FROM NOTICE-AND-TAKEDOWN TO NOTICE-AND-DELIST: IMPLEMENTING *GOOGLE SPAIN*

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INTRODUCTION

A. Media Storm

In May 2014, the Court of Justice of the European Union ("CJEU") ruled that individuals have a right to ask for the delisting of certain search results when their name is used as a search term.[1] Never before has a CJEU decision triggered such a large-scale response. On both sides of the Atlantic, people struggled to make sense of Europe's shocking ruling in *Google Spain*, also referred to as "the right to be forgotten" case.[2] Instantly infamous, the ruling has sparked an unprecedented debate about the balance between privacy and freedom of expression online. Many scorned the ruling, labeling it a menace to the public's right to know and a push for private censorship.[3] Others questioned its

1. Case C-131/12 Judgment of the Court (Grand Chamber), Google Spain SL v. Agencia Española de Protección de Datos, CURIA (May 13, 2014) (ECLI:EU:C:2014:317), http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62012CJ0131.

2. Andrew Orlowski, *Europe's Shock Google Privacy Ruling: The End of History? Don't Be Daft*, REGISTER (May 14, 2014, 1:43 PM), http://www.theregister.co.uk/2014/05/14/google_eu_ruling/.

3. *See, e.g.*, Dave Lee, *Google Ruling "Astonishing", Says Wikipedia Founder Wales,* BBC NEWS (May 14, 2014), http://www.bbc.com/news/technology-27407017. *See also* Christopher Kuner, *The Court of Justice of the EU Judgment on Data Protection and Internet Search Engines: Current Issues and Future Challenges*, LSE L., SOC'Y & ECON. WORKING PAPERS 3 (2015) (Eng.), https://www.lse.ac.uk/collections/law/wps/WPS2015-03_Kuner.pdf; Christopher Kuner, *Google Spain in the EU and International Context*, 22 MAASTRICHT J. EUR. & COMP. L. 158 (2015); Ann Cavoukian & Christopher Wolf, *Sorry, but There's No Online "Right to Be Forgotten"*, NAT'L POST (June 25, 2014, 12:01 AM),

practicability, both in terms of scale and outcome.[4] Supporters of the ruling embraced it as a victory for privacy, often adding that the detriment to freedom of expression would be minimal in practice.[5] Since then, media outlets have been reporting avidly on the thousands of incoming "forget-me" requests, several of which were reportedly authored by convicted criminals and corrupt politicians.[6]

B. Internet Law Crossroads

What makes *Google Spain* so interesting from a legal perspective is that it finds itself at the crossroads of different crucial fields of European Union ("EU") "Internet law": (1) privacy and data protection; (2) freedom of expression; and (3) intermediary liability exemptions.[7] First, the ruling confirmed the existence of a *right to be delisted* against search engines. In doing so, the CJEU catalyzed the debate on the exact scope of the Data Protection Directive 95/46.[8] More fundamentally, *Google Spain* is also emblematic of data protection law's current identity crisis, re-evaluating what it means to "control" one's personal data and how this should work in practice.[9] Second, the ruling has considerable implications for the fundamental right to freedom of expression.[10] In a world where search engines are the main tool for finding relevant content

http://natpo.st/1VratSw.

4. *See, e.g.*, Jonathan Zittrain, *Is the EU Compelling Google to Become About.me?,* HARV.: FUTURE OF THE INTERNET BLOG (May 13, 2014), http://blogs.law.harvard.edu/futureoftheinternet/2014/05/13/is-the-eu-compelling-google-to-become-about-me/.

5. *See, e.g.*, *Europe: 1, Google: 0: EU Court Ruling a Victory for Privacy*, SPIEGEL ONLINE INT'L (May 20, 2014, 6:58 PM), http://spon.de/aeeB5. For a comprehensive overview of commentary on the *Google Spain* ruling, see Julia Powles & Rebekah Larsen, *Academic Commentary: Google Spain*, CAMBRIDGE CODE, http://www.cambridge-code.org/googlespain.html (last visited Mar. 20, 2016).

6. *See, e.g.*, Jane Wakefield, *Politician and Paedophile Ask Google to "Be Forgotten"*, BBC NEWS (May 15, 2014), http://www.bbc.com/news/technology-27423527; Kevin Rawlinson, "*Hidden From Google" Lists Pages Blocked by Search Engine*, BBC NEWS (July 15, 2014), http://www.bbc.com/news/technology-28311217.

7. We have discussed each of these areas in more detail elsewhere. *See* Brendan Van Alsenoy, Aleksandra Kuczerawy & Jef Ausloos, *Search Engines After 'Google Spain': Internet@Liberty or Privacy@Peril?,* INTERDISC. CTR. FOR L. & ICT (Sept. 6, 2013), http://papers.ssrn.com/abstract=2321494.

8. Council Directive 95/46, 1995 O.J. (L 281) 31, 38 (EC) [hereinafter Data Protection Directive].

9. *See* Bert-Jaap Koops, *The Trouble with European Data Protection Law*, 4 INT'L DATA PRIVACY L. 250 (2014). For an in-depth discussion of the various rights embedded in the term "right to be forgotten" and their embodiment in laws around the world, see W. Gregory Voss & Céline Castets-Renard, *Proposal for an International Taxonomy on the Various Forms of the "Right to be Forgotten": A Study on the Convergence of Norms,* 14 Colo. Tech. L.J. 281 (2016).

10. Charter of Fundamental Rights of the European Union 364/01, art. 11, 2000 O.J. (C 2000) 1, 11; Convention for the Prot. of Human Rights and Fundamental Freedoms, art. 10, Nov. 4, 1950, C.O.E.T.S. 1.

online, any governmental interference in the provisioning of these services requires close scrutiny. Third, the ruling also relates to the topic of intermediary liability exemptions for online service providers. In this regard, search engines arguably suffer from some degree of schizophrenia. Google in particular is often eager to present itself as a "neutral intermediary."[11] According to this narrative, search results merely point to information that is already out there.[12] In other contexts, Google has presented its search results as deliberately articulated "speech."[13] The successful application of both strategies has been characterized as "having your cake and eating it too."[14]

That said, this article does not seek to analyze *Google Spain* from all of these angles.[15] Neither will this article question the merits of the ruling. The discussion begins with the finding that in the EU, data subjects *do* have a right to be delisted vis-à-vis search engines. From a practical perspective, exercising the right to be delisted effectively resembles the "notice-and-takedown" mechanism for the removal of illegal (or illegally published) content. With this in mind, the article focuses on the way forward, aiming in particular to elucidate some of the practical and procedural issues ensuing from the CJEU's ruling in *Google Spain*. Specifically, this article examines current and proposed measures for content removal and tests them in the delisting context. The purpose is to assess whether these measures are helpful to create an adequate delisting procedure and advance the discussion on the implementation of *Google Spain*.

11. For a critical appraisal of the arguments regarding the "neutrality" of search engines and their role as "innocent messengers," see Uta Kohl, *Google: The Rise and Rise of Online Intermediaries in the Governance of the Internet and Beyond (Part 2)*, 21 INT'L J. L. INFO. TECH. 187, 191–98 (2013).

12. Ranking would merely be the output of an algorithm, not a deliberate choice for which one should be held accountable. *See id.* at 195–96.

13. The reason being that speech enjoys constitutional protection (particularly in the U.S., under the First Amendment), which may shield the operator from certain legal claims. *See* James Grimmelmann, *Speech Engines*, 98 MINN. L REV. 868, 871 (2014); Allyson Haynes Stuart, *Google Search Results: Buried If Not Forgotten*, 15 N.C. J.L. & TECH. 463, 474 (2014).

14. Richard Curtis, *Google Says You Can Have Your Cake and Eat It Too*, DIGITAL BOOK WORLD (May 27, 2012), http://www.digitalbookworld.com/2012/google-says-you-can-have-your-cake-and-eat-it-too.

15. This has been amply done already. *See, e.g.*, Alsenoy, Kuczerawy, & Ausloos, *supra* note 7; Anna Bunn, *The Curious Case of the Right to Be Forgotten*, 31 COMP. L. & SECURITY REV. 336 (2015); Kuner, *supra* note 3; Orla Lynskey, *Control over Personal Data in a Digital Age: Google Spain v AEPD and Mario Costeja Gonzalez*, 78 MOD. L. REV. 522 (2015); Indra Spiecker, *A New Framework for Information Markets: Google Spain,* 52 COMMON MKT. L. REV. 1033 (2015). The Maastricht Journal of European and Comparative Law also dedicated a Legal Debate to the case in Issue 2014/3 with contributions by Giovanni Sartor, Hielke Hijmans, and Christopher Wolf. *See* Giovanni Sartor, *Search Engines as Controllers: Inconvenient Implications of a Questionable Classification*, 21 MAASTRICHT J. EUR. & COMP. L. 565 (2014).

I. HOW DID WE GET HERE?

A. Google Spain

1. Facts of the Case

In the late 2000s, a Spanish citizen Googled his name and found a bad memory. Among the first search results were references to decade-old newspaper announcements advertising the fact that his house was being put up for public auction by the Spanish Social Security Administration.[16] This upset him because the underlying debt had long been settled. So the man decided to contact the newspaper and ask for the announcements to be removed. The newspaper refused, explaining that it was under a legal obligation to publish such information.[17] The man then requested Google to stop referring to those pages when someone uses his name as a search term.[18] When he did not receive a positive answer from Google either,[19] he approached the national data protection authority ("AEPD"),[20] which issued a decision ordering Google to delist. Instead of complying,[21] Google appealed to the *Audiencia Nacional*, which, in turn, referred the matter to the Court of Justice of the European Union

16. Case C-131/12 Judgment of the Court (Grand Chamber), Google Spain SL v. Agencia Española de Protección de Datos, CURIA para. 14 (May 13, 2014) (ECLI:EU:C:2014:317), http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62012CJ0131.

17. Such publication was mandatory pursuant to an order issued by the Spanish Ministry of Labor and Social Affairs. *See* A.A.N., Feb. 27, 2012 (No. 725/2010, para. 1.2) (Spain) (ECLI:ES:AN:2012:19A), http://www.poderjudicial.es/search/doAction?action=contentpdf&databasematch=AN&reference=6292979&links=%22725/2010%22&optimize=20120305&publicinterface=true (text of *Audiencia Nacional* opinion on appeal from the decision of Spain's data protection authority).

18. *Id.* at para. 1.3.

19. The Spanish citizen first contacted Google's Spanish subsidiary. This subsidiary (Google Spain SL) forwarded the request to Google Inc. (U.S.), arguing that this is the entity responsible for the development of search results. *Id.* at para. 1.4; Case C-131/12 Opinion of Advocate Gen. Jääskinen, Google Spain SL v. Agencia Española de Protección de Datos, CURIA para. 20 (June 25, 2013) (ECLI:EU:C:2013:424), http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62012CC0131.

20. AGENCIA ESPAÑOLA DE PROTECCIÓN DE DATOS [SPANISH DATA PROTECTION AGENCY], http://www.agpd.es/portalwebAGPD/index-ides-idphp.php (last visited Mar. 20, 2016).

21. Arguably, it was a deliberate and strategic decision on Google's behalf *not* to comply with the AEPD's injunction. Besides wanting to obtain a more definitive and authoritative answer on whether or not these kinds of requests should be possible in the first place, Google was probably interested in clarification on who will bear the costs of compliance. Do search engines (exclusively) bear the burden of assessing delisting requests? Or can they just defer to the authorities (Data Protection Agency or Court) to make the appropriate balance? The CJEU seems to suggest a middle way, in which search engines can be asked to make a balance, but can easily defer the requester to the relevant national authority in more problematic cases without risking liability. Alsenoy, Kuczerawy & Ausloos, *supra* note 7, at 29 n.127.

("CJEU") for a preliminary ruling.[22]

2. Scope

To the surprise of many,[23] the CJEU held that EU data protection law *does* apply to search engines such as Google. More specifically, (some of the activities of) search engines fall within the scope of the Data Protection Directive.[24] Search engines' responsibilities, however, only extend to their own sphere of control, i.e., their own algorithms and search results.[25] In other words, the ruling does not impose search engine liability over the publication of the original content. Instead, the scope of application is concentrated on the search engine's activity of linking a specific search term (such as the name of an individual) with a specific search result. This operation, after all, is entirely controlled by the search engine.

3. Right to be Delisted

The CJEU unambiguously ruled that individuals can ask search engines to delist specific search results when their name is used as a search term.[26] It did *not* rule that search engines can be compelled to interfere with the source itself,[27] nor that search engines can be compelled to delist a search result entirely (i.e., on the basis of any search term).[28] Whether or not the source material being referred to is lawfully published is irrelevant.[29] Neither is the data subject required to demonstrate harm.[30] However, the Court did specify that the right is not

22. National courts can refer questions to the CJEU on the interpretation of specific provisions in EU law. The eventual decision by the CJEU is called a preliminary ruling and does not relate to the matter of the underlying case (which is still left to be decided by the referring national court). *See The Reference for a Preliminary Ruling*, EUR-LEX, http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1449495495167&uri=URISERV:l14552 (last updated Jan. 15, 2014).

23. The Court set aside the earlier advice issued by the Advocate General, who recommended that the CJEU should not recognize a "right to be forgotten" vis-à-vis search engines. *See* Case C-131/12 Opinion of Advocate Gen. Jääskinen, at para. 133.

24. Case C-131/12 Judgment of the Court (Grand Chamber), Google Spain SL v. Agencia Española de Protección de Datos, CURIA para. 41 (May 13, 2014) (ECLI:EU:C:2014:317), http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62012CJ0131. For an extensive analysis of the territorial scope and reach of the *Google Spain* ruling, see Brendan Van Alsenoy & Marieke Koekkoek, *Internet and Jurisdiction After Google Spain: The Extraterritorial Reach of the 'Right to Be Delisted'*, 5 INT'L DATA PRIVACY L. 105 (2015).

25. Spiecker, *supra* note 15, at 1040.

26. Such a right would be based on the rights to object and to erasure of the Data Protection Directive. *See* Data Protection Directive, *supra* note 8, arts. 12(b), 14.

27. Case C-131/12 Judgment of the Court (Grand Chamber), at para. 83.

28. *Id.* at paras. 80, 82, 87–89, 94, 99.

29. *Id.* at paras. 88, 93–94.

30. *Id.* at paras. 96, 99.

absolute, and the rights and interests of all parties need to be balanced.[31] The rights and interests at stake include the data subject's rights, the economic interests of the search engine operator as well as the legitimate interests of Internet users in accessing information on the basis of a specific name search. According to the CJEU, a search engine's economic interests alone cannot justify the respective interference with data protection rights. With regard to the balancing of fundamental rights and interests of Internet users versus those of the data subject, the Court did state that the latter override all others by default.[32] This should be read in light of the heightened impact search engines have on an individual's privacy and data protection rights.[33] As more and more of one's life is logged online,[34] search engines are capable of collating increasingly detailed biographical pictures. If one searches for an individual's name, the ensuing list of results may offer a (seemingly) comprehensive profile of that individual.[35] This profile may have a profound impact on a person's reputation, livelihood, and personal development. Today, "you are what Google says you are."[36]

4. Balancing

In the first instance, it is up to the search engine—i.e., the "controller"—to perform the required balancing exercise.[37] If the search engine fails to do so, or denies the request, individuals can approach the

31. *Id.* at paras. 74–76.

32. *Id.* at paras. 81, 97.

33. *Id.* at paras. 80–81 (referring to Articles 7 (privacy) and 8 (data protection) in the Charter of Fundamental Rights of the European Union).

34. For example: a high school graduation, a change in job, participation in a charity drive, etc.

35. In the CJEU's words, a search engine:

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

Case C-131/12 Judgment of the Court (Grand Chamber), at para. 80.

36. Megan Angelo, *You Are What Google Says You Are*, WIRED (Feb. 11, 2009, 11:23 AM), http://www.wired.com/2009/02/you-are-what-go/. *See also* Meg Leta Ambrose, *You Are What Google Says You Are: The Right to be Forgotten and Information Stewardship*, 17 INT'L REV. INFO. ETHICS 22 (2012) (pointing out that much online information is in fact more ephemeral than commonly portrayed).

37. This balancing exercise, importantly, differs from the one that would have to be made when a similar request is directed to the source-page directly. David Lindsay, *The 'Right to Be Forgotten' by Search Engines Under Data Privacy Law: A Legal Analysis of the* Costeja *Ruling*, 6 J. MEDIA L. 159, 173 (2014).

appropriate data protection authority or court.[38] As to the balancing exercise itself, the CJEU did provide some guidance, including: the nature or sensitivity of the information; public interest; role of data subject in public life; and time elapsed.[39] In any situation, it is important to emphasize that the data subject still has to fulfill the conditions for exercising his/her right to object/erase.[40] Moreover, the search engine is only subject to data protection rules "within the framework of its responsibilities, powers and capabilities."[41] The role of search engines is therefore mainly *reactive* in nature: they are only obliged to react to specific requests. They are not obliged to preventively assess the links between search terms and search results in general.

B. Implementation of Google Spain

1. Online Form

Soon after the CJEU's ruling, Google launched an online form that allows individuals to request delisting of search results for queries that include their name.[42] The page explains that Google will "assess each individual request and balance the [privacy] rights of the individual . . . with [the] public's right to know and distribute information."[43] Individuals are asked to give at least the following information:

(a) the country whose laws apply to the request;

(b) name used to search;

(c) contact email address;

(d) a proof of identity;

(e) each uniform resource locator (URL) requested to be delisted;

(f) an explanation (for each URL) of why the linked web page is about the individual; and

(g) a reason (for each URL) for why this URL is "inadequate, irrelevant, no longer relevant, or excessive."[44]

38. Case C-131/12 Judgment of the Court (Grand Chamber), at para. 77; *see also id.* at 171.

39. Case C-131/12 Judgment of the Court (Grand Chamber), at paras. 81, 93.

40. In order to exercise one's right to object, the data subject will have to put forward "compelling legitimate grounds relating to his particular situation to the processing of data relating to him." Data Protection Directive, *supra* note 8, at art. 14. The right to erasure can be exercised when the processing in question "does not comply with the provisions of this Directive, in particular because of the incomplete or inaccurate nature of the data." *Id.* at art. 12. Put differently, individuals will still have to motivate their requests for delisting.

41. Case C-131/12 Judgment of the Court (Grand Chamber), at paras. 38, 83.

42. *Search Removal Request Under Data Protection Law in Europe*, GOOGLE, https://support.google.com/legal/contact/lr_eudpa?product=websearch (last visited Mar. 20, 2016).

43. *Privacy & Terms FAQ*, GOOGLE, https://www.google.be/intl/en/policies/faq/ (last visited Mar. 20, 2016).

44. *Id.*

The form is only available on the local EU member-states' versions of Google (i.e., the EU country code top-level domains and their respective national languages).[45] Not long after Google did so, Bing[46] and Yahoo![47] put similar forms in place.

2. Advisory Council

Google assembled an "Advisory Council" of academics, entrepreneurs, and former public officials to provide guidance on how to implement the CJEU's ruling.[48] The Council held "public hearings" in seven European capitals, where a number of invited persons were given the opportunity to deliver testimony and the general audience could ask questions.[49] The Council's hearings and discussions eventually culminated in a report published in early 2015. Besides providing additional criteria to be considered when assessing delisting requests, the report also contained procedural suggestions.[50] Complementing the report, Google also released some numbers on the kinds of delisting requests it receives as part of its transparency reporting (see *infra*, Section III.E).[51]

45. Google's form can be found by clicking on "Privacy," then "FAQ," then "How can I remove information about myself from Google's search results?" *Search Removal Request Under Data Protection Law in Europe*, *supra* note 42.

46. Bing's form is available on EU versions via its homepage: European Data Protection. *Request to Block Bing Search Results in Europe*, BING, https://www.bing.com/webmaster/tools/eu-privacy-request (last visited Mar. 20, 2016). This page also provides helpful links to the relevant webpages on third-party social media sites where people can control the indexability of their content by search engines.

47. Yahoo's form is available on all local EU versions of Yahoo! via its homepage. *Requests to Block Search Results in Yahoo Search: Resource for European Residents*, YAHOO!, https://uk.help.yahoo.com/kb/search/requests-block-search-results-yahoo-search-resource-european-residents-sln24378.html (last visited Mar. 20, 2016).

48. Jemima Kiss, *Google Launches 'Advisory Council' Page on Right to Be Forgotten*, GUARDIAN (July 11, 2014, 9:45 PM), http://gu.com/p/3qpzh/stw.

49. For videos of each of these hearings, see *Google Advisory Council*, GOOGLE, https://www.google.com/advisorycouncil (last visited Mar. 20, 2016). For a short summary, see Brendan Van Alsenoy & Jef Ausloos, *Google's Advisory Council Hearings: Things to Remember and Things to Forget*, LONDON SCH. ECON.: MEDIA POL'Y PROJECT BLOG (Nov. 7, 2014), http://blogs.lse.ac.uk/mediapolicyproject/2014/11/07/googles-advisory-council-hearings-things-to-remember-and-things-to-forget/.

50. Concerning, for example, the request form, notification of webmasters, and appeal procedures.

51. *European Privacy Requests for Search Removals*, GOOGLE: TRANSPARENCY REP., https://www.google.com/transparencyreport/removals/europeprivacy/ (last updated Mar. 21, 2016).

3. Article 29 Working Party

In November 2014, the Article 29 Working Party ("29WP")[52] released *Guidelines on the implementation of the CJEU judgment on Google Spain*.[53] Besides officially endorsing the terminology "right to be delisted," 29WP provided a non-exhaustive list of balancing criteria.[54] Importantly, the Guidelines clarified that the ruling "does not oblige search engines to permanently carry out that assessment in relation to all the information they process, but only when they have to respond to data subjects' requests."[55] Such requests are subject to certain conditions and relate to the delisting of specific name-based search results only.[56]

4. Emerging Body of Case Law

A pan-European body of case law is emerging, with decisions in different jurisdictions explicitly referring to *Google Spain*.[57] In Spain, for example, Google has been held liable for moral damages when it did not delist results after being ordered to do so by Spain's data protection agency ("DPA").[58] Spanish courts have also reiterated the difference in responsibilities between search engines and platforms hosting content.[59] For example, Google was ordered to delist links to its own Blogger platform, while at the same time being exempted from having to remove the blog posts themselves.[60] In at least two instances, Dutch courts have emphasized the impact on freedom of expression of delisting requests

52. The 29WP is an independent EU advisory body composed of all Member State data protection agencies. S*ee Article 29 Working Party*, EUROPEAN COMMISSION, http://ec.europa.eu/justice/data-protection/article-29/ (last updated Oct. 6, 2015).

53. Article 29 Data Protection Working Party, *Guidelines on the Implementation of the Court of Justice of the European Union Judgment on "Google Spain and Inc. v Agencia Española de Protección de Datos (AEPD) and Mario Costeja González" C-131/12* (Nov. 26, 2014), http://ec.europa.eu/justice/data-protection/article-29/documentation/opinion-recommendation/files/2014/wp225_en.pdf [hereinafter *29WP Guidelines*].

54. *Id.* at 12.

55. *Id.* at 6.

56. Jef Ausloos & Brendan Van Alsenoy, *Implementing the "Right to Be Forgotten": The Article 29 Working Party Speaks Up*, LONDON SCH. ECON.: MEDIA POL'Y PROJECT BLOG (Dec. 3, 2014), http://blogs.lse.ac.uk/mediapolicyproject/2014/12/03/implementing-the-right-to-be-forgotten-the-article-29-working-party-speaks-up/.

57. For a comprehensive, structured overview of different criteria that can be derived from European case law and other relevant sources, *see infra* Appendix.

58. S.A.P, July 17, 2014 (R.G.D. No. 364/2014) (Spain).

59. For an extensive overview of relevant Spanish case law, see Miquel Peguera, *In the Aftermath of* Google Spain*: How the 'Right to Be Forgotten' Is Being Shaped in Spain by Courts and the Data Protection Authority*, 23 INT'L J.L. & INFO. TECH. 325 (2015).

60. Google can be considered to be a mere host with regard to the content on the Blogger platform. *See* S.A.N., Dec. 29, 2014 (R.G.D. No. 5252/2014) (Spain); S.A.N., Dec. 29, 2014 (R.G.D. No. 5254/2014) (Spain); S.A.N, Feb. 17, 2015 (R.G.D. No. 661/2015) (Spain); S.A.N, Feb. 24, 2014 (R.G.D. No. 568/2015) (Spain).

relating to journalistic content.[61] In France, a court ordered Google to delist links to information regarding criminal proceedings that, meanwhile, had already been removed from the plaintiff's criminal record.[62] Just across the border, a Belgian judge ruled that in certain cases, the original publisher can also be held responsible for making sure content is not listed by search engines such as Google in the first place.[63] Besides courts, DPAs across the EU have received over 2,000 delisting requests, including appeals to Google's decisions.[64] The growing volume of cases demonstrates there is a clear demand for a right to be delisted in practice. Progressively, these decisions should also bring about more substantial and substantive guidelines on how to implement the right.

II. HAVE WE MET BEFORE?

A. Dazed and Confused: Criticism of Google Spain

Google Spain immediately became a target of harsh criticism. The ruling has been criticized as not paying sufficient attention to the right of freedom of expression and failing to answer how it should be balanced

61. Stefan Kulk & Frederik Zuiderveen Borgesius, *Freedom of Expression and 'Right to Be Forgotten' Cases in the Netherlands After Google Spain*, 1 EUR. DATA PROTECTION L. REV. 113, 113–24 (2015).

62. Tribunal de grande Instance [TGI] [ordinary court of original jurisdiction] Paris, Ordonnance de de référé [interim order] Dec. 19, 2014, LEGALIS, http://www.legalis.net/spip.php?page=jurisprudence-decision&id_article=4425 (last visited Mar. 28, 2016).

63. Cours d'Appel [CA] [Court of Appeals] Liège, 20e ch. Sept. 25, 2014, 2013/RG/393, http://jure.juridat.just.fgov.be/view_decision.html?justel=F-20140925-11&idxc_id=283221&lang=FR (click "Imprimer").

64. Latest official numbers date from June 2015. *See* European Commission Press Release, Article 29 Data Protection Working Party - Delisting (June 18, 2015). In November 2015, the UK DPA released statistics on the delisting cases it has ruled on. *See* David Smith, *Has the Search Result Ruling Stopped the Internet Working?*, INFO. COMMISSIONER'S OFF.: BLOG (Nov. 2, 2015), https://iconewsblog.wordpress.com/2015/11/02/has-the-search-result-ruling-stopped-the-internet-working/. In one noteworthy case, the UK's Information Commissioner's Office ordered the delisting of links to current news stories reporting on older, already delisted stories. However, there seemed to be no apparent reason to mention the original complainant's name again other than having the information re-appear in search results on the basis of the person's name. *See* Samuel Gibbs, *Google Ordered to Remove Links to 'Right to Be Forgotten' Removal Stories*, GUARDIAN (Aug. 20, 2015, 11:47 PM), http://gu.com/p/4byx3/stw; *see also* Eerke Boiten, *Privacy Watchdog Takes First Step Against Those Undermining Right to be Forgotten*, LONDON SCH. ECON.: MEDIA POL'Y PROJECT BLOG (Aug. 25, 2015), http://blogs.lse.ac.uk/mediapolicyproject/2015/08/25/privacy-watchdog-takes-first-step-against-those-undermining-right-to-be-forgotten/.

Notably, in March 2016, the French DPA (CNIL) issued a €100,000 fine to Google for ignoring an earlier order to delist results globally. *Droit Au Déréférencement: La Formation Restreinte de La CNIL Prononce Une Sanction de 100.000 € à L'encontre de Google*, COMMISSION NATIONALE DE L'INFORMATIQUE ET DES LIBERTÉS [CNIL] (Mar. 24, 2016), https://www.cnil.fr/fr/droit-au-dereferencement-la-formation-restreinte-de-la-cnil-prononce-une-sanction-de-100000-eu.

against the rights to privacy and data protection.[65] Critics point out that a right to be delisted would constitute a vertical inference with the fundamental right to freedom of expression.[66] Indeed, the way in which the ruling was implemented has been heavily criticized from the start. Even though the CJEU confirmed the existence of a right to be delisted, the Court was largely silent on how it should work in practice. Google's reaction to the ruling,[67] and the 29WP Guidelines,[68] have only added fuel to the fire. The following paragraphs summarize the main criticisms of *Google Spain*. The aim of this section is to compile an inventory of the prevailing rhetoric rather than to rebut or embrace any of the arguments in particular.

1. Over-compliance

The flagship argument of *Google Spain* opponents relates to the risk of over-compliance. Many commentators fear that the ruling would incentivize search engines to delist content without any prior assessment.[69] The main reason is that processing the requests in an appropriate manner requires considerable resources (human, financial, and technological). A delisting procedure is "a labor-intensive operation that offers no obvious source of new revenue."[70] Critics fear that in order to facilitate the process and to avoid the extra costs, search engines might not investigate the requests adequately. Moreover, a failure to delist could potentially lead to liability. The most cautious approach for search engines would be to comply with all requests, and skip any (possibly burdensome and lengthy) balancing of the rights at stake. Hasty delisting procedures can easily lead to over-blocking of legitimate content. Overzealous compliance with the requests would hinder the rights to freedom of expression and access to information.

65. *See, e.g.*, Stefan Kulk & Frederik Zuiderveen Borgesius, *Google Spain v. González: Did the Court Forget About Freedom of Expression?*, 5 EUR. J. RISK REG. 389 (2014); Steve Peers, *The CJEU's Google Spain Judgment: Failing to Balance Privacy and Freedom of Expression*, EU LAW ANALYSIS (May 13, 2014), http://eulawanalysis.blogspot.co.uk/2014/05/the-cjeus-google-spain-judgment-failing.html.

66. Joris van Hoboken, Case Note, CJEU 13 May 2014, C-131/12 (Google Spain) (Sept. 14, 2014), (unpublished manuscript) http://papers.ssrn.com/abstract=2495580; *see generally* JORIS VAN HOBOKEN, SEARCH ENGINE FREEDOM: ON THE IMPLICATIONS OF THE RIGHT TO FREEDOM EXPRESSION FOR THE LEGAL GOVERNANCE OF WEB SEARCH ENGINES (2012).

67. Including setting up an Advisory Council to guide the implementation of the ruling. *See supra* Section I.B.2.

68. *29WP Guidelines*, *supra* note 53.

69. *See* Zittrain, *supra* note 4.

70. Craig Timberg & Michael Birnbaum, *In Google Case, E.U. Court Says People Are Entitled to Control Their Own Online Histories*, WASH. POST (May 13, 2014), http://wpo.st/ohWN1.

2. Rewriting History

According to several critics, allowing individuals to request delisting of legal and true content could lead to grim results. As Cavoukian and Wolf stated, "empowering individuals to demand the removal of links to unflattering, but accurate, information arguably goes far beyond protecting privacy."[71] Some commentators dramatically pointed out that the ruling enables the "rewriting of history".[72] Or worse, it converts the right to privacy into "the right to censor,"[73] especially when made by criminals, corrupt politicians, and the like.[74] Search engines would no longer present us with an accurate image of the world. Instead, search engines would merely give us, what the Advocate General called a "bowdlerized" version of facts, stripped of any "negative" information.[75] It is feared that denying easy access to anyone's inglorious past would have a catastrophic impact on the fundamental rights of freedom of expression and access to information.[76]

3. Heavy Burden

A third strand of critique relates to the burden imposed on search engine providers. After receiving a delisting request, the search engine must assess its merits. This includes evaluating the nature of the source content and balancing the different rights/interests at stake (see Appendix). With the ruling, the CJEU "has mandated that the Googles of the world serve as judge and jury of what legal information is in the public interest."[77] Resolving conflicts of rights between individuals requires a good amount of legal knowledge (and resources).[78] Deciding

71. Cavoukian & Wolf, *supra* note 3.

72. Timberg & Birnbaum, *supra* note 70.

73. Cavoukian & Wolf, *supra* note 3.

74. *Index Blasts EU Court Ruling on "Right to be Forgotten"*, INDEX ON CENSORSHIP (May 13, 2014), https://www.indexoncensorship.org/?p=57446; David Streitfeld, *European Court Lets Users Erase Records on Web*, N.Y. TIMES (May 13, 2014), http://nyti.ms/1iHQwPH.

75. Case C-131/12 Opinion of Advocate Gen. Jääskinen, Google Spain SL v. Agencia Española de Protección de Datos, CURIA para. 131 (June 25, 2013) (ECLI:EU:C:2013:424), http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62012CC0131.

76. Jeffrey Rosen, *The Right to Be Forgotten*, 64 STAN. L. REV. ONLINE 88, 88 (2012) (claiming that it represents the biggest threat to free speech on the Internet in the coming decade). *See* T.J. Raphael, *Should We Have a 'Right to be Forgotten' on the Net?*, PRI: TAKEAWAY (May 13, 2014, 6:30 PM), http://www.pri.org/stories/2014-05-13/should-we-have-right-be-forgotten-net; Matt Ford, *Will Europe Censor This Article?*, ATLANTIC (May 13, 2014), http://www.theatlantic.com/international/archive/2014/05/europes-troubling-new-right-to-be-forgotten/370796/.

77. Cavoukian & Wolf, *supra* note 3.

78. To be fair, few people doubted that Google had the capacity to efficiently implement a delisting procedure. After all, Google (and other search engines) has been operating a takedown mechanism for copyrighted content for years. *See* Viktor Mayer-Schönberger, *Omission of Search Results is Not a 'Right to be Forgotten' or the End of Google*, GUARDIAN

on conflicts of interests in the copyright context is already considered a thorny issue.[79] Balancing privacy and data protection rights against the right to freedom of expression arguably requires an even more careful—and burdensome—assessment.

4. Private Actors Make for Bad Judges

Another concern relates to the role of search engines as arbitrators. The ruling raised the question whether private entities should be asked to decide on conflicts of rights. In democratic countries, such role is traditionally reserved for the judiciary.[80] Transferring judicial power to the private sector could, at the very least, be considered inappropriate; especially when fundamental human rights are involved.[81]

5. Due Process

Google Spain not only affects the right to access information but also the right to impart information. Critics stress that the ruling fails to consider the interests of online publishers.[82] After all, the decision to delist affects the visibility of publishers' content.[83] Moreover, the ruling does not prescribe any involvement of publishers in the delisting process (e.g., through consultation, notification and/or appeal mechanisms). A publisher might not even realize that the findability of its content has been affected. Consequently, the ruling has been criticized for

(May 13, 2014, 6:30 PM), http://gu.com/p/3p7pc/stw.

79. For example, assessing the fair use exception is still problematic. *See* Lenz v. Universal Music Corp., 801 F.3d 1126 (9th Cir. 2015). *See also* Brian Focarino, *Dancing Baby Center of Test Case over Bad DMCA Takedown Requests*, IPWATCHDOG (Sept. 21 2015), http://www.ipwatchdog.com/2015/09/21/dancing-baby-test-case-over-dmca-takedown-requests/id=61746/.

80. *See EU Court 'Right to Be Forgotten' Ruling Threatens Freedom of Expression*, GLOBAL NETWORK INITIATIVE (May 15 2014, 11:38 AM), https://globalnetworkinitiative.org//news/eu-court-%E2%80%98right-be-forgotten%E2%80%99-ruling-threatens-freedom-expression; Heather Greenfield, *CCIA's Response to European Court of Justice Online Privacy Ruling*, COMPUTER & COMM. INDUSTRY ASS'N (May 13, 2014), https://www.ccianet.org/2014/05/ccias-response-to-european-court-of-justice-online-privacy-ruling/.

81. *See* Van Alsenoy & Ausloos, *supra* note 49. *See also Summary of the Results of the Public Consultation on the Future of Electronic Commerce in the Internal Market and the Implementation of the Directive on Electronic Commerce (2000/31/EC)*, EUR. COMM'N 12 (2009), http://ec.europa.eu/internal_market/consultations/docs/2010/e-commerce/summary_report_en.pdf.

82. In this paper we use the term "publisher" in a broad sense to refer to all parties that contribute to creation and dissemination of content online, such as authors, news publishers, bloggers, social media platforms, etc.

83. *See Right to Be Forgotten: With Free Expression Under Threat, Europe Needs a 'Marco Civil Moment'*, GLOBAL VOICES (Sept. 11 2014, 5:45 PM), https://globalvoicesonline.org/2014/09/11/right-to-be-forgotten-with-free-expression-under-threat-europe-needs-a-marco-civil-moment/.

disregarding the right to due process. Limiting one's right to impart information without ensuring proper defense mechanisms is not a standard worth following.

The criticism expressed in the wake of *Google Spain* overlaps to a great extent with the line of arguments used in the debate on blocking and removing illegal content online.[84] The apparent overlap between delisting and so-called "notice-and-takedown" procedures warrants a closer look at the latter. The lessons learned in the ongoing discussions on notice-and-takedown could inform the development of procedural safeguards in the context of the right to be delisted.

B. A Hint of Déjà-Vu?

The notice-and-takedown mechanism was designed to help eliminate illegal (or illegally published) content from the Internet.[85] In order to be efficient, the mechanism co-opts Internet intermediaries to keep the Internet "clean," when called upon by rights holders.[86] Upon receiving a notice, intermediaries must make a swift decision whether to remove content, block access, or ignore the complaint. In the latter case, the intermediaries risk becoming liable for facilitating the infringement by the third party. Involvement of public authorities is neither excluded nor required.

In the EU, the notice-and-takedown mechanism originates from E-Commerce Directive 2000/31.[87] The E-Commerce Directive has a horizontal nature, meaning that it covers various types of illegal content and activities (infringements on copyright, defamation, content harmful to minors, unfair commercial practices, etc.) and provides immunities for different kinds of liability (criminal, civil, direct, indirect).[88] A similar mechanism exists in the United States but is limited to copyright infringements under The Digital Millennium Copyright Act ("DMCA").[89] Despite obvious similarities between the EU and the U.S.

84. *See* Van Alsenoy, Kuczerawy & Ausloos, *supra* note 7, at 44.

85. For a history of the intermediary liability regimes and the "notice-and-takedown" procedures, see ORG. FOR ECON. CO-OPERATION & DEV., THE ROLE OF INTERNET INTERMEDIARIES IN ADVANCING PUBLIC POLICY OBJECTIVES (2011), http://www.oecd.org/internet/ieconomy/48685066.pdf.

86. *See, e.g.*, *A Clean and Open Internet: Public Consultation on Procedures for Notifying and Acting on Illegal Content Hosted by Online Intermediaries*, EUR. COMM'N, http://ec.europa.eu/internal_market/consultations/2012/clean-and-open-internet_en.htm (last updated Dec. 3, 2015).

87. Parliament & Council Directive 2000/31, 2000 O.J. (L 178) 1 (EC) [hereinafter E-Commerce Directive].

88. FLORENCE LE BORGNE-BACHSCHMIDT ET AL., IDATE CONSULTING, USER-CREATED-CONTENT: SUPPORTING A PARTICIPATIVE INFORMATION SOCIETY 220 (2008), http://www.ivir.nl/publicaties/download/233.

89. In the United States, liability of online intermediaries is governed by two provisions of federal law: Section 509 of the Communications Decency Act ("CDA") (codified at 47

mechanisms, the E-Commerce Directive lacks the safeguards provided for in the DMCA. These safeguards include a clear procedure for removal and replacement of content (put-back procedure), requirements for a valid notice and counter-notice as well as penalties for misrepresentations.[90] Unlike the DMCA, the E-Commerce Directive does not specifically address the position of search engines.[91]

Notice-and-takedown mechanisms on both continents are far from perfect; they are often accused of leading toward easy and unquestioned removals.[92] Abuse is not uncommon and its detrimental effect on freedom of expression has been commented on extensively.[93] The issues

U.S.C. § 230(c)) and Section 202 of the Digital Millennium Copyright Act (codified at 17 U.S.C. § 512). The former applies to defamation, invasion of privacy, tortious interference, civil liability for criminal law violations, and general negligence claims based on third-party content. The latter has been enacted specifically for copyright infringements. Because the focus of this article is on the procedural aspects of notice-and-takedown, we will focus on the DMCA regime only. For more on Section 230(c) of the CDA, see David S. Ardia, *Free Speech Savior or Shield for Scoundrels: An Empirical Study of Intermediary Immunity Under Section 230 of the Communications Decency Act*, 43 LOY. L.A. L. REV. 373, 452 (2010).

90. Limitations on Liability Relating to Material Online, 17 U.S.C § 512(d) (2014). For more on the DMCA, see ADAM HOLLAND ET AL., BERKMAN CTR. FOR INTERNET & SOC'Y, NOC ONLINE INTERMEDIARIES CASE STUDIES SERIES: INTERMEDIARY LIABILITY IN THE UNITED STATES (2015), http://cyber.law.harvard.edu/is2015/sites/is2015/images/NOC_United_States_case_study.pdf.

91. Search engines fall within the scope of the E-Commerce Directive as a whole, E-Commerce Directive, *supra* note 87, at recital 18, but they were not awarded with a specific liability exemption. The question of search engines' liability for third party content was left entirely to the discretion of the Member States. For example, Austria and Liechtenstein classified these types of services as providers of "access services," providing them with a liability exemption similar to that for the providers of mere conduit services. The underlying rationale was that "search engines generally do not edit the content they show in the results, are not the source of the information they link to, and are not in the position to remove it from the Web." Joris van Hoboken, *Legal Space for Innovative Ordering: On the Need to Update Selection Intermediary Liability in the EU*, 13 INT'L J. COMM. L. & POL'Y 1, 9 n.30 (2009). Other member states, such as Hungary, Portugal, and Spain, have opted for the hosting model for both search engine services and hyperlinking services. Several EU countries left this issue unregulated and apply the general rules of tort law.

92. *See, e.g.*, Rosa Julia Barceló & Kamiel Koelman, *Intermediary Liability in The E-Commerce Directive: So Far So Good, But It's Not Enough*, 16 COMPUTER L. & SECURITY REV. 231 (2000); THIBAULT VERBIEST ET AL., STUDY ON THE LIABILITY OF INTERNET INTERMEDIARIES (2007), http://ec.europa.eu/internal_market/e-commerce/docs/study/liability/final_report_en.pdf; ORG. FOR ECON. CO-OPERATION & DEV., THE ECONOMIC AND SOCIAL ROLE OF INTERNET INTERMEDIARIES 49 n.83 (2010), http://www.oecd.org/internet/ieconomy/44949023.pdf; Jennifer Urban & Laura Quilter, *Efficient Processes or Chilling Effects? Takedown Notices Under Section 512 of the Digital Millennium Copyright Act*, 22 SANTA CLARA COMPUTER & HIGH TECH. L.J. 621 (2006); *Unintended Consequences: Fifteen Years Under the DMCA*, ELECTRONIC FRONTIER FOUND. (Mar. 2013), https://www.eff.org/pages/unintended-consequences-fifteen-years-under-dmca.

93. *See* JENNIFER URBAN & LAURA QUILTER, EFFICIENT PROCESS OR "CHILLING EFFECTS"? TAKE-DOWN NOTICES UNDER SECTION 512 OF THE DIGITAL MILLENNIUM COPYRIGHT ACT: SUMMARY REPORT (2006), https://www.law.berkeley.edu/files/Chilling_Effects_Report.pdf; Wendy Seltzer, *Free Speech Unmoored in Copyright's Safe Harbor: Chilling Effects of the DMCA on the First Amendment*, 24 HARV. J.L. & TECH. 171 (2010). *See*

are a direct result of policymakers pushing Internet intermediaries into a role of gatekeepers, responsible for policing content online. Both in the EU and the U.S., the flaws of takedown procedures have led to discussions on potential improvements to the current system.[94]

It is important to highlight that *Google Spain* was not based on (nor did it even reference) the E-Commerce Directive. The CJEU considered that Google should be held liable for its own wrongdoings (failing to accommodate the data subject's rights), not for the actions of the third party (the publisher La Vanguardia) over which Google had no control. Therefore, the ruling was based entirely on the primary responsibility of Google under data protection law (Data Protection Directive 95/46).[95] Nonetheless, the ruling effectively led to the creation of a complaint-based system, which closely resembles the notice-and-takedown procedure.[96] We refer to this new hybrid mechanism as "notice-and-delist."

C. Not So Different After All

Notice-and-takedown and notice-and-delist procedures display strong similarities. Nevertheless, they are not completely analogous.[97] The two regimes differ both in scope and outcome. Notice-and-takedown targets illegal content or activities of third parties. Notice-and-delist relates to the autonomous and independent activity of the search engine itself: linking a search term with a result. Notice-and-delist applies regardless of the (il)legal nature of the original publication.[98] A refusal to honor a notice-and-takedown request could lead to the service provider's liability for non-action towards the third party's infringement. Ignoring a notice-and-delist request could amount to the search engine's liability for its own actions.[99]

also LUMEN DATABASE, https://lumendatabase.org/ (last visited Mar. 20, 2016) ("collects and analyzes legal complaints and requests for removal of online materials").

94. URS GASSER & WOLFGANG SCHULZ, BERKMAN CTR. FOR INTERNET & SOC'Y, GOVERNANCE OF ONLINE INTERMEDIARIES: OBSERVATIONS FROM A SERIES OF NATIONAL CASE STUDIES (2015), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2566364.

95. The CJEU did not assess the applicability of the E-Commerce Directive to search engines, nor did it address the relationship between the E-Commerce Directive and the Data Protection Directive. For the full discussion, *see* Van Alsenoy, Kuczerawy & Ausloos, *supra* note 7, at 60–62.

96. *See* Stavroula Karapapa & Maurizio Borghi, *Search Engine Liability for Autocomplete Suggestions: Personality, Privacy and the Power of the Algorithm*, 23 INT'L J.L. & INFO. TECH. 261, 261–289, 283 (2015).

97. They are, after all, based on different legal frameworks: the E-Commerce Directive, *supra* note 87, and the Data Protection Directive, *supra* note 8.

98. Generally the original content will be legal(ly published). Delisting is not concerned with the source content, but only with the justification for linking that content to a specific individual.

99. *See* Van Alsenoy, Kuczerawy & Ausloos, *supra* note 7, at 9–27.

Despite the differences, the two mechanisms present a strong conceptual kinship. In both cases, private entities whose rights have been infringed can address a service provider directly, requesting that the content no longer appear in the context of the provided service. For the sake of efficiency, involvement of public bodies is not required, though not excluded either. In both procedures, a court or other competent public body might join the proceedings, especially if the initial request is not honored. In both cases, it is the service provider's responsibility to assess the validity of the request (e.g., determining whether it comes from the eligible party). Next, the service provider must examine the contested material and decide whether to accommodate the request. A refusal to honor the request, in both cases, might result in liability of the service provider. In the search for procedural safeguards for notice-and-delist, it is therefore worth drawing from past experiences in the notice-and-takedown context.

III. WHERE DO WE GO FROM HERE?

Addressing the procedural aspects of notice-and-delist does not require reinventing the wheel. A lot can be learned, even if only by analogy, from what has been written about notice-and-takedown procedures. In our analysis, we refer to the E-Commerce Directive, and the DMCA. We also take note of the on-going Notice-and-Action Initiative,[100] which, *inter alia,* aims to improve existing takedown procedures in the E-Commerce Directive. Finally, we examine the main suggestions made in the wake of—and specifically addressing—*Google Spain*.[101] The ultimate purpose of this exercise is to test proposed notice-and-takedown safeguards in the context of delisting and to assess whether they could contribute to an adequate implementation of the right to be delisted.

100. In Europe, the criticism of notice-and-takedown played a major part of the review of the E-Commerce Directive. The European Commission focused on the intermediary liability regime, specifically on the mechanisms designed to eliminate illegal content from the Internet. The mechanisms in the Commission's initiative are known under the umbrella term "Notice-and-Action." *See A Coherent Framework for Building Trust in the Digital Single Market for E-Commerce and Online Services*, at 13 n.49, COM (2011) 942 final (Jan. 11, 2012). Currently the review of the intermediary liability regime will most likely be continued as part of the Digital Single Market Strategy for Europe. *See A Digital Single Market Strategy for Europe*, COM (2015) 192 final (May 6, 2015).

101. Particularly those made by the 29WP and in the context of Google's "Advisory Council Report." *See 29WP Guidelines*, *supra* note 53, at 6 n.50.

A. Subsidiarity: Start at the Source

The most straightforward solution to deal with infringing content online is to directly request the original publisher delete it. It is also the most permanent solution, as removal at the source generally prevents the content from reappearing at secondary sources such as search engines.[102] Directly approaching the source would also lead to a more thorough assessment. In principle, the publisher is better informed about the content and its context than search engines. Publishers can also address requests in different ways (e.g., through anonymization or pseudonymization), whereas search engines can only delist.[103] In the context of the Notice-and-Action Initiative it was argued that requiring approaching the source first would decrease the number of actual requests.[104] Subsidiarity, moreover, would significantly lower the burden on search engines. With all of this in mind, it may not come as a surprise that DPAs, as well as the Council of Europe, suggest approaching the source as a useful first step in practice.[105]

Though subsidiarity might seem simple in theory, it raises a number of practical issues. It may not be clear exactly whom to approach with a request and how. The original publisher might be unwilling to cooperate or simply ignore requests. Conversely, an easy-to-find and cooperative publisher raises another set of issues. Removal or adjustments[106] at the source will have a more severe impact on the accessibility of that content

102. Removal at the source does not prevent republication if content had been copied before removal.

103. The question about the obligations of the original publisher is currently pending at the CJEU in the *Manni* case. *See* Case C-398/15, Manni, 2015 O.J. (C 354) 20, http://curia.europa.eu/juris/fiche.jsf?id=C;398;15;RP;1;P;1;C2015/0398/P. *See also* Jef Ausloos, *CJEU is Asked to Rule on the 'Right to be Forgotten' Again*, TECH., POL'Y & SOC'Y (Sept. 18, 2015), https://jefausloos.wordpress.com/2015/09/18/cjeu-is-asked-to-rule-on-the-right-to-be-forgotten-again/.

104. For example, question eleven of the notice-and-action consultation, sub-choice five, yes or no response, reads: "A notice should contain evidence that the content provider could not be contacted before contacting the hosting service provider or that the content provider was contacted first but did not act." Response of European Digital Rights (EDRi): "Yes." *A Clean and Open Internet: Public Consultation on Procedures for Notifying and Acting on Illegal Content Hosted by Online Intermediaries*, EUROPEAN DIGITAL RIGHTS, https://edri.org/files/057862048281124912Submission_EDRi_NoticeAction.pdf (last visited Mar. 21, 2016).

105. It has been suggested (though not required) by the French DPA on its website. *See Comment effacer des informations me concernant sur un moteur de recherché*, COMMISSION NATIONALE DE L'INFORMATIQUE ET DES LIBERTÉS [CNIL] (May 30, 2014), https://www.cnil.fr/linstitution/actualite/article/article/comment-effacer-des-informations-me-concernant-sur-un-moteur-de-recherche/. *See also* Council, *Proposal for a General Data Protection Regulation: The Right to Be Forgotten and the Google Judgment*, at 7, 2012/0011 (COD) 11289/14 (Jul. 3, 2014), (memorandum to the Working Group on Information Exchange and Data Protection (DAPIX)); *29WP Guidelines*, *supra* note 53 (acknowledging that individuals may consider approaching the source first).

106. For example: anonymization, pseudonymization, or restricting access.

than mere delisting.

Subsidiarity is particularly confusing with regard to the delisting of legitimate content. Why approach the source, if the original publication was legal and the problem lies with the subsequent processing of personal data by a search engine? According to the 29WP, "[i]ndividuals are not obliged to contact the original site, either previously or simultaneously, in order to exercise their rights towards the search engines."[107] After all, publication and subsequent dissemination via search engines are two separate processing activities with different legal grounds.[108] They also have a different impact on the individual's rights and interests.[109] In many cases, the individual might not take any issue with the original publication, but might not want to be gratuitously linked to it on the basis of a mere name-search. This is especially true when the source content does not (directly) relate to that individual and/or the search results paint a misleading picture of that individual.[110]

It is not difficult to see the potential merits of subsidiarity in the notice-and-delist context; it seems a fairly straightforward procedural safeguard. In practice, however, there are too many factors outside of the individual's control (for example, findability and/or responsiveness of the original publisher). Even though subsidiarity might be helpful in some cases, it is not a reliable solution to the notice-and-delist predicament overall.

B. Publisher Notification

Notifying the web publisher ensures its involvement in the delisting process. Unlike subsidiarity, publisher notification only grants the publisher an auxiliary role. Web publishers may contribute to, but do not carry out, the balancing exercise.

In the notice-and-takedown context, notification is meant to inform the publisher about a complaint and give an opportunity to rectify potential wrongdoing. Depending on the purpose of notification, the

107. *29WP Guidelines*, *supra* note 53, at 6.

108. *Id.*

109. *Id.*

110. Not long after Google started implementing delisting requests, journalists at the *BBC* and *The Guardian* received notices that some of their (fairly recent) articles on shady bankers and corrupt referees had been delisted. It turned out, however, that the requests did not come from the actual subjects of these articles (the articles still showed up when Googling their names), but most likely from people who had once left a comment (and otherwise have no significant online presence). *See* Jeffrey Toobin, *The Solace of Oblivion: In Europe, the Right to Be Forgotten Trumps the Internet*., NEW YORKER (Sept. 29, 2014), http://www.newyorker.com/magazine/2014/09/29/solace-oblivion. In Australia, an individual also successfully sued Google and Yahoo! (under defamation law) for displaying search results in a way that insinuated the requestor was a dangerous criminal. *See* Van Alsenoy, Kuczerawy & Ausloos, *supra* note 7, at 39.

timing might be different. If the main goal is to involve the publisher in the decision-making process, the notification should be sent *before* the decision is made. Consulting the publisher allows it to provide additional context and better assess the request. Receiving more information is especially helpful in cases when it is not immediately clear which right should prevail. If the purpose is to inform publishers about the outcome and/or provide them with an opportunity to appeal, the notification may be sent *after* the decision was made.

Publisher notification was proposed as a safeguard for ensuring due process and the right to freedom of expression during the review process of the E-Commerce Directive.[111] It was also suggested that, after receiving a notification, the original publisher could respond to the allegations through a counter-notification.[112] Notably, counter-notification is one of the DMCA safeguards. Section 512(g) states that material must be restored ten to fourteen days after the counter-notification (unless the complainant has filed an action for a court order) and defines penalties for misrepresentations.[113]

Publisher notifications turned out to be one of the most debated issues in the context of delisting procedures. Including the web publishers in the process would help to properly balance the rights at stake. Publishers, moreover, are in a better position to defend the public interest in having access to the information. The 29WP agreed that publisher notification *prior* to the delisting might be helpful in particularly difficult cases, "when it is necessary to get a fuller understanding about the circumstances of the case."[114] There is no legal basis under EU data protection law for routinely notifying publishers *after* decisions have been made.[115]

Google's Advisory Council recommended that search engines should notify publishers "to the extent allowed by law."[116] The Council argued that notifications should be sent *prior* to reaching an actual delisting decision.[117] Currently, Google only notifies web publishers that

111. *See* Aleksandra Kuczerawy, *Intermediary Liability & Freedom of Expression: Recent Developments in the EU Notice & Action Initiative*, 31 COMPUTER L. & SEC. REV. 46 (2015).

112. However counter-notification was generally advised against in cases when content is manifestly illegal. *See A Coherent Framework to Boost Confidence in the Digital Single Market of E-commerce and Other Online Services*, at 45, SEC (2011) 1641 final (Jan. 11, 2012) [hereinafter *Digital Single Market Framework*]. *See also* Kuczerawy, *supra* note 111, at 54 n.93.

113. 17 U.S.C. § 512(g)(2)–(3) (2012).

114. *29WP Guidelines*, *supra* note 53, at 10.

115. *Id.* Routine communication to publishers might raise additional concerns. Under EU data protection law, such activity would require a separate legal basis in order to be considered legitimate. Data Protection Directive, *supra* note 8, art. 7.

116. LUCIANO FLORIDI ET AL., REPORT OF THE ADVISORY COUNCIL TO GOOGLE ON THE RIGHT TO BE FORGOTTEN 17 (Feb. 6, 2015), https://www.google.com/advisorycouncil/.

117. *Id.*

use its Webmaster tool.[118] The search engine allegedly only sends notifications in just over a quarter of delisting cases.[119] This (low) number can probably be explained by the fact that a large number of the requests concern content on third-party websites (i.e., social networks or people search engines).[120] Moreover, notifications appear to be issued only *after* delisting, seemingly neglecting its own Advisory Council's recommendations.[121] This practice suggests that Google does not intend to involve web publishers in the decision-making process. The reason for this approach could be that search engines do not recognize a legal right of publishers to have their content indexed and/or displayed in a particular order.[122] Providing a formal and well-structured appeal mechanism might encourage publishers to claim "the right to be indexed."

As mentioned before*, ex post* notification might still be useful if the recipient is afforded an opportunity to appeal the delisting decision. Successful appeals have already led to reversal of delisting decisions on several occasions.[123] Still, actual numbers remain unknown and Google does not seem to have a formalized, systematic appeal mechanism in place.[124] Arguably, even if search engine providers merely inform publishers, without allowing for an appeal, the notice still contributes to the overall transparency of the process. It may even seem generous of Google to ensure that publishers are aware that their content has lost visibility. That said, some have labeled the search engine's notification practices as a deliberate attempt to undermine the ruling.[125] Its practices

118. Gibbs, *supra* note 64.

119. Ellen P. Goodman et al., *Open Letter to Google from 80 Internet Scholars: Release RTBF Compliance Data*, MEDIUM (May 13, 2015), https://medium.com/@ellgood/open-letter-to-google-from-80-internet-scholars-release-rtbf-compliance-data-cbfc6d59f1bd.

120. *See European Privacy Requests for Search Removals*, *supra* note 51.

121. *See, e.g.*, Chris Green, *Law Firms Exploiting EU 'Right to be Forgotten' Ruling to Help Individuals Remove Awkward Newspaper Articles from Google*, INDEPENDENT (Apr. 17, 2015), http://www.independent.co.uk/news/world/europe/law-firms-exploiting-eu-right-to-be-forgotten-ruling-to-help-individuals-remove-awkward-newspaper-articles-from-google-10185164.html.

122. *See 29WP Guidelines*, *supra* note 53. *See also* Spanish Delegation, *Proposal for a General Data Protection Regulation: Chapters III and VIII*, 2012/0011 (COD) 7586/15, at 6 (Mar. 31, 2015), http://statewatch.org/news/2015/apr/eu-council-dp-reg-chap-III-VIII-es-7586-add-15.pdf (explaining that there is no "right to be indexed" or a "legitimate interest" to be indexed).

123. Goodman et al., *supra* note 119.

124. Google only offers a form to webmasters who are using the company's "webmaster tools." *EU Privacy Removal*, GOOGLE, https://www.google.com/webmasters/tools/eu-privacy-webmaster (last visited Mar. 31, 2016).

125. Paul Bernal, *Is Google Undermining the 'Right to be Forgotten'?*, CNN, http://edition.cnn.com/2014/07/07/opinion/bernal-google-undermining-privacy-ruling/index.html (last updated Jul. 7, 2014, 8:53 AM); Andrew Orlowski, *Google De-listing of BBC Article 'Broke UK and Euro Public Interest Laws' - So WHY Do It?,* REGISTER (Jul. 4, 2014, 12:31 PM), http://www.theregister.co.uk/2014/07/04/google_peston_bbc_delisting_not_

could lead to "republication, and ready reidentification, of complainants in a way that directly undermines their demand for practical obscurity."[126]

In conclusion, publisher notification can play an important role in the delisting process. It could act as a due process element and contribute to the balancing of rights at stake, including the public interest in accessing the information. The results of publisher notification depend on the purpose, timing, and implementation of the notification. Consulting publishers *before* delisting might provide additional context in difficult cases and contribute to the adequate assessment of requests. Notifying the publishers *after* delisting—particularly when no formal appeal procedure is available—does not add much to the opaque delisting process.

C. "Manifestly Illegal"

One of the biggest difficulties of policing content online is assessing whether content (or an activity) is actually illegal. A certain level of legal knowledge is required to make decisions on whether or not to take down or delist content. Some cases are so complex that even professional judges would find them difficult to resolve. Yet, in complaint-based systems, private entities are assigned such a role.

During the E-Commerce Directive review process, various stakeholders proposed that intermediaries should only be required to remove "manifestly illegal" content.[127] Manifest illegality is generally understood as a situation where content or an activity is obviously and

compliant_w_public_interest_law_says_expert/ (explaining that in some cases Google was accused of organizing a publicity stunt to raise censorship panic among publishers).

126. Julia Powles, *Why the BBC is Wrong to Republish 'Right to be Forgotten' Links*, GUARDIAN (Jul. 1, 2015, 7:57 AM), http://gu.com/p/4a95x/stw (explaining that the BBC and Wikimedia Foundation, among others, have done exactly this). *See* Neil McIntosh, *List of BBC Web Pages Which Have Been Removed from Google's Search Results*, BBC: INTERNET BLOG (June 25, 2015, 14:40), http://www.bbc.co.uk/blogs/internet/entries/1d765aa8-600b-4f32-b110-d02fbf7fd379; Nick Summers, *Wikimedia Slams 'Right to be Forgotten' Ruling, Creates Page for Wikipedia Link Removal Notices*, NEXT WEB (Aug. 6, 2014, 1:52 PM), http://tnw.to/i4rsB. *See also* Boiten, *supra* note 64.

127. *Digital Single Market Framework*, *supra* note 112, at 34–38. *See also* Patrick Van Eecke, *Online Service Providers and Liability: A Plea for a Balanced Approach*, 48 COMMON MKT. L. REV. 1455, 1467 (2011); Giovanni Sartor, *Providers' Liabilities in the New EU Data Protection Regulation: A Threat to Internet Freedoms?*, 3 INT'L DATA PRIVACY L. 3, 7 (2013) (arguing that liability should be excluded if a normal reasonable person might consider the content as being lawful). Also see Bits of Freedom's response to the Consultation on Clean and Open Internet, Question 16: "if information is unmistakably unlawful and there is a need to immediately disable access, the hosting provider can disable access rightaway [sic]." *A Clean and Open Internet: Public Consultation on Procedures for Notifying and Acting on Illegal Content Hosted by Online Intermediaries*, BITS OF FREEDOM, https://www.bof.nl/live/wp-content/uploads/040912-submissiontoformofconsultationeuropeancommission.pdf (last visited Mar. 21, 2016).

incontestably illegal without the need for further investigation.[128] The proposed solution has a certain appeal: obvious cases can (and arguably should) be dealt with by intermediaries themselves, whereas non-obvious cases should be decided by courts or other competent authorities.

Additional guidance might be derived from *L'Oreal v. eBay*. In *L'Oreal v. eBay*, the CJEU introduced the standard of "a diligent economic operator."[129] The CJEU held that a service provider may lose its liability exemption once it is "aware of facts or circumstances on the basis of which a diligent economic operator should have identified the illegality."[130] This means that the service provider can only be held liable if it is sufficiently clear that the content at issue infringes upon the rights of others. A similar approach could be adopted when assessing a data subject's rights to delist.[131]

Requests for delisting require assessment of the *link* between specific content and a name-search (as opposed to assessing the nature of the content itself) and its impact on the individual's right to privacy. While it sounds like a difficult task, Google's Chief Legal Officer, David C. Drummond, acknowledged that the majority of delisting requests are easy to solve.[132]

The idea that search engines should only be obligated to accommodate removal requests in "obvious" cases is not unreasonable.[133] Under such an approach, search engines would be

128. For example, in Austria it is considered an "infringement obvious to a non-lawyer without further investigation." ["wenn die Rechtsverletzung auch für einen juristischen Laien ohne weitere Nachforschungen offenkundig ist."] 817 der Beilagen zu den Stenographischen Protokollen des Nationalrates [Additions to the stenographic minutes of the National Assembly] XXI. GP, Zu § 16 EGC 3, at 37 (Nov. 19, 2001), https://www.uibk.ac.at/strafrecht/strafrecht/ecgrv.pdf. In Belgium, examples include child pornography, revisionism and incontestable defamation. Document parlementaire [Parliamentary works] 2002–2003, Doc 50 2100/01, at 48, http://www.dekamer.be/kvvcr/showpage.cfm?section=/flwb&language=fr&cfm=/site/wwwcfm/flwb/flwbn.cfm?lang=N&legislat=50&dossierID=2100; Van Eecke, *supra* note 127, at 1467.

129. Case C-324/09, L'Oréal SA v. eBay Int'l AG, 2011 E.C.R. I-06011 para. 120 (ECLI:EU:C:2011:474).

130. *Id.*

131. *But see* CTR. FOR DEMOCRACY & TECH., SHIELDING THE MESSENGERS: PROTECTING PLATFORMS FOR EXPRESSION AND INNOVATION (2012), https://www.cdt.org/files/pdfs/CDT-Intermediary-Liability-2012.pdf (arguing that defamation is too subjective an area of law to appropriately apply notice-and-takedown systems given the potential for abuse). Some EU Courts have also been reluctant to consider defamatory content as "manifestly illegal" for purposes of Article 14. *See also* VERBIEST ET AL., *supra* note 92, at 39, 100. Those who argue that intermediaries are inept to decide about takedown requests regarding defamatory content, are also likely to argue that intermediaries are unable to assess the legality of other content harming privacy interests.

132. David Drummond, Chief Legal Officer, Google, Address at the Brussels Meeting of the Advisory Council to Google on the Right to Be Forgotten (Nov. 4, 2014), https://youtu.be/OTAbo3n3BJ8.

133. During the hearings of Google's Advisory Council some experts discussed the idea of

required to delist content where it is sufficiently clear that its continued referencing under a name-based search constitutes a "disproportionate"[134] interference with the person's privacy and data protection interests.[135] The easy cases should be dealt with by search engines directly. Only a subset of requests will require a more thorough analysis and could benefit from involvement of DPAs or courts. Search engines can be expected to make a good faith effort and not offload their responsibility on courts and DPAs. The standard of a reasonable duty of care should be used to assess whether Google is taking its responsibility seriously. The question, in the end, is about sharing the costs of the delisting process.

D. Independent Body

In a perfect world, conflicts involving fundamental rights would always be decided by a court of law. An impartial judiciary offers the strongest warranty that the interests at stake are properly balanced. In practice, legal proceedings are costly and time-consuming. Moreover, no court system in the world is equipped to handle the volume of requests that followed *Google Spain*.

During the Advisory Council hearings, several experts recommended the creation of a new independent body that would act as an external arbiter in resolving delisting requests.[136] Inspiration could be drawn from alternative dispute resolution mechanisms. Although not without criticism, the ICANN domain name dispute resolution was pointed to as one potential model.[137]

Proponents view such independent body or "mediation authority" as an arbiter between publishers, search engines, and data subjects. The main goal is to ensure adequate balancing of the rights at stake. It is therefore recommended that the independent body comprises a wide variety of stakeholders, including public and private sector actors as well as civil society.[138] A balanced composition could help prevent a systemic

defining classes of manifestly unlawful content that would be delisted upon request. *See* FLORIDI ET AL., *supra* note 116, at 38.

134. Or, in the CJEU's words: "inadequate, irrelevant or excessive." Case C-131/12 Judgment of the Court (Grand Chamber), Google Spain SL v. Agencia Española de Protección de Datos, CURIA paras. 92–94 (May 13, 2014) (ECLI:EU:C:2014:317), http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62011CJ0184.

135. Van Alsenoy, Kuczerawy & Ausloos, *supra* note 7, at 70.

136. *See* FLORIDI ET AL, *supra* note 116, at 36 nn.48, 49.

137. *See id.*; Patrick Van Eecke, Internet Law Professor, U. of Antwerp, Address at the Brussels Meeting of the Advisory Council to Google on the Right to Be Forgotten (Nov. 4, 2014), https://youtu.be/OTAbo3n3BJ8 (at 25:30). For a general criticism of the ICANN model see Elizabeth G. Thornburg, *Fast, Cheap & Out of Control: Lessons from the ICANN Dispute Resolution Process*, 6 J. SMALL & EMERGING BUS. L. 191 (2002).

138. GLOBAL VOICES, *supra* note 83.

bias toward either free speech or privacy interests.[139] At the same time, one should remain mindful of the risks involved in the privatization of dispute resolution.[140] Opinions of the independent body should be based on existing laws and case law and not on rules solely created by stakeholders. Moreover, recourse to a court of law should always remain possible.

Skeptics expressed concerns as to how such a body would be funded.[141] The suggestion of charging search engines is appealing but immediately raises questions about impartiality and independence. It is not unusual, after all, that rules are shaped to cater to the needs of patrons.[142] Interestingly, in the wake of *Google Spain*, certain stakeholders appeared rather reluctant about the idea of an independent body. Some publishers, for example, feared that participation in such proceedings would entail considerable overhead.[143] Getting entangled in another bureaucratic endeavor might not help anyone's cause.

The idea of creating a new type of body to mediate delisting conflicts is worth considering. When implemented properly, it could mitigate significant risks associated with how notice-and-delist is currently exercised (e.g., lack of independent tribunal). In order to be effective, such a process requires a considerable effort on the part of the involved parties, each with different agendas and priorities. With this in mind, an independent body set up to deal with delisting requests seems a commendable goal in the abstract, but rather infeasible in the short run.

E. More Transparency

The lack of transparency in policing content online is a concern shared by many.[144] During the Notice-and-Action Directive consultation, many stakeholders supported the idea of obligatory transparency reports on content blocking and removal.[145] Providing information (e.g., statistics on the types of removed content and the grounds or criteria for removal) contributes to a better understanding of the underlying process. It might also help reduce the number of abusive takedown notices.[146]

So far, it is not a common practice for intermediaries to publish information on takedown requests.[147] To be fair, Google has been among

139. *See id.*

140. *See* Elizabeth G. Thornburg, *Going Private: Technology, Due Process, and Internet Dispute Resolution*, 34 U.C. DAVIS L. REV. 151 (2000).

141. *See* Van Eecke, *supra* note 137.

142. Thornburg, *supra* note 137, at 213.

143. Van Alsenoy & Ausloos, *supra* note 49.

144. *See, e.g.*, *Digital Single Market Framework*, *supra* note 112, at 6.

145. *See* Kuczerawy, *supra* note 111, at 14 n.89.

146. *Id.*

147. Rebecca MacKinnon, *Where Is Microsoft Bing's Transparency Report?*, GUARDIAN

the first to issue general transparency reports on requests to take down search results by both government and copyright owners.[148] Since 2014, Google has regularly published information about delisting requests in Europe.[149] Apart from some high-level numbers,[150] the report also includes a limited set of examples on the kinds of requests received.[151] Over half of the examples relate to controversial claimants such as public officials or criminals. The Guardian uncovered, however, that not even five percent of the requests Google receives actually concern such individuals.[152] The apparent lack of representativeness, as well the limited scope and detail of Google's current reporting on delisting cases prevents drawing any meaningful conclusions.[153]

Right after *Google Spain*'s one-year anniversary, eighty academics—from the EU and the US—signed an open letter to Google (and other search engines), calling for more granular transparency.[154] The letter requested the company to release data, in the form of anonymized and aggregated statistics, about compliance with notice-and-delist requests.[155] Still, at this time, Google's "entire process is silent and opaque, with very little public process or understanding of delisting."[156] Without specific information on how digital platforms such as Google exercise their power over information online, many of the issues cannot be assessed in detail. The 29WP and Google's Advisory Council also emphasized the need for more transparency.[157] Fact-free discussions on the right to be delisted are in no one's interest. The development of procedural safeguards in implementing the right to be delisted depends

(Feb. 14, 2014, 9:45 AM), http://gu.com/p/3mmap/stw.

148. *See Google Transparency Report*, GOOGLE, https://www.google.com/transparencyreport/ (last visited Mar 21, 2016).

149. *See European Privacy Requests for Search Removals*, *supra* note 51.

150. Between June 2014 and August 2015, Google reportedly received over 300,000 delisting requests, relating to over one million URLs (only 41.5% of which were actually delisted). *Id.*

151. For example: "A prominent business person asked us to remove articles about his lawsuit against a newspaper. We did not remove the articles from search results."; "A victim of rape asked us to remove a link to a newspaper article about the crime. We have removed the page from search results for the individual's name." *Id.*

152. Sylvia Tippmann & Julia Powles, *Google Accidentally Reveals Data on "Right to be Forgotten" Requests*, GUARDIAN (July 14, 2015, 9:28 AM), http://gu.com/p/4a9hc/stw.

153. Aleksandra Kuczerawy, *REVEAL Expert Seminar on the Right to be Forgotten (RTBF)*, REVEAL (July 1, 2015), http://revealproject.eu/reveal-expert-seminar-on-right-to-be-forgotten/.

154. Goodman et al., *supra* note 119.

155. Including, for example, categories of requests/requestors, the proportion for each category of successful and unsuccessful delistings, and categories (and corresponding proportion) of sources. *See id.*

156. *Id.*

157. *29WP Guidelines*, *supra* note 53; *Google Advisory Council*, GOOGLE, https://www.google.com/advisorycouncil/ (last visited Mar. 21, 2016).

on information that can only be provided by search engines.[158]

CONCLUSION

Google Spain caught many by surprise. The CJEU unambiguously established that search engines are subject to EU data protection law and need to consider requests to delist results for specific name-searches. How exactly the right should work in practice was left unanswered by the Court. Ever since, the road toward implementation has been a bumpy one. Google was fairly quick in reacting to the ruling and setting up an online delisting form. The Article 29 Working Party issued specific guidelines, and media and academics around the world all offered suggestions as to how delisting should (or should not) be implemented. Still, important questions remain, notably with regard to ensuring due process and safeguarding the fundamental right to freedom of expression.

Taking a step back, it seems that much can be learned from a similar, extant framework: the notice-and-takedown mechanism. Despite the differences between notice-and-takedown and notice-and-delist, there are considerable overlaps when examined from a practical standpoint. Hence, the longstanding notice-and-takedown discussions offer valuable insights for implementing the right to be delisted.

This article investigated several recommendations made in the context of notice-and-takedown and assessed how they might (or might not) contribute to an effective notice-and-delist procedure. First, it appears that subsidiarity, though useful in the abstract, will often not be viable in practice. Requesting the removal of content at its source requires content, or underlying activities, to be illegitimate. Delisting, however, is not hinged upon illegality at the source, but rather on the further processing by search engines. Second, notifying the original publisher only makes sense if they are given the chance to get involved, either *before* (providing context) or *after* (opportunity to appeal) a decision to delist is made. Third, search engines' obligations (to react to delisting requests) must be interpreted within the framework of their responsibilities, powers, and capabilities. Whereas search engines can be expected to resolve the straightforward cases—the vast majority of delisting requests—the harder cases can be referred to (or resolved in collaboration with) DPAs or courts. Fourth, installing an independent body to adjudicate delisting requests could help mitigate risks of bias in

158. For example: the (categories of) content that are requested to be delisted; the types of individuals that request erasure; the proportion of requests and successful delistings in specific categories of content, the proportion of overall requests and successful delistings; the reasons for denial and acceptance of delistings; and the proportion of delistings for which the original publisher or the relevant data protection authority participated in the decision. *See* Goodman et al., *supra* note 119.

the delisting process. Establishing such a body would, however, require considerable financial investments and a clear commitment on the part of participating stakeholders. Finally, the implementation of the right to be delisted has largely occurred behind closed doors. More transparency (for example, about requests and decision-making procedures) is necessary to have a meaningful discussion on the further implementation of the right to be delisted. Without sufficient transparency, any attempt at moving forward will only take us halfway.

APPENDIX: CRITERIA FOR DELISTING

The ruling by the Court of Justice of the EU in *Google Spain* notoriously raised important questions with regard to the protection of the fundamental right to freedom of expression. Even though the CJEU acknowledged delisting requests require a balancing exercise, its articulation of such a balancing test was rather sparse.[159] Attempts to provide more guidance on how to balance the different rights and interests at stake have resulted in the Article 29 Working Party publishing its own guidelines,[160] and Google putting together an "Advisory Council."[161] Taking a step back from initiatives specifically focusing on *Google Spain*, much can be learned from other sources, particularly European Court of Human Rights ("ECtHR") case law.[162] Drawing from all this, we developed a framework and list of criteria (or categories of criteria) that inform the application of the balancing test prescribed by the CJEU. This list is not hierarchical and conflicts between different criteria may arise in individual cases. The overall goal is to provide a methodological framework to tackle delisting cases.

Before listing the criteria, it is worth reiterating the (limited) scope of the balancing test. All interests involved (i.e., privacy, data protection, freedom to receive and impart information), need to be assessed in light of having a *specific webpage referred to on the basis of a name search*. It is important to clearly distinguish this evaluation from, for example, assessing the public interest in accessing the information altogether.[163]

159. *See* Case C-131/12 Judgment of the Court (Grand Chamber), Google Spain SL v. Agencia Española de Protección de Datos, CURIA paras. 81, 93 (May 13, 2014) (ECLI:EU:C:2014:317), http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62012CJ0131.

160. *See 29WP Guidelines*, *supra* note 53.

161. *See Google Advisory Council*, *supra* note 49.

162. *See* Stijn Smet, *Freedom of Expression and the Right to Reputation: Human Rights in Conflict*, 26 AM. U. INT'L L. REV. 183, 200 (2010).

163. For an elaborate list of what might be in the public's interest, *see* JOINT COMMITTEE ON PRIVACY AND INJUNCTIONS, PRIVACY AND INJUNCTIONS: REPORT, TOGETHER WITH FORMAL MINUTES, MINUTES OF EVIDENCE AND APPENDICES 16–17, http://www.publications.parliament.uk/pa/jt201012/jtselect/jtprivinj/273/273.pdf ("business of government and political conduct; the protection of public health and safety; the fair and

The latter will only constitute one of the many factors to be considered. Apart from the nature of the original content or its publisher, one will also need to look at the nature of the individual whose name is searched. Ultimately, it will be the connection between the name (search term) and the information (search result) that needs to be evaluated for being (still) relevant, adequate, and non-excessive.[164]

A. Nature of the Source

1. Nature of the information

One of the criteria explicitly mentioned in *Google Spain*, relates to the "nature of the information in question."[165] Relevant factors include:

- **Factual accuracy**[166]: Is the information up-to-date?[167] Is it complete?[168] If information is false—to the extent this can reasonably be verified—it weighs in favor of delisting.[169]
- Can the information be qualified as **hate speech, slander, libel** and the like?[170] References to publications that are criminally prosecutable are more likely to be delisted.
- Does the information **require special protection**? This factor includes so-called "sensitive data" (article 8 of the Data Protection Directive 95/46) which was explicitly referred to by

proper administration of justice; the conduct of the police; cheating and corruption in sport; involvement in serious crimes; corporate malpractice; the sympathy of a public figure with extremist dogma"). *See also* Von Hannover v. Germany (No. 2), 55 E.H.R.R. 15 (2012). In ECtHR case law, "[t]he public's 'right' to receive information falls under the general interest criterion because it involves a 'right' that is assigned to the entire population in abstract terms and is thus more akin to a general interest than to a fundamental or human right." Smet, *supra* note 162, at 221 n.151.

164. Case C-131/12 Judgment of the Court (Grand Chamber), at paras. 92–93

165. *Id.* at para. 81.

166. *29WP Guidelines*, *supra* note 53, at 15 (criterion 4); FLORIDI ET AL., *supra* note 116, at 10, 12.

167. *29WP Guidelines*, *supra* note 53, at 18 (criterion 7).

168. Put differently, does the information give an accurate representation or is certain information (deliberately) omitted? *Id.* at 15 (criterion 4).

169. This might also be concluded from ECtHR case law, conferring less protection to reputation-harming factual allegations lacking proof. Smet, *supra* note 162, at 234–235; *see also* Rb. Amsterdam 12 februari 2015, NJF 2015, 173 ([eiser]/Google Inc.) (Neth.) (ECLI:NL:RBAMS:2015:716) (one of the first post-*Google Spain* rulings, in which an Amsterdam Court claimed that delisting is more likely when the underlying information is not one of formal reporting, but rather a "ranting").

170. *29WP Guidelines*, *supra* note 53, at 16–17 (criterion 5(b)); *see also* RESEARCH DIVISION, INTERNET: CASE-LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS, EUR. CT. H.R. 17 (2015), http://www.echr.coe.int/Documents/Research_report_internet_ENG.pdf (explaining that freedom of expression does not protect "speech advocating racial discrimination and hatred, regardless of the medium used").

the CJEU.[171] Beyond the types of data narrowly defined to be "sensitive," other categories might also benefit from a more protective regime.[172] This would include, for example, "biometric data, genetic information, communication data, location data"[173] or information that "creates significant risks of identity theft, financial fraud, or other specific harms."[174] Generally speaking, links to these kinds of information should more readily be delisted.

- Does the information relate to a **criminal offense**?[175] Many examples exist of ex-convicts trying to escape the cloak of their past by having (links to) online information removed.[176] Indeed, many laws—on both sides of the Atlantic—specifically target the expunging of criminal records in order to facilitate reintegration.[177] Generally, removal or delisting of this kind of information will be a function of time (see *infra*). But, the severity of the crime, national legislation on the availability of such information,[178] and whether or not the person has been

171. Data Protection Directive 95/46 discusses "data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, trade-union membership, and the processing of data concerning health or sex life." Data Protection Directive, *supra* note 8, at art. 8(1). This is also how the 29WP explained the criterion in its guidelines. *29WP Guidelines*, *supra* note 53, at 17 (criterion 6).

172. The ECtHR also emphasized that the type of content appearing in a photograph, for example, can play an important role as well. *See* Mosley v. United Kingdom, 53 E.H.R.R. 30, para. 115 (2011).

173. Article 29 Data Protection Working Party, *Opinion 03/2013 on Purpose Limitation*, at 25 (April 2, 2013), http://ec.europa.eu/justice/data-protection/article-29/documentation/opinion-recommendation/files/2013/wp203_en.pdf.

174. *Search Help: Removal Policies*, GOOGLE, https://support.google.com/websearch/answer/2744324 (last visited Mar. 21, 2016) (Google's help page on information removal before it implemented its delisting form); *see* Van Alsenoy, Kuczerawy & Ausloos, *supra* note 7, at 68. Google's Advisory Council Report specifically refers to information relating to an individual's intimate or sex life, financial information, private contact or identification, etc. *See* FLORIDI ET AL., *supra* note 116, at 9–10.

175. *29WP Guidelines*, *supra* note 53, at 20 (criterion 13); Toobin, *supra* note 110.

176. For example, the Sedlmayer case in Germany. Aurelia Tamò & Damian George, *Oblivion, Erasure and Forgetting in the Digital Age*, 5 J. INTELL. PROP. INFO. TECH. & E-COM. L. 71, 78 (2014); *See also* Hans Graux, Jef Ausloos & Peggy Valcke, *The Right to Be Forgotten in the Internet Era*, ICRI Research Paper No. 11 3–5 (Nov. 12, 2012), http://papers.ssrn.com/abstract=2174896 (discussing traditional *droit a l'oubli* cases).

177. German courts have recognized that the removal of information might be necessary to ensure the individual's rehabilitation but in one case such removal was denied because the individual was imprisoned for life (and thus had no interest in rehabilitating). *See* Tamò & George, *supra* note 176, at 78.

178. In Belgium, for example, the processing of judicial information is prohibited altogether (even when the data subject consents). *See* Elise Defreyne & Romain Robert, *L'arrêt 'Google Spain': Une Clarification de la Responsabilité des Moteurs de Recherche . . . Aux Conséquences Encore Floues*, 3 REVUE DU DROIT TECHNOLOGIES DE L'INFORMATION 73, 107 (2015). *See also* Letter from Peter Fleischer, Global Privacy Counsel, Google, to Isabelle Falque-Pierrotin, Chair, Article 29 Working Party (July 31, 2014) (Peter Fleischer,

acquitted or released will also be relevant.[179] In a ruling shortly after *Google Spain*, for example, an Amsterdam court explained delisting links to criminal reporting can only be successful when they "reappear for no particular reason other than damaging/hurting the individual."[180]

- Can the information be considered **political speech**?[181] If so, it constitutes an important factor against delisting.[182] An important body of ECtHR case law exists in this regard as well.[183]
- The **type and/or format** of the information (e.g., audiovisual vs. textual material).[184] Pictures, arguably, have a bigger impact than text, especially when containing faces (and hence can be subjected to facial recognition software).[185]

Google's European head of privacy, expressing his concerns about the different approaches across the EU by attaching the *Questionnaire Addressed to Search Engines by the Article 29 Working Party Regarding the Implementation of the CJEU Ruling on the "Right to Be Forgotten"* to the letter.). In the allegedly first national delisting case after the CJEU's decision, a Paris Court ruled in favor of the requestor on the basis that the criminal facts did not appear in a particular section of that person's criminal record. Tribunal de grande Instance, *supra* note 62. A Dutch court, on the other hand, ruled against delisting because the underlying criminal facts had given rise to a lot of media attention (TV, newspapers, and even the inspiration for a book). The Court explained that when a person commits a crime, he/she simply needs to accept that this leaves nasty traces, accessible online, maybe even for a very long time. Rb. Amsterdam 18 september 2014, NJF 2014, 433 ([eiser]/Google Netherlands B.V.) (Neth.) (ECLI:NL:RBAMS:2014:6118).

179. In Spain, delisting has proven to be more likely when the person was eventually acquitted. *See* Peguera, *supra* note 59, at 335–37.

180. *See id.*

181. "Political speech" should be interpreted broadly: does the information "come within the scope of any public or political debate on a matter of general importance"? INTERNET: CASE-LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS, *supra* note 170, at 31. The (political) context in which the information is published also plays an important role. MONICA MACOVEI, A GUIDE TO THE IMPLEMENTATION OF ARTICLE 10 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 46–48 (2004) (citing Lingens v. Austria, 8 Eur. Ct. H.R. 407 (1986)). Conversely, publications merely "concentrating on sensational and, at times, lurid news, intended to titillate and entertain, which are aimed at satisfying the curiosity of a particular readership regarding aspects of a person's strictly private life" do not benefit from the same level of protection. *See* Mosley v. United Kingdom, 53 E.H.R.R. 30, para. 114 (2011); *see also* FLORIDI ET AL., *supra* note 116, at 10–11.

182. Toobin, *supra* note 110.

183. *See* INTERNET: CASE-LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS, *supra* note 170 (providing a comprehensive overview on balancing the rights to freedom of expression with the right to privacy online); *see also* Smet, *supra* note 162, at 223 (explaining that the ECtHR statements in the context of the public debate benefit from more protection).

184. Pictures are said to have a potentially bigger impact than text, especially when containing faces (which can be subjected to facial recognition algorithms). Difference in text-formats might also be relevant (e.g., protected by digital rights management or not). "For a private individual, unknown to the public, the publication of a photo may amount to a more substantial interference than a written article." Von Hannover v. Germany (No. 2), 55 E.H.R.R. 15, para. 113 (2012).

185. *See also* FLORIDI ET AL., *supra* note 116, at 10.

- The **manner in which information was collected.**[186] Was the referenced content collected with or without the data subject's consent and/or knowledge?

2. Identity of the Publisher

Apart from the nature of the information itself, the (original) publisher's identity will often constitute an important factor as well.

- Is the information **self-published**?[187] If so, this is generally an argument *against* delisting.[188] However, one might also argue the exact opposite. After all, if information is published at the initiative of the data subject, he/she might also have a claim on having it withdrawn or made less accessible.[189]
- What is the **reputability** of the publisher? If anything, the *Google Spain* Case made clear that even links to reputable news websites might be delisted.[190] Hence, this criterion seems to be primarily relevant when the source page is *not* reputable (e.g., revenge porn websites).[191] Still, it is safe to say that links referring to information published '"in the context of **journalistic purposes**,'" are less likely to be delisted.[192]
- Is the "source page" a **social networking site**? Many requests, it turns out, relate to third-party websites such as social networks or people search engines.[193] When the request relates to the data subject's own social network profile, Google

186. *See Von Hannover*, 55 E.H.R.R. at para. 113, and the case law cited there.

187. For example, when the data subject publishes a "selfie," blog post, or comment.

188. Google reportedly refused over one-fifth of requests (handled through the website Reputation VIP) exactly because the requestor is the author of the content. *See Infographic: How Google Treats "Right To Be Forgotten" Requests?*, REPUTATION VIP (September 23, 2014), http://www.reputationvip.com/blog/infographic-how-google-treat-right-to-be-forgotten-requests; *see also* Letter from Peter Fleischer, *supra* note 178; Toobin, *supra* note 110; FLORIDI ET AL., *supra* note 116, at 13. There is also German and French case law in which a person's right to have information removed was denied precisely because he/she made the disputed information public before. Tamò & George, *supra* note 176, at 78.

189. This seems to be the position of the Article 29 Working Party. *29WP Guidelines*, *supra* note 53, at 19. *See also* Defreyne & Robert, *supra* note 178, at 105–106.

190. Nonetheless, Google is said to more readily reject delisting requests when the link refers to a government website or renowned news organization. REPUTATION VIP, s*upra* note 188. Google's head privacy council did state that low barriers for online journalism make it increasingly hard to precisely define the latter. *See* Letter from Peter Fleischer, *supra* note 178; *see also* Toobin, *supra* note 110.

191. Related to this, the ECtHR "has also evaluated the *good faith* of applicants who made allegedly defamatory *remarks elsewhere*." Smet, *supra* note 162, at 228 (emphasis added).

192. *29WP Guidelines*, *supra* note 53, at 19 (criterion 11); *see also* FLORIDI ET AL., *supra* note 116, at 13.

193. Not 'traditional media or journalistic news outlets.' *See Google Transparency Report*, *supra* note 148.

reportedly tends to deny the request.[194] When the information is posted by third parties—and/or outside the individual's control—other criteria must be examined more closely.

- Does the publisher have a **legal obligation** to make the information public? Though clearly not a determinative factor, the 29WP emphasized it still plays an important role in evaluating a delisting request.[195] Reportedly, Google also looks at whether or not the underlying information constitutes government data.[196]

B. Status of the individual concerned

Besides the nature of the source, the characteristics of the individual also constitute an important element in the required balancing exercise. To start with, this individual must be a natural person.[197]

- Does the individual play a **role in public life**? This criterion was explicitly mentioned by the CJEU as a factor against delisting.[198] Though this concept is broader than the notion of public figures,[199] much can be learned from existing doctrine and case law on the latter.[200] From ECtHR case law on balancing privacy versus freedom of expression interests, we can deduct a hierarchical list of four categories of public figures: (a) democratically elected public officials/candidates;[201]

194. After all, the data subject will have the ability to control the level of publicity of his/her profile on the social networking site itself. *See* REPUTATION VIP, *supra* note 188.

195. "However, this will have to be assessed on a case-by-case basis, together with the criteria of 'outdatedness' and irrelevance." *29WP Guidelines*, *supra* note 53, at 19 (criterion 12).

196. REPUTATION VIP, *supra* note 188. In Spain, whether or not reference relates to information published in an official gazette does not seem to be a determinative factor. Peguera, *supra* note 59, at 333–35.

197. Data protection rights (*i.e.*, the right to delist) can only be exercised by natural persons. Data Protection Directive, *supra* note 8, at art. 1–2; *29WP Guidelines*, *supra* note 53, at 13 (criterion 1).

198. Case C-131/12 Judgment of the Court (Grand Chamber), Google Spain SL v. Agencia Española de Protección de Datos, CURIA para. 81 (May 13, 2014) (ECLI:EU:C:2014:317), http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62012CJ0131.

199. The 29WP also refers to The Resolution 1165 (1998) of the Parliamentary Assembly of the Council of Europe on the right to privacy. *29WP Guidelines*, *supra* note 53, at 14–15.

200. The notion of "public figure" is dynamic and depends on the context, circumstances and jurisdiction in which it is being evaluated. The prior conduct of individuals might play a role in this regard. *See* JOINT COMMITTEE ON PRIVACY AND INJUNCTIONS, *supra* note 163, at 25 (claiming that individuals who actively seek publicity, should also accept a higher threshold for delisting). The ECtHR, however, stated that prior cooperation with a publisher or the press does not mean an individual cannot be opposed to further publishing of that information. Von Hannover v. Germany (No. 2), 55 E.H.R.R. 15, para. 111 (2012).

201. MACOVEI, *supra* note 181, at 45 (discussing the particularly high threshold with

(b) other people in public positions; (c) people playing an important role in different aspects of public life; (d) people whose conduct attracts legitimate attention of public opinion.[202] Privacy expectations (and by extension the likelihood of delisting) gradually decline from (d) to (a). But even when the requestor qualifies as a public figure, this does not entail a *carte blanche* to refer to any kind of information (see *infra*).[203] Basically, persons who "willingly and knowingly lay themselves open to public scrutiny" have slimmer chances of seeing information delisted.[204] In its guidelines, the 29WP emphasized that 'public figures,' "due to their functions/commitments, have a degree of media exposure."[205] Hence, the 29WP continues, a good rule of thumb is to evaluate whether denying a delisting request would protect "against improper public or professional conduct." [206]

- Is the data subject a **minor**?[207] This factor is mentioned by the 29WP and is also explicitly mentioned in Google's Advisory Council Report as a factor in favor of delisting.[208]

regard to this category of public figures).

202. Categories (a)–(c) relate to the person's professional or social role, whereas (d) relates to the person's behavior or activities. Smet, *supra* note 162, at 226 (listing (a) politicians; (b) public servants (except those mentioned under (c)); (c) public servants engaged in law enforcement (e.g., prosecutors and judges); (d) other public figures; (e) private individuals).

203. ECtHR case law clarifies that "even where a person is known to the general public, he or she may rely on a 'legitimate expectation' of protection of and respect for his or her private life." *Von Hannover*, 55 E.H.R.R. at para. 111.

204. Smet, *supra* note 162, at 206.

205. *29WP Guidelines*, *supra* note 53, at 14–15 (referring to "The Resolution 1165 (1998) of the Parliamentary Assembly of the Council of Europe on the right to privacy"). *See also Search Result Delisting Criteria*, INFO. COMM'RS OFFICE, https://ico.org.uk/for-organisations/search-result-delisting-criteria (last visited Jan 22, 2016) (providing the list of criteria issued by the UK DPA).

206. *29WP Guidelines*, *supra* note 53, at 13.

207. "In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration." Charter of Fundamental Rights of the European Union, *supra* note 10, at art. 24; G.A. Res. 44/25, Convention on the Rights of the Child, art. 16 (Sept. 2, 1990); *29WP Guidelines*, *supra* note 53, at 3 (providing more references and a thorough explanation of the protection of personal data of children in the EU); JOINT COMMITTEE ON PRIVACY AND INJUNCTIONS, *supra* note 163, at 25 (addressing the issue of parents exposing information about their children).

208. *Google Transparency Report*, *supra* note 148 (specifying at least one request has been complied with in which the information related to a minor).

C. *Linking name to information*

After assessing the nature of both the search term and search result, we get to the heart of the required balancing exercise (as alluded to by the CJEU): evaluating the public interest in linking one to the other.[209] The CJEU refers to several data protection principles that are useful in this regard. Put briefly, the link between a name search and webpage needs to be fair and lawful, adequate, relevant and not excessive in relation to achieving the public interest.[210] Finally, the individual's legitimate expectations (on what information will be visible through search engines) should also be taken into account.[211]

- Does the search result **relate to the data subject**?[212] Though this criterion might seem self-evident, it is important to reiterate. Clearly, referencing information that has no—or only a slim—connection to the data subject, is not relevant within the meaning of article 6 of the Data Protection Directive. Additionally, search engines themselves have a clear incentive to only provide links that are relevant. More complex situations arise when, for example, the referenced information relates to family members of the respective data subject.[213]
- Does the information **relate to the reason that the individual** "**plays a role in public life**"?[214] That is, is there an overlap between the reason for the individual's notoriety (e.g., their professional life as a doctor, politician, etc.), and the information?[215] If so, the availability of the information in search results becomes more acceptable according to the

209. Case C-131/12 Judgment of the Court (Grand Chamber), Google Spain SL v. Agencia Española de Protección de Datos, CURIA para. 97 (May 13, 2014) (ECLI:EU:C:2014:317), http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62011CJ0184. As mentioned before, public interest in either one does not guarantee there being a public interest in linking the two, e.g., sensitive family pictures appearing when entering the name of a famous person; a newspaper article on tax evasion appearing when entering your grandmother's name when she merely wrote a trivial comment on that webpage.

210. *Id.* at paras. 70–72, 94.

211. *29WP Guidelines*, *supra* note 53, at 19 (criterion 10(b), tbl.1); RESEARCH DIVISION, *supra* note 170 at 14.

212. *29WP Guidelines*, *supra* note 53, at 13 (criterion 1, tbl.1).

213. According to ECtHR case law, a "public figure must not be exposed to public censure on account of cases concerning a member of his family, even if personal data is accessible on the Internet." INTERNET: CASE-LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS, *supra* note 170, at 16.

214. This criterion can be deducted from ECtHR case law. Von Hannover v. Germany (No. 2), 55 E.E.H.R. 15, para. 110 (2012); *see also 29WP Guidelines*, *supra* note 53, at 14 (criterion 2, tbl.1) (explicitly stated).

215. For example, crimes committed within one's professional capacity (*e.g.*, financial fraud, a botched medical procedure, sexual harassment). *Google Transparency Report*, *supra* note 148.

29WP.[216] The ECtHR does recognize, however, that in a limited number of situations, professional or business activities can fall within the scope of private life (and thus enjoy stronger protection).[217]

- Does the information relate to an incident in which the **data subject was a victim**? Delisting requests will generally be successful when the data subject is a victim of a crime that features in search results.[218]
- What is the **impact** of referencing on the data subject? Demonstrating a potential and/or disproportionately negative impact will generally be an argument in favor of delisting,[219] though certainly not a requirement.[220] The individual's legitimate expectations (of what information will be visible through search engines) are also important in this regard as well.[221] Indeed, the publication of information in a medium with an *a priori* limited audience will generate different expectations as to the (potential) impact on one's privacy.[222] A useful illustration can be found in the *Österreicher Rundfunk* case, where the ECtHR specifically referred to the impact on the individual's ability to reintegrate in society.[223]

D. Time and Context

The final category of criteria relevant for the balancing exercise following a delisting request could be dubbed "meta-factors." Meta-factors do not necessarily relate to the information or individuals directly. Instead, they constitute the circumstances in which the other

216. *29WP Guidelines*, *supra* note 53, at 15–16 (criterion 1, tbl.1). The 29WP does specify in criterion 5(a) that one should also check whether the data subject is "still engaged in the same professional activity." *Id.*

217. INTERNET: CASE-LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS, *supra* note 170, at 8 (citing Niemietz v. Germany, 16 E.H.R.R. 97, para. 29 (1992); Halford v. U.K., 24 E.H.R.R. 523, para. 42 (1997)). *See also* Defreyne & Robert, *supra* note 178, at 105.

218. *See also Google Transparency Report*, *supra* note 148.

219. *29WP Guidelines*, *supra* note 53, at 18 (criterion 8–9, tbl.1). This might also be the case, for example, when search results put the data subject at risk, (e.g., for identity theft or stalking).

220. Case C-131/12 Judgment of the Court (Grand Chamber), Google Spain SL v. Agencia Española de Protección de Datos, CURIA para. 96 (May 13, 2014) (ECLI:EU:C:2014:317), http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62011CJ0184.

221. *29WP Guidelines*, *supra* note 53, at 19 (criterion 10(b), tbl.1); *see also* INTERNET: CASE-LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS, *supra* note 170, at 14; Case C-101/01, Bodil Lindqvist, 2003 E.C.R. I-13025. Delisting evaluations might also depend on the level of (perceived) "intrusiveness" of search results. Put differently, how "private" is the matter by common standards?

222. Smet, *supra* note 162, at 200.

223. Defreyne & Robert, *supra* note 178, at 106.

criteria manifest themselves. The meta-factor of *time*, in particular, can be understood as a scale on which the above-mentioned criteria can be projected.

- The role of **time**.[224] The importance of virtually all criteria mentioned before will evolve over time.[225] Though interesting as thought-experiments, attempts at creating a methodology for applying time as a factor largely remain unsuccessful.[226] What can be said, however, is that the balancing exercise will have to be made at the time of the request.[227] This might weigh either in favor or against a delisting request.[228] In its guiding criteria for assessing delisting requests, the 29WP explicitly refers to time on several occasions. Most importantly, it does so when the underlying data is not up-to-date anymore[229] or relates to criminal facts. In the latter case, a lot will depend on the timing prescribed in local regulations on rehabilitation and/or prescription.[230]

224. S*ee* Paulan Korenhof et al., *Timing the Right to Be Forgotten: A Study into "Time" as a Factor in Deciding About Retention or Erasure of Data*, *in* 20 LAW, GOVERNANCE AND TECHNOLOGY SERIES: REFORMING EUROPEAN DATA PROTECTION LAW 171 (Serge Gutwirth, Ronald Leenes & Paul De Hert eds., 2015) (including a more elaborate study of the role of time with regard to the right to be forgotten debate more broadly).

225. Case C-131/12 Judgment of the Court (Grand Chamber), at para. 93. *See* Jef Ausloos, *The Right to Be Forgotten - It's about Time, or Is It?*, TECH, POL'Y & SOC'Y (Jan. 24, 2014), https://jefausloos.wordpress.com/2014/01/24/the-right-to-be-forgotten-its-about-time-or-is-it/. This article includes a concise overview of how time impacts data protection principles.

226. *See* Korenhof et al., *supra* note 224; FLORIDI ET AL., *supra* note 116, at 14.

227. Case C-131/12 Judgment of the Court (Grand Chamber), at paras. 94, 96, 99.

228. One ECtHR case, for example, concerned the publication of a book containing confidential information by the doctor of former French president Mitterand, just after the Mitterand died. Here the court ruled "the more time that elapsed, the more the public interest in discussion of the history of President Mitterrand's two terms of office prevailed over the requirements of protecting the President's rights with regard to medical confidentiality." Editions Plon v. France, 42 E.H.R.R. 36, para. 53 (2004). *See also* Flux v. Moldova, 50 E.H.R.R. 34, para. 35 (2007) (explaining that any damage done to the plaintiff's reputation had "substantially diminished with the passage of time"); Smet, *supra* note 162, at 217; Österreichischer Rundfunk v. Austria*,* 2006-I Eur. Ct. H.R. 13 (emphasizing that the lapse of time since a conviction and release constitutes an important element in favor of an individual's privacy interests when weighing it against the public's interest in publication). One of the first post-*Google Spain* rulings by a Dutch Court denied a right to be delisted, *inter alia* on the basis that the events referred to when searching for the individual's name only occurred less than three years before. *See* Youssef Fouad, *Netherlands: Court Rules on Right to Be Delisted from Search Engines,* 4 IRIS 19 (2015).

229. *29WP Guidelines*, *supra* note 53, at 18 (criterion 7, tbl.1). In many cases this criterion will cover an issue of "decontextualisation," as certain information might not be presented in its "original" context at the time of original publication. *See* C. de Terwagne, *'Droit à l'oubli ou droit à l'autodétermination informationnelle?'*, *in* D. Dechenaud, Le droit à l'oubli, Recherche effectuée pour la Mission de recherche Droit et Justice 19 (2014). *See also* Defreyne & Robert, *supra* note 178, at 106–7.

230. *29WP Guidelines*, *supra* note 53, at 20 (criterion 13, tbl.1). *See also Google*

- **Design** and contextual elements. This rather hard-to-define criterion can be drawn from existing case law in related areas. In two Australian cases, a court ruled that search engines caused reputational harm, independently from the original source.[231] The court came to this conclusion because of the way the search engines organized and displayed snippets and pictures of the individual concerned (creating the impression he was a criminal). Conversely, in a German case, the design and infrastructure of a teacher-rating website was actively taken into account to dismiss a duty to remove certain information.[232]

Transparency Report, *supra* note 148. ("A man asked that we remove a link to a news summary of a local magistrate's decisions that included the man's guilty verdict. Under the UK Rehabilitation of Offenders Act, this conviction has been spent. We have removed the page from search results for his name.").

231. *Trkulja v Google, Inc* [No 5] [2012] VSC 533 (Austl.); *Trkulja v Yahoo! Inc* [2012] VSC 88 (Austl.). *See* Van Alsenoy, Kuczerawy & Ausloos, *supra* note 7, at 39–40.

232. Tamò & George, *supra* note 176, at 79. The court ruled that the website was designed in a manner that prevented libelous statements.