

**THE EU COURT OF JUSTICE’S GOOGLE SPAIN DECISION:
WHAT IT MEANS FOR CONSUMERS, SEARCH ENGINES, AND WEB PUBLISHERS**

On 13 May 2014, the Court of Justice of the European Union (CJEU) handed down its judgment in a landmark privacy case, *Google Spain SL, Google Inc. v Agencia Española de Protección de Datos (AEPD), Mario Costeja González* ([Case C-131/12](#)). The CJEU held that EU data protection laws apply to Google’s search engine and that Google has an obligation to remove personal data from Google search results upon request under certain conditions. While privacy advocates welcomed the Court’s holding that Google is subject to EU privacy laws, many observers wondered how the decision might impact other Internet businesses or affect online freedom of expression.

This paper summarises the facts and key holdings of the *Google Spain* case and analyses its implications for the Internet. A close analysis of the Court’s reasoning suggests that its impact might be more limited in scope than some early accounts have suggested. Initial input from data protection authorities reinforces this view; the UK Information Commissioner’s Office, for example, has recently advised that “*there are some who are seeking to draw out much wider implications of the judgment for freedom of expression in general. It is important to keep the implications in proportion and recognise that there is no absolute right to have links removed.*”¹

Background

The *Google Spain* case originates from a complaint made by a Spanish national, Mario Costeja González, to the Spanish data protection authority (AEPD), against Google Inc. (the U.S. company), Google Spain (Google’s Spanish subsidiary), and a Spanish newspaper, *La Vanguardia*. In 1998, on the order of Spanish authorities, *La Vanguardia* published several articles about a real estate auction carried out to recover social security debts owed by Mr. González. Mr. González, contending that these proceedings had been “fully resolved for a number of years” and that the information was therefore “now entirely irrelevant,” asked for the articles to be removed both from *La Vanguardia*’s online archive and from Google’s search results when users entered a search query using Mr. González’s full name.

The AEPD rejected Mr. González’s complaint against *La Vanguardia*, concluding that the newspaper’s publication had been and remained lawful, but upheld Mr. González’s claim against Google Inc. and Google Spain. Both companies challenged the AEPD ruling before the Audiencia Nacional (Spain’s National High Court). That Court then applied to the CJEU for its views on several questions relating to the jurisdictional reach and substantive requirements of EU data protection law.

¹ Information Commissioner’s Office blog, “Four Things We’ve Learned from the Google EU Judgment,” available at <http://iconewsblog.wordpress.com/2014/05/20/four-things-weve-learned-from-the-eu-google-judgment/>



The Court's Ruling

The CJEU's decision sets forth three major holdings:

1. **Google “processes” personal data and is a data “controller” under EU law.** Google argued that its search engine activities—and in particular, its finding and indexing data without altering that data—do not constitute “processing” of personal data under EU law. Google also argued that, even if these activities do constitute “processing,” Google cannot be deemed a “controller” of this data processing “since it has no knowledge of these data and does not exercise control over the data” (para. 22). Google also argued that the “controllers” of the personal data in this case—and therefore the entities responsible for complying with EU data protection rules—are the websites that originally published the data.

The CJEU rejected these arguments. First, it held that Google’s collection, storage, organization, and disclosure of personal data in the course of its search engine activities constitute “processing” of personal data within the meaning of the EU Data Protection Directive. The fact that the personal data at issue had already been published online did not alter that decision. Second, invoking the test for controllership under EU law, the Court held that Google was a “controller” of this personal data because Google itself “determines the purposes and means of” its processing (para. 33). The Court also noted the “decisive role” that search engines play in the dissemination of personal data online (para. 36)—a fact underscored in this case by Google’s leading position in the Spanish search market (para. 43).

2. **Google’s search activities are subject to Spanish data protection law because Google’s Spanish subsidiary sells search advertising for Google.** Google argued that its search engine activities were not subject to European data protection law because “Google Inc. [located in the United States] operates Google Search without any intervention on the part of Google Spain; the latter’s activity is limited to providing support to the Google group’s advertising activity which is separate from its search engine service” (para. 51). These arguments were consistent with arguments Google has made in the past when EU Member State data protection authorities have sought to investigate and sanction Google in relation to its privacy practices.

The CJEU rejected these arguments as well. It held that Google’s search engine activities are covered by EU data protection law because the relevant test, under the EU Data Protection Directive, is whether the data processing in question is “carried out in the context of the activities of an establishment” within a Member State. Applying this test, the Court held that “the activities of the operator of the search engine [Google Inc.] and those of its establishment situated in the Member State concerned [Google Spain] are inextricably linked since the activities relating to the advertising space constitute the means of rendering



the search engine at issue economically profitable and that engine is, at the same time, the means enabling those activities to be performed” (para. 56). “Since [Google Search] results [are] accompanied, on the same page, by the display of advertising linked to the search terms, it is clear that the processing of personal data in question is carried out in the context of the commercial and advertising activity of the controller’s establishment” (para. 57). The Court also held that allowing Google to “escape” these obligations under EU law “would compromise the directive’s effectiveness and the effective and complete protection of the fundamental rights and freedoms of natural persons” (para. 58).

3. **EU law may require Google to remove search results linked to search queries “on the basis of a person’s name” unless that person’s privacy interests are outweighed by the public interest in access to the information involved.** The EU Data Protection Directive provides, in Articles 12 and 14, that individuals have rights of rectification, erasure, or blocking of personal data about them, including in relation to information that is inaccurate or out of date (para. 70). The Court held that these rights could require search engine operators such as Google to remove search results that process personal data and that are linked to searches “on the basis of a person’s name.”

The Court reasoned that search engine operators, as data controllers, may process data only if they have a legal basis to do so under EU law. The primary basis for Google to process the data in question, according to the Court, is Article 7(f) of the Directive. Article 7(f) allows a controller to process data when “processing is necessary for the purposes of the legitimate interests pursued by the controller or by the third party or parties to whom the data are disclosed.” The Court acknowledged that Google has a legitimate economic interest in operating its search engine, but held that, pursuant to Article 7(f) of the Directive, such interests are as a general rule “overridden by the interests for fundamental rights and freedoms of the data subject,” including where the data in question are “inadequate, irrelevant or excessive in relation to the purposes of the data processing” (para. 92). According to the Court, Google

“enables any internet user to obtain through the list of results a structured overview of the information relating to that individual that can be found on the internet — information which potentially concerns a vast number of aspects of his private life and which, without the search engine, could not have been interconnected or could have been only with great difficulty — and thereby to establish a more or less detailed profile of him. Furthermore, the effect of the interference with those rights of the data subject is heightened on account of the important role played by the internet and search engines in modern society, which render the information contained in such a list of results ubiquitous” (para. 80).

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The Court recognized that requiring Google to remove links to personal data “could, depending on the information at issue, have effects upon the legitimate interests of internet users potentially interested in having access to that information” (para. 81). It therefore held that, in such situations, “**a fair balance should be sought in particular between that interest [of internet users] and the data subject’s fundamental rights**” (*id.*) (emphasis added). The Court explained:

“Whilst it is true that the data subject’s rights . . . override, as a general rule, that interest of internet users [in accessing the information], that balance may however depend, in specific cases, 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” (para. 81).

- 4. Although Google may be required to block access to personal information, the publisher of that information is not necessarily subject to the same obligation.** Google argued that rather than requiring it to block the content, the Court should instead require *La Vanguardia* – the publisher of the original articles in question – to remove the content from its website. Again, the Court rejected Google’s claim. Publishers of content on web pages, in the Court’s view, are situated differently than search engines. Publishers could, for example, potentially benefit from an exception in the Directive that allows for data processing carried out “solely for journalistic purposes” (para. 85). Google, as a search engine, (in contrast to *La Vanguardia*) could not avail itself of this exception (*id.*). Moreover, because Google search results make access to personal information “appreciably easier,” including the information in a search result was likely to have a far greater impact on a data subject’s privacy than simply publishing the information on a web page. As a result, the balancing of the data subject’s privacy interests against those of the general public might be different for search engines like Google than for publishers (para. 87).

What the Ruling Means For Publishers

Shortly after the *Google Spain* decision was announced, some observers wondered whether the decision might also apply to publishers such that data subjects could demand that publishers remove access to articles containing personal data. Critics argued that such a result could curtail freedom of expression on the Internet and open the door to online censorship in the name of data privacy – a 21st century form of book burning.



Google also highlighted this threat, saying that the decision was concerning for both “search engines and online publishers.”²

A close reading of the Court’s decision, however, suggests that these concerns may be overblown. As already noted, the Court squarely held that search engines may be subject to obligations that are quite distinct from those imposed on online publishers. As the UK Information Commissioner’s Office explained, “*the original publication and the search engine are considered separately: the public record of a newspaper may not be deleted even if the link to it from a search website is removed.*”³

In part, this is because publishers (and, by extension, journalists) benefit from a special exception to the access right in the Data Protection Directive for processing carried out “solely for journalistic purposes” (para. 85). Where the exception applies, a newspaper or other publisher would have no obligation to take down or otherwise limit access to articles containing personal data.

The Court also noted that, even where publication is not covered by the journalistic exception, the privacy impact on a data subject of a single article on a single website is typically far less than the impact of appearing in Google search results, given how much more “findable” personal data is in search results as compared to an individual web page, and given that search engines effectively compile personal data from multiple sources to create a distinct user profile. These factors, in the Court’s view, mean that Google search results are “liable to constitute a more significant interference with the data subject’s fundamental right to privacy than the publication on the web page” (para. 87).

The European Commission, in a recent Factsheet published by the Directorate General for Justice, echoed this view. As DG Justice explained, “Removing irrelevant and outdated links is not tantamount to delet[ing] content. . . . While the Court ordered Google to delete access to the information deemed irrelevant by the Spanish citizen, it also emphasised that the content of the underlying newspaper archive should not be changed in the name of data protection The Spanish citizen’s data is still accessible but is no longer ubiquitous. This is enough for the citizen’s privacy to be respected.”⁴

Finally, the CJEU was clear that where the public interest in access to the information involved outweighs the individual’s private interest, the information need not be blocked. Where journalistic content involves issues of

² See The New American, “EU Court Invents “Right” to be Forgotten, Orders Google to Obey,” May 15, 2014, available at: <http://www.thenewamerican.com/world-news/europe/item/18269-eu-court-invents-right-to-be-forgotten-orders-google-to-obey>.

³ *Supra* note 1.

⁴ See European Commission Directorate for Justice “Factsheet on the ‘Right to be Forgotten’ ruling (C-131/12)”, available at: http://ec.europa.eu/justice/data-protection/files/factsheets/factsheet_data_protection_en.pdf



importance, the public interest may indeed outweigh the private one – again suggesting that the impact of the Court’s judgment may be limited.

These aspects of the Court’s ruling suggest that online publishers may have relatively little to fear from the decision and are significantly less likely than Google to be forced to remove content from their websites pursuant to a request from a data subject.

What the Ruling Means For Search Engines

Google controls around 90% of the search engine market in Europe.⁵ As a result, much analysis has focused on the impact of the Court’s ruling on Google. But analysis has yet to determine how other search engine providers, both horizontal and vertical, might be impacted by the decision.

The first question that merits consideration is whether EU data protection law will extend to other search engine providers – and in particular, providers of more specialized or localized search services – in the same way that it does to Google. As already noted, in concluding that Google Inc. was subject to Spanish data protection law, the Court relied heavily on the fact that Google Spain sold advertising linked to Google Inc.’s operation of the search engine. In the Court’s view, this conduct clearly met the criteria set forth in the EU Data Protection Directive, which extends EU law to data processing “carried out in the context of the activities of an establishment” within a Member State. This test, however, is highly fact specific and will apply differently to different search engines: specifically, if a search engine does not have an “establishment” within a Member State that sells search advertising, then the jurisdictional basis articulated by the Court for applying Spanish data protection law to Google might not apply.

The Directive does include other tests under which jurisdiction can be established (for example, use of equipment in a Member State to process data). These tests are likewise highly fact specific, and how they will apply from one search engine to another will depend on the individual operator’s practices. The proposed General Data Protection Regulation, if adopted, may introduce greater clarity governing the application of EU data protection law, premised on the controller’s main establishment and/or whether that controller targets data subjects in a particular Member State.

Also relevant in determining whether a given search engine operator will be subject to the “right to be forgotten,” the Court’s decision against Google turns on a balancing test that considers various factors to determine whether Google has a “legitimate interest” in processing the data of the individual concerned. The Court was clear that in virtually all (if not all) cases, the privacy interests of the data subject in removing

⁵ See Search Market Share, April 2014, available at: http://theword.co.uk/info/search_engine_market.html.



personal data will outweigh the economic interests of the search engine in processing and displaying such data. But the Court also said that the *public* interest in accessing such information is also highly relevant. Where the public interest is substantial, it may outweigh the data subject’s privacy interests and lead to a finding that the personal information should not be removed.

In the *Google Spain* case, the Court found that Google’s publication of search results containing information on the data subject had a major impact on that subject’s privacy rights for two reasons: first, because the search results enabled any internet user to obtain information that could not have otherwise been found or interconnected except “with great difficulty”; and second, because the “role played by the internet and search engines in modern society . . . render the information contained in such a list of results ubiquitous” (para. 80) The Court remanded the matter to the Spanish Courts to perform the final weighing of private versus public interests, however.

These factors raise questions as to how the judgment will apply to search engines other than Google. Whilst many horizontal search engines may, like Google, enable any Internet user to obtain personal information about a data subject that could not otherwise have been obtained easily, the second factor – relating to the *ubiquity* of information – may be particularly unique to Google. Only Google has a search market share approaching or exceeding 90% in Europe. As a result, it is arguable whether search results on search engines offering more specialized search services, for example, would have the same privacy impact as search results on Google. To the extent that vertical search engines (*e.g.*, travel sites, shopping sites, etc.) collect and display a significantly smaller fraction of personal data about any given data subject than horizontal search engines, their impact on the data subject’s privacy interests are likely to be correspondingly lower as well.

Google CEO Larry Page claims that the new rule could create challenges for internet start-ups. But the reality seems less straight-forward. The judgment so far is limited to search engine operators, and does not necessarily impact online service providers more broadly. Moreover, many start-up search engines may operate offices that sell search advertising in only one or two EU Member States, and possibly none. And judging by the more than two dozen complaints filed over the last five years by web and tech firms concerned about Google’s alleged anti-competitive practices, it may well be that start-ups view *Google* as more of a threat to their business than the CJEU’s judgment.

In short, although search engines – and in particular providers of horizontal search services – are right to be concerned about the impact of the Court’s decision, it remains to be determined whether the full universe of search service operators are in the same position as Google. And regardless of whether other search engines are bound to comply with privacy take-down requests, Google is, by dint of its sheer scale and market share, likely to receive the lion’s share of requests in practice.



What the Ruling Means for Consumers

The impact of the decision on consumer rights is complex. Privacy and consumer advocates have been mixed in their responses to the ruling. Many privacy advocates have long pushed for a decision by European courts requiring Google to comply with European data protection laws which they are currently ignoring and are operating outside of; the CJEU does exactly that, holding that Member State privacy rules reach Google, at least in those markets where Google sells search advertising via EU-established subsidiaries. Prominent advocates for the “right to be forgotten,” including EU Commission Vice President Viviane Reding, also welcomed the Court’s judgment, viewing the development of such a right as a “clear victory for the protection of personal data of Europeans.”⁶

But privacy advocates also have been disturbed by the ruling’s implications for free speech on the Internet. For example, Big Brother Watch, a UK privacy NGO, expressed concern that the decision risked taking Europe into “very dangerous territory” and that “if we start to make intermediaries responsible for the actions of the content of other people, you’re establishing a model that leads to greater surveillance and a risk of censorship.”⁷ Some commentators also expressed concern at the quandary the Court placed search engine providers in by asking them to effectively determine what the “public interest” is in specific web content.⁸

A close look at the decision suggests that the judgment’s impact on freedom of expression on the Internet may be more limited than it first appears, however. Google’s CEO takes the view that by giving users a right to be forgotten, the Court is on a collision course with the “right to know.” But the Court’s judgment seems less focused on the right to know *per se*, and more focused on Google’s right to *share* what it knows with everyone on the internet. Europe’s citizens may actually find themselves better able to “speak” online following the Court’s judgment than before it. By conferring on Europeans a right to make “forget me” requests, the Court unquestionably empowers them to exercise greater control over how their own digital histories are written.

For those who equate user control with censorship, it is important to remember that many publishers—particularly those engaged in journalism — will be under no obligation to comply with “forget me” requests. In addition, the Court explicitly recognized that search engines faced with such requests need to balance the privacy interests of the individual against the public interest in access to the information. Where there is a strong public interest in accessing the information, search engines will have solid grounds to refuse to remove

⁶ See USA Today, “New European Ruling Game-Changing for U.S. Companies,” available at:

<http://www.usatoday.com/story/money/business/2014/05/13/google-search-european-court-of-justice/9027645/>.

⁷ See Big Brother Watch, “The ECJ Ruling Does Not Provide the Right to be Forgotten,” available at:

<http://www.bigbrotherwatch.org.uk/home/2014/05/ecj-ruling-provide-right-forgotten.html>.

⁸ See Guardian, “Right to be forgotten ruling creates quagmire for Google et al”, available at:

<http://www.theguardian.com/commentisfree/2014/may/13/right-to-be-forgotten-ruling-quagmire-google>.



information. To quote the European Commission’s Justice Directorate, “the right to get your data erased is not absolute and has clear limits.”⁹

As noted above, some advocates have raised concerns that the decision appears to leave search engine providers the responsibility alone to weigh the public interest and perform the “balancing test” when they receive “forget me” requests. Only time will tell if this fear is justified. Given the lack of clarity or criteria in the decision to guide search engine operators seeking to evaluate the balancing test, search engine providers are likely to turn, at least for now, to data protection authorities for guidance. The Article 29 Working Party is currently working to produce guidelines, expected to be released around September, that will help to clarify how search engines should apply the balancing test in practice. There is also a body of European Court of Human Rights case law that will help to steer outcomes in these cases. Ideally these and other sources will counterbalance the influence of search engines on the public record.

Conclusion

As with many CJEU judgments, time will be required before the full impact becomes clear. That said, stepping back from the ruling (and the outcry in its wake), initial conclusions are emerging, among them:

- The CJEU’s judgment will unquestionably reshape how Europeans interact with search services and how they construct and control their web personas. But the ruling’s impact on freedom of expression on the Internet – and on publishers and journalism in particular – may well be more muted than Google and other commentators anticipate. This is because the Court explicitly recognized and carefully balanced the right to be “forgotten” against the “public’s right to know” and freedom of expression.
- Other search engine operators – in particular providers of horizontal services – may well face expectations that they will comply with the CJEU’s judgment. But it is clear that, due to its unique scale and its primarily advertising-based business model, Google will be the most affected of any of the search engines.
- Ultimately, which way the balance tips here will depend on many factors – including the criteria developed by search engines, the guidance provided by DPAs and other regulators and policymakers, and the extent to which Europeans avail themselves of the right.

⁹ See *supra* n. 4.

