European Court of Justice limits the territorial scope of the 'right to be forgotten'

Delivering its judgment in *Google* v *Commission nationale de l'informatique et des libertés (CNIL)* on 24 September 2019, the Court of Justice of the European Union (CJEU) held that Google does not have to remove search engine results worldwide in order to comply with a 'right to be forgotten' request under EU data protection law. The landmark decision limits the territorial scope of the EU right to de-referencing but leaves many open questions.

Background

2014 *Google Spain* v *Agencia Española de Protección de Datos (AEPD)* case

In its 2014 *Google Spain* ruling, the CJEU held that under the Data Protection Directive, citizens in the EU have a right to request search engines such as Google to remove links to personal information when this information is 'inadequate, irrelevant or no longer relevant'. As a result, search engines must ensure that the personal information in question cannot be found through online searches on the individual's name, even though the content itself remains online. Such a **right to de-referencing or delisting** is commonly referred to as the 'right to be forgotten'. Although, the Article 29 Working Party (now the European Data Protection Board), an EU advisory body on data protection, issued some guidelines on the implementation of the *Google Spain* judgment, the territorial scope of the 'right to be forgotten' was not fully clarified.

Internet users in the EU have increasingly used the right to de-referencing. Since June 2014, Google has processed more than **850 000 requests** to remove more than **3.3 million website addresses** (i.e. uniform resource locators or URLs) from its search engine. Google ultimately **delisted more than 1.3 million website addresses** (around 45 % of the website addresses) (See Google transparency report).

2018 General Data Protection Regulation and the 'right to be forgotten'

The General Data Protection Regulation (GDPR) replaced the Data Protection Directive from 25 May 2018, and enshrined a 'right to erasure' into EU law to strengthen the 'right to be forgotten' online. Pursuant to Article 17 GDPR, individuals have the right to have their personal data erased without undue delay; and the right to end any processing of the data where such data are no longer necessary in relation to the purposes for which they are collected, or where the individual has withdrawn their consent or objected to the processing of personal data. Furthermore, companies and organisations that are considered data controllers under Article 4(7) GDPR must comply with **individuals' requests to take down links to personal information**. In a limited set of circumstances, this general obligation does not apply, including when the personal data are needed to exercise the **right of freedom of expression**, when there is a **legal obligation to keep that data**, and for **reasons of public interest** such as public health or statistical research purposes.

2019 *Google* v *Commission nationale de l'informatique et des libertés (CNIL)* case

The question of the **territorial scope of the 'right to be forgotten'** was central to the dispute arising between the French Data Protection Authority (*Commission Nationale de l'Informatique et des Libertés*, or CNIL) and Google. The CNIL asked Google, in its Decision 2015-047, to remove, **on a worldwide basis**, the links to web pages from the list of results displayed following a search conducted based on a person's name. Google refused to comply with that formal notice, and appealed the CNIL decision to fine Google for its refusal. The case reached the French supreme administrative court (*Conseil d'Etat*), which in turn referred a **question on the interpretation of the territorial scope of the right to be forgotten** to the CJEU for a preliminary ruling. The court asked the CJEU to clarify whether a search engine operator is obliged to carry out de-referencing on all search engines worldwide, on search engines provided in the European Union, or only on the search engine of the Member State in which the person concerned requested de-referencing.

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CJEU decision in *Google* v *CNIL*

Key findings

The CJEU Grand Chamber judgment *Google* v *CNIL* (C-507/17), delivered on 24 September 2019, finds that:

- As matter of principle, under the Data Protection Directive and under the GDPR, search engine operators are **not required to carry out de-referencing on all versions of its search engine** (i.e. worldwide de-referencing). The Court argues that numerous third countries do not recognise the right to de-referencing or have a different approach to this right and that EU law only envisages providing a high-level protection for personal data within the Union.
- As a result, search engine operators are asked to carry out **de-referencing on versions corresponding to all EU Member States** (i.e. EU-wide de-referencing), to ensure a consistent and high level of protection throughout the EU.
- However, the right to data protection is not an absolute right. A balance must be struck between the rights to **privacy and protection of personal data** guaranteed by Articles 7 and 8 of the Charter of Fundamental Rights of the EU, and the right to **freedom of information** guaranteed by Article 11 of the Charter, to decide the territorial scope of de-referencing.
- Furthermore, **EU law does not *per se* prohibit global de-referencing**. The authorities of the Member States remain competent to weigh up, in the light of **national standards of protection of fundamental rights**, a user's right to privacy and the protection of their personal data, and the right to freedom of information. After weighing those rights against each other, where appropriate, a national authority could order the search engine operator to carry out de-referencing concerning all versions of that search engine.
- Finally, search engines operators must put **geo-blocking measures** in place to effectively prevent or, at the very least, seriously discourage, internet users in the Member States from gaining access to the links, which appear on versions of that search engine outside the EU.

First reactions and comments

The French supreme administrative court must now decide on the merits of the case at national level in light of the CJEU decision. CNIL stresses that one of the key issues for the French court will be to assess **whether Google geo-blocking measures are adequate** in the specific case at hand.

Stakeholders from civil society and the technology sector were rather supportive of the CJEU decision. Article 19, an advocacy group for freedom of expression rights, welcomed the outcome of the case as a **victory for freedom of expression**. The Computer and Communications Industry Association stressed that the Court's decision recognises search engines' efforts to guarantee EU residents' rights to be delisted **without compromising constitutional guarantees from countries outside the EU**, including when freedom of information is at stake.

However, academics and commentators question whether the decision provides **suitable guidance** on the territorial scope of the 'right to be forgotten'. Some academics emphasise that the CJEU decision leaves **national authorities the opportunity to impose a worldwide 'right to be forgotten'** and argue this creates a **risk of fragmentation** in the enforcement of the 'right to be forgotten' in the EU. Other experts stress the discrepancy between the accessibility of data worldwide and the 'right to be forgotten' territorial scope of application, and call for **the EU legislator to intervene** to provide clarification.

Potential inconsistencies between several recent CJEU decisions regarding the territorial scope of EU law applied to the online environment have been pointed out. In *Google* v *CNIL* the CJEU limits the extraterritorial application of the GDPR, while in *Glawischnig-Piesczek* v *Facebook*, it imposes no territorial limitation on the removal or blocking of illegal online content in the application of the 2000/31 E-Commerce Directive. Furthermore, EU Directive 2017/541 on combatting terrorism imposes an obligation on Member States to obtain the removal of terrorist content hosted outside their territory.