THE EFFECTS OF SEARCH ENGINES ON THE PLURALISM OF INFORMATION

Juridical aspects and econometric analysis

Rome, December 1st, 2014

A study by the Italian Institute for Privacy and Data Valorization
www.istitutoitalianoprivacy.it/it

edited by Luca Bolognini and Giuseppe Ragusa

Co-authors:
Luca Bolognini, Giuseppe Ragusa, Camilla Bistolfi, Francesco Corea, Lucio Scudiero

Contents

* Chapter by Giuseppe Ragusa and Francesco Corea

1. Freedom of information and international protection

The concept of "freedom of information" brings with it very many questions which are still partially unresolved, both in social terms and in juridical and economic terms.

Already at first glance it seems clear that it is not just a question of the right to produce/publish/transmit/share data (active profile), but also to be able to be informed by those who prepare and transmit news of public interest (passive profile) and also to be able to access that news. Already if these three basic profiles are considered, it is clear that such freedom is also founded on the right to research information and sources and on guarantees of pluralism which, however, must in turn be mediated with the other interests or rights of others each time they are involved. Purely as an example, one subject which is currently provoking much debate is that of the constant conflict and the necessary trade-off between two fundamental principles: on the one hand the right of individuals to be protected in respect to the use of data which concerns them (*protection of personal data*); on the other hand the right of the individual, understood as a member of civil society, to be able to have access to information and to be able to receive it as well as transmit/share it (*freedom of information*). The protection of personal data and the transparency of news continually call into question the parallel – or often conflicting – recognition of the right to privacy compared to public interest, for example, in the case of the free press and whoever exercises the right to report and/or criticize, which enjoys full recognition as a manifestation of the freedom of expression.

Equally relevant, in terms of individual rights, is the question of editorial responsibility, whose constituent features - primarily the exercise of effective control over content – mean that attribution to the various providers which provide services or content on the web can be complicated .

But to fully understand the boundaries of the fundamental freedom of information, it must first be remembered - before going into the problems of the relationship between that freedom and other freedoms and fundamental rights of individuals - that it is protected by major international treaties on human rights, preceding even the constitutions and laws of individual states.

The Universal Declaration of Human Rights, promoted by the UN in 1948, refers to that freedom in Article 19, where it states that: *"Everyone has the right to freedom of opinion and expression: this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers,*" These provisions were taken up again by the UN in 1966 in the *International Covenant on Civil and Political Rights* which, once more in Article 19, reiterates the concepts laid down in the Universal Declaration, and furthermore specifies that the circulation of information must however respect the rights and reputation of others as well as national security, public order, public health and morals. So, as mentioned above, even in this text the satisfaction of the interest to receive, to circulate and to have access to news is balanced with the protection of other fundamental rights, which obviously may not be neglected.

Along the same lines is the *Convention Against Corruption* drawn up by the UN in 2003, Article 13 of which refers to freedom of information understood as *"Participation of society"*, subject to the same limitations described above.

Narrowing the field, it is impossible not to refer to the Charter of Fundamental Rights of the European Union, which in Article 11 defines "Freedom of expression and information" and lays down that:

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.
2. The freedom and pluralism of the media shall be respected.

In this case, therefore, reference is made not only to an active freedom (communication) and a passive freedom (reception), but it also establishes the impossibility for public authorities to interfere with these rights and the obligation to ensure that the media respond to the needs of democratic and pluralist information. The difference compared to the conditions set down by the UN is the absence, in the provisions of the Charter, of a term indicating the right of access to information, which is specifically stated in the Universal Declaration.

Moreover, in Europe the subject is defined not only with reference to the freedom of information understood as freedom of the press and criticism, but also from the point of view of access to information generated and/or owned by public institutions *(*information *in re ipsa* of public interest). In the Maastricht Treaty of 1992, statement number 17 refers to the right of access to public information:

DECLARATION on the right of access to information
The Conference considers that transparency of the decision-making process strengthens the democratic nature of the institutions and the public's confidence in the administration. The Conference accordingly recommends that the Commission submit to the Council no later than 1993 a report on measures designed to improve public access to the information available to the institutions.

In 2008 in Budapest a group of international experts drafted the *Declaration on the Right of Access to Information*, aimed at the recognition of the right of access to information as a fundamental human right. Emphasis was also placed on the problem of considering the juridical and practical implications of this freedom, precisely because, as was said earlier, there may be exceptions to its use, such as the protection of personal data and the right to be forgotten, to which we will refer below.

Remaining in a European context, Article 10 of the Council of Europe's European Convention of Human Rights, lays down that:

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

Once again, therefore, there emerges the delicate question of the trade-off between information in the public interest with other rights or interests of equal importance, upon which the European Court of Human Rights has several times been obliged to rule with interpretations of the rights expressed in Article 10 of the ECHR. Certain exceptions were deemed "necessary" in a democratic society whose foundations are to be ensured, with its own laws guaranteeing the exclusion of an unjustified restriction of freedom of information. For these reasons, the Strasbourg Court has regulated the various cases starting from the evaluation of individual national law, accessible and cognizable, to verify that the interference of the latter on the freedom of information is proportionate in relation to the purpose for which the norm was adopted.

If the restrictions on freedom of Article 10 of the ECHR are necessary for the maintenance of democratic values, then they would have reason to be fulfilled despite the fact that domestic law may seem in apparent contrast with the Convention. To contextualize this kind of approach, one may start from the famous judgment of 1976, *Handyside v. United Kingdom,* where the Court held that the conviction of the owner of a publishing house, which had published a manual of sex education for students, was a violation of the freedom laid down in ECHR art. 10. In fact, while recognizing the intent to protect morals (art. 10 paragraph 2 of the ECHR), the Court noted the absence of a European standard that constituted the very concept of "morals", explaining that the lack of a uniform concept of "morality" in the legal area of application of the Convention does not, however, legitimize the Member State *a priori* to limit pluralism of information, because such a limitation should still be commensurate with the needs of a democratic society, that the Court itself interpreted as follows: *"Freedom of expression constitutes one of the essential foundations of such a society, one of the basic conditions for the progress and development of every man [...] It is applicable not only to "information" or "ideas" that are favorably received or regarded as inoffensive or with indifference, but also to that which offends, shocks or disturbs the State or any part of the population. Such are the demands of pluralism, tolerance and broadmindedness without which there is no "democratic society"*[1].

[1] Handyside v. United Kingdom, No. 5493/72, §41, ECHR 1976 in hudoc.echr.coe.int.

Indeed it is no coincidence that some of the most significant verdicts in relation to the protection of the rights referred to in Article 10 of the ECHR concern publishing - especially newspapers - with respect to freedom of information in the context of the discussion of issues of public interest. For example, in the case *Sunday Times v. The United Kingdom (no. 1)*[2] *(1979)* the plaintiff was about to publish a scientific article on the procedures carried out by a pharmaceutical company before trading a sedative which was considered by many people to be the cause of genetic defects in some newborn children. This was confirmed by the fact that many families were negotiating compensation with the company and an equal number of legal cases had been opened. For this reason, a British court upheld an injunction from the pharmaceutical company which justified the ban on publication of the article on the grounds that it would undermine pending lawsuits.

In its ruling on the case the European Court, while acknowledging that the British ruling had been issued to ensure the impartiality of judgment, it in fact constituted a restriction of the right to information that would go against the public interest.

In contrast, in the case *Du Roy and Malaurie v. France,*[3] the Court considered legitimate under Article 10 of the ECHR the conviction by a civil court of a publisher and a journalist following the publication of a magazine article containing information about criminal proceedings against some politicians which under French law should have remained confidential so as not to violate the principle of the presumption of innocence. In this case, even if there was at first glance a question of public interest in making public the information, in fact French state regulations would have been breached if the news had been leaked.

As is clear from these examples, in the case of limitations, it is essential that there is a legitimate need that is accurately interpreted and ascertained with certainty to justify blocking the publication of news, as established in the case *Observer and Guardian v. The United Kingdom*[4].

[2] The Sunday Times v. The United Kingdom, No. 6538/74, §42, ECHR 1979 in hudoc.echr.coe.int.

[3] Du Roy e Malaurie v. France, No. 34000/96, ECHR 2001 in hudoc.echr.coe.int.

[4] Observer and Guardian v. The United Kingdom, No. 13585/88, §45, ECHR 1991in hudoc.echr.coe.int.

2. The trade-off between Article 10 of the ECHR and other rights according to the European Court of Human Rights

As mentioned above, the European Court of Human Rights has had to deal with numerous cases that have been submitted to it, and has often had to consider whether the protection of other rights constitutes interference to Article 10 of the ECHR.

In order to do so, the Court had to ask itself what precisely was the national law to be taken into consideration, analyzing to what extent it was accessible and cognizable. Furthermore, since only a legitimate need can limit the freedom of information, the Court analyzed the proportionality of that restriction for the purpose set by the provision, considering whether this contrast was justifiable insomuch as necessary in a democratic society.

The criterion of "necessity", however, should not be confused with an arbitrary judgment on the usefulness of the restriction because, as decisions are made on a case by case basis, the interference must always respond to an urgent social need, be commensurate with the objective, and have adequate and relevant reasons[5].

For example, in 2012, the ruling in *Von Hannover v. Germany*[6] saw the attempt to balance the protection of privacy (art. 8 ECHR) with public interest concerning the publication of news about the plaintiff and his family. In this case, Princess Caroline of Monaco and her husband Ernst von Hannover had turned to a German court to prevent two weekly magazines from publishing an article and several photographs of the Princess on holiday with her family. The Court, proceeding from the provisions relating to the protection of privacy, ruled that the disclosure of the material would not result in any violation of the rights guaranteed under Art. 8 ECHR, given the public role of the plaintiffs and the fact that the photographs had been taken in a public place. In this case too, the legal reasoning of the Court departed from the identification of the standard that protects the positive obligation for Member States to the Convention to ensure the protection of the privacy of every individual under its jurisdiction (Art. 8 ECHR), subsequently making a trade-off between the right to privacy and freedom of information

[5] See Note 2.

[6] Von Hannover c. Germania (no. 2), No. 40660/08 & 60641/08, §73, ECHR 2012, in hudoc.echr.coe.int.

as guaranteed by Article 10. In the opinion of the Court, freedom of information, is not limited to the dissemination of news of a political nature but can also find its expression in the publication of news on the private lives of public figures. In the case of Caroline of Monaco, the legality of the publication of the photos that showed her with her family, was also guaranteed by the fact that the plaintiff was aware of the photos being taken and although the event took place during a private moment, it occurred in a public place.

Conversely, in the case *Axel Springer AG v. Germany*[7] (no.2) in 2012, the Court established the guilt of the German State for violation of Article 10, and sentenced it to pay damages to the publisher-plaintiff. In the case in question, the publishing company owning the daily newspaper *Bild* was about to publish the story of a television actor who had, not for the first time, been convicted for the consumption and possession of a small quantity of drugs. The man had turned to the courts to seek a national ban on publication. His claim was upheld by the court which ruled that the newspaper's coverage of the story was disproportionate to the relatively minor nature of the offence. According to the court, the case had received more attention than served to satisfy the public interest of making citizens aware of the facts, considering the low level of celebrity enjoyed by the actor.

The Strasbourg Court, following an appeal, tried to balance the freedom of the press with the right to privacy, applying the criteria relating to public interest in relation to the fame of the person concerned and the veracity of the information. It concluded that the actor had a sufficient reputation to be considered a "public figure" and that, therefore, the public had an interest in being informed about the facts which, furthermore, had been presented in a truthful manner and without prejudicial consequences for the man as he himself had given numerous interviews on his use of drugs.

In this case, therefore, the State was sentenced to pay damages to the newspaper-plaintiff, using the criteria elaborated in the *von Hannover* judgment, the outcome of which was the prevalence of freedom of information over the right to respect privacy.

[7] Axel Springer AG v. Germany, No. 39954/08, §47, ECHR 2012, in hudoc.echr.coe.int.

As a demonstration of the importance given to Article 10 of the ECHR, there is also the famous case *Casado Coca v. Spain*[8] of 1994, in which the Court demonstrated that freedom of information is not only applicable for news stories of public interest, but also for those concerning trade.

In this case, a Spanish lawyer had published advertisements relating to his profession, in some Barcelona-based newspapers and a German language magazine published in Spain, as a result of which the Council of the Spanish Bar Association had imposed a number of sanctions and issued reprimands, since the information did not fall under the protection of Article 20 of the Spanish Constitution[9] which, while protecting freedom of expression, does not consider the dissemination of advertising as a fundamental right. Moreover, the intention of the lawyer was not informative and was contrary to the rules of the Bar Association of Barcelona since it was held to be a form of unfair competition against other colleagues.

Following this, after having appealed at all levels of Spanish justice, the man turned to the European Court which, however, confirmed the rulings given by the Spanish courts.

For although the Court considered *"commercial speech"* to be protectable under Article 10 of the ECHR, in this case it held that the advertisements served a private and not public interest, and thus fell outside the scope of the provisions in question. For this reason, advertising activities may be limited if their purpose is to prevent unfair competition and prevent misleading advertising and, in this sense, both the Spanish Bar Association and the Spanish court had made the correct trade-off between freedom of information and the rights of other lawyers as established in the regulations.

In essence, therefore, while on the one hand the freedom as defined under Article 10 extends to the point that includes public disclosure of information that may be considered inconvenient or annoying, on the other hand it also cannot undermine other values which are equally protected by the Convention, without there being a trade-off between them.
An example of this is the case *Herczegfalvy v. Austria* (1992), in which the Court discovered an infringement of the right to receive information when a man being held in psychiatric detention had been denied access to reading material, radio and television, although there was no national law providing for such a right.

Similarly, in the case of *Open Door and Dublin Well Woman v. Ireland* (1992) the State was sanctioned for having prevented the two centres offering health services and advice to women from distributing information about abortion in other countries. The European body ruled that the decision by the Irish court, was an infringement of the freedom safeguarded by art.10 ECHR, as such information would not only be available elsewhere, but above all because the information was not prohibited by any Irish law.

In conclusion, freedom of expression and freedom of information are protected so as to ensure the maintenance of democratic values and protect the public's access to information which, however, should not be confused with the interest of satisfying the curiosity of the public. Sometimes, these freedoms may even prevail over pure individual rights and interests, as exemplified on the one hand, by the *von Hannover* case, in which the Court gave precedence to Article 10 over Article 8 of the Convention, and on the other hand by the *Casado Coca* case, in which the plaintiff's particular interest to publicize his professional career had to give way to conflicting public national interests, such as the protection of competition.

3. The impact of Internet on pluralism of information and the role of search engines

When one considers information of public interest, one must also consider its links to pluralism of sources, a concept fundamental to any democratic state since it is directly connected with the profile of the passive freedom of information itself, understood as the right to receive information from as many diversified sources as possible. To ensure that citizens may exercise their rights and their freedom of choice and judgment, they must be guaranteed free access to information, a right which, unsurprisingly, is considered as fundamental. On the contrary, control of the flow of news and information would herald the manipulation of public opinion as well as the concentration of power to which authoritarian regimes have always aspired through censorship and control of information networks.

[8] Casado Coca v. Spain, No. 15450/89, §32, ECHR 1994, in hudoc.echr.coe.int.

[9] Art. 20, Título I. De los derechos y deberes fundamentales - Capítulo segundo. Derechos y libertades, Sección 1.ª De los derechos fundamentales y de las libertades públicas, Constitución española de 1978.

For these reasons, the aforementioned Article 11 of the Charter of Fundamental Rights of the European Union states that the freedom and pluralism of the media shall be respected as essential elements of democracy promoted by the Union, while Article 10 of the ECHR excludes that *"there may be interference by the public authorities."*

Furthermore, the protection of pluralism of information may not be limited simply to the question of maintaining a competitive media market, that is to say the limitation of concentration of media ownership, but also necessarily includes a regulatory framework capable of pursuing extra-juridical and extra-economic objectives, such as the promotion and protection of press freedom, cultural diversity, freedom of research and editorial independence. For this reason, the development of the information society is strongly linked to the issue of media pluralism: if pluralism is safeguarded, citizens are able to contribute to the democratic debate through different channels in addition to traditional ones.

This type of *organizational structure* of information and the multidimensional notion of pluralism are the basis of democracy, which must necessarily be rooted in a public sphere that is well-informed, inclusive and pluralist and that receives from its media information that is diverse and independent of political power.

It can therefore be said that pluralism in the European context has resulted in a regulatory approach that tends to ensure that states adopt policies which are functional to the promotion of freedom of information both from the point of view of media professionals and that of their end-users. Indeed, governments have an active role in ensuring the circulation and the retrieval of different perspectives functional to the formation of public opinion (again see Article 10 of the ECHR and Article 11 of the EU Charter of Fundamental Rights).

In this sense, the birth of the web has fostered the growth of pluralism, since the Internet has helped to increase the number of information sources and opinions which may be consulted in the evaluation of the news, thanks to the neutrality of the medium and the lack of control by public or private authorities - at least in democratic countries – favoured by the a-territoriality of the web.

In this perspective, pluralism of information has increased thanks to the possibility for new organizations to become part of the information landscape, alongside traditional consolidated sources.

Furthermore, according to the survey on the service sector and on online advertising carried out by AGCOM in 2013[10], in Italy 42.1% of people are informed about the news (local, national and international) through the Internet, which is the third most-used source after television and newspapers. This shows the primary importance that Internet is assuming in satisfying demand for news and information, to such an extent that the survey report comments: *"It must then take into account the growing importance of the medium under the profile of pluralism of information owing to the spread by Internet of new models of information and new services of news distribution, with obvious consequences for the traditional order and the dynamics of markets of communication"*[11].

Indeed, taking into account the fact that the information content on the Internet is often free, it stimulates interest and public debate even among those who do not buy newspapers or who do not watch tv news.

This extreme openness of the Internet, however, has often led to reflections on the quality of the news offered, which many consider to be poor because, logically, the sources are not always verified or verifiable and, in some cases, may constitute entirely arbitrary opinions. The multi-polarity of the Internet is therefore its power but also to a certain extent its limit, since each user can publish content without being bound by journalistic standards or professional ethics, but simply acting on the basis of his/her right to freedom of expression and information as guaranteed by international treaties. The extreme ease of access to the Internet and the content generation which it allows should not be seen in negative terms, because such possibilities have allowed important instances of freedom of speech, as in the case of *citizen journalism* which at least in part helped spark the Arab Spring between 2010 and 2011.
It is clear that, in such a context, search engines have a strong impact on mediation between such diverse interests, since they may be seen as "digital intermediaries" that provide access to information, thus fostering pluralism - understood both as access to and choice of information for users. In this sense search engines increase the number of sources on which to draw and guarantee total personalization of the information experience, magnifying the information surplus typical of the information society.

Their services provide horizontal support to those who approach the web, helping them to navigate between the resources available on the Internet and helping them to find their way in the search for information. Contrary to what happens with websites and publishing products, search engines are not created to meet specific needs, but rather to direct users to the service they are looking for. This assumes greater importance if one takes into account the fact that, thanks to search engines, even younger people have increased their interest in the news, increasing still further the original characteristics of freedom of information that is a keystone of the information society.

In any case, it may definitely be said that, although even democratic countries have historically been accustomed to the idea of media ownership in private hands, Internet has allowed decentralization of information and interconnection, magnified by the ability of search engines to aggregate different sources, thus contributing to information and the formation of public opinion. Search engines are routinely used by a large proportion of the global population to seek the most varied forms of information. (According to the AGCOM survey, *"12.4% of the Italian population as a whole and 21.6% of web users"*[12]. Google is the most popular search engine both in Italy (21.5% of users[13]) and globally (76.6%[14]).

However, there has been criticism of the creation by search engines of the so-called "filter bubble",[15] the mechanism produced by an algorithm that selectively "guesses" what information a user would like to see on the basis of information available about the user. This mechanism, if not managed properly and transparently, can result in users becoming separated from information that disagrees with their viewpoints, effectively isolating them in their own cultural or ideological "bubbles".

[10] Attachment A to the Deliberation no. 19/14/CONS, in www.agcom.it.

[11] Attachment to the Deliberation no. 19/14/CONS, p. II, in www.agcom.it.

[12] Ibid. p. XXI.

[13] Ibid.

[14] comScore survey, February 2013, in www.comscore.com.

[15] Eli Parisier, *The Filter Bubble: How the New Personalized Web Is Changing What We Read and How We Think*, The Penguin Press, New York, 2011.

To this reflection may be added the question of the difficult trade-off between the public interest and the protection of other rights, such as privacy, reputation, the right to control over personal data and access, all accentuated precisely by the pervasiveness of the medium, whose range extends beyond national boundaries and involves the availability of such material anywhere and at any time.

In this sense, in September 2011, the Council of Europe Committee of Ministers adopted the Declaration on Internet Governance Principles, which established as a given first principle that the Internet should ensure the protection of all fundamental rights and freedoms, affirming their universality in accordance with internationally recognized human rights, and guaranteeing the respect of existing laws and democracy.[16]

To return to the subject of search engines, in a similar context, they have the important function of mediating between sources of information and the public, providing users with an essential tool for finding news that aggregates different sources, whether journalistic or otherwise. This process is aided by the fact that "Filter bubbles" seem not to have resulted in a reduction of the variety of information content available. On the contrary, the various search engines provide many fortuitous opportunities to discover new results (e.g. random search functions), or to broaden the panorama of information available through the "related searches" function. In addition, the simplification mechanisms that help users meet their needs also encourage them to look at other topics of which they may have little knowledge, stimulated by the user-friendly research functions offered by the service.

Therefore, as emphasised by the 2006 *Study on liability of Internet intermediaries* [17] to verify the implementation methods by the various Member States of the Directive on electronic commerce, search engines fulfill a social need by facilitating navigation for users.

[16] Declaration by the Committee of Ministers on Internet governance principles, *Human rights, democracy and the rule of law*, Committee of Ministers, 21 September 2011, in wcd.coe.int.

[17] G. Spindler, G. M. Riccio, A. Van der Perre, *Study on liability of Internet intermediaries*, Thibault Verbiest, 2007, in ec.europa.eu.

For all these reasons, two scenarios may be configured both of which are of extreme relevance to the evaluation of the role of search engines, and have been reflected in the most recent European decisions. On the one hand, a spontaneous reflection has arisen on the role of search providers compared to the traditional figure of the publisher, which does not seem to be *sic et simpliciter* assimilable to that of content and service providers, especially because of the problems caused by the attribution to the latter of so-called editorial responsibility. But on the other hand, attempts have been made to understand how to protect the right of access to information while at the same time respecting other rights of individuals, which may be in conflict with the right to access information. In fact, the pervasiveness of the Internet, which has increased thanks to search engines, provides mass publicity to news content, thus opening the debate on a wide range of issues, not least the right to be forgotten correlated to the fulfillment of the public interest to receive information .

4. Search engines: responsibility and the extendability of the concept of "publisher" to search engines

The information society is based on the services provided by Internet technologies and those of mobile telephony, and developed within the framework of policies under Title XIX of the Treaty on the Functioning of the European Union ("Research and Technological Development and Space") [18] . Within the framework of information society services, EC Directive 2000/31/CE on electronic commerce sought to *"contribute to the proper functioning of the internal market by ensuring the free movement of information society services between the Member States."*[19].

[18] Title XIX – Research and Technological Development and Space, Treaty on the Functioning of the European Union, in eur-lex.europa.eu.

[19] Directive 2000/31/EC, Art. 1 – Objective and scope, in eur-lex.europa.eu.

Within this legal framework information society service providers were generically defined by the Directive as a macro-category, comprising various types of providers of information society services: "*any natural or legal person providing an information society service."* [20] This group of "providers", therefore, includes publishers – who directly place content, providers of intermediate services such as mere conduit, caching and hosting, as well as those providers who do not deal with processing content, but with its indexing, as in the case of search engines.

In this regard, Directive 2000/31 focuses on identifying the liability of intermediaries and excludes the possibility of assigning them a general obligation to monitor or to actively search for misconduct. Article 15 states: " *Member States shall not impose a general obligation on providers, when providing the services covered by Articles 12, 13 and 14 [mere* conduit, caching e hosting] *to monitor the information which they transmit or store, nor a general obligation actively to seek facts or circumstances indicating illegal activity*. *Member States may establish obligations for information society service providers promptly to inform the competent public authorities of alleged illegal activities undertaken or information provided by recipients of their service or obligations to communicate to the competent authorities, at their request, information enabling the identification of recipients of their service with whom they have storage agreements."* All this is done on the understanding that, for the services of mere conduit, caching and hosting, Articles. 12, 13 and 14 do not *"affect the possibility for a court or administrative authority, in accordance with the legal systems of the Member States, to require the service provider to terminate or prevent and infringement."* Clearly, given the special characteristic of hosting services, those who provide them may also be subject to *"procedures governing the removal or disabling of access to information"* as laid down by Member States.

Within this context, and given the characteristics of search engines, they should be categorized as *Internet service providers*, and not *publishers*, because they have no power of control over content and therefore are not obliged to assume editorial responsibility.

[20] Directive 2000/31/EC, Art. 2, b) – Definitions, in eur-lex.europa.eu.

These positions have been confirmed by the ECJ in judgments in which it ruled that search engines could be considered responsible for violations of industrial property rights. One example is the lawsuit Google v. Vuitton[21], concerning the use of trademarks as keywords in search engine advertising services "on the basis of keywords corresponding to trade marks for goods or services identical with those for which that mark is registered."[22]. The Court ruled that "in the case where that ad does not enable an average internet user, or enables that user only with difficulty, to ascertain whether the goods or services referred to therein originate from the proprietor of the trade mark or an undertaking economically connected to it or, on the contrary, originate from a third party."[23], Article 14 of the Directive on electronic commerce EC 200/31 "must be interpreted as meaning that the rule laid down therein applies to an internet referencing service provider in the case where that service provider has not played an active role of such a kind as to give it knowledge of, or control over, the data stored. If it has not played such a role, that service provider cannot be held liable for the data which it has stored at the request of an advertiser, unless, having obtained knowledge of the unlawful nature of those data or of that advertiser's activities, it failed to act expeditiously to remove or to disable access to the data concerned."[24]. Therefore, the judgment precludes liability of the search engine precisely because the data which it stores come from a request from the advertiser, on whom no editorial control may be exercised.

By the same token, one can exclude the editorial responsibility of search engines when they provide search results that are simply a link with pages of content providers. It is in fact an operation that meets the criteria of automatic organization which does not include any changes to the content, if not to cite them in order of importance and relevance. To return to the above judgment, therefore, it can be stated that in the event of a user carrying out a search, the results supplied by the *service provider* are derived from the scanning of all content already present on the web and on which the search engine cannot exercise any type of editorial control.
Moreover, Recital 42 of the Directive 2000/31/EC lays down that: "*The exemptions from liability established in this Directive cover only cases where the activity of the information society service provider is limited to the*

[21] Joint Proceedings from C-236/08 to C-238/08, European Court of Justice, Grand Chamber, 23 March 2010, in curia.europa.eu.
[22] Point 2, Joint Proceedings from C-236/08 to C-238/08, European Court of Justice, Grand Chamber, 23 March 2010, in curia.europa.eu.

[23] Point 121, Joint Proceedings from C-236/08 to C-238/08, European Court of Justice, Grand Chamber, 23 March 2010, in curia.europa.eu.

technical process of operating and giving access to a communication network over which information made available by third parties is transmitted or temporarily stored, for the sole purpose of making the transmission more efficient; this activity is of a mere technical, automatic and passive nature, which implies that the information society service provider has neither knowledge of nor control over the information which is transmitted or stored."

Within these activities, of course, lie those of search engines, because they provide access to content on the Internet through the indexing of search results to make them easier to find, as well as to ensure users the right to access to information circulating on the web.

Another important aspect of the services offered by search engines is to allow navigation between Internet resources through the inclusion of some keywords handled by an algorithm which indexes identified data. By scanning the web, search engines build up an index, calculating relevancy to keywords and ordering results based on the popularity of pages, in order to give useful answers to the user's search criteria.

To this end, search engines use a software ("Spider") that creates lists of words found on sites, both on the page and in sequence ("Web crawling*").* At the conclusion of this process, the search engine indexes the results found by ordering pages for both the number of times the search word appears and as a function of the number of hits of the page (popularity).

For this reason, the availability of information poses the delicate question of the impact of algorithms on the diffusion of data, both from the point of view of the operators and from that of the users, since in both cases the greater or lesser significance of results is determined by automatic selection criteria.

---

5. Search engines: an empirical econometric analysis

[24] Point 120, Joint Proceedings from C-236/08 to C-238/08, European Court of Justice, Grand Chamber, 23 March 2010, in curia.europa.eu.

The natural consequence of what has been stated above was to verify the type of impact that search engines have had on websites, on the number of visits they received and therefore the relevance that the sites themselves achieve thanks to search engines.

The advent of more efficient search engines and the growth in their number has surely enabled the creation of more internet sites, and in particular sites of superior quality. By classifying sites according to the absolute number of visits received or the number of external links that indicate that website, you may be virtually certain that a site with better quality of information will be more easily accessible than others with less rigorous standards.

Unfortunately such certainty is only theoretical, since I) the most effective methods of ranking ensure that better information equals higher ranking only in almost all cases, since it may be subject to error, and II) the classification algorithms may be deliberately distorted in order to ensure a higher visibility to some specific sites. Moreover, these algorithms are also not so simple, but on the contrary so complicated that they are fully understood by only a small group of technically highly qualified people. Regulators are therefore faced with the eternal free market dilemma: oblige each search engine operator to provide full disclosure on how its "black box″ works, thus wiping out every source of competitive advantage, or let the market regulate itself with the risk, however, that some manipulation may be perpetuated by an individual to the detriment of many.

There is, however, a solution which, instead of worrying about the cause of the problem (which is apparently unsolvable), can for the most part deal with the effects. In this scenario, what a regulator should be concerned about is not actually understanding the inner workings of the tools used, but rather to ensure that the effects and potential externalities do not prove to be detrimental to the free market.

Therefore, what then becomes important in order to control search engines from a regulatory point of view, is to verify that the traffic resulting from these engines does not in any way distort competition and does not allow certain sites to benefit systematically from any structural singularities. In other words, a search engine should not have its own preferences, but rather express the preferences of the users of the Internet.

More specifically, it was necessary to ascertain from an empirical point of view that the sites which depend most on search traffic, that is to say by traffic deriving from search engines, show rapid and substantial growth in the number of site visits and in their ranking among most visited sites, although a percentage growth in the number of visits does not correspond to similar levels of growth in the rankings of most visited sites. The implications of this analysis would show that search engines are essential tools for the visibility of a website because they allow access to a broader base of users, but that an excessive imbalance towards these engines could be counterproductive to competition. In other words, a site that relies only (or mainly) on a search engine as its information channel does indeed become more popular, but not as much, for example, as one of its competitors which makes equal use of search engines and social networks.

Moreover, although it is possible to verify that sites depending most on search traffic do improve their ranking (although not to the extent of sites with access to multiple sources), it is also possible to observe that sites that initially are placed at the bottom of the rankings are liable to much more rapid growth thanks to search traffic than are sites placed higher in the rankings. Therefore, sites that initially had a low level of visits enjoy greater benefits from a search carried out on a search engine than do much more well-known and popular sites. It seems natural that a user does not turn to a search engine to look for a website whose URL is extremely well-known (like, for example, the BBC) but rather to look for less well-known sites (such as, for example, "La Gazzetta di Parma" or "Noz").

To sum up, a site that makes intensive use of search engines as access channels seems to receive a higher number of visits because nowadays these are fundamental and, the smaller the site, the greater is the positive effect of search engines. However it is not advisable to focus activities solely through search engines but rather to take advantage of a varied portfolio of sources, such as social networks, mailing lists or pop-up ads**.**

In order to test the hypotheses put forward above, data on Internet traffic was collected from SimilarWeb.com, a site that provides mainly raw data on the audience of a site, its sources, and the redirections from the site to other sites and vice-versa. The selected data concerned the News and Media sector in Italy and Germany, countries that were considered significant with regard to their legal framework and the dissemination of information. For each country, analysis was made of the top one hundred websites classified according to the number of visits received and their relative Global ranking, Country ranking and Category ranking (that is to say, relative to all sites, relative to the country in which the site is most used and relative to the category News and Media.) For each site the total volume of visits received was calculated along with a breakdown of the sources that users had used to access the site. Specifically, information was gathered about the exact number of visits for the months of June 2013 and May 2014. Data was gathered from a direct search of the site itself (Direct), from links provided via email (Mail), from other sites with direct clicks to the site under consideration (Referrals), search engines (Search), from social networks (Social) and finally by advertisements (display ads). The data was then initially subjected to cross-validation by randomly interviewing some of the major Italian newspapers to verify the accuracy of the information provided by SimilarWeb.com.

Finally, data on the average time spent on the website, the pages of the website on average viewed during each visit and the bounce rate[25] were used in the preliminary phase to determine the ranking provided and check it was consistent, not only based on the total number of visits received during the period, but also with respect to more robust qualitative parameters. In this way, it was possible to be certain that the ranking did not include "suspect" websites, that is to say websites that are clicked many times - even accidentally or because they appear in the form of advertising or pop-ups.

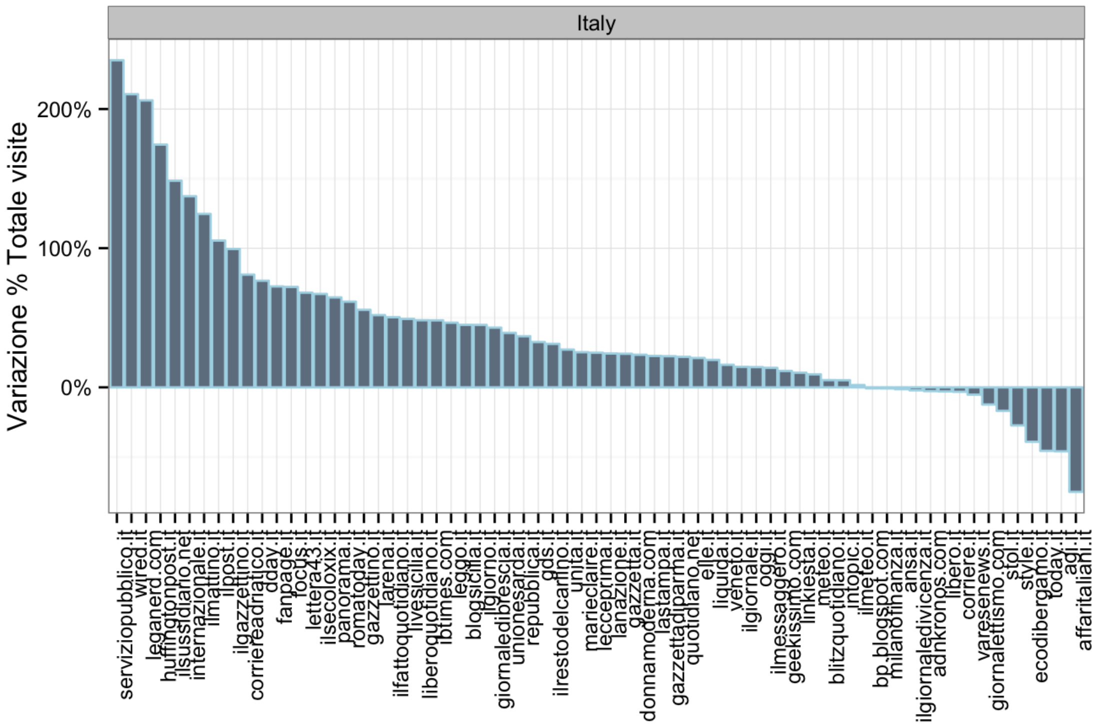
[25] The *Bounce Rate* is an indicator of the percentage of users who leave the site after just a few seconds after having looked at only the first page of the site.

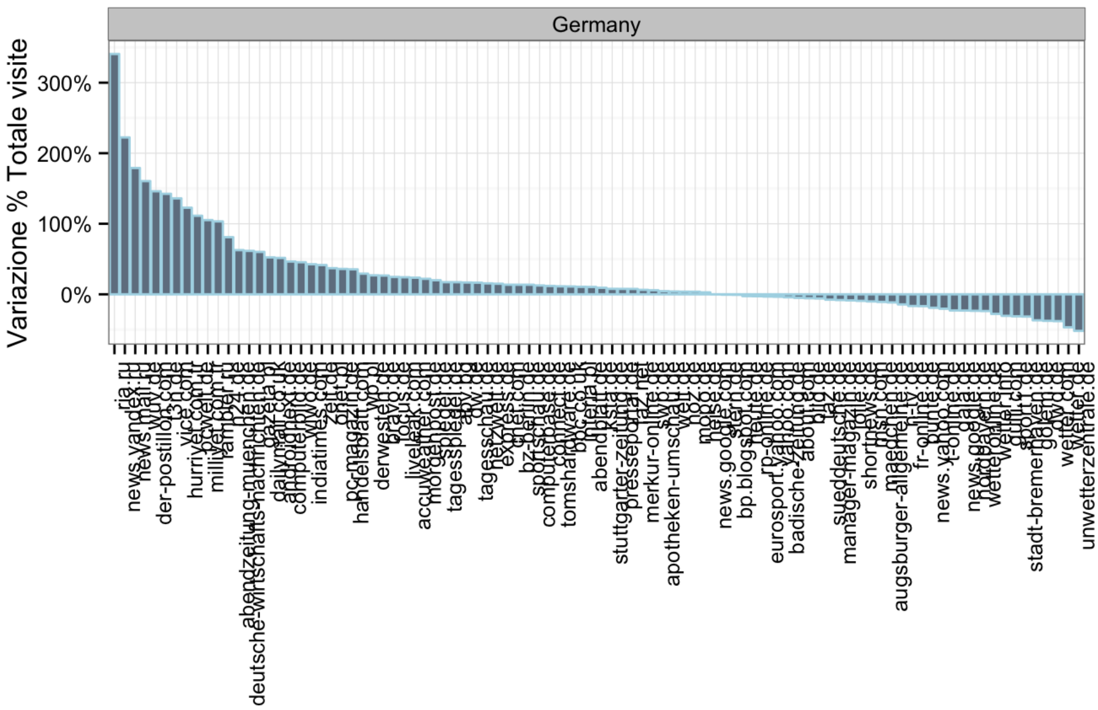
The first descriptive statistics resulting from a preliminary analysis of the dataset show the monthly growth of individual sites due to the total number of access sources used. **So, thanks to the first two graphs, it is possible to answer the following question: no matter how much a site uses social networks or search engines, what was the increase (decrease) in the number of visits received in the past month? The following figures show how for Italy (figure 1) and for Germany (figure 2), most of the sites increased their number of contacts between June 2013 and May 2014. And the smaller the sites, the greater the growth observed: a particularly interesting observation remembering that analysis is being made of percentage variations in growth rate and not absolute growth.** To give an example, the site "libero.it", which receives almost one hundred million monthly visits, is extremely unlikely to double its contacts in a month; it is an already mature site and with a very consolidated readership base. Far higher growth levels are potentially possible, for example, for "leganerd.com", a site that "only" receives about 350,000 monthly visits.

However, it must be pointed out that for all analyses performed, there is no single causal relationship; rather, many other factors could be taken into consideration to explain the various changes. Nevertheless, it is believed that the data collected and the analyses carried out are capable of capturing a more general trend somewhat accurately.

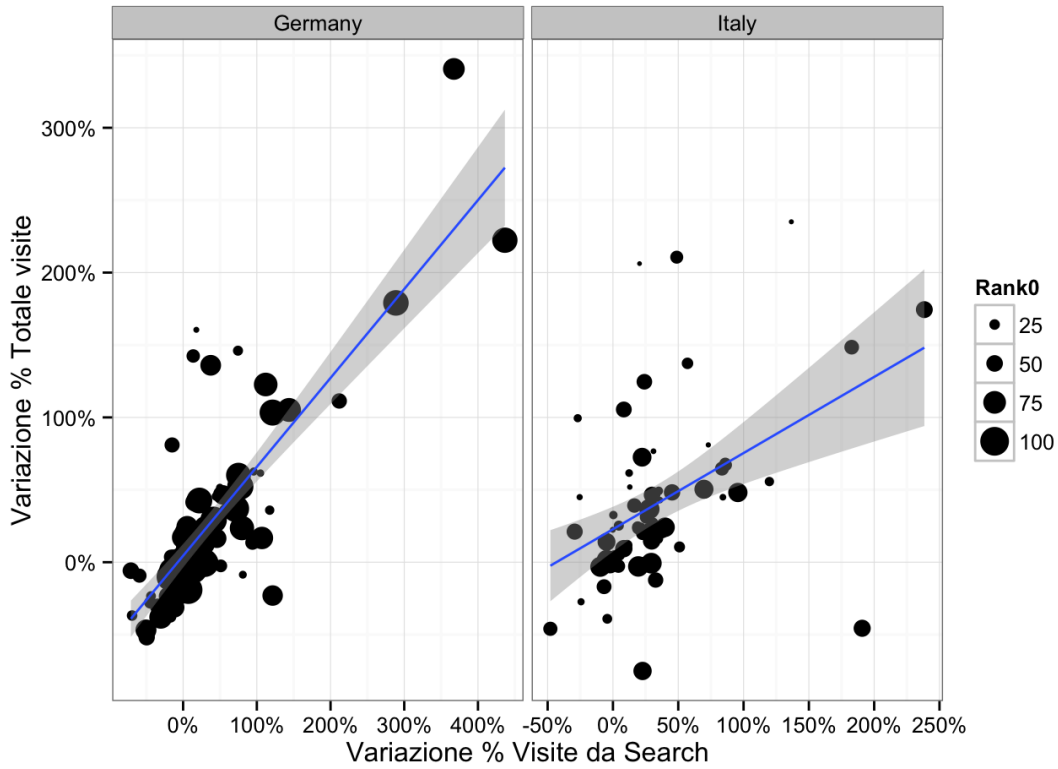
As far as the situation in Italy is concerned, the histogram shows that the first sites ("Serviziopubblico.it", etc.) even double in size thanks to the indistinct mass of sources used, while only very few sites seem to lose visitors ("Affaritaliani.it", for example). Germany seems to have even more accentuated characteristics. Indeed the first site tripled in size over a month, while for the remaining sites, the growth is very similar to that observed in Italy. The only substantial difference between the two countries is that in Germany there is a user-base which is even more willing to make frequent visits to small and new sites rather than major news-sites, users willing to leave the old and make room for the new.

So, both in Italy and in Germany, network users are seeking more information, they perform more searches on the web and often prefer to visit new, smaller sites rather than returning to the usual suspects, perhaps in search of information put forward with different and innovative points of view. It is possible to draw a *first conclusion: pluralism of information is increasing constantly.* But how much of this increase is due to search engines?


Italy
Variazione % Totale visite
200%
100%
0%
serviziopubblico.it
wired.it
leganerd.com
huffingtonpost.it
ilsussidiario.net
internazionale.it
ilmattino.it
ilpost.it
ilgazzettino.it
corriereadriatico.it
dday.it
fanpage.it
focus.it
lettera43.it
ilsecoloxix.it
panorama.it
romatoday.it
gazzettino.it
larena.it
ilfattoquotidiano.it
livesicilia.it
liberoquotidiano.it
ibtimes.com
leggo.it
blogsicilia.it
ilgiorno.it
giornaledibrescia.it
unionesarda.it
repubblica.it
gds.it
ilrestodelcarlino.it
unita.it
marieclaire.it
lecceprima.it
lanazione.it
gazzetta.it
donnamoderna.com
lastampa.it
gazzettadiparma.it
quotidiano.net
elle.it
liquida.it
veneto.it
ilgiornale.it
oggi.it
ilmessaggero.it
geekissimo.com
linkiesta.it
meteo.it
blitzquotidiano.it
infopic.it
ilmeteo.it
bp.blogspot.com
milanofinanza.it
ansa.it
ilgiornaledivicenza.it
adnkronos.com
libero.it
corriere.it
varesenews.it
giornalettismo.com
stol.it
style.it
ecodibergamo.it
today.it
agi.it
affaritaliani.it


Germany
Variazione % Totale visite
300%
200%
100%
0%
ria.ru
news.yandex.ru
news.mail.ru
der-postillon.com
vice.com
hurriyet.com.tr
milliyet.com.tr
rambler.ru
abendzeitung-muenchen.de
deutsche-wirtschafts-nachrichten.de
gazeta.ru
dailymail.co.uk
indiatimes.com
pc-magazin.de
handelsblatt.com
derwesten.de
focus.de
accuweather.com
morgenpost.de
tagesspiegel.de
tagesschau.de
express.de
bz-berlin.de
computerbild.de
tomshardware.de
stuttgarter-zeitung.de
presseportal.de
merkur-online.de
apotheken-umschau.de
welt.de
mopo.de
news.google.com
bp.blogspot.com
stern.de
rp-online.de
eurosport.yahoo.com
badische-zeitung.de
bild.de
sueddeutsche.de
manager-magazin.de
shortnews.de
augsburger-allgemeine.de
fr-online.de
news.yahoo.com
t-online.de
wetteronline.de
stadt-bremerhaven.de
wetter.com
wetter.de
unwetterzentrale.de

To answer that question it's enough to look closely at the next graph. It shows the variation (in percentage terms) in search traffic from the start of the period until its end in relation to the total variation of visits. Each site is identified by a dot in the distribution: the larger the dot, the higher was its ranking at the beginning of the period. The effect is clearly positive, since the straight line trend (in blue) slopes upwards. The slope of this line shows the impact of search engines compared to other sources. If the line were angled at precisely forty degrees, this would mean that the entire increase in total visits in a month had come completely from search traffic. However, what this graph suggests is that search engines are responsible for only part of the incoming traffic for each site**. Once again, Germany shows extreme tendencies, as most new visits are attributed to search traffic**. **In Italy there is a similar tendency, though in a less pronounced form (about half of the new incoming traffic can be attributed to search engines).**



The figure reveals, then, that search traffic effectively increases the total visits a site receives in a month by a substantial margin and that use of search engines is in effect a correct strategy to increase site visibility. For most sites, the intensive use of search engines allows them to obtain more monthly contacts, and this seems to be more true the smaller the site.

If, as shown above, small sites grow by a higher average and half of this growth is attributable to search engines (such as in the Italian case), it can be said that search engines have a more intense effect on smaller sites. ***Second conclusion: search engines increase pluralism of information, helping even small sites to emerge and gain visibility.***

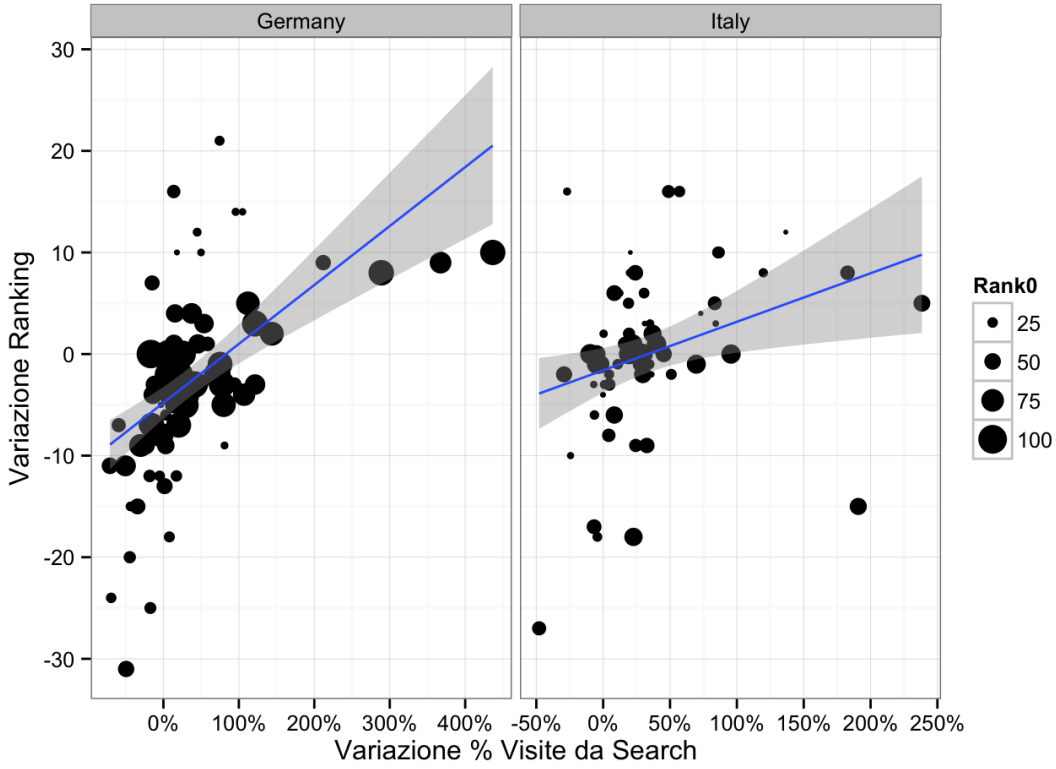
A more in-depth analysis also shows that there is a positive correlation between the traffic from search engines and the change of the position occupied by a site in the rankings, since the following graph was elaborated by attributing to the site ranked first a score of one hundred, while the site ranked last rated a score of one. In other words, the more a site relies on search engines to increase its visibility, the more its position in the ranking improves, as shown in the figure.

As an explanatory example for this conclusion, let us assume that a site I) previously attracted visitors through 50% search traffic and 50% social networks, and II) was the placed fiftieth in the rankings of most visited sites. If this site decides to increase its search traffic up to 75% (reducing social traffic to 25%), the result would be an improvement in its ranking. Based on studies and analyses of the data collected which are not presented here to avoid excessive complications, this effect appears to be greater the lower the ranking was before deciding to increase search traffic. So, a site that originally stood at eightieth position would benefit more from the increase in traffic compared to a search site that was positioned in sixtieth place.

Nevertheless, as the graph shows, the improvement in ranking cannot be attributed entirely to search traffic, but is probably the result of a more balanced portfolio of visibility tools. The explanation for this is perfectly simple. Relying completely on a single means of communication such as search engines may make sense but may not be efficient, because it means neglecting other important sources of traffic. Search engines increase pluralism of information, but as they are not a panacea for all ills, they must always represent only a fraction of the sources for visibility used by a site. Once again, the data confirms that these conclusions are more valid in Germany than in Italy. The steeper slope of the trend line (in blue) in the case of Germany compared to that of Italy is a symptom of how, in Germany, the intensive use of search engines gives better results and allows sites to increase their position in the rankings of most viewed sites more than is the case in Italy.

.

Third conclusion: search traffic allows a website greatly to increase its visibility (and this is all the more true the smaller the site), although it is certainly better not to depend solely on search traffic, but rather have a balanced portfolio of channels of incoming traffic (which is all the more true the larger the site is).



In conclusion, although as mentioned above, there is no single causal correspondence, the empirical evidence suggests that in Italy and Germany, the use of search engines fosters pluralism of information and does not distort the market, while also allowing smaller sites to increase their visibility. Search engines are not a certain remedy for every problem, but rather a tool to be used wisely and with restraint along with other sources. **From a balanced and prudent use of search engines individual sites gain nothing but benefits, as do consumers, who have the opportunity to access a greater volume and higher quality of information than ever before.**

In the light of the considerations set out above, one cannot but take note of the positive impact of search engines on the diversity and pluralism of information, both elements increased by the functions they offer within the framework of the freedom of expression and information as laid own in art. 10 of the ECHR.

Nevertheless, it is as well not to forget that when we refer to freedom of information, three diverse categories are called into question. First, information providers, understood as publishers who upload data on the Internet and thus act as content providers. Second, there are search engines which provide users with access to available information. Finally, there are the end-users of the supplied data, who in order to benefit from the resources made available by information providers pass through the search engine algorithm, which in turn filters the resources of the network based on the keywords entered .

At this point, however, a first problem arises when the status of service provider is assimilated under individual national regulatory systems to that of a publisher. It would be better to regard them as two distinct categories since search engines do not modify content, but simply transmit it, ensuring its availability and accessibility.

Under Italian law, this assimilation between service provider and publisher was accomplished by the so-called Romani decree (Legislative Decree. March 15, 2010 no. 44), which was approved to transpose EC Directive 2007/65 *(Audiovisual Media Services)* on audiovisual services regardless of the transmission techniques.

With this decree, the legislature created the conditions for the control of audiovisual operators aimed at preventing the creation of dominant positions in the Integrated Communications System (SIC), with the aim of fully implementing the principle of pluralism in the information sector .
Under the decree, the Italian Communications Authority (AGCOM) has the power to annually assess the economic dimensions of the Integrated Communications System (SIC) that *"the persons required to register in the register of communications operators set up in Article 1, paragraph 6, letter a), number 5) of the Act of 31 July 1997, no. 249, cannot either directly or through controlled or connected entities in accordance with paragraphs 14 and 15, achieve revenues of more than 20 percent of the total revenues of the integrated communications system"*.[26]

Article 4 of the Romani decree lists the set of categories that are not subject to the obligations imposed by the decree, as they do not fall within the definition of "audiovisual media service". Among these are *"services where audiovisual content is merely incidental and not its principal purpose, such as, but not limited to: a) websites that contain purely accessory audiovisual elements such as animated graphics, short advertising commercials or information related to a non-audiovisual product or service; […]c) search engines."*[27].

So, at least initially, the entire business category of search engines (defined as Internet service providers*)* was excluded from the Integrated Communications System because it was said to be extraneous to the provision of audiovisual media services, as the latter activity presupposes the exercise of a power of control over content by a person with editorial responsibility.

Nevertheless, in the past AGCOM has repeatedly urged the Italian legislature to review economic areas relevant to the protection of pluralism in order to take into account the importance of the role of the Internet with respect to the dynamics of pluralism. This resulted in the inclusion of the Internet (including search engines) among the markets subject to supervision by the Communications Authority.

Thus with law no.103 of 2012, art. 43 of the Legislative Decree 177/2005 was amended to partially accommodate the demands of the Authority, including the introduction of the analysis of revenues arising from "*advertising online and on different platforms, also directly, including the resources collected from search engines, from social platforms and sharing."*[28]

[26] Art. 43 clause 9 of the Legislative Decree 31 July 2005 no. 177, as amended by Legislative Decree 15 March 2010 no. 44 (Romani Decree).

[27] Art. 4 clause 1a) of the Legislative Decree 44/2010.

[28] Article of Law no. 103 of 2012 which converts the decree-law 18 May 2012, no. 63, entitled "Urgent provisions concerning the reorganization of the contributions to publishing companies, as well as the sales of newspapers and periodicals and institutional advertising."

In this way, therefore, the function performed by the search engine algorithm was likened to that of publishing, committing, in the opinion of this writer, a fundamental error that affects the same freedom of information as protected by Article. 10 of the ECHR and the guarantees of freedom and pluralism of the Internet. In fact, considering the advertising revenue of search engines within the markets relevant to the regulation *ex ante* in order to protect pluralism of information, means considering search engines responsible for the content that they index, as if they had the possibility of checking those contents. On closer examination, the Romani decree and its subsequent amendments contradict the provisions of the Directive on Electronic Commerce 2000/31/EC relating to ISPs that offer services of mere conduit, caching and hosting, since the indexing of data collected by search engines is a function of the criteria pre-determined neutrally by the algorithm, without any intervention on the content by the providers

In truth, before the law 103/2012, the legislature placed at the base of the integrated communications system the editorial responsibility of operators who produce content in the relevant markets and, for this reason, excluded internet service providers from the SIC, in line with the definition of them as given by the Directive 2000/31/EC.

The fact that the gathering of data on the part of search engines has come to be included in this scenario confirms the erroneous approach of the Italian legislation to the potential of search engines in the field of pluralism of information. To use a metaphor from nature, there has been confusion between the tree (the publisher) with the path that leads to it (the search engine).

It is therefore possible to agree with those who commented on the new legislation by saying that in Italy there have been *"some attempts, especially in the field of case law, to prefigure a participatory role on the part of providers in the creation of content, i.e. a role of "non-neutrality" or "non-passivity" in relation to the activities performed by users."*[29]

In this situation, the element that threatens to undermine freedom of information resides in the fundamental confusion of Italian legislation that assimilates search engines to publishers, as if the former had the ability to elaborate or modify content. But although the selection processes used by search engine algorithms index content in order of relevance, they have no effect on the content itself. Moreover, as has already been said, while publishers direct the information experience of consumers, search engines limit themselves to gathering together news content on the Internet by virtue of keywords, selecting content from the most various sources. In fact "pure" online publishers do not assemble the results and above all use content that they themselves impart as content providers, a power which in no way is shared by search engines, whose activities are based solely on the identification of information already present on the Internet, in order to facilitate and personalize users' search for and access to news, provided in the first instance by online publishers.

Although search engines sell advertising space to advertisers - and in that sense "compete" with traditional publishers, their revenues have no relationship with the concept of audience level typical of audiovisual media, precisely because they are not "providers of audiovisual media services." In fact, their earnings are derived from the use by their users of the Internet services offered by the search engines and not by the consultation of the content. The fact that, by collecting commercial advertising, search engines produce a potential (although this has by no means been proved) reduction in advertising investment to traditional audiovisual media, in no way restricts pluralism of information and carries no risk of market concentration. On the contrary, the inclusion of search engines in the SIC seems to suggest that for the Italian legislature they represent a threat to pluralism of information, as can happen in the case of a monopoly in markets such as those typical of the audiovisual sector.

[29] O. Pollicino, *Tutela del pluralismo nell'era digitale: ruolo e responsabilità degli Internet service provider*, 2014, in www.giurcost.org, p. 3.

Also in the light of the considerations expressed so far, the approach recently followed by the Italian legislature leaves room for more than one basic doubt, as is seemingly confirmed by the fact that initially the provisions of art. 4 of the Romani Decree precisely excluded search engines from its definition of "audiovisual media service". As was said earlier, if anything, they have the merit of facilitating the search for sources of information, without any possibility of intervening on the content, as they simply use an algorithm to aggregate and index the content provided by others. So if one were to reflect on the role that search engines play with regard to pluralism, one could reasonably say that they have helped increase it, offering access to diverse sources of information and also ensuring increased visits to the websites of major traditional publishers as well as more minor sites or those intended for a smaller market niche.

These positions have been reinforced by the rulings issued in various European countries regarding autocompletion and search suggestions, which have emphasized the effective difference between content and service providers. The two aforementioned functions allow users to: *"complete the search key, or to visualize the most common related searches by third parties. These operations are performed by an algorithm that automatically makes an association between the keywords that are most sought after by users."*[30] At times, however, autocompletion generates results that are likely to cause harm to the subjects to which they refer, for example in cases in which the words that appear automatically have negative values. For this reason, there have been numerous libel cases in which users, associations or other categories of people have turned to the courts to seek legal redress against a search engine, asking for it to be held liable for the harm to their reputation.

A case in point happened recently in Milan, where the Court, by a ruling of 25 March 2013, rejected a claim by the plaintiff that Google acted as a content provider since the autocompletion functions were allegedly designed by the search engine itself, and was therefore responsible for content arising from the algorithm. The judges rejected the claim, maintaining that Google *"statistically reproduces the most popular results of searches made by users, where 'Related Searches' reproduces the results of web pages that are indexed and made accessible by the search engine, starting from the terms in question."*[31]

[30] O. Pollicino, *Tutela del pluralismo nell'era digitale: ruolo e responsabilità degli Internet service provider*, 2014, in www.giurcost.org, p.15.

In the court's decision, the regulatory sources examined were those related to the activity of mere conduit, caching and hosting, governed by Legislative Decree no. 70/2003 which transposes the Directive on e-commerce 2000/31/ EC. Furthermore, the connection was also emphasized between these previsions and Recital no. 42 of the Directive, in an attempt to distinguish the responsibility of service providers from that of content providers.

Well, for the Court of Milan, *"Google, as an entity that offers search services via the Internet is certainly an Internet Service Provider,"*[32] and to this end the Court cited its own ruling of 24 March 2011, which laid down that: *"Search engines are data-bases which index the texts on the Internet and that offer users access in order to consult them: they are therefore essentially a database plus software."*

Nevertheless, even if the functions of autocompletion and "Related Searches" (found at the bottom of the page listing search results) are different "*from those of simple passive storage of information [caching] carrying out word associations by means of the mathematical and algorithmic systems peacefully conceived developed and adopted by Google,"* word associations *"do not constitute a meaningful sentence or a manifestation of thought nor, therefore, of what Google thinks, but only the result of the most popular searches made by users, or the display of terms used in web pages included in the search results for a given query, both made available to users as instruments to aid research."*[33]

That search engines do not have editorial responsibility and should not be assimilated to publishers is demonstrated precisely by the fact that the function of word association and gathering for autocompletion is based on an algorithm that calculates mathematically the recurrence of the search by users. Moreover, it is as well to emphasize the fact that, as offensive as certain combinations of words generated by autocompletion might be, they still represent an example of freedom of information, understood both as freedom to receive news and as freedom to access news, precisely for the fact that *autocompletion* shows those searches that are carried out most frequently, which in itself constitutes information.

[31] Ruling of the Court of Milan, 25 May 2013, Section I Civil, in www.oppic.it.

[32] Ibid.

[33] Ibid.

In the same line of case law may be placed the judgment of October 31, 2012[34] with which the Paris High Court overturned the sentence previously imposed on Google for search results provided by autocompletion, which had been challenged by a French user whose name was linked to the word *"secte"* (sect). Although part of a judgment ruling on a libel suit, the French judge nevertheless took the opportunity to point out that the suggestions made by the Google search string using autocompletion were determined by an algorithm based on objective criteria and without any human intervention.

As confirmation of the impossibility of assimilating search engines to content providers and, therefore, to publishers, is also a decision by the French Supreme Court, which in February 2013 ruled that Google is not directly responsible for the operation of its search engine in that the company does not elaborate the offensive elements (i.e. the content), but simply confines itself to using an algorithm that provides objective results based on mathematical calculations[35].

This jurisprudential position contrary to the assimilation of ISPs and content providers is consistent with the conclusions reached by the aforementioned *Study on liability of Internet Intermediaries*, where it was noted that in many European countries, following the transposition of Directive 2000/31/EC, search engines are considered as access providers or as host providers, and therefore are governed by the rules on service providers.
A similar approach is evident in countries such as Austria, Hungary, Portugal and Spain, which have placed an explicit exemption from liability for search providers, since they have the sole function of facilitating navigation for users seeking information on the Internet. France and Germany, however, despite not having specific legal provisions on the subject, consider search engines as service providers, as also suggested by the Italian courts - as demonstrated by Google's acquittal in a lawsuit brought by the Italian charitable organization Vividown Onlus.[36]

In the light of these considerations, it is clear that the Romani decree presents certain profiles of incompatibility with the European interpretation of the principles of pluralism of information and protection of freedom of the Internet as a means of expression, especially in the case law on Article 10 of the European Convention of Human Rights, which should be considered an integral part of the juridical order of the European Union owing to its explicit reference in the Treaty on the European Union.[37]

[34] Antonino M. / Google Inc. et autres, Tribunal de grande instance de Paris – 17ème chambre, Jugement du 31 octobre 2012, in www.legalis.net.

[35]«Mais attendu que, par motifs tant propres qu'adoptés, la cour d'appel a relevé que la société Google France sollicitait à bon droit sa mise hors de cause dès lors qu'elle n'avait pas de responsabilité directe dans le fonctionnement du moteur de recherche ni dans le site google.fr et qu'elle n'était pas concernée par l'élaboration des items incriminés; qu'elle a ainsi nécessairement répondu aux conclusions prétendument délaissées; que le moyen manque en fait. Par ces motifs: rejette le pourvoi», Cour de cassation, 1ère chambre civile, 19/02/2013, in www.courdecassation.fr.

[36] Case Google-Vividown, Sentence 17 December 2013 – 3 February 2014, no. 5107, Court of Cassation, Section. III Criminal, in www.dirittoegiustizia.it.

[37] Treaty on the European Union, Article 6, clause 3: *"The fundamental rights, as guaranteed by the European Convention on Human Rights and as they result from the constitutional traditions common to the Member States, are part of Union law as general principles."*

Furthermore, the Italian provisions contrast with the disclaimer set out in Directive 2000/31/EC which differentiates between content providers and Internet service providers, identifying as typical of the latter an absolutely distinct activity from that of publishing which, rather, is characterized by the power to intervene on content, as has been repeatedly confirmed by the aforementioned judgments on autocompletion.

Given these two profiles, the Romani Decree lays the groundwork for the monitoring of search engines that has no basis either in their nature or in the type of services provided, insomuch as they are based solely on the aggregation of data already present on the Internet and circulated by third parties.
In this way, Italian legislation comprises two unavoidably conflicting profiles. First, it contradicts the meaning given at European level to the concept of "pluralism", understood as diversity of sources: it has frequently been pointed out that pluralism is enhanced - and not compromised – by the spread of search engines, which have both facilitated the availability of news and increased the right of access to information. Secondly, the right of information in its passive profile, understood as a publisher's freedom to impart news, is impaired when the indexing of pre-existing content is considered as a publishing activity.

In this sense, the fact that search results refer back to an extremely diverse range of sources mean they may be seen as an instrument of protection for freedom of expression, because the different links provided by search engines increase the visibility of less widely-known or more unconventional points of view. In fact it is precisely the neutrality of search engines towards their own content that allows users to come into contact with unexpected expressions of opinion, opinions conflicting with their own points of view or in any case significantly different from their own.

Indeed, in the information society those who surf the web must possess the skills that enable them to find what they are looking for and to select the content independently, without the support of a publisher who places the information in order and points the way forward. As it is not yet possible for everyone to possess this kind of ability, search engines have the merit of facilitating the search by sorting the search results according to their popularity, thus giving the user at least one criterion for moving within the Internet.

It is undeniable, then, that search engines are a valuable resource for users, since they are capable of bringing together extremely differentiated - but relevant – data, thus reinforcing both the right of access to information in the *mare magnum* of the Internet, and also the ability of traditional publishers to diffuse news. The fact that they are equated to traditional publishers goes hand in glove with the erroneous view that "the person who exercises an activity of control over information has a significant role towards the protection of pluralism."[38]. The role and activities of search engines show on the contrary, that the increase of information sources, dissemination and access to information can also be obtained by means of neutral and mathematical criteria for the selection of sources – precisely such as those of the algorithm - without there being any need for control over content by those who offer a service of indexing the results.

6. Right of access, pluralism and search engines following the recent ruling by the Court of Justice of the European Union on the right to be forgotten: potential conflict with Article 10 of the ECHR

Concerning the question of the overlap between publishers and search engines and how it runs the risk of restricting freedom of information, the judgment of the Court of Justice of the European Union on the case Google Spain[39] may be considered as a watershed. The ECJ ruled that under existing EU data protection laws the Google search engine must be regarded as a data controller and that all search providers must make it possible for users to have links removed that concern their personal data. This decision has shaken the legal foundations of the Internet in Europe, to the point that debate is continuing as to whether the right of cancellation, as it now stands, will not be a precursor to the right to be forgotten whose definition has been under debate for more than two years as part of the European legislature's planned reform of EU privacy legislation.

[38] O. Pollicino, *Tutela del pluralismo nell'era digitale: ruolo e responsabilità degli Internet service provider*, 2014, in www.giurcost.org, pag. 27.

[39] Case -131/12, European Court of Justice, Grand Chamber, Sentence 13 May 2014, in www.altalex.it.

What matters here, however, is not the many - albeit crucial - issues of the right to protection of personal data involved in the case (over which many doubts of interpretation have been and continue to be generated among jurists), but rather a specific aspect of the legal reasoning of the Court of Justice about the actual role of search engines, which while defining search engines "data controllers", [40] nevertheless does not equate them *tout court* as content providers/publishers.

The test case privacy ruling by the European Union's court of justice against Google Spain was brought by a Spanish man, Mario Costeja González, after he failed to secure the deletion of an auction notice published by the Spanish Ministry of Employment and Social Affairs of his repossessed home dating from 1998 on the website of a mass circulation newspaper in Catalonia, *La Vanguardia*. The ECJ judges ruled that under existing EU data protection laws, Google had to erase links to two pages on *La Vanguardia*'s website from the results produced when Costeja González's name was put into the search engine. In November 2009, the man had contacted the newspaper to obtain the removal of data relating to him, since the sale had ended years earlier and the information was no longer relevant. *La Vanguardia* opposed the cancellation and for this reason, in February 2010 González made the same request to Google Spain. He also filed a complaint to the *Agencia Española de Protección de Datos* (AEPD) asking for the removal of information concerning him to be removed from the newspaper and from Google Spain or Google Inc. in Spain in July 2010, the director of the AEPD, while rejecting the complaint against *La Vanguardia*, granted the applications against the search engine company, ordering it to make it impossible to access the data through its portal. Following this decision, Google Spain and Google Inc. brought separate actions in the Spanish National Court against the ruling of the AEPD, claiming that not only inside the search function was there no processing of personal data, but above all that the activities of the search engine had nothing to do with the application of Directive 95/46/EC [41] on data protection, and that therefore it was impossible to consider Google as a data controller.

[40] In the sentence "Data Controller" The Italian translation of the concept ("Responsabile del trattamento") is due to the definition of the Italian Code concerning protection of personal data, Legislative Decree. 196/2003, in www.garanteprivacy.it.

[41] Adopted in Spanish legislation through Ley Orgánica no. 15/1999, 13 December 1999, concerning protection of personal data.

To contextualize the importance of the case, it is necessary to focus on the provisions of the privacy Directive which define "data controller"[42] as: "the natural or legal person, public authority, agency or any other body which alone or jointly with others determines the purposes and means of the processing of personal data."[43], distinguishing this figure from the "data processor" [44]: "a natural or legal person, public authority, agency or any other body which processes personal data on behalf of the controller."[45].

Article 23 then refers to "Liability", establishing that: "*Member States shall provide that any person who has suffered damage as a result of an unlawful processing operation or of any act incompatible with the national provisions adopted pursuant to this Directive is entitled to receive compensation from the controller for the damage suffered*." Therefore the controller is effectively liable unless he proves "*that he is not responsible for the event giving rise to the damage*." in which case "*he may be exempted, in whole or in part, from this liability.*"

Concerning the data subject's right to protection, Article 12 of the Directive lays down that: "*Member States shall guarantee every data subject the right to obtain from the controller: […] b) as appropriate the rectification, erasure or blocking of data the processing of which does not comply with the provisions of this Directive, in particular because of the incomplete or inaccurate nature of the data."*[46]. Furthermore, Article 14 orders Member States to grant the data subject the right at least in the cases referred to in Article 7 (e) and (f),[47] "*to object at any time on compelling legitimate*

[42] In Italy the official translation of the Directive 46/95/CE defines "Data Controller" in the Legislative Decree 196/2003 as "Titolare del trattamento" ("Appointed Processor") (Cfr. Art. 4 clause 1 f) of the Legislative Decree 196/2003, in www.garanteprivacy.it).

[43] Article 2 – Definitions, Directive 95/46/EC of the European Parliament and the Council, 24 October 1995, relative to the protection of natural persons concerning the processing of personal data, as well as the free circulation of such data, in eur-lex.europa.eu.

[44] In Italy the official translation of the Directive 46/95/CE defines "Data Processor" in the Legislative Decree 196/2003 as "Responsabile del trattamento" (Processing Supervisor") (Cfr. Art. 4 clause 1 g) of the Legislative Decree 196/2003, in www.garanteprivacy.it).

[45] Ibid.

[46] Art. 12 – Right of Access, Directive 95/46/CE of the European Parliament and the Council, 24 October 1995, relative to the protection of natural persons concerning the processing of personal data, as well as the free circulation of such data, in eur-lex.europa.eu.

[47] "Member States shall provide that personal data may be processed only if: […] e) it is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller or in a third party to whom the data are disclosed; or it is necessary for the purposes of the legitimate interests of third party or parties to whom the data are

grounds relating to his particular situation to the processing of data relating to him, save where otherwise provided by national legislation. Where there is a justified objection, the processing instigated by the controller may no longer involve those data."[48].

On these grounds, the Spanish National Court had combined the two lawsuits and had suspended the trial pending a preliminary ruling by the European Court of Justice on the possibility of applying the provisions of Directive 46/95/EC to search engines (understood as service providers). In particular, the Spanish court had raised three preliminary questions, which included the following, concerning, in summary:

> The material scope of the directive, its applicability to search engines, whether the type of activity performed by search engines on the data indexed by them could constitute a processing of personal data;
>
> the territorial scope of the application of the Directive on Privacy to Google Inc., a company incorporated in the USA with a subsidiary in Spain;
>
> whether Google could be defined as a Data Controller;
>
> the responsibility of a search engine like Google in the light of the Directive on Privacy;
>
> the derivability of a "right to be forgotten" in current European privacy legislation.

disclosed, except where such interests are overridden by the interests for fundamental rights and freedoms of the data subject."

[48] Art. 14 – The data subject's right to object, Directive 95/46/EC of the European Parliament and the Council, 24 October 1995, relative to the protection of natural persons concerning the processing of personal data, as well as the free circulation of such data, in eur-lex.europa.eu.

In assessing whether processing of personal data by Google was configurable, the Court took its starting point from the wording of Article 2 b) of Directive 95/46 /EC, which defines "processing of personal data" as: "*any operation or set of operations which is performed upon personal data, whether or not by automatic means, such as collection, recording, organization, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, blocking, erasure or destruction*," specifying in the light of the Lindqvist ruling,[49] that "*as regards in particular the Internet, the Court has already had occasion to note that the operation of loading personal data on an internet page should be considered as 'data processing' such as defined in Article 2b) of Directive 95/46 v. judgment."*[50]

This means, according to the Court, that if the search engine, when delivering its results, makes data appear that is related to natural persons, then it is performing an act of data processing by the very fact that such data is on the page, even if it comes from sites whose content is not controlled by the search engine and where the information had been lawfully published.

Shortly after, the ECJ specifies that *"Therefore, it must be found that, in exploring the internet automatically, constantly and systematically in search of the information which is published there, the operator of a search engine 'collects' such data which it subsequently 'retrieves', 'records' and 'organises' within the framework of its indexing programmes, 'stores' on its servers and, as the case may be, 'discloses' and 'makes available' to its users in the form of lists of search results. As those operations are referred to expressly and unconditionally in Article 2b) of Directive 95/46, they must be classified as 'processing' within the meaning of that provision, regardless of the fact that the operator of the search engine also carries out the same operations in respect of other types of information and does not distinguish between the latter and the personal data."*.[51]

[49] Point 25, Case-101/01, European Court of Justice , Sentence 13 May 2002, in www.altalex.it
[50] Point 26, Case C-131/12, European Court of Justice, Grand Chamber, Sentence 13 May 2014, in www.altalex.it.

[51] Point 28, Case C-131/12, European Court of Justice, Grand Chamber, Sentence 13 May 2014, in www.altalex.it.

In this and a successive passage of the judgment the Court of Justice recognizes, more or less explicitly, that the business of Google is distinct from that of publishers. The judges do not identify the "data controller" with a "publisher", but identify a "third kind of active participant in the processing."

The Court writes: "*Inasmuch as the activity of a search engine is therefore liable to affect* ***significantly, and additionally compared with that of the publishers of websites****,[my emphasis] the fundamental rights to privacy and to the protection of personal data, the operator of the search engine as the person determining the purposes and means of that activity must ensure, within the framework of its responsibilities, powers and capabilities, that the activity meets the requirements of Directive 95/46."*.[52]

Therefore, the Court distinguishes between the activities of production, selection and control of content typical of a publisher, and those of the organization and aggregation of information from the internet by the search engine.

There follows a highly significant passage where the Court explains that: *"the processing by the publisher of a web page consisting in the publication of information relating to an individual may, in some circumstances, be carried out 'solely for journalistic purposes' and thus benefit, by virtue of Article 9 of Directive 95/46, from derogations from the requirements laid down by the directive, whereas that does not appear to be so in the case of the processing carried out by the operator of a search engine. It cannot therefore be ruled out that in certain circumstances the data subject is capable of exercising the rights referred to in Article 12(b) and subparagraph (a) of the first paragraph of Article 14 of Directive 95/46 against that operator but not against the publisher of the web page."* [53]

There are two consequences to this. The first is that the Court refutes the neutrality of search engines, but not enough to give them the "protected" status of publishers/journalists. The second is that, with this approach, the Court is revising – with dubious criteria from a juridical point of view – its own jurisprudence with regard to the trade-off between the right to privacy

[52] Point 38, Case C-131/12, European Court of Justice, Grand Chamber, Sentence 13 May 2014, in www.altalex.it.
[53] Point 85, Case C-131/12, European Court of Justice, Grand Chamber, Sentence 13 May 2014, in www.altalex.it.

and freedom of information, beginning with the sentence concerning *Satamedia.*[54]

In that judgment, the same Court had decided that protection of "journalism" should prevail over the right to privacy, including even the activities of a publisher who in return for payment sent data concerning the financial and fiscal status of Finnish taxpayers to the cellphones of customers seeking such information.

As far as the Court's preliminary ruling on the correct interpretation of "data controller" is concerned, once again the search provider is not treated as a content provider to the extent that: *"It is the search engine operator which determines the purposes and means of that activity and thus of the processing of personal data that it itself carries out within the framework of that activity and which must, consequently, be regarded as the 'controller' in respect of that processing pursuant to Article 2(d)."*[55]

The important aspect here is that the Court does not question the legitimacy of the processing, that is to say it does not dwell on the question of the regularity or otherwise of the collection of data understood as dissemination of information already available on the Internet, which means it does not contest the basic activity of search engines as indexing content[56] and not the production/publishing of that content. This is at the heart of the difference between search provider and content provider.

While wanting to consider the search engine as a host provider, Article 14 of Directive 200/31/EC states that it is not responsible providing it does not "select or modify the information transmitted." Given, then, that there are no modifications made by search engines of the information they index, the interpretation of the term "select" could be controversial. This doubt, however, can easily be overcome if it is taken into consideration that the search engine algorithm indexes content, it does not make any selection of information transmitted, but simply places it in order according to the criterion of relevance and popularity. Its activity is organizational and non-selective.

---

[54] Case C-73/07,*Tietosuojavaltuutettu v. Satakunnan Markkinapörssi Oy, Satamedia Oy,* European Court of Justice, Grand Chamber, Sentence 16 December 2008.

[55] Point 33, Case C-131/12, European Court of Justice, Grand Chamber, Sentence 13 May 2014, in www.altalex.it.

[56] Cfr. Point 93, Case C-131/12, European Court of Justice, Grand Chamber, Sentence 13 May 2014, in www.altalex.it.

These notes show the multi-faceted nature of search engines, which normally should be defined as a *"third category"* between content providers and service providers, and which, however, still does not conform to the figure of publisher as properly understood.

Paradoxically, therefore, the judgment involves assessments that are clearly favourable to the views expressed here, of the ontological-functional difference between search engine and publisher. It remains, however, a sentence that can be criticized from a scientific-juridical point of view and not only for its ramifications concerning privacy, which here have not been dealt with. It is impossible not to note a certain blinkered interpretation when, by imposing the Court's decision requiring Google to obscure the results of a search around a certain "keyword" in the presence of a certain individual's "right to be forgotten", limitations are imposed on both pluralism of information and the freedoms referred to in Article 10 of the ECHR, and in particular the right of access to information itself, since the information of public interest was not eliminated at the publishing level (*La Vanguardia*) but at the level of accessibility (Google Search).

In this sense, it is not possible here to find the correct trade-off which has been described for the cases submitted to the European Court of Human Rights concerning the limitation of the freedom of art. 10, since the Court of Justice has carried out a trade-off between the right to protection of personal data and the freedom of expression against the wrong subject, the search engine, without considering the content provider, to whom the insertion of personal data and content can ultimately be traced back.

That is to say that in this case, a fundamental error has been made by separating the public interest to freedom of information from the action of research as "freedom to search for news." In fact, if the content provider *(La Vanguardia* in this case) is entitled to publish, then access provided by the search engine is also lawful*:* this position is supported by the reading of the content of Article 10 of the ECHR which defines freedom of information as also freedom of access to information.

It is not clear how it is possible to think that the provisions of the Convention are respected if a news item remains on the Internet, but the public interest in having access to it cannot be satisfied. Considering what has been said so far, it is clear that altering the results of a search, while that information is still available on the site of origin, goes against the notion of pluralism and freedom of information, placing the decision of the European Court of Justice in contrast with the provisions of the European Convention of Human Rights Article 10.

www.istitutoitalianoprivacy.it/it