To the President, Vice-President and Members of the Court of Justice of the European Union

STATEMENT
according to Art. 23 of the Statute of the Court of Justice and Art. 96 of the Rules of

Procedure of the Court of Justice

of **The Reporters Committee for Freedom of the Press**, 1156 15th St. NW, Suite 1250, Washington, D.C. 20005, USA, also acting on behalf of American Society of News Editors, The Associated Press, Association of Alternative Newsmedia, Chicago Tribune Company LLC, Dow Jones & Company, Inc., The E.W. Scripps Company, First Look Media Works, Inc., Floyd Abrams Institute for Freedom of Expression, Gannett Co., Inc., Hearst Corporation, International Documentary Assn., Los Angeles Times Communications LLC, Media Law Resource Center, Media Legal Defence Initiative, MPA – The Association of Magazine Media, National Press Photographers Association, National Public Radio, Inc., The New York Times Company, News Media Alliance, Online News Association, Thomson Reuters Markets LLC, The Seattle Times Company, Tully Center for Free Speech, and The Washington Post.

Represented by Frédéric Louis, Prof. Dr. Hans-Georg Kamann, Dr. Martin Braun and Christian Schwedler, lawyers, of Wilmer, Cutler Pickering Hale and Dorr LLP, Bastion Tower, Place du Champ de Mars 5, BE 1050 Brussels, Belgium, supported by Patrick Carome, David Bowker, and Ari Holtzblatt, lawyers, of Wilmer Cutler Pickering Hale and Dorr LLP, 1875 Pennsylvania Avenue, NW, Washington, DC 20006, United States.

in **Case C-507/17**

Parties to the dispute in the main proceedings

Applicant: Google Inc.

(„**Google**“)

Defendant: Commission nationale de l’informatique et des libertés

(„**CNIL**“)

Other Parties: Wikimedia Foundation Inc., Fondation pour la liberté de la presse, Microsoft Corp., Article 19 and Others, Internet Freedom Foundation and Others

(“**Other Parties**”)

Table of content

A. Introduction

1. The Reporters Committee for Freedom of the Press ("**Reporters Committee**"), also acting for a coalition of 24 news organizations and nongovernmental organizations specializing in the protection of freedom of expression and access to information ("**Coalition**"), is honoured to submit its written statement regarding the request for a preliminary ruling lodged by the French Conseil d'État ("**Council of State**") on 21 August 2017 ("**reference order**") to the Court of Justice of the European Union ("**Court of Justice**") in case C-507/17 concerning the scope of application of Articles 12(b) and 14(a) of Directive 95/46/EC[1] (the "**Directive**").

2. The request has been made in court proceedings brought by Google Inc. ("**Google**") against an order issued by the French data protection authority, the Commission nationale de l'informatique et des libertés ("**CNIL**") on 10 March 2016 ("**Order**"). The Order imposed a penalty of 100,000 Euros upon Google, on the basis that the latter allegedly had applied an insufficient procedure to implement an individual's right of delisting under Articles 12(b) and 14(a) of the Directive ("**right of delisting**"). Such right was recognized and shaped by the Court of Justice in its judgment in case C-131/12 *Google Spain and Google v. AEPD and Costeja*[2] ("***Google Spain***") and implemented by French law in Articles 38 and 40 of the French Data Protection Act. It enables an individual to request that internet search engines delist certain search results from the list of results displayed following a search made on the basis of this individual's full name. When a delisting request was granted, Google had routinely removed the links at stake from the search results displayed on all the search engine's sub-pages with domain extensions within the European Union ("**EU**") and the European Free Trade Association ("**EFTA**").[3] In addition, since March 2016, Google had been implementing a geo-blocking approach enabling the delisting to be effective on all the domain names of the google search engine when the search is made from the French territory.[4] The CNIL deemed both, a delisting from all EU and EFTA extensions and a delisting from all search results for searches made from the French territory, to be insufficient. Instead, it insisted that Google delist links globally, regardless of the Google extension used and the location of the individual running a search. According to the CNIL, Google must delist links not only for a person

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1 Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data, OJ 1995 L 281, p. 31.

2 Judgement in *Google Spain and Google v. AEPD and Costeja* C-131/12, EU:C:2014:317.

3 The search engine operated by Google is available under different domain names with different geographical extensions (.fr, .de, .jp, .com, .mx etc.). Google uses a variety of factors, including IP address, to determine the location of a user making a search request on Google. The Google search engine will yield different results depending on the domain extension and the location of the users. Search results will be adapted to the linguistic specificities of the various countries, but also prefer results that are of higher regional, or even local relevance. Most users routinely use their local geographical extension, e.g. more than 97% of users from France use the google.fr version of the search engine. In addition, Google redirects users in various ways to their respective local extension. E.g., if a user located in France types www.google.com into their browser, he/she will be ordinarily redirected to www.google.fr. Also, if a user located in France is using Google's Chrome browser, and that user types a search term (rather than a webpage address) into his/her browser's address field, that user will ordinarily be presented with results from www.google.fr.

4 Order of 10 March 2016, para. 12.

using Google in France or another Member State of the EU, but also for an individual using Google in any other country, even with respect to research concerning people and events outside of France and the EU, as in the cases of an Angolan reporter using google.com in Angola to research background on the "Angolagate" scandal[5], or a U.S. reporter researching whether a local police chief had committed a crime.[6] The CNIL further forbids Google to mention to users that certain links have been delisted from their search results and to alert publishers of the websites from which a link has been delisted that a delisting has been implemented.

3. The members of the Coalition are dedicated to the protection of free speech, freedom of expression and opinion, unencumbered access to information, and all rights and freedoms necessary to research, locate, gather, analyze, disseminate, and receive news and information. That information is sometimes unpopular or controversial, and frequently there are those who want the information suppressed. Journalists and news organizations are often targeted by foreign governments, corporations, or powerful individuals, and there are many places and instances where governments or other powerful interests seek to censor, distort, suppress, restrict, prevent, or otherwise control the flow of information made available to the public. Yet, throughout history, journalists and the news media—and, in turn, the public—have found protection and thrived in those parts of the world, including the EU, where access to information, freedom of expression and opinion, and related press freedoms are protected by law.

4. The Coalition intervened in the French proceedings because the case raises serious matters of principle concerning the ability of individual states to balance competing values of access to information, free expression and opinion, and press freedoms with privacy and data protection. While every state, and the EU, has an equal prerogative to make public policy and to attempt to strike what it considers a fair and proper balance between and among these values, the decision in *Google Spain* has had serious and negative impacts on access to information, freedom of expression, and freedom of the press that the Court of Justice should consider in determining the proper territorial scope of the right of delisting. These adverse impacts are exacerbated by the prohibition on search engines to warn website publishers in case of delisting. When reviewing the CNIL's global delisting demand, the Court must take into account the essential principle of international law that one state's regulation of these rights and freedoms cannot reach beyond its own borders and the traditional limits of its jurisdiction, thereby interfering with the sovereignty of other states to strike a different balance. Indeed, any single state's attempt to limit worldwide access to public information represents an existential threat to journalistic freedom and the fundamental rights of the people to receive information through any media, in

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5 Among the delisting requests Google mentioned before the CNIL's Restricted Committee was the request of a French person – Mr. Jean-Didier Maille – to delist a Wikipedia article describing his involvement in the illegal sale of arms to Angola in the so-called "Angolagate" scandal.

6 See below, para. 13. CNIL required Google to delete a link to an article about a police chief accused of theft, disregarding the fact that the complainant is still a public official in the U.S. and that his punishment remains pertinent to his profession and role in the community; Exhibit to letter from the CNIL to Google, dated 9 April 2015.

part because it would effectively empower the most restrictive and oppressive countries in the world to effectively control access to information—and impose their policies and will—anywhere in the world, even outside their borders. By endorsing such an approach beyond French borders, the CNIL's Order poses a grave threat to fundamental rights and freedoms everywhere.

5. The Coalition is confident that the Court of Justice, in answering the questions posed by the Council of State, will decide that a worldwide delisting of public information ordered by EU Member States' authorities would violate the fundamental freedoms of speech and opinion, information, communication and receipt of information enshrined in Article 11 of the Charter of Fundamental Rights of the European Union ("**Charter**"), Article 10 of the European Convention of Human Rights ("**Convention**") and similar laws of third states guaranteeing those fundamental rights as well as the public international law principles of territorial sovereignty, comity, non-interference and proportionality. A more balanced approach, limiting the right of delisting to the confines of the territorial scope of the EU's constitutional order from which it emanates, will not only prevent unacceptable restrictions to all these different fundamental rights and principles and a disastrous precedent for other third states inclined to repress information globally also for other, less justified reasons. It would also be fully in line with the protection of the right to protection of personal data as afforded by Article 8 of the Charter and implemented by the Directive.

B. Factual background

6. Before discussing the legal questions posed by the Council of State, the Reporters Committee notes the following facts, which are essential to the Court's consideration of these questions:

I. Delisting on a search engine limits journalists' and the media's ability to reach their audience and restricts most users' access to information

7. Despite not involving the deletion of the source referenced by delisted links, which therefore might still be accessed, delisting has the effect of limiting most users' ability to find a particular source via search engines. In the modern internet age, such limitations on users' ability to find sources amounts to a severe restriction on the dissemination of, and access to, the information included in the linked source.

8. Today, one of the most important channels for journalists to disseminate information, and *vice versa* for individuals to receive information, is via websites on the internet. The European Court of Human Rights ("**ECHR**") therefore recognized that "*in the light of its accessibility and its capacity to store and communicate vast amounts of information, the Internet plays an important role in enhancing the public's access to news and facilitating*

the dissemination of information in general."[7] This is increasingly true each day, as more and more people and entities rely upon the internet as an important source of information and critical tool for the dissemination of information.

9. Internet search engines are among the primary means through which the public seeks out and accesses news, news organizations, and other sources of journalism and reporting. Recent polls in Europe and the United States show that approximately one in five respondents use search engines as primary means of accessing news.[8] A 2016 Reuters Institute study found that users in six European countries (Czech Republic, Greece, Italy, Spain, Poland, and Turkey) turn to search engines as their principal news gateway at least half of the time.[9] By providing access to the work of journalists and news organizations, search engines serve fundamental values of free expression, debate, open discourse, and greater exchange of ideas—values at the heart of Article 11 of the Charter and Article 10 of the Convention.

10. While delisted information may still be provided through other distribution channels or remain available to those with the necessary technical skill, it is effectively unavailable to the vast majority of the global public, if they cannot find these websites via search engines. Whereas authors, journalists, publishers, news organizations, and the general public in the pre-internet era relied upon newsstands, libraries, and radio and television broadcasts to impart, seek and receive information, they now increasingly rely on the internet and internet search engines like Google as one of the primary portals for the exchange of information in addition to, and sometimes even in lieu of, a particular publisher's website.[10] In other words, delisting of information on a search engine as ubiquitous as Google would significantly impair the efforts of the publisher to widely distribute information and reach its intended audience.[11] Moreover, delisting may not only prevent readers from finding information, but may actually mislead many people into believing that information does not exist. When a search does not reveal information, many users

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7 ECHR, judgment of 10 March 2009 *Times Newspaper Ltd v. United Kingdom* (nos 1 and 2), Applications Nos. 3002/03 and 23676/03, para. 27. This case-law is confirmed in *GS Media BV*, C-160/15, ECLI:EU:C:2016:644, para. 45. Contrast in this respect with *Google Spain*, para. 87, which did not seem to fully acknowledge that vital role ("*may* play a decisive role").

8 See "New Eurobarometer shows how 15 to 45 year olds use the internet to access music, films, TV series, images and news," Sept. 14, 2016, available at https://perma.cc/JW5S-TT85; "How Americans Encounter, Recall and Act Upon Digital News," Pew Research Center (Feb. 2017), p. 12, available at https://perma.cc/V7J7-S2WX.

9 "Reuters Institute Digital News Report 2016," Reuters Institute for the Study of Journalism, Oxford University, p. 92, available at https://perma.cc/ES2C-LZQT.

10 Donald Cleveland & Ana Cleveland, Introduction to Indexing and Abstracting 259, 4th edition 2013.

11 The role that search engines play has been acknowledged by the Member States data protection authorities in the WP 29 Guidelines on the right to be forgotten ("Taking into account the important role that search engines play in the dissemination and accessibility of information posted on the Internet and the legitimate expectations that webmasters may have with regard to the indexation of information and display in response to users' queries"), see Guidelines at p. 10. However, the Guidelines fail to set up a workable system to make sure that access to information is properly taken into account.

may conclude that there is *nothing to be found* about a particular person, when in fact there is information but it has simply been delisted.

11. Fears about the impact of delisting on the news media are not merely hypothetical. More than 30 percent of the complaints that the CNIL receives concern the media[12], including frequent requests for delisting or delisting. Of the 31 demands that the CNIL enumerated in its exhibit to the CNIL's April 2015 letter to Google, about one-third sought the delisting of news articles.[13] Chris Moran, a member of *The Guardian*'s editorial team and also the person responsible for overseeing how readers access the newspaper's website through search engines, stated in October 2014, shortly after the *Google Spain and Google* decision, that "*in the last seven days,* [The Guardian had] *received over 20 million page views from Google, over half of that to content that is more than a week old. ... Google is, in a very real sense, the front page of our* [The Guardian's] *whole archive*."[14] Given the importance of internet search engines to the media and their readers, it is not surprising that Google received complaints from various publishers about removal resulting in reduced traffic to their sites.[15]

12. In the instant case before the Council of State, these repercussions are further aggravated by the fact that the CNIL's Order prevents Google from providing publishers with complete and timely notifications of delisting requests, and users from being informed that links have been delisted from their search results.[16] This poses a unique threat to the right of expression and information. The absence of information about delisting requests effectively precludes publishers and the news media from challenging delisting decisions and reversing mistaken delistings or takedowns. Such possibility to challenge takedowns is of paramount importance in light of the imprecise standard articulated in *Google Spain*. Even after attempts at clarification by the Article 29 Working Party, the rules to be applied remain nebulous. This situation creates a vital risk that search engines will steer wide of the danger zone when evaluating delisting requests, giving room for the right of delisting to cause a general chilling effect. When publishers can request that Google review a delisting decision, they can ensure that Google "*meet*[s] *its legal obligation to examine the merits of the requests*."[17]

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12 Response by Google Inc. to the Report Issued by the CNIL Rapporteur on Nov. 17, 2015, at 31, **Annex 2**.

13 *See* Exhibit to letter from the CNIL to Google, dated Apr. 9, 2015, **Annex 3**.

14 Meeting of the Advisory Council to Google on the Right to be Forgotten (Oct. 16, 2014), available at https://perma.cc/B2VB-ZF6Z.

15 Peter Fleischer, Response to the Questionnaire addressed to Search Engines by the Article 29 Working Party regarding the implementation of the CJEU judgment on the "right to be forgotten" 7–8 (July 31, 2014), available at https://perma.cc/YJ25-RZ6V.

16 In line with the Article 29 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, WP 225, p. 9-10.

17 Peter Fleischer, Response to the Questionnaire addressed to Search Engines by the Article 29 Working Party regarding the implementation of the CJEU judgment on the "right to be forgotten" 7–8 (July 31, 2014), available at https://perma.cc/YJ25-RZ6V; see also Google Transparency Report, Frequently Asked Questions, available at https://perma.cc/834Z-KRLQ.

13. Finally, it is important to note that search engines are not merely an important channel to disseminate journalistic content and making it available to the public. They are also very important tools for journalists to research, locate and gather information; to follow investigative leads; and to discover all the relevant facts. Delisting information from the search results displayed on search engines, in particular when it is done in the way requested by the CNIL that prevents journalists from knowing that information was erased, therefore also impairs the important journalistic task of investigating and uncovering information of public interest. Again, this threat to journalistic freedom is real. Among the delisting requests Google mentioned before the CNIL's Restricted Committee was the request of a French person – Mr. Jean-Didier Maille – to delist a Wikipedia article describing his involvement in the illegal sale of arms to Angola in the so-called "Angolagate" scandal.[18] If the CNIL's Order were to be upheld, Angolan reporters' ability to use google.com in Angola to research Mr. Maille's involvement in "Angolagate" would be severely hampered. The CNIL also required Google to delist a link to an article about a police chief accused of theft, disregarding the fact that the complainant is still a public official in the U.S. and that his punishment remains pertinent to his profession and role in the community. The CNIL also disregarded that such deletion might taint the efforts of a U.S. reporter researching the backgrounds to this story.[19]

14. Overall, if people are not able to freely search for delisted information on internet search sites such as Google, the practical effect is that the delisted information will not otherwise be found; it is effectively censored from public view. As a column in *The Wall Street Journal* put it: "*The mandate to forget is not so benign. Since taking effect, the rule has produced a disturbing record of censorship covering a broad range of stories of legitimate interest to the public*."[20] This will particularly be the case where the information delisted from the search results originally resides within a foreign website.

II. Different countries balance freedom of expression and information with right to privacy and data protection differently

15. The balancing decision the Court of Justice took in *Google Spain*, granting the right to data protection general primacy over conflicting fundamental rights and affording individuals with a broad right of delisting, is by no means an international standard. To the contrary, many jurisdictions have decided not to recognize a comparable "right to be forgotten," or go even further in affirmatively requiring the accessibility of certain information.

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18 See Response by Google Inc. to the Report Issued by the CNIL Rapporteur on Nov. 17, 2015, *inter alia* at 10, **Annex 2**; Wikipedia article on the "Angolagate" scandal, **Annexe 4**.

19 Exhibit to letter from the CNIL to Google, dated 9 April 2015, **Annex 3**.

20 James L. Gattuso, Europe's Latest Export: Internet Censorship, Wall Street Journal of 11 August 2015; see also L. Gordon Crovitz, Hiding on the Internet, Wall Street Journal of 30 August 2015, **Annex 5**.

16. Different countries strike very different balances between the rights of access to information and freedom of expression and opinion, on the one hand, and the right to protection of personal data on the other:

- The U.S., for example, does not recognize a "right to be forgotten," in part because its history of protecting free expression does not allow the government, except in the rarest and most extreme of circumstances, to order the suppression of information on public view. A federal court of appeals in the U.S. has pointed out that "*such a 'right to be forgotten', although recently affirmed by the Court of Justice of the European Union, is not recognized in the United States*."[21]

- In Colombia, the Constitutional Court held that "*a solution such as the one adopted by the Court of Justice of the European Union in* Costeja v. AEPD*, while being a mechanism ensuring the right to reputation of the person affected by the disclosure of information, implies an unnecessary sacrifice of the principle of Internet neutrality and, along with this, of the freedom of speech and freedom of information*."[22]

- In Japan, a court of appeal in Tokyo held that "*'the Right to be forgotten' claimed by* [the claimant] *is not established by the laws of Japan and the legal conditions of when it should be recognized or the effects of such right remain unclear.*"[23]

17. Not only do other jurisdictions not provide for similar rights to delistingde-listing as acknowledged by the Court of Justice, some jurisdictions, to the contrary, even specifically require certain information to be publicly accessible at all times. For example, in the state of Texas, the publication of information on parents who refuse to pay child support is *required* under Texas law as part of a policy to deter future offenders.[24]

III. Potential implications of a worldwide delisting

18. Should the Court of Justice confirm the CNIL's view, according to which the right of delisting requires Google to delist search results globally on all extensions, such a decision would likely have grave worldwide consequences. The Court of Justice would thereby claim a right of the EU legal order to determine the search results acceptable outside its territory. If the Court of Justice were to lead the way in asserting such a global scope of application for EU law, there would be nothing to prevent other jurisdictions from claiming the same global scope of application for their own laws. The result would

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21 This notion was affirmed by the U.S. Court of Appeals for the Ninth Circuit in May 2015. See U.S. Court of Appeals of the 9th Circuit, judgment in *Garcia v. Google, Inc.*, 786 F.3d 733, 745 (9th Cir. 2015), finding that American actress could not force Google to remove her association with a video on YouTube.

22 Colombian Constitutional Court, judgment of 12 May 2015, No. T277 *Gloria v. Casa Editorial El Tiempo*, p. 45.

23 12th Civil Division of the Tokyo High Court, judgment of 12 July 2016, No. 192, *Google Inc. v. Mr. M*.

24 Letter from the Texas Attorney general dated 8 July 2016, **Annex 6**.

be a "race to the bottom," as speech prohibited by any one country could effectively be prohibited for all, on a worldwide basis.[25]

19. In an increasingly globalized world, many news stories have a nexus to multiple jurisdictions. While the CNIL is not the first body to seize on the concept of the accessibility of online content to rationalize extraterritorial regulation of the internet, this approach is unworkable because it contains no limiting principle: every website is in theory accessible from every computer in every country that is connected to the internet.

20. The EU legal order is by no means the only legal order restricting the dissemination of certain information on the internet. Surveys of speech restrictions reveal a landscape of censorship by a vast number of other countries, many of which are far more restrictive than the EU. Saudi Arabia does not allow criticism of its leadership nor questioning of Islamic beliefs; Singapore bans speech that "denigrates Muslims and Malays"; and Thailand prohibits insults to the monarchy. Expression supporting gay rights authored by a European writer for a European audience violates the law in Russia. The Chinese government requires certain allegedly "harmful" information – like details of the Tiananmen Square massacre – to be suppressed by internet search providers. Even countries that are much friendlier to the concept of free speech have restrictive laws that forbid certain content: Australia forbids minors from viewing "unsuitable" internet content that includes marital problems and death, and Canada still treats seditious libel as a crime.[26]

21. If the EU claims authority to have information globally delisted, without regard to territorial limits, then multinational platforms and service providers such as Google will have even less legal justification for resisting the extraterritorial efforts of authoritarian regimes to suppress information and make the world "forget" about their transgressions and other inconvenient facts. That would, in turn, affect the information available to users in the EU. For example, a removal under Russia's own "right to be forgotten"[27] would affect availability of the information in the EU, even if the delisting, in this case, were not justified under EU law. The Chinese search engine Baidu bans from its search results any of the nine content categories identified in Article 15 of China's Measures on the Administration of Internet Information Services.[28] If the EU would claim authority to restrict the search results for Google searches conducted in China, the Chinese govern-

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25 Aaron Schwabach, Internet and the Law: Technology, Society, and Compromises 132–33, 2nd edition 2014.

26 *See* OpenNet Initiative Research, https://perma.cc/BPW8-RHBN; https://perma.cc/4BU6-HV3Z; https://perma.cc/C7H2-9ANY; License to Harm: Violence and Harassment against LGBT People and Activists in Russia, Human Rights Watch (Dec. 15, 2014), https://perma.cc/XF7A-HEJA; https://perma.cc/V2FR-X67M; Canada Criminal Code, R.S.C. 1985, c. C-46 ss. 59–61.

27 Federal Law "On Information, information technologies and on protection of information" No. 149FZ of 27 July 2006, as modified.

28 UNESCO Report, Fostering Freedom Online, 2014.

ment might well claim authority to restrict the search results for Google searches conducted in the EU. It would produce a race to the bottom, at a tremendous cost to fundamental rights and freedoms.

C. As to the Questions referred

22. Based on the above facts, the Reporters Committee, also in the name and on behalf of the Coalition, kindly requests the Court of Justice to approach the legal issues addressed by the Council of State's questions as follows:

I. Global right of delisting is incompatible with fundamental rights and freedoms as enshrined in the Charter

23. A global right of delisting as assumed by the CNIL is incompatible with fundamental rights and freedoms. Several years after the Court of Justice decision in *Google Spain*, the negative impact of the right of delisting on access to information, freedom of expression, and freedom of the press is increasingly clear. The possibility of expanding the right of delisting by applying it worldwide exacerbates these concerns and raises new ones. A global right of delisting would not only unduly restrict the fundamental freedom of expression and information as enshrined in Article 11 of the Charter (and Article 10 of the Convention), but also other fundamental freedoms and rights, for example the fundamental freedom to conduct a business as enshrined in Article 16 of the Charter.

24. The Court of Justice consistently held in the past that the right to protection of personal data as protected by Article 8 of the Charter, the Directive and in the future by the General Data Protection Regulation (the "**GDPR**"), within the system of fundamental rights as established by the Charter and the fundamental rights traditions of the Member States, is to be balanced against conflicting fundamental rights, the interests requiring free movement of personal data and services for the benefit of internet service providers and their users, and with the other general principles of Union law, such as *inter alia* the principle of proportionality.[29]

25. In *Google Spain*, the Court of Justice held that "*a fair balance should be sought in particular between that interest* [i.e. the legitimate interest of internet users potentially interested in having access to delisted information] *and the data subject's fundamental rights under Articles 7 and 8 of the Charter*."[30] Against this background, the Court of Justice held that a data subject's fundamental rights under Articles 7 and 8 of the Charter "*override, as a rule, not only the economic interest of the operator of the search engine but*

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[29] See e.g. judgments in *Lindqvist*, C-101/01, EU:C:2003:596, para. 87, 97; *Commission v. Germany*, C-518/07, EU:C:2010:125, para. 24; *Commission v. Hungary*, C-288/12, EU:C:2014:237, para. 51; *Schrems*, C-362/14, EU:C:2015:650, para. 42; and, per analogy, *Promusicae*, C-275/06, EU:C:2008:54, para. 68; *UPC Telekabel Wien*, C-314/12, EU:C:2014:192, para. 46.

[30] Judgment in *Google Spain*, para. 81.

also the interest of the general public in finding that information upon a search relating to the data subject's name."[31]

26. This statement is not entirely clear. In particular, it leaves open whether the Court of Justice by this statement intended to present the result of a comprehensive balancing test or whether it just evaluated the data subject's fundamental rights against economic "interests" of the search engine operator and the information "interests" of the public. Should the latter be the case, the Court of Justice's assessment would need to be complemented by a full balancing of all affected fundamental rights to determine the ultimate shape and scope of any right of delisting. Should the former be the case, the Reporters Committee respectfully disagrees with the Court of Justice's assessment:

    - First, the Court of Justice would not have considered the grave repercussions the right of delisting can have on the fundamental freedom of expression as protected by Article 11 of the Charter (and Article 10 of the Convention) and the essential role journalism and media play in democratic societies by enabling an open and informed debate on matters of public interest.[32] Article 11 of the Charter (and Article 10 of the Convention) does not only protect the "interest" of internet users potentially interested in having access to delisted information. It protects the freedom of expression as a comprehensive fundamental right, which includes "*the freedom to hold* [and disseminate] *opinions, and to receive and import information and ideas without interference by public authority and regardless of frontiers*". And, as Article 11(2) of the Charter expressly confirms, it also protects the "*freedom and pluralism of the media*," including journalists' ability to investigate stories, sort and collect information, and making information readily available to the public. As early as 1997, the European Union's Working Party on the Protection of Individuals with regard to the Processing of Personal Data observed that "*data protection legislation does not apply fully to the media because of the special constitutional status of the rules on freedom and expression of the press*."[33] And in interpreting Article 10 of the Convention, the European Court of Human Rights has said that "[f]*reedom of expression constitutes one of the essential foundations of a democratic society*" and that exceptions "*must be narrowly interpreted and the necessity for any restrictions*

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31 Judgment in *Google Spain*, para. 97.

32 Only the public's right to access information, albeit downgraded to a mere interest (see below, para. 26, second indent), was considered. The Court of Justice did in fact mention that the publication of information relating to an individual may be carried out for journalistic purposes (judgment in *Google Spain*, para. 85). It did so, however, only to stress that search engine operators do not benefit from a potential exemption for processing carried out "solely for journalistic purposes." At no point did the Court consider freedom of expression and the rights of journalists to seek and impart information within its balancing.

33 Working Party on the Protection of Individuals with regard to the Processing of Personal Data, Recommendation 1/97, Data protection law and the media. Adopted by the Working Party on 25 February 1997, available at https://perma.cc/H7XE-LBQL.

must be convincingly established."[34] Even the Directive itself in Article 9 expressly recognizes that internet anonymity must at times give way to freedom of expression and unencumbered access to information for journalistic purposes. In particular in case individuals exercise a right to object under Article 14(a) of the Directive and in the future Article 21(1) of the GDPR following a fully legitimate processing of their personal data by a search engine, such fundamental rights of journalists and the public must be given full account when weighing the rights of the data subject and all other rights and interests concerned.[35] As set out above[36], the delisting of information from the results accessible via search engines imposes actual severe restrictions upon journalists' and the general public's ability to exercise these fundamental rights. By not even mentioning this dimension of the right of delistingdelisting, the Court of Justice has conducted, in the view of the Reporters Committee, a skewed and incomplete balancing of all relevant fundamental rights.

– Second, by consistently framing freedoms and rights negatively affected by the right of delisting as "interests" – as opposed to what they actually are: fundamental freedoms and rights protected on an equal footing with the right to protection of personal data – the balancing conducted by the Court of Justice would be tilted towards the right to data protection from the very beginning. By establishing a general rule of prevalence of the right to data protection, the Court of Justice appears not to have recognized fundamental rights and freedoms other than the right to data protection – first and foremost the freedom of expression and information as protected by Article 11 of the Charter (and Article 10 of the Convention), but also other rights and freedoms like website or search engine operators' freedom to conduct a business as protected by Article 16 of the Charter – the value and weight required by the Charter.

27. While the Reporters Committee acknowledges the general decision of the Court of Justice that Article 7 and 8 of the Charter generally affords individuals a right of delisting, it respectfully urges the Court of Justice to take great care when further shaping the scope and application of such right in responding to the questions referred by the Council of State. The CNIL in its Order seeks to grant the right of delisting utmost primacy over any other affected fundamental right. The Reporters Committee submits that such application is incompatible (1) with the Charter (and the Convention), which guarantees the rights of privacy, data protection and free expression and information in one and the same title (Title II) without providing for any specific order of application of value, (2) with the Court of Justice's fundamental case law, requiring courts and authorities to strike a

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34 ECtHR, Observer and Guardian v. United Kingdom (Appl. No. 13585/88), judgment of 26 November 1991, Ser. A, No. 216, para. 59(a).

35 See judgment in *Google Spain*, para. 86.

36 See above, para. 9.

fair balance between the right of data protection and other fundamental rights and freedoms, as well as (3) with the general principle enshrined in Article 52(1) of the Charter that any restriction of fundamental rights and freedoms must be proportionate. The Court of Justice now has the chance to make sure that the right of delisting does not disproportionately encroach upon the fundamental rights and freedoms of millions of reporters, journalists, website operators, search engine operators and other individuals throughout the world.

28. In light of the above, the Reporters Committee submits that for the right of delisting to be applied reasonably and proportionately, its scope must be limited to domain extensions within the EU and EFTA. It would not be proportionate to require a delisting on domain extensions globally. As Google has demonstrated before the Council of State, applying the right of delisting to domain extensions within the EU and EFTA will cover the vast majority of searches conducted in the EU and EFTA.[37] It will afford individuals in the EU effective protection against the generally wide accessibility of sources associated with their name via search engines, the main source of concern with regard to the implications of search engines for individual's right to privacy. At the same time, it would avoid the worst encroachments on other fundamental rights and freedoms. E.g. journalists outside the EU would not be completely barred from fulfilling their constitutional role when reporting on individuals of public interest who would prefer to keep facts and information about their activities under wraps. Extending the right of delisting beyond this scope, however, would disproportionately constrain fundamental rights and freedoms of journalists and others who legitimately rely on an unrestricted access to information.

29. The Reporters Committee also respectfully urges the Court of Justice to clarify that there is no basis for the CNIL to prevent Google from providing publishers with complete and timely notifications of delisting requests, and users from being informed that links have been delisted from their search results. As set out above[38], such application of the right of delisting severely aggravates the negative effects of a right of delisting and therefore effectively causes disproportionate encroachments on fundamental rights and freedoms. In this regard, the Article 29 WP Guidelines' "concession" that search engines may contact the original web publishers to get their views on a delisting request "in particularly difficult cases" (p. 10 of Guidelines) does not offer a workable solution to this problem. Leaving aside the fact that the "particularly difficult" standard is so vague as to be non-administrable, Google may not be able to perceive that a particular delisting request poses a difficult, let alone a particularly difficult, issue as regards the right of freedom of expression and the right to access of information.

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37 E.g. 98.7% of search requests in France are conducted either on the google.fr domain or another EU/EFTA domain.

38 See above, para. 12.

II. Global right of delisting is incompatible with international law principles and the sovereign rights of States outside the EU

30. The Reporters Committee recognizes the EU's authority to weigh the competing interests between promoting personal privacy and data protection and protecting freedom of expression and opinion and the right of access to information in a way that reflects its values. However, ordering search engines to implement the results of such weighing globally, regardless of the existence of a link to the territory of a Member State of the EU, would be incompatible with international law principles and the sovereign rights of States outside the EU, and would in fact create an ominous new precedent for internet censorship that jeopardizes speech and press freedoms worldwide.

31. Upfront, the Reporters Committee considers it important to note that there is a fundamental difference between the question of whether Google is subject to European data protection law (as implemented in the national laws of the Member State), and the question of what kind of rights and obligations derive from the application of EU law and – most importantly for the case at hand – what kind of effect such law might have beyond the borders of the territory of the EU. The first question is purely inward-looking. It determines whether the presence of an international player like Google on the European market is sufficient to justify subjecting it to European law. The second question comprises an outward-looking element. Put simply, the question is whether Google, because some of its activities are directed toward the EU, can be required to subject also all its other global activities to the standards applicable within the EU. While the Court of Justice in *Google Spain* clearly answered the first question in the affirmative – Google is subject to European law – it did not answer the second question, which has now been referred to it by the Council of State.

32. The answer proposed by the CNIL is simple. The delisting of otherwise public information available on the internet "*must be effective without restriction for all processing, even if it conflicts with foreign rights*."[39] The Reporters Committee submits that this approach has no legal basis. Neither France nor the EU determine the reach of their legal orders within a vacuum. Conflicts between the legal orders of sovereign States or confederations of States, as lightheartedly accepted by the CNIL, are governed by well-established principles of public international law, in particular the principles of territorial sovereignty, comity, non-interference and proportionality (see below 1.). The EU and its institutions have repeatedly confirmed in the past to be bound by these principles (see below 2.). Against this background, an EU law-based global right of delisting as claimed by the CNIL would be incompatible with these principles (see below 3.).

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[39] See the Order, para. 7.

1. The international law principles of territorial sovereignty, non-interference, comity and proportionality

33. According to the general international law principle of territorial sovereignty, the power of a state to enforce its legal order is linked to its territory, and cannot be exercised outside its territory. This principle was formulated by the Permanent Court of International Justice ("**PCIJ**") as early as 1927 in its foundational *Lotus* judgment. Therein, the PCIL in clear words held that the "*first and foremost restriction imposed by international law upon a State is that – failing the existence of a permissive rule to the contrary – it may not exercise its power in any form in the territory of another State. In this sense jurisdiction is certainly territorial; it cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or from a convention.*"[40] As the PCIJ clarifies, "*it does not … follow that international law prohibits a State from exercising jurisdiction in its own territory, in respect of any case which relates to acts which have taken place abroad*."[41] It does follow, however, that a state must not exercise its jurisdiction in cases that do not have a so-called "genuine link," i.e. connection to the territory of an intervening state that is sufficiently close and renders such exercise reasonable and appropriate in light of the content and scope of the relevant norm at issue.

34. Since this general rule cannot always prevent conflicts between the laws of different states, e.g. in cases that have links to the territories of multiple states, international law has developed over the years a set of principles which provide further guidance in cases of conflicts. These include in particular the principles of non-interference, comity and proportionality. While the principle of non-interference generally affords every sovereign state a right "*to conduct its affairs without outside interference,"* and *"forbids all States or groups of States to intervene directly or indirectly in internal or external affairs of other States,*"[42] the principle of international comity requires that states in a broader sense seek to apply interpretations of their domestic law that "*would allow it to work in harmony with related foreign laws,"*[43] and generally avoids unreasonable or disproportionate interference with foreign laws.

35. These principles have consistently been recognized by constitutional and high courts around the globe. The U.S. Supreme Court held that it is a foundational principle of international law that each nation must "*avoid unreasonable interference with the sovereign authority of other nations*,"[44] whereas the Court of Appeals for the 9th Circuit held

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40 PCIJ, judgment of 7 September 1927 in *France. v. Turkey (S.S. Lotus)*, (ser. A) No. 10, p. 18 et seq.

41 PCIJ, judgment of 7 September 1927 in *France. v. Turkey (S.S. Lotus)*, (ser. A) No. 10, p. 19.

42 International Court of Justice, judgment of 27 June 1986 *Nicaragua v. United States*, Case concerning the military and paramilitary activities in and against Nicaragua, 1986 I.C.J. 14, paras 202 to 205; see also Resolution 2625 of October 24, 1970 of the General Assembly of the United Nations.

43 See United States Supreme Court judge Stephen Breyer, *The Court and the World: American Law and the New Global Realities*, 2015, p. 9192.

44 U.S. Supreme Court, judgment in *F. Hoffmann–La Roche Ltd*. v. *Empagran S. A.*, 542 U.S. 155, 164 (2004).

that "[c]*omity, as the golden rule among nations, compels* [each country] *to give ... respect to the laws, policies and interests of others*."[45] The Canadian Supreme Court as well as the House of Lords in the United Kingdom have affirmed that, under international law, each State must, outside its territory, respect individuals and the rights of all other sovereign States. The Canadian Supreme Court emphasized that this "*is a rule based on international law, by which sovereign power is bound to respect the subjects and the rights of all other sovereign powers outside its own territory.*"[46] And the German Federal Constitutional Court held that the German Constitution "*assumes the necessity of a delineation and coordination with other States and legal orders*," and "*is to be aligned with international law.*"[47]

2. The EU's compliance with the international law principles of territorial sovereignty, comity, non-interference and proportionality

36. The EU and its institutions have repeatedly confirmed in the past that they are be bound by and must respect the principles set out above.

37. In line with the aforementioned territoriality of all sovereign power, Article 52 of the Treaty on European Union ("**TEU**") and Article 355 of the Treaty on the Functioning of the European Union ("**TFEU**") tie the territorial scope of the European Treaties to the territories of the Member States. Hence, as a subject of international law, the EU's power to enforce its laws does not exist in its own right, but is derived from the sovereign rights of its Member States within their respective territories. This includes the fundamental laws and principles enshrined in the Charter, as is reflected in Articles 51(2) and 52(2) of the Charter, and specifically, for example, in Protocol (No. 30) to the TFEU on the application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom. Protocol (No. 30) clarifies that the Charter cannot have any influence within Poland and the United Kingdom not granted to it by these Member States.

38. The EU and its institutions have repeatedly demonstrated in the past their willingness to comply with the limits of the EU's jurisdiction that derives from its territoriality, as well as their expectation that other jurisdictions respect the EU's sovereignty. For instance, the Union Courts, on the one hand, examined in the past whether acts adopted by the Union institutions are compatible with public international law, and in particular with the

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45 U.S. Court of Appeals for the 9th Circuit, judgment in *Mujica v. AirScan Inc.,* 771 F.3d 580, 608 (9th Cir. 2014).

46 Canada Supreme Court, judgment of 1 May 1897, 27 SCR 461, p. 790; see also House of Lords, 12 June 2003, *Eram Shipping Company Limited and others v. Hong Kong and Shangai Banking Corporation Limited,* UKHL 30, para. 79.

47 German Federal Constitutional Court, judgment of 14 July 1999, BVerfGE 100, 313 (362 et seq. para. 174) („[Das Grundgesetz] *geht von der Notwendigkeit einer Abgrenzung und Abstimmung mit anderen Staaten und Rechtsordnungen aus. … Zum anderen muß das Verfassungsrecht mit dem Völkerrecht abgestimmt werden.*"

principle of non-interference and proportionality.[48] On the other hand, the EU adopted Regulation (EC) No. 2271/96, which was meant to prevent against an application of certain U.S. laws to natural and legal persons "*under the jurisdiction of the Member States,*" since such extra-territorial application would "*violate international law and impede the attainment of* [the EU objective of free movement of capital between Member States]."[49]

39. This general compliance with the international law principle of territoriality is also clearly reflected in the EU legislation in the specific field of data protection law. E.g., recital 21 of the Directive clarifies that the Directive "*is without prejudice to the rules of territoriality applicable in criminal matters*." Article 28 of the Directive provides that each national supervisory authority when enforcing the Directive only has jurisdiction "*within its territory*." The Court of Justice held in this respect that "*it follows from the requirements derived from the territorial sovereignty of the Member State concerned, the principle of legality and the concept of the rule of law that the exercise of the power to impose penalties cannot take place, as a matter of principle, outside the legal limits within which an administrative authority is authorised to act subject to the law of its own Member State.*"[50] Even within the EU, the Court of Justice thus recognized the limits imposed by international law on the ability of states to enforce their laws outside their territorial limits. Given that these limits are to be respected within a close supranational organization like the EU, it must all the more be respected with regard to potential conflicts of EU law with the legal orders of sovereign states outside the EU.

3. Non-compliance of a global right of delisting with international law principles

40. A global right of delisting as applied by the CNIL would clearly infringe the international law principles of territorial sovereignty, non-interference, comity and proportionality. It would effectively impose the unclear balancing decision the Court of Justice took in *Google Spain*, granting the right to personal data protection general primacy over what are as a matter of law conflicting fundamental rights and affording individuals a virtually limitless right of delisting, on internet users and search engine providers worldwide. It would do so irrespective of whether the circumstances of a specific case might have a much closer link to the territory of states weighing the affected fundamental rights differently than the Court of Justice. Enforcing EU law in such situations would clearly infringe the sovereign rights of these states, contrary to established principles of international law.

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48 See for example judgments in *Gencor v Commission* T-102/96, EU:T:1999:65, paras. 99 et seq. 102 et seq. and in *Intel v Commission* C-413/14 P, EU:C:2016:788, paras 48 et seq.

49 Council Regulation (EC) No 2271/96 of 22 November 1996 protecting against the effects of the extra-territorial application of legislation adopted by a third country, and actions based thereon or resulting therefrom, OJ L 309 of 29 November 1996, p. 1, Preamble.

50 Judgment in *Weltimmo*, C-230/14, EU:C:2015:426, para. 56.

41. The fundamental freedom of expression, opinion and information is recognized and highly valued by many national and international fundamental rights codes. E.g., Article 19 of the International Covenant on Civil and Political Rights ("**ICCPR**") and Article 19 of the Universal Declaration of Human Rights ("**UDHR**") both protect not only a journalist's right to speak and publish, but also the public's right to "*receive ... information and ideas through any media and regardless of frontiers*." They ensure that reporters, journalists, authors, researchers, and individuals in similar professions cannot be prevented from doing their job and exercising their fundamental freedoms and rights,[51] and protect the global public's right to seek, receive, and impart information.

42. As set out above[52], many jurisdictions have expressly decided that they do not recognize a right of delisting due to the severe encroachments it can sometimes have on the freedom of expression and information and other fundamental rights. The CNIL has, nevertheless, routinely ordered the delisting of websites originating in the U.S., which does not recognize a right of delisting. For example, the CNIL has ordered the delisting of links to websites describing or displaying official court decisions in a legal action against a complainant under the Dodd-Frank Act, a U.S. securities industry law, even though the links bear no connection to France other than through the French nationality of the defendant.[53] The CNIL did so, regardless of the fact that the links contained purely U.S.-based information which is part of a U.S. public court record, access to which is protected by the U.S. Constitution as well as the common law. A global right of delisting as suggested by the CNIL, if accepted, would compromise free access to public information on a global basis and thereby allow one jurisdiction to unilaterally deprive news organizations and their readers of the legal protections to which they are entitled under the laws of other countries.

43. The Reporters Committee recognizes the EU's power to assign to the fundamental rights guaranteed by its legal order the weight it deems appropriate under applicable EU law, and to apply the resulting rights and obligations within its territory. The Reporters Committee submits, however, that the EU, according to the international law principles of non-interference, comity and proportionality, has to refrain from enforcing such rights and obligations in cases that are more closely linked to other jurisdictions, disproportionately interfering with the sovereign rights of these jurisdictions. The different Google domain extensions cater to the results yielded by searches on Google in respect of content and language to a specific jurisdiction, thereby inextricably linking these results to this specific jurisdiction. It would be disproportionate for the EU, in terms of its limited territorial

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51 See U.N. Human Rights Committee, General Comment No. 34, 102nd Session of 12 September 2011, International Covenant on Civil and Political Rights, General Remarks, para. 20, available at http://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf: "*The free communication of information and ideas about public and political issues between citizens, candidates and elected representatives is essential. This implies a free press and other media able to comment on public issues and to inform public opinion without censorship or restraint*." (internal citations omitted).

52 See above, para. 16.

53 See Letter from the CNIL to Google of 9 April 2015, **Annex 3**; Bloomberg article "CEO Buhannic Accused of Assaulting Employee", **Annex 7**.

sovereignty, to enforce a right of delisting on domain extensions associated with, and therefore more closely linked to, jurisdictions outside the EU, thereby restricting the right of the media to inform non-EU residents and restricting the right of non-EU citizens to seek access to information in the way they see fit.

C. Proposal for an answer to the questions put to the Court of Justice

44. In light of the above, the Reporters Committee suggests that the Court of Justice holds in answer to the questions referred by the Council of State that it would be disproportionate to require search engine operators, when granting a delisting request, to apply this delisting on a global basis. The Reporters committee therefore suggests to answer the referral questions as follows:

> **The 'right to delisting, as provided by Articles 12(b) and 14(a) of Directive 95/46/EC of 24 October 1995, is to be interpreted as meaning that a search engine operator is not required, when granting a request for de-referencing, to remove the links at issue globally or beyond the domain name corresponding to a Member State in which the request is deemed to have been made.**

Frédéric Louis — Prof. Dr. Hans-Georg Kamann

Dr. Martin Braun — Christian Schwedler

List of Annexes

	Description of the annexe	Reference (page and paragraph)	Pages in the list of annexes
1	Power of attorneys and certificates of authority to practice of the Coalition's lawyers	n.a.	1-6
2	Response by Google Inc. to the Report Issued by the CNIL Rapporteur on Nov. 17, 2015	7/11	7-50
3	Letter from the CNIL to Google, dated Apr. 9, 2015	7/11	51-67
4	Wikipedia article on the "Angolagate" scandal	8/13	68-83
5	Wall Street Journal articles: James L. Gattuso, Europe's Latest Export: Internet Censorship, 11 August 2015; L. Gordon Crovitz, Hiding on the Internet, 30 August 2015	8/14	84-91
6	Letter from the Texas Attorney general dated 8 July 2016	9/17	92-98
7	Bloomberg article "CEO Buhannic Accused of Assaulting Employee"	19/42	99-110