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A Dutch Perspective on the 'Right to Be Forgotten'

An Analysis of Dutch Lower Court Judgments in Light of the *Hoge Raad* Judgment of 24 February 2017 and the *Costeja* Judgment

Sits Schreurs*, Nena van der Kammen & Sofie Oosterhuis

1. Introduction

1. On 13 May 2014 the European Court of Justice (ECJ) introduced the 'right to be forgotten' in the landmark *Costeja* judgment.[1] Shortly after this judgment, national courts in the Member States started interpreting and applying the *Costeja* judgment.[2] In the Netherlands, numerous judgments were delivered, often with different interpretations of the *Costeja* judgment, leading to uncertainty for the applicants.[3] The *Hoge Raad* (the Dutch Supreme Court) decided, for the first time, on the right to be forgotten on 24 Feb. 2017 while referring to *the Costeja* judgment, thereby creating a precedent which the courts at first instance and on appeal are expected to follow.[4]

* nena.vdkammen@gmail.com

1 ECJ 13 May 2014 ECLI:EU:C:2014:317, Google Spain SL and Google Inc. v. Agencia Española de Protección de Datos (AEPD) and Mario Costeja González, curia.europa.eu/juris/documents.jsf?num=c-131/12. This judgment has been extensively dealt with in the literature. See inter alia, E. Frantziou, 'Further Developments in the Right to be Forgotten: The European Court of Justice's Judgment in Case C-131/12, Google Spain, SL, Google Inc v. Agencia Espanola de Proteccion de Datos', 14. *Human Rights Law Review* 2014, p 761; P. Gryffroy, 'Delisting as a part of the decay of information in the digital age: a critical evaluation of Google Spain (C-131/12) and the right to delist it has created', 22. *Computer and Telecommunications Law Review* (2016); M. Taylor, 'Google Spain Revisited', 3. *European Data Protection Law Review* 2015, p 195; S. Kulk & F.J. Zuiderveen Borgesius, 'Google Spain v. Gonzalez: Did the Court Forget about Freedom of Expression', 5. *European Journal of Risk Regulation* 2014, p 389; S. Singleton, 'Balancing a Right to Be Forgotten with a Right to Freedom of Expression in the Wake of Google Spain v. AEPD', 44. *Georgia Journal of International & Comparative Law* 2015, p 165.

2 See Table 1.

3 L. Mourcous & M. Weij, '2018 het jaar van Google: het recht om vergeten te worden in de rechtspraak', *Tijdschrift voor Internetrecht* 2018(5/6), p 189.

4 Hoge Raad 24 Feb. 2017 GOOGLE NETHERLANDS B.V., GOOGLE INC., deeplink.rechtspraak.nl/inziendocument?id=ECLI:NL:HR:2017:316 = *Computerrecht 2017/102*, note by S. Kulk & F.J. Zuiderveen Borgesius, *Jurisprudentie in Nederland* 2017/57, note by E.J. Peerboom-Gerrits; *Tijdschrift voor Internetrecht* 2017/2, note by G.H. Spruyt, 'Hoge Raad past Google Spain one-venwichtig toe - Noot bij het arrest van de Hoge Raad inzake het "recht om vergeten te worden"';

2. Scholarly literature has paid considerable attention to the *Hoge Raad*'s interpretation of the *Costeja* judgment and there exists a general consensus that the *Hoge Raad* has strictly followed and thus correctly applied the ECJ's judgment. Moreover, the *Hoge Raad* did not submit preliminary questions to the ECJ, which indicates that the *Costeja* judgment, in relation to the case before the *Hoge Raad*, left no outstanding questions according to the *Hoge Raad*.

3. This contribution is therefore not so much focused on the *Hoge Raad* judgment but revolves around the right to be forgotten cases decided by the lower courts. The main objective of the research is to examine to what extent the lower courts follow the *Hoge Raad* judgment, and thereby the *Costeja* judgment. In particular, it aims to analyse the legal framework applied by the lower courts, how the lower courts apply the elements which are part of the balancing act introduced in the *Costeja* judgment (e.g., a 'public figure') and whether the priority rule is correctly applied. In addition, the case law of the lower courts is used to examine whether there are issues which did not arise before the ECJ or the *Hoge Raad* and, if so, how the courts have dealt with such issues. The lower courts have struggled especially with the unclear status of personal data relating to criminal offences and its 'weight' in the balancing act. A last objective is to examine how the GDPR (the General Data Protection Regulation) is applied since it entered into force. The *Hoge Raad* judgment was dated 24 February 2017 before the entry into force of the GDPR. The analysis of the case law of the lower courts explores how the courts deal with the GDPR, especially in comparison with the old Data Protection Directive. Based on its findings, this contribution attempts to predict how future judgments on the GDPR might look like.

2. Approach

4. Based on the objectives of this research set out in the introduction, the following approach is used. After the introduction (section 1) and the approach (section 2), this contribution first sets out the most important legal rules relating to the right to be forgotten in the Dutch context so as to clarify within which legal framework the analysis takes place. The facts and reasoning of the *Costeja* judgment are assumed to be known (section 3). Then, the *Hoge Raad* judgment is explained. The case at first instance and on appeal and the opinion of the Procurator General (PG) are also discussed in order to place the *Hoge Raad* judgment in a broader perspective. This section takes a more neutral stance, as it functions more as a stepping stone for the subsequent sections which form the core

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K.L. Gerhards, 'Ook in Nederland mag er vergeten worden', *Bedrijfsjuridische berichten* 2017(89); S. Kulk & F.J. Zuiderveen Borgesius, 'Freedom of Expression and Right to Be Forgotten Cases in the Netherlands after Google Spain', 1. *European Data Protection Law Review* 2015(113).

of the analysis (section 4). The contribution then turns to the case law of the lower courts and thoroughly analyses 13 decisions in light of the *Hoge Raad* and the *Costeja* judgments. It has limited itself to all judgments delivered by the lower courts specifically dealing with the right to be forgotten after the *Hoge Raad* judgment of 24 February 2017: as the lower courts generally tend to follow judgments by the *Hoge Raad* as precedents, judgments before this date are of minor importance. As follows from the introduction, the analysis of the judgments focuses on the legal framework applied by the lower courts, the factors which should be considered as part of the balancing act (e.g., a 'public figure') and the (correct) application of the priority rule. For the sake of feasibility, other issues fall outside the scope of this research. This research is limited to the removal of search results and will not therefore consider the removal of data on source pages. Sources pages are the websites to which the hyperlinks on the search engines refer to, and these can be, for example, online newspaper archives or blogs. The *Costeja* judgment has limited the 'right to be forgotten' to search engines. Therefore, the balancing act following from the *Costeja* judgment which the *Hoge Raad* and the lower courts have followed is also limited to search engines. These cases do not include requests for the removal of data from source pages. As this research is limited to the application and the interpretation of the *Costeja* judgment's balancing act, the application of the 'right to be forgotten' on source pages is not considered. The balancing act for source pages might differ substantially from that of the search engines as there might be different competing rights at stake. This research also does not discuss to what extent Google has to remove personal data (total removal or can anonymization suffice?). This section ends with a conclusion in which the findings are synthesized (section 5). Subsequently, the analysis is further intensified by paying special attention to the entry into force of the General Data Protection Regulation (GDPR) and its meaning for possible forthcoming cases on the 'right to be forgotten' (section 6). The contribution ends with a brief conclusion in which the findings of the research are summarized (section 7).

5. This contribution contains a thorough analysis of 13 judgments by the Dutch lower courts decided after the Hoge Raad decision of 24 February 2017. When 'judgments by the lower courts' or 'Dutch cases' are considered, reference is made solely to these judgments. In order to assist readers in navigating through the analysis, a number is assigned to each case (for an overview see section 5, Table 1). The use of academic literature is relatively limited, as the contribution focuses on judgments that are current and have been delivered by the lower courts, which typically receive less attention from academic authors.

3. Legal Framework

6. This section lays down the legal framework on which Dutch cases were based and decided upon. The GDPR is also part of the legal framework, but is discussed separately in section 6.

7. The Personal Data Protection Act (PDPA; *Wet bescherming persoonsgegevens*) is the Dutch implementation of the Data Protection Directive.[5] Articles 8(f), 36 and 40 PDPA are the most relevant provisions in this context. Article 36 PDPA codifies the 'right to erasure' (Article 12 Data Protection Directive).[6] According to this provision, an individual can only request the removal of personal data 'if they are factually incorrect, incomplete or irrelevant in relation to the purpose(s) of the processing or are otherwise being processed in breach of legal rules'. Article 8 PDPA should be read in conjunction with Article 40 PDPA. Following from Article 8(f) PDPA:

> [...] personal data may be processed *only* if: [...] the data processing is necessary for the purposes of the *legitimate interests* pursued by the controller or by a third party to whom the data are disclosed, *unless such interests are overridden by the interests or the fundamental rights and freedoms of the data subject, notably the right to privacy*, which require protection.

Article 40 PDPA states that the individual 'may at any time object to the controller where data are being processed pursuant to *section 8* (e) and *(f)* on grounds relating to his particular circumstances'. Taken together, Articles 8, 36 and 40 PDPA compel the courts to undertake a balancing act taking into account, on the one hand, the interests or the fundamental rights and freedoms of the data subject (notably the right to privacy) and the factual correctness, completeness or irrelevance of the data, and on the other hand, the legitimate interests pursued by the controller or by a third party.

8. In some of the Dutch 'right to be forgotten' cases, the claimant relied on Article 16 PDPA which prohibits the processing of certain categories of sensitive personal data (see section 5.3). This is data relating to a person's religion or belief, race, political affinity, health, sex life, and trade union membership. Such data are, with some minor exceptions, categorically excluded from the right to process data by controllers or third parties.

9. Besides, in one case the claims were based on an 'unlawful act' under Article 6:162 Dutch Civil Code (DCC; *Burgerlijk Wetboek*). Following this provision a person who commits an unlawful act against another person, and that unlawful act can be attributed to him, must repair the damage that this other person has suffered as a result thereof.

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5 Dir. 95/46/EC of 24 Oct. 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, http://data.europa.eu/eli/dir/1995/46/oj.

6 H.H. DE VRIES, 'Commentaar op art. 36 Wbp', in G.J. ZWENNE & P.C. KNOL (EDS), *Tekst en Commentaar Privacy- en telecommunicatierecht.*

10. Lastly, Article 8 of the European Convention on Human Rights (ECHR) and Articles 7 and 8 of the Charter on Fundamental Rights of the European Union (EU Charter) have also been used as a legal basis for a claim on the 'right to be forgotten'. The provisions relate to the right to private life.

11. Although neither the ECJ nor the *Hoge Raad* specifically refers to the Article 29 Working Party's guidelines, this contribution cannot fail to mention these guidelines.[7] In its guidelines, the Working Party establishes a list of common criteria for dealing with requests to remove personal data. The criteria provide helpful insights when interpreting the meaning of the *Costeja* judgment and should be seen as a 'flexible working tool' to be applied in accordance with national law. As can be seen in other jurisdictions, the courts (sometimes directly) rely on these criteria when dealing with cases, which indicates their importance.[8] It would be going too far to discuss all of these criteria in this section, but throughout this article they will be referred to.

12. In the following section, the balancing act between fundamental rights introduced in the *Costeja* judgment as applied and interpreted by the *Hoge Raad* will be clarified in light of these legal provisions.

4. The Right to Be Forgotten: The Hoge Raad

4.1. Introduction

13. As mentioned in the introduction, the *Hoge Raad* ruled for the first time on the 'right to be forgotten' on 24 February 2017.[9] In this judgment the *Hoge Raad* interpreted and applied the *Costeja* judgment of the ECJ in a Dutch context. The judgment of the *Hoge Raad* created a precedent for the lower courts and will therefore be the starting point of this research. Firstly, the relevant facts will be discussed (section 4.2), after which the most important considerations of the *Rechtbank Amsterdam* (the Amsterdam District Court) and the *Gerechtshof Amsterdam* (the Amsterdam Court of Appeal) will be described (section 4.3). Secondly, the grounds of appeal in cassation will be explained (section 4.4), subsequent to the views of the Advocate General (section 4.5). Lastly, the considerations of the *Hoge Raad* will be discussed (section 4.6).

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7 Article 29 Data Protection Working Party - Guidelines on the Implementation of the Court of Justice of the European Union Judgment on 'Google Spain and Inc. v. Agencia Espanola de Protection de Datos (AEPD) and Mario Costeja González' C-131/12, *OJ* 26 Nov. 2014, https://ec.europa.eu/justice/article-29/documentation/opinion-recommendation/files/2014/wp225_en.pdf.

8 See for England and Wales: High Court of Justice Queen's Bench Division 13 Apr. 2018 NT1 AND NT2 v. GOOGLE LLC, www.judiciary.uk/wp-content/uploads/2018/04/nt1-Nnt2-v-google-2018-Eewhc-799-QB.pdf.

9 Hoge Raad 24 Feb. 2017 *supra* 4.

4.2. Facts

14. The *Rechtbank Amsterdam* ruled on this case on 18 September 2014.[10] The case concerned a man who had requested Google to remove various links referring to websites containing information about his conviction for a serious crime. In addition, he requested the removal of the statement referring to a few removed results and the uncoupling of his name from the name of Peter R. de Vries – a well-known crime reporter in the Netherlands – in the automated search bar of Google's search engine.[11] The claimant relied on the Dutch PDPA, unlawful acts by the defendants (Article 6:162 DCC) and the *Costeja* judgment to substantiate his claim.

4.3. The Rechtbank Amsterdam and the Gerechtshof Amsterdam

15. One of the first remarks made by the *Rechtbank Amsterdam* is the consideration that restraint is required when imposing restrictions on the operation of a search engine.[12] In addition, the *Rechtbank Amsterdam* referred to the importance of the two fundamental rights at stake, namely: the privacy of the claimant (Article 8 ECHR) and the right to freedom of information of Google (Article 10 ECHR and Article 7 of the Dutch Constitution).[13] With regard to the *Costeja* judgment the *Rechtbank Amsterdam* stated that this judgment only intends to protect persons who are being relentlessly hounded by messages that are 'irrelevant', 'excessive' or 'unnecessarily defamatory'.[14] In general, this negative publicity as a consequence of a serious crime has to be perceived as lasting relevant information about a person.[15] The court continued by stating that negative qualifications will only be 'excessive' or 'unnecessarily defamatory' in very exceptional cases. Eventually, the *Rechtbank Amsterdam* decided in these proceedings that this was not the case as the claim had not been sufficiently substantiated.[16] The claimant appealed against this judgment.

16. The *Gerechtshof Amsterdam* took a different starting point than the *Rechtbank Amsterdam.* It first mentioned that every data subject has the right to rectify, exchange or block data if there is processing that is incompatible with Directive 95/46/EC.[17] Besides, the *Gerechtshof Amsterdam* explicitly referred to

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10 Rechtbank Amsterdam 18 Sep. 2014, GOOGLE NETHERLANDS B.V., GOOGLE INC, deeplink. rechtspraak.nl/inziendocument?id=ECLI:NL:RBAMS:2014:6118.

11 *Ibid.*, para. 3.1.

12 *Ibid.*, para. 4.5.

13 *Ibid.*, para. 4.7.

14 *Ibid.*, para. 4.11.

15 *Ibid.*

16 *Ibid.*

17 Gerechtshof Amsterdam 31 Mar. 2015 GOOGLE NETHERLANDS B.V., GOOGLE INC., deeplink. rechtspraak.nl/inziendocument?id=ECLI:NL:GHAMS:2015:1123. para. 3.5.

the link between this directive, the PDPA and the *Costeja* judgment as it explained that the PDPA has been introduced to implement this directive and should therefore be viewed in light of the *Costeja* judgment.[18] In addition, this court explicitly referred – in contrast to the *Rechtbank Amsterdam* – to Articles 7 and 8 of the EU Charter.[19]

17. The *Gerechtshof Amsterdam* further declared that the claimant could request, on the basis of these two articles, that information relating to him is no longer made available by means of inclusion in a search engine result list.[20] However, the *Gerechtshof Amsterdam* stated that this will not be the case if interference with the fundamental rights of the person in question on the basis of special reasons is justified by the overriding interest of the public to have access to the information.[21]

18. During the proceedings before the *Gerechtshof Amsterdam*, the appellant was also being prosecuted for a serious offence for which he had already been convicted at first instance.[22] The *Gerechtshof Amsterdam* stated that although he had appealed against this conviction, he did not adduce anything new in the present proceedings which detracted from his conviction at first instance.[23] Therefore, the *Gerechtshof Amsterdam* concluded that the publications and the public interest were, for the time being, a consequence of his own behaviour.[24] In addition, the court decided that it had not been made plausible that the search data had been manipulated nor had it become apparent that the autocomplete function had been deliberately damaged.[25] Hence, the *Gerechtshof Amsterdam* upheld the judgment of the *Rechtbank Amsterdam.*[26]

4.4. Grounds of Appeal in Cassation

19. Google et al. claimed that the *Gerechtshof Amsterdam* had failed to appreciate that there should have been a weighing of all the fundamental rights that were at stake. In addition, they were of the opinion that the right to privacy does not, as a general rule, take priority over other fundamental rights.[27]

20. With regard to the appeal on the merits, the limb of the appeal stated that since the claimant had not been irrevocably convicted at the time of the judgment

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18 *Ibid.*, para. 3.5.
19 *Ibid.*
20 *Ibid.*
21 *Ibid.*
22 *Ibid.*, para. 3.6.
23 *Ibid.*
24 *Ibid.*
25 *Ibid.*, paras 3.12-3.14.
26 *Ibid.*, para. 4.
27 Hoge Raad 24 Feb. 2017 *supra* n. 4, para. 3.5.1.

of the *Gerechtshof Amsterdam,* there were no special reasons that would justify interference with his private life. More concretely, because the *Gerechtshof Amsterdam* could not conclude without further ado that a suspect or convicted person plays a role in public life.[28]

4.5. Conclusion of the Procurator General

21. The Procurator General (Frans Langemeijer) elaborated on the conflicting fundamental rights at issue.[29] According to the PG, the *Hoge Raad* should balance the fundamental rights that are affected by allowing or rejecting a claim.[30] The conflicting fundamental rights at stake are laid down in Articles 8 and 10 ECHR, Articles 7, 8, 11 and 16 EU Charter and Article 7 of the Dutch Constitution (*Grondwet*).[31]

22. The PG then referred to and explained the *Costeja* judgment where the PG included the request for the removal of particular data.[32] The PG also referred to Article 3(2) of the Directive which states that this Directive shall not apply to the processing of personal data in the course of an activity which falls outside the scope of Community law and the activities of the State in areas of criminal law.[33]

23. The PG discussed the conditional cross-appeal in cassation and concluded that it cannot lead to the cassation of the judgment on appeal.[34] According to the PG, the *Gerechtshof Amsterdam* explicitly sought compliance with the ECJ ruling in the *Costeja* judgment.[35] In addition, the PG was of the opinion that the *Gerechtshof Amsterdam* correctly addressed the fundamental rights and interests involved in its reasoning.[36] Besides, the PG stated that it could not follow from the judgment of the *Gerechtshof Amsterdam* that the right to privacy would in principle outweigh other relevant fundamental rights.[37] On the contrary, according to the PG the *Gerechtshof Amsterdam* underlined as a starting point the equality of the rights involved.[38] According to the PG the priority rule in principle only applies in one category of specific cases: so-called removal requests.[39]

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28 *Ibid.*, para. 3.6.1.
29 Parket bij de Hoge Raad 4 Nov. 2016 GOOGLE NETHERLANDS B.V., GOOGLE INC., deeplink.rechtspraak.nl/inziendocument?id=ECLI:NL:PHR:2016:1116. para. 2.2.
30 *Ibid.*, para. 2.2.
31 *Ibid.*, para. 2.3.
32 *Ibid.*, paras 2.11–2.15.
33 *Ibid.*, para. 2.16.
34 *Ibid.*, paras 3.1–3.9.
35 *Ibid.*, para. 3.3.
36 *Ibid.*
37 *Ibid.*, para. 3.6.
38 *Ibid.*
39 S. Kulk & F.J. Zuiderveen Borgesius, *Jurisprudentie in Nederland* , para. 14.

24. Subsequently, the PG discussed the principal appeal in cassation and concluded that the appeal must be dismissed.[40] First, the PG stated that even though the ECJ did not elaborate on what should be understood by 'the role this person plays in public life', it nevertheless becomes clear from this judgment what the ECJ has envisaged.[41] Without explaining what this entails exactly, the PG directly referred to judgments of the European Court of Human Rights (ECtHR) concerning the protection of private life and the freedom of speech, emphasizing the role that the person in question plays in public life.[42] More concretely, the PG referred to the *Axel Springer/Germany(1)* judgment of the ECtHR[43] in which it decided that 'Article 8 ECHR cannot be relied on in order to complain of a loss of reputation which is the foreseeable consequence of one's own actions such as, for example, the commission of a criminal offence'.[44] After citing this part of the judgment the PG stated that due care is in line with accusing a person of committing a criminal offence at a stage in which there is still no certainty of this.[45] Then he linked the above to the judgment of the *Gerechtshof Amsterdam.* He explained that the *Gerechtshof Amsterdam* had made reference to the not irrevocable conviction of the claimant in order to show that the accusation of committing a criminal offence had not been taken lightly.[46] With regard to the remainder of the grievances, the PG agreed with the findings of the *Gerechtshof Amsterdam.*

4.6. The Hoge Raad

25. The *Hoge Raad* cited paragraphs 80, 81, 88 and 97 of the *Costeja* judgment, and explained that these considerations entail that the fundamental rights of a natural person as defined in Articles 7 and 8 EU Charter (the right to respect for private and family life and the protection of personal data) as a rule outweigh, and therefore take priority over, the economic interest of the operator of the search engine and the legitimate interest of the internet users who may wish to obtain access to these search results.[47] The *Hoge Raad* subsequently stated that this could be different in 'particular cases', depending on 'the nature of the information concerned and its sensitivity to the private life of the person in question and the interest of the public to have knowledge of this information, which is particularly determined by the role that this person plays in public life'.[48] In light of the foregoing, the *Hoge Raad* stated that the conditional cross-appeal by Google et

40 Parket bij de Hoge Raad 4 Nov. 2016 *supra* n. 29. paras 4.1–4.14.
41 *Ibid.*, para. 4.2.
42 *Ibid.*
43 http://hudoc.echr.coe.int/fre?i=001-109034.
44 Parket bij de Hoge Raad 4 Nov. 2016 *supra* n. 29, para. 4.3.
45 *Ibid.*, para. 4.3.
46 *Ibid.*
47 Hoge Raad 24 Feb. 2017 *supra* n. 4, paras 3.5.4–3.5.5.
48 *Ibid.*, para. 3.5.5.

al. erred in law, meaning that the argumentation of the contention in the incidental appeal was based on an error of law.[49]

26. Contrasting the opinion of the PG, the *Hoge Raad* decided that the principal appeal in cassation should succeed.[50] The *Hoge Raad* explained that the *Gerechtshof Amsterdam* had not determined anything with regard to the interest of the public to obtain information about the conviction of the claimant when searching by using the full name of the claimant.[51] In addition, the *Gerechtshof Amsterdam* had not concluded anything about what may be important in this context, particularly whether the claimant plays a role in public life and, if so, what role.[52] Therefore the *Hoge Raad* concluded that the mere fact that the claimant had been convicted of a serious crime at first instance together with the publicity that ensued was insufficient evidence to come to its conclusion.[53] Besides, the *Hoge Raad* noticed that the *Gerechtshof Amsterdam* had not established the nature and extent of the interest of the claimant, including the irrevocable nature of his conviction.[54] Furthermore, the *Gerechtshof Amsterdam* had failed to investigate in this case where the balance must be sought between the interests of the claimant, on the one hand, and those of the public, on the other.[55] Additionally, the *Hoge Raad* ascertained that it is sufficient that a substantial part of the public, searching on the basis of his full name, will make the connection between the claimant and the search results stating his first name and the first letter of his surname.[56]

5. Analysis of the Case Law of the Lower Courts

5.1. Introduction

27. Since the *Hoge Raad* judgment on 24 February 2017 which interpreted and applied the framework laid down by the *Costeja* judgment in the Dutch context, a considerable number of cases on the right to be forgotten have been decided by the lower courts (see Table 1 below). This section shows how the *Hoge Raad* judgment, discussed in the previous paragraph, and therewith the *Costeja* judgment, have been further developed by the Dutch lower courts. As follows from the introduction and the approach, the analysis focuses on the applicable legal framework, the factors to be considered as part of the balancing act (e.g., a 'public figure') and the application of the priority rule.

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49 *Ibid.*, para. 3.5.6.
50 *Ibid.*, para. 3.6.6 and 3.7.2.
51 *Ibid.*, para. 3.6.5.
52 *Ibid.*
53 *Ibid.*
54 *Ibid.*
55 *Ibid.*
56 *Ibid.*, para. 3.7.1. The *Hoge Raad* referred the case back to the Court of Appeal of The Hague, see *Gerechtshof* Den Haag 5 Jun. 2018 ECLI:NL:GHDHA:2018:1296 (see C7, table 1 below).

28. In the first part of this section, general remarks are made that are applicable to all the selected cases. In the second part the contribution zooms in on the three identified types of cases: cases involving personal data relating to criminal offences, cases involving personal data relating to disciplinary matters and cases which involve a public figure. As will be shown, due to their particular factual situation, these groups contain distinctive aspects (e.g., a different legal ground and more attention to particular elements) and therefore deserve closer examination (sections 5.3–5.5). The contribution ends with a conclusion in which its findings are synthesized (section 5.6).

Table 1 All Dutch Lower Court Judgments Concerning the Right to be Forgotten Since 24 February 2017

*No.**	*Type of Case*	*Judgments*	*Legal Framework***	*Request*
1	Criminal case	*Rechtbank* Amsterdam, 22 March 2018 ECLI: NL: RBAMS:2018:3357	Articles 16 PDPA and 36 and 40 PDPA	Granted
2	Criminal case	*Rechtbank* Amsterdam, 15 February 2018 ECLI:NL: RBAMS:2018:1644	Articles 16 PDPA and 36 and 40 PDPA	Granted
3	Criminal case	*Rechtbank* Rotterdam, 7 February 2019 ECLI:NL: RBROT:2019:948	Article 16 PDPA	Refused
4	Criminal case	*Gerechtshof* Den Haag 23 May 2017 ECLI:NL: GHDHA:2017:1360	Articles 16 PDPA and 36 and 40 PDPA	Refused
5	Criminal case, public figure	*Rechtbank* Amsterdam, 25 January 2018 ECLI: NL: RBAMS:2018:2979	Articles 16 PDPA and 36 and 40 PDPA	Refused
6	Criminal case, public figure	*Rechtbank* Amsterdam, 22 March 2018 ECLI: NL: RBAMS:2018:3354	Articles 16 PDPA and 36 and 40 PDPA	Refused

*No.**	*Type of Case*	*Judgments*	*Legal Framework***	*Request*
7	Criminal case, public figure	*Gerechtshof* Den Haag 5 June 2018 ECLI:NL: GHDHA:2018:1296	Articles 36 and 40 PDPA, Article 6:162 DCC	Refused
8	Disciplinary case	*Rechtbank* Amsterdam, 22 March 2018 ECLI: NL: RBAMS:2018:3355	Articles 16 PDPA and 36 and 40 PDPA	Refused
9	Disciplinary case, public figure	*Rechtbank* Amsterdam, 19 July 2018 ECLI:NL: RBAMS:2018:8606	Articles 10 GDPR and 17 GDPR	Granted
10	Public figure	*Rechtbank* Midden-Nederland, 8 May 2018 ECLI:NL: RBMNE:2018:2196	Articles 36 and 40 PDPA	Refused
11	-	*Rechtbank* Limburg, 20 March 2018 ECLI:NL: RBLIM:2018:2751	Articles 36 and 40 PDPA	Refused
12	-	*Rechtbank* Limburg, 24 May 2018 ECLI: NL: RBMNE:2017:6893	Articles 36 and 40 PDPA	Refused
13	-	*Rechtbank* Den Haag, 19 April 2018 ECLI:NL: RBDHA:2018:4672	Articles 36 and 40 PDPA	Refused

**In the text the judgments are referred to as C1, C2* etc.
***All these judgments also refer to both the Costeja judgment and the Hoge Raad judgment.*

5.2. General Remarks

29. It is worth noting that when the lower courts refer to the *Costeja* judgment they also always mention the *Hoge Raad* judgment and vice versa. The lower courts do not point out elements of the *Costeja* judgment which the *Hoge Raad* did not discuss in its judgment, nor elements which the *Hoge Raad* discussed which were not discussed in the *Costeja* judgment. This might indicate that, in the opinion of the lower courts, the *Hoge Raad* strictly followed the *Costeja* judgment, and that it

has interpreted and applied the *Costeja* judgment in a correct and complete manner.[57]

5.2.1. Applicable Legal Framework

30. The overall analysis of the 13 judgments (see Table 1) shows that claimants rely on Article 16 PDPA; Articles 8(f), 36 and 40 PDPA with reference to the *Costeja* judgment and the *Hoge Raad* judgment of 24 February 2017; and in just one case (C7) to a 'wrongful act' under Article 6:162 DCC (all explained in section 3).

31. Article 16 PDPA is invoked as a primary ground in cases which involve personal data relating to criminal offences (C1-C6); in such cases Articles 8(f), 36 and 40 PDPA in conjunction with the *Costeja* judgment and the *Hoge Raad* judgment form only an *alternative* ground. As will be shown in section 5.3, the lower courts have considerably struggled with the application of Article 16 PDPA when dealing with cases involving the right to be forgotten.

32. If the cases did not have a criminal dimension, the lower courts concentrated their reasoning around Articles 8(f), 36 and 40 PDPA with reference to the *Costeja* judgment and the *Hoge Raad* judgment (C8-C13). It can thus be concluded that the lower courts rely on the same legal framework as the *Hoge Raad*, whose judgment was also solely based on an application of Articles 8(f), 36 and 40 PDPA, with reference to the *Costeja* judgment.

5.2.2. Factors to Consider When Applying a Balancing Act

33. The *Hoge Raad* judgment and the *Costeja* judgment demonstrate that when the lower courts decide on a request to remove personal data from a search engine, they must carry out 'a balancing of the opposing rights and interests concerned', such as the privacy rights of the data subject and the economic interests of the operator. It also indicates which rights and interests *in particular* influence this balancing act: 'the nature of the information concerned and its sensitivity to the private life of the person in question and the interest of the public to have knowledge of this information, which is particularly determined by the role this person plays in public life'.[58] As will become clear below, the lower courts take a fairly strict account of these factors when applying the balancing act.[59]

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57 It should be noted that the *Hoge Raad* did not submit preliminary questions, which indicates that, also from the *Hoge Raad*'s perspective, the *Costeja* judgment was clear.

58 ECJ 13 May 2014 *supra* 1, paras 74-7, 97-99.

59 See also L. Mourcous & M. Weij, 'Drie jaar het recht om vergeten te worden: een analyse van de Nederlandse rechtspraak', *Tijdschrift voor Internetrecht* 2017(4).

5.2.2.1. Privacy Rights

34. The first element of the balancing act is whether the processing of personal data in a certain case constitutes an interference with the data subject's privacy rights. In most cases, the lower courts simply state that, as a matter of fact, the publication of the data subject's personal data has negative consequences for his or her private life and thus constitutes an interference with privacy rights. The Working Party's guidelines indicate under what circumstances such interference may exist, for example, where 'the availability of certain information through internet searches can leave data subjects open to risks such as identity theft or stalking'.[60] Most lower courts, however, do not elaborate what the possible negative consequences for the data subject could be. One case forms an exception (C2). In this case, the *Rechtbank Amsterdam* noted that the public availability of the personal data of the data subject hindered the data subject in his online dating efforts, as people simply googled his name and found his criminal background.[61]

35. Furthermore, some lower courts distinguish between publications which refer to a data subject's private or professional life. These courts conclude less easily that there is an interference with someone's right to privacy if a publication concerns someone's professional life, because the link with his or her private life is less clear (C2, C10 and C12).[62] This ties in with the Working Party's guidelines, that also make this distinction.[63]

5.2.2.2. Economic Interests

36. A less prominent element of the balancing act are the economic interests of the operator. There seems to be no attention devoted to this. Not one lower court explicitly explained what the economic interest might consist of, nor is it part of the balancing act. It can be assumed that these courts simply assume that this interest exists. Anyhow, a request to remove personal data can only be refused if 'particular reasons' apply, and according to the *Hoge Raad* judgment and the *Costeja* judgment the economic interest of the search engine does not provide

60 Article 29 Data Protection Working Party, *supra* 7, p 18.

61 Rechtbank Amsterdam 15 Feb. 2018, https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBAMS:2018:1644, para. 4.15. See also Mourcous & Weij, *Tijdschrift voor Internetrecht,* p (189), who discuss this case.

62 Rechtbank Rotterdam 7 Feb. 2019, https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBROT:2019:948, para. 4.12; Rechtbank Midden-Nederland 8 May 2018, https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBMNE:2018:2196, para. 4.15; Rechtbank Midden-Nederland 24 May 2018, https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBMNE:2017:6893, para. 4.10.

63 Article 29 Data Protection Working Party, *supra* 7, p 16.

such a reason – thus it is not a necessary element to be considered when deciding on such a request.[64] The Working Party's guidelines also do not recognize economic interests as an element that is necessary to be considered.

5.2.2.3. Interest of the General Public

37. In the *Costeja* judgment, the ECJ mentioned both 'the interest of the general public in finding (certain personal) information' and 'the preponderant interest of the general public in having (...) access to the information in question'.[65] It seems that the lower courts do not make a distinction between these two interests. Therefore, these two interests are discussed together and are simply referred to as 'the interest of the general public'.

38. When discussing the interest of the general public, the lower courts consider different factors. Logically, they examine the 'role played by the data subject in public life', which – according to the *Costeja* judgment and the *Hoge Raad* judgment – is a particularly relevant circumstance to determine whether there is indeed an legitimate interest of the public.[66] The cases where a public figure was involved are discussed separately (see section 5.5).

39. The lower courts also emphasize the importance of publications giving an indication of the data subject's professional integrity and capacity, as knowledge of this might be in the interest of the general public: publications can protect companies and especially individuals against possible risks which may arise when dealing with the data subject. In a judgment by the *Rechtbank Amsterdam* (C8) it concerned an accountant who had received a disciplinary sanction. The *Rechtbank Amsterdam* ruled that future clients should be able to judge the accountant's professional integrity and thus the request to remove information about the sanction was refused.[67] The *Rechtbank Rotterdam* (C3) came to the same conclusion in another judgment. In this case the data subject was a landlord who had threatened tenants. The *Rechtbank Rotterdam* argued that a future tenant, normally the weaker party in relation to the landlord, should be able to inform him/herself about the background of the data subject (the landlord) and the general opinion about him, which is relevant when deciding if one wants to rent from the landlord.[68] According to the *Rechtbank Amsterdam* (C2), the connection between criminal behaviour and professional capacity is especially relevant for professions like doctors and journalists, who are subject to

64 Hoge Raad 24 Feb. 2017 *supra* n. 4. para. 3.5.6; ECJ 13 May 2014 *supra* n. 1. para. 99.
65 *Ibid.*
66 *Ibid.*
67 Rechtbank Amsterdam 22 Mar. 2018, https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBAMS:2018:3355, para. 4.19.
68 Rechtbank Rotterdam 7 Feb. 2019 *supra* n. 61, para. 4.12.

higher integrity standards, and less for e.g., an artist manager.[69] The Working Party's guidelines explain that 'information is more likely to be relevant if it relates to the current working life of the data subject (...)'.[70] The foregoing reasoning by the lower courts is in line with the statement in the Working Party's guidelines: information about the data subject's working life may give an indication of his or her professional integrity and capacity, which is relevant information for (especially weaker) third parties dealing with the data subject.

40. Some lower courts have furthermore reasoned that there was an interest of the general public if a data subject's personal data was relevant in light of a current societal debate. Resulting from an overall analysis the following examples were found: tax evasion (C6),[71] the integrity and expertise of accountants (C8),[72] charities' lack of transparency (C9),[73] a director's liability (C11)[74] and malpractices in bankruptcy cases (C10).[75] The lower courts emphasize that journalists must be able to critically address these issues in order to inform and warn the public (C13).[76] The Working Party's guidelines also state that it is more likely that a request to remove data is refused if the data subject is the subject of public debate.[77] In this respect, the judgments by the lower courts illustrate some interesting examples of topics that have been publicly debated.

5.2.2.4. Nature and Sensitivity of the Information

41. A final element of the balancing act is the 'nature of the information in question and its sensitivity for the data subject's private life'. The nature and sensitivity of information are of course strongly interlinked: based on its nature, data could be sensitive information on someone's private life. A clear example of information which is of a particular nature, and which is certainly sensitive with regard to the data subject's private life, is personal data relating to criminal offences. Cases involving such data are discussed separately in section 5.3.

42. When considering the nature of the personal data and its sensitivity, four relevant factors can be distinguished in the judgments by the lower courts. First,

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69 Rechtbank Amsterdam 15 Feb. 2018 *supra* n. 60, para. 4.23.

70 Article 29 Data Protection Working Party, *supra* n. 7, p 16.

71 Rechtbank Amsterdam 22 Mar. 2018, https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBAMS:2018:3354.

72 Rechtbank Amsterdam 22 Mar. 2018 *supra* n. 66.

73 Rechtbank Den Haag 19 Apr. 2018, https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2018:4672.

74 Rechtbank Limburg 20 Mar. 2018, https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBLIM:2018:2751.

75 Rechtbank Midden-Nederland 8 May 2018 *supra* n. 61.

76 See in particular: Rechtbank Den Haag 19 Apr. 2018 *supra* n. 72, para. 4.16.

77 Article 29 Data Protection Working Party, *supra* n. 7, p 18.

there is a great deal of emphasis on the journalistic nature of the publication. If publications are *not* factually incorrect, outdated, tendentious, suggestive or focused on sensation, this gives an indication of the journalistic nature of the publication (e.g., C5 and C10).[78] That is also the case if the information was published in a serious, national newspaper and concerns a topic which is a matter of public debate (C2, C8 and C13).[79] Other relevant circumstances to consider are whether or not the publication was preceded by a journalistic investigation and if the journalist adhered to the principle of hearing both sides of the story (C2).[80] The Working Party's guidelines state that 'it may be relevant to consider whether the information was published for a journalistic purpose'.[81] The reasoning of the lower courts clearly meet this criterion and, moreover, provides for additional elements to be considered.

43. Second, it matters whether the information by its very nature was publicly available. A good example of this is a case by the *Rechtbank Midden-Nederland* where an insolvency administrator held the data subject, a director of a bankrupt company, liable for the negative balance of the company (C10). This liability claim was published in the liquidation report[82] and could therefore easily be found when searching by using the data subject's name. The *Rechtbank Midden-Nederland* argued that the liquidation report *by its nature* is publicly available, because it aims to inform creditors and other stakeholders, and therefore dismissed the data subject's claim.[83]

44. Third, the lower courts considered whether the information is still relevant today. The rationale is that individuals should at a certain point have the right to be forgotten, especially if the publication concerns something that happened a long time ago and contains no new information. The *Rechtbank Amsterdam* drew an interesting comparison (C2). On the one hand, criminals receive a 'declaration of good standing' after which their criminal record is 'forgotten'. In contrast, the past of the data subject, once published online, criminal or not, haunts him or her forever. This leads to an unequal situation. Self-evidently the *Rechtbank Amsterdam* did not conclude that, based on this comparison, every data subject has the right to be forgotten after a period of five years of good standing.

78 See e.g., Rechtbank Amsterdam 25 Jan. 2018, https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBAMS:2018:2979, para. 4.12; Rechtbank Midden-Nederland 8 May 2018 *supra* n. 61, para. 4.14.

79 Rechtbank Amsterdam 22 Mar. 2018 *supra* n. 66, para. 4.19; Rechtbank Amsterdam 15 Feb. 2018 *supra* n. 60, para. 4.20; Rechtbank Den Haag 19 Apr. 2018 *supra* n. 72, para. 4.16.

80 Rechtbank Amsterdam 15 Feb. 2018 *supra* n. 60, para. 4.20.

81 Article 29 Data Protection Working Party, *supra* n. 7, p 19.

82 In Dutch: '*faillissementsverslag*'.

83 Rechtbank Midden-Nederland 8 May 2018 *supra* n. 61.

A balancing of interests always has to take place.[84] It is possible that the publication is still relevant today, for example in light of a current public debate or because the data subject has recently shown similar impermissible behaviour (C8, C6 and C10).[85] The Working Party's guidelines are quite limited in respect of publications about something that happened a long time ago: they only mention that the assessment in these kinds of cases 'will be dependent on the purpose of the original processing'.[86] The reasoning by the lower courts is therefore of additional value when dealing with such cases.

45. Lastly, the lower courts have emphasized that the removal of personal data sometimes leads to an 'unbalanced public image' of the data subject. This point is not so much related to the *material* nature of the information, but rather to the *representative* nature of the information in relation to the image of the data subject. If a search result is the only reference to, for example, the criminal background of the data subject while other results reflect the data subject as a successful businessman, any removal would unjustifiably cause such an unbalanced public image (C5).[87] So to avoid this, the lower courts take account of the representative nature of the published personal data of the data subject. Although this reasoning makes sense, it is not clear whether this corresponds with the intended meaning of 'nature' pursuant to the *Hoge Raad* judgment and therewith the *Costeja* judgment, as 'nature' most likely refers to the material content of the information. Moreover, the Working Party's guidelines do not explicitly mention the risk of an unbalanced image.

5.2.3. A Correct Application of the Priority Rule?

46. As explained in section 4, both the *Costeja* judgment and the *Hoge Raad* judgment clarify that, as a general rule, the right of privacy overrides and therefore takes priority over the rights of internet users. However, this could be different in 'particular cases', depending on 'the nature of the information concerned and its sensitivity to the private life of the person in question and the interest of the public to have knowledge of this information, which is particularly determined by the role this person plays in public life'.[88] If it concerns no 'particular case', then the privacy rights of the data subject prevail over the rights of internet users. If it concerns a 'particular case', courts should engage in a balancing act between the privacy rights of the data subject and the rights of the internet users (more

84 Rechtbank Amsterdam 15 Feb. 2018 *supra* n. 60.

85 Rechtbank Amsterdam 22 Mar. 2018 *supra* n. 66, para. 4.19; Rechtbank Amsterdam 22 Mar. 2018 *supra* n. 70, para. 4.14. Rechtbank Midden-Nederland 8 May 2018 *supra* n. 61, para. 4.15.

86 Article 29 Data Protection Working Party, *supra* n. 7, p 19.

87 Rechtbank Amsterdam 25 Jan. 2018 *supra* n. 77, para. 4.16.

88 Hoge Raad 24 Feb. 2017 *supra* n. 40, para. 3.5.5.

specifically, the public interest). In such a 'particular case', for 'particular reasons', the balancing act would favour the rights of the internet users, if for 'particular reasons' (such as the role played by the data subject in public life) the interference with the data subject's privacy rights is justified by the 'preponderant interest' of the general public in having access to the information in question. The term 'preponderant' is essential, as it indicates at what point the balance tips to the rights of the internet users. In other words: only if the interest of the general public is superior to or significantly more important than the privacy rights of the data subject will the rights of the internet users prevail. If not, the privacy rights, as a general rule, prevail. It is interesting to analyse how the lower courts cope with the criterion of 'preponderant interest'.

47. In some cases the lower courts have merely summed up all the relevant circumstances and end with the conclusion that it concerns a 'particular case' in which the rights of the internet users prevail (e.g., C6 and C8). In such cases, the courts seemed to imply that the justification of interference with the data subject's privacy rights by a 'preponderant interest' of the general public naturally follows from their list of relevant circumstances.[89]

48. In other cases, the lower courts gave a more elaborate explanation for their decisions. In one case, the *Rechtbank Amsterdam* decided in favour of Google, because their arguments (based on special circumstances relating to the nature of the information and the fact that the data subject played a role in public life) 'have a much heavier weight' than the negative consequences for the data subject (C5). In another case by the *Rechtbank Amsterdam*, where it concerned a minor offence and there was no public debate about the criminal proceedings, the *Rechtbank Amsterdam* argued that only a 'particular and substantial' public interest can prevail over the privacy rights of the data subject, and that this was not the case (C2, C10 and C13).[90] These criteria are aligned quite closely with the criterion of 'preponderant interest' developed by the ECJ and the *Hoge Raad* because the lower courts have emphasized that only due to substantial reasons can one deviate from the general rule that privacy rights prevail.

49. Deviating from these two cases by the *Rechtbank Amsterdam*, the *Rechtbank Rotterdam* argued that the public interest should 'outweigh' the privacy rights of the data subject (C3).[91] This criterion seems to be incorrect as it treats both interests as equal, while the correct rule is that, in principle, privacy rights

89 Rechtbank Amsterdam 22 Mar. 2018 *supra* n. 66, para. 4.19; Rechtbank Amsterdam 22 Mar. 2018 *supra* n. 70.

90 Rechtbank Amsterdam 25 Jan. 2018 *supra* n. 86, para. 4.19; Rechtbank Amsterdam 15 Feb. 2018 *supra* n. 60, para. 4.18. Compare Rechtbank Den Haag 19 Apr. 2018 *supra* n. 72, para. 4.16, where the court spoke of a 'considerably heavier weight'; and Rechtbank Midden-Nederland 8 May 2018 *supra* n. 66, para. 4.15: 'much less weight'.

91 Rechtbank Rotterdam 7 Feb. 2019 *supra* n. 61.

prevail, and only in 'particular cases' where particular reasons based on the preponderant interest of the general public justify interference with someone's privacy rights.

5.3. Cases Involving Personal Data Relating to Criminal Offences

50. In the subsequent subsections the article zooms in on the three particular types of cases: cases involving personal data relating to criminal offences (cases 5.3), cases involving personal data relating to disciplinary matters (section 5.4) and cases involving a public figure (section 5.5).

51. In a large part of the identified cases (see Table 1), the data subject wanted to remove personal data relating to criminal behaviour. These cases varied from a relatively minor offence (community service of 80 hours) to more serious forms of crime, such as tax avoidance and money laundering.[92]

52. In all judgments within this group, the claimants based their claim primarily on Article 16 PDPA, which prohibits the processing of certain categories of sensitive personal data, such as data relating to criminal offences (see section 3). Articles 36 and 40 PDPA are only used as alternative grounds. This is opposed to all other judgments (outside this group), where Articles 36 and 40 PDPA in conjunction with the *Costeja* judgment and the *Hoge Raad* judgment were invoked as the principal ground (see Table 1). One case forms an exception (C7): in the case which came before the Hoge Raad, the claimant did not base his claim on Article 16 PDPA (which is quite remarkable, because the data subject had been convicted of a serious crime).[93] As such, the Hoge Raad could not, unfortunately, explicitly consider Article 16 PDPA in its decision: it incorporated personal data relating to criminal offences in its general balancing act, without reference to Article 16 PDPA. As will follow below, the lower courts have taken a similar approach.

53. In their judgments, the lower courts have struggled with the application of Article 16 PDPA when applying the balancing act concerning the right to be forgotten. On the one hand, the meaning of Article 16 PDPA seems clear: if someone's personal data falls within its scope, it may as a rule not be processed. On the other hand, however, this would impose a massive obligation on search engines like Google. Neither the ECJ nor the *Hoge Raad* has directly touched

92 Rechtbank Amsterdam 22 Mar. 2018 *supra* n. 70; Rechtbank Amsterdam 22 Mar. 2018, https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBAMS:2018:3357; Rechtbank Amsterdam 15 Feb. 2018 *supra* n. 60; Rechtbank Rotterdam 7 Feb. 2019 *supra* n. 61.

93 As also noted by Kulk and Zuiderveen Borgesius in their case note; S. Kulk & F.J. Zuiderveen Borgesius, *supra* n. 4. However, after the *Hoge Raad* referred the case back to the Court of Appeal, the claimant tried to base its claim on Art. 16 PDPA. This appeal was dismissed on procedural grounds. See Gerechtshof Den Haag 5 Jun. 2018, https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:GHDHA:2018:1296, para. 3.10.

upon this issue,[94] thus the lower courts themselves had to deal with this issue. The line of reasoning of the lower courts is very similar. They have argued that if Article 16 PDPA would implicate that personal data relating to offences and criminal convictions are categorically excluded from the processing of information by Google, then Google will have to adhere to all the requests for the removal of personal data relating to criminal offences. As search engines like Google are an indispensable tool for internet users to find information, the categorical exclusion of personal data related to offences and criminal convictions would render the fulfilment of their function impossible. That would be incompatible with the general interest (e.g., C5).[95] The lower courts therefore take account of Article 16 PDPA, but only as part of a more general balancing of interests, based on Articles 8(f), 36 and 40 PDPA, the *Hoge Raad* judgment, the *Costeja* judgment and the conflicting freedoms of the EU Charter mentioned in both judgments (respect for private and family life and the protection of personal data versus the freedom of expression and information).[96] It is questionable whether the inapplicability of Article 16 PDPA based on the general interest is legally valid: Article 16 PDPA provides no exception as to the processing of personal data relating to criminal offences based on the general interest.[97]

54. Two judgments nicely show how Article 16 PDPA is incorporated in the balancing of interests.[98] In one case (C2), the *Rechtbank Amsterdam* stated that when applying the balancing of interests, first and foremost, the criminal nature of the personal data is important, especially when considering the sensitivity of the personal data. With explicit reference to Article 16 PDPA, it mentioned that it is 'for a good reason' that Article 16 PDPA prohibits the processing of particular

94 In the meantime, however, the ECJ has shed light on this issue. See ECJ 24 Sep. 8 2019 ECLI:EU:C:2019:773, GC et al. v. Commission nationale de l'informatique et des libertés (CNIL). The ECJ decided, in short, that the operator of a search engine is required to accede to a request for de-referencing relating to links to web pages displaying information (data) concerning offences and criminal convictions, where the information relates to an earlier stage of the legal proceedings in question and, having regard to the progress of the proceedings, no longer corresponds with the current situation.

95 Rechtbank Amsterdam 25 Jan. 2018 *supra* n. 86, para. 4.6. See also Mourcous & Weij, *Tijdschrift voor Internetrecht,* pp 189-190.

96 Articles 7, 8 and 11 EU Charter.

97 Although it should be noted that in some judgments which were delivered shortly after the *Costeja* judgment but before the *Hoge Raad* judgment on 24 Feb. 2017 courts have concluded that Google had to remove such data, based solely on Art. 16 PDPA. See Mourcous & Weij, *supra* n. 3, p 189; F.J. Zuiderveen Borgesius, 'Het "right to be forgotten" en bijzondere persoonsgegevens: geen ruimte meer voor een belangenafweging?', 4 *Computerrecht* 2016(126).

98 In other cases this incorporation is less explicit, see Rechtbank Amsterdam 19 Jul. 2018, https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBAMS:2018:8606, para. 4.12; Rechtbank Limburg 20 Mar. 2018 *supra* n. 73, para. 4.17.3; and Rechtbank Rotterdam 7 Feb. 2019 *supra* n. 61, para. 4.12.

forms of information.[99] The reasoning of the *Gerechtshof Den Haag* is even more interesting (C4). It first state that the privacy rights of the data subject, in principle, prevail over the rights of internet users, and that this is for a good reason if the case involves a special category of personal data, such as data relating to criminal offences. In other words: if a case concerns personal data relating to criminal offences, it becomes harder to deviate from the general rule that privacy rights prevail.[100]

55. When applying the balancing act in cases which involve personal data relating to criminal offences, the lower courts typically take account of two factors (apart from the factors that are considered by almost all courts, listed in section 5.2.3). The most relevant factor is the type of criminal offence committed, as also mentioned by the Working Party's guidelines.[101] In all judgments in this group the courts paid attention to this. On a general note, it can be concluded that the more serious the crime the less likely it becomes that the request for removal is granted (e.g., C1 and C6).[102] The lower courts also take account of how long it has been since the offence occurred (C2 and C5),[103] the second factor mentioned by the Working Party's guidelines. However, this factor is considered by all lower courts, thus also in cases which do not relate to a criminal offence (see further section 5.2.3, 'the nature and sensitivity of the information').

56. The foregoing shows that even if data subjects can rely on Article 16 PDPA, the lower courts will not grant their request solely based on this provision. Although the lower courts will certainly take account of Article 16 PDPA, they will only do so as part of a more general balancing of interests based on Articles 36 and 40 PDPA. When applying the balancing of interests, the lower courts particularly take into account what type of criminal offence had been committed and how long ago the offences occurred.

5.4. Cases Involving Personal Data Relating to Disciplinary Matters

57. It is interesting to see that before the entering into force of the GDPR, requests to remove personal data relating to disciplinary matters were based on Article 16 PDPA. However, in one judgment after the entering into force of the

99 Rechtbank Amsterdam 15 Feb. 2018 *supra* n. 60, paras 4.14-4.15.

100 Gerechtshof Den Haag 23 May 2017, https://uitspraken.rechtspraak.nl/inziendocument?id=ecli:nl:ghdha:2017:1360, paras 5.12-5.16.

101 Article 29 Data Protection Working Party, *supra* n. 7, p 20.

102 See e.g., Rechtbank Amsterdam 22 Mar. 2018 *supra* n. 70; Rechtbank Amsterdam 22 Mar. 2018, https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBAMS:2018:3357; Rechtbank Amsterdam 15 Feb. 2018 *supra* n. 60; Rechtbank Rotterdam 7 Feb. 2019 *supra* n. 61.

103 See e.g., Rechtbank Amsterdam 15 Feb. 2018 *supra* n. 60, para. 4.17; Rechtbank Amsterdam 25 Jan. 2018 *supra* n. 86, para. 4.14.

GDPR (C9), the court decided that it was not Article 10 GDPR (the equivalent of Article 16 PDPA) but Article 17 GDPR that formed the relevant legal basis for the decision. Because this closely relates to the GDPR, this case is also discussed in section 6.

58. When considering the factors to be considered as part of the balancing act in cases relating to disciplinary matters, two points should be addressed. First, in a case of the *Rechtbank Amsterdam* the question arose whether a doctor's position qualifies as 'a role in public life' (C9).[104] If so, this would make it more likely that public access to information about doctors via a search result would be justified. With reference to the case law of the ECtHR, Google raised the argument that persons who choose a public function should be able to deal with more serious criticism: hence a doctor should be subject to higher standards than the average citizen. The *Rechtbank Amsterdam* stated that a doctor, to some extent, can be considered to be a 'public figure'. With reference to the Advocate General,[105] the *Rechtbank Amsterdam* however argued that doctors do not hold a public *function*: they only act in relation to an individual patient. They can be held responsible for their professional work, but only in a private consultation with the patient. Because of their confidentiality obligation, doctors cannot engage in a public debate about a specific case. Hence publications about a doctors' work do not serve any purpose, because doctors cannot publicly react. Moreover, the doctor the in question had been already held accountable for her fault during the disciplinary proceedings.[106] In its guidelines, the Working Party notes that 'members of the (regulated) professions can usually be considered to fulfil a role in public life' and that 'there is an argument in favour of the public being able to search for information relevant to their public roles and activities'.[107] From these statements it does not necessarily follow that a doctor is always a public figure nor that personal data should always be publicly available. The *Rechtbank Amsterdam*'s reasoning does not therefore clash with these statements: it stated that, indeed, a doctor can be considered to fulfil a role in public life, but this does not necessarily entail that doctors can be forced to publicly discuss specific cases.

59. A second point in relation to the factors to be considered as part of the balancing act also follows from the case of a doctor. Google raised the argument that future patients should know about disciplinary proceedings and the sanctions imposed, because this may influence the image that those patients have of the professional competences of the doctor. This argument was dismissed, because it is

104 Rechtbank Amsterdam 19 Jul. 2018 *supra* n. 96.

105 Parket bij de Hoge Raad 20 Dec. 2013, https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:PHR:2013:1273.

106 Rechtbank Amsterdam 19 Jul. 2018 *supra* n. 96, para. 4.14.

107 Article 29 Data Protection Working Party, *supra* n. 7, p 13.

relatively easy to find this information via another, more appropriate means, namely in the BIG-register (an individual healthcare professionals register which, following their own website, 'gives clarity about the care provider's qualifications and entitlement to practice').[108] Based on this fact, the court distinguished this case from the case involving an accountant, where such a register was not available.[109]

5.5. Cases Involving a 'Public Figure'

60. The *Costeja* judgment and the *Hoge Raad* judgment on 24 February 2017 both explicitly mention that 'in particular, (...) the role played by the data subject in public life' may justify interference with the data subject's fundamental right to privacy.[110] In light of that consideration, it is interesting to examine how the lower courts deal with so-called 'public figures'.

61. On a general note, it is interesting to see that in only one case in which the data subject was considered a public figure did the court actually grant the request to remove personal data (C9). This might indicate that the lower courts attach a heavy weight to the factor of a 'public figure', which would be in line with the particular status that it has in the balancing act expressed by the *Hoge Raad* judgment and the *Costeja* judgment.

62. A second notable point is that the lower courts, when deciding whether the data subject is a public figure, consider it to be important that it was his or her own fault that he or she became publicly known. In one judgment by the *Rechtbank Midden-Nederland* (C10), the claimant did not actively seek publicity, but the media paid attention to his bankruptcy cases in which he had been convicted and subsequently both criminal and civil sanctions had been imposed. Because this was a consequence of his behaviour, the court considered him to be a public figure.[111] Another case in which the claimant did not actively seek publicity (C5) concerned a person who had been interviewed on a few occasions by the national media and who appeared in the Quote 500 list (a list of the 500 wealthiest people in the Netherlands). Since he had apparently not objected to this, the *Rechtbank Amsterdam* considered him to be also a public figure.[112] The strong emphasis on the data subject's own fault is quite remarkable. Following the lower courts' reasoning it seems that even if the data subject has committed a relatively minor offence, which has however received a great deal of media attention, then he or she could be considered to be a public figure. The Working Party's guidelines do not

108 See https://english.bigregister.nl/about-the-big-register.
109 Rechtbank Amsterdam 19 Jul. 2018 *supra* n. 96, para. 4.16.
110 ECJ 13 May 2014 *supra* n. 1, para. 99.
111 Rechtbank Midden-Nederland 8 May 2018 *supra* n. 61.
112 Rechtbank Amsterdam 25 Jan. 2018 *supra* n. 86.

contain such a criterion. It is therefore unclear how this criterion relates to the *Hoge Raad* judgment and therewith the *Costeja* judgment.

63. Lastly, it matters if the data subject can defend him or herself in the public debate. In a judgment of the *Rechtbank Amsterdam* (C9), also discussed above, a doctor had operated on a patient with the aid of a certain product, which led to medical complications. This doctor actively engaged in the public debate about the risks of this product. On this latter basis, the court considered her to be a public figure, but only 'to a certain degree'. This qualification was not decisive when deciding on her request, because the court reasoned that the doctor could not account for individual patients because of her duty of confidentiality.[113] Although the Working Party's guidelines do specifically mention this, the reasoning certainly makes sense and could be an additional factor when considering the interest of the general public.

5.6. Synthesis

5.6.1. Applicable Legal Framework

64. In cases which do not involve personal data relating to criminal offences, all lower courts rely on Articles 8(f), 36 and 40 PDPA. This compels the lower courts to engage in a balancing act taking into account, on the one hand, the interests or the fundamental rights and freedoms of the data subject (notably the right to privacy) and the factual correctness, completeness or irrelevance of the data, and, on the other hand, the legitimate interests pursued by the controller or by a third party. This framework is the exact same legal framework as applied by the *Hoge Raad*, and as such also amounts to a correct implementation of the framework expressed by the ECJ.

65. The foregoing analysis has shown that the lower courts have struggled with the incorporation of personal data relating to criminal offences in the balancing act with regard to the right to be forgotten, although, in the end, all lower courts have applied a similar approach. These courts do not view Article 16 PDPA as a categorical exclusion of Google's right to process data, but incorporate personal data relating to criminal offences in their balancing act. This approach ties in with the framework laid down by the ECJ and the *Hoge Raad*: they have introduced a balancing act within which, inter alia, particular attention should be paid to the nature and sensitivity of the information. When engaging in this balancing exercise, some of the lower courts have used the angle of 'nature and sensitivity' to attach more weight to personal data relating to criminal data, which given its special status is certainly appropriate. However, a critical side note should be

113 Rechtbank Amsterdam 19 Jul. 2018 *supra* n. 96, para. 4.14.

made: the lower courts' reasoning that Article 16 PDPA forms no categorical exclusion of Google's right to process personal data is solely based on 'the general interest'. However, Article 16 PDPA provides no exception as to the processing of personal data relating to criminal offences based on the general interest.

5.6.2. Factors to Be Considered as Part of the Balancing Act

66. Regarding the factors to be considered as part of the balancing act, the lower courts quite strictly follow the framework expressed by the *Costeja* judgment and confirmed by the *Hoge Raad* judgment: they pay attention to privacy rights, the interest of the general public and the nature and sensitivity of the information concerned. A few additional conclusions can be drawn.

67. When discussing the negative consequences for the data subject's private rights, most lower courts simply state, as a matter of fact, that the publication of the data subject's personal information has such consequences. They do not explicitly explain or set out what these consequences could be and what their extent is, which makes it more difficult to engage in an appropriate balancing act. The lower courts could pay more attention to this. On a positive note, however, the lower courts have distinguished between publications which refer to a data subject's private or professional life; publications about someone's professional life generally have a lesser impact on someone's private life.

68. When considering the interest of the general public, the lower courts have placed a great deal of emphasis on the 'public figure' element, which is appropriate given its special status in the framework expressed by the ECJ and the *Hoge Raad.* It is remarkable to see that in only one judgment has a lower court granted the request of a 'public figure' to remove data, which might indicate that the lower courts attach a great deal of weight to the 'public figure' factor. Also, there is much emphasis on the 'own fault' criterion, but since the Working Party's guidelines do not refer to such a criterion, it is unclear how it relates to the *Hoge Raad* judgment and therewith the *Costeja* judgment. A strong argument in favour of the public figure who wants to remove his or her data is that he or she cannot defend him/herself in a public debate (which is, for instance, the case for doctors). Although the Working Party's guidelines do specifically mention this, the reasoning certainly makes sense and could be an additional factor when considering the interest of the general public. In addition to the factors related to the 'public figure' element, the lower courts have argued that information related to the data subject's working life could be relevant, as it gives an indication of his or her professional integrity and capacity. Also, if the data subject's behaviour relates to a topic that is subject to a societal debate (such as tax evasion), the public availability of information about this behaviour may serve the general interest.

69. In respect of the nature and sensitivity of personal data, the lower courts have considered different factors which to some extent overlap with the criteria

determined by the Working Party's guidelines. First and foremost is the case for personal data relating to criminal offences, which most lower courts give more weight to due to its particular nature, in line with the Working Party's guidelines. The lower courts also follow the criteria of the guidelines in relation to the journalistic nature of the publication and the relevance of the publication for today. Especially the latter two factors clearly fall within the scope of the *Hoge Raad* judgment and therewith the *Costeja* judgment. Two other factors raised by the lower courts, whether the information by its very nature was publicly available (e.g., a liquidation report by an insolvency administrator) and the representativeness of the information in relation to the public image of the data subject, do not directly follow from the guidelines but may provide new, helpful insights when deciding on the right to be forgotten. Although it should be mentioned that in respect of the latter factor (representativeness), it is not clear whether this corresponds with the intended meaning of the 'nature' of the information concerned, as 'nature' most likely refers to the material content of the information. The Working Party's guidelines also do not explicitly mention the risk of an unbalanced image.

5.6.3. The Application of the Priority Rule

70. With the exception of one lower court, all lower courts have applied the priority rule in accordance with the framework expressed in the *Hoge Raad* judgment and therewith the *Costeja* judgment. Most courts have simply concluded that, based on all the relevant circumstances, a case is a 'particular case', which justifies a deviation from the general rule. Some lower courts have made it explicit why their case is a 'particular case': they have indicated that, based on an analysis of all the relevant circumstances, the interest of the general public has much greater weight (or something alike) than the privacy rights of the data subject. Such reasoning is correct: only if the interest of the general public is significantly more important than the negative consequences for the data subject is interference justified.

6. A Glance into the Future: GDPR and the Right to Be Forgotten in the Netherlands

6.1. Introduction

71. On 25 May 2018 the GDPR[114] entered into force in the European Union. A specific provision on the right to be forgotten is included in Article 17 GDPR, albeit it is included between brackets in the 'right to erasure'. This section delves into the questions of what Article 17 GDPR entails and whether the entry into force

114 Reg. 2016/679 of 27 Apr. 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 Regulation), http://data.europa.eu/eli/reg/2016/679/oj.

of the GDPR has changed the right to be forgotten. This section will first make a textual comparison between the PDPA and the GDPR concerning the 'right to be forgotten' to determine whether their provisions contain notable differences (section 6.2). Subsequently, the only Dutch judgment on the right to be forgotten which is based on the GDPR is discussed (section 6.3). This judgment is then compared to the *Hoge Raad* judgment and the *Costeja* judgment so as to see whether the applicable balancing act following from the GDPR is different than in the case law based on the *Costeja* judgment (section 6.4). The section ends with a conclusion on whether the GDPR changes anything about the pre-GDPR interpretation of the 'right to be forgotten' (section 6.5).

6.2. Comparison Between the PDPA and the GDPR

72. The PDPA has already been extensively discussed in section 3 and will not therefore be discussed here. The GDPR has expanded the scope of the right to be forgotten in Article 17 in order to be consistent with the *Costeja* judgment.[115] Article 17 GDPR also refers to the right to erasure, by which the right to be forgotten is included in brackets. An essential element of Article 17 GDPR is the right to demand that personal data placed on the internet by the individual or third parties have to be erased.[116] The provision in the GDPR is wider than the *Costeja* judgment as it applies to all data controllers, and not merely to search engines.[117] Article 17(1)(a)-(f) GDPR includes a limited enumeration of cases in which the individual can instigate such a request. Individuals can request that their personal data be erased when their personal data are no longer necessary in relation to the purpose for which they were collected or otherwise processed, where an individual has withdrawn his or her consent, or where the processing of their personal data does not otherwise comply with the GDPR.[118] However, there are also exceptions to this right. Following from Article 17(2) GDPR, the further retention of personal data after such a request can be lawful where, inter alia,[119] it is necessary:

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115 K.A. Houser & G. Voss, 'GDPR: The End of Google and Facebook Or a New Paradigm in Data Privacy', 25. *Richmond Journal of Law & Technology* 2018, p 73.

116 M. Krzysktofek, *GDPR: General Data Protection Regulation (EU) 2016/679: Post-Reform Personal Data Protection in the European Union* (Alphen aan den Rijn: Kluwer International 2018) 147.

117 L. Edwards, 'Data Protection: Enter the General Data Protection Regulation', in: L. Edwards (ed.) *Law, Policy and the Internet* (Oxford, Portland: Hart Publishing 2018).

118 P. Lambert, *Understanding the new European Data Protection Regulation* (Boca Raton: CRC Press 2018), p 197.

119 P. Lambert, *Understanding the new European Data Protection Regulation*, p 198. Other exceptions are: 'for compliance with a legal obligation (c) for a performance of a task carried out in the public interest or in the exercise of official authority vested in the controller (...) (d) on the grounds of public interest in the area of public health'.

> for exercising the right of freedom of expression and information, (...) for archiving purposes in the public interest, scientific or historical research purposes, or statistical purposes.

One obvious difference between the PDPA and the GDPR is that the GDPR explicitly refers to the right to be forgotten. However, the literature has been sceptical towards the actual regulation of the right to be forgotten by the GDPR. It has been argued by Di Ciommo that because the right to be forgotten is merely included between parentheses, it seems to be relegated from an individual right to an ancillary interest linked to the erasure of data. According to him, this (partially) hollows out the right under the GDPR. The wording of Article 17 simply sets out the rules governing the erasure of data, and does not specifically regulate the right to be forgotten.[120] However, at the same time it has been observed that the right to erasure, which was already present in the Data Protection Directive, has been developed into the right to be forgotten. Moreover, because Article 17 GDPR includes both terms, it has been argued that they refer to the same right, and thus, that there is no difference between the two. This is exemplified by the legislative process of the GDPR.[121]

73. Article 17 GDPR is considered to be a codification of the *Costeja* judgment, although it does widen the scope of the right to be forgotten as a whole. The approach of the *Costeja* judgment can be identified in Article 17(1)(a) which states, as previously mentioned, that a data subject has to request erasure if the data have become unnecessary in relation to the purpose for which they were collected or subsequently processed.[122] All the other grounds for such a request go beyond the *Costeja* judgment, and also beyond the previous Data Protection Directive and thereby the PDPA. Article 17 GDPR moves beyond the 'factually incorrect, incomplete or irrelevant' criterion that is mentioned in Article 36 PDPA, but adds other grounds as previously discussed.

74. Another notable difference between the PDPA and the GDPR relates to the exceptions to the right to be forgotten. Article 8 PDPA formulates it so that data can be processed *unless* the interests of the data controllers are overridden by the fundamental rights and freedoms of the data subject. Article 17(3) GDPR takes a slightly different approach. The exceptions have also widened since the *Costeja* judgment. The only exception put forward by the ECJ concerned the role of the individual in public life and the interest of

120 F. Di Ciommo, 'Privacy in Europe after Regulation (EU) No 2016/679: What Will Remain of the Right to Be Forgotten', 3. *Italian Law Journal* 2017, p 623.

121 M. Krzyszktofek, *GDPR*, p 149.

122 M. Krzyszktofek, *GDPR*, p 149.

the general public.[123] Instead it formulates that a data subject has the right to the erasure of personal data, *unless* the processing of such data is necessary for exercising the right of freedom of expression and information. This implies a change in the starting point of the right to be forgotten: the possibility of a request versus a right that the data subject has. The PDPA takes the perspective of the data controller as a starting point, while the GDPR emphasizes the right that the data subject has.

6.3. Post-GDPR Dutch Case Law

75. To date,[124] only one case concerning the right to be forgotten has been decided based on the GDPR in the Netherlands. There are other cases that have been decided after the GDPR entered into force; however, the PDPA was still used because these cases were brought to court before the GDPR entered into force.[125]

76. On 19 July 2018 the *Rechtbank Amsterdam* dealt with a request for the removal of personal data from Google (C9).[126] The case involved a medical disciplinary procedure against a surgeon (the applicant). After an operation that she had performed, a complication relating to the patient occurred. The patient then filed a complaint against the applicant because of the lack of organization and care after the operation. The following medical disciplinary procedure led to an unconditional suspension, which subsequently led to a conditional suspension after an appeal procedure.[127] When searching using the name of the applicant in Google, her name and photo popped up on a blacklist for medical practitioners. The applicant filed a request with Google to remove these hyperlinks, but Google denied this.[128] The applicant primarily relied on Article 16 PDPA and Article 10 of the GDPR, stating that the medical disciplinary data were personal data relating to criminal offences and thus could not be processed.[129] Alternatively, the applicant relied on the 'right to be forgotten' as laid down in Article 17 GDPR in conjunction with the *Costeja* judgment.[130]

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123 ECJ 13 May 2004 *supra* n. 1, para. 97.

124 29 Mar. 2019.

125 See e.g., Rechtbank Midden-Nederland 14 Nov. 2018 *verzoeker/Google LLC*, http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:RBMNE:2018:5594 and Rechtbank Rotterdam 7 Feb. 2019 *verzoeker/Google Inc,* http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:RBROT:2019:948.

126 Rechtbank Amsterdam 19 Jul. 2018 *supra* n. 96, paras 2.3–2.6.

127 *Ibid*., paras 2.3–2.6.

128 *Ibid*., paras 2.7–2.10.

129 *Ibid*., para. 3.2.

130 *Ibid*., para. 3.3.

77. The *Rechtbank Amsterdam* stated first and foremost that the GDPR has replaced the PDPA, but that the parties noted that there are barely any differences in the applicable yardstick. The *Rechtbank Amsterdam* stated that it would use the GDPR when it differs from the PDPA.[131] The processing of personal data is grounded on Article 6(f) GDPR which states that the processing of personal data can only be lawful if the 'processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data'.[132] The *Rechtbank Amsterdam* balanced two fundamental rights, on the one hand the right to privacy and respect for personal data, and, on the other, the freedom of information.[133]

78. The *Rechtbank Amsterdam* concluded that Google had to remove the hyperlinks to the blacklist. In its considerations, the *Rechtbank Amsterdam* referred to the GDPR and its case law which states that when a search engine processes personal data, the balancing of interests is always in favour of the applicant, unless there are special circumstances.[134] The *Rechtbank Amsterdam* considered that the applicant could be regarded as a 'public figure'. Firstly because she had an important role in the debate on the risks of a certain product, and secondly because she had not disputed that she invites patients with complaints because of that product to be treated by her. However, this is not decisive because this does not mean that she would have to continually account for an individual case in the public debate. Moreover, the applicant had already accounted for this specific case before the disciplinary court.[135] Thus, there were no special circumstances that would have the applicant's right to privacy and respect for personal data give way to the public interest. The applicant had a personal interest in her name on the blacklist of medical practitioners not emerging every time that someone searches her name on Google. This interest carries greater weight than the public interest to have access to this information. Moreover, the 'public' is able to find the disciplinary measures by consulting the BIG-register.[136]

6.4. Comparing Rechtbank Amsterdam to the Hoge Raad Judgment and the Costeja Judgment

79. The aforementioned case begs the question of whether the applicable balancing act following from the GDPR is different than the *Costeja* judgment and the

131 *Ibid.*, para. 4.2.
132 *Ibid.*, para. 4.7.
133 *Ibid.*, para. 4.9.
134 *Ibid.*, para. 4.10.
135 *Ibid.*, para. 4.16.
136 *Ibid.*; all healthcare professionals are registered in the BIG-register, which shows what a healthcare professional can and is allowed to do.

Hoge Raad ruling. The applicant based her request on both Article 17 GDPR in conjunction with the *Costeja* judgment. The issues of a 'public figure' and 'public interests' are central to this dispute. The *Rechtbank Amsterdam* referred explicitly to both the *Costeja* judgment and the *Hoge Raad* judgment to decide whether the applicant can be regarded as a 'public figure', thereby using the same balancing act as in the *Costeja* judgment and the *Hoge Raad* ruling in February 2017. The *Rechtbank Amsterdam* reiterated the considerations from the *Hoge Raad* that the right to private life and respect for personal data carries greater weight than the economic interests of a search engine, but that this can be different in exceptional cases. The exception is dependent on whether the information is necessary in light of the public interest, or whether the applicant is a public figure. The fundamental right to privacy and respect for personal data, on the one hand, and the freedom of information, on the other, form the basis of the balancing act which the *Rechtbank Amsterdam* undertook. This is the same balancing act conducted by the *Hoge Raad* and in the *Costeja* judgment. This is not surprising as Article 17 GDPR is seen as a codification of the *Costeja* judgment, although it expands the grounds for a removal request.

80. An interesting difference with the case law before the GDPR entered into force is that the *Rechtbank Amsterdam* considered that following from Article 10 GDPR, disciplinary measures are no longer considered to be personal data relating to criminal offences. Therefore, the applicant could not rely on Article 10 GDPR. This was different under the PDPA, whereas the lower courts read Article 16 PDPA (the equivalent of Article 10 GDPR) in such manner that it also covered disciplinary measures.[137] This could indicate that in the post-GDPR era, the lower courts treat personal data relating to disciplinary matters no longer as a special category of data with a particular status.[138] Consequently, the nature and sensitivity of personal data relating to disciplinary matters are considered to have lesser weight than in the pre-GDPR area, which will influence future balancing acts by the courts in cases involving disciplinary matters.

6.5. Does the GDPR Change the 'Right to Be Forgotten' Balancing Act?

81. As previously discussed, the right to be forgotten under Article 17 GDPR is a codification of the *Costeja* judgment. This means that this provision is to be interpreted in light of already existing European and national rules, and that these should be read together with the principles laid down in the relevant case law.[139] This is also exemplified by a more recent judgment by the ECJ on 16

137 See s. 5.4.

138 Rechtbank Amsterdam 19 Jul. 2018 *supra* n. 96, para. 4.12.

139 F. Di Ciommo, 3. *Italian L.J.* 2017, p 623.

January 2019 *Deutsche Post AG* v. *Hauptzollamt Köln*, on the interpretation of the GDPR and the old Data Protection Directive.[140] Although this judgment does not concern the right to be forgotten, it does compare the Data Protection Directive to the GDPR. This judgment concerned the interpretation of the collection and processing of personal data,[141] and the ECJ concluded that the meaning of those provisions have the same meaning under the GDPR as under the Data Protection Directive.[142] This shows that the Data Protection Directive and the relevant case law are still guiding principles for the interpretation of the GDPR. As there is no recent judgment by the ECJ on the interpretation of the right to be forgotten under the GDPR, it is to be expected that the *Costeja* judgment, and therewith the *Hoge Raad* judgment in the Netherlands, are still relevant for the interpretation of Article 17 GDPR. This is also exemplified by the judgment of the *Rechtbank Amsterdam*, where the decision was grounded on Article 17 GDPR, but reference was still made to the *Hoge Raad* judgment and the *Costeja* judgment. Moreover, it appears that the right to freedom of expression and information, and the right to erasure are at least equal according to Article 17(3) GDPR.[143] This expresses the 'fair balance' notion which was at the heart of the *Hoge Raad* judgment and therewith the *Costeja* judgment. It would therefore come as no surprise that the balancing act from these judgments will still be used for prospective cases.

7. Conclusion

82. The main objective of the research was to examine to what extent Dutch lower courts follow the *Hoge Raad* judgment, and therewith the *Costeja* judgment. To this end, this contribution carried out a thorough analysis of 13 judgments which were decided by the Dutch lower courts after the *Hoge Raad* judgment on 24 February 2017.

83. It particularly focused on the legal framework applied by the lower courts, the relevant factors to be considered as part of the balancing act and the correct application of the priority rule. On a general note, it can be concluded that the lower courts quite strictly follow these elements as laid down by the *Hoge Raad* and the *Costeja* judgment, although there are some exceptions, which have been addressed in section 5.6.

84. In addition, this contribution examined whether there were issues related to the right to be forgotten which did not emerge before the ECJ or the *Hoge Raad*,

140 ECJ 16 Jan. 2019 ECLI:EU:C:2019:26, *Deutsche Post AG* v. *Hauptzollamt Köln*, http://curia.europa.eu/juris/document/document.jsf?text=&docid=209846&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=6587022.

141 Articles 2, 6 and 7 of the Data Protection Directive and Arts 4, 5, and 6 of the GDPR.

142 ECJ 16 Jan. 2019 *supra* n. 138, paras 53-59.

143 J. Lousberg & C. Cuijpers, 'Het recht op vergeten en Google' *Privacy & Informatie* 2017(5).

and if so, how the courts have dealt with such issues. In this respect, this contribution shed light on some interesting points, such as in particular the treatment of personal data relating to criminal offences, which was not addressed by both the ECJ and the *Hoge Raad*. Arising from the overall analysis, it also provided a number of new criteria and examples that courts in Europe could consider when dealing with cases on the right to be forgotten. For example, it is important to consider whether public figures can actually defend themselves in public debate; for doctors it is not possible to publicly discuss private cases due to a confidentiality agreement.

85. A last objective was to research how the GDPR is applied since it entered into force. There is limited case law from the ECJ and the Dutch lower courts on the interpretation of the GDPR, which is not surprising because it only entered into force recently. There are therefore still many unresolved questions on how the right to be forgotten under the GDPR will be exactly interpreted, in particular because its scope is broader than the *Hoge Raad* judgment and the *Costeja* judgment. However, as the only Dutch case pertaining to the right to be forgotten under the GDPR has illustrated, the balancing act following from the *Hoge Raad* judgment and the *Costeja* judgment is still used to determine whether personal data should be erased: the same legal framework, the relevant factors to be considered and the same priority rule established in those judgments were applied. This exemplifies that the *Hoge Raad* judgment and the *Costeja* judgment are still of relevance for GDPR cases.