Case Title: Google v. Agencia Española de Protección de Datos (2019)

*Meta-Data*:

* Case Number: Roj: SAN 1801/2019 - ECLI:ES:AN:2019:1801
* Date of decision: April 23, 2019
* Featured case: N/A
* Region: Central Europe and Asia
* Country: Spain
* Type of expression: Electronic / Internet-based Communication
* Judicial Body: National High Court
* Type of law: Administrative Law
* Main Themes: Privacy, Data Protection and Retention
* Outcome: Reversed Lower Court
* Status: Closed
* Tags: Right to be forgotten, Google, Personal Data

*Analysis:*

* **Summary and Outcome:**

In 2019 Spain's National High Court reversed a ruling of Agencia Española de Protección de Datos (AEPD) related to three complaints that Google was communicating to third parties the search engine's results deindexed. In 2016, the AEPD imposed a 150,000 Euro fine on Google since it found that the search engine was committing a serious breach of the Data Protection Act each time it disclosed who and why requested that certain content disappears from its search results. Likewise, the AEPD decided that in inattention to the guidelines issued by Article 29 Working Party on the Right to be Forgotten, the search engines did not have a legal obligation to inform web admins. Therefore, at a certain point, the web admins stopped knowing which news had been deindexed from the search engine, and thus there was no way to argue against each deindexing. However, when the case reached the National High Court, it concluded that the disciplinary procedure used by the AEDP was not the ideal legal mechanism to establish a general position on a generic type of processing operation.

**-Facts**:

On March 26, 2015, a first complaint was filed with AEPD about a possible legal breach by Google following a press release by the AEPD concerning a document approved by the Article 29 Working Party (WG29) on the "right to be forgotten". Through this document, the WG29 analyzed rulings related to the right to be forgotten of the CJEU, and the common interpretive criteria for their application were dictated. The complainant held a possible legal breach by the Internet search engine Google concerning two issues addressed in the AEPD statement. On the one hand, the policy of warning users about incomplete results and, on the other, the communication to third parties of the effects that the search engine had deindexed. Expressly, the complaint referred to a website notice on the search engine. According to the complaint, the statement read as follows:" [the company] may provide information to webmasters of URLs that have been removed from our search results."

On June 25, 2015, a second complainant pointed out that Google's content removal tool enabled communication by the search engine to the source websites. The complainant contended that when he searched his name and surname on the search engine, the following message would appear on the lower end of the page: "In response to a legal requirement sent to Google, we have removed 2 results from this page. You can learn more about this requirement at ChillingEffects.org."

A third complainant, on November 27, 2015, referred to the notice at the bottom of the page of Google search results with the following content: "In response to a legal requirement sent to Google, we have removed 2 results from this page. If you wish, you can obtain more information about this requirement in LumenDatabase.org ".

On March 18, 2016, The Subdirectorate General for Data Inspection began carrying out preliminary investigation actions and agreed to initiate a disciplinary procedure against Google for the alleged infringement of articles 11.1 and 10 of the Law on Protection of Personal Data (*Ley orgánica 15/1999 de Protección de Datos,* LOPD), typified as serious in articles 44.3.k) and 44.3d).

On September 14, 2016, the AEPD rendered a verdict in which it found that Google had infringed Article 10 of the LOPD and imposed a 150,000 Euro fine on the corporation. The AEPD also ordered Google to adopt the necessary measures to end the violation of article 10 of the LOPD. The AEPD determined that Google had disseminated identifiable delisting data to web admins, finding this a security breach. According to the AEPD, such conduct was contrary to Agency's press release concerning the guidelines issued by WG29. Additionally, the AEDP held that the information provided by Google to web admins contained details that made it viable to identify the owners of the data.

Further, the AEPD held that Google's policy to communicate information to website admins regarding individuals' requests to remove search results was unnecessary for management and resolution.

Additionally, the AEPD held that Google failed to meet the consent criteria established by the law by sharing with third parties notice of the individuals who requested deletions of information. According to the Agency, users had no other alternative to prevent their data from being transferred to a third party. Thus, the user's consent was not considered autonomous, unequivocal, and a clear expression of their will as requested by law.

The AEPD concluded that it could not consider that users consented to allow Google to communicate their data to third parties simply because they requested the search engine to delete information.

On November 30, 2016, the AEPD rejected Google's request for an appeal and upheld its previous ruling.

On February 1, 2017, Google filed a contentious-administrative appeal with the National High Court.

* **Decision Overview:**

The main issue for the National High Court to analyze was if AEDP had breached national administrative law standards.

Google requested via the contentious-administrative appeal that the National High Court declare the AEDP disciplinary procedure null and void. Google argued that the AEDP's determination failed to limit its decision only to the facts in dispute, which referred to the entity's conduct concerning the notifications to the related web admins. In Google's view, the AEDP had used the decision to establish a "general criterion". Likewise, Google's claimed that the AEPD should have channeled the case through an administrative act, such as instruction.

However, the AEPD insisted on recalling that the goal of the disciplinary procedure was to determine responsibilities that arose from the disclosure of data by Google concerning the information on URLs that it had removed from the search results in response to queries based on specific names without the users' consent.

The AEPD added that implementing the appropriate procedures to meet the criterion set out in the judgment of the 2014 ruling of the European Court of Justice in the case of *Google Spain SL v. Agencia Española de Protección de Datos* had provoked interpretative queries. The AEPD claimed that it was the authority empowered to resolve such conflicts.

Therefore, according to the AEPD, the disciplinary procedure was the appropriate channel for establishing the criterion of the AEPD for the questions raised by the complainants in light of the WG29 guidelines.

The Court held that the purpose of a disciplinary procedure relies on establishing a general or interpretative criterion on the approaches for applying the requirements contained in the judgment of the CJEU and WG29 guidelines. However, the Court considered that a disciplinary procedure that culminates in imposing a significant financial penalty was not the ideal means to establish interpretative criteria on such a novel and complex issue.

Consequently, the Court held that the requirement to shape interpretations carries on greater relevance in disciplinary resolutions where certain constitutional rights and principles are at stake. The Court added that in the instant case, the reasoning behind the AEPD was inaccurate.

Regarding the procedure, the Court held that Article 55.2 Law 39/2015, states that the preliminary proceedings in the disciplinary procedures ought to determine, as precisely as feasible, the facts susceptible to motivating the initiation of the legal proceeding.

The Court considered that the proven facts of the AEPD resolution did not comply with the requirements of a disciplinary procedure firstly because such ascertained facts appeared disconnected from the details described by the Complainants, which supposedly motivated the opening of the preliminary investigation proceedings.

Furthermore, The Court noted that in criminal and administrative disciplinary procedures, the account of all the facts surrounding a case is essential to define the nature and extent of the committed offense.

The Court remarked that considering every fact related to a case is the only way to effectively comply with the principle of strict legality (*nullum crimen, nulla poena sine lege*). According to the Court, this principle reflects the need for certainty that must guide the exercise of the administrative branch's disciplinary power, as outlined in Article 25.1 of the Constitution.

Likewise, the Court held that the assessment of the evidence was an essential element of the disciplinary procedure. Yet, the Court held that there was no analysis or reference to the specific complaints at no point in the AEPD resolution, nor was there any assessment of the evidence gathered about them.

Also, the Court remarked that the resolution failed to evaluate the evidence and disregarded the factual background by establishing that the proof was merely the transcription of the forms used by Google.

In sum, the Court considered that the AEPD, in this case, had failed to initiate a disciplinary procedure based on a complaint of detailed facts and in compliance with the legal principles that regulate the procedure. According to the Court, Article 70 of the General Data Protection Regulation (EU GDPR) established the WG29 as the body in charge of interpreting the scope of the right to erasure (the right to be forgotten) enshrined in Article 17.2.

The Court concluded that the critical and reasonable doubts raised concerning applying this novel precept and the irregularities detected in the disciplinary procedure did not sustain the imposition of the sanction on Google in the contested decision. Consequently, the Court annulled the AEDP ruling.

*Direction:*

* Outcome: Expands Expression

Before the High National Court's ruling, web admins, such as media outlets, could not know about deindexed information and thus were unable to argue against each deindexing, something that could restrict their Right to freedom of information. The High National Court decision expanded expression by reversing the AEDP determination, allowing Google to inform web admins which news had been deindexed from the search engine.

*Perspective*:

* **Related International and/or regional laws:**
	+ [EU, General Data Protection Regulation](https://gdpr-info.eu/)
	+ [EU, Recommendation 2018/334](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32018H0334)
	+ [EU, Article 29 Working Party Guidelines on consent under Regulation 2016/679](https://ec.europa.eu/newsroom/article29/items/623051)
	+ [ECJ, Google Spain v. Agencia Española de Protección de Datos (AEPD), C-131/12 (2014)](https://globalfreedomofexpression.columbia.edu/cases/google-spain-sl-v-agencia-espanola-de-proteccion-de-datos-aepd/?lang=es)
* **National law or jurisprudence:**
	+ [Spain, Law 15/1999, Protection of Personal Data](https://fra.europa.eu/en/law-reference/organic-law-151999-13-december-protection-personal-data)
	+ [Spain, Law 39/2015 of the Common Administrative Procedure of the Public Administrations](https://afyonluoglu.org/PublicWebFiles/Reports/PDP/2015%20Spain-Law%2039-2015%20Common%20Administrative%20Procedure%20of%20PA.pdf)
	+ [Spain, Law 30/1992, Legal Regime of the Public Administrations and Common Administrative Procedure](https://www.boe.es/buscar/act.php?id=BOE-A-1992-26318)

**- Other national law or jurisprudence: N/A**

*Significance*:

* The decision establishes a binding or persuasive precedent within its jurisdiction
* Related Cases: Self-generated
* Date updated: N/A

*Docs*:

* **Official Case Documents:**

Judgment (in Spanish):

https://www.poderjudicial.es/search/AN/openDocument/3e264256be8041eb/20190524

* Reports, Analysis, and News Articles:
	+ David Erdos, “Disclosure, Exposure and the ʻRight to be Forgottenʼ after Google Spain: Interrogating Google Search's webmaster, end user and Lumen notification practices” Computer Law & Security Review, Volume 38, September 2020, 105437
		- https://www.sciencedirect.com/science/article/pii/S026736492030042X?casa\_token=b973ONDSfZgAAAAA:x\_Ni\_1y3zLk8xEn5c2YGe0\_dSYS2ZC6VDIwefs7hXDVr3R-KycyDHl\_vyeDB590DzrmBIBYMWeso#cit\_37