In a victory for speech, EU's top court sides with Google in right to be forgotten case

The French privacy regulator (CNIL) had tried to assert authority over Google globally, arguing that the EU's "right to be forgotten" (RTBF) applied not just to EU jurisdiction countries but to the entire Google.com index. Google countered that RTBF removals should apply to European domains exclusively, and Europe's top court agreed.

In a huge decision and victory for speech, the Court of Justice of the European Union (ECJ), one of Europe's two highest courts, ruled that RTBF and any corresponding delisting requests do not apply globally and that data protection authorities within Europe (generally) don't have authority to regulate or control what the rest of the world sees on Google or another search engine.

The background. The case arrived at the ECJ following a roughly €100,000 fine imposed by CNIL when Google defied the regulator's demand that it delist content from its global index. CNIL had argued that removing content from EU domains was not enough because users could circumvent RTBF by simply going to Google.com. Thus to fully enforce the letter and spirit of RTBF, the disputed content would need to be removed from Google's index globally.

Google had sought to balance compliance with EU law and its global role as a provider of access to information by redirecting Google.com searches within Europe to country level domains, based on IP address. The French were not satisfied by this approach and fined Google accordingly.

Google win previewed by advisory opinion. Google's win was telegraphed in January when the ECJ's top legal advisor,

Advocate General Maciej Szpunar, issued an opinion that sided with Google. The opinion, which was essentially adopted by the court, argued the court should limit the geographic scope of de-listing under RTBF.

In its just-issued opinion the ECJ held, "[W]here a search engine operator grants a request for de-referencing pursuant to [RTBF], that operator is not required to carry out that de-referencing on all versions of its search engine, but on the versions of that search engine corresponding to all the [EU] Member States, using, where necessary, measures which, while meeting the legal requirements, effectively prevent or, at the very least, seriously discourage an internet user conducting a search from one of the Member States on the basis of a data subject's name from gaining access, via the list of results displayed following that search, to the links which are the subject of that request."

Implications of ruling in CNIL's favor. Szpunar's advisory opinion recognized the implications of a finding in favor of CNIL: "If worldwide de-referencing were admitted . . .there would then be a danger that the European Union would prevent individuals in third countries from having access to information. If an authority within the European Union could order de-referencing on a worldwide scale, an inevitable signal would be sent to third countries, which could also order de-referencing under their own laws. Let us suppose that, for whatever reason, third countries interpret certain of their rights in such a way as to prevent persons located in a Member State of the European Union from having access to information which they sought. There would be a genuine risk of a race to the bottom, to the detriment of freedom of expression, on a European and worldwide scale."

In effect, he's saying that other countries could turn around and potentially deny Europeans access to information they care about. This is exactly right.

However, Szpunar and the ECJ didn’t rule out the possibility that there could be circumstances where the EU might have extraterritorial jurisdiction in RTBF cases but it said that those were not the facts of the particular case at issue. Disturbingly that leaves open the door for future attempts at global regulation by EU authorities.

The decision cannot be further appealed by CNIL.

Why we should care. As Szpunar suggested, and Google itself argued to the court, had the ECJ sided with the French regulator, it would have created a dangerous precedent. That might have emboldened other countries to try and globally censor content they didn’t like or were threatened by.

Not all countries are equally interested in the freedom of information. Imagine, for example, China asking Google to globally remove content about the Tiananmen Square massacre (because it’s “unfair” to Chinese citizens). Saudi Arabia or Pakistan might have sought removal of content critical of the Prophet Muhammad. And not so far from the realm of possibility, the current U.S. administration might have sought to minimize access to scientific data that conflicted with policy or political positions (e.g., on climate change).

As the advisory opinion points out, it would have been “a race to the bottom, to the detriment of freedom of expression, on a worldwide scale.”

About The Author

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