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# The 'right to be forgotten' and the right to freedom of expression and information-legal problems on the basis of the judgment of the Supreme Administrative Court of 9 February 2023

**ABSTRACT:** *According to Art. 17(3) of Regulation (EU) 2016/679 of the European Parliament and of the Council, the 'right to be forgotten' is not absolute and is excluded when data processing is necessary to exercise the right to freedom of expression and information. These freedoms are protected by Art. 11 of the Charter of Fundamental Rights. The content of this provision is consistent with the text of Art. 10 of the European Convention on Human Rights, which is a source of protection of freedom of expression under European law. The freedom to express one's views and to obtain and disseminate one's information is provided for in Art. 54 of the Constitution of the Republic of Poland. In this regard, the Supreme Administrative Court expressed its view in the judgment of 9 February 2023, assuming that the 'right to be forgotten' applies to online archival press materials, and making such publications available is not necessary to exercise the right to freedom of expression. Therefore, it is possible to request the removal of personal data from such materials. The problem that emerged on the basis of the judgment issued boils down to the fact that the court did not fully take into account that the press plays an important role in society and the function of the press is not only to inform about various events, but it also has an archival function. Following the reasoning of the court, the past could be falsified. This verdict changes the rules of the media, is dangerous for the press and can have a 'chilling effect' on publishers. In this context, it is important to analyse the court's interpretation from the point of view of grammatical and teleological interpretation of the provisions, which may also lead to the conclusion that outdated press materials will be removed 'ex officio'.*

**KEYWORDS:** *the 'right to be forgotten', the right to freedom of expression and information, personal data protection, GDPR, The Supreme Administrative Court, Poland, European Court of Human Rights.*

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## 1.
## The history of the 'right to be forgotten'

The 'right to be forgotten' is the name of the right that was first introduced on 13 May 2014 by a ruling issued by the Court of Justice of the European Union.[1] The Court found that under European data protection law, individuals may request search engines such as 'Google' to remove certain search results associated with their name. The Court of Justice of the European Union agreed to the request submitted by the complainant, interpreting the concept of 'data controller' broadly enough to include Internet search engine operators within its scope, which was intended to be the result of emphasising the importance of Google's activity in processing personal data of citizens of European Union Member States.[2] The Court found that the operator of a search engine is responsible for the processing of personal data placed on websites published by third parties and must comply with the legal provisions that provide natural persons with protection in this respect (Directive 95/46/EC).[3] When deciding to remove content, search engines should consider whether the requested information is inaccurate, inadequate, irrelevant or exaggerated, and whether it is in the public interest to retain it in the search results. This obligation cannot be fulfilled solely because specific information is no longer inconvenient for the person concerned. This obligation constitutes an exercise of the 'right to be forgotten' or the right 'to remove links'.[4]

Initially, the 'right to be forgotten' was not regulated directly in any legal act. It could only be derived from the right to privacy and the right to personal data protection.[5] Under national law, the right to privacy under Art. 47 of the Constitution of the Republic of Poland can be considered a conglomerate of protected values, within which there are characteristic forms of privacy and legal guarantees of their protection, which include the protection of personal data under Art. 51 of the Constitution of the Republic of Poland.[6] Privacy understood as a personal right has not been codified

1 Judgment of the Court of Justice of the European Union of 13 May 2014, ref. no. file: C-131/12 in the case of Google Spain SL and Google Inc. v. Agencia Espaňola de Protecciŏn de Datos (AEPD) and Mario Costeja Gonzàlez [Online]. Available at: http://curia.europa.eu/juris/liste.jsf?language=pl&num=C-131/12 (Accessed: 2 March 2023).

2 Czerniawski, 2023, no page.

3 Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data (OJ EU L 281, 23/11/1995 pp. 0031- 0050).

4 '*The right to be forgotten' on the Internet* [Online]. Available at: https://eur-lex.europa.eu/PL/legal-content/summary/right-to-be-forgotten-on-the-internet.html (Accessed: 15 March 2022).

5 Gutowski, 2018, no page.

6 Constitution of the Republic of Poland of 2 April 1997 (Journal of Laws 1997, No. 78, item 483).

in the Civil Code, however, taking into account the open catalogue resulting explicitly from Art. 23, both in legal scholarship and in jurisprudence, privacy protection was allowed under this provision.[7] It can already be noted at this point that the 'right to be forgotten' is included in the category of personal rights, under which the data subject has the right to request that the violation of the law be discontinued, resulting in the deletion of information.[8] These two rights have common features because they refer to privacy as a good deserving legal protection.[9]

The right to personal data protection derives from the right to privacy. It is treated as its emanation or element.[10] Both the right to privacy and the right to the protection of personal data are 'third generation' rights, if it can be said that the right to the protection of personal data exists separately from the right to privacy.

The 'right to be forgotten' was also related to the right to delete personal data, derived from Art. 12(b) of Directive 95/46/EC, which provides for the right to request the deletion of one's data. This law is not a completely new institution. It should be treated as an extension and clarification of the current legal order.[11] However, the main normative act in which the 'right to be forgotten' is directly articulated is the General Data Protection Regulation, which has been in force in the European Union since 25 May 2018.[12]

Before the entry into force of the Regulation, the applicable regulation was Directive 95/46/EC, the purpose of which was to introduce a uniform system of personal data protection, because differences in the degree of protection of individual rights and freedoms could have a negative effect on the flow of data between Member States, which could result in failure to implement many projects that the establishment of the internal market will ensure.[13] Contrary to the provisions of the GDPR, member countries had a margin of freedom in their actions. The Directive is important in the light of these considerations because it was on its basis that the Court of Justice of the European Union established the 'right to be forgotten'. However, it should be recalled that Directive 95/46/EC, as a secondary law instrument, was addressed to States, therefore this provision could not be given the attribute of having direct effect in a

7 Act of 23 April 1964 - Civil Code (Journal of Laws 2019, item 1145).
8 Judgment of the Court of Appeal in Warsaw of 3 April 2017, ref. no. file: I ACa 2462/15, Legalis 1720163.
9 Sakowska-Baryła, 2015, p. 23.
10 Jabłoński and Wygoda, 2002, p. 207.
11 Rostkowska, 2017, no page.
12 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 (OJ L 119/1).
13 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions of 4 November 2010, *A comprehensive approach on personal data protection in the European Union,* COM (2010) 609.

horizontal relationship between individuals.[14] There was an obligation to issue an act of national law, which only then would constitute the source of a claim in a private law relationship.[15]

The 'right to be forgotten' was one of the basic elements of the reform of European personal data protection regulations. It has remained a theoretical concept for a long time. The concept itself has been applied to the institution of expungement in criminal proceedings. From a practical point of view, however, it was found that it is not possible to guarantee the full effectiveness of the law, because information transferred to the Internet may be recorded.[16] The purpose of the entry into force of the General Data Protection Regulation was to adapt the regulations on the protection of personal data to the needs of the information society and technological realities.[17] In the light of the development of the 'right to be forgotten', the right to the protection of personal data is a reference point for the direction of its evolution at the level of EU law. The definition adopted in the General Data Protection Regulation, which refers to all information regarding the data subject, is important for considerations regarding the protection of personal data. In a broad sense, this terminology refers both to data published by the data subject and by third parties. It may be difficult to precisely define the phenomenon of linking information to the data subject. The entire concept of the 'right to be forgotten' sets a new standard for personal data protection instruments. The effectiveness of the fundamental and universal right to the protection of personal data has increased and it has enabled natural persons to supervise their data. The reform has improved the dimension of personal data protection linked to the internal market by reducing fragmentation, strengthening coherence and simplifying the regulatory environment, thus eliminating unnecessary costs and reducing administrative burdens. These assumptions strongly determine the inclusion of the 'right to be forgotten', and their full implementation is a response to the need to create a comprehensive personal data protection system in all spheres of operation of their entities.[18]

According to Art. 17 of the GDPR, the data subject may request from the controller the erasure of personal data concerning him or her without undue delay, and the controller is obliged to do so without undue delay in certain circumstances:

14 Judgment of the CJEU of 4 December 1974 in the Van Duyn case, ref. no. file: 41/74, point 15.
15 Different positions are also expressed in the judgments of the Court of Justice of the European Union. They belong to the minority. As an example, one can cite: the judgment of the CJEU of 22 November 2005 in the Mangold case, ref. no. file: C-144/04.
16 Rosen, 2011, p. 345.
17 Special Eurobarometer (EB) No. 359 'Data protection and electronic identity in the EU (2011)'.
18 Opinion of the European Data Protection Supervisor of 7 March 2012 on the data protection reform package (OJ EU C 192/7 of 30 June 2012).

a) personal data are no longer necessary for the purposes for which they were collected or otherwise processed;
b) the data subject has withdrawn consent on which the processing is based in accordance with Art. 6(1)(a) or Art. 9(2)(a), and there is no other legal basis for processing;
c) the data subject objects to the processing pursuant to Art. 21(1) and there are no overriding legitimate grounds for the processing or the data subject objects to the processing pursuant to Art. 21(2) towards processing;
d) personal data have been processed unlawfully;
e) personal data must be deleted in order to comply with a legal obligation provided for by Union law or the law of the Member State to which the controller is subject;
f) personal data were collected in connection with offering information society services referred to in Art. 8(1).

The General Data Protection Regulation places particular emphasis on the protection of humans, by virtue of the very fact that they are humans. The protection of personal data is only secondary. First of all, the individual and his or her privacy are protected. Legal solutions adopted at the European Union level provide an opportunity to improve the situation of a weaker entity in contact with entities that have a global reach. They are a manifestation of the democratisation of law because they give victims more effective access to measures ensuring the protection of their rights as a result of violations through the use of new technologies as an open platform. Certain courses of action imposed by the European Union serve to reduce harm, both in the moral and material spheres.

The application of the 'right to be forgotten' involves many inaccuracies, but its inclusion in the data protection system should be assessed positively, especially in the context of the objectives of the proposed solutions at EU level, which include increasing the control of individuals in the use of information concerning them and ensuring transparent protection mechanisms, including in promoting the protection of personal data on the Internet. Importantly, the concept of the 'right to be forgotten' is currently accused of being in conflict with other fundamental rights and freedoms, of not specifying the procedures and method of deleting controlled data, as well as of not specifying the regulations in the event of informing third parties about the exercise by an individual of the 'right to be forgotten'. Another problem manifests itself in the inadequacy of the practical possibilities of data administrators due to technical limitations and the inability to control every network user who uses any information that has been previously shared. Therefore, it is understandable that, in

addition to practical and theoretical issues, the design of technological improvements is important.[19]

## 2.
## Exclusions to the 'right to be forgotten'

The 'right to be forgotten' is not an absolute right. Considering the content of para. 3 of the above-mentioned provision, the 'right to be forgotten' does not apply to the extent that data processing is necessary:

- to exercise the right to freedom of expression and information;
- to fulfil a legal obligation or task carried out in the public interest or in the exercise of public authority;
- for reasons of public interest in the field of public health;
- for archival, statistical, historical and scientific research purposes;
- in the scope of establishing, pursuing and defending claims.

Although the application of the above exceptions is not fully understood, they are necessary to maintain a balance between the 'right to be forgotten' and other fundamental rights. Literature is interested in the right to freedom of expression, which to some extent contradicts the methods of implementing the 'right to be forgotten'. The relationship between the freedom of speech and the right to data protection requires an interpretation of how the 'right to be forgotten' is implemented in the context of information submitted for disclosure. The juxtaposition of these two laws is called 'media exception'. This applies when interpreting Art. 17 and Art. 80 of the Regulation may raise some doubts. Pursuant to Art. 80, each Member State shall take measures to ensure the coexistence of both rights. The current wording of this provision gives Member States freedom to analyse the provisions of the Regulation, because the EU legislator does not directly specify the scope of restrictions and derogations. In this context, the scope of economic activity must be taken into account. It is becoming more and more popular, alongside the activity of bloggers and internet forum users. This type of activity is increasingly considered to be one whose subject is the public dissemination of information and opinions, regardless of the type of medium used to transmit them. The institution of the 'right to be forgotten' can be reconciled with freedom of speech by developing certain procedures at the level of Member States. From a practical point of view, it is the national authorities that are responsible for controlling the data processing method that will co-create the scope of the 'right to be forgotten' and fulfil the provisions of the Regulation.

19 Ambrose and Ausloos, 2013, pp. 22-23.

## 3.
## Discussion of the first exclusion – the right to freedom of expression and information in the context of the 'right to be forgotten'

The 'right to be forgotten' must be seen in the context of its social function and balanced against other fundamental rights in accordance with the principle of proportionality. A balance is clearly established between the fundamental rights to respect for private life and protection of personal data established in Articles 7 and 8 of the Charter of Fundamental Rights, and the right to freedom of information set out in Article 11 of the same body of rights.[20] A collision can be observed between an individual's rights regarding his or her data and freedom of expression and information, which includes the right to receive and transmit information. When invoking this exception, it is important to consider how these values interact. A guideline may be the Google Spain ruling, where the Court of Justice of the European Union indicated that removing links to certain information may create a conflict with the interests of Internet users attempting to access a category of information, and their interests may be enhanced by the data subject's special role in public life. When refusing to delete data based on this exception, the personal data controller should not only confront opposing interests, but also justify an opinion in detail. As a general rule, the rights of the data subject should take precedence over the interests of Internet users, but in justified cases, this balance may depend on the nature of the information under consideration and how significant it is for the privacy of the data subject and the public interest in using that information, which in turn may depend on the role played by the person in public life.[21] The analysis of de-listing leads to the conclusion that, in evaluating the requests, in the search engine provider's decision to maintain or block search results, it is necessary to consider the potential impact of the decision on Internet users' access to information.[22] The existence of such influence does not necessarily result in the rejection of a request to be removed from the search results list. Interference with the fundamental rights of a data subject should be motivated by the primary interest of the general public in having access to specific information.

The Court also made a distinction between the legitimacy of a website publisher to disseminate information and that of a search engine provider. It stated that the publisher of a website can only conduct its activities for journalistic purposes, where it could benefit from the exemptions that Member States may establish in such cases

20 Charter of Fundamental Rights of the European Union of 7 December 2000 (OJ EU 2016 C 202).
21 Judgment of the CJEU of 24 September 2019, ref. no. file: C-136/17, point 66.
22 Ibid., point 56.

under Art. 9 of the Directive (Art. 85 of the GDPR). The European Court of Human Rights has indicated that balancing the interests at stake may lead to different conclusions, depending on the complex content of the application (against the entity that originally published the information, against a search engine whose main interest is not the publication of primary information about a person, but facilitating the identification all available information about the data subject and creating his profile).[23]

## 4.
## The issue of the Supreme Administrative Court Judgment

The latest, quite recent, judgment of the Supreme Administrative Court of 9 February 2023 relating to the 'right to be forgotten' is detrimental to the freedom of expression.[24] The case started with the refusal of the President of the Office for Personal Data Protection to initiate proceedings. The complainant requested the deletion of personal data from press material dating back several years. The authority claimed that the data had been processed as part of journalistic activities and that the regulations of the EU Regulation, including Art. 17, was not applicable to it. The authority explained that the Polish legislator in Art. 2(1) of the Personal Data Protection Act[25] excluded Art. 5 to 9, Art. 11, Art. 13 to 16, Art. 18 to 22, Art. 27, Art. 28(2) to (10) and Art. 30 of the GDPR in relation to journalistic activities. Since the Authority does not have the authority to assess the legality of data processing in the article posted on the website based on the conditions specified in Art. 6(1) of the GDPR, it is not possible to delete personal data.

The case was referred to the Voivodship Administrative Court in Warsaw, whose opinion was that, although the press law does not set any time limit for the availability of press materials on the publisher's website, the 'right to be forgotten' implies an obligation to delete data when its processing is no longer necessary for the use of the right to freedom of expression, and therefore the Office for Personal Data Protection should assess in each case whether such necessity exists or not. The Provincial Administrative Court in Warsaw quashed the contested decision. The text containing the complainant's personal data constitutes published press material within the meaning of the press law.[26] The legislator does not specify the time limit by which press materials may be published on the Internet. In practice, it is assumed that each

23 Warecka, 2018, no page.
24 Judgment of the Supreme Administrative Court of 9 February 2023, ref. no. file: III OSK 6781/21 [Online]. Available at: https://orzeczenia.nsa.gov.pl/doc/6C317F6401.
25 Act of 10 May 2018 on the protection of personal data (consolidated text: Journal of Laws of 2019, item 1781).
26 Act of 26 January 1984 Press Law (consolidated text: Journal of Laws of 2018, item 1914).

publication can be available indefinitely, therefore it does not matter whether the text in question is archival in nature, even if it were placed in a separate catalogue. In the Court's opinion, the Authority wrongly assumed that the 'right to be forgotten' does not apply to this type of materials within the limits set out in Art. 17 of the GDPR. The national legislator did not exclude the application of this regulation to press activities. As regards the content of Art. 17(3)(a) of the GDPR, it states that if certain personal data are no longer necessary for the purpose for which they were collected or otherwise processed, and are no longer necessary from the perspective of the freedom to exercise the right to freedom of expression and information, it is possible to apply the general rules of the 'right to be forgotten'. Consequently, it is groundless to assume that in order to exercise the right to freedom of expression and information, each article must be published indefinitely.

In response to this ruling, the President filed a cassation appeal with the Supreme Administrative Court. He requested that the contested judgment be set aside in its entirety and that the case be remitted for reconsideration to the Court of First Instance and that the costs of the proceedings be awarded. He criticised the judgment under appeal, among other things – violation of the provisions of substantive law, i.e.:

- Art. 17(1) to (3) of the GDPR in connection with Art. 2(1) of the Personal Data Protection Act by incorrectly interpreting them, by assuming that the legislator's exclusion of the application of Articles 5 to 9 of the GDPR for press activities does not constitute an obstacle to the application of Art. 17 of the GDPR for press activities;
- Art. 17(3)(a) of the GDPR by incorrectly interpreting it and assuming that the President of the Personal Data Protection Office was entitled to assess the necessity of personal data processing in this case, while the possibility of making the above assessment was excluded by Art. 2(1) of the Personal Data Protection Act.

The essence of the case in question, outlined in the cassation appeal, are the following three equally important issues: firstly, whether the President of the Personal Data Protection Office had a legal basis to rule on irregularities in the processing of the complainant's personal data in connection with the publication of the complainant's personal data in a press article on the website posted on a server and in databases related to them, assuming that some time has elapsed since the first publication of the press material, and the press article is currently stored on the publisher's portal in archival resources; secondly, whether making available an archival publication stored on the website constitutes an activity consisting in editing, preparing, creating or publishing press materials within the meaning of the Press Law (press activity), to which the provisions of Articles 5 to 9, Art. 11, Articles 13 to 16, Articles 18 to 22, Art. 27, Art. 28(2) to (10) and Art. 30 of the GDPR do not apply, in accordance with the

provisions of Art. 2(1) of the Personal Data Protection Act; thirdly, whether the 'right to be forgotten' applies to press activities. The GDPR is a comprehensive regulation on the protection of personal data, which does not require implementation by national law in order to be applied in a given country. Pursuant to Art. 85(1) of the GDPR, Member States adopt provisions that reconcile the right to the protection of personal data under the GDPR with the freedom of expression and information, including processing for journalistic purposes and for the purposes of academic, artistic or literary expression. Recital (153) of the GDPR explains that the law of Member States should reconcile the provisions governing freedom of expression and information, including journalistic, academic, artistic or literary expression, with the right to the protection of personal data under the Regulation. The processing of personal data solely for journalistic purposes or for the purposes of academic, artistic or literary expression should be subject to exceptions or derogations from certain provisions of the Regulation where this is necessary to reconcile the right to the protection of personal data with the right to freedom of expression and information, as provided for in Art. 11 of the Charter of Fundamental Rights of the European Union. This should apply in particular to the processing of personal data in the audio-visual field and in press archives and libraries. Member States should therefore adopt legal acts specifying the derogations and exceptions necessary to ensure a balance between those fundamental rights.

Therefore, the GDPR itself notes that there is an inevitable conflict between the right to personal data protection and the freedom of expression and information in journalistic, academic and artistic activities, which is manifested in the fact that the enforcement of personal data protection requirements significantly limits the possibility of free data processing, however, the collection and dissemination of information may violate personal data protection regulations. This entails the need to reconcile these two rights and freedoms to enable their coexistence. Recognising this problem, the EU legislator authorised in Art. 85(1) of the GDPR, Member States to adopt specific provisions in this regard and introduce restrictions on data protection to ensure freedom of expression and information.

The EU legislator decided that a journalist should be exempt from certain data protection requirements when collecting and using personal data, because the need to comply with the requirements could significantly limit the freedom to pursue a profession and carry out a related mission, and thus the freedom of the press. It should only be added that the concept of journalistic needs should refer to the press in the broad sense of the word, i.e. traditional press (magazines), but also radio, television and other electronic media, including online portals, in accordance with the provisions of press law.

Within the meaning of Art. 2(1) of the Data Protection Act (the so-called 'press clause'), exclusions regarding press activities and literary and artistic expression

include the following provisions of the EU Regulation: rules regarding the processing of personal data (Art. 5); grounds for the admissibility of personal data processing (Art. 6); conditions for expressing consent by the data subject (Art. 7); conditions for the child to give consent in the case of information society services (Art. 8); processing of special categories of personal data (Art. 9); processing that does not require identification (Art. 11); information provided in the event of obtaining personal data in a manner other than from the data subject (Art. 14); the right of access of the data subject (Art. 15(1) and (2)); the right to rectify data (Art. 16); the right to limit processing (Art. 18); obligation to notify the data recipient about rectification or deletion of personal data or restriction of processing (Art. 19); the right to transfer data (Art. 20); the right to object (Art. 21); automated decision-making in individual cases, including profiling (Art. 22); representatives of controllers or processors without an establishment in the Union (Art. 27); obligations of the processor (Art. 28(2) to (10)); recording processing activities (Art. 30).

The Polish legislator pointed out that a significant part of the obligations provided for in the GDPR does not apply to journalistic activities consisting in editing, preparing, creating or publishing press materials, within the meaning of the Press Law Act. In the name of constitutional freedoms and social good – general principles of personal data protection, such as the principle of lawfulness, transparency and reliability, the principle of limiting the purpose of data processing, data minimisation, accuracy, limitation of storage, integrity and confidentiality and accountability, have been excluded. However, as the Court of First Instance rightly pointed out, specified in detail in Art. 2(1) of the Personal Data Protection Act, the provisions of the GDPR do not cover Art. 17 of the GDPR, which provides for the right to delete data (the so-called 'right to be forgotten'). The Supreme Administrative Court shares the position of the Court of First Instance that the EU legislator in Art. 17(3)(a) of the GDPR has excluded the application of the general rules of the right to be forgotten only when it is 'necessary' to exercise the right to freedom of expression and information (paragraph (3), introductory sentence), and not generally – in the scope of the right to freedom of expression or information. It is therefore justified to conclude that the 'right to be forgotten' applies, for example, to cases where certain personal data are no longer necessary for the purpose for which they were collected or otherwise processed – pursuant to Art. 17(1)(a) of the GDPR and at the same time they are not necessary from the perspective of the freedom to exercise the right to freedom of expression and information, within the meaning of Art. 17(3)(a) of the above-mentioned act.

Initially, press activities and the related freedom of the press were exercised by publishing press materials in paper form. In such a situation, there were no automated instruments for searching and collecting personal data. Press materials published on paper may therefore be available in an unchanged form, i.e. among others: contain data about people for an indefinite period of time, because without any additional

activity (related to their development and creation of new databases, which, it is worth emphasising, can currently be created almost exclusively using devices such as computers and software, and therefore at least partially in an automated manner) it is not possible to obtain information about individual people from them easily and quickly. The publication of personal data in paper form as part of press activities is therefore unlimited in time, but accessing them many years after their publication is very difficult. The processing of personal data is automated when operations on personal data are performed using devices (most often IT systems, computers, servers and accompanying software) enabling automatic operation (i.e. performing specific activities automatically without the need for any action by a human being). Personal data processing is most often carried out using IT systems that allow for the automatisation of activities, improving the efficiency of processing while increasing the speed and reducing the costs of performing this type of activities. Nowadays, conducting press activities in a traditional way (through the publication of paper texts) along with the publication of press materials on the Internet or conducting press activities only on the Internet, as well as the functioning of technical possibilities allowing for the quick acquisition of personal data from press materials published on the Internet, require limiting the processing time of personal data in press materials available on the Internet. This is because there is a conflict of the right to privacy guaranteed indirectly by Art. 51 of the Constitution of the Republic of Poland with the right to freedom of expression and access to information guaranteed in the provisions of Articles 14 and 54 of the Constitution of the Republic of Poland.

The Supreme Administrative Court agreed in principle with the position expressed by the Regional Administrative Court. The Supreme Administrative Court stated that the legal solutions contained in Articles 14 (freedom of the media), 51 (right to protection of personal data) and 54 (freedom of expression) of the Polish Constitution and Art. 85 of the GDPR (processing vs. freedom of expression and information) dictate that the priority of press freedom over the protection of the right to privacy is possible only until the objectives of press activity are realised, and therefore until the press material serves to realise the citizens' right to reliable information, openness of public life and social control and criticism, until the specific information contained in the press material has the attribute of actuality (rapporteur Judge Rafał Stasikowski).

In addition, the Court shared the view that the publisher's making available of an archive publication stored on a website does not constitute press activity within the meaning of the press law, as this consists in editing, preparing, creating or publishing material. We should agree with the Court of First Instance that a specific information is valid if it describes current phenomena or their specific assessments or is an analysis of past events (journalism), i.e. only for a certain period of time. Information published in the past may, in fact, be interesting even after a significant period of time

– for the assessment of occurring phenomena, changes in positions, reconstruction of old press reports on the course of events, or simply – collecting data about specific people. Making press materials available on the Internet or compiling a personal database, do not belong to the tasks of the press listed directly by law. According to the Supreme Administrative Court, material published on the publisher's website remains actual only for a certain period of time, depending on the circumstances. In the Court's view, archive publications are not necessary for the exercise of freedom of expression and this right has already been exercised at the time of publication. In view of this, the 'right to be forgotten' is applicable.

## 5.
## Why is this judgment so dangerous?

The judgment is dangerous for freedom of expression, which is one of the foundations of democracy. This is because it denies press archives, after a period of 'topicality' not precisely determined by the Court, the possibility of being covered by the press exception from the Data Protection Act. The press exception balances freedom of expression on the one hand and the right to the protection of personal data on the other in press activities. Indeed, the GDPR provides that such a balancing act is carried out by the national legislator.

Data protection rules should not interfere with freedom of expression or threaten the information functions of the press. To this end, the possibility of a press clause has been introduced. The Polish press clause is not yet as restrictive as, for example, in Sweden, where the right to personal data protection cannot limit press freedom in any way.

In the case considered by the Supreme Administrative Court, it was held that online press archives do not fall under this exception, except for up-to-date material. The storage of personal data in these archives is treated like any other data processing activity to which the GDPR applies. Consequently, any individual whose personal data is mentioned in the press material will be able to request the exercise of the 'right to be forgotten', that is, the deletion of the data from the press archive. Publishers will not be able to rely on the press exception and, moreover, the Court has forbidden to point to freedom of expression at all, because in its view, archive publications are not necessary for the exercise of this freedom. This puts the publisher at a disadvantage, as it will have to assess in each specific case whether the narrowly defined exceptions to the 'right to be forgotten' in the GDPR have arisen. Should he decide to deny the right, the burden of proof would be on him. This judgment is also dangerous in a

broader context, as it excludes for web archives all other limitations on the application of the GDPR contained in the press exception.[27]

## 6.
## What are the consequences of the judgment of the Supreme Administrative Court?

The effect of the Court's position will be to apply to archives Article 5 of the EU Regulation introducing principles for the processing of personal data that every data controller must comply with *ex officio*. If the latest view persists, the publisher will have to assess whether the purpose limitation principle has been correctly applied to the archived text without waiting for data subjects' requests.[28] This approach to freedom of expression in press activities is incompatible with the standards established by the European Court of Human Rights.

## 7.
## What do these standards provide for?

A milestone is the *Węgrzynowski* and *Smolczewski v. Poland* judgment of 16 July 2013.[29] The Court left no doubt that an online press archive is covered by the right to freedom of expression, protected by Article 10 of the European Convention on Human Rights and Fundamental Freedoms.[30] Moreover, it recognised that such archives are of great importance to society. They are an important source of historical knowledge and education. A different position could lead to the rewriting of history, that is, the creation of knowledge about a past event, without knowing all the accounts.

The Supreme Administrative Court is moving in precisely this direction. The 'right to be forgotten' in the judgment of the Supreme Administrative Court is 'retroactive'. Press material that becomes outdated will not only be subject to deletion at the request of the person wishing to exercise the 'right to be forgotten', but possibly also

27 *Publishers against the wall after the Supreme Administrative Court's ruling. The 'right to be forgotten' is retroactive* [Online]. Available at: https://www.rp.pl/dane-osobowe/art38050021-wydawcy-pod-sciana-po-wyroku-nsa-prawo-do-bycia-zapomnianym-dziala-wstecz (Accessed: 2 March 2023).

28 Żaczkiewicz-Zborska, 2023, no page.

29 Judgment of the European Court of Human Rights of 16 July 2013, complaint no. 33846/07 [Online]. Available at: https://etpcz.ms.gov.pl/etpccontent/$N/990000000000001_I_ETPC_033846_2007_Wy_2013-07-16_001.

30 Convention for the Protection of Human Rights and Fundamental Freedoms, drawn up in Rome on 4 November 1950 (Journal of Laws 1993, No. 61, item 284).

at the initiative of the publisher, as Article 5 of the GDPR mandates the deletion after a certain period of data that are no longer necessary for the purposes for which they were processed. Removing personal data from the material means deleting part of the publication, after which the text may become unintelligible and incomplete. The Supreme Administrative Court did not fully consider that the press has an important function in society. It comes down not only to reporting on various events, but also has an archival value. This chronicle of events, happenings, histories, situations and people is not only relevant from a current point of view. It also draws on various information from the past. Removing negative information from newspaper archives would, after some time, lead to falsification of the past.[31]

## 8.
## The significance of the judgment of the European Court of Human Rights (Application No 33846/07)

The judgment of the European Court of Human Rights was issued long before the provisions of the GDPR came into force. In the author's opinion, data protection standards have not changed since then, as the judgment referred to freedom of expression and not directly to data protection legislation. The judgment has a universal character. Its background was a personal rights case before the Polish courts. The judgment concerned the online archive of *Rzeczpospolita* and an article posted there. The text concerned two lawyers who were accused by journalists of using their positions to the disadvantage of public finances. On 8 May 2002, the District Court in Warsaw received a lawsuit for the protection of personal rights, brought by the applicants under Articles 23 and 24 of the Civil Code. The Court found that the journalists in question had not contacted the applicants and their allegations were largely based on rumours and overheard information. The Court stated that journalists have both the right and the obligation to inform the public about issues important to them, using the freedom of expression guaranteed in the Constitution. However, the authors of the article failed to make even the minimum effort to verify the information contained in the article, for example by contacting the complainants and attempting to obtain their comment on the matter. The article does not demonstrate that the allegations were based on reliable factual grounds. The Court accepted the applicants' claim in

31 *Supreme Administrative Court: deletion of personal data is possible for press archives. Adam Bodnar: we would actually be falsifying the past* [Online]. Available at: https://tvn24.pl/polska/nsa-kasowanie-danych-osobowych-mozliwe-dla-archiwow-prasowych-w-internecie-adam-bodnar-de-facto-falszowalibysmy-przeszlosc-6793664 (Accessed: 3 March 2023).

full, ordering the journalists and the newspaper's editor-in-chief to pay a total of PLN 30,000 for a social purpose and to publish an apology in the newspaper.[32]

On 7 July 2004, the applicants again sued the newspaper under the same provisions of the Civil Code. In their lawsuit, they claimed that, according to their latest findings, the article in question was still available on the newspaper's website. The complainants claimed that the article was highly listed in the 'Google' search engine and that anyone looking for information about them could access it very easily. The availability of the article on the newspaper's website, in violation of previous court orders, resulted in an ongoing situation that enabled many people to read the article. The applicants' rights were therefore violated in the same way as when the original article was published. As a result, the protection provided to them pursuant to judgments favourable to them became ineffective and illusory.[33] The applicants sought an injunction ordering the defendants to remove the article from the newspaper's website and publish a written apology for violating the applicants' rights through the article's continued presence on the Internet. They also applied for compensation in the amount of PLN 11,000 for non-pecuniary damage.

The District Court in Warsaw, in its judgment of 28 September 2005, dismissed the applicants' claim. The essence of the legal issue to be resolved by the Court was to answer the question whether the disclosure of a new source of publication, including the Internet, provided an actual basis for filing a new action for the protection of personal rights within the meaning of the Civil Code. According to the Court, the answer to this question should be positive. The Court opined that the disclosure of a new source of publication of the defamatory article, in this case the newspaper's website, gave rise to the applicants bringing a new action. Therefore, the claim was not subject to *res judicata*. The Court emphasised that removing the article from the newspaper's website would be devoid of any practical purpose, constituting a manifestation of censorship and rewriting history. Furthermore, it would be against archiving rules. If, in the current proceedings, they applied to the Court for an order to provide the online publication of the article with a footer or link informing the reader about the content of the judgments or if they applied for an order to require the defendants to publish an apology on the newspaper's website, so that the Court could consider upholding such a claim. The Court further noted that the applicants had already received compensation in the first proceedings. The Court also stated that if they discovered circumstances important for the assessment of the case, but unknown to them during the first proceedings, they should have applied for the reopening of the proceedings and not filed a new lawsuit with the Court. The applicants appealed.

32 *Węgrzynowski and Smolczewski v. Poland,* paras. 6,7,8.
33 Ibid., para. 9.

On 20 July 2006, the Court of Appeal in Warsaw dismissed the applicants' appeal. The Court was of the opinion that the key factor for assessing the case was the fact that the article in question was published on the newspaper's website in December 2000. The Court noted that the applicants claimed that they had learned about the publication of the article on the Internet only one year after the judgment issued in April 2003 became final. However, the fact that in the first proceedings they did not request the application of measures aimed at eliminating the possible effects of a violation of their rights in relation to publications on the Internet prevented the Court from examining in the current case the facts that existed before that judgment. The plaintiffs could not file a new action based on factual circumstances that already existed during the previous proceedings. The Court also noted that at the time in question the online publication of the article was not the so-called undisclosed circumstance.

The applicants filed a cassation appeal, alleging that they had violated the provisions of substantive law by misinterpreting them and the provisions of substantive law by refusing to apply the provisions on the protection of personal rights, invoking their right to effective legal protection of personal rights, including their reputation. They again argued that the continued availability of the article on the newspaper's website violated their personal rights. The cassation appeal was not accepted.

In the complaint to the European Court of Human Rights, the complainants alleged that their right to respect for their private life and reputation had been violated. In general, finally, we could say that in the first proceedings they eventually won a lawsuit for violation of their personal rights in the publication, but this does not justify the removal of the text from the press archive. A reference to the outcome of the civil lawsuit may be included in the article. The European Court of Human Rights therefore opted not to change, remove the article posted from the archives, but to provide a correction if it turned out that the information contained in the article was not true. This is the right approach because the article was published. It has become a reference point for future actions and part of history.

The European Court of Human Rights did not find a violation of Article 8 of the Convention, but noted at the same time that the risk of harm caused by content and messages posted on the Internet to the exercise and enjoyment by individuals of freedom and human rights, especially the right to respect for private life, is certainly higher than the risk emanating from the press.[34] The Court found that online archives serve the public interest and are subject to the guarantees arising from the protection of freedom of expression. One of the important tasks of the press, especially in the era of the development of the Internet, apart from exercising its control function, is documenting reality and making information from the past available to the public.

34 Ibid.

The Court noted that, during the first proceedings, the applicants had not formulated any request regarding the presence of the article in question on the Internet. Therefore, the courts could not rule on this issue. The judgments rendered in the first case did not give the applicants reasonable grounds to expect an order to remove the article from the newspaper's website. The Court shared the view of national courts that it is not the role of the judiciary to engage in rewriting history by ordering the removal from the public sphere of all traces of publications that, pursuant to final court judgments issued in the past, were considered materials constituting baseless attacks on the reputation of individuals. Moreover, an important circumstance for the assessment of the case is that the legitimate interest of society in access to public press archives on the Internet is protected under Art. 10 of the Convention.[35]

## 9.
## Conclusion

The judgment of the Supreme Administrative Court of 9 February 2023, file reference: III OSK 6781/21, is an important step in shaping the balance between the 'right to be forgotten' and the right to freedom of expression and information. In the realities of the dynamically changing digital world, the adjudicating body had to face a dilemma that is increasingly facing courts both in Poland and in other European Union countries. The conflict of these two fundamental rights requires courts to take into account both the interests of the individual and the public good, which often leads to difficult decisions.[36]

The judgment emphasises that the 'right to be forgotten' is not absolute and must always be assessed in the context of other rights and freedoms, in particular freedom of expression and the right to information. The protection of personal data, although fundamental to maintaining privacy, cannot lead to limiting access to information relevant to public debate.[37] This judgment highlights the need to apply a proportionality test, which allows for balancing the interests of the parties, taking into account the specificities of each case.

The Supreme Administrative Court's judgment, which gave primacy to the right to personal data protection over freedom of the press, changed the rules of operation of the media. The press clause was intended to achieve a balance between personal data protection and freedom of expression. However, the Court assumed that the provisions on personal data protection apply to the press archives in their full scope. The

35 Ibid., para. 65.
36 Kulesza, 2018, p. 27.
37 Zanfir, 2020, p. 427.

principle (excluded by the clause) that personal data must be stored no longer than necessary for the purposes of their processing would apply. However, the Court did not specify what a press archive is and when information becomes outdated. These cumulative problems can lead to a chilling effect in the actions of publishers (refraining or discouraging them from performing legal obligations or exercising their rights due to a sense of threat of sanctions or suffering other legal consequences for their actions – this term was used by the ECtHR).[38] Media and other entities publishing information may fear legal consequences related to violating the 'right to be forgotten', which may result in self-censorship and limiting the publication of materials that could be important for public debate. Such a phenomenon may negatively affect the transparency of public life and the public's access to reliable information.[39]

In the context of this judgment, it can be noted that the 'right to be forgotten', although increasingly used by individuals, is still an area full of ambiguities and interpretational challenges.[40] Future case law and the development of legal regulations will be crucial for precisely establishing the boundaries between these rights, as well as for their effective protection in the digital age. Understanding and properly applying this judgment is crucial for legal practitioners who have to navigate the jungle of legal norms regulating these issues, taking into account the interests of both the individual and society.

As a result of the analysis of the title issue, the following *de lege ferenda* conclusions can be proposed:

1) Introducing clear criteria for assessing proportionality – the judgment of the Supreme Administrative Court of 9 February 2023 highlights the need to clarify the criteria based on which courts should assess the proportionality between the 'right to be forgotten' and the right to freedom of expression and information. In this regard, it would be appropriate to consider introducing legislative or case law guidelines that would enable a more uniform assessment of the conflict between these rights. These guidelines could take into account, among other things, the importance of the information from the point of view of the public interest, the time that has elapsed since the events that are the subject of the information, and the potential impact on the privacy of the data subject.[41]
2) Increasing privacy protection in the digital space – given the growing importance of personal data protection in the digital age, it is worth considering introducing mechanisms that make it easier for individuals to exercise their 'right to be forgotten' while not excessively restricting access to public information.

38 Judgment of the European Court of Human Rights of 26 April 1979, complaint no. 6538/74 [Online]. Available at: www.echr.coe.int.
39 Lubasz, 2024, p. 121.
40 Sibiga, 2024, no page.
41 Białecki, 2021, no page.

This could include, for example, the ability to automatically anonymise or partially remove personal data from archived *on-line* materials, without having to completely remove the content.[42]

3) Developing mediation and dispute resolution mechanisms – in order to mitigate potential conflicts between the 'right to be forgotten' and freedom of expression, it is worth considering introducing mediation institutions that could operate before the case is brought to court. Mediators specialising in personal data protection and media law could help the parties find compromise solutions that would be acceptable to both parties, while avoiding lengthy and expensive court proceedings.[43]
4) Improving the information process for citizens – due to the growing number of requests for data deletion, it may be worth considering introducing an obligation for public and private institutions to provide clear and understandable information on procedures related to the 'right to be forgotten'. Introducing standard forms and guidelines could significantly improve this process, increasing citizens' awareness of their rights and the obligations of data controllers.[44]
5) Amending regulations on archives and information protection – it is also worth considering reviewing and updating the regulations on data archiving and access to public information to better reflect contemporary challenges related to privacy protection. These regulations should precisely define in what situations and on what principles archival information can be deleted or access restricted so that it does not interfere with the right to information, while at the same time respecting the rights of an individual to the protection of their personal data.[45]

In the context of the judgment, there is a risk that the 'right to be forgotten' could be abused by public figures or other entities to hide information that could be of importance to society. The court did not provide mechanisms to prevent such abuse, which raises concerns that the 'right to be forgotten' could be used as a tool to censor inconvenient but true information.

42 Grzelak, 2019, pp. 23-45.
43 Jaszczyński, 2020, pp. 75-94.
44 Kulesza, 2019, pp. 14-32.
45 Żelechowski, 2020, pp. 85-100.

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