, paragraph 34.

11 See judgment in *Google Spain*, paragraph 35.

12 See judgment in *Google Spain*, paragraph 80 and the case-law cited; see also paragraphs 36 to 38 of that judgment.

13 See judgment in *Google Spain*, paragraph 38.

14 C-136/17, EU:C:2019:773.

judgment, it stated that while the specific features of the processing carried out by the operator of a search engine in connection with the activity of the search engine cannot thus justify it being exempted from compliance with those provisions, those specific features may, however, have an effect on the extent of the operator's responsibility and obligations. Since it is responsible not because sensitive data appear on a web page published by a third party but because of the referencing of that page, the provisions on processing those data can apply to it only by reason of that referencing and thus 'via a verification, under the supervision of the competent national authorities, on the basis of a request by the data subject'. [15]

16. The third point established by the Court concerns the need to take into consideration all the fundamental rights concerned in the context of a request for de-referencing made to the operator of a search engine and to strike a balance between those rights that takes account not only of the circumstances of the case but also of the technological characteristics of the internet environment.

17. In that regard, although, on the one hand, the Court excluded the possibility that interference with the data subject's fundamental rights caused by the display of information concerning him or her in the results of a search made by means of an internet search engine on the basis of his or her name, could, given the potential seriousness of that interference, not be justified by merely the economic interest which the operator of such an engine has, on the other, it acknowledged that 'the removal of links from the list of results could, depending on the information at issue, have effects upon the legitimate interest of internet users … in having access to that information'. [16] In that situation, the Court considers that 'a fair balance should be sought in particular between that interest and the data subject's fundamental rights under Articles 7 and 8 of the Charter'. [17] That requirement is reiterated in the judgment in *GC* with reference to Article 17 of the GDPR, which codified the right to erasure of personal data (or 'right to be forgotten') recognised by the Court in its judgment in *Google Spain* [18] and which expressly lays down, in paragraph 3(a), as also noted by the Court, the requirement to strike a balance between the abovementioned rights. [19] In that judgment, the Court also confirms what had already been stated in the judgment in *Google Spain* as regards the criteria on the basis of which that balance is to be struck, reaffirming that 'while the data subject's rights protected by Articles 7 and 8 of the Charter override, as a general rule, the freedom of information of internet users, that balance may, however, depend, in specific cases, on the nature of the information in question and its sensitivity for the data subject's private life and on the interest of the public in having that information, an interest which may vary, in particular, according to the role played by the data subject in public life'. [20] Beyond the wording adopted by the Court, it is apparent in particular from the judgment in *GC* that balance is to be struck between fundamental rights *of equal importance*, which constitute the prerequisites for the proper functioning of a democratic society. Therefore, it is not possible to argue that any one overrides another in abstract terms, rather it is necessary to strike a balance in such a way as to bring about a co-existence which causes the least possible infringement of each of the fundamental rights concerned. It also follows from that judgment that that balance shifts, from the rights to respect for private life and protection of personal data laid down in Articles 7 and 8

15 See judgment in *GC*, paragraphs 45 to 47.

16 See judgment in *Google Spain*, paragraph 81.

17 See judgment in *Google Spain*, paragraph 81.

18 See judgment in *Google Spain*, in particular paragraphs 88 and 99. The Court deduced the right to erasure of personal data from its interpretation of Article 12(b) and the first paragraph of Article 14 of Directive 95/46.

19 See judgment in *GC*, paragraphs 54 to 59.

20 See judgment in *GC*, paragraph 66; to that effect, although without an explicit reference to the right to information laid down in Article 11 of the Charter, see judgment in *Google Spain*, paragraph 81.

of the Charter to the right to inform and be informed enshrined in Article 11 of the Charter, the more the person in question plays a public role and internet users therefore have an interest in obtaining information on him or her. [21]

18. The fourth point which emerges from the Court's case-law is the attribution to the operator of the search engine – as the controller of the personal data processed for the operational needs of that engine – of the role of weighing up the fundamental rights concerned in order to ensure that that processing meets the requirements laid down in the GDPR (and previously those of Directive 95/46). [22] That role was subsequently codified in Article 17 of the GDPR.

19. Where the 'right to be forgotten' is at issue, the operator of the search engine is then required to decide, on the basis of all the rights and interests involved and in the light all the circumstances of the individual case, which contents are to be included in the list of searches made via that engine and which are to be excluded from that list. Where the controller does not grant the request for de-referencing, the data subject may bring the matter before the supervisory authority or the judicial authority so that that authority may carry out the necessary checks and order the controller to take measures accordingly. [23] In that context, it should be recalled that on 26 November 2014 the Article 29 Working Party [24] adopted guidelines on the implementation of the judgment in *Google Spain*, [25] designed to provide information on how the data protection authorities assembled in the Working Party intend to implement that judgment. Those guidelines also contain a non-exhaustive list of common criteria which the data protection authorities will apply to deal, on a case-by-case basis, with the complaints filed with their national offices following refusals by search engines of de-listing requests. It is pursuant to those guidelines that, in particular, Google examines applications for de-referencing which are submitted to it.

20. It is in the light of the principles set out above that the questions referred by the Bundesgerichtshof (Federal Court of Justice) must be examined.

B. The first question referred for a preliminary ruling

21. Google challenges the admissibility of the first question referred, which it claims is hypothetical in nature given that the solution put forward by the Bundesgerichtshof (Federal Court of Justice) takes the form of an abstract construction, unrelated to the facts of the main proceedings. In its view, the Court also does not have the necessary material to provide a useful answer.

22. In that regard, I consider, first, that Google's argument that the order for reference is not sufficiently detailed in that regard must be dismissed. In my view, the Bundesgerichtshof (Federal Court of Justice) has provided a sufficiently precise and complete picture of the factual context characterising the dispute before it and the need, in that context, to obtain an answer to the first

[21] To the same effect, see also judgment of 24 September 2019, *Google (Territorial scope of de-referencing)* (C-507/17, EU:C:2019:772, paragraph 45).

[22] Exercise of the right to de-referencing was linked by the Court to the mechanism provided in Article 12(b) and Article 14(1)(a) of Directive 95/46, under which the relevant requests may be addressed by the data subject directly to the controller who must then duly examine their merits and, as the case may be, end processing of the data in question. See judgment in *Google Spain*, paragraph 77. See, as regards the GDPR, explicitly, judgment in *GC*, paragraph 66.

[23] See judgment in *Google Spain*, paragraph 77.

[24] Set up in accordance with Article 29 of Directive 95/46, the Article 29 Working Party is an independent advisory body on data protection and privacy.

[25] https://ec.europa.eu/newsroom/article29/items/667236/en.

question referred. The Court has all the necessary material to answer that question, irrespective of the fact that the referring court does not specify either whether the applicants in the main proceedings actually have legal protection against the content provider or what the consequences a negative finding in that regard would be. Second, the mere fact that, in the view of the Bundesgerichtshof (Federal Court of Justice), it is necessary, for the purposes of resolving the dispute before it, to verify beforehand the correctness of the methodology which it considers to be applicable in a situation such as that in the main proceedings, which is defined in general and abstract terms, does not mean that the question referred for a preliminary ruling to the Court in that regard is hypothetical, if it appears that the answer to that question is likely to enable the referring court, after making the necessary factual findings, to resolve the dispute in the main proceedings. Lastly, I note that the further arguments put forward by Google in support of the inadmissibility of the first question relate, in essence, to the implications of any acceptance by the Court of the answer proposed by the referring court and thus concern the substance of that question.

(a) Preliminary observations

23. By the first question, the Court is asked, in essence, to clarify the obligations incumbent on the operator of a search engine when dealing with a request for de-referencing based on a claim, not supported by evidence, that some of the information which appears in the referenced content is false, in this case certain articles containing data and comments on the business model and results of the companies managed by the applicants in the main proceedings. Since, in the light in particular of the professional context of the articles in question and the importance of information to investors given the high-risk sector in which the applicants operate,[26] de-referencing would be justified only if the contested information were actually false, the Bundesgerichtshof (Federal Court of Justice) is uncertain whether it is for the applicants in the main proceedings to furnish proof, or a certain degree of evidence, that that information is not true or whether it is incumbent on Google to assume that the applicants' claims are well founded and carry out the requested de-referencing or seek to clarify the facts itself. The Bundesgerichtshof (Federal Court of Justice) proposes that the answer should depend on whether there is a reasonable possibility of the data subject seeking legal protection, for example by means of interim relief, directly against the content provider and asks the Court, in essence, whether an interpretation of Article 17(3)(a) of the GDPR to that effect is correct.

24. For partially different reasons, all the parties and interested persons which have submitted observations in the present proceedings oppose the solution proposed by the Bundesgerichtshof (Federal Court of Justice),[27] at least in so far as that solution implies, contrary to the case-law referred to in points 11 to 19 of this Opinion, that the balancing of interests under Article 17(3)(a) of the GDPR is to be carried out on the basis of the sole criterion of the existence of a reasonable possibility of legal protection against the content provider.

25. For my part, I note that it is clear from the order for reference that the Bundesgerichtshof (Federal Court of Justice) considered the question of the possible relevance to be attached to that criterion only after balancing the rights laid down in Articles 7, 8 and 11 of the Charter on the basis of all the circumstances of the case and having concluded, on the assumption that the

[26] Those are just some of the criteria considered by the Bundesgerichtshof (Federal Court of Justice) and expressly referred to in the order for reference. However, it is clear from a reading of several passages of that order that that court carried out an overall assessment of the various factors characterising the case before it.

[27] The Greek Government's position appears to be more nuanced.

contested information was true, that the internet users' right to information prevailed. The situation to which the Bundesgerichtshof (Federal Court of Justice) refers is therefore that in which, after all the other relevant factors have been weighed up, the grant or dismissal of the request for de-referencing depends *solely* on whether information the erasure of which is sought is true or false. It follows that, if the Court were to answer the question referred by the Bundesgerichtshof (Federal Court of Justice) in the affirmative, it would not mean that the grant or dismissal of the request for de-referencing based on the alleged inaccuracy of the information made accessible by the search engine operator would depend *solely* on whether the data subject was able to seek protection against the content provider nor would it imply, contrary to what Google maintains, that the operator of a search engine would automatically be required to carry out de-referencing if such protection were not available. Moreover, such results would be contrary to the correct articulation between the provisions of Article 17(1) and (3)(a) of the GDPR, which rules out any automatic conclusion liable to interfere with the exercise by the controller of the authority to control or assess the necessary balancing of the fundamental rights concerned. An affirmative answer from the Court to the first question would simply mean that, where the internet users' right to information and the content provider's freedom of expression appear, on the basis of all the relevant circumstances, to override the applicant's rights *and* the granting of the request for de-referencing is justified only if the contested information is actually false, the national court and, at the pre-litigation stage, the operator of the search engine, would be permitted to rely conclusively, where the false nature of the information is not evident and the applicant failed to furnish at least some evidence to that effect, on that fact. On closer inspection, however, the existence or otherwise of a reasonable possibility of seeking legal protection against the content provider not only cannot, in itself, constitute an exclusive or decisive criterion for the purposes of dismissing or granting a request for de-referencing, whatever the grounds therefor, but also does not constitute a criterion relevant to the balancing exercise to be carried out pursuant to Article 17(3)(a) of the GDPR. In itself, that criterion says nothing about the existence of a right to the erasure of data which appear in the contested content or the need, for the exercise of the right to freedom of expression and information, to maintain the referencing of that content.

26. Those precisions having been made, for the purposes of the answer to be given to the first question it is necessary, in my view, to start by clarifying the importance, when weighing up the fundamental rights concerned in a case such as that at issue in the main proceedings, of the role played by the data subject in public life within the meaning of the Court's case-law, on the one hand, and the existence of a challenge to the truth of the information processed, on the other.

(b) Interference with the fundamental rights protected by Articles 7 and 8 of the Charter and the role of the data subject in public life

27. Notwithstanding their importance in EU constitutional law, the fundamental rights to respect of private life and protection of personal data are not absolute.[28] As is clear in particular from Article 17(3)(a) of the GDPR, the right to protection of personal data must be considered in relation to its function in society and be balanced against other fundamental rights, in accordance with the principle of proportionality.[29] In carrying out that balancing exercise, due weight must be given to the right to inform of the owner of the web page the de-referencing of which is sought and the right of the public to obtain the information contained in that web page.

[28] See judgment in *GC*, paragraph 58 and the case-law cited.

[29] See judgment in *GC*, paragraph 57 and the case-law cited.

28. As is apparent from the Court's case-law cited above, this interest may vary depending on the 'role played in public life' by the person to whom the information relates. This expression includes, in so far as is relevant to these proceedings, not only situations in which that person holds a political post, which, by definition, exposes him or her to the democratic scrutiny of public opinion, but also situations where he or she has a significant economic role. [30] More generally, the confidence both of other economic operators and of consumers is a prerequisite for the proper functioning of the market. This confidence requires public access to information about persons in professional roles that is likely to affect market dynamics and consumer interests, sometimes even more markedly than the acts of policy makers. Naturally, this information is essentially that which relates to their professional roles, but can also extend to aspects of their private sphere where they are connected or, in any event, likely to impact their professional activity and affect public confidence. In that respect, it should be noted that the Court has already stated that acceptance of an economic role entails acceptance of a limitation on the scope of protection of private life. [31]

29. Where the data subject plays a public role, as described above, not only where that role is in fact prominent, but also where it has a more limited scope, in the balancing exercise to be carried out under Article 17(1) and (3) of the GDPR, the right to inform and the right to be informed may, in the light of all the relevant circumstances, prevail over the fundamental rights protected by Articles 7 and 8 of the Charter. The professional context and the journalistic nature of the publications in question, as well as the nature of the disputed information, which relates predominantly to the actions of the companies managed by the applicants, also militate in favour of that prevalence in the circumstances of the case in the main proceedings, as the referring court has noted.

(c) The truth of the information and how the balancing exercise is to be carried out

30. The tendency of the right to freedom of expression and information to override the right to private life and the right to protection of personal data where the data subject plays a significant role in public life is reversed where it is established that the information covered by the request for de-referencing is untrue. In such a case, it could probably be argued that in reality the right to inform and the right to be informed do not even come into play since they cannot include the right to disseminate and access falsehoods. Even without cutting the Gordian knot of the relationship between the right to freedom of expression and information and the truth of the information, [32] it may be more simply observed that that right, with its dual significance, both active and passive, cannot, when relating to false information, in any event be placed on an equal footing with the fundamental rights to a private life and protection of personal data. In this case, the applicable prevailing criterion, rooted in one of the fundamental values of the European Union, is that of human dignity.

31. Article 2 TEU, which also refers to the constitutional traditions of the Member States, places respect for human dignity at the top of the list of values on which the European Union is founded. Article 1 of the Charter, for its part, states peremptorily that 'human dignity is inviolable' and that 'it must be respected and protected'. In the 'Union of values', which the European Union is, human

[30] See, to that effect, ECtHR, 19 October 2017, *Fuchsmann v. Germany* (CE:ECHR:2017:1019JUD007123313, §§ 40 and 41), and 14 December 2006, *Verlagsgruppe News GmbH v. Austria* (CE:ECHR:2006:1214JUD001052002, § 36).

[31] See judgment of 9 March 2017, *Manni* (C-398/15, EU:C:2017:197, paragraph 59).

[32] That issue assumes particular relevance in the United States system given the great protection accorded to the right to free speech by the first amendment to the United States Constitution.

dignity has a kind of primacy and is the footing on which much of European integration is based. If human dignity is inviolable and must always be respected and protected, without any provision being made for interests justifying its limitation, as is the case for most of the fundamental rights guaranteed by the Charter, it will not be possible to invoke any legal reason, not even one relating to the exercise of a fundamental right, in order to sacrifice it.[33] Untrue information not only infringes the fundamental right of the person concerned to protection of personal data but also ultimately affects his or her dignity in that it puts forward a false representation of him or her, thus altering his or her identity. This is especially true in the internet ecosystem in which information spreads rapidly, is permanent and, on account of the actions of search engines, produces accurate profiling of the person concerned. In cyberspace, the dissemination of false information about someone is a permanent disfigurement of his or her identity which, nowadays, is defined above all on the web, and a serious offence against his or her dignity.

32. That said, I note that the GDPR itself provides a clear answer to the question of the importance to be attached to the truth of the personal data processed. The principles applicable to the processing of those data, listed in Article 5(1) of that regulation, include, in point (d), the principle of 'accuracy', according to which, on the one hand, the personal data must be 'accurate and, where necessary, kept up to date', and, on the other, 'personal data that are inaccurate, having regard to the purposes for which they are processed' must be erased or rectified without delay.[34] The accuracy of the data constitutes, in the view of the Court, one of the 'conditions of lawfulness' of the processing of personal data[35] and is therefore relevant, in particular, to the application of Article 17(1)(d) of the GDPR.

33. Where the truth of the information processed by the operator of the search engine is at issue, as in the case in the main proceedings, the issue of balancing the fundamental rights concerned thus arises in quite specific terms, at least at the stage at which it has not yet been established whether the information is true or false. At that stage, the central question is precisely who is to make such an assessment and how.

34. Before addressing that question, I consider it appropriate to provide further clarification as to how the balance between the fundamental rights concerned is to be struck where the activities of search engines are involved.

(d) The balancing of fundamental rights against the capabilities, powers and responsibilities of the operator of the search engine

35. The way in which the operator of a search engine is to strike a balance between conflicting fundamental rights when examining a request for de-referencing is necessarily affected by the characteristics of the technological context to that conflict. The tension between freedom of information, in its twofold active and passive aspect, on the one hand, and the right to private life and protection of personal data, on the other, is different in cyberspace. Internet technology impacts not only the way in which the right to information and the rights of respect for private life and protection of personal data interact, but also the manner in which they are to be balanced. It is for that reason that the Court's case-law on the abovementioned 'right to be

[33] See Explanations relating to the Charter of Fundamental Rights (OJ 2007 C 303, p. 17), Explanation on Article 1.

[34] See also recitals 39 and 71 of the GDPR, as well as Article 16 and Article 18(1)(a), respectively on the exercise of the right to rectification and the right to restriction of processing.

[35] To that effect, see the judgment in *GC*, paragraph 64, notwithstanding the fact that, formally, the GDPR distinguishes the 'principles relating to processing of personal data' listed in Article 5 from the conditions of the 'lawfulness of processing' listed in Article 6.

forgotten' refers to the 'capabilities' which an operator of a search engine has, and to its 'powers' and its 'responsibilities'. That is also the case where the request for de-referencing is based on the allegedly false nature of the information on the web page to which the link to be de-referenced relates. The operator of a search engine cannot be required to carry out general monitoring of the content hosted and to verify the truth thereof. Moreover, such monitoring would be very difficult to carry out. Similarly, it is not within the capabilities of the operator of a search engine to verify a posteriori whether the content of an article published on a web page included in the list of search results is true or false, since it does not have available to it the information that is available to the web publisher or the powers to make such an assessment.

36. At the same time, however, it is not possible to overlook the special responsibility of the operator of a search engine as the 'gatekeeper' of the information. Since it plays an active – and not merely a technical and neutral – role in disseminating information online, on which it has built its business model and from which it derives its profits, that operator will also have to play an active role in eliminating from search results content that includes false personal data, provided that that role remains within the scope of its powers and capabilities. In that respect, I note that the special responsibility associated with the function of 'gatekeeper' of information which certain platforms have is emphasised by the judgment of 3 October 2019, *Glawischnig-Piesczek*, [36] in which the Court ruled that the provisions of the Directive on electronic commerce [37] do not preclude the courts of a Member State from ordering a hosting service provider to remove or block access to not only information which was previously declared to be illegal, as it was defamatory, but also to equivalent content, to avoid its dissemination despite the removal of the original content. The effectiveness of the protection of individual rights in relation to the principal ways in which information is disseminated on the internet therefore justifies, in the view of the Court, even to the detriment of the platform's economic interests, a specific monitoring obligation (general monitoring would be incompatible with Article 15(1) of the Directive on electronic commerce), provided that it does not place an excessive burden on intermediaries. The measures aimed at combating the spread of disinformation and hate speech online [38] and the tendency of EU law to impose on platforms such as Google, in specific areas, greater monitoring obligations in relation to hosted content, are moving in the same direction. [39]

(e) The various solutions put forward in these proceedings

37. Within the general framework outlined above, I do not find the solutions put forward, in particular by the parties to the main proceedings and the referring court, to be convincing.

38. Contrary to what the applicants in the main proceedings propose, de-referencing cannot be carried out on the basis of a mere unilateral request by the data subject who claims, without providing evidence, that the content in question contains false information, in particular if, as

[36] C-18/18, EU:C:2019:821.

[37] Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (OJ 2000 L 178, p. 1; 'the Directive on electronic commerce').

[38] I refer in particular to the 2016 Code of conduct on countering illegal hate speech online (https://ec.europa.eu/info/policies/justice-and-fundamental-rights/combatting-discrimination/racism-and-xenophobia/eu-code-conduct-countering-illegal-hate-speech-online_en) and the 2018 Code of Practice on Disinformation (https://digital-strategy.ec.europa.eu/en/policies/code-practice-disinformation), drawn up by the Commission and subscribed to by the main electronic platforms.

[39] Article 17 of Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC (OJ 2019 L 130, p. 92) and Articles 3 and 5 of Regulation (EU) 2021/784 of the European Parliament and of the Council of 29 April 2021 on addressing the dissemination of terrorist content online (OJ 2021 L 172, p. 79) are moving in that direction.

seems to be the case of these applicants, they are subjects in relation to whose activity the public has, in principle, a right to information, by virtue of the role which they play on the market. Such an answer would leave to the data subject the unilateral choice of having the content relating to him or her de-referenced, without there being any possibility of assessing the merits of the claims capable of justifying it, and would result in an excessive and unjustified sacrifice of the web publisher's right to inform and the public's right to be informed, thus disregarding the role which those rights have in a democratic society.

39. Nor do I find convincing the answer put forward by Google, which, by excluding any involvement of the operator of the search engine, would require the data subject to apply to the publisher of the web page and request the removal of the content claimed to be false. If such a solution were to be adopted, the weapon in the hands of the person who considers that his or her fundamental rights to private life and protection of personal data have been infringed would be a blunt one. Faced with a refusal by the web publisher to remove the information, that information would continue to be disseminated via the search engine and, if it were in fact false, would continue to infringe unjustifiably the data subject's fundamental rights. We are, thus, in a situation that is the reverse of the previous one, in which the balance between the different fundamental rights would be entirely in favour of the right to information, disproportionately and unjustifiably sacrificing the fundamental rights protected by Articles 7 and 8 of the Charter.

40. Lastly, as regards the solution put forward by the referring court, which obliges the data subject, where possible, to bring an action against the web publisher, this too leads, in my view, to a disproportionate sacrifice of the rights laid down in Articles 7 and 8 of the Charter. First, the speed at which information spreads on the internet and the difficulty in removing it subsequently, if it is found to be false, conflicts with the length of legal proceedings, even urgent legal proceedings, and the resulting harm to the data subject could also be irreparable. Second, that solution could prove to be difficult in practice in all cases, not uncommon in the internet ecosystem, where there are significant practical obstacles to bringing an action against the operator of the website on which the contested content appears, which may be based in a third country or be difficult to identify. Furthermore, if the possibility of bringing an action against the content provider were to be attributed decisive importance in protecting the data subject's rights in circumstances such as those in the main proceedings, the operator of the search engine would thus be relieved of responsibility, which would in itself be contrary both to the acknowledgement of the autonomous nature of the processing of personal data associated with the operation of search engines and to the principle, established by the Court, that the data subject must be able to apply to the data controller concerned to obtain the de-referencing of the data relating to him or her, irrespective of any prior erasure of those data by the person who first put the contested content online. As I have already observed, that principle, together with the role of search engines in the dissemination of content on the internet and consequently in the amplification of the harm which individuals sustain from online publication of information concerning them, precludes any answer which relieves the operator of a search engine of the obligation incumbent on it, as data controller, to satisfy the conditions on the lawfulness of processing, with includes the accuracy of the data processed.

41. In each of the solutions which has been reviewed, the balance is tipped entirely in favour of one of the rights concerned, whereas it is necessary to find a balance which results in the least possible sacrifice of the fundamental rights involved. In the statements made below, I will explain how, in my view, this balance should be identified.

(f) The proposed solution and 'procedural data due process'

42. In a case such as that at issue in the main proceedings, in which the right to de-referencing depends, in essence, on determination of the truth of the information which appears in the de-referenced content and thus on the accuracy of the personal data processed by the operator of the search engine, the only option is, in my opinion, to identify a specific 'procedural fairness'.

43. In the internet ecosystem, 'private powers' have emerged – also because of the technical characteristics of the medium and the economic dynamics which inevitably lead to the concentration of economic and social power in the hands of a few platforms – which are likely to impact significantly the exercise of fundamental rights, especially those laid down in Articles 7, 8 and 11 of the Charter. In particular, having an impact on the effective enjoyment of those fundamental rights is an unavoidable consequence of the role of information 'gatekeepers' which each of those platforms plays. In order to address this phenomenon, in its case-law on the 'right to be forgotten', the Court has, in essence, conferred direct horizontal effect on the fundamental rights laid down in Articles 7 and 8 of the Charter. The next logical step, in order to make those rights effective, is to confer on private individuals adequate procedural guarantees vis-à-vis electronic platforms responsible for the processing of personal data, which correspond to obligations on those platforms, naturally adapted to the characteristics of the technological medium and the peculiarities of the conflicts between fundamental rights that are developing in the internet environment. In the internet world, there is a need for some form of 'procedural data due process'. [40]

44. Under the GDPR, a private individual has the right to request the de-referencing of a web page containing data relating to him or her which he or she considers to be untrue. However, exercising that right entails, in my view, the burden of indicating the evidence on which the request is based and providing prima facie evidence of the false nature of the content the de-referencing of which is sought, where that is not manifestly impossible or excessively difficult, in particular with regard to the nature of the information concerned. [41] The imposition of such a burden appears to be consistent with the wording and scheme of the GDPR, in which the various rights to rectification, erasure, restriction of processing and objection conferred on the data subject are subject to specific conditions and it is for the person who intends to avail him or herself of them to prove that the relevant conditions are satisfied.

45. When presented with a request for de-referencing, the operator of the search engine is required, by virtue of the role which it plays in the dissemination of information and the resulting responsibilities, to carry out checks to confirm or otherwise the merits of the request that are within its specific capabilities. It will be possible to carry out such checks on the data which it hosts which relate to the person in question and to the publisher of the page on which the contested content is published, data which the operator of the search engine can swiftly analyse using the technological tools at its disposal. In addition, where possible, the operator of the search engine will have to initiate rapidly an adversarial debate with the web publisher who initially disseminated the information, who will then be able to set out the reasons supporting the

[40] See, on that subject, Crawford, K. and Schultz, J., *Big Data and Due process: Towards a Framework to Redress Predictive Privacy Harms*, Boston College Law Review, 2014, p. 93.

[41] In the case before the Bundesgerichtshof (Federal Court of Justice), the information claimed to be false concerns, in essence, the economic data of the companies managed by the applicants. In those circumstances, it is difficult to maintain that the applicants in the main proceedings are unable to present at least some evidence that the data in the contested articles are false.

truth of the personal data processed and the lawfulness of the processing. Lastly, the operator of the search engine will have to decide whether or not to grant the request for de-referencing, briefly stating the reasons for the decision.

46. Only if substantial doubts remain as to whether the information in question is true or false, or if the weight of the false information in the context of the publication in question is manifestly insignificant and that information is not of a sensitive nature, will the operator of the search engine be able to dismiss the request. The data subject will then be able to apply to the judicial authority which has the power to carry out the necessary checks, or to the supervisory authority as referred to in Article 51 of the GDPR, in connection with a complaint against the decision of the operator of the search engine.

47. If the content concerns a person who has a public role, according to the meaning set out above, since the right to information has, in principle, greater weight than the rights laid down in Articles 7 and 8 of the Charter, the decision to de-reference will have to be based on particularly strong evidence that the information is false. In cases of that kind, where reasonable doubt as to whether the information is true or false remains, de-referencing will, in my view, have to be ruled out. In any event, a fortiori where the contested content concerns a person by virtue of the role which he or she plays in public life, it will not be possible to grant de-referencing if it merely expresses opinions, even if they are highly critical and even if they are expressed in very colourful and irreverent tones, or if they are satire.[42] The rectification of untrue data concerns information on data and not opinions, which nevertheless contribute to the development of public debate in a democratic society, provided that they do not slide into defamation. Nevertheless, it is clear that even where the original request is dismissed, the operator of the search engine will be required to undertake the de-referencing if the false nature of the information is ultimately established by a court.

48. Lastly, where the circumstances of the case advise it in order to avoid irreparable harm to the data subject, the operator of the search engine will be able temporarily to suspend referencing,[43] or to indicate, in the search results, that the truthfulness of some of the information in the content to which the link in question refers is contested,[44] without prejudice, however, to the right, in the first instance, of the web publisher to contest such an initiative before a court.

49. The solution proposed strikes, in my view, a balance between the various rights involved, and also avoids the danger of transforming Google into the 'judge of the truth' or of conducting some kind of private censorship of information on the net. The latter danger could easily materialise if general obligations not to host publications containing false information, or general obligations to ascertain whether or not information covered by a request for de-referencing is false, were imposed on search engines. In that case, in order to avoid any possible responsibility the search engine would be encouraged to de-reference all dubious content, even in the absence of any evidence that would reasonably lead to it being considered false, resulting in serious harm to the freedom of information. To counter that risk, it would be useful to lay down a procedure for exercising the right to de-referencing, which places specific burdens on all the parties involved.

[42] See, inter alia, ECtHR, 25 May 2021, *Milosavljević v. Serbia* (CE:ECHR:2021:0525JUD005757414, § 63).

[43] The possibility of a temporary restriction of data processing is expressly provided for in Article 18(1)(a) of the GDPR, where the accuracy of the personal data is contested by the data subject and for a period enabling the controller to verify the accuracy of the personal data.

[44] See, with regard to an answer of this kind, ECtHR, 10 March 2009, *Times Newspaper Ltd v. United Kingdom (No 1 and No 2)* (CE:ECHR:2009:0310JUD000300203).

50. In the light of all the foregoing considerations, I suggest that the Court answer the first question to the effect that Article 17(3)(a) of GDPR should be interpreted as meaning that, within the context of the weighing-up of the conflicting fundamental rights arising from Articles 7, 8, 11 and 16 of the Charter, within the scope of the examination of a request for de-referencing made to the operator of a search engine on the basis of the alleged false nature of the information which appears in the referenced content, it is not possible to concentrate conclusively on the issue of whether the data subject could reasonably seek legal protection against the content provider, for instance by means of interim relief. In the context of such a request, it is incumbent on the data subject to provide prima facie evidence of the false nature of the content the de-referencing of which is sought, where that is not manifestly impossible or excessively difficult, in particular with regard to the nature of the information concerned. It is for the operator of the search engine to carry out the checks which fall within its specific capacities, contacting, where possible, the publisher of the referenced web page. Where the circumstances of the case so indicate in order to avoid irreparable harm to the data subject, the operator of the search engine will be able temporarily to suspend referencing, or to indicate, in the search results, that the truth of some of the information in the content to which the link in question relates is contested.

C. The second question referred for a preliminary ruling

51. By the second question, the Bundesgerichtshof (Federal Court of Justice) asks, in essence, whether, within the context of the weighing-up of the conflicting rights and interests arising from Articles 7, 8, 11 and 16 of the Charter, pursuant to Article 12(b) and Article 14, first paragraph, point (a) of Directive 95/46 and Article 17(3)(a) of the GDPR, in connection with a request for de-referencing made to the operator of a search engine, in its capacity as data controller, and seeking to obtain the removal from the results of an image search, carried out on the basis of a natural person's name, photographs displayed in the form of thumbnails showing that person, account should be taken conclusively of the context of the publication on the internet in which those thumbnails originally appear, a context which the search engine does not display, but to which it merely refers via a link which appears at the same time as those thumbnails. The Bundesgerichtshof (Federal Court of Justice) explained that while, taken in isolation, the photographs of the applicants make no contribution to public debate, in the context of the article into which they are incorporated, they contribute to conveying the information and opinions expressed therein.

52. Google considers that that question is hypothetical, first, because, contrary to what is stated in the order for reference, the dispute in the main proceedings does not concern a request for de-referencing of the results of an image search carried out on the basis of a natural person's name, but the general prohibition on displaying the thumbnails which appear in one of the articles at issue, and, second, because the photographs in question have not been referenced by Google since September 2017 and the articles at issue have not been available on the g-net website since 28 June 2018. In that regard, it should be recalled that, according to the Court's settled case-law, it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions submitted by the national court concern the interpretation of EU law, the Court of Justice is, in principle, bound to give a ruling. [45] The Court may refuse to rule

[45] See judgment of 24 February 2022, *Eulex Kosovo* (C-283/20, EU:C:2022:126, paragraph 28 and the case-law cited).

on a question referred by a national court for a preliminary ruling only where it is quite obvious that the interpretation of EU law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it.[46] In the present case, it is not clear from the case documents before the Court that the referring court's question concerning the interpretation of the provisions of Directive 95/46 and the GDPR is not genuine or that the interpretation of those provisions bears no relation to the actual facts of the main action or its purpose. As regards, in particular, the fact that neither the photographs in question nor the articles at issue appear on the g-net website any longer, the referring court explains that it proceeds on the basis of the principle that the removal of such content is of a purely temporary nature and the applicants in the main proceedings retain an interest in a decision being taken on their request for de-referencing. In such circumstances, the reality and usefulness of the interpretation requested cannot, in my view, be called into question.

53. Turning to the substance of the question referred by the Bundesgerichtshof (Federal Court of Justice), it should first be noted that, as Google correctly observed, the same rules apply to name searches for images via a search engine on the internet as apply to web searches. The Court's case-law referred to above, in points 11 to 19 of this Opinion, therefore also applies in the case of requests for de-referencing relating to the results of that type of search. The displaying, in those results, of photographs of natural persons in the form of thumbnails constitutes processing of personal data in respect of which the operator of the search engine assumes the role of 'controller' within the meaning of Article 2(d) of Directive 95/46 and Article 4(7) of the GDPR and is responsible, within the scope of its responsibilities, powers and capabilities, for compliance with the requirements contained in those acts. In the case of a request for de-referencing of the results of an image search, the operator of the search engine will have to strike a balance between the various fundamental rights concerned and assess whether the data subject's rights to respect for private life and protection of personal data or freedom of expression and information prevail. In doing so, it will have to take account of all the relevant factors.[47]

54. The question whether those factors should also include the content of the web page containing the photograph the removal of which is sought, depends, in my view, on the correct identification of the subject matter of the processing in question and the nature of that processing. As stated above, in the dispute in the main proceedings the applicants request the de-referencing of four photographs depicting them. However, that request does not cover either the information contained in the text of the article which appears on the publisher's web page at the same time as those photographs nor those photographs in their function of visual and descriptive support of that text and as an integral part of the article in question. The referencing via a web search of the link to that article and the photographs which it contains constitutes distinct processing with a distinct subject matter to which the applicants object by a separate request for de-referencing (in respect of which the Bundesgerichtshof (Federal Court of Justice) raised the first question referred for a preliminary ruling).

55. By retrieving the photographs of natural persons published on the internet and reproducing them in the results of an image search, in the form of thumbnails, independently of the context in which they appear, and stripping them of any informative or descriptive value which was originally attributed to them, the operator of a search engine offers a service in which it carries

[46] See judgment of 24 February 2022, *Eulex Kosovo* (C-283/20, EU:C:2022:126, paragraph 29 and the case-law cited).

[47] As regards the relevant factors for such a balancing exercise where the allegedly harmful action relates to the publication of photographs, see, inter alia, ECtHR, 7 February 2012, *Von Hannover v. Germany* (CE:ECHR:2012:0207JUD004066008, §§ 109 to 113 and the case-law cited).

out autonomous processing of personal data which is distinct both from that of the publisher of the web page from which the photographs are taken and from that, for which that operator is also responsible, of referencing that page. As the Bundesgerichtshof (Federal Court of Justice) correctly observed, given the nature of such processing, in which some of the content created by third parties, which is autonomous, is extracted and displayed separately, the operator of the search engine appears to act not as an intermediary but rather as a content creator.

56. In my view, it follows from the foregoing that in the context of the balancing of conflicting fundamental rights to be carried out pursuant to the relevant provisions of Directive 95/46 and the GDPR for the purposes of examining a request for removal of photographs depicting a natural person from the results of an image search carried out on the basis of a natural person's name, account should be taken only of the informative value of the photographs in their own right, independently of the content of which they form part on the web page from which they are taken. Conversely, if, in connection with a request for de-referencing of the link to a web page, the displaying of photographs in the context of the content of that web page were contested, it would be the informative value that those photographs have in that context which should be taken into account for the purposes of that balancing exercise.

57. The arguments put forward by Google in its written observations do not, in my view, invalidate that conclusion. Although it is true that, in an image search, the thumbnails appear with a link to the content of the web page of which they form part, that does not change the fact that they are displayed by the search engine in an entirely autonomous manner outside of the context in which the photographs are placed. Unlike in the case of a web search, in which the results do not allow immediate use of the referenced content, in an image search the display of the graphic content, including the thumbnails of photographs published on the internet, constitutes in itself the result sought by the user, regardless of his or her subsequent decision to access the original web page or not. The fact, emphasised by the referring court, that such a display is consistent with Google's business model and that it would not be technically possible to do otherwise, similarly does not call into question the autonomous nature of the data processing which that display entails.

58. It is of course possible that, by requesting the removal of the photographs depicting him or her, the data subject is in fact seeking to restrict access, via the link accompanying those photographs, to the content of which they form part and to information which may be of public interest contained therein. However, it should be noted in this regard that while the removal of photographs from the results of an image search undoubtedly reduces the possibilities for accessing the content of which they form part, that content remains directly accessible via a conventional web search. Moreover, such a search makes it possible to display, via the referenced link, the entire content, including the photographs which, in their original context, fully perform the role they may be assigned by the web publisher of conveying and corroborating the information provided and the opinions expressed. Thus, in the main proceedings, even if the request for de-referencing of the articles at issue were to be dismissed, given that freedom of expression and information overrides the applicants' rights to respect for their private life and protection of personal data, any granting of the request for removal of the photographs showing them would not excessively or unjustifiably limit that freedom if, as the Bundesgerichtshof (Federal Court of Justice) states, those photographs have little informative value when taken out of the context of which they form part.

59. Having regard to the clarifications contained in the preceding point, the conclusion which I reached in point 56 of this Opinion, far from conferring almost absolute protection on the right of personal portrayal, correctly recognises the importance of that right among those relating to personality. An individual's image is in fact one of the chief attributes of his or her personality as it expresses his or her originality and enables him or her to be distinguished from his or her peers. The right to protection of one's image constitutes one of the essential components of personal development and presupposes the person's control over his or her own image, in particular the possibility of refusing dissemination thereof.[48] Therefore, it follows that, while freedom of expression and information undoubtedly includes the publication of photographs,[49] protection of the right of privacy takes on a particular importance in that context given the capacity of photographs to convey particularly personal and even intimate information about an individual or his or her family.[50]

60. In the light of the foregoing considerations, I suggest that the Court answer the second question referred for a preliminary ruling to the effect that Article 12(b) and Article 14, first paragraph, point (a) of Directive 95/46 and Article 17(3)(a) of the GDPR should be interpreted as meaning that, within the context of the weighing-up of conflicting rights and interests arising from Articles 7, 8, 11 and 16 of the Charter, in connection with a request for de-referencing made to the operator of a search engine seeking to obtain the removal, from the results of an image search carried out on the basis of a natural person's name, of photographs displayed in the form of thumbnails depicting that person, account should not be taken of the context of the publication on the internet in which those thumbnails originally appear.

V. Conclusion

61. In light of all the foregoing considerations, I suggest that the Court answer the questions referred by the Bundesgerichtshof (Federal Court of Justice, Germany) as follows:

(1) Article 17(3) of Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) should be interpreted as meaning that, within the context of the weighing-up of conflicting fundamental rights arising from Articles 7, 8, 11 and 16 of the Charter of Fundamental Rights fo the European Union, which is to be undertaken within the scope of the examination of a request for de-referencing made to the operator of a search engine on the basis of the alleged false nature of the information which appears in the referenced content, it is not possible to concentrate conclusively on the issue of whether the data subject could reasonably seek legal protection against the content provider, for instance by means of interim relief. In the context of such a request, it is incumbent on the data subject to provide prima facie evidence of the false nature of the content the de-referencing of which is sought, where that is not manifestly impossible or excessively difficult, in particular with regard to the nature of the information concerned. It is for the operator of the search engine to carry out the checks which fall within its specific capacities, contacting, where possible, the publisher of the referenced web page. Where the circumstances of the case so indicate in order

[48] ECtHR, 7 February 2012, *Von Hannover v. Germany* (CE:ECHR:2012:0207JUD004066008, § 96).

[49] See ECtHR, 14 December 2006, *Verlagsgruppe v. Austria* (CE:ECHR:2006:1214JUD001052002, §§ 29 and 40 and the case-law cited).

[50] ECtHR, 7 February 2012, *Von Hannover v. Germany* (CE:ECHR:2012:0207JUD004066008, § 103 and the case-law cited).

to avoid irreparable harm to the data subject, the operator of the search engine will be able temporarily to suspend referencing, or to indicate, in the search results, that the truth of some of the information in the content to which the link in question relates is contested.

(2) Article 12(b) and Article 14, first paragraph, point (a) of Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data and Article 17(3)(a) of Regulation 2016/679 should be interpreted as meaning that, within the context of the weighing-up of conflicting rights and interests arising from Articles 7, 8, 11 and 16 of the Charter of Fundamental Rights, in connection with a request for de-referencing made to the operator of a search engine seeking to obtain the removal, from the results of an image search carried out on the basis of a natural person's name, of photographs displayed in the form of thumbnails depicting that person, account should not be taken of the context of the publication on the internet in which those thumbnails originally appear.

[i] — The wording of the title of this document has been amended since it was first put online.