European Court of Justice Ruling Limits Territorial Reach of the "Right to Be Forgotten"

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On September 24, 2019, the European Court of Justice (ECJ) issued a much anticipated preliminary ruling on certain questions of EU data protection law in the case of *Google Inc. v. Commission nationale de l'informatique et des libertes*. In response to a request by the French appeals court for the ECJ's interpretation under the EU's General Data Protection Regulation (GDPR) and its predecessor, Directive 95/46/EC, the ECJ concluded that a search engine operator, when faced with a data subject's request for removal of links generated from a search of the data subject's name, is obligated to carry out such a request only on versions of its search engine corresponding to EU member states rather than on all versions worldwide.

Background

EU data protection law under Article 17 of the GDPR and Article 12(b) of Directive 95/46/EC affords EU data subjects a qualified right of erasure with respect to their personal data, a right known colloquially as the "right to be forgotten." Following a 2014 ECJ ruling that found Google's indexing of personal data in connection with its search engine activities to fall within the scope of Directive 95/46/EC, Google implemented certain de-referencing procedures in order to be responsive to erasure requests from EU data subjects desiring to remove links returned by searches requesting the data subject's name. However, in May 2015, the French data protection authority, the Commission nationale de l'informatique et des libertes (CNIL), served a formal notice to Google asserting that the company was further required under France's national implementation of Directive 95/46/EC to apply such de-referencing to results generated through all versions of Google's search engines worldwide, not only those generated through Google's EU domain name extensions (as Google had been doing). When Google refused to comply, the CNIL imposed a €100,000 fine.

On appeal from Google, France's highest administrative court requested that the ECJ issue a preliminary ruling on certain questions of EU data protection law, focusing on whether the scope of de-referencing obligations imposed on a search engine operator was limited to the search engine domain name extensions within the EU member states in which the request for removal was made, whether such obligations extend to domain name extensions in all EU member territories, or whether such obligations extend to domain name extensions worldwide.

The Ruling

In its preliminary ruling, the ECJ confirmed that, in line with its precedents, Google's processing of personal information through its search engine activities falls within the scope of the GDPR and the prior Directive 95/46/EC. Moreover, the ECJ found that, based on the interconnectedness between various national versions of its search engine, Google's search engine activities must therefore be considered a single act of processing across jurisdictions. However, despite such finding, the ECJ nevertheless held that EU data protection law in its current form could not compel Google to remove results from its search engines operating outside the EU member states.

In reaching its conclusions, the ECJ recognized that protection of privacy and personal data is a qualified right and a balance must be struck with other fundamental rights, including a right to information that may vary among jurisdictions outside the EU member states. The ECJ also noted that the legislative history of the GDPR and Directive 95/46/EC did not expressly suggest that obligations for de-referencing should be

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imposed on versions of search engines beyond those in EU member states. As such, the ECJ held that the scope of current EU data protection law was more limited than the CNIL's interpretation, and only required search engine operators to implement de-referencing on versions of its search engines within the EU member states. However, the ECJ did hold that search engine operators must implement measures sufficient to prevent or strongly discourage individuals in EU member states from accessing the removed information, for instance, by accessing, from within an EU member state, a version of the search engine outside the EU member states such as through a VPN. Lastly, the ECJ noted that while current EU data protection law does not compel such de-referencing on all versions of search engines worldwide, it also does not prohibit such an obligation, which leaves the door ajar for EU member states to implement additional obligations to that effect.

Key Takeaways

The ECJ's preliminary ruling has been met with support from the business community as a limitation on the broad and often vague scope and territorial reach of recent EU data protection laws. However, given the specific facts of the case and the data subject rights at issue, practitioners should be mindful of drawing undue inferences regarding limitations on the scope and territorial reach of EU data protection laws as a result. Nonetheless, it bears watching to see if the ECJ or EU member state authorities will apply the ECJ's rights balancing test under other circumstances with similar results. Only time will tell the full import of the ECJ's ruling.

For the full text of the ruling, click **here**.

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