THE EUROPA MOOT COURT COMPETITION

On 6 October 2017, the Court of Justice of the European Union received the following reference for a preliminary ruling from the High Court of Justice of the Kingdom of Orderly-Brexitland. The Kingdom of Orderly-Brexitland and the Republic of Livonia are members of the European Union since 1 January 1958. The Republic of Mercuria is a neither a Member State of the European Union nor part of the EEA.

A public hearing is scheduled to take place on 31 March and 1 April 2018 in Kavala, Greece.

Consider that Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (OJ 2016 L 119, p. 1) is applicable ratione temporis to the facts of the present case.

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KINGDOM OF ORDERLY-BREXITLAND
IN THE HIGH COURT OF JUSTICE

1 October 2017

Before

Judge May (President), Judge Davis, Judge Johnson, Judge Sturgeon, Judge Hammond

In joined cases

D Stamper

(Claimant)

v

H Cessange

Waterleaks

(Respondents in the First Action)

Poodle Inc

Poodle OB Ltd

(Respondents in the Second Action)

AFTER hearing Counsel for the Claimant and Counsel for the Respondents on 3, 4 and 5 September 2017 and

AFTER consideration of the written submissions filed by the parties

THE COURT ORDERED THAT

(1) The questions set out in Schedule 1 to this order be referred to the Court of Justice of the European Union for a preliminary ruling under Article 267 of the Treaty on the Functioning of the European Union. Schedule 2 to this order sets out the factual and legal background to this reference as well as the arguments of the parties.

(2) Costs be reserved.

[signature]

Registrar
14 October 2017

D Stamper

(Claimant)

v

H Cessange and others

(Respondents)

SCHEDULE 1: QUESTIONS REFERRED

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(1) a) Is the right to erasure ('right to be forgotten') under Article 17 of the General Data Protection Regulation to be interpreted as including a right to obtain from controllers of personal data not only the erasure of such data but also the delisting of such data and the erasure of links to such data?

b) Are Articles 3(1) and 17 of the General Data Protection Regulation to be interpreted so that the Regulation and the right to be forgotten pursuant thereto apply to circumstances such as those in the main proceedings whereby the data subject is a third State national who has no connection with any EU Member State and seeks to prevent access to his personal data primarily by the public of that third State by relying on Article 17 of the General Data Protection Regulation?

(2) a) Can the activities of individuals and organizations such as those of Mr Cessange and Waterleaks which consist of obtaining through anonymous sources and rendering public secret, classified or otherwise restricted material, including emails from individuals holding public office, be justified on the basis of Articles 6(1)(e), 9(2)(g) and 17(3)(a) and (b) of the General Data Protection Regulation, when it is alleged that the disclosure of the personal data in question was undertaken with a view to influence the outcome of a democratic election in a third State?

In case of an affirmative answer:

b) Can the exceptions to the right to erasure ('right to be forgotten') pursuant to Article 17(3)(a) and (b) of the General Data Protection Regulation be successfully relied upon when the personal data disclosed:

- are of a sensitive and purely private nature and belong to the data subject but relate to a third person holding elected public office in a third State and concern that third person's private life?
- are of a sensitive and purely private nature (such as medical records of the data subject) but the data subject holds unelected public office in a third State?
- are work-related and reveal political opinions of the data subject as well as his colleagues in the context of an election campaign?

D Stamper

(Claimant)

v

H Cessange and others

(Respondents)

SCHEDULE 2: ANNEX

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1. This Annex sets out the factual and legal background to the reference and a summary of the parties' submissions.

2. Mr Doug Stamper is a national of the United States of America (USA). He was chief of staff to President Frank J Underwood. In 2016, President Frank Underwood sought to renew his term as President and nominated his wife, Mrs Claire Underwood, as candidate for the office of Vice-President. Mr Stamper was a high-ranking member of their election campaign. Mr and Mrs Underwood won the 2016 election against their Republican opponent, Mr Will Conway, Governor of New York. However, soon after his inauguration, President Frank Underwood decided to resign amidst allegations of election fraud in order to avoid impeachment. Following his resignation, Mrs Underwood assumed the office of President.

3. Poodle Inc is an US technology company that specializes in Internet-related services and products such as online advertising technologies and online search tools as well as communication, publishing and development tools. Poodle runs a very successful search engine known as Poodle Web Search which over the years has become the most-used Internet search engine in the world. Poodle Inc manages the domain www.poodle.com. Poodle OB is a wholly-owned subsidiary of Poodle Inc incorporated in the Kingdom of Orderly-Brexitland. It manages the domain www.poodle.ob.

4. Mr Hadrian Cessange is the founder of the multi-national media organization and associated library 'Waterleaks'. Waterleaks is an unincorporated body established in Iceland and it publishes on its website large datasets of secret or otherwise restricted official material provided by anonymous sources. Its stated aim is to promote freedom of information, to expose to the public eye the manner in which governments operate and to push for more transparency with respect to government action.

5. Mr Cessange and Waterleaks came to global prominence through the publication of US Government secret and classified documents. Following that publication, Mr Cessange and Waterleaks became the subject of a criminal investigation launched by the US Attorney-General. Mr Cessange is also the subject of an extradition request submitted to the Kingdom of Orderly-Brexitland by the Republic of Livonia where he is alleged to have committed the crime of assault. However, while the extradition proceedings were ongoing in the Kingdom of

Orderly-Brexitland, he sought refuge at the Embassy of the Republic of Mercuria in the Kingdom of Orderly-Brexitland, where he successfully applied for political asylum. Since then, he has been living in and managing Waterleaks as well as its website from the Embassy. In May 2017, the Livonian prosecution authorities closed the investigation against Mr Cessange without pressing charges but Mr Cessange remains in the Embassy fearing that if he were to leave he would be the subject of another extradition request by the US Government for breach of its anti-espionage legislation.

6. During the run-up to the 2016 US presidential election, the personal email account of Mr Stamper was hacked and a substantial amount of data was stolen. The US intelligence services attributed responsibility for the security breach to a hacking group known as the Polar Bear which is alleged to be affiliated to the Russian Federation. However, Russian President Viktor Petrov has consistently denied any Russian involvement in the hacking of Mr Stamper's email account. Mr Cessange and Waterleaks refuse to disclose the identity of their source.

7. A month before the US Presidential Election Day, Waterleaks started releasing thousands of emails hacked from Mr Stamper's email account. The release of hacked data continued over the course of a number of days until the Embassy of the Republic of Mercuria cut off Mr Cessange's access to the Internet in order to prevent further involvement of Mr Cessange and Waterleaks in actions that could influence the outcome of the US presidential election.

8. The hacked emails released by Waterleaks are essentially divided into two groups: private emails and work-related emails. The private emails contain a vast range of private information concerning his day-to-day life. Due to the indiscriminate release of emails by Waterleaks, a range of sensitive private information relating to Mr Stamper became widely available such as his date of birth, his private email address, his home address, several of his bank account and credit card numbers, several medical reports as well as his iCloud password. The release of his iCloud password allowed access to his iCloud profile which was republished as a screenshot on several websites. Due to this security breach, Mr Stamper was obliged to change all of his passwords, create a new email address and apply for new credit cards. The disclosure of his private emails also revealed Mr Stamper's chronic alcohol problem as well as his knowledge of an extramarital affair between Mrs Claire Underwood and a male member of her staff when she was still the First Lady.

9. As far as work-related emails are concerned, they included emails relating to the managing of the 2016 Presidential campaign, information and comments exchanged between senior campaign and party officials on Mr and Mrs Underwood's position on many issues. In addition, information and comments revealing Mr Stamper's own views on a variety of domestic and foreign policy issues were disclosed. Mr Stamper considers that such documents compromise his future professional career.

10. In this context, Mr Stamper relied on Article 17(1) of the General Data Protection Regulation (hereinafter 'the Regulation') and requested Mr Cessange and Waterleaks to remove all of the personal data concerning him without delay from the Waterleaks website and to erase them. On the basis of the same provision, he requested Poodle Inc and Poodle OB to delist all

webpages that contain, reproduce or refer to the hacked data published by Waterleaks, including the webpages referring to his alcoholism as well as to Mrs Underwood's extramarital affair, from any searches carried out on the Poodle search engine, regardless of whether the individual undertaking the search is located in the European Union or abroad. For the avoidance of doubt, Mr Stamper did not only request from Poodle and Poodle OB the delisting of the Waterleaks webpages but also of any other webpage reproducing the content of the hacked data.

11. Mr Cessange and Waterleaks refused to comply with Mr Stamper's request stating that "[people] have to understand the reality that privacy is dead". Poodle Inc and Poodle OB refused to delist claiming that the right to be forgotten as codified in Article 17 of the Regulation provides for a right to erasure but not a right to delisting. Poodle and Poodle OB added that, in any event, delisting could not be applied to search results referring to the political opinions expressed by Mr Stamper in work-related emails because such processing was in the public interest. Poodle and Poodle OB took the same in view in relation to search results referring to Mr Stamper's alcohol addiction as well as to Mrs Underwood's extramarital affair considering that both Mr Stamper and Mrs Underwood are US public figures holding public office and that the American people are entitled to know such critical aspects of their lives. Poodle Inc and Poodle OB consider that the Regulation cannot be interpreted in a way that would deprive the American public of its right and freedom of information, under the US constitution, in relation to its leadership.

12. In these circumstances, Mr Stamper brought separate actions against Mr Cessange and Waterleaks as well as against Poodle and Poodle OB under Article 79 of the Regulation in order to enforce his right to erasure ('right to be forgotten') under Article 17 of the Regulation. Given their close connection, the cases were joined according to Civil Procedure Rule 9(25).

13. The essence of Mr Stamper's case against Mr Cessange and Waterleaks is that the hacked data from his email account are personal data in the sense of Article 4(1) of the Regulation and that Mr Cessange and Waterleaks are controllers in accordance with Article 4(7) of the Regulation. In his view, Mr Cessange and Waterleaks have processed his personal data pursuant to Article 4(2) of the Regulation insofar as they have collected, recorded, organized, structured, stored, disclosed by dissemination or otherwise made available the hacked data. Mr Stamper claims that Mr Cessane and Waterleaks' processing of his data is unlawful because none of the conditions laid down in Article 6(1) of the Regulation are fulfilled. He points out in particular that he never consented to the hacking of his email account and that, far from being in the public interest, the processing of the hacked data by Mr Cessange and Waterleaks was done with the aim of undermining the democratic process in the USA and in order to influence the judgement of the American people for the benefit of Mr Conway and a foreign power. Mr Stamper further contends that the disclosure of his work-related emails that reveal his political opinions on a variety of domestic and foreign policy matters is prohibited by Article 9(1) of the Regulation and cannot be justified on any of the grounds listed in Article 9(2) of the Regulation. In this respect, Mr Stamper points out that the Respondents rely on US public interest whereas Article 9(2)(g) of the Regulation refers to 'substantial public

interest, on the basis of Union or Member State law'. This cannot be interpreted to include US public interest. Finally, Mr Stamper submits that none of the grounds listed in Article 17(3) of the Regulation apply in the present case. In this respect, Mr Stamper claims that in rendering public the hacked data in bulk and without any attempt to withhold even the most personal information, Mr Cessange and Waterleaks did not engage in an act protected by freedom of expression and information. He considers that their professional activities are a flagrant abuse of such freedom. Given that their primary motivation was linked to undermining the 2016 US presidential election, they cannot subsequently rely on the freedom of expression and information to shield themselves from Mr Stamper's legitimate right to erasure.

14. In their reply, Mr Cessange and Waterleaks reject all of Mr Stamper's claims. They first contest the premise on which Mr Stamper's action is based and according to which the Regulation is applicable to the present case. They consider that as they are established in the Embassy of the Republic of Mercuria, their activities are not covered by Article 3(1) of the Regulation. In their view, to find otherwise would amount to an extraterritorial exercise of jurisdiction contrary to international law. In addition, they claim that their activity is purely political and as such falls outside the material scope of the Regulation pursuant to Article 2(2)(a) thereof. Finally, they argue that electronic correspondence is not personal data in the sense of Article 4(1) of the Regulation and consequently the Regulation does not apply.

15. In the alternative, Mr Cessange and Waterleaks argue that their processing of Mr Stamper's data is lawful pursuant to Article 6(1)(e) of the Regulation. They claim that the political opinions expressed by Mr Stamper in several of his emails are pertinent facts that the public needs to be aware of. This is because people like him, although unelected, hold significant positions of public authority which allow them to create policy. In addition, the public has a right to know what the true views of its elected and unelected leaders are on a variety of issues, all the more so in the run-up to an election. This is particularly the case in relation to Mr Stamper's alcoholism (which could seriously impair his judgement and compromise his ability to serve as chief of staff to the US President) as well as of Mrs Underwood's extramarital affair. In connection with this latter element, Mr Cessange and Waterleaks argue that Mrs Underwood holds the highest public office an American citizen can hold. Infidelity and dishonesty is a character trait the American public has a right to be informed of before exercising its right to vote.

16. Therefore, in their view, revealing the political opinions of Mr Stamper was justified on the grounds stated in Article 9(2)(g) of the Regulation. Insofar as the disclosed emails were of a private nature, Mr Cessange and Waterleaks submit that, due to his past position as chief of staff to President Frank Underwood, a variety of information on Mr Stamper, such as his email address, his date of birth, his home address etc, was already in the public domain. It would be unreasonable to require an organization such as Waterleaks that seeks to promote transparency of government and freedom of information by shedding light on the inner working of government agencies to comply with the order sought by Mr Stamper. For example, such compliance in the specific instance would be unworkable as it would consume so much time

and energy that it would be impossible to disclose to the general public important information relevant to the upcoming presidential election before Election Day.

17. Further in the alternative, Mr Cessange and Waterleaks argue that Mr Stamper is a political figure and as such he has no right to be forgotten. In any event, they claim that the processing of his emails was necessary for exercising the right of freedom of expression and information and for the performance of a task carried out in the public interest (Article 17(3)(a) and (b) of the Regulation). On this basis, Mr Cessange and Waterleaks submit that Mr Stamper has no right to obtain the erasure of the data from the Waterleaks website.

18. Turning now to the case against Poodle and Poodle OB, Poodle and Poodle OB accept that they are controllers in the sense of Article 4(7) of the Regulation. However, they consider that Article 17 of the Regulation (which was promulgated in 2016) has departed from the Court's judgment of 13 May 2014, Google Spain and Google (C-131/12, EU:C:2014:317) and has limited the right to be forgotten to a right to erasure of data (Article 17(1)) and an obligation of the controller (in this case Mr Cessange and Waterleaks) to inform other controllers which are processing the personal data in question (in this case Poodle and Poodle OB) that the data subject has requested the erasure by such controllers of any links to the personal data in question (Article 17(2)).

19. Apart from the fact that they never received any notification from Mr Cessange and Waterleaks under Article 17(2) of the Regulation, Poodle and Poodle OB argue that delisting of links is not erasure of data in the sense of Article 17(1) and that Article 17(2) does not impose on them any obligation to delist links, especially as they have received no notification from Mr Cessange and Waterleaks and that erasure of the data by them is required pursuant to Article 17(1) of the Regulation. In this context, Poodle and Poodle OB rely on the legislative history of Article 17 of the Regulation which shows that the EU legislature did not adopt the Commission's proposal (COM(2012) 11 final, Article 17 'right to be forgotten and to erasure') which provided for 'the right to obtain from the controller the erasure of personal data relating to them *and the abstention from further dissemination of such data*'.

20. Assuming that Article 17(1) of the Regulation provided for a right to be forgotten that would require controllers to erase links, Poodle and Poodle OB, on the one hand, and Mr Stamper, on the other, disagree as to the scope of this right. Poodle and Poodle OB argue that the wording of Article 3(1) of the Regulation does not require operators of Internet search engines to delist all relevant results from searches performed on domains that do not relate to an EU Member State (such as www.poodle.com which relates to the USA). In their view, geo-blocking is an appropriate means of enforcing the right to be forgotten. They therefore consider that it is sufficient to delist the relevant results from any search performed on www.poodle.ob or any other Poodle domain relating to an EU Member States.

21. Mr Stamper contests these arguments in his reply. He relies on Article 3(1) of the Regulation to claim that the delisting of the relevant results should be global and include all Poodle domains given the ubiquitous nature of the Internet, even those relating to third States. On this point, Poodle and Poodle OB argue in their rejoinder that it would be unreasonable to grant Mr

Stamper's claim a global effect, especially insofar as most jurisdictions outside the EU, including Mr Stamper's home jurisdiction (the USA), do not recognize the existence of a right to be forgotten. If that is the correct interpretation to be given to Article 3(1) of the Regulation, Poodle and Poodle OB consider that it is invalid because it violates the principle of territorial jurisdiction recognized in international law.

22. The High Court considers that, pursuant to Article 4(1) of the Regulation, data such as the ones at issue in the case at hand are personal data because they contain information relating to an identified natural person. It also considers that the Respondents in both actions have engaged in the processing of these data in the sense of Article 4(2) of the Regulation. It has no doubt that they also meet the definition of controller provided in Article 4(7) of the Regulation. Finally, the High Court is convinced that Article 2(2)(a) does not apply to Mr Cessange and Waterleaks because it is clear from recital 16 that the exception in question is essentially concerned with the processing of data in the context of national security.

23. However, the High Court has serious doubts as to the correct interpretation of Articles 3, 6(1)(e), 9(2)(g) and 17(1) and (3) of the Regulation. These doubts essentially concern two issues: the scope of the Regulation and the nature of the activities of Mr Cessange and Waterleaks as well as their characterization under the Regulation.

24. As far as the scope of the Regulation is concerned, the High Court is of the unanimous opinion that the premises of the diplomatic missions of the Republic of Mercuria in the Kingdom of Orderly-Brexitland constitute sovereign territory of the Kingdom on which Orderly-Brexitland law and EU law are fully applicable and binding. Thus, in the case of Mr Cessange and Waterleaks there is no question of extraterritorial application of the Regulation.

25. By contrast, it is not clear to the High Court whether Articles 3(1) and 17 of the Regulation should be interpreted in such a way as to require Poodle and Poodle OB to delist all pertinent search results even when the relevant searches are performed by individuals located outside the EU, using Poodle domains relating to third States such as www.poodle.com.

26. In the first place, whilst it is clear that Article 17 of the Regulation provides for a right of erasure of data, it is not certain that erasure of data would include the delisting of web links resulting from searches performed on search engines and which, for example, direct to webpages that reproduce the content of the personal data whose erasure has been requested. Erasure is not a term defined in the Regulation. A literal interpretation of the words 'erasure of data' might suggest that delisting is not included. This interpretation is supported by both the legislative history of the Regulation referred to above and the wording of Article 17(2) of the Regulation which speaks of erasure of personal data and erasure of links to those personal data. Given this uncertainty, the High Court has decided to refer the question of the definition of the words 'erasure of data' in Article 17(1) of the Regulation to the Court of Justice of the European Union.

27. Assuming that the delisting of links is part of the right to erasure and to be forgotten enshrined in Article 17 of the Regulation, the High Court considers that Poodle's policy on geo-blocking

might be a sufficient means of enforcing the right to be forgotten. However, it recognizes that there is considerable force in the argument according to which the right to be forgotten would be emptied of all its content if the data whose delisting is being requested could be obtained by performing a search on a Poodle search engine from a location outside EU territory. In that context, it doubts whether Article 17 is intended to apply to a situation such as the one in the present case where a third State national is essentially seeking to block access of the public of a third State to the data in question. The High Court doubts that Article 17 of the Regulation is intended to turn the courts of EU Member States into the world's privacy policeman. It has therefore decided to refer this question to the Court of Justice of European Union.

28. Subject to the answers to these questions, the High Court turns to the context in which Mr Stamper's data have been processed initially by Mr Cessange and Waterleaks and subsequently Poodle Inc and Poodle OB. The High Court is of the view that it should first decide whether the processing of Mr Stamper's data by Mr Cessange and Waterleaks is lawful and/or can be justified by public interest considerations. If it turns out that such processing was unlawful and/or could not be justified by public interest considerations, the High Court considers that, by necessary implication, Poodle and Poodle OB should stop listing the relevant data by means of their search engines.

29. The High Court considers that, as a matter of principle, the processing of purely private and work-related emails, without the consent of the data subject, must be considered unlawful under Article 6(1) of the Regulation, unless one of the grounds listed in Article 6(1)(b)-(f), and especially Article 6(1)(e) would justify such processing. The same applies to the processing of such data under Article 9 of the Regulation, unless processing can be justified under Article 9(2)(g) of the Regulation. In a similar vein, an individual is entitled to obtain the erasure of such data or to rely on his right to be forgotten under Article 17 of the Regulation if the processing of data is unlawful, unless such processing can be justified by the exercise of the right of freedom of expression and information (Article 17(3)(a) of the Regulation) or by the performance of a task carried out in the public interest (Article 17(3)(b) of the Regulation).

30. It is clear to the High Court that the answer to these questions depends on whether the activities of activists (or whistleblowers) such as Mr Cessange and Waterleaks can be considered to be performed in the public interest and be protected by the right to freedom of expression and information, especially in circumstances such as the present ones where third State nationals essentially seek to prevent, through the Regulation, the US public from accessing the data in question. After all, Mr Stamper has no interests of a private or professional nature in the EU and the reputational and other alleged damage suffered through the publication of his emails is essentially incurred in the US.

31. In addition, if Mr Cessange and Waterleaks' activities are justified on any of the grounds mentioned in paragraph 29 of this judgment, it is unclear how such justification would work in this context. Mr Stamper's emails are divided between those which are purely private and those which are work-related. Is the public interest justification to be examined on an email-by-email basis or should one take a global approach? The release of certain pieces of information, although absolutely unjustified in relation to an ordinary citizen, may be

appropriate for a person holding public office. Even so, the question of the inappropriate involvement in the US presidential election of a foreign power remains. Would Mr Stamper be entitled to obtain erasure in the period running up to Election Day? Would that right fade away after Election Day? Finally, is Mr Stamper entitled to a right to erasure of data which, although his, relate to a third person holding public office?

32. The High Court considers the answers to these questions are so far from obvious that it actually wonders whether it was wise, in the first place, to allow the right to erasure and the right to be forgotten to be applied to information published on the Internet. Be that as it may, these rights are embodied in the Regulation and the national courts have to uphold them. In this context, the High Court decided to refer the second question to the Court of Justice of the European Union.