TERRITORIAL APPLICATION OF THE "RIGHT TO BE FORGOTTEN"

The Court of Justice of the European Union ("**CJEU**") rendered a judgement concerning the territorial application of the obligation of search engine operators to carry out the de-referencing of personal data, establishing that search engine operators are required to carry out the de-referencing only on the search engine versions corresponding to EU Member States

Key issues

- **The "right to be forgotten" can be applied only in EU:** The CJEU held that there is no obligation under EU law which requires search engine operators to de-reference personal data of individuals on all the versions of its search engines, even though it does not prohibits such a practice.
- **Search engine operators have additional obligations:** Search engine operators must institute internal mechanism which will ensure that the de-referenced information cannot be accessed from an EU Member State.
- **Member States will evaluate the adequacy of de-referencing in all Member States:** Member States will be in charge with the evaluation of the appropriateness of the de-referencing of the links concerning all version of the search engines corresponding to all Member States, and of the effectiveness of the measures preventing the access to de-referenced information, from the EU.

BACKGROUND

The French Council of State requested the CJEU to establish whether the obligation of search engine operators to carry out the de-referencing should be applied on all versions of its search engines or only on the versions of the search engines corresponding to EU all Member States or of the Member State of residence of the person benefiting from the de-referencing.

On 24 September 2019, the CJEU held in the case of Google LLC (successor to Google Inc.) v Commission nationale de l'informatique et des libertes ("CNIL") that search engine operators are required to carry out the de-referencing on the versions corresponding to all the Member States. Additionally, search engine operators are required to put in place measures deterring internet users from gaining access, from one of the Member States, to the links which appear on versions of the search engine outside the EU.

The right to be forgotten

In May 2014, the CJEU established on the case of *Google Spain SL, Google Inc. v Spanish Data Protection Authority and Mario Costeja Gonzalez* that search engine operators are responsible for the processing of personal data which appear on web pages as published by third parties. The CJEU held that individuals may request the search engine operators to remove from the list of results links which include their personal information. Moreover, individuals may bring the matter before the competent authority, in order to obtain the removal of the link, if the search engine operator refuses to grant their request.

Lack of clarity of the territorial application of the "right to be forgotten"

Although the CJEU established the existence and content of the "right to be forgotten", it did not further detailed the territorial application of such right. Given

that search engine operators carry out commercial activities that are intricately interlinking multiple jurisdiction during their day to day course of business, the question of its territorial application had to be clarified, in order to ensure the uniform application of the right recognised by the CJEU by the competent authorities.

The lack of clarity of the territorial application of the right to be forgotten generated the dispute involving Google Inc. and CNIL, the French Data Protection Authority. In 2015, Google Inc. was fined by CNIL for the refusal to remove links to sensitive personal data on all the versions of the search engine available worldwide. Google Inc. requested before the French Council of State the annulment of the fine as it deemed that the right to de-referencing, as defined by the CJEU in Case no. C-131/12 (*Google Spain SL, Google Inc. v Spanish Data Protection Authority and Mario Costeja Gonzalez)*, should not be applied without geographic limitation.

The French Council of State referred the dispute to the CJEU, to ascertain what is the correct territorial application of the "right to be forgotten". More specifically, the CJEU had to establish whether search engine operators were to remove the links to personal data of individuals on all the versions of their search engines, without any geographic limitation, or if it should be limited to the search engines corresponding to all EU Member States or to the search engine corresponding to the Member State where the person requesting the removal of the link is residing.

The CJEU analysed the scope of application of the EU legislation on the protection of personal data in the context of the global access of internet users to information on-line, the particularities of the business activities of search engine operators and the right to freedom of information.

Decision of the CJEU regarding the territorial application of the "right to be forgotten"

The CJEU held that there is no obligation under EU law which requires search engine operators to de-reference personal data of individuals on all the versions of its search engines, even though it does not prohibits such a practice.

Nevertheless, the EU Law does require the search engine operators to de-reference personal data of individuals on all the versions of its search engine corresponding to all the Member States.

Additionally, the de-registration must be performed in a manner which can effectively protect the personal data of the subject of the request within the EU. Therefore, search engine operators are also required to implement measures which will effectively prevent or discourage an internet user conducting a search from a Member State to obtain the removed results from a search engine corresponding to a jurisdiction located outside of the EU.

EU Member States will be in charge with the evaluation of the appropriateness of the de-referencing of the links including personal data concerning all version of the search engines corresponding to all EU Member States. Additionally, the EU Member States will also be in charge with the evaluation of the adequacy of the measures adopted by search engine operators to prevent the access to the de-referenced links from the Member States. The CJEU did not provide any evaluation criteria for these aspects, and it remains for the national courts or authorities to weigh in all the interests involved, to reach a proportionate solution.

Impact of the decision

The CJEU decision in the case of Google LLC v CNIL brings clarity with regards to territorial application of the right to be forgotten and establishes the obligations the search operators have, in order to ensure the effective application of the "right to be forgotten".

Firstly, it was established that the right to be forgotten is applicable only within the EU, as the EU data protection law does not extend the scope of its application outside the EU, nor does it implement cooperation instruments or mechanisms for its application outside the EU.

Secondly, search engine operators are required to carry out the de-referencing in all the Members States and must institute effective internal mechanism which will ensure that the de-referenced information cannot be accessed from an EU Member State.

While the CJEU explained the territorial application of the "right to be forgotten", it did not implement a criteria for evaluating the opportunity of obtaining the de-referencing on all the versions of the search engines available in the EU and for evaluating the appropriateness of the measures imposed by search engine operators to prevent access to de-referenced links within the EU. The lack of clear criteria for evaluating these aspects, given the complexity of the issue, could give rise to more uncertainty within the national courts and authorities, when assessing the application of the "right to be forgotten".

Further on, it is also expected that the clarifications brought to the territorial application of the GDPR in this case will also serve in other cases where territorial application is disputed and further limitations of GDPR application in other commercial areas may be argued.

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