

Privacy or Transparency? A New Balancing of Interests for the ‘Right to Be Forgotten’ of Personal Data Published in Public Registers*

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Abstract

The European Court of Justice, in a decision dated 9 March 2017, dealt with the right of individuals to request of the authority responsible for maintaining the companies register the elimination (‘right to be forgotten’) of personal data concerning them entered in that register. According to the ECJ decision, as EU law currently stands, the right to be forgotten relating to information published in companies registers is to be determined by Member States on the basis of a case-by-case assessment. If compelling legitimate grounds relating to the requester’s particular situation exceptionally justify it, such authority may, upon the expiration of a sufficiently long period after the dissolution of the company concerned, limit access to such personal data entered in that register only to third parties who can demonstrate a specific interest in obtaining that data.

I. Background of the Case

1. The Preliminary Reference

On 12 December 2007, Mr Manni, an Italian entrepreneur, as sole director of an Italian building company, filed a lawsuit against the Lecce Chamber of Commerce, claiming that, in spite of the fact that his company had been awarded a contract for the construction of a tourist complex, the properties involved in that real estate development project were not sold because of information published in the companies register. In particular, the challenged information regarded the plaintiff’s role as sole director and liquidator of Immobiliare e Finanziaria Salentina Srl, a company which had been declared insolvent in 1992 and struck off the companies register on 7 July 2005, after the completion of liquidation. Moreover, Mr Manni claimed that the personal data published in that public register was processed by a third party company specialized in conducting market research and assessment¹ and that the Lecce Chamber of

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¹ This claim is not particularly relevant for the analysis of this paper which will deal with

Commerce, after a request for the data's removal, refused to do so.

On 1 August 2011, the Tribunale di Lecce upheld the claims and ordered to the Lecce Chamber of Commerce to anonymise – but not remove – the data related to Mr Manni, as well as to pay him compensation for the damage suffered.² In its decision, the Tribunale di Lecce argued that, unless there is a particular public interest in the retention and disclosure of registry entries related to events occurring during the company's existence, register entries related to such events should not be permanent. However, Italian law does not provide a minimum or a maximum retention term of retention of data published in the companies register. For this reason, the Court of First Instance balanced the conflicting interests of ensuring transparency and access to third parties of the information published in the companies register and the right to privacy. In particular, the Court referred to an 'appropriate period' from the negative business event and the removal of the company from the register, after which time the processing of such data is no longer necessary. This anonymization of data ensures the public interest to the historical memory of the company and its related events.

The Lecce Chamber of Commerce appealed this decision directly to the Italian Supreme Court pursuant to Art 152, para 13, of the decreto legislativo 30 June 2003 no 196, also known as the Italian Data Protection Code (hereinafter, 'IDPC'). According to the Italian Supreme Court, public registers play an important role by gathering and providing information which promotes the creation and development of commercial and social relations. Indeed, such data contributes to increase and ensure legal certainty, and that is the public purpose which justifies their retention. Hence, the Supreme Court underlined that a former director and liquidator, whose bankruptcy has been reported in the companies register and whose company registration was thereafter cancelled, has not the right to request the Chamber of Commerce the cancellation or anonymization of the data already published in the companies register. Indeed, such information plays a public function aimed at ensuring legal certainty through the mandatory tasks attributed to the Chamber of Commerce and the compulsory rules related to the entries published in the companies register.

Notwithstanding the public purpose argued by the authority responsible for maintaining the companies register which would justify the permanent processing of personal data, the Supreme Court recognised the relevance of the right to be forgotten as a fundamental instrument to protect personal identity. As a consequence, this right needs to be balanced with the necessity to ensure legal certainty through the information published in the companies register.

Hence, the controversial issue, which has led the Italian Corte di Cassazione to refer its questions to the European Court of Justice (hereinafter, 'ECJ'), consists in understanding whether, in the absence of any legal rule, the protection of

data published in the companies registers and their relation with the right to be forgotten.

² Tribunale di Lecce 1 August 2011 no 1118 (unpublished).

personal data would provide the data subject the right to obtain the cancellation or anonymization of his or her data published in the companies register after a certain period of time. The Corte di Cassazione also asked the ECJ to identify the time period when the processing of information published in the companies register would be no longer necessary for the purposes for which the data were collected or further processed.

After analysing the case and considering the conflicting interests of, on one hand, ensuring the transparency of the information described above, the Italian Corte di Cassazione decided to refer to the ECJ the following questions:

‘(1) Must the principle of keeping personal data in a form which permits identification of data subjects for no longer than is necessary for the purposes for which the data were collected or for which they are further processed, laid down in Art 6, para 1, letter e) of Directive 95/46/EC, transposed by decreto legislativo 30 June 2003 no 196, take precedence over and, therefore, preclude the system of disclosure established by means of the companies register provided for by Directive 68/151 and by national law in Art 2188 of the Civil Code and Art 8 of legge 29 December 1993 no 580, in so far as it is a requirement of that system that anyone may, at any time, obtain the data relating to individuals in those registers? (2) Consequently, is it permissible under Art 3 of Directive 68/151, by way of derogation from the principles that there should be no time limit and that anyone may consult the data published in the companies register, for the data no longer to be subject to ‘disclosure’, in both those regards, but to be available for only a limited period and only to certain recipients, on the basis of a case-by-case assessment by the data manager?’

2. The ECJ Decision

In its decision, the ECJ has addressed the limits of the right to be forgotten in relation to data published in the companies registers.

According to the ECJ decision, as EU law currently stands, the right to be forgotten related to information published in companies registers shall be determined by Member States

‘on the basis of a case-by-case assessment, if it is exceptionally justified, on compelling legitimate grounds relating to their particular situation, to limit, on the expiry of a sufficiently long period after the dissolution of the company concerned, access to personal data relating to them, entered in that register, to third parties who can demonstrate a specific interest in consulting that data’.

In order to explain the outcome of this decision, it is necessary to highlight the fundamental path of the ECJ’s reasoning.

In its decision, the European Court has first focused on clarifying the relevant legal basis applying to the information published in the companies registers and their public purposes. In particular, Art 2, para 1 of Directive 68/151/CEE³ (hereinafter, 'First Directive') provides a minimum list of information which Member States are obliged to make available to the public by introducing mechanisms of compulsory disclosure. In particular, this data covers, *inter alia*, the appointment, termination of office and details of the persons who either as a body constituted pursuant to law, or as members of any such body, are authorised to represent the company in dealings with third parties and in legal proceedings, or take part in the administration, supervision or control of that company. This includes, according to Art 2, para 1, letter j) of the First Directive, the appointment of liquidators and a description of their respective powers. Pursuant to Art 3, para 1 to para 3 of the First Directive, this information shall be disclosed through the national public register, allowing everyone to obtain a copy – even partial – of the entries by request.

It is worth mentioning that, at the time of the decision, Directive 2012/17/EU⁴ had already entered into force, expressly providing that the processing of personal data carried out within the framework of this Directive shall be subject to the Directive 95/46/EC⁵ (hereinafter, 'Privacy Directive' or 'EUDPD'). However, the case in question involves facts which occurred before that period and, for this reason, it is necessary to rely on the rules provided for by the First Directive.

Regarding the purpose of the registration, the First Directive aims to protect third parties' interests to ascertain, by examining the basic documents of joint stock companies and limited liability companies, the registrant's assets as well as to obtain other information, especially that related to the entity's legal representatives. Moreover, in the *Haaga* case,⁶ the ECJ has specified that the purpose of the First Directive is guaranteeing legal certainty in the relations between third parties and companies with the aim of improving trades among Member States for the development of the internal market.⁷

³ First Council Directive 68/151/EEC of 9 March 1968 on co-ordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Art 58 of the Treaty, with a view to making such safeguards equivalent throughout the Community (1968) OJ L 65.

⁴ Directive 2012/17/EU of the European Parliament and of the Council of 13 June 2012 amending Council Directive 89/666/EEC and Directives 2005/56/EC and 2009/101/EC of the European Parliament and of the Council as regards the interconnection of central, commercial and companies registers (2012) OJ L 156.

⁵ 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 (1995) OJ L 281.

⁶ Case C-32/74 *Friedrich Haaga GmbH*, Judgement 12 November 1974, available at <https://tinyurl.com/ybf4dndo> (last visited 25 November 2017).

⁷ According to para 6 of the *Haaga* case: 'It is important that any person wishing to establish and develop trading relations with companies situated in other Member States should be able easily to obtain essential information relating to the constitution of trading companies and to

In general, the ECJ observed that, according to its case law, any interested third party has a right to the information published in public registers, by virtue of Art 3 of the First Directive and in accordance with the general principle provided by Art 54, para 3, letter *g*) of the European Economic Community Treaty (the legal base of the First Directive), whose aim is to avoid discrimination among third parties intending to access company information. As a result, specific categories of subjects (such as creditors) are not the only ones permitted to access the information published in the companies registers.⁸

In the light of this framework, as a general principle, the retention and access to data published in the companies register would not be limited, considering also the fact that, as pointed out by Advocate General Bot, even after the dissolution of the company, rights and legal relations relating to the company continue to exist in the case of a legal action against the legal representatives, the members of the entity's organs or against the liquidators of that company.⁹ However, the possibility of bringing legal proceedings depends on the limitation periods provided by the law of each Member State. That is the only legal criterion which can be applied in order to assess the existence of a right to access company information during the time. The fragmentation of the national laws about limitation periods could be considered as one of the reasons which have not allowed the ECJ to define a single term after which data should be removed or anonymised.

After having defined the European legal basis of the companies' mandatory disclosure, the ECJ then focused on privacy and data protection. First, the ECJ

the powers of persons authorised to represent them, which requires that all the relevant information should be expressly stated in the register'.

⁸ Case C-97/96, *Verband deutscher Daihatsu-Händler eV v Daihatsu Deutschland*, Judgement of 4 December 1997, paras 19, 20 and 22, available at <https://tinyurl.com/yahajqot> (last visited 25 November 2017); Joint cases C-435/02 and C-103/03, *Axel Springer AG v Zeitungsverlag Niederrhein GmbH and Co. Essen KG and Hans-Jürgen Weske*, order of 23 September 2004, paras 29 and 33, available at <https://tinyurl.com/y75vku82> (last visited 25 November 2017).

⁹ According to para 73: 'In this regard, it seems to me to be beyond doubt that such information, including personal data, must be subject to the principle of disclosure of the register not simply for as long as a company is active on the market, but also after it has ceased trading. The fact that a company ceases to exist and is consequently removed from the register does not prevent rights and legal relations relating to that company from continuing to exist. It is, therefore, necessary for persons who may claim such rights against a company which has ceased trading, or who have entered into such legal relations with that company, to have access to information relating to it, including personal data relating to its directors'. According to para 74: 'As the German Government has pointed out, even data which is no longer current is important to trade. Thus, in the event of litigation, it is often necessary to know who was authorised to act on behalf of a company at a given time. Similarly, I consider, as do the Czech and Polish Governments, that it is necessary to preserve the information in the register even after the dissolution of a company, since such information may still prove to be relevant, for example in verifying the legality of an instrument executed by the director of a company several years previously, or enabling third parties to bring an action against the members of the company's organs or its liquidators'.

specified that the information published in the companies' registers is to be considered as personal data pursuant to Art 2, letter *a*) EUDPD by virtue of their capacity to make identified or identifiable a natural person. Moreover, it is not relevant that the information has been provided as part of a professional activity.¹⁰ As a consequence, the activity of the registers, consisting in transcribing, retaining and communicating by request companies' information, entails a processing of personal data and the authority for maintaining the register should be considered as the controller.¹¹

The application of the Privacy Directive to the case in question obliges the ECJ to take into account the Directive's strict relation to the protection of fundamental rights. Indeed, according to Art 1 and Recital 10 EUDPD, the Privacy Directive's aim consists of ensuring a high level of protection of the fundamental rights and freedoms of natural persons, as stated repeatedly also in the ECJ case law and, in particular, by the landmark decision *Google Spain*.¹²

In the European legal framework, the right to privacy and data protection are enshrined in the Charter of the Fundamental Rights of the European Union (hereinafter, 'CFREU') which, as established by Art 6 of the Treaty on the Functioning of the European Union (TFEU), has the same legal value of the EU Treaties. In particular, Art 7 CFREU ensures the right of respect for private life, while, Art 8 CFREU protects the right to the protection of personal data. Art 8, paras 2 and 3 CFREU establishes the general principles of data processing:

'data must be processed fairly, for specific purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law, that everyone has the right of access to data which has been collected concerning him or her and the right to have it rectified, and that compliance with those rules is to be subject to control by an independent authority'.¹³

The consent of the data subject constitutes the core of the rights to privacy

¹⁰ Case C-615/13 P, *ClientEarth v The Secretary of State for the Environment, Food and Rural Affairs*, Judgement 16 July 2015, para 30, available at <https://tinyurl.com/y7d3os8k> (last visited 25 November 2017).

¹¹ Art 2, letters *b*) and *d*) EUDPD.

¹² Case C-131/12, *Google Spain SL e Google Inc. v Agencia Española de Protección de Datos (AEPD) e Mario Costeja González*, Judgement of 13 May 2014, para 66, available at <https://tinyurl.com/y8su9tla> (last visited 25 November 2017). See also *ex multis* Joint cases C-293/12 and C-594/12, *Digital Rights Ireland Ltd v Minister for Communications, Marine and Natural Resources, Minister for Justice, Equality and Law Reform, Commissioner of the Garda Síochána, Irlanda, The Attorney General and Kärntner Landesregierung, Michael Seitlinger, Christof Tschohl e a*, Judgement of 8 April 2014, available at www.eur-lex.europa.eu (last visited 25 November 2017); Case C-362/14, *Maximilian Schrems v Data Protection Commissioner*, Judgement of 6 October 2015, available at <https://tinyurl.com/yb8gkfr6> (last visited 25 November 2017).

¹³ Those requirements are implemented *inter alia* in Arts 6, 7, 12, 14 and 28 of the Privacy Directive.

and data protection.¹⁴ Art 7, letter *a*) EUDPD provides that a processing of personal data can be carried out only after having obtained the unambiguous consent of the data subject. Nevertheless, in some specific cases provided by law,¹⁵ consent is not required, and, for this reason, a processing of personal data, even in the lack of an unambiguous consent, would be carried out lawfully.

In the case in question, according to the ECJ reasoning, the legal grounds related to processing for the performance of a task of public interest, pursuant to Art 7 letter *e*) EUDPD, and for legitimate interests of the controller, pursuant to Art 7 letter *f*) EUDPD, could be applied, as was highlighted by the Advocate General in its opinion.¹⁶

In spite of the fact that the Privacy Directive provides legitimate grounds for the processing of personal data, Art 6, para 1, letter *e*) EUDPD establishes a general limitation which obliges Member States to ensure that personal data is collected and processed in a way which allows the identification of data subjects no longer than is necessary for the purposes for which the data were collected or further processed. Therefore, when data is stored for longer periods for historical,

¹⁴ According to Art 2, letter *h*) EUDPD, consent is defined as any freely given specific and informed indication of his wishes by which the data subject signifies his agreement to personal data relating to him being processed.

¹⁵ In particular, data can be processed without the consent of the data subject: (a) for the performance of a contract to which the data subject is party or in order to take steps at the request of the data subject prior to entering into a contract; or (b) for compliance with a legal obligation to which the controller is subject; or (c) in order to protect the vital interests of the data subject; (d) for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller or in a third party to whom the data are disclosed; or (e) for the purposes of the legitimate interests pursued by the controller or by the third party or parties to whom the data are disclosed, except where such interests are overridden by the interests for fundamental rights and freedoms of the data subject which require protection under Art 1, para 1.

¹⁶ According to para 52 of its opinion: 'I observe at the outset that the processing of personal data at issue in the main proceedings satisfies several of the criteria making data processing legitimate set out in Art 7 of Directive 95/46. Firstly, in accordance with Art 7, letter *c*) of that directive, the processing is 'necessary for compliance with a legal obligation to which the controller is subject'. Secondly, in accordance with Art 7, letter *e*) of that directive, the processing is 'necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller or in a third party to whom the data are disclosed'. Thirdly, in accordance with Art 7, letter *f*) of Directive 95/46, the processing is 'necessary for the purposes of the legitimate interests pursued (...) by the third party or parties to whom the data are disclosed, except where such interests are overridden by the interests for fundamental rights and freedoms of the data subject which require protection under Art 1, para 1'. With regard, *inter alia*, to the ground for legitimation provided for in Art 7, letter *e*) EUDPD, it should be noted that the ECJ has already held that the activity of a public authority consisting in the storing, in a database, of data which undertakings are obliged to report on the basis of statutory obligations, permitting interested persons to search for that data and providing them with print-outs thereof, falls within the exercise of public powers. Case C 138/11, *Compass-Datenbank GmbH v Republik Österreich*, Judgment 12 July 2012, paras 40 and 41, available at <https://tinyurl.com/yct3lnd2> (last visited 25 November 2017). Moreover, such an activity also constitutes a task carried out in the public interest within the meaning of that provision.

statistical or scientific use, Member States must lay down appropriate safeguards and data controllers are responsible for ensuring compliance with those principles. Failure to comply with Art 6, para 1, letter *e*) EUDPD should result in the possibility for data subjects to obtain the erasure or block of the data concerned, pursuant to Art 12, letter *b*) EUDPD.

Moreover, even in the lack of any failure to comply with this provision, according to Art 14, letter *a*) EUDPD, Member States are obliged to grant data subjects the right to object at any time on legitimate grounds related to particular situations regarding the processing of their data, provided that Member States have not issued rules which limit such right. In other words, the right of data subjects to object against the processing of their data grants the possibility to take into consideration all the circumstances of a specific processing of data.

In the case in question, the ECJ has recognised as a general principle that Member States do not have to guarantee natural persons a right to obtain the post company dissolution erasure of personal data published in the companies registers upon the expiry of a sufficiently long period. According to the ECJ, this is because this failure to guarantee personal data erasure does not interfere with the fundamental rights to privacy and data protection provided by the CFREU. The First Directive limits the required disclosure to data related to the identity and functions of subjects in a specific company, thus reducing the uncertainty in the business relations between third parties, joint-stock companies and limited liability companies¹⁷ in order to ensure the proper functioning of the internal market.

The ECJ has also stated, however, that in spite of the above-mentioned interest, there could be some specific situations which would justify, as an exception, the limitation to the access to data published in the companies registers after the expiration of a sufficiently long period after the dissolution of a company. Since the application of Art 14, letter *a*) EUDPD depends on the national provisions applied by Member States, the decision about this issue is a matter of national law. Consequently, the referring Court has the task to identify the national provisions which could apply in this case.

In order to provide interpretative guidance to the national court, the ECJ specified that, considering the legitimate interest of purchasers in accessing to that information the alleged facts related to the difficulties in selling the touristic complex built by Mr Manni's company are not sufficient to limit the access to the information related to its bankruptcy published in the companies register.

¹⁷ According to para 50 of the decision: 'In view of this, it appears justified that natural persons who choose to participate in trade through such a company are required to disclose the data relating to their identity and functions within that company, especially since they are aware of that requirement when they decide to engage in such activity'.

II. Right to Be Forgotten and Public Registers: A Difficult Relationship?

1. The Right to Be Forgotten

The ECJ argues in its decision that the necessity to ensure transparency in order to promote commercial relations and, consequently, the development of the internal market, cannot be taken into consideration without balancing the fundamental rights of privacy and data protection enshrined in the CFREU.¹⁸ The ECJ considers the interference with the rights of respect for private life and the right to protection of personal data not disproportionate in this case, since only a limited number of personal data is published in the companies register. Thus, natural persons who choose to participate in a business activity through such a joint stock company or limited liability company should be justifiably required to disclose data related to their identity and functions within those companies.

These conclusions need to be contextualized by an examination of the evolution of the right to privacy in the EU.¹⁹ Although the right to privacy and data protection is currently expressly enshrined in the CFREU, this is the result of a long path leading to the recognition of the constitutional dimension of such rights in the EU. Originally, the right to data protection was introduced by the Privacy Directive, whose aim was to regulate the free circulation of personal data within the EU.²⁰ In 1995, the protection of personal data was fundamental in order to enhance the development of the internal market fostering the circulation of people, goods and capital. Currently, this economic root is still relevant, but the constitutional dimension of the right to privacy has become predominant, due to concerns related to the increase in the amount of the data exchanged around the world through new digital technologies. This trend is shown by the ECJ jurisprudence and by the adoption of the new European General Data Protection Regulation²¹ (hereinafter, 'GDPR'), whose Recital 1

¹⁸ H. Hijmans, *The European Union as Guardian of Internet Privacy: The Story of Art 16 TFEU* (Berlino: Springer, 2016); O. Pollicino and M. Bassini, 'Reconciling Right to be Forgotten and Freedom of Information in the Digital Age' *Diritto pubblico comparato ed europeo*, 641-662 (2014); G. Sartor, 'The Right to Be Forgotten: Balancing Interests in the Flux of Time' 24(1) *International Journal of Law and Information Technology*, 72-98 (2016).

¹⁹ A timeline of the principal events in the development of this right is available at <https://tinyurl.com/ydy882pe> (last visited 25 November 2017).

²⁰ According to Recital 7, 'Whereas the difference in levels of protection of the rights and freedoms of individuals, notably the right to privacy, with regard to the processing of personal data afforded in the Member States may prevent the transmission of such data from the territory of one Member State to that of another Member State; whereas this difference may therefore constitute an obstacle to the pursuit of a number of economic activities at Community level, distort competition and impede authorities in the discharge of their responsibilities under Community law; whereas this difference in levels of protection is due to the existence of a wide variety of national laws, regulations and administrative provisions'.

²¹ 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

states: 'The protection of natural persons in relation to the processing of personal data is a fundamental right'. Moreover, Art 8, para 1 of the Charter of Fundamental Rights of the European Union (the 'Charter') and Art 16, para 1 TFEU provide that everyone has the right to the protection of their personal data. Additional evidence of the relevance of privacy in the current society is the proposal of the EU Commission for the review of the e-privacy Directive.²²

The recognition of their constitutional dimension makes that privacy and data protection cannot be considered as monads in the framework of fundamental rights, but need to be balanced with other fundamental rights as also specified by Recital 4 of the GDPR.²³ This approach is confirmed, for example, by the provisions of the Privacy Directive which allow data controllers to process personal data of the data subjects, even when they have not obtained the subject's previous consent.²⁴ In other words, the right to personal data protection is balanced in some cases with other interests, such situations in which consent is not required for data processing necessary to safeguard life or bodily integrity of a third party as provided by Art 24, para 1, letter g) IDPC.

However, these exceptions do not prejudice the right to the data subject to control its data and their dissemination. In particular, according to Art 6, para 1, letter e) EUDPD, Member States are obliged to keep the data in a form which allows identification of data subjects for no longer than is necessary for the purposes for which the data was collected or further processed. Moreover, Art 12 EUDPD gives data subjects the option to object to the processing of personal data in order to obtain the rectification, erasure or blocking of incomplete or

Regulation 'GDPR') (2016), OJ L 119. However, the economic relevance of data protection is still important, as explained by Recital 3 of the GDPR which states: 'The economic and social integration resulting from the functioning of the internal market has led to a substantial increase in cross-border flows of personal data. The exchange of personal data between public and private actors, including natural persons, associations and undertakings across the Union has increased. National authorities in the Member States are being called upon by Union law to cooperate and exchange personal data so as to be able to perform their duties or carry out tasks on behalf of an authority in another Member State'.

²² Proposal for a Regulation of the European Parliament and of the Council concerning the respect for private life and the protection of personal data in electronic communications and repealing Directive 2002/58/EC (Regulation on Privacy and Electronic Communications) (2017), COM (2017) 10 final.

²³ According to Recital 4 GDPR: 'The processing of personal data should be designed to serve mankind. The right to the protection of personal data is not an absolute right; it must be considered in relation to its function in society and be balanced against other fundamental rights, in accordance with the principle of proportionality. This Regulation respects all fundamental rights and observes the freedoms and principles recognized in the Charter as enshrined in the Treaties, in particular the respect for private and family life, home and communications, the protection of personal data, freedom of thought, conscience and religion, freedom of expression and information, freedom to conduct a business, the right to an effective remedy and to a fair trial, and cultural, religious and linguistic diversity'.

²⁴ This is one of the cases in which the right to privacy is balanced with other interests. See in particular, H. Kranenborg, 'Article 8', in S. Peers et al eds, *The EU Charter of Fundamental Rights: A Commentary* (Oxford: Hart Publishing, 2014), 224, 229.

inaccurate data whose processing of which does not comply with the provisions of the Privacy Directive.

The recent development of the information society and the creation of new digital technologies have increased the ability of data collectors and processors to storage and access to information even after long periods of time. This ability raises serious concerns regarding the implications for the right to privacy and data protection.²⁵ This online framework has contributed to the fostering of the constitutional dimension of the right to be forgotten, in view of its strict relation with the right to personal identity. Indeed, the right to be forgotten should not be considered as an instrument that the data subject can exploit in order to object against unlawful processing of his or her personal data, but it is there to ensure that the personal identity of each individual is not prejudiced.²⁶ The evolution of the right to be forgotten should not be considered, however, as a mere consequence of digital developments, as demonstrated by some judicial decisions which have already addressed this issue before the adoption of the Privacy Directive.²⁷

At the EU level, there is still no definition of the right to be forgotten. Art 17 GDPR limits the right of the data subject to obtain the erasure of personal data concerning him or her from the controller without undue delay to specific grounds. Accordingly, the right to be forgotten can be defined as the right of the

²⁵ In this case, it seems necessary to assess the processing of personal data in relation with the development of new digital technologies allowing an easier circulation of data across the EU keeping in mind the protection of fundamental rights. See O. Pollicino and M. Bassini, 'Il diritto all'oblio: i più recenti spunti ricostruttivi nella dimensione comparata ed europea', in F. Pizzetti ed, *I diritti nella rete della rete, il caso del diritto d'autore* (Torino: Giappichelli, 2013); P. Costanzo, 'Il fattore tecnologico e le sue conseguenze', AIC National convention 'Costituzionalismo e globalizzazione', Salerno, 23-24 November 2012, available at <https://tinyurl.com/y6vpad66> (last visited 25 November 2017); F. Pizzetti, 'La tutela della riservatezza nella società contemporanea' *Percorsi costituzionali*, I, 61-68 (2010).

²⁶ M. Mezzanotte, *Il diritto all'oblio. Contributo allo studio della privacy storica* (Napoli: Edizioni, Scientifiche Italiane, 2009); V. Mayer-Schönberger, *Delete: The Virtue of Forgetting in the Digital Age* (Princeton: Princeton University Press, 2009); G. Sartor, 'The Right to be Forgotten: Dynamics of Privacy and Publicity', in L. Floridi ed, *The Protection of Information and the Right to Privacy* (Berlino: Springer, 2014), 1-15.

²⁷ Tribunal de Grande Instance de Seine, 14 October 1965, Mme. S. c. Soc. Rome-Paris Films, JCP 1966, II, 14482; Tribunal de Grande Instance de Paris, 20 April 1983, Mme. M. c. Filipacchi et soc. Cogedipresse, JCP 1983, II, 20434. Before Google Spain, the right to be forgotten was already addressed by scholars looking in particular at the conflicting interests between privacy and freedom of information. See G. Finocchiaro, 'La memoria della rete e il diritto all'oblio' *Diritto dell'Informazione e dell'Informatica*, 391-404, (2010); J. Rosen, 'The Right to be Forgotten' 64 *Stanford Law Review Online*, 88, 88-89 (2012); F. Werro, 'The Right to Inform v. The Right to be Forgotten: A Transatlantic Clash', in A. Colombi Ciacchi et al eds, *Liability in the Third Millennium*, (Baden-Baden: Nomos, 2009), 285-300; E. Gabrielli ed, *Il diritto all'oblio. Atti del Convegno di Studi del 17 maggio 1997* (Napoli: Edizioni Scientifiche italiane, 1999); T. Auletta, 'Diritto alla riservatezza e «droit à l'oubli»', in G. Alpa et al eds, *L'informazione e i diritti della persona* (Napoli: Edizioni Scientifiche Italiane, 1983), 127; G.B. Ferri, 'Diritto all'informazione e diritto all'oblio' *Rivista di diritto civile*, 801 (1990); M.R. Morelli, 'Oblio (diritto all')' *Enciclopedia del diritto, Aggiornamento VI* (Milano: Giuffrè, 2002), 848; M. Mezzanotte, n 26 above.

data subject to object to the processing of his or her personal data once the purposes of the processing of the data have been fulfilled.

Before the adoption of the GDPR, in 2012, the right to be forgotten was expressly recognised for the first time at the EU level by the ECJ landmark decision in the Google Spain case. The case involved the indexing in a search engine of two news articles published many years ago on a Spanish newspaper in which an announcement mentioning the complainant's name appeared for a real-estate auction connected with attachment proceedings for the recovery of social security debts. In that case, the ECJ ruled that search engines, by virtue of their role of data controller, are obliged to remove links to web pages, published by third parties and containing information relating to that person, which result from the list displayed following a search made based on a person's name. It is irrelevant that the information is erased beforehand or simultaneously from those web pages, or that the publication of such information is lawful. The ECJ's conclusion is rooted in the necessity to protect the fundamental right to privacy of the data subject, who has the right to obtain the deindexing of the information relating to him or her from a list of web results of search using his or her name. In principle, the fundamental rights enshrined in Arts 7 and 8 CFREU override, not only the economic interest of the search engine, but also the interest of the general public in having access to that information as a result of a search relating to the data subject's name. The Court identified, however, some limits to the right to be forgotten such as the role played by the data subject in public life. In this case, the interference with the fundamental rights of the data subject would be justified by the preponderant interest of the general public to have access to this information, even in a list of search engine results.

It is necessary, however, to highlight the peculiarities of the Google Spain case in order to distinguish it from the current case. There are some similarities between them. First of all, the basic question of the national courts was commonly sought to understand whether data subjects have the right to request the removal or the blocking of their personal data or information to third subjects involved in the processing of such data. In both cases, the ECJ recognised that search engines and the authority responsible for maintaining the companies register have responsibilities regarding the data under their control as data controllers. According to the ECJ, the activities carried out by these two subjects fall under the scope of the definition of 'processing' set forth in Art 2 EUDPD.²⁸ Accordingly, both Google and companies registries should be considered as data controllers because of their role in processing personal data.²⁹

²⁸ According to Art 2, letter *b*) EUDPD, processing means 'any operation or set of operations which is performed upon personal data, whether or not by automatic means, such as collection, recording, organization, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, blocking, erasure or destruction'.

²⁹ According to para 28: 'Therefore, it must be found that, in exploring the internet

There are, however, differences between both cases that need to be analysed. First, the fundamental rights at stake in the two decisions are different. In *Google Spain*, the rights to privacy and data protection conflict with the necessity to ensure freedom of expression and information (in order to grant public access to information) and the freedom to do business in relation to the activity of the online platform. In the current case, the interest that conflicts with the right to privacy consists in ensuring transparency in business relations in order to promote the development of the internal market as provided for by the First Directive at EU level and by national provisions.

In spite of the fact that both subjects have been considered responsible for the processing of personal data, there is a strong difference even in the purpose of the data processing. In the case of search engines, their activity is not intended to pursue a public interest recognised by the law, unlike the case of the authority responsible for maintaining the companies register. This difference does not mean that information displayed on search engines is not protected. This information falls under the scope of the freedom of expression and the right to access to information. Search engines do not, however, exercise a recognised public function in disseminating that information. For this reason, it is not possible to identify a legal ground which justifies the proportionality and necessity of the processing. This is shown by the approach of the ECJ in *Google Spain*, which ordered the deindexing of the results displayed in search engines' results without directly imposing an obligation on the hosting provider to remove the contents at issue.

Furthermore, the public interest in accessing information clearly depends also on the public role of the data subject in the society. In the *Google Spain* case, Mr *Consteja Gonzales* was a private citizen, and, for this reason, the ECJ considered as disproportionate the maintenance of web results related to facts that had occurred many years before the case. In the case in question, although also Mr *Manni* was not a public figure, the information retained by the companies register is prescribed by law to ensure transparency in the relations between companies and third parties, not published at the option of companies or other subjects. In other words, the public function exercised by the public register constitutes a limitation for the right to be forgotten by transforming data about unknowing people in relevant information for the society. Indeed, the publication

automatically, constantly and systematically in search of the information which is published there, the operator of a search engine 'collects' such data which it subsequently 'retrieves', 'records' and 'organises' within the framework of its indexing programmes, 'stores' on its servers and, as the case may be, 'discloses' and 'makes available' to its users in the form of lists of search results. As those operations are referred to expressly and unconditionally in Article 2, letter *b*) of Directive 95/46, they must be classified as 'processing' within the meaning of that provision, regardless of the fact that the operator of the search engine also carries out the same operations in respect of other types of information and does not distinguish between the latter and the personal data'.

of such information in the companies registers is functional to ensure transparency in the relationship among business and interested parties with the consequence that access to information becomes predominant over the right to privacy of data subject as for data of individuals which play a public role in the society.

However, it is necessary to point out that the balancing among these two conflicting interests is not fixed but, as stated by the ECJ, there may be specific situations in which the overriding and legitimate reasons relating to the specific case of the person concerned justify exceptionally that access to personal data entered in the register is limited, upon expiry of a sufficiently long period after the dissolution of the company in question, to third parties who can demonstrate a specific interest in their consultation. Regarding this point, the ECJ has not provided specific criteria. Probably, such interpretative lack is the consequence of the ECJ decision to entrust to the national legislation the definition of those legal mechanisms related to cancellation and anonymization of data published in the companies registers under request of data subjects. In other words, it seems that the ECJ has recognised this right, but only in exceptional cases defined by Member States.

2. The Companies Register

In order to assess the conflicting interests in this case, it is also necessary to focus on the purpose of the companies register and the legal mechanisms which allow the cancellation of data published in such register.

At the European level, the companies register was first introduced by Art 3 of the First Directive in 1968.³⁰ One of its purposes was to ensure certainty in the law regarding relations between the company and third parties. In particular, the First Directive provided, *inter alia*, rules in order to harmonise the basic documents which the company, within the meaning of Art 58 EEC, should disclose in order to allow third parties access to their contents and other information, especially that information regarding the persons who are authorised to represent and bind the company. In 2003, the European Parliament and the Council adopted the Directive 2003/58/EC, which repealed the First Directive. Since then, the above-mentioned Directive 2012/17/EU,³¹ and other previous EU measures such as Directive 2009/101/EU, have increased the possibility to access the information published in the companies registers also through the use of digital technologies and the cooperation between the authority responsible for maintaining the registers across the EU.

As noted in the *Haaga* case,³² the purpose of the First Directive is to guarantee legal certainty in the relationship between third parties and companies,

³⁰ In each Member State, a file shall be opened in a central register, commercial register or companies register, for each of the companies registered therein.

³¹ See n 4 above and accompanying text.

³² See n 6 above and accompanying text.

with the aim of improving trades between Member States after the introduction of the internal market.

In *Daihatsu Deutschland*, the ECJ adopted a wide interpretation of the notion of ‘third party’. In particular, Art 54, para 3, letter *g*) EEC aims to generally protect the interests of ‘others’, without defining it and, for this reason, the ECJ observed that the term ‘others’, cannot be limited merely to creditors of the company. Accordingly, the ECJ stated that

‘Article 3 of the First Directive, which provides for the maintenance of a public register in which all documents and particulars to be disclosed must be entered, and pursuant to which copies of the annual accounts must be obtainable by any person upon application, confirms the concern to enable any interested persons to inform themselves of these matters’.³³

In *Springer*,³⁴ the ECJ has provided a clearer analysis about this issue, stating that

‘such disclosure obligations could be adopted on the basis of Article 54, para 3, letter *g*) of the Treaty, since that provision, which confers broad powers on the Community legislature, refers to the need to protect the interests of “others” generally, without distinguishing or excluding any categories falling within the ambit of that term, so that the ‘others’ referred to in that article includes all third parties. It follows that that term must be interpreted broadly and that it extends in particular to competitors of the partnerships concerned’.

With such general principles in mind, it is time to look at the Italian regulation of the companies register. The function of the companies register in Italy is to provide for the legal disclosure of company information in order to protect the expectation of third parties and, therefore, to ensure the creation of an accurate source of information. This state of affairs is essential for the development of economic activities and, consequently, for the functioning of the entire economy.³⁵

The general regulation of the Italian companies register is provided for by Arts 2188-2197 of the Civil Code. However, in spite of the fact that such provisions were introduced in 1942, the current Italian companies register entered fully in force only after the adoption of legge 29 December 1993 no 580

³³ Case C-97/96 n 8 above, para 22.

³⁴ Case C-435/02 and Case C-103/03, *Springer* n 8 above, paras 29 and 33.

³⁵ C. Ibba and C. Demuro, *Il registro delle imprese a vent'anni dalla sua attuazione*, (Torino: Giappichelli, 2017); S. Luoni and M. Cavanna, ‘Il registro delle imprese, vent'anni dopo. Un panorama dottrinale’ *Giurisprudenza italiana*, 1016-1040 (2015); C. Ibba, *La pubblicità delle imprese*, (Padova, CEDAM, 2006); G. Ragusa Maggiore, *Il registro delle imprese* (Milano: Giuffrè, 2002); A. Pavone La Rosa, *Il registro delle imprese* (Torino: Giappichelli, 2001).

and decreto del Presidente della Repubblica 7 December 1995 no 581.³⁶

According to Art 2188 of the Civil Code, the Italian companies register is public and managed by the office of the companies register under the supervision of a judge delegated by the President of the Court of the county town.³⁷ Art 2196 of the Civil Code lists the information which is to be provided by companies required by Art 2195 Civil Code, which are: a) surname and name, place and date of birth, citizenship of the entrepreneur; b) the firm and the business activity; c) the registered office; d) the surname and the name of proxies and attorneys.

This mandatory disclosure can be divided into three forms which produce different legal effects. The first form – mere disclosure – is only meant to make available to the public specific information without producing legal effects *vis-à-vis* third parties, such as the deposit of the balance sheet pursuant to Arts 2435 and 2492 of the Civil Code. The second form – declaratory disclosure – has the effect of ensuring legal effects *vis-à-vis* third parties pursuant to Art 2193 Civil Code. Failure to comply with this obligation means that an act or an information do not produce legal effects *vis-à-vis* third parties unless they have been aware of such information. In any case, the validity of an act does not depend on this kind of disclosure. The third form of disclosure – constitutive disclosure – is a condition for the validity of the act as for the setting up of a limited liability company or for the amendments to the instrument of incorporation.

Moreover, Art 2191 of the Civil Code provides that information published in the companies register can be cancelled when the disclosure occurred without complying with the conditions provided by law.³⁸ However, neither the Italian Civil Code nor legge 29 December 1993 no 580 allow other reasons for cancellation or a specific term after which the cancellation can be requested.

According to this framework, as Italian law currently stands, there are no legal mechanisms which oblige the Chamber of Commerce, or can be relied upon by the data subject, to eliminate information which is necessary for interested parties to exercise their rights. Moreover, according to the order of the Italian Corte di Cassazione which led to the decision in question, the lack of a legal mechanism for the elimination or anonymization of their published data

³⁶ Before the adoption of such measures, only the register of the commercial companies, managed by the records offices pursuant to Arts 100 and 101 of the Implementing Measure of the Civil Code and Art 262 of the Insolvency Law pursuant to the Italian Commercial Code issued on 1882, existed. Neither the implementation of the First Directive with decreto del Presidente della Repubblica 29 December 1969 no 1127 has removed the application of the transactional period.

³⁷ Before the adoption of legge 29 December 1993 no 580, there were two registers: the first was the companies register managed by the records office of the Tribunals, while, the second included the enterprise managed by the Chamber of Commerce.

³⁸ Art 17 of decreto del Presidente della Repubblica 7 December 1995 no 581; G. Buccarella, *La cancellazione delle società dal registro delle imprese* (Milano: Giuffrè, 2015)

is not the only reason which would preclude data subjects from making such a request to the companies register. The main reason for this is linked to the nature of the register, whose aim is to provide business data over time without predicting their chronological utility in relation to an indeterminate plurality of subjects.

Considering the rights and relations which a company could maintain with third parties in several Member States, even after its dissolution, and the fragmentation of the limitation periods of each Member State national laws, it seems impossible to define a single European limitation period after which the entry of the data in the register and their disclosure would be no longer necessary.

3. The Italian Framework

Once defined the purpose of the companies register, it is now necessary to focus on the extension of the right to be forgotten in Italy to data published in the companies registers.³⁹ In other words, it is necessary to understand whether, given the lack of any regulatory measure which expressly allows the data subject to obtain the removal or block of his or her data, it is possible to identify legitimate grounds which would justify such request.

According to the current legal framework, it is not possible to identify either an EU or a national right to be forgotten for the information published in the companies register. According to the ECJ, the provision of this right is a matter of national legislation and, for this reason, it will be necessary to wait until individual Member States decide whether to implement a right to be forgotten for such data. However, the risk of leaving this decision in the hand of Member States could result in an unjustified fragmentation in the protection of privacy around the EU.

Even if there were a national limitation period, the lack of any legal mechanism which expressly authorises the Chamber of Commerce – or any

³⁹ A. Mantelero, 'Right to be forgotten e pubblici registri' *Nuova giurisprudenza civile commentata*, 1, 70-80 (2016); D. Lorusso, N. Gentile and M. Sarti, 'Registro delle imprese e trattamento dei dati personali' *Ventiquattrore Avvocato*, 49-58 (2016); M. Pappalardo, 'L'accesso al registro delle imprese tra garanzia di trasparenza e diritto all'oblio - Il commento' *Le Società*, 820 (2017); G. Scorza, 'Niente oblio per i dati nel registro delle imprese' *L'Espresso*, available at <http://tinyurl.com/yb7q42ba> (last visited 25 November 2017). Regarding the Italian debate related to the right to be forgotten, G. Resta and V. Zeno-Zencovich, *Il diritto all'oblio su Internet dopo la sentenza Google Spain* (Roma: Roma Tre-Press, 2015); F. Pizzetti, *Il caso del diritto all'oblio* (Torino: Giappichelli, 2013); Id, 'Il prisma del diritto all'oblio', in Id, *Il caso del diritto all'oblio* (Torino: Giappichelli, 2013), 21; F. Pizzetti, 'La decisione della Corte di giustizia sul caso Google Spain: più problemi che soluzioni' *Federalismi.it*, 1-5 (2014); G.E. Vigevani, 'Identità, oblio, informazione e memoria in viaggio da Strasburgo a Lussemburgo, passando per Milano' *7 Danno e responsabilità*, 731-742 (2014); T.E. Frosini, 'Diritto all'oblio e Internet' *Federalismi.it*, 1-6 (2014); C. Blengino, 'La Corte di giustizia e i motori di ricerca: una sentenza sbagliata' *Medialaws.eu*, 19 May 2014; G. Corrias Lucente, 'Ancora su Google e il diritto all'oblio' *Medialaws.eu*, 24 June 2014; M. Bassini, 'Il diritto all'oblio ai tempi di Internet: la Corte di giustizia sui motori di ricerca' *Quaderni costituzionali*, 730-732 (2014).

other authority – to remove such data for this reason precludes the application of such solution. Nevertheless, it is worth mentioning that, after the expiry of such a limitation period, the possibility for interested parties to rely on specific rights created by this data ceases. Accordingly, considering that the aim of the companies register is to ensure legal effects *vis-à-vis* third parties, the interest in retaining the information published in the companies register would exceed its original purpose due to the impossibility for interested parties to rely on any such rights. In particular, Art 2949 of the Civil Code establishes a limitation period of five years for actions involving corporations. The same term applies to actions against members of the board of directors,⁴⁰ auditors,⁴¹ liquidators and shareholders.⁴² After such time, the interest in maintaining the information published in the companies register would be no longer relevant to protect the expectations of third parties. For this reason, such data could be eliminated or anonymized under the request of the data subject. According to this mechanism, however, the Chamber of Commerce would be competent to determine the existence of a right depending on the expiration of the limitation time, and this would be the exercise of a function which belongs to the courts. For this reason, if a Member State were to decide to introduce a right of the data subject to request the elimination or the anonymization of the information published in the companies registers, such a Member State should consider which authority is competent to make such a decision, and should introduce judicial remedies against the decision of an administrative authority in order to safeguard the rights of each individual. In this framework, it cannot be excluded that a judge could examine the limitation period provided by Italian law as a criterion in order to assess the necessity to access information which is necessary for exercising a right of third parties.

However, before the case in question, there were no judicial decisions in Italy which have dealt with the right to be forgotten in its relation to public registers.⁴³ The Italian Data Protection Authority (hereinafter, 'IDPA'), however, has already faced this issue in different occasions. In all the cases it has considered, the IDPA has rejected the requests aimed to obtain the cancellation or the anonymization of the data published in the companies register⁴⁴ without providing a detailed reasoning to justify its decision. In a decision issued on 12 October 2012, for example, the IDPA considered the complaint as groundless

⁴⁰ Art 2395 Civil Code.

⁴¹ Art 2407 Civil Code.

⁴² Art 2495 Civil Code.

⁴³ More in general, Italian judicial decisions have applied the principles decided by the ECJ in the case Google Spain. There are also many judicial and administrative cases which have addressed another issue that is related to the news included in online archives. A. Mantelero, 'Right to be forgotten ed archivi storici dei giornali. La Cassazione travisa il diritto all'oblio' *Nuova giurisprudenza civile commentata*, 543-549 (2012).

⁴⁴ *Ex multis* Italian Data Protection Authority, 3 April 2003, doc web 1128778; 6 October 2005, doc web 1185197; 4 October 2011, doc web 1851178; 18 October 2012, doc web 2130054.

since the information at issue was lawfully retained by the authority responsible for maintaining the companies register as prescribed by law.

Before the adoption of the IDPC, in 1985, the Italian Supreme Court did decide a case which is particularly relevant for the recognition of a right to be forgotten to each individual. In that case, the Italian Supreme Court ruled that everyone has an interest to be represented with his true identity in social life. In particular, individuals have the right to not have their intellectual, political, social, religious and professional heritage misrepresented. Such a right is rooted in the fundamental right of each individual to enjoy constitutional protection, based on the open clause provided by Art 2 of the Italian Constitution. This decision is usually considered the first judicial recognition of the right to personal identity in Italy and it could be considered also the basis for the recognition of the right to be forgotten.⁴⁵

Hence, the case in question does not involve solely the right of access to business information in relation to the right to privacy and data protection, but also involves other constitutional values, such as the right to personal identity and the freedom to engage in business. Indeed, although it would appear that a limitation of the right of those subjects who have consciously decided to participate in business life through a representative role is justified, it cannot be forgotten that the retention of past business information would prejudice other constitutional interests. For example, information related to bankruptcy could impact on the freedom to do business and the right to work as respectively provided by Arts 41 and 4 of the Italian Constitution.

In looking at the Italian case law, the Italian Corte di Cassazione has recognised that privacy is not a 'totem' in defense of which it is possible to sacrifice all the other rights, and has recognized the necessity to balance the right to privacy and data protection with other fundamental rights.⁴⁶ This approach, which is in line with the ECJ case-law and the Recitals of the GDPR, however, does not provide a satisfactory answer, due to the necessity of a case-by-case assessment for each request of cancellation. For example, in the case in question, it is necessary to consider that, in spite of the fact that a certain person has held a specific office in a bankrupt company, this does not mean that such event is linked to mistakes or wrong decisions of the company's representatives,

⁴⁵ Corte di Cassazione 22 June 1985 no 3769, *Foro italiano*, 2211 (1985). T. Auletta, n 27 above; G.B. Ferri, n 27 above; G. Finocchiaro, 'Il diritto all'oblio nel quadro dei diritti della personalità', in G. Resta and V. Zeno-Zencovich eds, *Il diritto all'oblio su Internet dopo la sentenza Google Spain* (Roma: Roma Tre-Press, 2015), 29; V. Zeno-Zencovich, 'Identità personale' *Digesto delle discipline privatistiche, sezione civile* (Torino: UTET, 1993), IX, 294-303; G. Finocchiaro, 'Identità personale' *Digesto delle discipline privatistiche, sezione civile* (Torino: UTET, 2010), 721-737; G. Resta, 'Identità personale e identità digitale' *Diritto dell'Informazione e dell'Informatica*, 511-531 (2007); F. Di Ciommo and R. Pardolesi, 'Dal diritto all'oblio in Internet alla tutela dell'identità dinamica. È la Rete, bellezza!' *Danno e responsabilità*, 701-716 (2012).

⁴⁶ Corte di Cassazione 20 May 2015 no 10280, available at <https://tinyurl.com/yc4k28ts> (last visited 25 November 2017).

as also argued by the General Advocate Bot in his opinion related to the case in question.⁴⁷ For example, bankruptcy could be due to other factors, such as market trends.

For this reason, it is necessary to look somewhere else. Indeed, there is another constitutional value which must be taken into consideration in the balance between granting transparency and access to third parties to the information published in the companies register and ensuring the right to privacy and data protection of data subjects. In particular, the existence of an exception in the data processing for reasons related to compliance with a requirement provided by law finds its deep roots in the duty of solidarity expressed by Art 2 of the Italian Constitution. This general obligation, which is strongly in conflict with the proliferation of individual rights in recent years, is necessary to ensure the rights of each individual. The Italian Corte di Cassazione has recognised that the principle of solidarity acts as the necessary balance between idiosyncratic positions and society, by means of duties that are imposed for the safeguard and protection of interests and values of the community as a whole. In other words, according to the Corte di Cassazione,

‘the principle of solidarity then constitutes the point of mediation that allows the legal system to safeguard the right of the individual within the community’.

The relation between the individual and the community is the key of the system of fundamental rights recognised by the Italian Constitution: individuals enjoy their rights not as monads, but in their relations with the social groups which belong to.⁴⁸ Such assumptions have been shared by the Italian Corte di Cassazione in its decision which followed the ECJ decision in question.⁴⁹

Another reason which would justify the approach of the ECJ in the case in question – as suggested by Advocate General Bot – is strictly related to the efficiency of the public registers across the EU and, consequently, with their capacity to ensure transparency and access to business information. Otherwise, the provision of a general obligation to assess and remove personal data published in the companies registers would entail a disproportionate burden for the authorities responsible for maintaining such registers which would require more resources in order to satisfy all the data subjects’ requests. The evident result of this burden would prejudice the public interest in ensuring transparency and access to business information.

⁴⁷ Opinion of Advocate General Bot, delivered on 8 September 2016, para 86.

⁴⁸ Corte Costituzionale 28 February 1992 no 75, available at <https://tinyurl.com/y83rc65a> (last visited 25 November 2017) and Corte Costituzionale 17 December 2013 no 309, available at <https://tinyurl.com/ybmmxq3j> (last visited 25 November 2017).

⁴⁹ Corte di Cassazione 9 August 2017 no 19761, available at www.dejure.it (last visited 25 November 2017).

In this framework, it is necessary to consider the guidelines issued by the IDPA in the field of personal data processing in administrative acts and documents carried out by public actors and other subjects for the purpose of achieving transparency on the web. In this document, the IDPA recognises the need, without considering the purpose of the processing, to balance the need to balance transparency with the fundamental rights of each individual, in particular with the rights to privacy, personal identity and the protection of personal data. In the case in which the law does not identify a term for the maintenance of the data published online by a public administration, the guidelines expressly request the subjects involved in the processing to define such periods according to the purpose for which that personal data has been published in order to guarantee the right to be forgotten of data subjects.

Although the scope of these guidelines is limited to the web, the express reference to personal identity, and more in general to fundamental rights, is a clear example of awareness of the constitutional implications related to the retention of data published in public registers.

De iure condito, as stated also by the Italian Corte di Cassazione in its decision following the referral of the ECJ, there is no legal mechanism which allows data subjects to promptly obtain the removal of their data published in the companies register until specific rules will be not introduced by the national legislator.

4. The New European General Data Protection Regulation

Considering this framework, it seems that the original economic role of the EU data protection is still relevant. The need to ensure transparency in order to promote relationship between businesses and third parties for the development of the internal market has been considered a predominant interest which justifies the limitation of other fundamental freedoms.

The adoption of the GDPR, which will enter into force on 25 May 2018, will foster the arguments in favour of transparency and access to the information published in public registers.

According to Art 17, para 1 of the GDPR, known as right of erasure, the data subject shall have the right to obtain from the controller the erasure of personal data concerning him or her without undue delay, in particular when the personal data are no longer necessary in relation to the purposes for which they were collected or otherwise processed.⁵⁰

⁵⁰ The other grounds provided by Art 17 GDPR regards the cases in which (a) the data subject withdraws consent on which the processing is based and where there is no other legal ground for the processing; (b) the data subject objects to the processing overriding legitimate grounds for the processing (c) the personal data have been unlawfully processed; (d) the personal data have to be erased for compliance with a legal obligation in Union or Member State law to which the controller is subject; (e) the personal data have been collected in relation to the offer of information society services.

However, para 2 of the same article establishes some exceptions to this right of erasure. Those exceptions include the processing of data for compliance with a legal obligation which requires processing by EU or Member State law to which the controller is subject; for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller; even for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes in accordance with Art 89, para 1 of the GDPR if the right referred to in para 1 is likely to render impossible or seriously impair the achievement of the objectives of such processing; and for the establishment, exercise or defence of legal claims.

Accordingly, the need to ensure transparency in the future through the mandatory disclosure of business information in the companies register could be limited only by following the narrow interpretation provided by the ECJ in the case in question: through the national implementation of a legal mechanism which is compliant with the GDPR provisions and which take into consideration the existence of overriding reasons which could justify limitations to third-party access to the data published in the companies registers.