GDR NEWS

ECJ ruling leaves door open on global right to be forgotten

Vincent Manancourt and Robert Hart

The European Court of Justice has said that EU law does not explicitly ban member state authorities from ordering delisting requests outside the bloc, but stopped short of decreeing that the right to be forgotten applies worldwide.

In a related ruling, the ECJ said search engines must balance privacy rights with the public interest when considering requests to remove sensitive data from search results.

Today's rulings lack some of the clarity of ECJ Advocate General Maciej Szpunar's opinions on the issue, which he published in January. In those, Szpunar called for search engines to automatically delist sensitive data on request, and said that expanding the territorial scope of the right to be forgotten would endanger freedom of expression worldwide.

First published on the *Global Data Review* website, 24 September 2019

The ECJ's decisions are in response to two cases referred by France's Council of State. The global delisting case stems from Google's challenge to French data watchdog CNIL's order that it should delist several links across all of its domain names. CNIL had fined Google €100,000 in 2016 for failing to follow the order.

The other case considered whether Google should delist search results that point to sensitive personal data under article 8 of the pre-GDPR EU Personal Data Directive. Four individuals known only as GC, AF, BH and ED appealed to the courts after CNIL had agreed with Google's decision not to delist the links.

The right in question allows individuals to demand search engines to remove certain results linked to personal data from search results – rather than from the website where the data originally appeared.

Global right to be forgotten

If the ECJ had sided with CNIL and the French government in the global delisting case, it would have given European data watchdogs the green light to order deindexing not only within the EU, but across the world, affecting countries such as the US that lack the right to be forgotten.

But in a decision that is broadly positive for Google, the court today ruled against CNIL, arguing that "currently, there is no obligation under EU law, for a search engine operator who grants a request for de-referencing made by a data subject, as the case may be, following an injunction from a supervisory or judicial authority of a member state, to carry out such a de-referencing on all the versions of its search engine."

But the court added that while EU law does not currently require search engines to carry out delisting worldwide, it does not ban them from doing so either. It also said that a delisting request in one member state would apply across the bloc.

"The authorities of the member states remain competent to weigh up, in the light of national standards of protection of fundamental rights, a data subject's right to privacy and the protection of personal data concerning him or her, on the one hand, and the right to freedom of information, on the other, and, after weighing those rights against each other, to order, where appropriate, the operator of that search engine to carry out a de-referencing concerning all versions of that search engine," the court said.

CNIL noted this caveat in its statement.

"The court specifies that, although there is no obligation of global de-referencing under EU law, it is also not forbidden. Thus, a supervisory authority, and so CNIL, has the authority to force a search engine operator to

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delist results on all the versions of the search engine if it is justified in some cases to guarantee the rights of the individuals concerned," a spokesperson said.

They added that CNIL would apply the court's decisions when dealing with the "hundreds of delisting requests" it receives every year. In the ECJ hearing back in September, CNIL **had** argued that the full effectiveness of the fundamental right to be delisted would only be protected properly with global bans.
Alex van der Wolk, a Morrison & Foerster partner in Brussels, said that the ECJ's approach appears to be a compromise.

"[It is] saying that EU law applies outside of the bloc but that it can't make a judgement on how that will interplay with local laws, and that it's rather for local authorities to do so."

Olivier Proust at Fieldfisher in Brussels said that rather than providing more certainty on territorial scope of the right to be forgotten, today's decision may have "opened Pandora's box".

"For internet users, there is also a risk that the right to de-referencing may apply differently in the future depending on the interpretations that will be made by the national supervisory authorities and how the freedom of expression is defined in each member state. In some countries, users may be able to obtain global de-referencing of search results, while in others this right will be limited to the territory of the EU," he said.

He said that for Google, the decision may turn out to be a Pyrrhic victory.

"It may have won on the general principle, but in practice it is likely to face an array of legal actions at a member-state level in the near future. Unfortunately, this decision does not provide absolute legal certainty on the interpretation of the right to be forgotten," he said.

Sensitive data

In the second case, the court said it was up to Google to decide whether to delist search results that contain sensitive data. This is a marked departure from Advocate General Szpunar's January **opinion**, which called for automatic removal of sensitive data on request.
The ECJ said that though privacy rights generally override the public's interest in having access to information, "that balance may be called into question depending on the nature of the information in question and its sensitivity for the data subject's private life and on the interest of the public in having that information, an interest which may vary, in particular, according to the role played by the data subject in public life."

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It said that when considering delisting requests, search engines should determine the “seriousness of the interference” with privacy rights and whether the link in question “is strictly necessary” for protecting the public interest in being able to access the webpage via an online search.

Morrison & Foerster’s van der Wolk said the ruling places a “hefty” responsibility on Google.

“The court is saying that Google has to do the balancing test on its own, I think that is a pretty hefty responsibility. It’s saying to Google that if you are not in control of your search engine, who is?” he said.

More reactions

In a statement, Peter Fleischer, a senior privacy counsel at Google, said: “Since 2014, we’ve worked hard to implement the right to be forgotten in Europe, and to strike a sensible balance between people’s rights of access to information and privacy. It’s good to see that the court agreed with our arguments.”

DLA Piper partner Patrick Van Eecke in Brussels praised the ECJ’s decision.

"I believe that the European Court made a wise and legally correct decision by acknowledging that the European data protection rules do not rule the world. If the judges decided otherwise … it would have set a precedent for other regimes to have their rules apply outside of their territory as well,” he said.

Maureen Daly at Beauchamps in Dublin said the case highlights the “continuing conflict” between the law and the internet.

“Some will be relieved that the [ECJ] did not extend EU law to other nations particularly at a time when the EU has been resisting attempts by other nations to access data stored in the EU,” she said.

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First published on the *Global Data Review* website, 24 September 2019

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First published on the *Global Data Review* website, 24 September 2019