

European Court Rules against Google, in Favour of Right to be Forgotten



*The EU's Court of Justice has ruled against Google in a case in which a Spanish citizen, backed by his national data protection authority, wanted the company to remove search links to an old local newspaper story related to his bankruptcy. **Jef Ausloos** of the Interdisciplinary Centre for Law and ICT (ICRI) of the University of Leuven explains some key issues in the case, arguing that implications should not be too extreme, but warns of the Court's prioritising of data subjects over internet users.*

The Court of Justice of the European Union (CJEU) finally released its long-awaited judgment in the **Google Spain (C-131/12)** case. In short, the Court decided that individuals do have a right to request search engines to remove links to webpages when the individual's name is used as a search query. This ruling cannot be overturned and is now referred back to the national court. Theoretically, it is still possible for Google to take this case to the European Court of Human Rights (based on **article 10 ECHR**) once the national Court makes a final decision.

Although the Case is often referred to as the *Right to be Forgotten* Case, it does not hinge upon the similarly named provision in the proposed **Data Protection Regulation**. Instead, the main legal basis in this decision was the Data Protection Directive 95/46 (hereafter: 'the Directive'), including the rights to object (art.14) and to erasure (12(b)). The case is particularly interesting because it lies at the intersection of data protection law, freedom of expression and intermediary liability rules (a detailed discussion on this interaction is available [here](#)).

The CJEU was **asked** to answer **three** main questions, relating to (1) the territorial scope of the Directive; (2) the material and personal scope of the Directive; and (3) whether or not data subjects have a right to object/erasure when it comes to search engines directly.

Scope of Application

With regard to the first two questions, the Court was rather straight-forward. To the extent that '*the operator of a search engine sets up in a Member State a branch or subsidiary which is intended to promote and sell advertising space offered by that engine and which orientates its activity towards the inhabitants of that Member State*', the processing falls within the territorial scope of application of the Directive (art.4(1)a) (§.60).

Given the fact that search engines 'collect', 'retrieve', 'record', 'organize', 'store' and 'make available', they do *process* personal data, and thus fall within the material scope of application of the Directive (art.2(b)) (§.28-29).

The Court also specified that search engines' activities can be distinguished from (and are additional to) those carried out by the original publisher(s). Hence, they should be considered *controllers* (art.2(d)) (§.41).

Right to be forgotten?

The third category of questions that was presented to the CJEU, related to the so-called right to be forgotten and constitutes the most controversial aspect in this case. Some of the key issues are:



Limited scope of the judgement

First of all it is important not to overemphasise the impact of this judgment on the right to freedom of expression (art. 11 **Charter**; art.10 **ECHR**). In this particular case, the request related specifically to the link between using an individual's name as a search query and the search result referring to a particular webpage. In other words, even if the request is granted, the same webpage can still be reached through other – maybe more relevant – search terms.



Will it be flooded with requests for erasure?
Photo by Robert Scoble CC-BY-2.0

No obligation to delete, but an obligation to balance

One should not conclude that any individual can now request search engines to delete links to webpages when their name is used as a search term. Instead, such requests will still have to comply with the requirements under article 12(b) (right to erasure) and/or article 14 (right to object). Put briefly, these provisions require a balance to be made between opposing rights and interests (§.74; 76). Hence, the plaintiff will have to substantiate his/her request and upon receiving such a request, the search engine will have to make the necessary balance. If the search engine does not grant the request, the CJEU specified that 'the data subject can bring the matter before the supervisory or judicial authority so that it carries out the necessary checks' (§.77). In other words, search engines are not obliged to comply with takedown requests, unless a supervisory or judicial authority issues them.

Independent responsibility of Search Engines

This observation ties back to the personal scope of the Directive. It was emphasised throughout the judgement that Google's activities can clearly be distinguished from those of the original publishers. The potential harm or negative consequences vis-à-vis the data subject will in many cases not result from an obscure publication in a local online newspaper, but rather from the widespread (and often decontextualised) availability of the information through search engines. A logical consequence is that even though the original content is published lawfully, data subjects will still be able to request the removal from search engines directly. It is important to distinguish this from potential requests directed to the original publisher (e.g. to remove or blur out his/her personal data) (§. 39).

Over- burdening search engines?

Upon first reading, one could claim the judgment puts to big a burden on search engines. After all, paragraph 38 specifically states that the operator of a search must comply with all the requirements in the Directive. It goes without saying that subjecting search engines to the full application of the data protection Directive, gives rise to **considerable concerns**. On the other hand, the judgment does specify that search engines only need to comply with the Directive 'within the framework of their responsibilities, powers and capabilities' (§.38; 83). It is still too early, however, to predict how this will play out in practice.

Presumption that data subject's rights trump all others

One of the most important concerns I have at this stage, concerns the Court's presumption that '*data subject's rights [...] override, as a general rule, the interest of internet users...*' as well as the economic interests of the search engine operator itself (§.81). In other words, it seems that the court suggests an *imbalance* of interests should be presumed, favouring privacy interests over all others. However, the Court does seem to nuance this by stating the balance might depend on the nature of the information, its sensitivity, the interest of the public, the role of the relevant individual in public life, etc. Needless to say that this wording is not conducive to legal certainty.

Implications



The ruling by the Court of Justice in Google Spain undoubtedly raised many eyebrows. Surprisingly it almost entirely goes against the [Opinion of the Advocate General](#) issued in June 2013. Nevertheless, it is still too early to draw general conclusions from the judgement. Even though at first glance it seems to considerably threaten freedom of expression/information interests, much of the wording seems to be very nuanced and limited in scope when looked at more closely. Additionally, the decision is entirely based on the existing legal framework (Directive 95/46). It is hard to predict how the judgment will interact with the future data protection Regulation, which is already being drafted.

This article gives the views of the author, and does not represent the position of the LSE Media Policy Project blog, nor of the London School of Economics.

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