

Access Now's comments to the EDPB consultation on Guidelines 5/2019 on the criteria of the right to be forgotten in the search engines cases under the GDPR

Introduction

Thank you for your opportunity to provide comments to the Guidelines 5/2019 on the criteria of the right to be forgotten in the search engines cases under the GDPR.

Access Now is an international organisation that defends and extends the digital rights of users at risk around the world.¹ We work on data protection and privacy around the world and we maintain a presence in 13 locations around the world, including in the policy centers of Washington, DC and Brussels.² We have been providing analysis on the implementation of the right to be forgotten as established by the Costeja judgment of the EU Court of Justice (CJEU) since 2014. In 2016, we published a paper on the global implication of this right and the risk it poses when applied outside the European Union.³

In our submission, we will focus on the need to ensure that content does not get removed from the internet or search engines indexes or cache as a result of a right to be forgotten request made under Article 17 of the GDPR following the new delisting right created as a result of the Costeja judgment. We will comment on issues related to the implementation of this right both inside the EU and outside.

The right to be forgotten in search engine cases: delisting, not erasure

The EDPB Guidelines on the right to be forgotten in the search engine cases read as follows:

"Delisting requests do not result in the personal data being completely erased. Indeed, the personal data will not be erased from the source website nor from the index and cache of the search engine provider."

We strongly support this statement and we welcome the clarity provided by these guidelines to ensure harmonisation in the application of these rights by authorities across the EU going forward. We would however like to point out that a number of member states have created conflicting provisions on the application of this right in other online platforms. While Article 17 of the GDPR does not allow for such national divergences, the existence of these measures at local level risk creating fragmentation. In the worst case, they contradict the spirit, objective and, text of the right and its interpretation and could lead to content being deleted.

¹ Access Now, <https://www.accessnow.org/>

² Access Now - About Us, <https://www.accessnow.org/about-us/>

³ Access Now - Understanding the right to be forgotten globally, https://www.accessnow.org/cms/assets/uploads/2017/09/RTBF_Sep_2016.pdf

For instance, in November 2018, the Spanish Parliament passed a data protection law which includes problematic provisions a “right to be forgotten” which authorises the deletion of content from social media platforms through the use of this right.⁴ This provisions goes beyond what was established by the CJEU in the Costeja judgment, the GDPR and the present guidelines.

Beyond the risk of fragmentation in the EU, the Spanish adaptation of the GDPR is also used by a number of Latin American countries as a model framework when developing or updating their data protection law. Recently, Uruguay presented a draft law which included measures establishing a “right to be forgotten” which suggest the deletion of URLs from search engines and other content from social media.⁵ The law takes elements from the Spanish law on data protection but omits important safeguards, including from the GDPR or the CJEU jurisprudence, to ensure that the rights to access to information and freedom of expression are not undermined by the right to be forgotten. A similar proposal is currently being debated in Mexico where the legislator also uses the Spanish law as a reference.⁶ We therefore welcome the clarity brought by these guidelines to ensure that content is not removed by search engines from source websites, the index or the cache. We also call on EU member states to not extend the scope of application of the right to be forgotten to avoid fragmentation inside the EU and prevent interference with other human rights globally.

The scope of application of the right to be forgotten to search engines: limiting it to the EU

While the issue is not raised in these guidelines, we would like to take the opportunity to raise the question of the geographical scope of application of the right to be forgotten.

In a 2019 judgment of a case opposing the CNIL to Google, the CJEU established that the right to be forgotten should be applied to all domain names from the EU, but not outside. The Court justified this decision by pointing to the fact that the adoption of the General Data Protection Regulation requires a consistent and harmonised level of protection for users across the EU. The Court further added that each EU state is, however, empowered to limit this scope in order to protect freedom of information, paving the way for a patchwork of approaches across the EU which could result in further fragmentation and incorrect application of the right. Given the grave risks for the rights to freedom of information and expression linked to the misapplication and misunderstanding of the right to be forgotten, Access Now recommends that EU lawmakers and regulators do not modify the scope of application of this right outside the EU.

Conclusion

We appreciate the opportunity to submit comments to the Guidelines 5/2019 on the criteria of the right to be forgotten in the search engines cases under the GDPR and the continued effort of the EDPB to engage with stakeholders.

We remain available for any questions you may have.

For more information, please contact
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⁴ Spanish law on data protection, Article 94 <https://www.boe.es/eli/es/lo/2018/12/05/3/con>

⁵ Access Now, Derecho al olvido en anteproyecto de ley en Uruguay, <https://www.accessnow.org/derecho-al-olvido-en-anteproyecto-de-ley-en-uruguay/>

⁶ Legislative proposal, Mexican Senate, https://infosen.senado.gob.mx/sgsp/gaceta/64/2/2019-12-03-1/assets/documentos/Inic_Morena_Sen_Monre_al_Posesion_Particulares.pdf