

Open Letter to Google Advisory Council

September 9, 2014

Dear Members of the Google Advisory Council,

We, the undersigned organisations, would like to contribute to your assessment of the recent ruling of the Court of Justice of the European Union (CJEU) that is sometimes referred to in the media (but not in the ruling) as the “right to be forgotten”.

As the ruling has been largely misrepresented by parts of the press, we will first take this opportunity to clarify some misunderstandings that have circulated about the context and scope of the ruling.

First, this case is not about a “right to be forgotten”. When the CJEU ruled on the case¹, the press reported the decision as an example of a new “right to be forgotten,” even though such a right is not articulated in the legislation on which the ruling is based. The media coverage created the mistaken impression that Google would have to start deleting information from the internet (or its own index) whenever an EU citizens asked the search engine to do so, if information was irrelevant, inaccurate, outdated or excessive. The court specified that search results based on a person's name are to be removed if the request meets the criteria laid out in the ruling. However, not only will the information remain on the internet, but it will remain in Google’s index.

Second, the scope of the ruling is far narrower than has been portrayed in the press. Google has expressed concerns that the ruling requires a private company to make arbitrary decisions that would interfere with freedom of communication. While it is certainly true that the Court could have provided far more guidance on how complaints should be handled, the narrow scope of the ruling does not and cannot require Google to interfere with freedom of expression beyond the principle of proportionality. More specifically, Article 52 of the European Charter of Fundamental Rights, which requires restrictions on fundamental rights be prescribed by law (and not, for example, arbitrarily by a private company, such as Google). Such an interpretation is only possible if the Court overlooked this basic aspect of EU law.

Third, Google alters search results for various reasons. Google voluntarily removes content, de-indexes links, and otherwise alters search results for a wide range of purposes, generally on an arbitrary basis and without any existing European legal obligation to do so. For instance, Google de-indexes information on a global scale based on domestic US copyright law, the Digital Millennium Copyright Act. The impact of the CJEU ruling appears far more limited than other existing arrangements as the content remains online and remains findable through Google using any relevant search terms except when using the complainant's name.

The Role of the Advisory Council

[1http://curia.europa.eu/juris/document/document.jsf?jsessionid=9ea7d2dc30d6833e2dd1702c475888dc
b58fdbe834f7.e34KaxiLc3qMb40Rch0SaxuOaN50?
text=&docid=152065&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=308010](http://curia.europa.eu/juris/document/document.jsf?jsessionid=9ea7d2dc30d6833e2dd1702c475888dcb58fdbe834f7.e34KaxiLc3qMb40Rch0SaxuOaN50?text=&docid=152065&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=308010)

The Advisory Council now has a difficult task ahead. This is compounded by the fact that the Court did not provide adequate guidance to Google; nor have EU legislators proposed adequate safeguards to prevent Google or any company covered by the ruling from implementing the ruling (or related rulings) in ways which would restrict freedom of communication.

The signatory organisations present the Council with the following recommendations:

1. *We encourage the Council to guide Google's implementation to ensure that the company is transparent and accountable for the decision making criteria being developed.*

Balancing the public interest and the legitimate interest of citizens not to have their person defined by incorrect, outdated or otherwise irrelevant information is and will continue to be a daunting task. At the moment it is unclear which criteria Google is following to assess such requests. The criteria developed by Google to determine its compliance with incoming requests should be transparent. Though to uphold the essence of the ruling the privacy of the complainant must be respected, where anonymisation of information disclosed about alterations should be a rule, with informed consent as a possible exception.

2. *We remind the Council that it is the role of the European institutions to provide a legal definition and scope of the right to erasure.*

While the Advisory Council has been tasked to provide expert input into Google implementation of the ruling, the Council cannot generate legal safeguards, nor can it provide authoritative legal guidance to the company. Therefore, we encourage the Council to ask that such legal safeguards be created by European legislators and to call for additional legal clarifications.

3. *We kindly ask you to carefully consider the potential consequences of your activities on European citizens' rights.*

As the European Union is currently reviewing its legal framework for the protection of personal data, your work might impact this reform effort. This danger is particularly significant when we consider the level of misunderstandings that have arisen in relation to this case. It would be unfortunate if your efforts to uphold citizens' rights were to inadvertently cause further delay in the conclusion of this crucial reform for the protection of fundamental rights in Europe.

4. *We call on the Advisory Council to ensure that any recommendations will be in line with Google's commitment for global government surveillance reform.*

The revelations of mass surveillance have shown the need to ensure strong and reliable rules for citizens' rights to privacy and data protection. This need has been acknowledged by several companies, including Google, through their participation in the movement for global government surveillance reform. This movement recognises the need for governments to take action in order to protect their citizens' security and advises for the review of current laws and practices.

We hope that the Advisory Council will seize the opportunity of the meetings organised in several European capitals to clarify and elaborate on the implementation of the ruling, and to ensure that Google's implementation of the ruling is transparent, accountable, and in line with fundamental rights.

Sincerely,

Access

ApTI

Bits of Freedom

Chaos Computer Club (CCC)

Digitalcourage

Digitale Gesellschaft

European Digital Rights (EDRi)

Initiative für Netzfreiheit

IT-Pol

Panoptikon Foundation

Vrijschrift