

Michigan Journal of International Law

Volume 36 | Issue 4

2015

Privacy Almighty? The CJEU's Judgment in Google Spain SL v. AEPD

David J. Stute
University of Michigan Law School

Follow this and additional works at: <https://repository.law.umich.edu/mjil>



Part of the [European Law Commons](#), [Internet Law Commons](#), and the [Science and Technology Law Commons](#)

Recommended Citation

David J. Stute, *Privacy Almighty? The CJEU's Judgment in Google Spain SL v. AEPD*, 36 MICH. J. INT'L L. 649 (2015).

Available at: <https://repository.law.umich.edu/mjil/vol36/iss4/3>

This Note is brought to you for free and open access by the Michigan Journal of International Law at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Journal of International Law by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mjil.repository@umich.edu.

NOTE

PRIVACY ALMIGHTY? THE CJEU'S JUDGMENT IN GOOGLE SPAIN SL V. AEPD

*David J. Stute**

INTRODUCTION.....	649
I. CONTEXT.....	652
A. <i>The Legal Framework</i>	652
B. <i>Public Sentiment in the EU</i>	654
C. <i>Mr. Costeja González's Case</i>	655
D. <i>Overview of the Court's Response</i>	657
II. JURISDICTION OVER SEARCH ENGINES OUTSIDE THE EU	658
A. <i>Ratione Materiae: The Directive's Applicability to Search Engines</i>	658
B. <i>Tensions in the Court's Reasoning</i>	659
C. <i>Ratione Personae: The Relevance of the Search Engine's Location</i>	661
III. THE RIGHT TO BE FORGOTTEN.....	663
A. <i>The Kind of Right Involved (A Primer)</i>	663
B. <i>The Basic Contours of the Right to Be Forgotten</i>	664
C. <i>The Additional-Harm Theory and its Consequences</i> ..	667
D. <i>The Direct Liability and Procedural Role of Search Engines</i>	669
IV. THE COURT'S OBJECTIVES	672
A. <i>Protecting fundamental rights</i>	672
B. <i>Harmonizing laws across the EU</i>	674
C. <i>Controlling Google's Power</i>	675
CONCLUSION	679

INTRODUCTION

The Internet has matured into an unprecedented repository of data, retrievable through myriad unique “links,” or Uniform Resource Locators. Yet, this wealth of information only became broadly accessible through the invention and continual development of algorithm-based

* The author worked in the legal departments of Google Inc. and its German subsidiary. Google provided no funding for this Article, which was written after the employment relationship ended. The views expressed in this article are strictly those of the author.

search engines.¹ Keyword searches empowered search-engine users to find—and sometimes stumble upon—information with great ease. Indeed, search-engine indices arguably have become the most comprehensive catalogues of information the world has ever seen.

This wealth of accessible information poses challenges to traditional notions of privacy: aspects of our private and public lives, which previously would have rarely left the vicinities of our immediate social or professional circles, today find their way onto the Internet, where they are indexed for effortless potential retrieval through search engines. Because the marginal cost of indexing results for one more set of keywords (for instance, a person's name) is negligible compared to the economic reward for the largest search engines, we find matching information when searching for people's names irrespective of the role they assume in public life.² While this public exposure may be immensely useful for some, problems arise when—for a variety of reasons, ranging from the tragic to the banal—people object to the dissemination of their personal information.³ Should there be new legal protections to accommodate those affected by evolving technological realities, or should we sacrifice privacy at the altar of freedom of expression and access to information?⁴ And if new legal protections are the answer, who should be liable to provide relief?

In this debate, search engines have been framed as mere intermediaries, such as a newsstand or a card catalogue.⁵ This analogy, however, might be inaccurate today—unless we are to add that, *inter alia*, this newsstand is frequented by about ninety percent of the market,⁶ and that there is a list of publications about every person (or most people) available at each of its locations. Moreover, search engines are the centralized, habitual gateways to the information consumed in today's information societies, and thus, should not be excluded from attempts to address the problems posed (in part) by the reality they helped create.

The Court of Justice of the European Union (“the Court” or “the CJEU”) confronted these questions in its May 2014 judgment in *Google Spain SL, Google Inc. v. Agencia Española de Protección de Datos, Mario*

1. See generally Elizabeth van Couvering, *The History of the Internet Search Engine: Navigational Media and the Traffic Commodity*, in WEB SEARCH: MULTIDISCIPLINARY PERSPECTIVES, 177, 177-206 (Amanda Spink & Michael Zimmer eds., 2008).

2. See generally, Hal A. Varian, *The Economics of Internet Search*, 96 RIVISTA DI POLITICA ECONOMICA 177, 177-191 (2006) (explaining the economics of low marginal costs as applied to search engines).

3. See Jeffrey Toobin, *The Solace of Oblivion: In Europe, the Right to Be Forgotten Trumps the Internet*, THE NEW YORKER (Sept. 29, 2014), <http://www.newyorker.com/magazine/2014/09/29/solace-oblivion>. See generally Brendan Nyhan, *Why Rumors Outpace the Truth Online*, N.Y. TIMES (Sept. 29, 2014), http://www.nytimes.com/2014/09/30/upshot/its-so-much-more-fun-to-spread-rumors-than-the-truth._r=0 (discussing how public exposure online may lead to misconceptions and rumors that are difficult).

4. See Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

5. See Toobin, *supra* note 3.

6. *Id.*

Costeja González.⁷ Based on the premise that new technologies require concomitant, evolving rights,⁸ the Court's solution was a "right to be forgotten," that is, a right to have search-engine results removed from search indices. While hailed as a victory by some, others have criticized the priority placed on the right to be forgotten over other, equally relevant rights.⁹

It is all too easy to settle for a reductionist explanation that the judgment's merits are relative depending on one's cultural perspective or the interest represented.¹⁰ Rather, this Article seeks to contribute a critical examination of the legal-political context of the judgment within the European Union, the soundness of the Court's reasoning, the Court's likely animating principles, and its actual or probable effects. Such an effort to better understand the Court's judgment appears overdue as privacy protections in Europe and elsewhere are likely to change significantly in the

7. Case C-131/12, *Google Spain SL, Google Inc. v. Agencia Española de Protección de Datos (AEPD)*, Mario Costeja González, 2014 ECLI:EU:C:2014:317 [hereinafter *Google Spain SL v. AEPD*].

8. See *id.* para. 80; see also Opinion of Advocate General Jääskinen, Case C-131/12, *Google Spain SL, Google Inc. v. Agencia Española de Protección de Datos (AEPD)*, Mario Costeja González, 2013 ECLI:EU:C2013:424, para. 1 (quoting Warren & Brandeis, *supra* note 4, at 195) [hereinafter Opinion of Advocate General Jääskinen, *Google Spain SL v. AEPD*, 2013].

9. See Danny Hakim, *Right to Be Forgotten? Not That Easy*, N.Y. TIMES (May 29, 2014), <http://nyti.ms/1hD5Lu6> (noting the divergence between European and American views on privacy). Compare Jonathan Zittrain, *Don't Force Google to 'Forget'*, N.Y. TIMES (May 14, 2014), <http://www.nytimes.com/2014/05/15/opinion/dont-force-google-to-forget.html> (criticizing the decision as "a form of censorship, one that would most likely be unconstitutional if attempted in the United States") and Ann Cavoukian & Christopher Wolf, *Sorry, But There's No Online 'Right to Be Forgotten'*, NAT'L POST (June 25, 2014), <http://www.http://news.nationalpost.com/full-comment/ann-cavoukian-and-christopher-wolf-sorry-but-theres-no-online-right-to-be-forgotten> (arguing the decision is wrong on policy grounds and an affront to the First Amendment), with David Hoffman, *The Right to Be Relevant Through Obscurity: Why the European Court of Justice Decision is Not Surprising*, POLICY@INTEL (July 16, 2014), <http://blogs.intel.com/policy/2014/07/16/europes-new-right-forgotten-new-forgetting/> (positing that the CJEU decision is about a right to be relevant); Evan Selinger & Woodrow Hartzog, *Google Can't Forget You, But It Should Make You Hard to Find*, WIRED (May 20, 2014, 3:33 PM), <http://www.wired.com/2014/05/google-cant-forget-you-but-it-should-make-you-hard-to-find/> (casting the decision as part of a debate about "the proper way to enhance or preserve obscurity"); Eric Posner, *We All Have the Right to Be Forgotten*, SLATE (May 14, 2014, 4:37 PM), http://www.slate.com/articles/news_and_politics/view_from_chicago/2014/05/the_european_right_to_be_forgotten_is_just_what_the_internet_needs.html (praising the decision as a "pragmatic and flexible" balancing of freedom of expression and privacy interests), and "Urteil ist ein Sieg der Bürgerrechte," NDR.DE, <http://www.ndr.de/info/sendungen/interviews/Interview-mit-Johannes-Caspar,.html> (last visited Oct. 30, 2014) (quoting Hamburg DPA, Johannes Caspar, as calling the decision a "victory for citizens' rights").

10. See James. Q. Whitman, *The Two Western Cultures of Privacy: Dignity Versus Liberty*, 113 YALE L.J. 1151, 1160 (2004).

coming years,¹¹ for example, by means of the EU Commission's pending General Data Privacy Regulation.¹²

I. CONTEXT

A. *The Legal Framework*

The State's abuse of personal information during the Second World War and Cold War left a strong cultural mark on the European Union.¹³ In the aftermath of the Second World War, the right to privacy was elevated to the level of a human right internationally (United Nations Universal Declaration of Human Rights),¹⁴ as well as in Europe (European Convention on Human Rights).¹⁵ While the popular fear was originally a fear of intrusion by government, it evolved to encapsulate skepticism of large corporate databases, lest those data collections be used for abusive purposes.¹⁶ By the 1980s, the Organization for Co-Operation and Development (OECD) had issued "Recommendations of the Council Concerning Guidelines Governing the Protection of Privacy and Trans-Border Flows of Personal Data,"¹⁷ and the European Council (not an EU institution) followed suit with its "Convention for Protection of Individuals with

11. See Julie Brill, FTC Comm'r, Privacy in the Age of Omniscience: Approaches in the United States and Europe, Address at the Mentor Group Vienna Forum (Sept. 11, 2014), http://www.ftc.gov/system/files/documents/public_statements/581751/140911mentorgroup.pdf.

12. *Proposal for a Regulation of the European Parliament and of the Council on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data (General Data Protection Regulation)*, COM (2012) 11 final (Jan. 25, 2012) [hereinafter Proposal for a General Data Protection Regulation].

13. *But see* Whitman, *supra* note 10, at 1164-71 (noting that the notion of controlling dignity and personal honor predates the 20th-century reactions to fascism and is properly understood as a "leveling up" of the general population to privileges previously reserved for members of aristocratic and monarchical societies).

14. G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948).

15. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221, E.T.S. No. 005.

16. See David Lazer & Viktor Mayer-Schönberger, *Statutory Frameworks for Regulation Information Flows: Drawing Lessons for the DNA Data Banks from Other Government Data Systems*, 34 J.L. MED. & ETHICS 366, 368 (2006):

Take as an extreme example the effort in the 1930s by the Netherlands to redesign their population information systems. The clear purpose of this endeavor was to improve administrative efficiency. However, part of the data that they collected for innocent reasons, was each citizen's religious affiliation. Catastrophically, these data systems fell into the hands of the Nazis, and, arguably, as a result, Dutch Jews were killed at a much higher rather than any other Jews in Western Europe during the Holocaust.

17. Organization for Economic Co-operation and Development [OECD], *Recommendations of the Council Concerning Guidelines Governing the Protection of Privacy and Trans-Border Flows of Personal Data*, C(80)58/FINAL (Sept. 23, 1980).

Regard to Automatic Processing of Personal Data.”¹⁸ Because the conventions were not self-executing, however, data protections continued to vary widely among member states as they enacted their own data protection laws.¹⁹ Moreover, new technologies posed evolving privacy challenges to “harmonizing” and thus integrating the EU into a single market.²⁰ Meanwhile, the free flow of data between member states became increasingly important to fostering the integration of the EU’s internal market.²¹ Hence, the idea of a pan-European data protection directive was born.²²

In late 1995, when broad access to the Internet was still a new phenomenon,²³ the European Parliament and the Council of Ministers adopted Directive 96/46 “on the protection of individuals with regard to the processing of personal data and the free movement of such data.”²⁴ Providing a framework for harmonizing data protection laws across member states, the Directive had a dual purpose: ensuring the free flow of data within the European Union while protecting the fundamental right to privacy.²⁵ The Directive was addressed to the member states and required them to pass implementing legislation by late 1998.²⁶ In implementing legislation within the Directive’s framework, each member state was to set up a minimum of one “supervisory authority” (later termed “Data Protection Authorities” or “DPAs”) for monitoring and enforcing compliance with the member state’s implementing legislation within the territory of the member state.²⁷ Any person could directly contact the DPAs to claim infringements of data privacy rights (by both government and private actors).²⁸ DPA decisions were made subject to appeal before member state courts.²⁹ In 1999, Spain passed its implementing legislation, which provided for the amendment of a supervisory authority, the Agencia Española de Protección de Datos (AEPD).³⁰

18. Convention for the Protection of Individuals With Regard to Automatic Processing of Personal Data, opened for signature, Jan. 28, 1981, E.T.S. No. 108.

19. See Steven R. Salbu, *The European Union Data Privacy Directive and International Relations*, 35 VAND. J. TRANSNAT’L L. 655, 668-69 (2002).

20. CHRISTOPHER KUNER, *EUROPEAN DATA PROTECTION LAW AND ONLINE BUSINESS* 29 (2003).

21. CHRISTOPHER KUNER, *EUROPEAN DATA PROTECTION LAW: CORPORATE COMPLIANCE AND REGULATION*, xi (2d ed. 2006) (“Information has become the new raw material of the world economy. Just as, in past centuries, iron, wood, and coal were the foundation upon which the economy was based, so nowadays it is data and information.”).

22. See Salbu, *supra* note 19, at 668.

23. Opinion of Advocate General Jääskinen, *Google Spain SL v. AEPD*, para. 27-28.

24. Council Directive 95/46, 1995 O.J. (L 281) 31 (EC).

25. *Id.* art. 1(2).

26. See *id.* arts. 32-34.

27. See *id.* art. 28.

28. *Id.* art. 28(4).

29. *Id.* art. 28(3).

30. *Ley Orgánica de Protección de Datos de Carácter Personal* (Law on the Protection of Personal Data) (L.O.P.D. 1999, 15) (Spain). See generally Rafi Azim-Khan, Dominic Hodgkinson, Alessandro Liotta & John L. Nicholson, *New Spanish Regulation Tightens Up*

B. Public Sentiment in the EU

Leading up to the judgment, there had been numerous calls by politicians, regulators, academics, competitors, and traditional news media across the EU to constrain Google's power,³¹ and subject its unknown quantities of servers, containing vast amounts of personal data, to EU law.³² Moreover, European skepticism of entrusting U.S. technology companies with large quantities of personal data was particularly high in light of the Edward Snowden revelations.³³ The company's market share in the EU search business continued to hover around ninety percent.³⁴ At the same time, a long-running Commission investigation into possible violations of competition law appeared to be near a settlement without any findings of wrongdoing.³⁵ The Commission set out to increase Google's tax liability in the EU.³⁶ A new General Data Protection Regulation with an explicit right to be forgotten had been discussed extensively since its introduction in January 2012 but was not scheduled to be adopted before 2016.³⁷ EU politicians and regulators attributed the delay to extensive lobbying of EU institutions by U.S. technology firms—including Google, Facebook, and the U.S. Chamber of Commerce—aiming to water down

Data Protection Requirements, PILLSBURY.COM, <http://www.pillsburylaw.com/publications/new-spanish-regulation-tightens-up-data-protection-requirements> (last visited Oct. 30, 2014).

31. See Mathias Döpfner, *An Open Letter to Eric Schmidt: Why We Fear Google*, FRANKFURTER ALLGEMEINE (Apr. 16, 2014), <http://www.faz.net/aktuell/feuilleton/debatten/mathias-doepfner-s-open-letter-to-eric-schmidt-12900860.html> (publicizing a response to a letter to Google Chairman, Eric Schmidt, from the head of Axel Springer AG, one of Europe's largest publishing houses); Volker Zastrow, *Zum Tode von Frank Schirmacher: Neuland*, FRANKFURTER ALLGEMEINE (June 15, 2014), <http://www.faz.net/aktuell/politik/zum-tode-von-frank-schirmacher-neuland-12990725.html> (noting that the late publisher of one of Europe's most prominent newspapers was "proud" to have "majorly contributed" to the Court's ruling).

32. See Sebastian Anthony, *Microsoft Now Has One Million Servers – Less Than Google, But More Than Amazon, Says Ballmer*, EXTREME TECH.COM (July 19, 2013, 1:11 PM), <http://www.extremetech.com/extreme/161772-microsoft-now-has-one-million-servers-less-than-google-but-more-than-amazon-says-ballmer>.

33. See Dan Kaplan, *Overseas Companies Reluctant to Use U.S. Cloud After Snowden NSA Leaks*, SCMAGAZINE.COM (July 29, 2013), <http://www.scmagazine.com/overseas-companies-reluctant-to-use-us-cloud-after-snowden-nsa-leaks/article/305046> (citing a survey by Cloud Security Alliance as revealing that 56% of non-U.S. residents, 62% of whom were from Europe, believed their companies were less likely to engage U.S. providers of cloud services in light of the Snowden incident).

34. See Toobin, *supra* note 3.

35. See Claire Cain Miller & Mark Scott, *Google Settles Its European Antitrust Case; Critics Remain*, N.Y. TIMES (Feb. 5, 2014), <http://nyti.ms/LxX5ek>.

36. See Ian Allison, *Europe Cracks Down on Google, Apple, Facebook and the Data-Driven Tax Black Hole*, INT'L BUS. TIMES (Dec. 12, 2013, 9:18 AM), <http://www.ib-times.co.uk/tax-internet-ec-oecd-google-facebook-apple-529601>.

37. See Proposal for a General Data Protection Regulation, *supra* note 12, art. 17; see Karin Retzer & Joanna Lopatowska, *The Draft EU General Data Protection Regulation: Where We Are Now and Where We Are Going*, MOFO.COM, <http://media.mofo.com/files/Uploads/Images/131113-draft-eu-data-protection.pdf> (last visited Oct. 30, 2014).

the Regulation's requirements.³⁸ German publishers, for their part, had successfully lobbied the German parliament for the passage of ancillary copyright legislation aimed at a share of search-engine revenues,³⁹ but the actual effect of the new law remained uncertain. On the other hand, member state high courts had ruled against Google in a number of important cases.⁴⁰ In short, there were ample reasons for EU institutions to demonstrate their responsiveness to public and media concerns about the state of privacy rights in light of technological change.

C. Mr. Costeja González's Case

In early 1998, the Spanish newspaper, *La Vanguardia Ediciones SL*, published two announcements in its print edition about a real-estate auction to collect on social-security debts owed by Mr. Mario Costeja González, a Spanish lawyer.⁴¹ Subsequently, the newspaper made these announcements available on its website.⁴²

In November 2009, Mr. Costeja González contacted the newspaper directly, requesting that the two announcements be removed as irrelevant, given that the proceedings against him had been concluded years ago.⁴³ When he had searched for his name on Google, the results included links to the newspaper's announcements.⁴⁴ The publisher, however, refused to remove the two webpages from its website, arguing that the publication was lawful pursuant to an order of the Spanish Ministry of Labour and Social Affairs.⁴⁵

Having been turned away by the publisher, Mr. Costeja González proceeded to ask Google Spain to remove the two search results when search-

38. See April Dembosky & James Fontanella-Khan, *US Tech Groups Criticized for EU Lobbying*, FIN. TIMES (Feb. 4, 2013, 9:19 AM), <http://www.ft.com/intl/cms/s/0/e29a717e-6df0-11e2-983d-00144feab49a.html#axzz3IDN3LrIV>; see also Gregor Thüsing, *Datenschutz als Persönlichkeitsschutz*, FRANKFURTER ALLGEMEINE (Sept. 1, 2013), <http://www.faz.net/aktuell/politik/die-gegenwart/datenschutz-datenschutz-als-persoenlichkeitsschutz-12555555.html>.

39. See Ole Reißmann, *Umstrittenes Internetgesetz: Bundesrat winkt Leistungsschutzrecht durch*, SPIEGEL ONLINE (Mar. 22, 2013), <http://www.spiegel.de/netzwelt/netzpolitik/umstrittenes-gesetz-bundesrat-fasst-leistungsschutzrecht-nicht-an-a-890351.html>; TAZ, *Lobbying wie aus dem Lehrbuch*, DIE TAGESZEITUNG (Feb. 28, 2013), <http://www.taz.de/!112000/>; see also Greg Sterling, *Following Germany's Lead Spain Passes Misguided "Google Tax" Anti-Piracy Law*, SEARCHENGINELAW.COM, <http://searchengineland.com/spain-follows-germany-passing-google-tax-guide-copyright-protection-207103> (last visited Oct. 30, 2014).

40. See Bundesgerichtshof [BGHZ] [Federal Court of Justice] Oct. 25, 2011, *Gewerblicher Rechtsschutz und Urheberrecht* [GRUR] 311 (Ger.); Bundesgerichtshof [BGHZ] [Federal Court of Justice] May 14, 2013, *Gewerblicher Rechtsschutz und Urheberrecht* [GRUR] 751 (Ger.).

41. *Google Spain SL v. AEPD*, para. 14; Opinion of Advocate General Jääskinen, *Google Spain SL v. AEPD*, para. 18.

42. Opinion of Advocate General Jääskinen, *Google Spain SL v. AEPD*, 2013, para. 18.

43. *Id.* para. 19.

44. *Id.*

45. *Id.*

ing for his name.⁴⁶ In turn, Google Spain forwarded the request to the operator of its search engine, Google Inc., in California.⁴⁷ Meanwhile, Mr. Costeja González—finding “it too far and difficult to launch a complaint in the U.S.”—proceeded to file a complaint with the AEPD.⁴⁸ He sought to enjoin the newspaper from publishing his personal information on these two pages, or else alter the pages in such a way as to prevent them from appearing in search engines.⁴⁹ In addition, Mr. Costeja González claimed that Google Inc. or Google Spain should be required to remove or conceal the two search results when searching for his name.⁵⁰ He maintained his legal theory that the proceedings had been resolved and dated back a number of years, and that therefore, reference to them had grown irrelevant.⁵¹

In July 2010, the AEPD’s director concluded that the newspaper’s continued publication of the announcements was legal due to the Ministry of Labour and Social Affairs’ order, whose objective had been to solicit a maximum number of bidders for the auction.⁵² Conversely, the AEPD upheld the complaint as against Google Spain and Google Inc., reasoning that search engines are subject to Member State data-protection implementing legislation due to their role as data processors.⁵³ Having thus concluded that Google’s search engine fell within the jurisdiction of the AEPD for data-privacy purposes, the AEPD held it had power to require search engines to remove or block access to data that compromises the “fundamental right to data protection and the dignity of persons in the broad sense.”⁵⁴ This power, the AEPD concluded, could be invoked by any subject of such data who “wish[ed]” that “such data not be known to third parties.”⁵⁵ Moreover, the AEPD imposed direct, or primary, liability on search engines without requiring data subjects to contact the publisher of data first.⁵⁶

Google Spain and Google Inc. appealed the decision to the administrative chamber of the *Audiencia Nacional*, Spain’s national appellate tri-

46. *Id.* para. 20.

47. *Id.*

48. *Id.* para. 21.

49. *See id.* para. 20; *Google Spain SL v. Agencia Española de Protección de Datos*, para. 15; *see also* Opinion of Advocate General Jääskinen, *Google Spain SL v. Agencia Española de Protección de Datos*, 2013, paras. 41-42 (explaining how website publishers can exclude pages from being indexed by using a short code).

50. *Google Spain SL v. Agencia Española de Protección de Datos*, para. 15.

51. *Id.*

52. *Id.* para. 16.

53. *Id.*

54. *Google Spain SL v. AEPD*, para. 17.

55. *Id.*

56. *Id.*

bunal for administrative proceedings, including those of the AEPD.⁵⁷ In order to answer whether a search-engine operator, when prompted by a data subject, has an obligation to remove results linking to third-party websites containing personal data, the *Audiencia Nacional* stayed the proceedings and referred a detailed set of preliminary questions about the interpretation of the Directive to the CJEU.⁵⁸ These questions pertained to the implemented Directive's territorial scope, its applicability to search engines, and the extent of individual rights granted by the Directive: whether the Directive establishes a so-called right to be forgotten.⁵⁹ The Greek, Italian, Austrian, and Polish governments, as well as the European Commission, joined the proceedings.⁶⁰

D. Overview of the Court's Response

The Court answered the interpretive questions referred by the *Audiencia Nacional* in the following way: First, it held that search-engine operators are subject to the Directive as processors of personal data pursuant to Articles 2(b) and (d).⁶¹ Second, it asserted personal jurisdiction under Article 4(1)(a) when a search-engine operator establishes a branch or subsidiary in a member state to promote and sell advertising on the search engine and directs its activity at the member state's population.⁶² Third, the Court recognized, pursuant to Articles 12(b) and 14(a), a natural person's general right to request—and search-engine operators' obligation to comply with—the removal of third-party search results appearing when searching for her name and containing information relating to her person, even if the information is not previously or simultaneously removed from the publisher's website itself.⁶³ In addition, this general right is not contingent upon a finding of prejudice to the data subject in order for the information to be removed.⁶⁴ Finally, the Court held that information's lawfulness changes over time, and that, in light of the fundamental rights under Articles 7 and 8 of the Charter of Fundamental Rights of the European Union,⁶⁵ the data subject's rights “override, as a rule,” both the economic interest of the operator and the general public's interest in the information.⁶⁶

57. *Id.* para. 18; PODER JUDICIAL ESPAÑA, <http://www.poderjudicial.es/cgpj/es/Poder-Judicial/Audiencia-Nacional/Informacion-institucional/Como-funciona-la-AN> (last visited Oct. 30, 2014).

58. *Id.* paras. 19-20.

59. Case C-131/12, *Google Spain SL v. AEPD*, 2012, Reference for a Preliminary Ruling, <http://curia.europa.eu/juris/liste.jsf?num=C-131/12> (last visited Oct. 30, 2014).

60. *See* *Google Spain SL v. AEPD*.

61. *Id.* para. 100.

62. *Id.*

63. *Id.*

64. *Id.*

65. Charter of Fundamental Rights of the European Union arts. 7-8, Dec. 18, 2000, 2000 O.J. (C 364) 1 [hereinafter Charter].

66. *Google Spain SL v. AEPD*, para. 100.

The Court referred the case back to the *Audiencia Nacional* to apply these interpretations of the Directive to the case at hand.⁶⁷

II. JURISDICTION OVER SEARCH ENGINES OUTSIDE THE EU

A. *Ratione Materiae: The Directive's Applicability to Search Engines*

In order for search engines to fall within the scope of the Directive, the Court first had to establish that the case involved personal data.⁶⁸ The Directive's broad definition of such data as "any information relating to an identified or identifiable [data subject]"⁶⁹ clearly extended to bankruptcy auction notices bearing Mr. Costeja González's name.⁷⁰ Even if "personal data" was involved, however, the Court also had to address whether search engines "process" such data.⁷¹ The Court built on its own case law⁷² and the text of the Directive—which refers to collecting, retrieving, recording, organizing, storing, disclosing, and making available personal data—to conclude that search engines "collect[]" and "retrieve[]" personal data by "exploring the [I]nternet automatically, constantly and systematically" before "record[ing]," "organis[ing]," "stor[ing]," "disclos[ing]," and "mak[ing] available" such information.⁷³ It thus rejected the argument that search engines don't "process" such data because no human interaction with the data gathered, indexed, and displayed actually occurs.⁷⁴

These determinations alone, however, would not have subjected search engines to the positive removal obligations for search results sought by Mr. Costeja González. Rather, the Court also had to find search engines to be "controllers" of personal data. Article 2(d) defines the term as "the natural or legal person, public authority, agency or any other body which *alone or jointly* with others determines the *purposes and means* of the processing of personal data."⁷⁵ Having already concluded that search engines process personal data, the Court swiftly reasoned that these search engines also determine the purposes and means of their processing activity.⁷⁶ The Court found further support for this construction in the Direc-

67. *See id.*

68. *See* Directive 95/46, *supra* note 24, at art. 1(1); *cf.* Hanseatisches Oberlandesgericht Hamburg [OLGZ] [Hamburg Higher Regional Court] Nov. 13, 2009, MultiMedia und Recht [MMR] 141 (Ger.) (noting, *inter alia*, that the German implementing legislation of the Directive did not apply to search engines).

69. Directive 95/46, *supra* note 24, art. 2(a).

70. *See* Opinion of Advocate General Jääskinen, *Google Spain SL v. AEPD*, 2013, para. 71.

71. *See* *Google Spain SL v. AEPD*, para. 21.

72. *Id.* para. 26 (citing Case C-101/01, *Sweden v. Bodil Lindqvist*, 2003 E.C.R. I-12971, para. 25 (holding that loading of personal data onto a website constitutes "processing")).

73. *Id.* para. 28.

74. *See id.* paras. 22, 41.

75. Directive 95/46, *supra* note 24, art. 2(d) (emphasis added).

76. *Google Spain SL v. AEPD*, para. 33.

tive's objective of ensuring effective protection of the data subjects' rights.⁷⁷

In contrast, Google argued that website publishers, not search-engine operators, should be held responsible as website publishers could indicate to the search engine's robots to exclude webpages from being indexed by use of a simple code.⁷⁸ But even if this meant that the "purposes and means" of processing were determined jointly between the search-engine operator and the website publisher, the Directive's text, according to the Court, allowed imposition of liability on search engines irrespective of the publisher's liability.⁷⁹ Moreover, the Court stated that the search engine's processing is separate and additional to that conducted by host sites themselves because of search engines' instrumental role in disseminating third-party data and providing a "structured overview" of information relating to the individual,⁸⁰ thus causing additional harm to that of the source publication. In other words, the Directive's fundamental-rights guarantees could not be effectuated if search engines were to be outside the scope of the Directive.⁸¹ The Court thus concluded that search-engine operators are "controllers."⁸²

B. *Tensions in the Court's Reasoning*

Deeming search engines "controllers" (for purposes of asserting jurisdiction under the Directive) creates a number of potential complications.⁸³ As Advocate General Niilo Jääskinen pointed out in his findings, a broad, "blind literal" interpretation of "controller" might lead to absurd results.⁸⁴ Moreover, such an interpretation might exceed the intentions of the Community legislators who passed the Directive in 1995 when the Internet's trajectory of encompassing a comprehensive, global, widely accessible database of the world's information arguably could not have been foreseen.⁸⁵ For example, employing the Court's interpretation, an ordinary Internet user who downloads the Court's judgment to her computer, not strictly for personal purposes, could be considered a "controller."⁸⁶ In other words, ordinary Internet users would be subject to the compliance obligations of controllers under the Court's interpretation of the Directive. The Court, however, seems to have guarded against such an interpretation

77. *Id.* para. 34.

78. *Id.* para. 39.

79. *Id.* para. 40.

80. *Id.* paras. 35-37.

81. *Id.* para. 38.

82. *Id.* paras. 33-34.

83. *See id.* paras. 32-41.

84. Opinion of Advocate General Jääskinen, *Google Spain SL v. AEPD*, paras. 29-30, 81.

85. *See id.* paras. 27-28.

86. *Id.* para. 29; *see also* THE EUROPEAN UNION COMMITTEE, *EU DATA PROTECTION LAW: A 'RIGHT TO BE FORGOTTEN'?*, 2014-5, H.L. 40, at 16-17, (U.K.).

by means of its additional-harm theory,⁸⁷ which singles out search engines for purposes of the Directive and thus protects or shields other Internet users from being subject to the Directive's requirements. Thus, even if the definition might be extended to other large-scale intermediaries,⁸⁸ it does not lend itself to include the unassuming individual the Advocate General was concerned about.

Yet, another objection is less easily dismissed: How can a search engine comply with the positive data processing and data-quality obligations imposed on controllers under Articles 6 and 7?⁸⁹ For instance, how can a search engine ensure that a data subject cannot be identified any "longer than is necessary for the purposes for which the data were collected," given the quantity of data indexed?⁹⁰ And how is a search engine to ensure that it processes personal data "only if the data subject has unambiguously given his consent"?⁹¹ The absurd consequence would be that search engines themselves would be illegal under EU law.⁹² To avoid such an outcome, Advocate General Jääskinen argued that the Court should apply a rule of reason as it had done in *Lindquist*, thus not rendering search engines "controllers" of personal data.⁹³ However, another way out of this conundrum is to refrain from taking the Court's reasoning to its logical extreme, that is, curtail the controller obligations of Articles 6 and 7 to constitute mere *ex post* obligations when a data subject puts the search engine on notice. The Court might have implicitly endorsed this approach by failing to address this problem.

Of course, the Court had to deem search engines "controllers" of personal data in order to find the Directive applicable, stating, for instance, that "it [could] not be accepted" that Google should escape liability.⁹⁴ A legal realist would be inclined to infer that the Court sacrificed—or rather deferred grappling with—the logical integrity of the Directive in order to rule on the fundamental rights questions at the core of the reference action, which the Court evidently cared about deeply.⁹⁵ On the other hand, a more charitable reader would find justification for the Court's broad definition of the term "controller" emanating from the Directive—the logic of

87. Google Spain SL v. AEPD, paras. 80, 87.

88. See Albert Gidari, Jr., *The Right to Be Forgotten, Everywhere*, PERKINS COIE (June 4, 2014), <http://www.perkinscoie.com/en/news-insights/the-right-to-be-forgotten-everywhere.html> (noting that the judgment "eviscerates" the separate corporate identity doctrine).

89. See Opinion of Advocate General Jääskinen, Google Spain SL v. AEPD, paras. 89-90.

90. Directive 95/46, *supra* note 24, art. 6(e).

91. See *id.* art. 7(a).

92. See Opinion of Advocate General Jääskinen, Google Spain SL v. AEPD, 2013, para. 90.

93. *Id.* para. 30 (citing Case C-101/01, Sweden v. Bodil Lindqvist, 2003 E.C.R. I-12971, paras. 67-70).

94. Google Spain SL v. AEPD, para. 58.

95. See *id.* para. 34.

which Advocate General Jääskinen criticized⁹⁶—and credit the Court’s implicitly permissive interpretation of controller obligations as correcting any potential absurdities. No matter one’s understanding, the problem is likely to come to the fore when, in future litigation, a claimant questions search-engine operators’ processing of data without prior blanket *ex ante* compliance with controller obligations.

C. *Ratione Personae: The Relevance of the Search Engine’s Location*

The Directive specifies the circumstances under which member states must exercise jurisdiction under their respective implementing legislation.⁹⁷ Accordingly, such legislation is applicable where “the processing is carried out *in the context* of the activities of an *establishment* of the controller on the territory of the Member State.”⁹⁸ Google Inc.’s Spanish establishment, Google Spain SL, possessed separate legal personality.⁹⁹ But the Court relied on Recital 19 in the Directive’s preamble to exclude the legal form of an establishment in a member state as a jurisdictional shield.¹⁰⁰ For purposes of privacy claims against search-engine operators, the Court thus rejected what is known as the “separate corporate identity doctrine.”¹⁰¹

Google Inc., however, would not be subject to the provisions of member state implementing legislation merely by having an establishment in the EU. The data processing of Google Inc.’s search engine also had to occur “*in the context* of the activities of an establishment of the controller.”¹⁰² Since Google Spain merely promoted the sale of advertising and did not operate Google Inc.’s search engine,¹⁰³ the Spanish subsidiary could not be considered the controller of the personal data in question.¹⁰⁴ Therefore, the Court had to find that Google Inc.’s data processing occurred “in the context of the activities” of Google Spain.¹⁰⁵

96. See Opinion of Advocate General Jääskinen, *Google Spain SL v. AEPD*, 2013, para. 10, 76-83.

97. See Directive 95/46, *supra* note 24, art. 4.

98. *Id.* art. 4(1)(a); *Google Spain SL v. AEPD*, para. 50 (emphasis added).

99. *Google Spain SL v. AEPD*, para. 49 (emphasis added).

100. *Id.* paras. 48-49; Directive 95/46, *supra* note 24, preamble 19 (“Whereas establishment on the territory of a Member State implies the effective and real exercise of activity through stable arrangements; whereas the legal form of such an establishment, whether simply branch or a subsidiary with a legal personality, is not the determining factor in this respect; whereas, when a single controller is established on the territory of several Member States, particularly by means of subsidiaries, he must ensure, in order to avoid any circumvention of national rules, that each of the establishments fulfills the obligations imposed by the national law applicable to its activities.”)

101. See *Gidari*, *supra* note 88 (noting that the judgment “eviscerates” the separate corporate identity doctrine).

102. Directive 95/46, *supra* note 24, art. 4(1)(a) (emphasis added).

103. See *Google Spain SL v. AEPD*, para. 43, 51.

104. *Id.* para. 51.

105. *Id.* para. 50.

Formally, the Court reached this conclusion by citing the text: “in the context of” the establishment’s activities is less restrictive than “by” the establishment.¹⁰⁶ The Court also bolstered this reading with teleological arguments (the Directive’s purpose of protecting the fundamental right to privacy of natural persons)¹⁰⁷ and by referring to the legislative intent of foreclosing technical circumvention of the Directive (as evidenced by Recitals 18 and 20 of the preamble).¹⁰⁸ Yet, the fact that the advertising revenues produced by Google Spain feed back into and thereby help sustain the existence of the search engine that is run by its parent might ultimately have swayed the Court.¹⁰⁹ In other words, the Court appears to have followed the money to conclude that the parent and its local establishment were “inextricably linked.”¹¹⁰

Unfortunately, for purposes of legal certainty, the Court neglected to answer definitively which of the factors mentioned were dispositive to its conclusion. In addition, the Court declined to address the jurisdictional impact of two other potentially dispositive conditions the *Audiencia Nacional* inquired about,¹¹¹ and thereby left the conditions’ independent jurisdictional impact unanswered. Similarly, it did not address questions as to whether, absent an establishment in a member state, jurisdiction could arise under public international law, or by making use of equipment within EU territory.¹¹² This suggests that the Court meant to avoid a broad jurisdictional holding that could be applied in areas outside of privacy law.

Nevertheless, the Court’s ruling is unambiguous as to search engines operated abroad: member state jurisdiction for privacy claims exists where there is an establishment in a member state intended to help fund and promote the operation of the search engine.¹¹³ Of course, this rationale is not inherently limited to search engines; in principle, it might be extendable to any controller of personal data anywhere with an establishment in a member state and intentions to promote and sell ads for its data processing product.¹¹⁴ Because the Court merely required the local subsidiary to “*intend*[] to promote and sell [search-engine] advertising” that is directed

106. *Id.* para. 52.

107. *Id.* paras. 53, 58 (“[I]t cannot be accepted” that Google “should escape the obligations and guarantees” of the Directive).

108. *See id.* para. 54.

109. *Id.* para. 55; *see also* Opinion of Advocate General Jääskinen, *Google Spain SL v. AEPD*, 2013, para. 64.

110. *Google Spain SL v. AEPD*, para. 56.

111. *See id.*, paras. 45, 59 (stating that not addressing the impact of the parent company’s listing of a member state subsidiary as the representative and controller for two filing systems, or the local subsidiary’s forwarding of legal requests to the parent company).

112. *Id.* para. 60; *cf.* Proposal for a General Data Protection Regulation, *supra* note 12, art. (3)(3) (“This Regulation applies to the processing of personal data by a controller not established in the Union, but in a place where the national law of a Member State applies by virtue of public international law.”).

113. *See Google Spain SL v. AEPD*, para. 60.

114. *See* *Gidari*, *supra* note 88.

at the population of the member state exercising jurisdiction,¹¹⁵ the wording is not even limited to actual sales or promotion of advertising. The judgment's language thus lends itself to a reading of a low threshold of mere intent behind a local subsidiary. The Court will need to clarify in future cases whether it meant this language to be taken to its logical conclusion.

In sum, the member state-subsiary basis for extraterritorial jurisdiction not only eliminates the shield of the 'separate corporate identity' doctrine but also provides a potent sword for assertions of personal jurisdiction under the Directive.¹¹⁶

III. THE RIGHT TO BE FORGOTTEN

A. *The Kind of Right Involved (A Primer)*

When asked about the Court's decision, Mr. Costeja González exclaimed that what he "did was to fight for the right to request the deletion of data that violates the honor, dignity and reputation of individuals."¹¹⁷ As Yale University law professor, James Whitman, points out, what Europeans perceive of as privacy differs significantly from common perceptions in the United States.¹¹⁸ Whereas continental Europeans in this context tend to think first and foremost about dignity of natural persons and their ability to control the information disclosed about themselves, that is, the right to control one's public image,¹¹⁹ Americans primarily (though by no means exclusively) perceive of privacy as liberty from intrusion by the government, "especially in one's own home."¹²⁰ Accordingly, Americans are much more worried about their "private sovereignty within [their] own walls"—at least traditionally.¹²¹ In contrast, European states have developed various legal regimes aimed at protecting a sense of personhood.¹²²

Thus, the right here primarily concerns a continental-style (dignity) right to control one's public image. This right was termed the "right to be

115. Google Spain SL v. AEPD, para. 60 (emphasis added).

116. Note, however, that extraterritorial assertions of jurisdiction over Internet content hosted outside of the EU (including in the U.S.) is not a new phenomenon in Europe. For instance, the German Federal Court of Justice did just that in 2010, asserting jurisdiction over an archived online news article in the New York Times that pertained to a German resident. Applying the factor of "directed to," the Court held that jurisdiction is established where the content in question contains a clear reference to a location in Germany. Cf. Bundesgerichtshof [BGHZ] [Federal Court of Justice] Feb. 3, 2010, Gewerbllicher Rechtsschutz und Urheberrecht [GRUR] 461 (Ger.).

117. Reuters, *The Man Who Sued Google to Be Forgotten*, NEWSWEEK (May 30, 2014, 2:13 PM), <http://www.newsweek.com/man-who-sued-google-be-forgotten-252854>.

118. Whitman, *supra* note 10, at 1155-60.

119. *Id.* at 1160-64.

120. *Id.* at 1161.

121. *Id.* at 1162.

122. *Id.* at 1163.

forgotten,”¹²³ but has also been called a right to irrelevancy and a right to obscurity.¹²⁴ Labels aside, its goal is to give natural persons a say in what cannot appear in search engines about them.

B. *The Basic Contours of the Right to Be Forgotten*

The *Audiencia Nacional* asked the Court whether a search-engine operator has an obligation under Article 12(b) (right to erasure) or Article 14(a) (right to object) to remove third-party search results that contain information about the data subject and appear when searching for the data subject’s name, even if the third-party website does not remove the information or the publication of the information is lawful.¹²⁵ The Court again framed the question in terms of the “high level of protection of fundamental rights and freedoms of natural persons” sought by the Directive and backed by Articles 7 (respect for private and family life) and 8 (protection of personal data) of the Charter of Fundamental Rights of the European Union.¹²⁶ Moreover, the Court pointed out the two-sided principle of protection found in Recital 25 of the preamble, which states that the Directive both confers rights and imposes obligations.¹²⁷ It then proceeded to interpret the two provisions inquired about by the referring court.

Article 12(b) requires member states to ensure that every data subject has a “right to obtain from the controller as appropriate the rectification, erasure or blocking of data the processing of which does not comply with the provisions of this Directive, *in particular* because of the incomplete or inaccurate nature of the data.”¹²⁸ The Court interpreted this obligation to extend to compliance with all of the Directive’s personal data processing requirements—not just primarily incomplete or inaccurate data.¹²⁹ The Court further specified that—subject to a member state’s exceptions in areas such as national security, defense, or public security—*all* processing of personal data first had to comply with Article 6’s requirements and subsequently with those of Article 7.¹³⁰ Yet, as in the material scope analysis, the Court failed to state specifically whether these are *ex ante* obligations,

123. See generally VIKTOR MAYER-SCHÖNBERGER, *DELETE: THE VIRTUE OF FORGETTING IN THE DIGITAL AGE* (2009).

124. Selinger & Hartzog, *supra* note 9.

125. Google Spain SL v. AEPD, para. 62.

126. *Id.* para. 66 (citing Case C-473/12, *Institut professionnel des agents immobiliers v. Geoffrey Englebert*, ECLI:EU:C:2013:715, para. 28, <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62012CJ0473&from=EN> (last visited Oct. 30, 2014)); Charter, *supra* note 65; see also Google Spain SL v. AEPD, paras. 3, 68; cf. Opinion of Advocate General Jääskinen, Google Spain SL v. AEPD, para. 126 (observing that Charter was not meant to widen the scope of EU law).

127. Google Spain SL v. AEPD, para. 67.

128. Directive 95/46, *supra* note 24, art. 12(b) (emphasis added).

129. Google Spain SL v. AEPD, para. 70.

130. *Id.* para. 71. (noting that whereas Article 6 requires member states’ implementing legislation to ensure qualitative requirements for the processing of personal data, including fairness, lawfulness, relevancy, and timeliness of information identifying a data subject, Article 7 additionally requires a positive, legitimate reason for such processing.)

as the Directive's text would suggest.¹³¹ But it provided a clue as to the mode of construction of these provisions, stating that controllers (only) "must take every *reasonable* step" to ensure compliance.¹³² Thus, the Court appears to have foreclosed a "blind literal" reading the Advocate General Jääskinen had warned against in the material scope context, opting for a reasonableness approach to search engine obligations instead.¹³³

For purposes of Article 12(b), the Court stopped short of recognizing search engines as acting in the public interest under Article 7(e), that is, an independent legitimating reason not subject to being trumped by other rights or interests.¹³⁴ Instead, it only conceded that search-engine operators' data processing is "capable of being" considered a legitimate interest under Article 7(f),¹³⁵ laying the groundwork for a balancing of rights. Thus, in accordance with the text of Article 7(f), the search engine's interest is only legitimate so long as it is not "overridden" by the fundamental rights and freedoms of the data subject under Article 1(1) of the Directive and Articles 7 and 8 of the Charter.¹³⁶

In addition to bringing a claim pursuant to Article 12(b), a data subject may also object to processing under Article 14(a) "on compelling legitimate grounds relating to his particular situation" as outlined in Articles 7(e) and 7(f).¹³⁷ The Court stated that the balancing that would occur under Article 14(a) would be more specific to the particular circumstances.¹³⁸ But given that a data subject thus would have to justify his objection, there seems to be little if any incentive to pursue a claim under 14(a) as opposed to 12(b). This is even more so as the Court in passing gave search-engine operators an additional defense in the form of Article 7(e)'s unconditional public-interest legitimating reason, which it failed to mention in its analysis of Article 12(b).¹³⁹ It remains to be seen whether such subtle, yet potentially significant, differences in the interpretation of search-engine obligations under the two articles will remain distinct or morph into one claim that will be treated alike.¹⁴⁰

Moreover, the Court firmly established the significance of timeliness of personal data,¹⁴¹ stating that Article 6(c) to (e) also requires that data be "adequate, relevant, and not excessive in relation to the purposes" of

131. See Directive 95/46, *supra* note 24, arts. 6, 7.

132. Google Spain SL v. AEPD, para. 72 (emphasis added).

133. Opinion of Advocate General Jääskinen, Google Spain SL v. AEPD, 2013, para. 30.

134. *Cf. id.* paras. 36, 121 (noting that their role was "crucial for the information society, and [that] their liability for third-party content [in other areas] . . . ha[d] been limited in order to facilitate their legitimate activities.").

135. Google Spain SL v. AEPD, para. 73.

136. *Id.* para. 74.

137. *Id.* para. 76.

138. *Id.*

139. *Id.*; see Directive 95/46, *supra* note 24, art. 7(e).

140. Unfortunately, briefs are not open to the public for CJEU cases.

141. Google Spain SL v. AEPD, para. 92.

the data processing.¹⁴² This means that data that was once processed lawfully might “age” to become inadequate, irrelevant, or excessive, thus outliving its legitimate inclusion in search results for the data subject’s name. When this point is reached, the Court concluded that the information must be removed.¹⁴³ But the Court provided no specifics as to when information is no longer relevant, or whether this may differ depending on the kind of information involved. This could provide an opening for future reference actions but also creates substantial legal uncertainty in the meantime. As expected in a reference action merely interpreting EU law,¹⁴⁴ the Court refrained from explicitly applying this principle to Mr. Costeja González’s case, as the original publication dated back sixteen years. Rather, the Court stated that “it should be held” that announcements be excluded from the search-engine results for his name.¹⁴⁵ Thus, the Court’s *de facto* application of these terms to the facts of the case at least provides partial insight into its definition of these terms: claims involving the precise features of Mr. Costeja González’s should result in removal of search results. But this factbound definition hardly provides helpful guidance to those applying member state law under the Directive’s framework to different sets of facts. The Court’s subsequent balancing analysis, however, provides partial relief to the uncertainty.

As to the scope of the removal, the Court only required removal from the search results for the data subject’s name as opposed to a complete removal of a given URL from search results.¹⁴⁶ At the same time, the Court failed to specify the country domain or domains from which the search results should be removed. Therefore the question remains as to whether a Spanish user has a right to effectuate removals of specific search results for her name from a search engine’s non-Spanish domains, given that these domains are similarly accessible from Spanish territory.¹⁴⁷ There are at least some hints that could provide a partial answer to this question. The Court stated that any person—presumptively not just residents or citizens of a member state—whose request has been rejected by a search-engine operator, may subsequently take her claim to a member state DPA, which is to exercise its powers of investigation and intervention to effectuate a temporary or permanent ban on processing.¹⁴⁸ In addition,

142. *Id.* para. 72.

143. *See id.*

144. *See* Consolidated Version of the Treaty on the Functioning of the European Union art. 15, May 9, 2008, 2008 O.J. (C 115) art. 267.

145. *Id.* para. 98.

146. *See id.* para. 96.

147. *See* Friedhalm Greis, *Google-Suchergebnisse: EU-Datenschützer verlangen weltweite Löschung*, GOLEM.DE (July 24, 2014, 2:54 PM), <http://www.golem.de/news/google-suchergebnisse-eu-datenschuetzer-verlangen-weltweite-loeschung-1407-108101.html> (noting that DPAs in the EU are asking for worldwide removals); *see also* Julia Fioretti, *Google Under Fire From Regulators on EU Privacy Ruling*, REUTERS, July 24, 2014, <http://www.reuters.com/article/2014/07/24/us-google-eu-privacy-idUSKBN0FT1AZ20140724>.

148. *Google Spain SL v. AEPD*, paras. 77-78.

although the Court is quiet on the territorial scope of a DPA's powers, the Directive itself states that each authority is limited to the territory of its member state.¹⁴⁹ From this context and the fact that the Court is also silent on standing,¹⁵⁰ it seems plausible to conclude that even if the authority of the member state's DPA is limited to its own territory, a data subject could at least bring claims to the attention of DPAs across the EU, thereby effectuating search-result removals from member state domains beyond her own.

C. *The Additional-Harm Theory and its Consequences*

As first introduced in the material scope analysis, the Court reiterated that the harm inflicted by search-engine operators on the data subject's rights is separate and distinct from that inflicted by the website publisher.¹⁵¹ This is so, according to the Court, because the search engine makes it "appreciably easier" for anyone to obtain a "structured overview" of data pertaining to someone else when searching for their name on a search engine, thus potentially displaying a detailed profile of that person's personal data.¹⁵² The ubiquitous presence of the Internet today, says the Court, amplifies such infringement of the data subject's rights.¹⁵³

The Court derived several conclusions from this conception of the potential for harm inflicted by search-engine results: first, the Court deemed it "clear" that data processing cannot be justified merely by the economic "interest" of the search-engine operator.¹⁵⁴ Second, the Court added that, as a general rule, the data subject's rights also trump the Charter Article 11 interest of Internet users in the information.¹⁵⁵ Third, because the search-engine operator's processing is separate and distinct from that of the website publisher, search engines are directly liable without resort to a given website's publisher.¹⁵⁶ The first two conclusions will be addressed in this subsection while the third conclusion will be addressed in the subsequent subsection.

The Court's language could be read as establishing a rebuttable presumption in favor of the data subject over the search engine's interest in

149. Directive 95/46, *supra* note 24, art. 28(1).

150. Of course the facts of this case did not pose standing obstacles that might have prompted a narrower holding, given that Mr. Costeja González's claim pertained to a Spanish publication and that he pursued his claim through the institutions of his own member state.

151. Google Spain SL v. AEPD, para. 80.

152. *Id.* paras. 80, 87.

153. *Id.* para. 80.

154. *Id.* para. 81.

155. *Id.* paras. 81, 97 (holding that the data subject's rights "override, as a rule, not only the economic interest of the operator . . . but also the interest of the general public"). *But see* Opinion of Advocate General Jääskinen, Google Spain SL v. AEPD, paras. 120-37.

156. *See* Google Spain SL v. AEPD, para. 83.

conducting a business,¹⁵⁷ the public's right to having access to information,¹⁵⁸ and (implicitly) the publisher's right to free expression.¹⁵⁹ There are at least two non-exclusive reasons for such a presumption. As repeatedly stated,¹⁶⁰ the Court might simply have considered it sound in terms of the Directive's purpose of protecting certain fundamental rights to create a rebuttable presumption.¹⁶¹ In addition, a presumption partly limits the role accorded to those who are charged with deciding claims on the ground, that is, member state DPAs, courts, and search engines. These actors are thus to decide in principle but only in the limited sphere set by the Court—perhaps promoting the principle of legal certainty in the EU.¹⁶² Secondly, the presumption could be a partial offset for the fact that the Court did not impose strict (and likely unworkable) *ex ante* compliance obligations with Articles 6 and 7.

But the Court clarified that the data subject's rights are not completely unchecked or absolute,¹⁶³ thus pointing either to a balancing analysis without a presumption or specifying circumstances under which the presumption may be overcome. To this end, the Court stated that a "fair balance" depends in some cases on "the nature of the information in question and its sensitivity for the data subject's private life," as well as the interest of the public in having access to the information, which may vary depending on the data subject's role in public life.¹⁶⁴ Yet, it is unclear what the contours and effect of this exception might be. For instance, what kind of stature in public life would render the exception to personal-data protection applicable? Would a person running for local office fall under the exception and for what purposes?

Some member state courts, such as Germany's, have created nuanced personality-rights jurisprudence to address such questions.¹⁶⁵ For instance,

157. See Charter, *supra* note 65, art. 16; see also Opinion of Advocate General Jääskinen, *Google Spain SL v. AEPD*, para. 124.

158. Charter, *supra* note 65, art. 11; see Opinion of Advocate General Jääskinen, *Google Spain SL v. AEPD*, para. 121.

159. Charter, *supra* note 65, art. 11; see Opinion of Advocate General Jääskinen, *Google Spain SL v. AEPD*, para. 122.

160. See, e.g., *Google Spain SL v. AEPD*, paras. 3, 58, 66.

161. Note that the Court historically tends to rule in favor of data protection over other rights. Cf. Laraine Laudati, *EU Court Decisions Relating to Data Protection*, EC.EUROPA.EU, Dec. 2014, http://ec.europa.eu/anti_fraud/documents/data-protection/dpo/ecj_decisions_relat ing_data_protection_en.pdf.

162. See generally ALINA KACZOROWSKA, *EUROPEAN UNION LAW* 116 (3d ed. 2013).

163. *Google Spain SL v. AEPD*, paras. 81, 97.

164. *Id.*

165. Edward J. Eberle, *Human Dignity, Privacy, and Personality in German and American Constitutional Law*, 1997 UTAH L. REV. 963, 979 (1997) ("German personality law is . . . a creature of the [German] Constitutional Court, as rights of privacy are of the [U.S.] Supreme Court."); see also Edward J. Eberle, *Human Dignity, Privacy, and Personality in German and American Constitutional Law*, 1997 UTAH L. REV. 963, 976 n.59 (1997) (noting that the notion of free development of personality is fundamentally a Kantian one, which was developed by jurist Friedrich Carl von Savigny into his theory of autonomy, in turn influencing Otto von Gierke in his framing of the 1896 German Civil Code, and that the main theo-

allegedly false statements of fact are treated differently from expressions of opinion;¹⁶⁶ distinctions between spheres of “privacy” may affect the outcome;¹⁶⁷ and the social justification for the removal, for example, when convicted felons seek to have search-engine results removed so as to better reintegrate into society, is factored into the determination.¹⁶⁸ With the Court’s apparent usurpation of this traditional area of member state competency, it remains to be seen whether the Court will develop similar distinctions in its own online-privacy jurisprudence. Given its mentioning of exceptions, the Court expressed a willingness to address such factors, and the Court certainly ensured that future reference actions clarifying exceptions will be forthcoming.

In sum, the Court in effect significantly enlarged its own role not only by recognizing a right to be forgotten and finding search-engine liability in this area a matter of EU law, but also by circumscribing the adjudicative role of DPAs, member state courts, and search-engine operators. Finally, it is also plausible that the Court implicitly sought to give EU political actors reason to provide clarification by means of the pending General Data Protection Regulation as to the exceptions as well as the definitions relating to timeliness of personal data.¹⁶⁹

D. *The Direct Liability and Procedural Role of Search Engines*

Further relying in part on its additional-harm theory, the Court imposed direct liability on search engines.¹⁷⁰ To support this conclusion, the Court reasoned that because those responsible for the publication may *sometimes* not be subject to EU law and because of the ease with which information spreads beyond the original source publication online, effective protection of data subjects could only be achieved by imposing primary liability on search-engine operators.¹⁷¹ Similarly, the Court found additional support for holding search engines directly liable by citing the journalistic purposes exception of Article 9, which applies to websites but not to search engines.¹⁷² This example, according to the Court, reconfirms

retical development of personality rights in Germany paralleled the original development of privacy rights in America); Gregor Thüsing, *Datenschutz als Persönlichkeitsschutz*, FRANKFURTER ALLGEMEINE, Sept. 1, 2013, <http://www.faz.net/aktuell/politik/die-gegenwart/datenschutz-datenschutz-als-persoentlichkeitsschutz-12555555.html> (explaining that data protection law and personality-rights law overlap in that the right to individual self-determination is a personality right derived from Articles 1(1) (human dignity) and 2(1) (free development of personality) of Germany’s Basic Law).

166. See MARIAN PASCHKE, WOLFGANG BERLIT & CLAUS MEYER, HAMBURGER KOMMENTAR - GESAMTES MEDIENRECHT 1020-28 (2d ed. 2011).

167. See *id.* at 1007-20.

168. See *id.* at 1015-18.

169. Cf. Proposal for a General Data Protection Regulation, *supra* note 12.

170. See *Google Spain SL v. AEPD*, para. 83.

171. *Id.* para. 84.

172. *Google Spain SL v. AEPD*, para. 85.

that the requirements imposed on search engines may be separate from those imposed on the website publishers themselves.¹⁷³

Some courts in member states, if not all, had previously developed regimes of search-engine secondary liability.¹⁷⁴ In Germany, for instance, the courts derived the concept of “disturber” liability and later applied it to alleged personality-rights violations appearing on search engines.¹⁷⁵ In contrast, the Court decided that natural persons may direct their requests under Article 12(b) and Article 14(a) directly at the controller of information, that is, the search-engine operator.¹⁷⁶ Whereas the data subject appears to be under no obligation to make a *prima facie* case or demonstrate prejudice to her under Article 12(b),¹⁷⁷ she must justify her objection under Article 14(a).¹⁷⁸ The operator is to then “duly examine [the] merits” and potentially seize processing of the data.¹⁷⁹ Search-engine operators—not courts or DPAs—thus render the initial determination as to the data subject’s (relative) rights.¹⁸⁰ The publisher of the website whose freedom of expression could be curtailed by hiding search-engine results for her content is curiously absent from that process.¹⁸¹

Secondary liability is not without merit: First, effective redress arguably could be provided only by the publisher of the website because the search-engine operator could only remove the search result, not erase the source of the information itself.¹⁸² By separating the harm inflicted by search-engine results from that of the source publication, however, the Court appears to have countered that removal of the information displayed on search engines could be more effective than the removal from the publisher’s website itself.¹⁸³

Second, common procedural rights, such as hearing both sides to a dispute before making a determination as to their relative rights,¹⁸⁴ are arguably best safeguarded by putting all parties on notice.¹⁸⁵ The search-engine operator should not represent the website publisher or the public

173. *Id.*

174. *See, e.g.,* Thomas Hoeren & Silviya Yankova, *The Liability of Internet Intermediaries: The German Perspective*, 43(5) INT’L REV. INTELL. PROP. & COMPETITION L. 501, 504 (2012) (discussing the German courts perspective on this issue).

175. *Id.* at 504-06.

176. *See* Google Spain SL v. AEPD, paras. 53, 66, 77.

177. *See id.* para. 99.

178. *Id.* paras. 76, 100 (stating that decisions on costs under Article 14(a) are a matter for the court).

179. *Id.* paras. 77, 98-99.

180. *See id.* paras. 77-81.

181. *See* Opinion of Advocate General Jääskinen, Google Spain SL v. AEPD, para. 134.

182. *See id.* para. 109.

183. Google Spain SL v. AEPD, para. 84.

184. Kaczorowska, *supra* note 162, at 117.

185. *See* Opinion of Advocate General Jääskinen, Google Spain SL v. AEPD, para. 134.

at large in this process for two reasons: their rights vis-à-vis the party seeking redress may differ (right to free expression or access to information versus the right to conduct a business); and their economic incentives are not necessarily interchangeable, potentially resulting in a chilling effect on the display of information in search results.¹⁸⁶

Of course, the Court neither foreclosed nor endorsed the possibility of notifying website publishers when requests are lodged against their content.¹⁸⁷ Although not an obligation as such, this could at least be read as a tacit acceptance of such a practice, which the German Federal Court of Justice in 2011 endorsed for Blogger, Google's blog-hosting platform.¹⁸⁸ While the German court's process is not without shortcomings of its own,¹⁸⁹ that court at least made an attempt to afford a role to both the author and the data subject:¹⁹⁰ upon receipt of a substantiated request, Google must notify the owner of the blog in dispute by forwarding the request to the owner.¹⁹¹ Only if the parties cannot come to terms with each other or the owner fails to respond, is Google to balance their rights and remove information accordingly.¹⁹²

In contrast, the CJEU failed to mandate even such partly effective steps.¹⁹³ The mere fact that search-engine operators, unlike providers of hosted services, might not have the contact information of website publishers cannot fully account for this omission since fake, or no longer up-to-date, user contact information for hosted products might be similarly lacking.¹⁹⁴ Alternatively, the Court might have placed little significance in the chilling effect of incentives for search-engine operators to blindly comply with requests. Or the Court might have trusted an invisible hand of the market to convince search-engine operators that it would be advantageous for their business to forward requests and thus bolster their claims to transparency.¹⁹⁵ Perhaps the Court did not share Advocate General Jääskinen's conception of the role played by search engines as an omnipresent

186. See *id.* paras. 133-34. The search engine operator arguably has an amplified financial incentive in complying with removal requests given the scale of its data processing.

187. See James Ball, *EU's Right to Be Forgotten: Guardian Articles Have Been Hidden by Google*, THE GUARDIAN, July 2, 2014, <http://www.theguardian.com/commentisfree/2014/jul/02/eu-right-to-be-forgotten-guardian-google>; Robert Peston, *Why Has Google Cast Me into Oblivion?*, BBC News (July 2, 2014), <http://www.bbc.com/news/business-28130581>.

188. Bundesgerichtshof [BGHZ] [Federal Court of Justice] Oct. 25, 2011, *Gewerblicher Rechtsschutz und Urheberrecht [GRUR]* 311 (Ger.).

189. See Georg Nolte & Jörg Wimmers, *Wer stört? Gedanken zur Haftung von Intermediären im Internet*, *Gewerblicher Rechtsschutz und Urheberrecht Beilage* 58 (2014).

190. Bundesgerichtshof [BGHZ] [Federal Court of Justice] Oct. 25, 2011, *Gewerblicher Rechtsschutz und Urheberrecht [GRUR]* 311 (Ger.).

191. *Id.*

192. *Id.*

193. See generally Kaczorowska, *supra* note 162.

194. See Nolte & Wimmers, *supra* note 189, at 65-66.

195. See Ball, *supra* note 187 (pointing out that Google had notified the paper about the removal of links to six articles).

source of information,¹⁹⁶ reasoning that non-indexed information on third-party websites is almost as real and available as information displayed on search engines. Finally, it is possible the Court considered a search engine's less censored U.S. domain an effective substitute for ensuring continued access to the information.¹⁹⁷ But the Court remained silent, withholding its reasons for not providing for a more rigorous adversarial process, such as an explicit obligation to notify publishers.¹⁹⁸ Thus, in the absence of a legal requirement, those who are left out of the process between the data subject and the search engine must rely on search-engine operators' benevolence, hoping that these operators will consider sharing requests with website publishers worth their resources and legal risk.¹⁹⁹

IV. THE COURT'S OBJECTIVES

A. *Protecting fundamental rights*

Although not a human rights court as such,²⁰⁰ the Court has long asserted its role in safeguarding the effective protection of fundamental

196. See Opinion of Advocate General Jääskinen, *Google Spain SL v. AEPD*, paras. 10, 36; see also Bundesgerichtshof [BGHZ] [Federal Court of Justice] July 17, 2003, *Neue Juristische Wochenschrift* [NJW] 3406 (Ger.) (“Ohne die Inanspruchnahme von Suchdiensten und deren Einsatz von Hyperlinks . . . wäre die sinnvolle Nutzung der unübersehbaren Informationsfülle im World Wide Web praktisch ausgeschlossen.”) (“Without resort to search services and their use of hyperlinks . . . it would be practically impossible to make expedient use of the vast depth of information on the World Wide Web.”) (author's translation).

197. See Toobin, *supra* note 3 (quoting Viktor Mayer-Schönberger as referring to the decision as merely creating a “speed bump” due to the fact that users could switch to the search engine's “.com” domain).

198. This could imply that member states may add their own requirements, or simply that the Proposed Regulation should add to the Court's judgment. See Mark Scott, *Google Reinstates European Links to Articles From the Guardian*, N.Y. TIMES July 4, 2014, <http://www.nytimes.com/2014/07/05/business/international/google-to-guardian-forget-about-those-links-right-to-be-forgotten-bbc.html> (noting that the Court may have purposefully avoided giving specific guidance in light of the pending regulation).

199. See Richard Waters, Henry Mance & John Aglionby, *Google U-Turn Over Deleted Newspaper Links*, FINANCIAL TIMES (July 3, 2014), <http://www.ft.com/cms/s/0/64e37214-02d0-11e4-a68d-00144feab7de.html#axzz3HroDwzuz> (reporting that Google had received about 70,000 removal requests and had hired “an army of paralegals to vet every web address” before deciding whether to remove links); see also Mark Scott, *Google Provides Details on ‘Right to Be Forgotten’ Requests in E.U.*, N.Y. TIMES (Oct. 9, 2014, 7:00 PM), <http://bits.blogs.nytimes.com/2014/10/09/google-provides-details-on-right-to-be-forgotten-requests/> (noting that Google's Transparency Report had revealed that the company to date had received 143,000 requests for 491,000 links as a result of the right to be forgotten ruling); *Transparency Report: European Privacy Requests for Search Removals*, GOOGLE, <http://www.google.com/transparencyreport/removals/europeprivacy/> (last visited Oct. 30, 2014) (providing ongoing statistics).

200. Patricia R. Waagstein, *Human Rights Protection in Europe: Between Strasbourg and Luxembourg*, STANFORD PROGRAM ON INTERNATIONAL AND CROSS-CULTURAL EDUCATION, http://spice.fsi.stanford.edu/docs/human_rights_protection_in_europe_between_strasbourg_and_luxembourg (last visited Oct. 30, 2014).

rights and freedoms within the EU legal order.²⁰¹ So it should hardly come as a surprise that the Court continued on this path. From this perspective, the Court's interpretation of the Directive actually appears to give effect to its text in a rather straightforward manner. After all, Article 1 of the Directive states its purpose unambiguously: "In accordance with this Directive, member states shall protect the fundamental rights and freedoms of natural persons, and in particular their right to privacy with respect to the processing of personal data."²⁰² Thus the Directive's stated *telos* mirrored the Court's longstanding self-image and role within the EU.²⁰³ Armed with this mandate, it aimed to give people a right to control their public image in the Internet age—even if seemingly starting from the desired result and working its way through the Directive's textual maize.²⁰⁴ And it confirmed the existence of the right to be forgotten by drawing on all the authority it could muster by deciding the reference action in Grand Chamber and mentioning the importance of the right to privacy no less than nine times.²⁰⁵ Similarly, in closing, the Court left little to chance, essentially telling the *Audiencia Nacional* how to apply the Court's interpretation to the facts of the case.²⁰⁶

Some of the effects of the judgment, however, cast doubt on the ultimate effectiveness of any person's right to be forgotten.²⁰⁷ In line with the so-called Streisand effect,²⁰⁸ a new independent website has sprung up listing webpages removed from search engines' European domains.²⁰⁹ Moreover, the Court's example of imposing primary liability on search-engine operators and their much-publicized compliance has showcased the technical means and legal mechanisms for a (further) balkanized Internet.²¹⁰ The Court's judgment could thus provide a blueprint to governments within and outside of the EU to restrict the information available on

201. See Elizabeth F. Defeis, *Human Rights and the European Court of Justice: An Appraisal*, 31 *FORDHAM INT'L L.J.* 1104 (2007).

202. Directive 95/46, *supra* note 24, art. 1.

203. See, e.g., *Google Spain SL v. AEPD*, para. 66; see generally Defeis, *supra* note 201.

204. See RICHARD A. POSNER, *HOW JUDGES THINK* 230-68 (2008) (advocating for such result-oriented judicial reasoning).

205. See *Google Spain SL v. AEPD*, paras. 66, 68, 74, 80, 87, 91, 97, 99; see also Opinion of Advocate General Jääskinen, *Google Spain SL v. AEPD*, paras. 1, 28 (opening his opinion with a quote from Warren and Brandeis's *Right to Privacy* and comparing the changes faced by the Court to those posed by the invention of the printing press).

206. *Google Spain SL v. AEPD*, paras. 98-99.

207. *Id.* para. 78.

208. See Justin Parkinson, *The Perils of the Streisand Effect*, *BBC NEWS MAGAZINE* (July 30, 2014), <http://www.bbc.com/news/magazine-28562156> (indicating the definition of the term is the phenomenon that occurs when an attempt to hide or delete a piece of information instead results in wider circulation of the information, particularly on the Internet); Roger Parloff, *Enforcing Your 'Right to Be Forgotten' May Get You Remembered*, *FORTUNE* (Oct. 7, 2014, 7:00 AM), <http://fortune.com/2014/10/07/right-to-be-forgotten>.

209. Kevin Rawlinson, *'Hidden From Google' Lists Pages Blocked by Search Engine*, *BBC NEWS* (July 15, 2014), <http://www.bbc.com/news/technology-28311217>.

210. Toobin, *supra* note 3, at 32.

search engines, no matter where those search engines are based. This argument, however, neglects to account for the fact that the balkanization of the Internet was already underway prior to the judgment,²¹¹ and that—at least within the EU—the immediate effect of the judgment is less rather than more balkanization. Nonetheless, there can be little doubt that the Court’s judgment does not necessarily lead to enhanced protection of fundamental rights.

B. Harmonizing laws across the EU

Starting with its seminal decision in *Van Gend*,²¹² the Court has been a main driver in the legal integration of the EU.²¹³ The effect of the Directive on search-engine providers did not receive uniform treatment across the EU prior to the Court’s May 2014 ruling.²¹⁴ Therefore, the Court brought a measure of uniformity to the issue by subjecting search-engine operators to the Directive.

But not only did the Court clarify the applicability of the Directive, it also in effect brought a significant share of personality-rights jurisprudence under the Court’s wing by giving any person a right to have certain information removed from search results.²¹⁵ As discussed, this right, as interpreted by the Court, is broader in scope and considerably less burdensome on the plaintiff than traditional personality rights. For instance, a data subject does not have to attempt to approach publishers of information first since the Court imposed direct liability on search-engine providers; a data subject can more easily enforce her right across the EU; and a data subject does not have to make a *prima facie* case of illegality. Thus, data subjects are incentivized to bring or bolster their claims citing their rights under the Directive, and hence under EU law, which the Court interprets authoritatively.

211. See Michael Hickins, *Post-Snowden ‘Balkanization’ of the Internet Should Worry CIOs*, WALL STREET JOURNAL (Apr. 4, 2014, 5:23 PM), <http://blogs.wsj.com/cio/2014/04/14/post-snowden-balkanization-of-the-internet-should-worry-cios/tab/print>; Sascha Meinrath, *The Future of the Internet: Balkanization and Borders*, TIME MAGAZINE (Oct. 11, 2013), <http://ideas.time.com/2013/10/11/the-future-of-the-internet-balkanization-and-borders>.

212. Case 26/62, *Van Gend en Loos v. Nederlandse Administratie der Belastingen*, 1963 E.C.R. 1.

213. See Antoine Vauchez, *The Force of a Weak Field: Law and Lawyers in the Government of the European Union (For a Renewed Research Agenda)*, 2 INT’L POL. SOC. 128, 131 (2008); see generally Elizabeth F. DeFeis, *Human Right and the European Court of Justice: An Appraisal*, 31 FORDHAM INT’L L.J. 1104, 1114 (2007) (discussing the CJEU’s leadership in the integration of human rights law across the EU).

214. See Hanseatisches Oberlandesgericht Hamburg [OLGZ] [Hamburg Higher Regional Court] Nov. 13, 2009, MultiMedia und Recht [MMR] 141 (Ger.) (noting, *inter alia*, that the German implementing legislation of the Directive did not apply to search engines).

215. See *Google Spain SL v. AEPD*, para. 78; see also Caitlin Dewey, *Pianist Asks The Washington Post to Remove a Concert Review Under the E.U.’s ‘Right to Be Forgotten’ Ruling*, WASHINGTON POST, Oct. 31, 2014, <http://www.washingtonpost.com/news/the-intersect/wp/2014/10/31/pianist-asks-the-washington-post-to-remove-a-concert-review-under-the-e-u-s-right-to-be-forgotten-ruling>.

Of course, it remains to be seen to what extent member states courts and legislatures will differentiate traditional personality rights from the privacy rights under the Directive, or find ways to delineate the Directive's scope in spite of the judgment—perhaps through the new General Data Protection Regulation.²¹⁶ Whatever the response at the EU or member state level, there can be no doubt that the Court's judgment increased the uniformity of privacy rights as against search-engine operators across the EU,²¹⁷ and that by moving these issues within the scope of EU fundamental rights, the Court established itself as the ultimate arbiter of these rights.

C. Controlling Google's Power

Commentators in Europe interpreted the judgment as an effort to curtail Google's power.²¹⁸ The search engine could have responded to the judgment in one of the following ways. First, it could have decided to redirect requests received to member state DPAs. Not only would this response have been problematic in terms of overwhelming leanly staffed DPAs with requests and thereby likely upsetting a key regulator, it would also have elevated DPAs to decision makers for tort cases traditionally handled by member state courts. In addition, the judgment did not clearly endorse such blanket deference by search-engine operators to DPAs, thus exposing Google to liability.²¹⁹ In the alternative, Google could have opted to quickly develop its capacity to handle requests for removal of data arising under the judgment.²²⁰ Given the vast numbers of requests potentially involved, the mode of legal review in any such effort would have had to be scalable;²²¹ it would also be unlikely to approach the level of scrupulous balancing traditionally performed by member state courts.²²² Furthermore, any such legal review and decision-making would be performed by a private-sector company instead of a public institution.²²³ Finally, basic features of fair legal proceedings, such as proper collection of evidence, hearing of both sides, and transparency would be absent.²²⁴ In other words, there were liability and normative drawbacks to both alternatives.

Google opted for the second alternative, putting in place an online form to provide a pipeline for incoming requests, and other search-engine

216. Proposal for a General Data Protection Regulation, *supra* note 12.

217. See, e.g., Directive 95/46, *supra* note 24, art. 30(1)(a).

218. See, e.g., Innocenzo Genna, *Search Engines, Right to Be Forgotten and Data Protection: Regulating Google?*, RADIOBRUXELLESLIBERA, <http://radiobruelleslibera.wordpress.com/2014/05/13/search-engines-right-to-be-forgotten-and-data-protection-regulating-google> (last updated May 14, 2014).

219. See *Google Spain SL v. AEPD*, para. 77.

220. See *Waters et al.*, *supra* note 199.

221. See *Scott*, *supra* note 199; *Transparency Report*, *supra* note 199.

222. See *Opinion of Advocate General Jääskinen*, *Google Spain SL v. AEPD*, para. 133.

223. *Id.*

224. See *id.* at para. 134; see also *Kaczorowska*, *supra* note 162 at 117.

providers followed suit.²²⁵ In the judgment's aftermath, Google's public *mea culpa* stressed that the company was not only working urgently to implement the judgment but was also reevaluating its approach to privacy in the EU more generally.²²⁶ Google assembled a panel of company officials and outside experts to solicit public feedback in Europe on the company's privacy practices.²²⁷ In a sign of the public's desire to exercise their right to be forgotten, Google alone received over 140,000 individual requests over a span of approximately four months after the judgment.²²⁸

But did Google's compliance have any impact on its power—or rather, could it have? In terms of the search engine's market power, the judgment might actually have created additional barriers to entry for competitors to Google's search-engine business by imposing significant regulatory compliance costs. This potential effect would further cement Google's market power and thus run counter to the Commission's efforts in the competition field.²²⁹ Even prior to the judgment, Google had a monopoly of the search engine market in Europe with a market share of about ninety percent.²³⁰ As the incumbent firm, Google thus had potential advantages—such as the sunk costs of building a search engine—over new market entrants.²³¹ Rebutting this structural concern, Chicago School

225. Dave Lee, *Google Sets Up 'Right to Be Forgotten' Form After EU Ruling*, BBC NEWS (May 30, 2014), <http://www.bbc.com/news/technology-27631001>.

226. See Richard Waters, *Google's Larry Page Resists Secrecy But Accepts Privacy Concerns*, FINANCIAL TIMES (May 30, 2014, 2:00 AM), <http://www.ft.com/intl/cms/s/0/f3b127ea-e708-11e3-88be-00144feabdc0.html>; see also Murad Ahmed & Duncan Robinson, *The Big Stick Behind Google's Soft Power Approach to Europe*, FINANCIAL TIMES (Sept. 16, 2014, 5:36 PM), <http://www.ft.com/intl/cms/s/0/7f5c3052-3e5f-11e4-a620-00144feabdc0.html#axzz3GS27w6ul>; Cornelius Rahn, Brian Parkin & Stephanie Bodoni, *Google's Schmidt to Soothe Rattled Germans in Berlin Talks*, BLOOMBERG BUSINESS (Oct. 14, 2014, 9:06 AM), <http://www.bloomberg.com/news/articles/2014-10-14/google-s-schmidt-heads-to-berlin-talks-to-soothe-rattled-germans>.

227. Jemima Kiss, *Google Launches 'Advisory Council' Page on Right to Be Forgotten*, THE GUARDIAN, July 11, 2014, <http://www.theguardian.com/technology/2014/jul/11/google-advisory-council-page-right-to-be-forgotten>.

228. See Scott, *supra* note 199.

229. See The European Union Committee, *supra* note 76 (observing that “smaller search engines would not necessarily be able to comply with this judgment as easily as Google” and that such smaller engines might “automatically withdraw links to any material objected to because they would not have the resources to examine requests on a case by case basis,” thus “effectively allow[ing] any individual an uncontested right of censorship”); see also Opinion of Advocate General Jääskinen, *Google Spain SL v. AEPD* para. 133 (referring to the possibility of the major search engine providers receiving an “unmanageable” number of requests for removal, while new entrants would be even more burdened than the larger providers).

230. Toobin, *supra* note 3; see generally Luis Ortiz Blanco, *Market Power in EU Antitrust Law 57* (Andrew Read trans.) (2011).

231. *The Power of Google: Serving Consumers or Threatening Competition?: Hearing Before the Subcomm. on Antitrust, Competition Policy and Consumer Rights of the S. Comm. on the Judiciary*, 112th Cong. 1, 33 (2011) (statement of former Assistant Att'y Gen. Thomas O. Barnett, testifying for Expedia) (“If you have an 80 percent share of the market with barriers to entry, you have monopoly power. Those barriers don't come from the supposed

economists would argue that the market will regulate itself due to the dominant firm's monopoly profits, which will attract new entrants to the market and eventually lead to the dominant firm's market power vanishing.²³² The more structurally focused Harvard School adherents, examining impediments to entry, on the other hand, would disagree.²³³ And the potentially amplified competitive significance of scale in the search-engine market only heightens this concern.²³⁴

Leaving aside these general points of contention over the nature of Google's search-engine monopoly in Europe, new entrants after the Court's judgment now face a cost not incurred by Google when it entered the EU market. Namely, new entrants must comply with the new legal obligations imposed by the Court, that is, evaluate and process any number of right-to-be-forgotten requests. In Google's case, this required "an army of paralegals" in addition to the technical changes required to implement the exact type removal sought by the Court in terms of domains and search query.²³⁵ In addition, the ambiguities in the Court's judgment will likely result in significant litigation expenses for any companies in this market. Of course, smaller rivals may face a lesser onslaught of requests—at least initially. But the fact remains that the burden of these compliance costs puts new entrants at a competitive disadvantage vis-à-vis Google. Even the Chicago School's narrower definition of barriers to entry appears to recognize this. As the late Chicago economist, George Stigler, noted, barriers to entry are conditions that impose higher long-run costs of production on a new entrant than are borne by the firm already in the market.²³⁶ In particular, these are non-natural barriers to entry, that is, barriers created by government itself.²³⁷ Thus, the Court's judgment—even under the Chicago School's narrower definition of barriers to entry—

cost of switching or clicking to another site. The barriers come from building an effective search engine.").

232. See Herbert Hovenkamp, *Antitrust Policy After Chicago*, 84 MICH. L. REV. 213, 227 (1985).

233. See SIMON BISHOP & MIKE WALKER, *THE ECONOMICS OF EC COMPETITION LAW: CONCEPTS, APPLICATION AND MEASUREMENT* 3-020 (3d ed. 2010) (noting that the greater the sunk costs are for entry, the likelihood of entry decreases).

234. DOJ Antitrust Division, *Statement of the Department of Justice Antitrust Division on Its Decision to Close Its Investigation of the Internet Search and Paid Search Advertising Agreement Between Microsoft Corporation and Yahoo! Inc.*, DOJ OFFICE OF PUBLIC AFFAIRS (Feb. 18, 2010), <http://www.justice.gov/opa/pr/statement-department-justice-antitrust-division-its-decision-close-its-investigation-internet> ("The search and paid search advertising industry is characterized by an unusual relationship between scale and competitive performance.").

235. See Waters et al., *supra* note 199.

236. GEORGE J. STIGLER, *THE ORGANIZATION OF INDUSTRY* 67, 67-69 (1968); see also Bishop & Walker, *supra* note 233, at 3-024.

237. ROBERT BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* 310-29 (1978); see, e.g., Carl Christian von Weizsäcker, *A Welfare Analysis of Barriers to Entry*, 11 BELL J. ECON. 399 (1980) (discussing the government's role in encouraging "appropriate social organization," including entry barriers).

is arguably at odds with any efforts to rein in Google's market power in the EU.

Yet, the Court might have guarded against such an effect by mentioning that a search engine must only ensure compliance with the Directive's obligations within the framework of its "powers and capabilities."²³⁸ Such a reading could provide room for a proportionality defense for smaller competitors. In the alternative, it will once again be up to the proposed General Data Protection Regulation to fix any shortcomings of the CJEU's judgment.

Commentators have also remarked that the judgment elevated Google to an important adjudicator of the right to be forgotten, enhancing the company's power.²³⁹ As previously discussed, the procedure articulated by the Court results in removals from European search indices through private correspondence between Google and complainants without ever catching the light of day and without (necessarily) providing publishers and authors of information any opportunity to make their case in the balancing of rights.²⁴⁰ Thus, there could be chilling effects on speech, unless the Court's instruction that search engines must "duly examine" requests proves to be a legal safeguard against insufficient internal processes that fail to filter out illegitimate requests.²⁴¹

This concern over procedural safeguards, transparency, and the relative weight of rights, however, does not address directly whether the CJEU put Google into a quasi-judicial role. In some respect, the characterization as an adjudicator might be an overstatement or even a misnomer, given that (at least) denied requests may be taken to DPAs or member state courts, which will review claims *de novo* and without deference to Google's determination. In this respect, Google's role is quite similar to that of any natural or legal person who receives a legal request and must decide whether to comply with the demand or risk the matter escalating into a lawsuit. From this formal perspective, it is difficult to conceive of this resource-intensive compliance obligation as enhancing Google's power.

238. Google Spain SL v. AEPD, para. 83.

239. See *Google Is Not a Legitimate Arbiter*, REPORTERS WITHOUT BORDERS (Sept. 26, 2014), <http://en.rsrf.org/union-europeenne-google-is-not-a-legitimate-arbiter-26-09-2014.47025.html>; cf. Craig W. Walker, *Application of the DMCA Safe Harbor Provisions to Search Engines*, 9 VA. J.L. & TECH. 1, 2-3 (2004) (noting search engines have handled copyright requests in the U.S. at least since the passage of the Digital Millennium Copyright Act).

240. See Nancy Scola, *Designing 'The Right to Be Forgotten'*, WASHINGTON POST (Aug. 4, 2014), <http://www.washingtonpost.com/blogs/the-switch/wp/2014/08/04/designing-the-right-to-be-forgotten> (noting that 53% of requests had resulted in takedowns in the first attempt and an additional 15% were approved upon further investigation, but that "it is simply impossible for Google to ever understand the nuances about which it is being required to adjudicate.").

241. See *Google Spain SL v. AEPD*, para. 77; see also DPA, *Google soll weniger löschen*, DIE TAGESZEITUNG (Oct. 10, 2014), <http://www.taz.de/!147701/> (noting that German consumer-protection regulators had asked Google to remove less frequently).

But this conception is incomplete. Because for requests *granted*, Google in all likelihood will be the only and final level of adjudication. For who would appeal a granted request to a DPA or a court? Certainly not the data subject or Google. Thus, whenever Google grants a request, its determination receives *de facto* deference by virtue of the CJEU's procedure. Given the scale of Google's adjudicatory function, the CJEU may be said to have turned Google into a key institution in shaping the effect of the right to be forgotten. Of course the proposed General Data Protection Regulation provides an opportunity to curtail Google's (and other search engine's) role. For instance, an amendment requiring notification of publishers or authors of the original content could provide partial relief. Moreover, regulatory oversight could establish limits to Google's adjudicatory responsibility.²⁴² The Court, however, did precious little to address this concern.

CONCLUSION

By interpreting the Directive to include a right to be forgotten, the Court firmly established itself as the ultimate authority on this right across the EU, moving a significant area of member state law under the umbrella of the EU. Undoubtedly, the Court thus used this case to enhance its own role compared to other EU and member state institutions. But moreover, it demonstrated a willingness to take on powerful interests by imposing EU regulatory requirements on the U.S.-based technology sector—even if many of the effects of the judgment remain to be seen. Last but not least, the Court took a stand in the public debate over the protection of people's privacy in the Internet age. Other high courts likely will take notice of the judgment and its effects.

To be sure, the judgment leaves plenty of questions unanswered and arguably might not have struck the right balance between relative rights. First, the apparent presumption of a data subject's right over the rights of others is doctrinally questionable. Second, the Court should have more clearly defined the contours of the right to be forgotten, for example, in terms of geographic scope, affected domains, and standing requirements. Third, the Court should have made more of an effort to define exceptions to the data subject's right. Of course, the Court might have felt constrained by the facts of the case or decided on a gradual approach to developing a more intricate doctrine.²⁴³ But to the extent the Court considered its authority to define the doctrine limited by the Directive or the case, it should have explicitly invited the EU legislator to act.

Whether implicit or explicit, the Court demonstrated its deference to the EU legislator and left plenty of reasons for them to revisit the issue

242. See DPA, *Regierung plant Schlichtungsstelle für 'Recht auf Vergessen'*, FRANKFURTER ALLGEMEINE (May 27, 2014), <http://www.faz.net/aktuell/wirtschaft/netzwirtschaft/suchmaschinen-regierung-plant-schlichtungsstelle-fuer-recht-auf-vergessen-12960937.html>.

243. FTC Public Statement, *supra* note 11, at 10-11 (noting that the lack of clarity should be familiar to lawyers in the U.S. legal system, where the contours of a doctrine are often developed gradually over time).

with the Proposed Regulation.²⁴⁴ If this was the Court's intention, it succeeded. member state politicians have been abuzz with suggestions for improving upon the judgment.²⁴⁵ Not surprisingly, Google and other U.S. technology firms, meanwhile, have increased their lobbying of lawmakers and regulators at the EU and member state levels.²⁴⁶

In sum, when the Regulation is adopted, it should state unambiguously whether and to what extent search engines are subject to its requirements. It should include a requirement to notify website publishers and authors of information when feasible. Moreover, it should impose transparency requirements on controllers for the requests they receive instead of leaving it up to industry to make such information public. Finally, the EU should consider shifting the adjudicatory responsibility from search engines to democratically accountable institutions.

244. See Proposal for a General Data Protection Regulation, *supra* note 12.

245. See DPA, *supra* note 242.

246. Ahmed & Robinson, *supra* note 226; Robert Lane Greene, *Mr Schmidt Goes to Berlin*, THE ECONOMIST (June 12, 2014, 10:56 AM), <http://www.economist.com/blogs/schumpeter/2014/06/google-germany> (noting that Google Chairman Eric Schmidt met with the German Vice Chancellor and Economic Affairs Minister, Sigmar Gabriel, who had previously called for Google to be broken up).

