The transparency of the application of the right to be forgotten with respect to public records needs transparent, justifiable rules.

MITLA requested a meeting about the right to be forgotten with Minister Bonnici in November 2015, never received a reply

Statement by the Malta Information Technology Law Association (www.mitla.org.mt)

For immediate release
Thursday, 16th March, 2018

The Malta IT Law Association (MITLA) is extremely concerned about recent reports that private individuals have successfully requested that court cases decided against them be deleted from online databases of such judgements without having in place clear rules as to how the right to be forgotten is being exercised with respect to public registers.

MITLA is particularly frustrated by the fact that Minister Owen Bonnici has stated in the Malta Independent today that:

"Three years ago I was somewhat disappointed that no debate existed in Malta about the right to be forgotten. While in foreign jurisdiction extensive debates took place on the impact of the processing of personal data on the World Wide Web and the effects of search facilities, here there was absolute no debate at all.

I made a public appeal but, unfortunately, it fell on deaf ears then."

For the record, MITLA is publishing a communication it sent to Minister Bonnici on the 5th November 2015 specifically on the right to be forgotten. Refer to **Annex A** below.

Removal of personal data from an online service administered by Government and which contains public records, especially court judgments, cannot be simply compared to de-listing from a search engine. In this light, the applicable jurisprudence of the European Courts should be Manni (C-398/15) and not (C-131/12) as the latter refers to de-listing whilst the former refers to removal of personal data from a public record.

MITLA notes that the right to be forgotten is not an absolute right but has to take into consideration various factors, included but not limited to whether public interest discussions come into play but also against whom the request is made and the nature and purpose and importance of the personal data being erased.

The application of public interest considerations restricting the right to be forgotten are stronger when the request for erasure of pubic data is not being made against a search engine, or a newspaper but on the keeper of the public record. This has not only been confirmed by European Court Judgements but by the Article 29 Working Party itself.

MITLA would like to express its current concerns regarding the applicability of the right to be forgotten with respect to online judgments on the basis of four legal principles which are extremely relevant in such discussions. These are the principles of transparency, legitimacy, justifiability, proportionality and necessity.

1. *Transparency:* It appears that a number of requests to have a court judgement removed from the electronic version of the court registry were made via a petition to the Director General at the Courts of Justice who, it transpires, has been informally and unofficially entrusted by the Minister of Justice to use his discretion in deciding such requests on a case-by-case basis.

The management of such petitions and requests is clearly flawed. There is no rule, policy or procedure publicly available that outlines the possibility of exercising one's right to be forgotten with respect to the deletion of court decisions available on the online local court database. The legal community is not aware of the existence of any prerequisites stating unequivocally the circumstances in which this right might be successfully claimed vis-à-vis the court's website; or the parameters against which such a request will be measured or decided.

There is no transparency whatsoever in the 'system', a fact which is furthermore corroborated by the Minister of Justice who is quoted as saying that he has left this matter at the discretion and in the hands of a single person whose job description under the Code of Civil Procedure does not include such quasi-judicial, administrative powers, and whose credentials for such a task have not, so far, been stated, let alone established in a transparent manner.

2. *Legitimacy:* MITLA warns that this current situation, which is the first to have been publicised and put in the public domain, indicates that the right to be forgotten from the online court database (as opposed to a de-listing by a search engine) may be granted to individuals without any legal basis and, therefore, lacks legitimacy. Indeed, it may simply be granted in order to pander to private persons' disproportionate expectation of their rights, while creating a precedent for further unjustified requests.

This is because there exists a clear and legitimate interest for court judgements to be placed on an online database and for judgements to be left online and publicly available for an indefinite period of time, irrespective of the subject matter and/or the parties involved, when proceedings have been carried out in public and there are no legal

exceptions – such as the privacy of minors or national security – which expressly warrant exclusion from such a database.

It is an accepted practice in an open democracy that access to judgements and decisions, whether of a civil or criminal nature, is granted to one and all, and not just the parties involved or parties having a direct interest. More than an accepted practice, it is a legitimate expectation backed by international law and provided for in specific international conventions to which Malta is a party. These international rules are aimed at ensuring the proper implementation of the fundamental right to a fair trial and also, on the flipside, at benefitting the whole of society, by ensuring transparency in the judicial process through the active participation and ability of one and all to observe and scrutinise the juridical process.

One such Convention is the International Convention on Civil and Political Rights which builds on the fundamental human right to an openly public and fair trial by stating, in Article 14(1) that: "…any judgement … shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children."

Similarly Article 6(1) of the European Convention on Human Rights (ECHR), is categorical in its statement that "judgements shall be pronounced publicly." No exception is therefore stated in the case of the publication of judgements and no room for manoeuvre can therefore be allowed because, as with all rights, any exception has to be stated and, moreover, interpreted very narrowly. Therefore there is an incontrovertible international obligation on Malta for judgements and decisions to be made public.

Case law has established clearly that in order for the requirement of 'publicity' to be satisfied, a judgement needs to be read out in an open court and deposited in a court registry where it is accessible to everyone.[i]

According to the OSCE,[ii] depositing the judgement in a public court registry is the minimum necessary to satisfy such a requirement for a party to the convention, such as Malta, not to be considered to be in breach of the ECHR. No exception to this requirement is allowed on the basis of privacy of the parties themselves or of third parties unless in the case of juveniles, matrimonial disputes and the guardianship of children.

The Council of Europe Recommendation of the Committee of Ministers to member states on the delivery of court and other legal services to the citizens through the use of new technologies, R (2001) 3 of 28th February 2001,[iii] is furthermore insistent on the requirement of members of the Council of Europe, including Malta, to make national public registers as easily available to all members of the public as possible in the interest of "democratic participation". This, of course, includes online resources.

3. *Justifiability*: This principle refers to the need for such a decision to be taken on the basis of law. Under current local data protection legislation, the right of erasure is tackled by the Data Protection Act as well by the Regulations on the Processing of Personal Data (Police and Judicial Cooperation in Criminal Proceedings). When all the relevant provisions are read together, it is clear that the right for data subjects to be forgotten does exist if the data is no longer required for the purpose that it was collected for, and if the data subject can prove that such processing is causing distress.

It is submitted that most, if not all judgements delivered, are always going to cause someone some level of distress, whether it is the party that has lost a civil suit, or the person convicted of a crime, or whether it is their families, or third parties who find themselves in a similar position, or who simply disagree with one point or another of the judgement.

4. *Necessity:* The right of erasure needs to be weighed against other conflicting interests and rights, such as public interest and transparency, as mentioned above, and it then needs to prevail over such interests and rights so that the necessity to retain such data becomes secondary to the data subject's right to be forgotten. It also needs to be applied in a proportionate manner so as not to go beyond what is strictly necessary to safeguard the data-subject's rights to the detriment of other third party interests.

It is submitted, however, that the right to erasure should not be abused of so as to absolve us in all situations from the truth of our past if this is still relevant to our present and our future, whether as individuals or as society at large. It cannot be used as a blank cheque to re-write our (personal) history, especially when crimes, which affect the whole of society, are involved. If we start on this dangerous route, will we continue to erase other, more heinous crimes, simply because it is not fair for one's criminal history to follow one for the rest of one's life? Where would the fairness and justice in that be for the victims of that crime? Where would that leave society at large?

For these reasons alone, and there may well be others, the publication of court judgements and decisions, without proper legal provisions establishing how their removal can be justified, will always provide a very strong argument in favour of public interest. This is part and parcel of our democratic principles and the citizens' undeniable right to actively participate in the judicial process in accordance with such principles.

5. Proportionality:

Reference has been made by Minister Bonnici to the guidance issued by Article 29 Working Party (presumably 14/EN WP225). It has to be made clear that such guidance was issued with respect to the implementation of the Costeja judgement and not Manni.

In any case, whilst such guidance focuses on de-listing from search engines, and not specifically from online public records, it is pertinent to point out that nevertheless this guidance stresses the importance of balancing rights and achieving proportionality but also sheds light on public interest considerations.

The application of public interest considerations are stronger when the request for erasure of pubic data is not being made against a search engine, or a newspaper but on the keeper of the public record.

The following extracts from 14/EN WP225 are of extreme relevance to the current discussion:

"…a balance of the relevant rights and interests has to be made and the outcome may depend on the nature and sensitivity of the processed data and on the interest of the public in having access to that particular information. The interest of the public will be significantly greater if the data subject plays a role in public life."

"In practice, the impact of the de-listing on individuals' rights to freedom of expression and access to information will prove to be very limited. When assessing the relevant circumstances, DPAs will systematically take into account the interest of the public in having access to the information. If the interest of the public overrides the rights of the data subject, de-listing will not be appropriate."

"It is not possible to establish with certainty the type of role in public life an individual must have to justify public access to information about them via a search result. However, by way of illustration, politicians, senior public officials, business-people and members of the (regulated) professions can usually be considered to fulfil a role in public life. There is an argument in favour of the public being able to search for information relevant to their public roles and activities. A good rule of thumb is to try to decide where the public having access to the particular information – made available through a search on the data subject's name – would protect them against improper public or professional conduct."

"Information is more likely to be relevant if it relates to the current working life of the data subject but much will depend on the nature of the data subject's work and the legitimate interest of the public in having access to this information through a search on his or her name."

Conclusion

While the right to be forgotten will certainly be developed further by the imminent applicability of the EU's General Data Protection Regulation from the end of May, there is

nothing in this regulation (or Art 29 Working Party Documents) which can persuade that it is intended to automatically include, in its purview, the possibility that court judgements and decisions might, at any point in time, be deleted from any online database carrying court judgements within democratic Europe on the basis that the data contained therein are no longer required for their original purpose or that there is no overriding ground to retain such judgement or decision, especially when one considers the balancing act that has to be taken into consideration (through laws with are necessary, legitimate, transparent, proportionate and justifiable) between the rights of data subjects and the public interest.

However, it is submitted that if, similarly to Germany, there were to be a law passed by Parliament, equally applicable to all, enacted transparently following public consultation, which did not go against international obligations, and which could allow for some, if not all, criminal sentences to no longer be made available on the online court registry based on specific known and certain criteria, and only once criminal sentences had been served, and the debt to society had been fully paid, then there may be an acceptable legal basis to limit access to an online registry of a person's criminal past. However, the German model cannot be completely followed as it is based on constitutionally entrenched principles of informational self-determination and the right to personality found in the German Constitution and subsequently reflected in specific laws relating to the rehabilitation of offenders. Unfortunately, a bill presented in 2014 proposing the introduction of such concepts, including informational self-determination, in the Maltese Constitution was never discussed by Parliament.

A national discussion should be initiated with respect to introducing laws on the rehabilitation of offenders as well as its impact on the right to be forgotten. It is only through a proper balancing between the right to be forgotten and the right relating to public interest that limiting access to the online court database for criminal offences can be legally reconciled.

Annex A:

From: Antonio Ghio
Date: Thursday, 5 November 2015 at 13:18
To: "owen.bonnici@gov.mt" <owen.bonnici@gov.mt>
Subject: Right to be Forgotten - MITLA - Request for Meeting

Dear Minister

I am writing in my capacity as President of the Malta Information Technology Law Association (www.mitla.org.mt).

I have read with interest your latest comments regarding the debate that needs to initiated and instigated in relation to the Right to be Forgotten.

You will note that our first Annual Conference indeed touched upon such subjects. Links below.

http://www.mitla.org.mt/conference/

http://www.independent.com.mt/articles/2015-04-07/company-news/Over-120-participate-in-first-MITLA-Conference-6736133419

A copy of the ebook which was prepared by the Association after the Conference can be found here: https://readymag.com/mitla/mitla/

MALTA IT LAW
ASSOCIATION

In light of the importance of the notions and implications of such developing rights (as the right to be forgotten) MITLA was already planning to have another General Conference in early 2016 specifically on the subject of the Right to be Forgotten. Such conference might fall squarely in your proposals to initiate a national debate.

MITLA would therefore wish to offer its expertise and services for this noble cause.

We believe that the Association, with your assistance, can serve as a perfect catalyst for any discussion/debate as well as formulation of a national position on the subject of the right to be forgotten.

In light of this, we would be grateful if could set up a short meeting with yourself in order to discuss this collaboration and draft a working schedule. This might also serve as an opportunity for MITLA to formally introduce itself and to discuss other potential matters where the Association can provide input including e-courts and digital signing.

Looking forward to receiving from you in due course

Thanks and Regards

Antonio

About MITLA:

The Malta IT Law Association was set up in 2014 with the following objectives:

- Promote the advancement and development of information technology law, including but not solely limited to computer law, internet law, electronic communications law, information law, electronic commerce law, remote gaming law and cybercrime, (hereinafter referred to as "ICT Law") in Malta and the advancement of Malta as an international centre of excellence in ICT Law;
- Actively research, discuss and circulate information on legal developments taking place on the international plane and within the European Union with respect to ICT Law and the knowledge economy;
- Promote with international and regional organisations or associations and other national government and non-government bodies legislative and regulatory changes related to ICT Law and to consider together with these entities proposals for legislative interventions having the same aim;
- Afford opportunities for the discussion and consideration of matters of interest to members of the Association and to undertake or assist in the preparation of legal instruments and papers in respect of such matters; and
- Collect and circulate statistical and other information of interest to the members of the Association and to form a collection of publications and documents accessible to the members of the Association.

MITLA presently counts more than 200 members most of which are C-suite executive which hail from the legal, professional and technical professions.

Visit http://www.mitla.org.mt for more information

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[i] See (2007) Case of Szücs v. Austria, The International Journal of Human Rights, 2:1, 101-104, DOI: 10.1080/13642989808406713

[ii] See Access to Court Decisions – A legal analysis of international and national provisions, OSCE Rule of Law Department, 2008 at p. 13: http://www.right2info.org/resources/publications/publications/OSCE_AnalysisAccesstoCourtDecisions17092008.pdf

[iii] Recommendation Rec(2001)3 of the Committee of Ministers to member states on the delivery of court and other legal services to the citizen through the use of new technologies (adopted by the Committee of Ministers on 28 February 2001 at the 743rd meeting of the Ministers' Deputies):