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From Principle to Practice: The EU-Wide Implementation Challenges of the "Right to Be Forgotten" Following *Google v CNIL*

Od zasady do praktyki. Wyzwania dotyczące ogólnounijnej realizacji „prawa do bycia zapomnianym" po sprawie Google przeciwko CNIL

ABSTRACT

While scholarly attention largely gravitates towards the debate on regional versus global delisting under EU law, this paper scrutinizes the *Google v CNIL* ruling concerning the conditions and methods of EU-wide delisting in light of the preliminary reference questions posed. The focus lies in the intricate analysis absent from the dispositif, which leaves many complexities to the evaluation of the national data protection authorities and the courts, and, concerningly, to the solely discretion of the search engine operators. Nuanced analyses absent from the dispositif address the crucial aspects in defining the territorial scope such as the role of geo-blocking, the possible public interest variations within the EU and the regulatory cooperation frameworks, particularly in light of Google's standard delisting procedure. Furthermore, the research highlights the concerns about the varying levels of protection for EU citizens, contrasting the delisting procedure before the search engine operator and the formal proceedings involving the data protection authorities and the courts. By exploring a significant decision by the Belgian data protection authority, the author illustrates the possibilities for regulatory cooperation to achieve a cohesive and comprehensive approach to EU-wide delisting. The author advocates for regulatory transparency in this legal area and explicit guidance from the European Data Protection Board toward ensuring that the "right to be forgotten" is applied consistently and in a manner that genuinely protects individuals' rights across the EU.

Keywords: delisting; de-referencing; RTBF; Google; geo-blocking; cooperation and consistency

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INTRODUCTION

The *Google Spain* judgment of the Court of Justice of the European Union (CJEU) affirmed the individuals' (data subjects') right to request search engine operators to stop displaying search results containing links to their specific personal data if deemed inaccurate, inadequate, irrelevant, or excessive under EU data protection law.[1] Known as the "right to be forgotten", this delisting right[2] targets name-specific queries without affecting results using alternative keywords[3] and does not imply the erasure of data from third-party websites or search engine indexes. Following this ruling, individuals in the EU could directly request delisting from search engine operators, which prompted Google and other large operators to swiftly implement relevant procedures. However, the CJEU did not specify how these operators should remove the links from search results. Google initially implemented delisting across all local versions of the search engine (delisting by reference to country code Top-Level Domains [ccTLDs], i.e., "ccTLD-blocking", representing a "natural geographical delineation of the Internet"[4]) targeting the EU/EFTA Member States. Such a regional approach was implemented to ensure EU-wide consistency in line with *Google Spain*.[5] However, disagreements emerged

[1] Judgment of the CJEU of 13 May 2014 in case C-131/12, *Google Spain SL and Google Inc. v Agencia Española de Protección de Datos (AEPD) and Mario Costeja González*, ECLI:EU:C:2014:317.

[2] The relevant case law of the CJEU mainly uses the term "de-referencing". See judgment of the CJEU of 24 September 2019 in case C-507/17, *Google LLC v Commission nationale de l'informatique et des libertés (CNIL)*, ECLI:EU:C:2019:772; judgment of the CJEU of 24 September 2019 in case C-136/17, *GC and Others v Commission nationale de l'informatique et des libertés (CNIL)*, ECLI:EU:C:2019:773; judgment of the CJEU of 8 December 2022 in case C-460/20, *TU, RE v Google LLC*, ECLI:EU:C:2022:962.

[3] European Data Protection Board, *Guidelines 5/2019 on the Criteria of the Right to be Forgotten in the Search Engines Cases under the GDPR (Part 1)*, version 2.0, 7.7.2020, https://edpb.europa.eu/sites/default/files/files/file1/edpb_guidelines_201905_rtbfsearchengines_afterpublicconsultation_en.pdf (access: 2.2.2024), p. 5, 12 (points 8–9, 49).

[4] D.J.B. Svantesson, *Delineating the Reach of Internet Intermediaries' Content Blocking – "ccTLD Blocking", "Strict Geo-location Blocking" or a "Country Lens Approach"?*, "SCRIPTed – A Journal of Law, Technology & Society" 2014, vol. 11(2), pp. 157, 161–162.

[5] In the paper, written before the *Google v CNIL* case, Y. Padova (*Is the Right to Be Forgotten a Universal, Regional, or 'Glocal' Right?*, "International Data Privacy Law" 2019, vol. 9(1), p. 26) argued that the merit of the regional approach lies in its alignment with the inherently European character of the right to delisting. Firstly, it emphasizes the European origin of the right, highlighting its foundational principles. Secondly, it is consistent with the interpretation by the CJEU that the right to delisting is not absolute. Lastly, the concept of a "digital territory" for the application of the right to delisting matches the physical territory of the EU. This alignment fosters a strong sense of coherence by reconnecting the geographical location of individuals, their rights as inhabitants of this territory, and the operations of search engines within the same space.

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regarding the wider scope of delisting. While the data protection authorities (DPAs) grouped within the earlier Article 29 Data Protection Working Party[6] (now the European Data Protection Board, EDPB[7]) advocated for global delisting, across all domain versions, including "google.com", Google together with its Advisory Council contested this interpretation.

Importantly, an expert consulted by the Advisory Council suggested the use of technology to identify EU search queries and restrict access to disputed links in such cases. While initially the Council dismissed the proposal due to concerns about precedents for repressive regimes and efficacy,[8] Google implemented such enhanced delisting approach in 2016. It voluntarily extended delisting to non-EU domains for searches originating in the same European country where the request was granted, relying on geo-blocking technology to restrict access based on users' IP addresses.[9]

The disagreement over the territorial scope of delisting escalated in the proceedings against Google in France, in which the DPA (Commission nationale de l'informatique et des libertés, CNIL) ordered delisting across all of Google's domain versions. Despite acknowledging the potential of geo-blocking, the CNIL considered it incomplete due to concerns that delisted information could still be accessed by users outside the region affected by geo-blocking or those using methods such as proxy servers or virtual private networks (VPNs) to mask their EU location.[10] For example, under Google's still current policy the links to delisted data of a person residing e.g. in Croatia, such as their outdated news article or online dating profile,[11]

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[6] The Working Party was established as an independent EU advisory entity concerning data protection and privacy matters. For more, see Articles 29–30 of Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ L 281/31, 23.11.1995).

[7] With the entry into application of the General Data Protection Regulation (GDPR), the EDPB replaced the Article 29 Working Party. See Article 94 (2) and Chapter VII section III of the Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (OJ L 119/1, 4.5.2016; Corrigendum, OJ L 127/2, 23.5.2018).

[8] The Advisory Council to Google on the Right to be Forgotten, *Report*, 6.2.2015, https://static.googleusercontent.com/media/archive.google/en//advisorycouncil/advisement/advisory-report.pdf (access: 2.2.2024), p. 20, including note 37 with the expert opinion of H. Hijmans. See also N. Gumzej, *Technical Solutions Supporting the Online RTBF in the CJEU and ECHR Jurisprudence*, "2023 46th MIPRO ICT and Electronics Convention (MIPRO)" 2023, p. 1468.

[9] The policy was applied also retroactively to all previous delistings under *Google Spain*. See P. Fleischer, *Adapting Our Approach to the European Right to be Forgotten*, 4.3.2016, https://blog.google/topics/google-europe/adapting-our-approach-to-european-rig (access: 2.2.2024).

[10] Commission Nationale de l'Informatique et des Libertés, Deliberation 2016-054, 10.3.2016, https://www.legifrance.gouv.fr/cnil/id/CNILTEXT000032291946 (access: 2.2.2024).

[11] See CNIL's infographic at *Scope of M. PLAINTIFF's Right to Be Delisted according to Google*, 24.3.2016, https://www.cnil.fr/en/infographic-scope-m-plaintiffs-right-be-delisted-according-google (access: 2.2.2024).

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would still remain visible to (a) friends and business contacts outside the EU, (b) friends and business contacts in other EU Member States using non-EU domain versions, and (c) friends and business contacts in Croatia using non-EU domain versions and masking their location.

The dispute eventually led to a preliminary reference procedure before the CJEU and the *Google v CNIL* ruling (C-507/17). The CJEU ruled that the EU law does not mandate global delisting, but delisting across versions corresponding to EU Member States. It also pointed to possible measures to prevent the circumventions of delisting, emphasizing their legal compliance and effectiveness in preventing or at minimum discouraging access to delisted content from one of the Member States.

The ruling's ambiguity,[12] addressed as the "judgment of Solomon"[13] or even "Pilate's decision"[14] sparked extensive academic discourse. Commentators expressed concerns over potential fragmentation of EU data protection law and highlighted the legal uncertainty it brings.[15] Scholars such as O.J. Gstrein warned of diverse interpretations by different DPAs and the courts, which challenges the harmonization goals of the GDPR. Questions also arose regarding how the CJEU would convey the varying territorial scope of implementation to EU data subjects, whether it entails global delisting, "glocal"[16] delisting using geo-blocking technology, or exclusively national delisting.[17]

Early commentators such as J. Globocnik expressed optimism and highlighted collaborative efforts, uniformity, and supplementary GDPR mechanisms as potential remedies against arbitrary law application.[18] However, nearly five years post-*Google v CNIL* and almost a decade post-*Google Spain*, the lack of concentrated efforts, particularly by the European DPAs, is troubling. While delisting requests against Google have surged,[19] discussions on specific measures and technologies such as

[12] E. Bougiakiotis, *One Law to Rule Them All? The Reach of EU Data Protection Law after the Google v CNIL Case (August 17, 2020)*, "Computer Law and Security Review" 2021, vol. 42.

[13] M. Bartolomé, *Google v. CNIL and the Right to Be Forgotten: A Judgment of Solomon*, "Global Privacy Law Review" 2020, vol. 1(1), pp. 61–62.

[14] G. Frosio, *Enforcement of European Rights on a Global Scale*, [in:] *Routledge Handbook of European Copyright Law*, ed. E. Rosati, London 2021, p. 428.

[15] For example, see M. Samonte, *Google v. CNIL: A Commentary on the Territorial Scope of the Right to Be Forgotten*, "European Papers" 2019, vol. 4(3), pp. 847–850.

[16] For the expression in the context of delisting, see Y. Padova, *op. cit.*, pp. 18, 26–27.

[17] O.J. Gstrein, *Right to Be Forgotten: European Data Imperialism, National Privilege, or Universal Human Right?*, "Review of European Administrative Law" 2020, vol. 13(1), p. 136. See also idem, *The Judgment That Will Be Forgotten: How the ECJ Missed an Opportunity in Google vs CNIL (C-507/17)*, "Verfassungsblog: On Matters Constitutional" 2019.

[18] J. Globocnik, *The Right to Be Forgotten is Taking Shape: CJEU Judgments in GC and Others (C-136/17) and Google v CNIL (C-507/17)*, "GRUR International" 2020, vol. 69(4).

[19] See Google, *Google Transparency Report – Requests to Delist Content under European Privacy Law*, https://transparencyreport.google.com/eu-privacy (access: 2.2.2024).

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geo-blocking, implementation details and associated circumvention concerns at the EDPB level remain lacking. This deficiency highlights the critical need for consistent and equivalent levels of protection for EU individuals, which this research aims to address.[20]

This paper addresses gaps in existing doctrine by focusing on the nuanced criteria and conditions for comprehensive EU-wide delisting. It compares these to Google's standard delisting practices and discusses their implications for EU citizens. The paper thoroughly analyzes the *Google v CNIL* ruling, which leaves many complexities to the evaluation of national DPAs, courts, and search engine operators. Key aspects include the role of geo-blocking, public interest variations within the EU, and regulatory cooperation frameworks. The research highlights concerns about the varying levels of protection for EU citizens, contrasting delisting procedures before the search engine operators and formal proceedings involving the DPAs and courts. By synthesizing judicial interpretations with practical applications, this study critiques the principles established in *Google v CNIL* and explores options for expansive delisting based on the location of relevant searches within the EU.

This study combines classical legal research methods with comparative analysis to examine the EU-wide territorial scope of the right to delisting under CJEU jurisprudence, selected regulatory case law, and Google's standard practices. It uses the formal dogmatic method and legal linguistic interpretation to dissect the *Google v CNIL* judgment in relation to the relevant preliminary reference questions, including an analysis of Google's practices and the CNIL's decision that led to the reference. The goal is to delineate the legal parameters of the ruling and clarify its implications for consistent EU-wide delisting and protection of EU data subjects. Additionally, the study uses legal doctrinal analysis and comparative legal methods to evaluate different interpretations, incorporating academic commentaries, the Advocate General's opinion, and regulatory approaches. This multidimensional analysis is vital for understanding the operational realities and legal complexities of delisting across the EU, particularly the effectiveness and legal standing of geo-blocking measures and the role of the place of search in implementing EU--wide delisting.

The structure of this paper is as follows. The introduction details the evolution of the right to delisting and the territorial delisting strategy adopted by Google, which sets the context for nuanced examination of subsequent legal interpretations and implementation. The first part, "The nuances of EU delisting according to *Google v CNIL*", which serves as both the results and discussion section, examines the complexities of EU-wide delisting and scrutinizes the CJEU's responses to the challenges of achieving comprehensive and effective EU-wide delisting.

[20] N. Gumzej, *Technical Solutions…*, p. 1469. The only guidelines issued by the EDPB so far, but which do not address these concerns, are its *Guidelines 5/2019*.

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The next section, "EU-wide delisting order: Case example", provides an in-depth analysis of the Belgian DPA's decision, which illustrates the practical application of delisting through informal cooperation among the European DPAs and aims for a comprehensive delisting framework. It shows how theoretical discussions and legal frameworks play out in real-world scenarios, thereby contributing to both the results and the discussion about the effectiveness and enforcement of the EU-wide right to delisting. The final part synthesizes insights from the analysis and offers practical proposals for addressing identified gaps and ensuring better consistency and efficiency in implementing the right to delisting for European individuals.

THE NUANCES OF EU DELISTING ACCORDING TO *GOOGLE V CNIL*

1. The principle of EU-wide domain-based delisting

In addressing the first question regarding the extension of delisting measures across all domain versions of the search engine, the CJEU affirmed the absence of a mandate for global delisting under EU law. This stance stems from the recognition that many third-party states diverge in their approach to such regulations. Moreover, it reflects the nuanced interplay between the right to data protection, which is not universally absolute, and the concurrent imperative to uphold the freedom of information for internet users, which balance may vary on a global scale.[21]

As explained in the introduction, in focus of this paper is the CJEU's analysis concerning EU-wide delisting, addressing the two subsequent preliminary reference questions. The second question pertained to whether the right to delisting, as established in *Google Spain* and interpreted under EU law (currently the GDPR), obliges the operator to implement delisting solely for the searches conducted on the search engine version corresponding to the EU Member State where the delisting request originated, or more broadly across all EU versions of the search engine. For instance, if a Croatian citizen's delisting request is granted, should the links be suppressed only for searches conducted on the "google.hr" domain, or should it extend to searches on all EU search engine versions (e.g. google.pl, google.es, google.at).

In its response, the CJEU initially affirmed that delisting is generally anticipated to apply to all EU Member States, which is a position it also echoed in the dispositif. Although the focus remains on domain-specific delisting, the approach advocating for delisting across the entire EU aligns with the objective of maintaining a consistent and robust level of personal data protection across the EU, as mandated by

[21] *Google v CNIL*, points 53–65.

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the directly applicable GDPR.[22] However, as demonstrated in the following section, the detailed elaborations of the CJEU in the body of the judgment introduce a significant layer of complexity to the matter.

2. Shaking up the EU domain-based delisting principle: geo-blocking, place-of-search-based delisting, and the varying public interest shift

2.1. Using geo-location data to localize EU search versions and implement geo-blocking

In order to fully grasp the importance of the posed third preliminary question for resolving the scope of delisting issue it is first necessary to point to Google's localization practice and approach to delisting, which involves geo-blocking. Both practices address the attempted circumventions to the domain-based delisting and rely on the user's location when carrying out the relevant search.[23]

Firstly, Google automatically redirects the searches originating in the EU to the relevant local domain of its search engine. In other words, the users are redirected to the country version of its search engine on the basis of their location, regardless of the domain they enter (e.g. "google.com").[24] Next, as noted in the introduction, due to possibilities of overriding such redirections and masking or hiding the IP addresses associated with the search origin, in March 2016 Google voluntarily implemented in addition to delisting across all European domains also the practice of blocking access to delisted content on any of its domains used for relevant searches, including the widely popular "google.com" domain.

While the situation makes it clear that the country code domain name is not the sole suitable territorial link to the EU, especially since ".com" domain is utilized by users throughout the EU,[25] such Google's practice only affects the searches originating in the EU State of residence of the successful requesting party. In other words, geo-blocking is not applied in cases of searches by users located in all other EU countries, where they are using any non-EU domain for that search.[26]

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[22] *Google v CNIL*, point 66.

[23] The CJEU was duly aware of both. See *Google v CNIL*, points 32 and 42.

[24] In connection with this, see E. Kao, *Making Search Results More Local and Relevant*, 27.10.2017, https://www.blog.google/products/search/making-search-results-more-local-and-relevant (access: 2.2.2024).

[25] J. Hörnle, *Internet Jurisdiction: Law and Practice*, New York 2021, p. 251.

[26] (1) "For example, in the European Union we delist URLs from versions of Google's search results for countries applying European data protection law. We'll also use geolocation signals (like IP addresses) to restrict access to the delisted URL on all Google Search services for users we think are in the requester's country" (*Legal Help, Right to Be Forgotten Overview*, https://support.google.com/legal/answer/10769224?hl=en, access: 2.2.2024). (2) "We delist URLs from all European Google Search domains (google.fr, google.de, google.es, etc.) and use geolocation signals to restrict

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Compared to solely EU domain-based delisting, the geo-blocking practice introduced by Google increases the protection of the person requesting delisting, and its initiative to do so should be commended. For instance, if a friend, relative, or business contact located in the same EU Member State conducts a search using a non-EU domain like "google.com", bypassing Google's automatic redirection to the local search engine domain, they could easily retrieve the delisted data. Conversely, individuals conducting the same search using the local version of the search engine would not have access to delisted content.

However, Google's approach may still raise concerns of incomplete and ineffective protection from the data protection law perspective. Commentators such as M. Taylor argue that while the current territorial delisting implementation by Google is not unreasonable (since there are connections between Google's activities, EU territory and the EU residents), it is not sufficient since the rights of data subjects according to EU law are not sufficiently protected, taking into account the easy circumvention and especially since the rights of the data subjects are not protected EU-wide.[27]

Both these approaches to delisting, which are based on the users' search location, were presented to the CJEU as additional measures to EU domain-based delisting.

2.2. The convoluted perspective on the place-of-search based delisting

With the noted Google's practices in mind, which acknowledged the fact that domain-specific restrictions can be bypassed, the third preliminary question sought clarity on whether as an adjunct to EU domain-based delisting, delisting should extend to all versions of the search engine based on the location of the search in the EU, through measures such as geo-blocking, either according to the location of the successful delisting applicant (as then and nowadays still implemented by Google through geo-blocking) or even wider, across the entire EU territory.

access to the URL from the country of the person requesting the removal. For example, let's say we delist a URL as a result of a request from John Smith in the United Kingdom. Users in the UK would not see the URL in search results for queries containing [john smith] when searching on any Google Search domain, including google.com. Users outside of the UK could see the URL in search results when they search for [john smith] on any non-European Google Search domain" (Google, *European Privacy Requests Search Removals FAQs*, https://support.google.com/transparencyreport/answer/7347822?hl=en, access: 2.2.2024).

[27] M. Taylor, *Transatlantic Jurisdictional Conflicts in Data Protection Law: Fundamental Rights, Privacy and Extraterritoriality*, Cambridge 2023, pp. 183–185.

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Even though the issue of geo-blocking is essential to the question of territorial limitations and variations in delisting,[28] the CJEU's discussion of the relevant third preliminary question was minimal and without reference to Google's geo-blocking practice.[29] While acknowledging the need for a technologically neutral approach,[30] the Court has not at minimum recognized, in comparison to its previously proclaimed principle of EU domain-based delisting, the impact that any such technologically enabled delisting might have on the goal of the complete and effective protection of data subjects under EU law.[31] In any case, a structured discussion on the third preliminary question would have been beneficial for legal clarity and certainty reasons.[32]

The approach of the Advocate General in his Opinion was easier to follow in terms of structure and focus on the preliminary reference questions posed. That analysis relied significantly on the noted Google's policies of automated redirections and geo-blocking practice. If properly implemented, and in line with the law, the Advocate General considered such practice would render the issue of domain-based delisting obsolete.[33] In other words, the focus is not on the domains on which delisting is implemented, but on the *place from which the search is carried out*. Consequently, along the lines also of the CJEU's justification of the domain-based delisting as a principle under EU law, the Advocate General opined that any user making the relevant search in the EU should not access delisted information regardless of the domain used for the search. In order for that to happen, the operator must be *obliged* to ensure effective and complete delisting for all relevant name-

[28] S. Wrigley, A. Klinefelter, *Google LLC v. CNIL: The Location-Based Limits of the EU Right to Erasure and Lessons for U.S. Privacy Law*, "North Carolina Journal of Law and Technology" 2021, vol. 22(4), p. 717.

[29] For criticisms of the CJEU's lacking regard of technological possibilities of geo-blocking, see, e.g., J. Quinn, *Geo-Location Technology: Restricting Access to Online Content without Illegitimate Extraterritorial Effects*, "International Data Privacy Law" 2021, vol. 11(3), pp. 305–306. Also see analysis by A. Iannotti della Valle (*The (In)Adequacy of the Law to New Technologies: The Example of the Google/CNIL and Facebook Cases before the Court of Justice of the European Union*, "European Journal of Privacy Law & Technologies (EJPLT)" 2020, no. 2, p. 178), who argues that the Court failed to sufficiently consider the technological aspects and inappropriately burdened Google with the sole responsibility of implementing the "sufficiently effective measures", while "being totally disinterested in the technical feasibility of protecting the right to be forgotten thus configured and not taking into consideration the easy circumvention that could derive from it". The Court's lack of engagement with the more technical details is evident primarily through its notable omission in addressing the third question, showing no concern to specify whether the use of geo-blocking technique is necessary or adequate for ensuring the intended protection.

[30] J. Globocnik, *op. cit.*, p. 385.

[31] See *Google v CNIL*, point 39 (questions 2 and 3).

[32] The Court decided to address all questions jointly. See *Google v CNIL*, point 43.

[33] Opinion of Advocate General Szpunar delivered on 10 January 2019 in case C-507/17, ECLI:EU:C:2019:15, point 72.

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based searches originating in the EU. In accordance with the case at hand, and the relevant third preliminary question, such ensuring of effective and complete delisting for all searches made in the EU presupposes the operator's *mandatory* use of geo-blocking measures, in line with the law.[34]

The pathway toward recognizing the place-of-search-based delisting principle was far more convoluted in the CJEU's ruling. Its formation began with the Court's relativization of the previously proclaimed EU-domain-based delisting principle.

The relativization was initiated by a recognized absence of comprehensive harmonization under EU law in reconciling the balance between the data protection and the freedom of information rights.[35] This stems from the potential conflict between divergent public interests in various EU Member States seeking access to pertinent information (via a search engine and a very narrow name-based search query). Though, as J. Hörnle rightfully commented, with this the clarity of the judgment was diminished,[36] the CJEU underscored the imperative for balancing these competing rights and interests even in the context of the otherwise rather limited right to delisting.[37]

In light of this, the CJEU directed attention to the cooperation and consistency instruments and mechanisms provided under the GDPR and emphasized the practical application of these mechanisms in reconciling data protection and freedom of information rights across the EU Member States. According to the CJEU, that procedure could result in a delisting decision of the DPAs, which would cover all relevant name-based searches that are carried out *from the EU territory*.[38]

As observed, despite its previously proclaimed principle of EU domain-based delisting, it is here that the CJEU makes its first reference to the *EU place of search criterion* for delisting that covers all searches from the EU territory. Thereby it indicates, on the one hand, that the geographical location from which the searches

[34] *Ibidem*, points 70–78.

[35] *Google v CNIL*, point 67. See Article 85 GDPR as well as Article 17 (3) (a) GDPR, which both leave it to the Member States to reconcile the right to data protection with the right to freedom of expression and information. See also H. Kranenborg, *Article 17: Right to Erasure ('Right to Be Forgotten')*, [in:] *The EU General Data Protection Regulation: A Commentary*, eds. C. Kuner, L.A. Bygrave, C. Docksey, New York 2020, p. 481.

[36] J. Hörnle, *op. cit.*, p. 252.

[37] The freedom of information for internet users is here exemplified through the ease with which they can obtain pertinent data about the data subject by entering their name in a search engine. This data remains easily accessible to internet users using alternative search terms and is not removed from its original source of publication.

[38] *Google v CNIL*, points 68–69. See also Chapter VII of the GDPR. As T. Streinz (*The Evolution of European Data Law*, [in:] *The Evolution of EU Law*, eds. P. Craig, G. de Búrca, New York 2021, pp. 925–926) notes, similar mechanisms are absent in other areas of EU data law, which opens the door to specific decisions by national courts that impact the accessibility of delisted content also within the EU.

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are conducted within the EU may well play a crucial role in determining the scope of delisting. On the other hand, determination of such a wider scope according to the Court appears possible only following prior coordination of the DPAs, due to possible public interest variations throughout the EU.

Importantly, most of these vital arguments remain absent from the dispositif.

3. A critique of the CJEU's approach to EU-wide delisting

The CJEU's approach to EU-wide delisting should be criticized. Firstly, it is because by logic of its own determination on the possibly diverging public interest throughout the EU to access delisted information, determination of both the EU domain-based and place-of-search-based delisting as supported by geo-blocking, should be preceded by a prior analysis of potential public interest variations in individual Member States. To be precise, there is no difference as regards the scope of intrusion that the delisting might have on the users' freedom of information in the cases of domain-based and place-of-search-based delisting (including geo-blocking). Affected search engine users are in both cases the users who are carrying out relevant searches in the territory of the EU, as identified by Google on the basis of geolocation data.

As a result, the same procedural requirements noted by the CJEU for ordering delisting on the basis of the location data of search users throughout the EU as the EU(-wide) domain-based delisting would then be required, i.e. employment of the cooperation mechanism under the GDPR in cases of doubt on the varying public interest to access delisted information throughout the EU.

Thus a delisting decision based on a harmonized approach of the European DPAs would appear to be a prerequisite for implementing EU-wide delisting even in the cases, as argued previously in the paper, where the more restricted delisting in scope is concerned, such as that limited to European domains.

This also means that where the collaborative regulatory process under the GDPR is not initiated following a delisting request, the level of protection of users' rights throughout the EU as affected by an EU-wide delisting decision may significantly vary. Of course, the DPAs could also decide that the delisting takes place in only one of several Member States (e.g. if there is a substantially higher interest to access relevant information in some Member States).[39]

In light of the preceding analysis, it is difficult to understand why the CJEU left out from the dispositif the vital considerations on the balancing of data protection and privacy rights with the interest of the EU public and the related possibility of DPA decisions. This also takes into account the fact that these concerns directly relate to the posed preliminary reference questions and may affect interpretations of EU domain-based delisting as a principle under EU law.

[39] J. Globocnik, *op. cit.*, p. 386.

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Secondly, though ensuring the easy and quick access of individuals to delisting requests and procedure, which resulted in a streamlined procedure before the search engine operators themselves, the CJEU appears to have disregarded the unintended consequences of the possibly varying level of protection. These variations depend on the choice and ability of such individuals to take action against the operator's decision, thereby involving the DPAs and ultimately the courts in the decision-making process. Specifically, a private company such as Google cannot itself be entrusted with the assessment of the complex public interest considerations and nuances throughout the Member States that the Court highlighted in the body of its judgment. Thus, there is no comparable procedure in the assessment of public interest variations where the search engine operator is the sole venue for the delisting decision without further involvement of the DPAs and the courts (i.e. upon a legal remedy against the operator's delisting decision).

Thirdly, it is the premise of this paper that the proper addressal of circumventions is what ultimately defines the scope of delisting. Thus, a delisting order that covers *all relevant searches from the EU territory* implies the mandatory use of technical measures such as geo-blocking for any IP address used for the search within the EU, regardless of the domain on which the search was conducted. In other words, as J. Globocnik argued already early, effective *EU-wide delisting* may only be ensured by a standard application of geo-blocking measures.[40]

However, while advocating for a technologically neutral approach, the CJEU entrusted the assessment of measures to address circumventions to the DPAs and ultimately the courts, in terms of both the legality and purpose. Critically, where DPAs and the courts are not involved, it left these issues and therefore determination of the scope of implementation to the sole discretion of the search engine operator. Simultaneously, the Court recognized the significance of the aim in determining the scope of delisting based on the users' search location.

EU-WIDE DELISTING ORDER: CASE EXAMPLE

The Belgian DPA's 2020 decision provides a rare and comprehensive publicly available analysis of the conditions for EU-wide delisting. It addresses the important issues of discerning between and combining the domain-based and place-of-search (geo-blocking) delisting approaches.[41] Though the decision was subsequently annulled by the Brussels Court of Appeal for lacking explanation on DPA's jurisdiction over Google Belgium (instead of Google LLC), the DPA's assessment of the

[40] *Ibidem*; S. Wrigley, A. Klinefelter, *op. cit.*, p. 716.

[41] Litigation Chamber (Chambre Contentieuse), Decision on the merits 37/2020 of 14 July 2020 in case no. DOS-2019-03780, https://www.gegevensbeschermingsautoriteit.be/publications/beslissing-ten-gronde-nr.-37-2020-eng.pdf (access: 2.2.2024).

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conditions for the issuing of an EU delisting orders that include the delisting from non-EU domains for data subjects in the EU, was itself not subject to examination by the Court.[42]

According to the Belgian DPA, the purpose of consulting other DPAs is to consider the public interest in other Member States regarding access to delisted content. This is relevant when deciding on delisting across all Google domain names (e.g. "google.be", "google.fr", "google.de") and European residents. In cases of more restricted delisting, such as limiting it to Google's top-level Belgian domain name (".be") and implementing geo-blocking for Belgian users, residents of other Member States would still have access to delisted content. Other situations may arise where collaboration with only two DPAs could be satisfactory. For instance, if a request for delisting pertained to only two Google country extensions (e.g. ".fr" and ".lu"), and included geo-blocking measures for residents of these nations, the consultation process would entail reaching out solely to the DPAs of those particular countries.[43]

In light of the lacking clarity and a more general determination in Google's Privacy Policy on determination of the relevant data controller (generally),[44] the DPA's finding on the inapplicability of the one-stop-shop mechanism in that case is here not discussed in detail.[45] In absence of such mechanisms, the DPA relied on Article 61 GDPR to carry out informal consultations with the other DPAs on the scope of territorial delisting in its intended delisting decision. Thus, it viewed their feedback as the needed procedural requirement toward its ordering of the EU domain-based and EU-wide place-of-search-based (i.e. geo-blocking) delisting measures.[46]

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[42] Cour d'Appel Bruxelles, 2020/AR/1111, 30.6.2021, https://www.gegevensbeschermingsautoriteit.be/publications/arrest-van-30-juni-2021-van-het-marktenhof-ar-1111-beschikbaar-in-het-frans.pdf (access: 2.2.2024).

[43] Litigation Chamber, *op. cit.*, point 87 and footnote 44.

[44] It is only with the amendment of its Privacy Policy on 1 July 2021 that Google transparently declared Google LLC (based in California, USA) as the data controller responsible for processing information indexed and displayed in Google Search services regardless of the data subject's location. See Google, *Google Privacy Policy*, *European Requirements – Data Controller*, https://policies.google.com/privacy (access: 2.2.2024) – compare to earlier versions. See also the adjusted data removal request form: Google, *Personal Data Removal Request Form*, https://reportcontent.google.com/forms/rtbf?visit_id=638253262036290912-1897396507&hl=en&rd=1 (access: 2.2.2024).

[45] A recent digest covering one-stop-shop cases under the GDPR shows that the DPAs have issued relatively few decisions under the cooperation mechanism of Article 60 GDPR, which likely stems from the fact that the majority of such cases are processed as local matters. See A. Mantelero, *One-Stop-Shop Thematic Case Digest: Right to Object and Right to Erasure*, 9.12.2022, https://edpb.europa.eu/system/files/2023-02/one-stop-shop_case_digest_on_the_right_to_object_and_right_to_erasure_en.pdf (access: 2.2.2024), p. 5.

[46] Litigation Chamber, *op. cit.*, point 89.

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Taking into account that the large majority of DPAs responded in agreement to the DPA's intended EU-wide delisting decision, and its view that delisting cannot be effective if it also does not apply to searches performed outside of Belgium,[47] the DPA ordered the search engine operator to "implement any effective technical solutions required to remove search listings (…), for all the search engine's websites in every language, but only for users visiting them from the European Economic Area (…)".[48]

Consequently, the DPA established here that the territorial scope of delisting should extend to all of the EU/EEA member countries. That decision is based on the recognition that searches conducted from locations beyond Belgium, whether physically or via a proxy server accessing alternative search engine versions, could potentially present a substantial risk to the data protection rights of the person seeking delisting. The DPA found it entirely plausible that within the context of that person's professional activities, they might have connections in other European countries, especially those neighboring Belgium. Individuals in these regions may seek information about the data subject using Google versions specific to their countries, rather than the Belgian one (".be"). Given this scenario, restricting the delisting to Belgium alone would lack efficacy.[49]

This case exemplifies the potential for effective regulatory cooperation among the European DPAs, which leads to a genuinely comprehensive EU-wide delisting order. Such cooperation, as demonstrated by the Belgian DPA's initiative, transcends the mere domain-based delisting to include geo-blocking measures based on the searcher's location within the entire EU/EEA territory. Despite the annulment of the DPA's decision by the Brussels Court of Appeal due to jurisdictional issues, the collaborative approach towards considering the varying public interest across Member States highlights a path forward for achieving a balance between the right to data protection and the freedom of information. The positive response from the majority of DPAs to the proposed EU-wide delisting approach reinforces the feasibility of broader geo-blocking measures than those, which are currently standard in Google's practice.

[47] "In a borderless Europe, it would be futile to order that the delisting apply only to searches performed from Belgian IP addresses" (*ibidem*, point 90).

[48] *Ibidem*, operative part of the decision: item 2.

[49] *Ibidem*, point 91.

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CONCLUSIONS

Building on an extensive analysis of *Google v CNIL* and its implications, this paper examines the complexities of implementing the right to delisting across the EU. While much discourse centers on regional versus global delisting, this research highlights the critical and frequently overlooked issues of geo-blocking and the nuanced application of delisting practices within the EU legal framework.

Some authors argue that overriding geo-filtering technologies such as via VPNs makes the right to delisting seem impossible,[50] while others see this as a justification for a global approach to delisting.[51] Whereas discussions exist on possible solutions to localization circumventions,[52] geo-blocking must, according to the CJEU, be sufficiently effective to prevent or at least seriously discourage internet users in the Member States from accessing delisted content. Given these considerations, geo-blocking based on the IP location of users across the EU offers a robust mechanism for addressing accessibility to delisted content. However, challenges remain, including the need for consistent application and adherence to the principles set forth in *Google v CNIL*.

This study shows that the CJEU, in focusing on EU domain-based delisting, may have implicitly relied on automated redirections to local EU versions. While this approach might prevent access to delisted information by EU residents, it does not consider potential circumventions that compromise the effectiveness of delisting. Therefore, the Court's approach can be critiqued for not providing a clear response regarding additional measures to restrict access to delisted data based on the search origin being the data subject's Member State or any EU Member State, regardless of the domain version consulted.

The study also indicates there should be no difference in the required assessment of the balance between public interest in accessing information and data protection, whether delisting is applied across all EU domains or all domains based on searches originating in any EU Member State. Affected search engine users are those carrying out relevant searches within the EU, as identified by Google based on geolocation data. As M. Birnhack noted, "geolocation is an important tool in applying the legal

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[50] J. Friesen, *The Impossible Right to Be Forgotten*, "Rutgers Computer and Technology Law Journal" 2021, vol. 47(1), pp. 192–196.

[51] K. Carrara, *The Right to Be "Almost" Forgotten: What Are the Limits of a Territorial Interpretation of Data Protection*, Tilburg University, LL.M. thesis, 2020/2021, http://arno.uvt.nl/show.cgi?fid=154901 (access: 2.2.2024). See also P.T.J. Wolters, *The Territorial Effect of the Right to Be Forgotten after Google v CNIL*, "International Journal of Law and Information Technology" 2021, vol. 29(1), p. 69.

[52] See D. Erdos, *Search Engines, Global Internet Publication and European Data Protection: A New Via Media?*, "The Cambridge Law Journal" 2020, vol. 79(1), pp. 26–27. Additionally, see P.T.J. Wolters, *op. cit.*, pp. 70–71.

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decision, but it is only a tool at the service of the law".[53] Thus, in both scenarios, the fundamental considerations remain consistent, with the distinction lying in the technical implementation and scope of the delisting and not in the underlying legal and ethical principles. Consequently, the absence in the dispositif of vital concerns regarding the possibly varying public interest and regulatory cooperation under the GDPR might suggest a flawed assumption that EU domain-based delisting could uniformly address objectives of the GDPR without requiring a nuanced analysis of public interest variations. All this suggests gaps in judicial direction, which open the door to different interpretations and consequently varying levels of protection throughout the EU.

In light of this, and considering the ongoing lack of a harmonized approach and guidance at the EDPB level, Google's delisting practice extended by geo-blocking since 2016 remains the standard. This study raises questions about how Google incorporates the nuances of *Google v CNIL* into its delisting decisions, particularly in the absence of explicit guidance or a coordinated mechanism among the European DPAs. Paradoxically, while acknowledging the limitations of domain-based delisting, Google's practice seems to exceed *Google v CNIL*. Nonetheless, its standard approach does not adequately consider that restricting access to delisted data based only on the search origin within the data subject's Member State may be ineffective for most data subjects in today's digital age.[54] This can fall short of providing complete and effective data protection under the GDPR. This observation also acknowledges the significant limitations of the right to delisting, as delisted data can still be accessed through alternative search queries, which suggests that the impact on information access might be relatively minor, especially when compared to broader challenges of information accessibility online.[55] In any event, these findings indicate gaps in achieving consistent levels of protection for EU data subjects, particularly where search engine operators are the primary arbitrators of delisting requests.

While regulatory and judicial practices addressing these nuanced issues are limited, the decision by the Belgian DPA stands out for its thorough consideration of these complexities. Despite procedural limitations, this decision marks a notable example of effective yet informal regulatory cooperation, which resulted in an EU-wide delisting order that extends across all EU search domains and all domains based on the searcher's location within the entire EU. However, even though this

[53] M. Birnhack, *Symposium. The Glocal Net: Standing on Joel Reidenberg's Shoulders*, "Fordham Law Review" 2022, vol. 90(4), pp. 1453–1454.

[54] N. Gumzej, *Google Me and Tell Me Who I Am (Not): The Legal Intricacies of Global Delisting Orders in the "Right to Be Forgotten" Cases*, "SEE Law Journal" 2024, no. 12, p. 151.

[55] For related more extensive analyses by this author, see eadem, *'The Right to Be Forgotten' and the Sui Generis Controller in the Context of CJEU Jurisprudence and the GDPR*, "Croatian Yearbook of European Law and Policy" 2021, vol. 17.

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case serves as a potential model for future delisting efforts, caution should be exercised due to the challenges associated with requiring DPAs to coordinate on each delisting decision, which is likely to overburden their resources.[56]

Consequently, this paper emphasizes the need for focused dialogue among search engine operators, DPAs, policymakers and stakeholders to refine the nuances of *Google v CNIL* and ensure that delisting practices are transparent,[57] consistent and responsive to the potentially varying public interest contexts within the EU. Clear guidelines by the EDPB are essential for navigating these complexities effectively and ensuring a more consistent and legally compliant approach to delisting across the EU. Additionally, enhanced oversight of relevant DPA and court decisions is crucial, particularly since a comparative overview highlights insufficient coverage.[58] Given this context, a lack of transparency undermines the goals of consistent and effective protection of delisting rights across the Member States. The availability of relevant practices, as well as academic research and insights, such as those presented in this paper, is vital for developing effective regulatory practices and judicial interpretations in this area, and driving the creation of more coherent and equitable delisting practices across the EU.

[56] That is a concern possibly reciprocating the reasons behind the delegated decision-making authority under *Google Spain* to the large search engines. See R.A. Hulvey, *Companies as Courts? Google's Role Deciding Digital Human Rights Outcomes in the Right to Be Forgotten*, 2022, https://www.hks.harvard.edu/sites/default/files/2023-11/22_01_hulvey_companies-as-courts.pdf (access: 2.2.2024), p. 10. As A.S. Obendiek (*The Right to Be Forgotten: Moral Hierarchies of Fairness*, [in:] *Data Governance: Value Orders and Jurisdictional Conflicts*, Oxford 2022, p. 191) notes, the disparity in financial resources and administrative limitations perpetuates a situation in which public actors acquiesce to the implementation and regulatory influence exerted by tech companies.

[57] For earlier calls to Google for greater transparency on the substantive criteria used for delisting decisions and developments, see J. Kiss, *Dear Google: Open Letter from 80 Academics on 'Right to Be Forgotten'*, 14.5.2015, https://www.theguardian.com/technology/2015/may/14/dear-google-open-letter-from-80-academics-on-right-to-be-forgotten (access: 2.2.2024); M. Smith, *Updating Our "Right to Be Forgotten": Transparency Report*, 26.2.2018, https://blog.google/around-the-globe/google-europe/updating-our-right-be-forgotten-transparency-report (access: 2.2.2024); T. Bertram [et al.], *Five Years of the Right to be Forgotten*, "Proceedings of the 2019 ACM SIGSAC Conference on Computer and Communications Security", November 2019, pp. 959–972.

[58] This is with certain exceptions. For example, see Agencia Española de Protección de Datos, *Memoria Annual 2022*, https://www.aepd.es/documento/memoria-aepd-2022.pdf (access: 2.2.2024), pp. 42 ff.

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ABSTRAKT

O ile uwaga doktryny w dużej mierze skupia się na debacie na temat regionalnego i globalnego usuwania z listy według prawa unijnego, o tyle w niniejszym artykule analizie poddano sprawę *Google przeciwko CNIL* w odniesieniu do warunków i metod usuwania z listy na obszarze całej Unii Europejskiej w świetle postawionych pytań prejudycjalnych. Nacisk położony został na skomplikowaną analizę, której nie ma w sentencji wyroku, co pozostawia wiele zawiłości do oceny krajowym organom ochrony danych i sądom, a także – co niepokojące – wyłącznej swobodzie operatorów wyszukiwarek internetowych. Szczegółowe analizy, których brak w sentencji wyroku, odnoszą się do kluczowych aspektów definiowania zakresu terytorialnego, takich jak rola geoblokowania, możliwe różnice dotyczące interesu publicznego w Unii Europejskiej i ram współpracy regulacyjnej, szczególnie w świetle standardowej procedury usuwania z listy Google. Ponadto w opracowaniu podkreślono obawy dotyczące różnych poziomów ochrony obywateli Unii Europejskiej, kontrastując procedurę usunięcia z listy prowadzoną przed operatorem wyszukiwarki z formalnym postępowaniem z udziałem organów ochrony danych i sądów. Analizując istotną decyzję belgijskiego organu ochrony danych, autorka ilustruje możliwości współpracy regulacyjnej między organami ochrony danych w celu osiągnięcia spójnego i kompleksowego podejścia do usuwania z listy na obszarze całej Unii Europejskiej. Autorka opowiada się za przejrzystością regulacyjną w tym obszarze prawa i za wyraźnymi wytycznymi Europejskiej Rady Ochrony Danych w celu zapewnienia, by „prawo do bycia zapomnianym" było stosowane spójnie i faktycznie chroniło prawa osób fizycznych w całej Unii Europejskiej.

Słowa kluczowe: usunięcie z listy; usuwanie odnośników; RTBF; Google; blokowanie geograficzne; współpraca i konsekwencja