Google Spain and the right to be forgotten

What next?

The data debates

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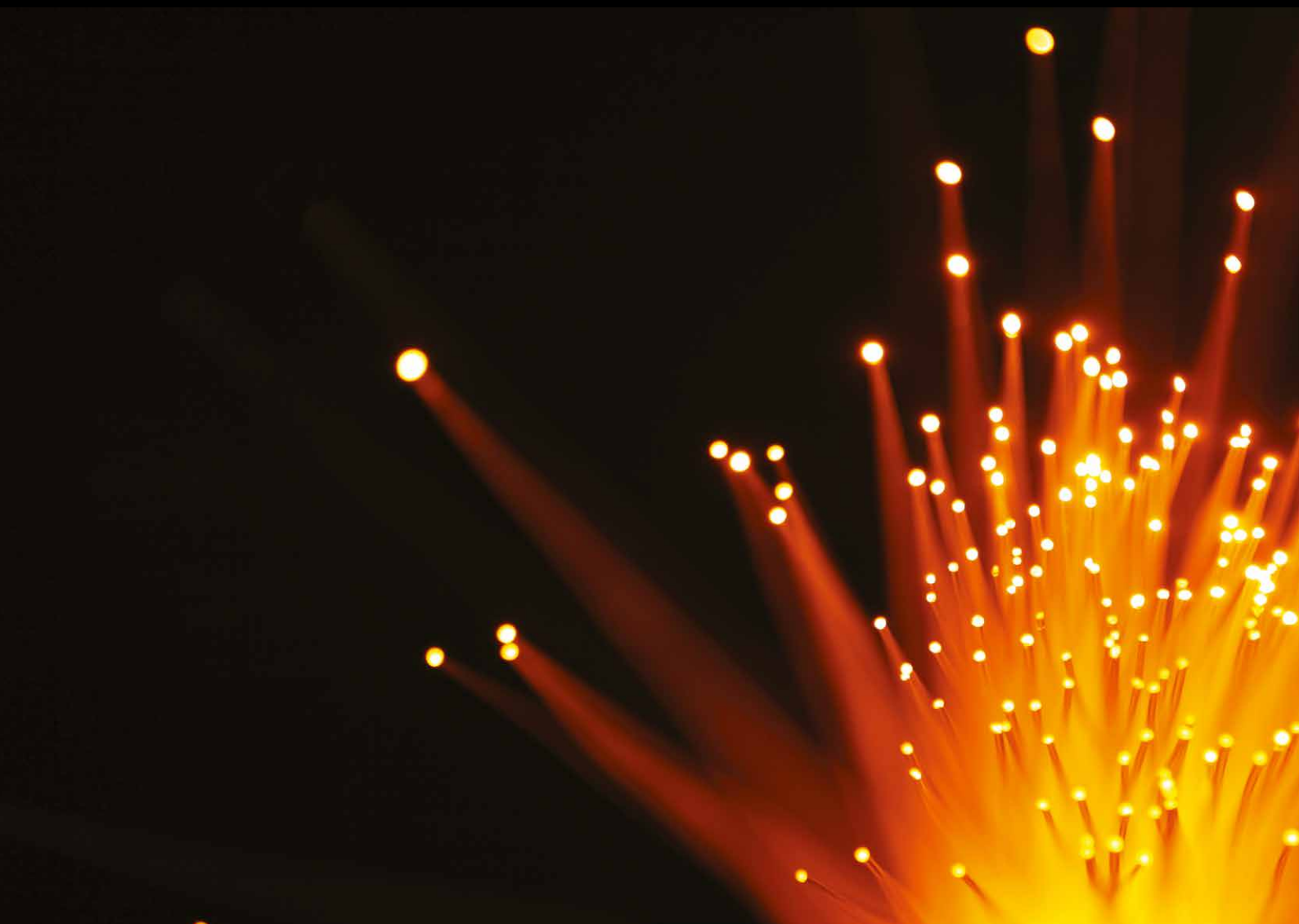

The judgment in *Google Spain*

It has become a routine aspect of modern life to use Internet search engines to look for and collate biographical information relating to other people, be they business contacts, potential employees, lost acquaintances, celebrities or others. The purpose of such searches can range from commercial interest to journalistic investigation to idle curiosity.

The judgment from the Court of Justice of the European Union (the "**CJEU**") in *Google Spain*[1] handed down on 13 May 2014 called into question the legality of European-established search engines collating personal information and then facilitating such searches. The judgment has been greeted with surprise from both the legal and the technology worlds.

However, the implications from the judgment are only beginning to be addressed. In this note, we consider the judgment and the implications in the round and in the context of the continuing and increasingly important debate concerning the use of personal data in Europe.

[1] Google Spain SL and Google Inc AEPD and González [2014] EUECJ C-131/12 (13 May 2014)

The judgment in *Google Spain*: a quick guide

by Blanca Escribano

The case arose after a complaint that was brought against Google (Google Spain SL and Google Inc.) by a Spanish individual, Mario Costeja González, to the Spanish Data Protection Authority (AEPD). Mr González had been the subject of an auction notice for unpaid debts that was published in a widely-read newspaper in Spain (*La Vanguardia*) in the late 1990s. Despite the time that had elapsed since this initial publication, it still featured prominently in a Google search for Mr González's name. Mr González argued that this was in breach of the EU Data Protection Directive (the "DPD") as the data was not current and that in such circumstances, there should essentially be a "right to be forgotten". He requested the data to be erased from both the search engine and from the digital version of the newspaper.

The AEPD rejected the complaint against the Spanish newspaper, taking the view that the information in question had been lawfully published by it, but agreed as regards Google Spain and Google Inc. The Spanish data protection watchdog ordered Google to take the necessary measures to withdraw the data from its search results. In response, Google Spain and Google Inc. brought two actions before the *Audiencia Nacional* (National High Court) claiming that the AEPD's decision should be annulled.

It is in this context that the Spanish court referred a series of questions to the CJEU on the interpretation of three key aspects of the DPD:

- whether the activity of search engines as providers of content falls within the concept of processing of personal data and, if so, whether a search engine can be regarded as a "data controller";
- the territorial scope of the DPD and in particular the concept of 'establishment', bearing in mind the fact that whilst the Google search engine is provided by Google Inc from outside of the EU in California, it nevertheless has a Spanish subsidiary (Google Spain SL) and an office in Spain; and finally
- the responsibility of search engines to remove from their search results links to web pages that are published by third parties and which contain information relating to individuals.

Almost a year ago, on 25 June 2013, Advocate General Jääskinen delivered his Opinion in the case to the CJEU. In his view, the EU data protection legislation was equally applicable to those search engines set up in a Member State when, for the purpose of promoting and selling advertising space on that search engine, they have an office or subsidiary which orientates its activity towards the inhabitants of that State. However, he stated that search engine providers cannot be considered "data controllers" in relation to information on third party websites and that Directive 95/45/EC does not establish a general "right to be forgotten". Essentially he concluded that Google was effectively in the EU, but not obliged to obey that particular aspect of data protection legislation.

On 13 May 2014 the CJEU finally gave its judgment, agreeing with the Advocate General's opinion only in respect of the question of territorial scope. In contrast to the Advocate General, it has ruled that an Internet search engine operator is responsible for the processing that it carries out of personal data which appears on third-party web pages (Case C 131/12).

The main aspects of the ruling are as follows:

- Legally, activities carried out by search engines consisting in finding information published, indexing it automatically, storing it temporarily and making it available to the public must be classified as 'processing of personal data' and furthermore, the operator of the search engine must be regarded as the 'controller'.
- When the operator of a search engine sets up a branch or subsidiary in a Member State to promote and sell advertising space offered by that engine and which directs its activity at the inhabitants of that Member State, this branch or subsidiary falls into the category of 'establishment' set out in the Data Protection Directive.
- The operator of a search engine is obliged to remove web links resulting from searching a person's name (at least after it has been requested to do so) where the information collated is deemed harmful to the individual's privacy, regardless of whether the information on such web pages is published by third parties. The CJEU has stressed the need to strike a balance between the fundamental rights of the individual whose information is appearing in search engines and the right of the public to access that information.

The CJEU also commented as to how individuals could bring similar claims against search engines established in the EU saying that firstly claims could be addressed directly to the EU- established search engine operator. If the search engine rejects the request to remove search results, it would then be open to the claimant to bring a private claim before their national courts under national data protection laws and/or complain to their local data protection authority.

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How far does "the right to be forgotten" extend?

by Ashley Hurst

Perhaps the most critical question for Google's lawyers when receiving a deluge of new take-down/blocking requests will be when the data processing complained of is unlawful within the EU data protection regime and when Google has the requisite knowledge of such unlawful processing.

The processing of the data by Google search (not necessarily the original publisher) must be contrary to the data protection principles established by the DPD, or more accurately the legislation that implements the DPD in the relevant member state of the European Union. So, for example, a UK citizen would need to demonstrate a breach of the Data Protection Act 1998 by reference to the data protection principles set out in schedule 1 of the Act.

Each European Member State has implemented its own data protection laws based on the DPD. There are significant variations and each Member State has developed its own body of case law and regulatory decisions as to what is unlawful data processing, but all national implementing legislation and that case law will now need to be seen in light of the guidance provided by the CJEU in the Google Spain decision.

But what exactly is that threshold for the level of sensitivity of the personal data before its processing by a search engine is unlawful? Many observers, particularly those steeped in First Amendment law in the United States, would be forgiven for thinking there is barely any threshold at all. But a closer look at the CJEU's reasoning is required.

The key phrase in the judgment is at paragraph 92, which provides the rather limited guidance (largely parroting the DPD) that the data will be unlawfully processed when it is:

- "**inadequate**, **irrelevant** or **excessive** in relation to the purposes of the processing";
- "not kept **up to date**", or
- "kept for **longer than is necessary** unless they are required to be kept for historical, statistical or scientific purposes".

For a landmark judgment, it is hard to imagine a more opaque set of guiding principles. In the context of search engines, a whole barrage of questions emerge:

1. When is data irrelevant and by what standard is relevance judged? Is this some kind of public interest test or can it be relevant to a small group of people? Presumably, as per the judgment, relevance fades over time but how long does it take for historical records to become irrelevant? When is the data "no longer" relevant? So far we have one data point: 16 years for a repossession notice is too old. But how can we apply these vague principles to other situations?

2. What does 'excessive' mean? Does it mean that ten Google search results containing the same personal data should be treated differently from a single search result? If data was true at the time of publication (for example, that an individual has a serious illness) does it become 'out of date' when the facts change (for example, the illness is cured)? Does its position in the Google search rankings matter? It is interesting that the CJEU pointed out the impact that a search result could have on an individual's privacy, noting that it can often give the information much more prominence than if it were merely left to the third-party website on which it is published (see below). One may take from this that its position in the search rankings would matter, but the court has not quite said as much.

3. When is data required for statistical purposes? Google does not exist for statistical purposes. It simply indexes data and statistics stored on other websites so would this exception be relevant to Google? How will such statistics be found if not through search engines?

We could go on and on.

Google's ability to collate data is also key. The CJEU stated at para 80:

> *"It must be pointed out at the outset that … processing of personal data, such as that at issue in the main proceedings, carried out by the operator of a search engine is liable to affect significantly the fundamental rights to privacy and to the protection of personal data when the search by means of that engine is carried out on the basis of an individual's name, since that processing 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."*

Whilst unhelpful to Google, this passage will at least be seized upon by other website operators and platforms (and Google's other services) to argue that the decision applies only to search engines and their unique indexing qualities and coverage across the web. But we will have to wait and see just how narrowly it will be interpreted and whether websites with search functions will also be caught by these broad principles.

A more fundamental question being asked is whether it is right at all that Google and other search engines should have to take the role of judge and jury in determining the answers to these questions. In this respect, it is important to consider how the threshold for 'unlawful data processing' sits alongside the safe-harbour 'mere conduit', 'caching' and 'hosting' defences provided for by Articles 12, 13, and 14 of the E-Commerce Directive.

In the case of *Metropolitan Schools v Google*[2] in the UK, Google was classified as a 'mere conduit' in relation to its search results, even having been notified of unlawful (libellous) content being returned, and so was not liable for it. This decision was not too far behind the protection that would be afforded to Google in the US by virtue of section 230 of the Communication Decency Act 2000. However, following *Google Spain*, regardless of that decision in relation to Google as an intermediary search engine it can now be liable as a data controller - effectively as a primary publisher.

What we can be sure of is that individuals will be looking at their Google take-down requests based on grounds of defamation, malicious falsehood, copyright, passing off, breach of confidence, and breach of privacy to see whether they can be recast as claims for unlawful data processing. And that will be happening in 28 European jurisdictions.

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[2] [2009] EWHC 1765 (QB) (16 July 2009)

How will Google respond?

by Dan Tench

Google's only public response to the judgment so far is to say that it is "disappointed" by the decision. It is reported that it is already being deluged with requests from individuals to bar access to personal information.

In order to accede to these requests, Google faces two formidable hurdles. Firstly, it needs to establish an administrative procedure for receiving, filtering and dealing with requests. This may involve a degree of evaluation to determine what information it will continue to be permissible, an enormous quasi-judicial task.

Secondly, it may need to develop sophisticated technical means to block personal information. This could be tricky. The judgment does not require blocking of any particular websites, merely websites relating to an individual which are responsive to a search relating to that individual. So if there is an article regarding X's crashing his car, Google are not permitted to allow searches returning the article based on entering X's name, but there appears no reason why the article could not be returned if their indexing and the user's the search relates to the make of the car in question. Developing the means that determines automatically whether a search term relates to an individual or is impersonal is far from straight-forward.

Moreover, Google's problems go further than this because the unlawfulness of their processing of personal data may not be dependent on them first receiving a complaint or a request from the individual in question that they stop. Every act of processing may already in itself be potentially unlawful. If so, Google is amassing an enormous potential liability every hour.

Google would appear to have four options.

Firstly, they could simply ignore the decision and carry on processing personal information regardless, as they always have. The difficulty is not just that they are potentially leaving themselves open to a very great deal of costly litigation but also the data protection regulators are likely to take an increasingly aggressive line with the company with possibly substantial fines for non-compliance. If they were to carry on, they may wish to withdraw their physical presence from Europe, closing down their many European subsidiaries, to seek to escape the effect of these new requirements. But the impact of such a withdrawal on their business would surely be dramatic. Could they really continue to sell the advertising which sustains their service in Europe without a physical presence here?

Secondly, they could seek to comply with the judgment and stop processing personal information as the judgment requires. The difficulty here is not only the administrative and technical challenges identified above but also the commercial consequences. Searches on individuals may not be necessarily the most lucrative in terms of selling advertising (not for example compared to searches for the latest high-tech gadgetry) but such searches must do a lot in terms of bringing users to the site.

Thirdly, they could seek to challenge the decision legally. The difficulty is that the Grand Chamber of the CJEU is the highest court in Europe, there is no appeal. Google might seek to bring further cases to the Court in the hope that the apparent effect of this judgment could be diluted by future clarifying decisions. However, to do so, they would first need a reference from a court in a member state and that would require convincing such a court that there was an outstanding uncertainty. Given the terms of the judgment, courts may consider the position in respect of search engine liability is pretty clear. Moreover, there is no guarantee that a future decision of the CJEU may be any more favourable to Google than this one

Finally, they could seek legislative change. As stated below, a new Data Protection Regulation has been in a long state of discussion and development. However, the possibility that this might assist Google seems unlikely. The only question for legislators is the extent to which they can increase the protection of personal data. The chances of them reducing this protection and rowing back against the decision of the CJEU seem remote.

So there appear to be no good options for Google. It seems likely that at least in the medium term, it will have to accept that there is no alternative but to prepare itself for a vast influx of data removal requests.

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The implications for online publishers

by Jack Gilbert

The judgment plainly is likely to be of very great significance to European search engines. The question many others will be asking, however, is the extent to which it will also affect other providers of content on the Internet such as online publishers. Newspapers in particular very often maintain extensive archives. Could these now be subject to a legal requirement to surgically remove personal data, particularly old personal data?

The judgment made it clear that privacy rights have to be balanced with other rights, such as the right to freedom of expression. The trouble for Google is that as the Court saw it, its only countervailing right was its own commercial interest, on which the Court gave as little weight as it did to the rights of users of Google's search service.

With newspapers and other online publishers, the position may be different. With daily news and other published content the competing right to freedom of expression is much stronger, as has been repeatedly emphasised by the European Court of Human Rights. The Strasbourg court has a longer track record in this area than its CJEU counterpart in Luxembourg; something to which the CJEU will pay considerable regard when determining the balance between privacy and other rights.

Newspaper archives could perhaps be said to be more similar to Google's search service than the daily news. However, newspapers' archives have always been widely seen as an important matter of public record and the arguments supporting them are very strong in a way which simply does not apply to Google. Moreover, the CJEU found that there was something particularly invasive in the way Google collated information relating to individuals from across the web. That does not apply in any way the same degree in respect of newspaper archives.

Nonetheless, the debate may in time turn to the propriety of the continued availability of old personal data in online newspaper archives. Even if this question is ultimately decided by a court (most obviously the CJEU), such judicial decisions are rarely made in a vacuum. For this reason, media publishers wishing to retain the online availability of online archives of their material would be sensible to start a public debate making the case for such archives.

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What now for the right to be forgotten?

by Ross McKean

If Commissioner Viviane Reding is correct, the seismic changes proposed to Europe's data protection laws are now a foregone conclusion. After the Parliament recently voted 621 to 10, with 22 abstentions in favour of the latest text of the draft General Data Protection Regulation, she described the reforms as "irreversible".

Commissioner Reding celebrated the CJEU's decision with a post on Facebook saying that *"[the] judgment is a strong tailwind for the data protection reforms" and that "data belongs to the individual, not the company, and unless there is a good reason to retain this data, an individual should be empowered – by law – to request erasure of this data. … This is exactly what the data protection reform is about: making sure those who do business in Europe, respect European laws and empowering citizens to take the necessary actions to manage their data. - Big data need big rights."*

The original draft Regulation included the so-called "right to be forgotten" (the "right to be forgotten and to erasure", to give it its full name), which has proven to be one of its most controversial proposals. Critics questioned how in a hyper-connected world it would ever be possible to remove all copies of data from multiple applications stored on multiple servers around the world. Furthermore, there are often legitimate reasons (such as free speech) why an organisation might retain information where the individual to whom it relates would rather it was deleted. It cannot be an absolute right and describing it as such would mislead the very individuals whom the right was intended to protect. In response to these criticisms, the latest draft of the Regulation makes some minor concessions. These include a rebranding of the proposals from "the right to be forgotten" to the "the right to erasure".

So, are the reforms proposed in the draft Regulation now inevitable? Not at all. Despite Commissioner Reding's enthusiastic postings, the final form of the Regulation and the timeframe of its adoption is far less certain. Why? Because it is all change in Brussels with current polls suggesting very significant changes to both the European Parliament and the Commission in this year's elections. Commissioner Reding is stepping down from the Commission and is standing for Parliament and although the other key supporter of the Regulation, MEP Jan Philipp Albrecht, is expected to retain his seat in the Parliament, it will be a very different Parliament following May's elections. Significant gains are predicted for the extreme left and right wing parties at the expense of more centrist parties. How the new Parliament will view the draft Regulation is unclear. In addition, the Council of Ministers remains divided on the draft Regulation. Few expect to see a final text of the Regulation until 2015 and what that text will look like and what the right to be forgotten / right to erasure will entail is far from certain.

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The data debates - How the CJEU's decision fits in to the current online data discussions on search engines

by Andreas Splittgerber

While the press and the public are currently focussing on the interpretation and impact of this latest decision of the CJEU against Google, the overall broad picture should remain in focus. The "right to be forgotten" is only one – and possibly not the most severe – of many data privacy issues triggered by Google's service offerings. Other topics that are currently discussed in Europe in this context include Google's illegal practice of scanning incoming emails to place advertisements, using invalid privacy policies or surveillance possibilities through Google Glasses.

Scanning Incoming emails

Earlier this year, Google finally admitted its practice of scanning Gmail accounts and other Google user content. Google recently changed its Terms of Service and in doing so confirms a long practice that has already been an open secret. The new section under "Your Content in our Services" states:

> *"Our automated systems analyse your content (including emails) to provide you personally relevant product features, such as customized search results, tailored advertising, and spam and malware detection. This analysis occurs as the content is sent, received, and when it is stored."*

This practice is widely seen as illegal. In Germany it is expected that since Google's practice is now laid down in its Terms of Services, consumer protection agencies are likely to become active and initiate judicial proceedings against Google in the near future.

Also, this practice of scanning incoming emails may come into the focus of German prosecutors. Other than in the US, where Google's practice was examined under wiretapping laws, German prosecutors likely will look into the criminal offence of phishing (sec. 202b German Criminal Code). Other EU-countries have similar criminal laws.

Google Glasses

Despite the fact that there has only been a limited sale of Google Glasses in the U.S., several German data protection specialists have already strongly criticized the product. For example, just recently a German television debate featured the topic "Becoming a criminal with high-tech glasses". One of Germany's best known data privacy commissioners, Thilo Weichert, said that Google Glasses are clearly a *"weapon to attack people's personal rights" and that "it would be a disaster if Google Glasses would be extensively sold in Germany and Europe"*. Weichert also said that a business model that affects personal rights to such extent is highly problematic from a legal point of view. People would film and record other people. Nobody could feel unobserved any longer. Weichert has already acted against Google in the past in relation to other data protection issues. It appears likely that he will strike again once Google Glasses are sold in Germany.

Infringing Privacy Terms

At the end of last year the Regional Court of Berlin declared 25 clauses of Google's privacy policy invalid as they are too opaque, relate to unjustified data processing and/or contain invalid consent language. One of the main issues is that Google intends to use personal data across services and also for purposes that are not related to the specific service used (e.g. Gmail, Google+, etc.). The decision of the regional court of Berlin is not final yet and the appeal decision is pending. Google has not done much to remediate this situation. If and to the extent the Berlin decision is confirmed by the appeal court, Google will have to make considerably changes both to its privacy policy and to its data processing practices.

The decision in Germany is consistent with decisions in other EU jurisdictions. In France, French privacy regulator the CNIL has protected French consumers by ordering Google to inform its users about its violations on the google.fr landing page:

So it can be seen that the *Google Spain* decision is merely part of much broader shifting sands in respect of the use of personal data online. Until recently, Google may have considered that they could undertake the widespread use of personal data largely with impunity. But in Europe at least, on a number of fronts that position is changing extremely rapidly.

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The Court of Justice of the European Union - Anti-American and anti-tech or merely Europe's highest court?

by Clive Gringras

Like most litigants receiving a judgment from Europe's highest and largest court, Google had a press release ready to greet the waiting media about its much-awaited case on the liability of internet companies. Moments after the fifteen-judge court ruled, Google issued its views with a blog headed, "European Court rules in Google's favour". It went on to say in that blog post *"Google aims to provide as much information as possible to users so that they can make informed decisions" adding in the post: "[The Court] also confirmed that European law that protects internet hosting services applies to Google's [business model]. This is important because it is a fundamental principle behind the free flow of information over the internet."*

Refresh browser: that cannot be true!

Didn't we learn this week that the Court entirely rejected Google's claims and held that Google was established in Europe and had so much control over the content of its pages that it breached 20-year-old EU privacy laws?

In fact, both statements are true. The blog post above was written on 23 March 2010 when Google was happy that the Grand Chamber applied EU legislation to an American company providing a dominant role in the indexing and monetising of internet content. That EU legislation – the so-called E-Commerce Directive – gave Google Inc a defence to what could otherwise have been an infringement of EU rights. This time around, that same court applied different EU legislation to the same American company providing the same (and larger) role.

The CJEU is not anti-American nor is it anti-Internet and certainly is not anti-freedom of expression. Olswang's success before the Court for Yahoo![3] in 2012 is another example of a US internet player feeling well-treated by Europe's highest court.

But the Court is not "pro" or "anti" any business model nor a blinkered supporter of any particular country's citizen's or corporations. What it applies, since 1952 in over 28,000 judgments, is **European** law. Legislation crafted by a democratically-elected European Parliament representing now twenty-eight sovereign states. It does so without fear or favour, striking down even the activities of the very European countries that both founded and fund it, and sometimes siding with companies with headquarters on other continents, paying negligible taxes.

The most recent Google case was simply business-as-usual for the Court which in 2013, decided over 1,500 cases. The Court typically takes between one and two years to deliver its judgments – always unanimous and about half the time with the assistance of an Advocate General prior-published opinion. Very few of the cases before the Court involve the full Grand Chamber of fifteen judges, but instead call on a panel of three or five judges from the pool of around twenty-seven. These judges are called from all the member states of the European Union and as their resumes show, have varied backgrounds, often highly multicultural and multilingual.

Not all of these 1,500 cases were akin to Google's recent loss or win four years' earlier. Those two cases were examples of "references for a preliminary ruling". This is where a member state's court – not the litigants, note – has determined that it needs guidance on interpreting an area of European law. In US terms, these requests for preliminary rulings are akin to the Rule 19 of the Supreme Court, "certification of a question of law". Perhaps that is where the similarities end however as on average the CJEU accepts more requests a day than the US Supreme Court accepts a **decade**. Typically the Court provides about four-hundred rulings a year just like the one we are discussing here.

[3]Football Dataco and Others [2012] EUECJ C-604/10 (01 March 2012)

It's the Member State's court that refers a case to the CJEU and history shows that some Member States' courts are far more likely to refer than others. At Olswang we consider this as a strategic part of evaluating where, if there is a choice, a client should bring a substantive case. Statistically and politically, Germany is the country most likely to refer a case to the CJEU, responsible for over a quarter of the Court's referrals. Clients eager to obtain a ruling which will impact the whole of Europe, but able to wait the two years to get that ruling are advised – all things being equal – to work with our German litigation team.

If it's quicker, more certain and more local justice that is needed, our litigation teams in Belgium, France, Spain and the UK will use their sophisticated experience of the jurisdictional rules in their courts to export the case outside their territory. The courts in just these five offices handle over 55% of referrals to the Court. The other twenty-three Member States fill up the docket a couple of percent each, on average.

We have great experience of advising a client how to position a case to avoid or prompt a referral. We also have practical experience of knowing which court is the most likely to refer and so, how to best plan (and budget) for a case.

Some battle-weary clients and friends will be wondering just how a court with only 28 judges – and European vacations – can decide 1,500 cases a year. One way is the incredibly streamlined procedure. Those litigants eager to roll out their 'jury' points and long lists of cases supporting their arguments need to rethink their approach and consider other ways of putting across their views such as through being supported by submissions from Member States – something we advise upon with due sensitivity and probity.

As Google has found out, this busy and experienced court, has its own rules and applies European law. It should come therefore as little surprise to Google and now no surprise to others that if you want to trade and profit from the 500 million citizens of Europe you will be bound by its laws.

Si fueris Romae, Romano vivito more; si fueris alibi, vivito sicut ibi. When in Rome, do as the Romans do.

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