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Federal Constitutional Court rules in favour of the “Right to be forgotten” in online archives and extends the scope of data subject rights

With its two decisions published yesterday, the Federal Constitutional Court (Bundesverfassungsgericht, BVerfG) strengthened personal rights in the digital world. It developed the right to be forgotten in a way that optimises the fundamental rights of freedom of opinion and information, as well as the right of informational self-determination. The court had requested statements of the Hamburg Commissioner for Data Protection and Freedom of Information in both cases which it confirmed in its rulings.

The right to be forgotten is based on a jurisdiction of the European Court of Justice and has been incorporated into the GDPR. So far, this provision is predominantly applied to the relationship between search engine operators and data subjects. Since 2014, data subjects are entitled to request a delisting of certain results in a name-related search from search engine operators - in Germany essentially Google's search engine - if this is necessary to protect their right to informational self-determination and their general right of personality. In this case, this right is applied directly by the Federal Constitutional Court against online archives of press companies.

The decision of the BVerfG "Recht auf Vergessen I" (Right to be forgotten I) is about a press article, reporting about an investigation of a murder crime committed in 1981. The perpetrator was sentenced to life imprisonment and finally released in 2002. After weighing freedom of the press against the protection of personal rights, the Federal Constitutional Court recognises an obligation of online archive operators to take into account the time circumstances – in this case more than 30 years - when assessing online publication of articles containing personal information. Regarding the current conditions of the information society, according to the Court there is no absolute right which allows publishers to distribute articles based on the name of a data subject via the Internet for an indefinite period of time. Instead, it is crucial to take into account the temporal aspects of the publication and weigh it against the protection of personal rights and the right of informational self-determination of affected persons.

In the future, technical measures, such as restricting web crawlers' access to certain files or an automatic redirection to copies of articles without personal data, must be considered by publishers. However, this is only mandated if those concerned expressly assert their rights.

The "Right to be forgotten II" decision, on the other hand, does not consider the rejection of a delisting claim from the search results by a regular court as a violation of the right to informational self-determination. The complainant had unsuccessfully contacted Google requesting the removal of a link, referring to a newspaper article mentioning her name. The article uses the expression “nasty tricks” in connection with the behaviour of the complainant as an employer. The Federal Constitutional Court expressly emphasises that the findability of such articles could not only have negative effects

regarding the social sphere, but also the private sphere of the data subject through its permanent accessibility. After weighting all relevant factors, however, the Court's decision confirms previous decisions, to not grant a delisting in this specific case. Not only the short period of time passed since the publication is an argument against the delisting in this matter, but also the fact that the complainant gave her consent to an interview, which has been featured in the said article.

The Hamburg Commissioner for Data Protection and Freedom of Information, Johannes Caspar, commented: "It is encouraging that the Federal Constitutional Court confirmed our view in both cases. In the future, the two decisions will have an influence in the legal debate and the practice of implementing 'the right to be forgotten'. Notably, the Federal Constitutional Court strengthens the third-party effect of the basic right of informational self-determination, with regard to the press sector. This is particularly true in view of the fact that, due to the so-called media privilege of press publishers, data subjects do not have the option to file a complaint to the data protection supervisory authorities."

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