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Forgive and Forget? The Right to be Forgotten

This toolkit aims to describe what the “right to be forgotten” is, outlines how an individual can exercise this right, and explains the wider implications this may have for individuals, the media and data controllers.

Introduction - What is the Right to be Forgotten?

In its judgment on 13th May 2014 in the case of [Google Spain SL, Google Inc. v Agencia Española De Protección De Datos, Mario Costeja González \(C-131/12\)](#) (the Google Spain Case) the Court of Justice of the European Union (CJEU) ruled that a “right to be forgotten” exists under the Data Protection Directive 95/46/EC (the Data Protection Directive). As the highest court in the European Union (EU), the CJEU is comprised of one judge from each member state and its rulings are applicable to every EU Member State. The CJEU held that individuals can request search engines to remove links to data about themselves that are “inaccurate ... inadequate, irrelevant or excessive in relation to the purposes of the processing”. The landmark judgment has generated an enormous amount of discussion, written commentary and controversy.

Below we provide a summary of the facts of the case, discuss what the “right to be forgotten” means in practice, consider the positive and negative implications of the CJEU’s judgment and question the right of privacy over the freedom of expression, before discussing how to make a request to a search engine for the removal of a link.

The facts of the Google Spain Case

In the Google Spain Case Mr González requested that Google Spain and Google Inc. remove links produced by its search results that detailed a notice given in a local newspaper about the auction of his property, which was necessary so that he could repay his social security debts. Mr González argued that since the matter had been resolved several years ago the search results were no longer relevant and ought to be removed as they contravened his right to privacy.

CJEU’s Decision

The CJEU held that the Data Protection Directive applies to search engine operators. These operators were found to be responsible for the processing of personal data, even if third parties publish the data. Article 2(b) of the Data Pro-

tection Directive defines the “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.” The judgment in the Google Spain Case held that there will be circumstances where individuals have the right to ask search engines to remove links provided that they contain personal data about them which is, as referenced above, “inaccurate ... inadequate, irrelevant or excessive” for data processing purposes.

The Court was eager to point out, however, that even where data meets the required criteria, there also needs to be a fair balance, in particular, between the interest of the individual’s fundamental rights, i.e., the right to privacy and the right to the protection of personal data against the right of the public to have access to the information and the freedom of expression. The judgment confirms that there might be situations where the right of the public to the information will override the right of the individual to the removal of the information. For example, “It’ll be harder, for example, to have a story from the 1990s about an arrest for assault removed if you’re a politician than if you’re a plumber”.¹ This balancing test will be exercised on a case-by-case basis and the elements that the Court will take into account include:

- the nature and sensitivity of the information;
- the role played by the data subject in public life;
- the age of the information; and
- the public interest in accessing the information.

Google argued that Google Spain amounted to not much more than a sales office for online advertisements and therefore the EU Data Protection Directive did not apply to the parent company Google Inc. The Court did not accept this argument and said, “no matter where the physical server of a company processing data is located, non-European companies, when offering services to European consumers, must apply the European rule”. Therefore, non-European companies, such as, a US search engine provider, will be subject to European data protection legislation when processing a European data subject’s data, regardless of the geographical location of the processing.

The Effect of the Decision in Practice

The judgment allows an individual to make an application for the link between his/her name and the information provided by the data controller (the person(s) who determine(s) the purposes for and the manner in which any personal data are processed, i.e. the search engine provider) to be removed from the search engine’s results’ list on condition

¹ Dave Lee, ‘What is “the right to be forgotten”?’ (BBC News, 13 May 2014) <<http://www.bbc.co.uk/news/technology-27394751>> accessed 6 Jan 2015

that the data meets the relevant criteria. The search engine does not however permanently delete the information from its original source; it simply does not allow the information to appear within the results of the internet search.

The Court of Amsterdam has applied the judgment of the Google Spain Case to a succeeding case and ruled that, "The [Google Spain] judgment does not intend to protect individuals against all negative communications on the Internet, but only against 'being pursued' for a long time by 'irrelevant', 'excessive' or 'unnecessarily defamatory' expressions". In this instance the Court of Amsterdam refused to allow a man's request for the removal of links to online publications that linked him to a crime he had been convicted of committing.

Data Protection Directive v draft General Data Protection Regulations

The CJEU in the Google Spain Case relied upon the 1995 Data Protection Directive (95/46), which was subsequently implemented into Spanish law. The corresponding legislation in the UK is the Data Protection Act 1998.² There has been a lot of discussion in the legal press as to whether the Google Spain Case went beyond the Data Protection Directive, especially given the fact that the draft General Data Protection Regulation (GDPR), first introduced in January 2012, has been widely reviewed and commented upon within the EU legislature. However, the EU has highlighted how Article 12, clauses (b) and (c) of the Data Protection Directive provide data subjects with the option to request that their data be deleted if it is no longer required. A data subject has:

"the right to obtain from the controller ... (b) ... the rectification, erasure or blocking of data the processing of which does not comply with the provisions of [the] Directive ... (c) notification to third parties to whom the data have been disclosed of any rectification, erasure or blocking."

Nonetheless, the area of data protection law in the EU is in a transitional state as the GDPR continues to progress between the legislative bodies and the Council of the European Union still needs to finalise its draft before final negotiations can be concluded. As presently drafted, the GDPR will strengthen a data subject's rights for a digital age. For example, the European Commission has suggested that companies provide evidence that data is still required or relevant and therefore cannot be deleted. In addition, the draft GDPR requires a data controller who provides a data subject's data to a third party to take "reasonable steps" to tell any third party about a data subject's request for that data to be deleted. In its consultation process the European Parliament extends this obligation by requesting the controller to "obtain from third parties the erasure of any links".³ The exceptions to this, however, are provided for in Article 17 of the draft GDPR, which states that the following areas of public interest: public health; the right of the freedom of expression; and data processed for historical, statistical and scientific purposes would prevent the right to be forgotten from being implemented.

² When implementing an EU Directive into its domestic legislation, each Member State has a certain amount of discretion as to how this is done. This is in contrast to an EU Regulation, which is implemented across each Member State (the number of which presently stands at 28) in exactly the same way.

³ Article 17, [European Parliament](#) proposed General Data Protection Regulation 12 March 2014

Positive and Negative Implications

An important implication of the judgment, as already stated, is the type of data that people can request data controllers to remove. This might be of particular importance to, for example, an individual that has been abused and does not wish for their abuser to be able to find out personal information about them online.

An individual can ask for information to be removed whether or not the continuing public availability of that content would be prejudicial to them. Furthermore, data subjects can request removal of links from search engines even when the original content was published lawfully. It may be that information that was once correct has now become inaccurate. Google search, for example, has now been operating for 16 years. Overall, this means that the threshold for the individual to maintain their privacy has been lowered, which is a positive implication for a person seeking to remove the link between their name and the information, but implies an obligation on the data controller to remove such information at the request of the said individual.

Individuals who apply to have link(s) removed from search engines need to be aware of the Streisand effect. Named after the singer and actress Barbra Streisand, the effect of this is where the data subject becomes more talked about as opposed to forgotten if he/she pursues matters to a resolution, especially if litigation is involved. The sale of Mr González's property to pay his debts, for example, has become known across the globe and consigned to judicial history; this is contrary to Mr Gonzalez's original wish, which was for his identity and the sale of his property to remain separate.

There has also been criticism of the judgment in that it allows individuals and search engines to alter archives and the public's perception of history. Individuals who have been mischievous may apply for their indiscretions to be removed from search engine results in order to demonstrate good character for future employment opportunities. One side of the argument is that this practice distorts reality, while the other side believes that it is a more practical approach to the use of the Internet today.

What the Decision Means for Search Engines

Although search engines as data controllers are not liable for the content published, all search engines need to be conscious of the judgment in the Google Spain Case. Non-EU parent companies that process data through their EU subsidiaries will be aware that this decision applies to them. This means that the parent company needs to provide the appropriate infrastructure required in order to deal with requests, received as a result of this judgment, in a time efficient manner; a process that may prove to be financially prohibitive due to the resources needed to assess individual cases.

The Article 29 Working Party (Article 29 WP), an independent advisory body on data protection and privacy established under Article 29 of the Data Protection Directive 95/46/EC, has now published a set of [guidelines](#) regarding the broadening obligations of search engines following the Google Spain Case. According to the Article 29 WP, EU law must be sufficiently robust so as to prevent circumvention and ensure that data subjects' rights are effectively protected. To this extent de-listing links should not only be applied to national domains, such as .co.uk or .de but should also be extended to "all relevant domains, including .com". The result is that, search engines need to be careful when de-listing links in practice to ensure the effectiveness of the action from the view of the data subject.

Privacy v Freedom of Expression

The CJEU's judgment puts individuals in a strong position in allowing them to protect their privacy and personal data and this has caused a lot of concern for supporters of the freedom of expression. Many media companies at the outset of the judgment voiced their concern that other human rights, such as, the freedom of the media or the freedom of expression would be compromised in favour of the right to privacy. However, the Google Spain Case does place the right of privacy higher than other individual rights. The CJEU judgment makes it clear that search engines must deal with requests for the removal of particular URLs on an individual, case by case basis and balance the right to privacy against the rights mentioned above. When balancing these juxtaposed positions search engines must consider whether any public interest in keeping the information in question in the public domain outweighs that of the individual's privacy. Consideration also needs to be given to the type of information in contention, especially its sensitivity to the data subject. One potential exemption to the CJEU judgment is requests from people who lead a public life due to the nature of their work.

Google's Transparency Report details those requests received by the search engine in the first five months following the CJEU's judgment, (see below for further details) and illustrates that requests to be forgotten are not removed as a matter of course, but are considered on their individual merits. While it is not a requirement of the judgment, Google has taken to notifying each website concerned after one of its articles has been removed from Google's search results. Angered by some of the decisions which Google has taken, such as Google's decision to remove a blog post by its economics editor, Robert Peston, the BBC has said that it will shortly be producing a list of each URL Google has advised the BBC it has removed. In addition, this has caused publishers to speculate why certain links have been removed by the search engine from its results. Newspaper, The Telegraph, has already produced and will be maintaining a list of all its articles that have been affected by the CJEU's judgment.

How Search Engines Have Responded

The major search engine providers in Europe have implemented web forms to request a privacy related removal of search results, which can be found here: [Bing](#), [Google](#), [Yahoo!](#).

Google has also instituted the so-called [Advisory Council](#) to enrich the discussion on the "right to be forgotten" and determine the best way to comply with the ruling.

How can an individual request a link to be removed?

Each web form asks the requester to provide personal details as well as information about the case. Amongst other things, the individual has to issue every URL it would like to be removed, including a specific reason(s) for each URL. An employee of the respective search engine provider will then manually assess the request and to make a decision as to whether to uphold or reject each request.

Note: It might be reasonable for an individual to seek removal directly from the publisher first if the publication itself is inaccurate.

Possible results

The outcome of an assessment could be either removal or (partial) denial. The individual will be informed about the decision. In the case of denial, the notification will also contain reasoning why one (or more) URL requested will not be removed. The individual is then eligible to ask the appropriate Data Protection Authority, listed [here](#), to review the case. In the UK, this body is called the Information Commissioner’s Office. In the case of removal, it is important to be aware of the following: the publisher will also receive a notification (which theoretically enables him to re-publish the content under a different URL) and the information is only removed from the local search results, for example, “.co.uk”, related to the individual’s name (which means that the information still can be found using other search terms or a different domain of the search engine, for example, “.com”).

Note: If a person gets a publisher to take down information from its website, it could be worthwhile to additionally ask search engine providers for removal. It takes some time (up to two months) for information to disappear from the search results due to varying re-indexing cycles.

Examples

According to its Transparency Report, Google has received over 19,500 removal requests (including 64,000 URLs) from the UK, of which almost two thirds have been denied. So far, the website most impacted by privacy related requests is Facebook. This report also includes an analysis of the types of requests Google has received so far. The table below highlights examples of requests sent to Google UK and demonstrates the kind of requests have been granted or denied.

REMOVAL

- 3 (out of more than 50) links to articles about a botched medical procedure not mentioning the procedure itself
- link to a summary of judgments including a man’s guilty verdict (conviction was spent under the Rehabilitation of Offenders Act)

DENIAL

- links to articles on embarrassing Internet content a media professional posted himself
- links to articles covering an investigation of sexual abuse accusations against a clergyman
- link to a petition demanding the removal of a public official
- links to articles that reference an individual’s dismissal for sexual crimes committed in the course of employment

Complaints to Data Protection Authorities

In September 2014, the Article 29 WP asked all Member States and their respective data protection authorities to apply a coordinated and consistent approach when dealing with complaints from individuals whose requests to be “de-



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linked” have been refused. The Article 29 WP [press release](#), issued after it had liaised with stakeholders and media companies, provides details of the relevant procedure to be adopted. The procedure will establish a network of specific personnel for data protection authorities to communicate with. The network will produce and maintain a record of decisions made about complaints as well as a guide to recognising similar cases and more complex matters.

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References

Title	Author	Source
Press release on the Google Spain Case, 22 Sept 2014	Article 29 Working Party	http://bit.ly/ZrCb8d
Guidelines on the implementation of the Court of Justice of the European Union judgment on “Google Spain and Inc. v. Agencia Española de Protección de Datos (AEPD) and Mario Costeja González” C-131/12	Article 29 Working Party	http://ec.europa.eu/justice/data-protection/article-29/documentation/opinion-recommendation/files/2014/wp225_en.pdf
Removal request web form	Bing, Microsoft	https://www.bing.com/webmaster/tools/eu-privacy-request
Google Inc. and Google Spain SL v Agencia Española de Protección de Datos (AEPD), Mario Costeja González (Case C-131/12)	CJEU	http://curia.europa.eu/juris/liste.jsf?num=C-131/12#
Press release on the Google Spain Case, 13 May 2014	CJEU	http://curia.europa.eu/jcms/upload/docs/application/pdf/2014-05/cp140070en.pdf
List of European Data Authorities	European Commission	http://ec.europa.eu/justice/data-protection/bodies/authorities/eu/index_en.htm



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Texts adopted General Data Protection Regulations 12 March 2014	European Parliament	http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2014-0212+0+DOC+XML+V0//EN
Article 19s call to Google over 'right to be forgotten' ruling	Glenslade, Roy (The Guardian)	http://www.theguardian.com/media/greenslade/2014/oct/16/freedom-of-speech-google
Transparency Report on European privacy in search	Google	http://www.google.com/transparency-report/removals/europeprivacy/?hl=en and http://www.google.com/transparency-report/removals/europeprivacy/faq/?hl=en
Removal request web form	Google	https://support.google.com/legal/contact/lr_eudpa?product=websearch
Google Advisory Council	Google	https://www.google.com/advisorycouncil/
The right to privacy catches up with search engines: the unforgettable decision in Google Spain v AEPD	James, Stephen	C.T.L.R. 2014, 20(5), 130-133



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Google Spain SL and Google Inc. v AEPD and Mario Costeja Gonzalez: protection of personal data, freedom of information and the "right to be forgotten"	Kelsey, Elizabeth	E.H.R.L.R. 2014, 4, 395-400
BBC to publish "right to be forgotten" removal list	Lee, Dave (BBC News)	http://www.bbc.co.uk/news/technology-29658085
What is the right to be forgotten?	Lee, Dave (BBC News)	http://www.bbc.co.uk/news/technology-27394751
Why has Google cast me into oblivion?	Peston, Robert (BBC News)	http://www.bbc.co.uk/news/business-28130581
Four Things We've Learned from the EU Google Judgment	Smith, David	http://iconewsblog.wordpress.com/2014/05/20/four-things-weve-learned-from-the-eu-google-judgment/
Telegraph stories affected by EU 'right to be forgotten'	The Telegraph	http://www.telegraph.co.uk/technology/google/11036257/Telegraph-stories-affected-by-EU-right-to-be-forgotten.html
Rehabilitation of Offenders Act 1974	UK Government	http://www.legislation.gov.uk/ukpga/1974/53



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The wider effect of the 'right to be forgotten' case Ustaran, Eduardo

PDP 14 8 (8)

Removal request web form

Yahoo!

https://io.help.yahoo.com/contact/index?y=PROD_SRCH&token=w5FCchB1dWGbC2RE0kcjj0u65u86GoeqUkmqtTbcuO%252BLU%252FUQgc3BzwNZtXp6XEXn5YwJ6Wu6A9MCYnw7SzQy5BySKiGUpoj0xug9Sr7JfZdSQjOyA5v2Of2mZTMotlsehDS1xQqu1g%253D&locale=en_GB&page=contactform&selectedChannel=email-icon&isVip=false

Remove search results from Yahoo Search

Yahoo!

<https://uk.help.yahoo.com/kb/search/remove-search-results-yahoo-search-sln4530.html?impressions=true>