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Companies as Courts?

Google's Role Deciding
Digital Human Rights Outcomes
in the Right to be Forgotten



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Outcomes in the Right to be Forgotten

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Introduction

One of the unwritten rules of the internet is that it was designed to never forget, a feature associated with emerging privacy harms from the availability of personal information captured online. Before the advent of search engines, discovering personal histories would have required hours of sifting through library records. Search engines present the opportunity to find immense amounts of personal details within seconds through a few simple keystrokes. When individuals experience privacy harms, they have limited recourse to demand changes from firms, as platform companies are in the business of making information more accessible.

The European Union's Right to be Forgotten (RTBF) is a novel and somewhat experimental protection designed to obscure reputation-harming content from search results to preserve individual dignity and privacy. Individuals are granted the right to appeal directly to search engines to remove privacy-harming information from search results. European Union citizens request that Google obscures personal details by completing an online form. If successful, Google no longer displays links to the infringing article within search results for an individual's name, making personal details more challenging to retrieve. The online news articles remain active—although much less accessible—given the nearly ubiquitous use of search tools to find and locate information online.

However, not all applications for the RTBF are granted, as online privacy protections can interfere with existing human rights, demanding careful scrutiny of each case. One of the largest complications of the RTBF is preserving the public's right to access information and ensuring that removing links from search results does not violate existing free speech protections. Some information is clearly in the public's interest to process. Public officials, for example, have a narrower chance of receiving protection as the public's right to information outweighs privacy harms. Minors, on the other hand, are almost certain to receive stringent protection from the law, shielding youth from content that creates emotional harm. Each appeal for the RTBF involves a delicate balancing act between two fundamental freedoms: privacy and free speech.



The entity making such fundamental decisions is a multinational corporation rather than a court. Through the ruling of the Court of Justice of the European Union (CJEU), Google was effectively delegated authority to review privacy appeals from individuals and determine whether to obscure content. The balancing test Google performs is one of the most important legal processes defining the boundaries of human rights in the digital age. Within the European Union, Google determines privacy protections advanced by Articles 7 and 8 of the Charter of Fundamental Freedoms of the European Union and the right to free expression provided by Article 11 of the Charter on a case-by-case basis. The Advocate General of the CJEU noted that this test to reconcile “the right to privacy and the protection of personal data with the right to information and to freedom of expression” is one of the “main challenges of our time.”¹

My research first demonstrates the broad latitude Google possesses to determine how human rights apply online. Google officials pushed back against the new responsibility, arguing that through the RTBF, the European Union placed Google “in charge of editing what’s out there in the world.”² Civil society also contested the decisions, pointing out that “Google is making decisions that are publicly relevant. As such, it is becoming almost like a court or government, but without the fundamental checks on its power.”³ The decision generated concern from member states, with United Kingdom officials arguing that “it is wrong in principle to leave search engines themselves the task of deciding

¹ GC and Others v. Commission nationale de l’informatique et des libertés, Case No. C-136/17, ECLI:EU:C:2109:14, Opinion of Advocate General Szpunar (Court of Justice of the European Union, January 10, 2019).

² Farhad Manjoo, “Google’s Grand Plans: A Conversation With Larry Page and Sundar Pichai,” *Bits Blog* (blog), *New York Times*, June 26, 2014, <https://bits.blogs.nytimes.com/2014/06/26/googles-grand-plans-a-conversation-with-googles-larry-page-and-sundar-pichai/>.

³ Sylvia Tippmann and Julia Powles, “Google Accidentally Reveals Data on ‘Right to Be Forgotten’ Requests,” *The Guardian*, July 14, 2015, <https://www.theguardian.com/technology/2015/jul/14/google-accidentally-reveals-right-to-be-forgotten-requests>.

whether to delete information or not, based on vague, ambiguous and unhelpful criteria, and we heard from witnesses how uncomfortable they are with the idea of a commercial company sitting in judgment on issues like that.”⁴ Even international organizations have expressed reservations with the involvement of private actors in the provision of human rights.⁵

Any type of supranational decision-making faces threats to impartiality. I outline two possibilities that could give rise to bias when a multinational corporation evaluates individual requests for privacy protections across the European Union and the possibilities for variation across countries in the ability to secure protections. In terms of policy recommendations, I argue that Google has taken great strides in publishing a transparency report and statistics about the demand for the RTBF across countries. The EU, however, could legislate greater transparency around the balancing tests that Google conducts. Similar to recently passed legislation in Germany, the EU should legally clarify how Google should report on its practices and implement a process of reviewing how a firm conducts one of the most important balancing tests of the digital age.

My research holds implications for other public policy questions surrounding the role of platform companies in society. Google’s role is notable in terms of the scale of the cases adjudicated. Obscuring information from Google search results is desirable to many citizens: over three million individuals have mobilized to secure greater control over personal information and delist personal information from search results.

Understanding how private adjudication operates in the human rights space has implications for understanding how platform companies are increasingly playing an outsized role in determining the boundaries of human rights online. As companies

beyond Google such as Facebook create Oversight Boards, the judicial aspects of companies should be more carefully considered by academics, advocates, and public officials.

II. The Judicial Aspects of Google’s Decisions

The Human Rights of Forgetting

There is no doubt that the internet, and social media in particular, expanded the possibilities for interconnection between societies. Although social media was initially described in a halcyon manner as a medium for democratic expression, it increasingly generates societal harms ranging from disinformation to privacy violations.⁶ Some governments have begun to address the negative aspects of information proliferation and have organized legislation that shapes the types of permissible content online.

Governments respond to bottom-up pressure from individuals and businesses to control the availability of online information within their jurisdiction.⁷ One harm unique to the information age is the lack of control over personal information. As search engines increasingly become the means of finding information online, the first page of a search query has become significant to someone’s reputation, as others can easily find personal information in a way that would have been challenging before the advent of online search tools. Information found in the results shapes a stranger’s estimations of that individual—creating the potential for humiliation or, at the extreme, the forfeiture of jobs or personal relationships. Individuals desire to remove search results on Google for a myriad of reasons, including removing links to articles about financial battles with surrogates,⁸ press that reveals an individual’s sexuality,⁹ critiques of pro-

⁴ Edward Lee, “Recognizing Rights in Real Time: The Role of Google in the EU Right to Be Forgotten,” *U.C. Davis Law Review* 49, no. 3 (February 1, 2016): 1017.

⁵ UN General Assembly, Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, A/HRC/32/38 (May 2016).

⁶ Dipayan Ghosh, *Terms of Disservice: How Silicon Valley Is Destructive by Design* (Washington, DC: Brookings Institution Press, 2020), 31; Sarah Kreps, *Social Media and International Relations* (Cambridge: Cambridge University Press, 2020).

⁷ Beth Simmons and Rachel Hulvey, “A Liberal Theory of Cyber Borders,” working paper.

⁸ In Austria, Google “received a request from the Austrian Data Protection Authority on behalf of an individual to delist 40 URLs from Google Search reporting about two individuals who hired a surrogate. After the pregnancy, the parties got into an argument about fees, which was widely covered in the news.” See “Explore requests: Austria,” Requests to delist content under European privacy law, Google Transparency Report, Google, n.d., https://transparencyreport.google.com/eu-privacy/overview?hl=en&privacy_requests=country:AT;year::decision:&lu=privacy_requests.

⁹ In Germany, Google “received a request to delist five URLs from Google search reporting about a well-known performing artist who challenged his suspension after he made sexual harassment complaints against a senior figure in his organization. The articles report about the trial but also include private information regarding the individual’s sexuality.” See “Explore requests: Germany,” Requests to delist content under European privacy law, Google Transparency Report, Google, n.d., https://transparencyreport.google.com/eu-privacy/overview?hl=en&privacy_requests=country:DE;year::decision:&lu=privacy_requests.

When individuals experience privacy harms, they have limited recourse to demand changes from firms, as platform companies are in the business of making information more accessible.

fessional incompetence on online directory boards,¹⁰ and news about monetary windfalls from court awards.¹¹

Citizen mobilization resulted in stronger privacy protections online in the European Union to address the concerns about the negative impacts of the proliferation of information. Mario Costeja Gonzalez appealed to the Spanish Data Protection Authority, lodging a complaint against Google Spain.¹² Costeja argued that access to news of his real estate forfeiture and failure to pay social security debts online violated his privacy under European Union law, as he resolved these proceedings and reference to them was irrelevant and outdated.¹³ The Spanish Data Protection Authority ruled that it has the power to order the withdrawal of data and the prohibition of access from search engines. Upon appeal, the Court of Justice of the European Union affirmed that privacy is harmed specifically from the search engine aggregation that easily allows a “structured overview of information” about an individual’s private life, as without this technology, “information could not have been interconnected or could have only with great difficulty.”¹⁴ This effect is heightened due to the important role search engines play in modern life and industry, making the information contained in search results ubiquitous.¹⁵ The landmark CJEU ruling established the Right to be Forgotten in the European Union. The CJEU agreed with the Spanish Data Protection Authority and explicitly referred to Costeja’s argument that the fundamental rights of privacy include the “right to be forgotten.”¹⁶ Although the RTBF seems like a novel protection, it derives from a long history of the right to



Court of Justice of the European Union (CJEU)

oblivion in the European Union that arose as a means of protecting the dignity and privacy of individuals.¹⁷ Under Article 7 of the Charter of Fundamental Rights of the European Union, individuals are protected from inappropriate communications that threaten to degrade, humiliate, or mortify them.¹⁸ Drawing from these protections, the CJEU held that the Charter of Fundamental Rights of the European Union and the 1995 Data Protection Directive protect individual rights online.¹⁹ Specifically, Article 12(b) of the Data Protection Directive grants individuals the right to “rectification, erasure, or blocking of data the processing of which does not comply with the provisions of the Directive, in particular because of the incomplete or inaccurate nature of the data.”

¹⁰ In France, Google “received a request from the French Data Protection Authority on behalf of a medical professional to delist one URL from Google Search providing interviews of former patients which criticized the individual’s professional competence.” See “Explore requests: France,” Requests to delist content under European privacy law, Google Transparency Report, Google, n.d., https://transparencyreport.google.com/eu-privacy/overview?hl=en&privacy_requests=country:FR;year;;decision:&lu=privacy_requests.

¹¹ In Ireland, Google “received a request from an individual on behalf of both herself and her child to delist three URLs from Google Search reporting about a recent damages case against an airline, which they won.” See “Explore requests: Ireland,” Requests to Delist Content Under European Privacy Law, Google Transparency Report, Google, n.d., https://transparencyreport.google.com/eu-privacy/overview?hl=en&privacy_requests=country:IE;year;;decision:&lu=privacy_requests.

¹² *eDate Advertising GmbH and Others v. X and Société MGN LIMITED*, Joined Case Nos. C-509/09 and C-161/10 ECLI:EU:C:2011:685, Judgement of the Court, paragraph 45 (Court of Justice of the European Union, October 25, 2011).

¹³ *Costeja*, paragraph 14.

¹⁴ *Costeja*, paragraphs 80, 87.

¹⁵ *eDate Advertising GmbH and Others v. X and Société MGN LIMITED*, Joined Case Nos. C-509/09 and C-161/10 ECLI:EU:C:2011:685, Judgement of the Court, paragraph 45 (Court of Justice of the European Union, October 25, 2011).

¹⁶ *Costeja*, paragraphs 91, 94.

¹⁷ Viktor Mayer-Schönberger, *Delete: The Virtue of Forgetting in the Digital Age* (Princeton: Princeton University Press, 2011).

¹⁸ Robert C. Post, “Data Privacy and Dignitary Privacy: Google Spain, the Right to Be Forgotten, and the Construction of the Public Sphere,” *Duke Law Journal* 67, no. 5 (2018): 981–1072. This longstanding concept at stake is referred to as “dignitary privacy.”

¹⁹ *Costeja*, paragraphs 70, 88.

Balancing Tests

Although *Costeja* was fundamental for advancing strong privacy protections online, there were many details left to resolve in the wake of the CJEU ruling.²⁰ The CJEU ruled that there was a violation of rights without fully explaining the specific conditions when individuals could secure the privilege of obscuring links from online search results related to their name. Did the CJEU interpret European law as granting *Costeja* the “right to be forgotten” because the length of time that passed, the specific content about *Costeja*’s debt, or the fact that he had resolved the debts and the data were no longer accurate? Citing Article 6 of Directive 95/46, the CJEU reasoned that the information in the *Costeja* case should be removed from search results as it was “inadequate, irrelevant or no longer relevant, or excessive” and the data were inaccurate given the change in *Costeja*’s situation and the length of time that had elapsed.²¹ However, the Court also acknowledged the “sensitivity for the data subject’s private life of the information contained in the announcements,” suggesting that the content of particular announcements could spur a larger need to protect privacy under certain conditions.²²

Complicating the decision further is the need to consider the public’s right to access information. The CJEU acknowledged that a balancing test would need to be formulated each time an individual requested protection. The removal of links from the list of search results could impact the interest of individuals in having access to that information, raising the need for consider how to weigh free speech protections against the privacy rights codified in the Charter. The CJEU noted that this balance may depend both “on the nature of the information in question and its sensitivity for the data subject’s private life” and also “on the interest of the public in having that information, an interest which may vary, in particular, according to the role played by the data subject in public life.”²³ It specifically noted that in the case of *Costeja*, “there do not appear to be particular reasons substantiating a preponderant interest of the public in

having, in the context of such a search, access to that information,” but acknowledged that this was a step that would need to be established on a case-by-case basis.²⁴

Authority could have been delegated to national courts or the national Data Protection Authorities steeped in European privacy law to weigh and evaluate these important questions, but Google is instead the first entity to interpret the CJEU’s decision and determine the appropriate balance between the public’s interest in having access to information and privacy protections. Google was tasked with operationalizing the RTBF and serves as the first arbiter of whether an individual’s information is obscured from search results. As such, Google possesses considerable discretion to evaluate individual cases and set broad standards for rights in the digital age. David Drummond, the chief legal officer of Google, noted that the challenge involves “figuring out what information we must deliberately omit from our results” with limited guidance from the Court and “vague and subjective tests” about which information is in the public’s interest.²⁵ As Lee elaborated, the right to be forgotten is “still under development,” and the entity tasked with determining the appropriate balance between privacy and right to information online are employees of a firm, not publicly elected officials.²⁶

Recognizing the importance of Google’s position in establishing the contours of the right to be forgotten, Google established an Advisory Council to solicit a wide range of views on how to best balance the public’s right to information and an individual’s privacy rights. After the CJEU ruling, the Advisory Council embarked on a seven-city European tour of meetings to solicit views from privacy experts, freedom of information advocates, and members of the public. In the opening remarks at the meeting in Spain, Google’s chairman Eric Schmidt noted the “complicated issues at stake” in determining how to comply with the ruling, necessitating the need to solicit a broad range of opinions.²⁷ Some cases are straightforward. For instance, when a victim of physical assault asks

²⁰ Lee, “Recognizing Rights in Real Time,” 1033–35.

²¹ *Costeja*, paragraphs 72, 92–93.

²² *Costeja*, paragraph 98.

²³ *Costeja*, paragraphs 81, 97.

²⁴ *Costeja*, paragraph 98.

²⁵ David Drummond, “We Need to Talk about the Right to Be Forgotten,” *The Guardian*, July 10, 2014, <http://www.theguardian.com/commentisfree/2014/jul/10/right-to-be-forgotten-european-ruling-google-debate>.

²⁶ Lee, “Recognizing Rights in Real Time,” 1023.

²⁷ Mark Scott, “Discussing Online ‘Right to Be Forgotten,’ Google Takes European Privacy Tour to Spain,” *Bits Blog* (blog), *New York Times*, September 9, 2014, <https://bits.blogs.nytimes.com/2014/09/09/discussing-online-right-to-be-forgotten-google-takes-europe->

for articles describing the attack to be removed from online search queries of the individual's name, or when individuals request that links to the publication of medical histories are removed, the cases clearly involve an interest in protecting privacy rights under European law. However, Drummond noted there are many gray areas and ethical questions that a firm needs to adjudicate involving criminal convictions, religious or philosophical beliefs, and political speech.²⁸ Some of the cases are highly controversial, including requests for articles reporting sexual misconduct to be removed from search results if enough time has passed from the crime.²⁹

In *GC and Others*, the CJEU was asked in 2019 to evaluate how Google should handle cases involving sensitive personal information. One of the applications involved a French individual who requested that Google remove a link leading to a satirical photomontage placed online depicting her alongside the mayor of a municipality where she served as head of cabinet in an intimate relationship. The photos were placed online during the campaign for canton elections when she was a candidate. Her request to remove the link from search results associated with her name was refused by Google on the grounds of the public's right to access information, even though she no longer served as head of the cabinet or was seeking elected office. The CJEU ruled that when Google received a request involving sensitive data, it must take into account the seriousness of the interference with the data subject's fundamental rights to privacy and the substantial public interest to determine whether the search results are "strictly necessary for protecting the freedom of information of internet users potentially interested in accessing that web page by means of such a search."³⁰ In other words, the CJEU again left the power to determine the balance between fundamental rights to Google's discretion on a case-by-case basis rather than creating blanket standards that certain information must be removed.³¹

III. Threats to Impartiality

International decision-making, almost by nature, involves the possibility for unequitable results. Beyond the obvious issues involved with powerful countries tipping the scales so that "might triumphs right," a spate of research identifies the bias that results when the nationals of particular countries hold positions of power.³² Sources of favoritism could arise from the ideological views held by employees and the implicit bias in decision-making when the staff are drawn from only a handful of like-minded countries. Adjudication is not immune from these concerns. Voeten considered several conditions that could give rise to the justices of international courts failing to impartially evaluate cases using appointments to the European Court of Human Rights.³³

Ideology

International decision-making often incorporates the ideology and beliefs of the nationals that hold positions of power within the organization. One source of bias could stem from Google's establishment as an American firm. Many executives working for Google are steeped in US conceptions of free speech advancing the right to communicate and access information as paramount. Klonick elegantly documents how American free speech norms were reflected in the self-regulatory practices of platform companies and came to shape the way that companies made decisions about content moderation. Employees hired to write the rules guiding company practices were trained in the US Constitution and First Amendment jurisprudence.³⁴ Over time, companies like Google also attracted top talent through the use of liberal values and heavy emphasis on extending the global possibilities for expression.

an-privacy-tour-to-spain/.

²⁸ David Drummond, Opening Remarks, Google Advisory Council Meeting, Brussels, November 4, 2012, <https://archive.google.com/advisorycouncil/>.

²⁹ Hungarian Data Protection Authority, email correspondence with author, November 12, 2020.

³⁰ *GC and Others*, paragraph 68.

³¹ Jure 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* 69, no. 4 (April 1, 2020): 380–88, <https://doi.org/10.1093/grurint/ikaa002>.

³² Allison Carnegie and Nikolay Marinov, "Foreign Aid, Human Rights, and Democracy Promotion: Evidence from a Natural Experiment," *American Journal of Political Science* 61, no. 3 (2017): 671–83, <https://doi.org/10.1111/ajps.12289>.

³³ Erik Voeten, "The Politics of International Judicial Appointments: Evidence from the European Court of Human Rights," *International Organization*, 2007, 669–701.

³⁴ Kate Klonick, "The New Governors: The People, Rules, and Processes Governing Online Speech," *Harv. L. Rev.* 131 (2017): 1618–22.

Google's responses to the RTBF have often used American conceptions of free speech to justify leaving information within search results to advance the public's right to information. Although both liberal, US and European notions of free speech and privacy are often at odds, as Brussels privileges privacy whereas the US has one of the most stringent and uncompromising notions of free speech protections.³⁵ It was no mystery that Google did "not welcome the right to be forgotten" as a protection that requires the firm to deliberately omit information from search results.³⁶ During the Advisory Council meetings in Brussels, David Drummond expressed dissatisfaction with the RTBF given Google's role is analogous to a card catalog at a library, noting "an unwritten assumption" that when an individual submits a request on Google search, one will be able to retrieve the desired information. Drummond argued that Google's role feels "counter to the card catalog or index idea."³⁷ Drummond further used international human rights law and Article 19 of the Universal Declaration of Human Rights to underscore Google's opposition to the RTBF and desire to instead advance specific protections of the "right to receive and impart information."³⁸

Google has fought to keep the RTBF contained within the borders of the European Union, citing a need to protect internet freedom. National Data Protection Authorities have attempted to force Google's hand to change the geography of the way the RTBF is executed. Google prefers to limit delistings to all European versions of Google search (e.g., google.co.uk, google.fr).³⁹ The Commission Nationale de l'Informatique et des Libertés (CNIL), the French privacy regulator, demanded that Google delist links globally (not just within the European results) to ensure new privacy protections were not easily circumvented by the way that individuals use Google search. Peter Fleischer, Google's global legal counsel, argued that the "If the C.N.I.L.'s proposed approach were to be embraced as the standard for Internet regulation, we would find ourselves in a race to the bottom. In the end, the Internet would only be as free as the world's least free place."⁴⁰

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— Peter Fleischer, Google's global legal counsel

These types of values may inform how Google handles cases. As a multinational firm, Google desires to comply with local and regional laws. In public forums about the RTBF, Google repeatedly empathized the firm's commitment to comply with the court's decision. Where the guidelines handed down by the CJEU are less clear and Google faces considerable discretion, we could expect that Google is more likely to err on the side of free expression than privacy due to the ideology of the firm and the American values held by employees.

Market Power

Bias could also result from the oversight structures in place within the European Union. Scholars have long considered the tension between multinational corporations and governments.⁴¹ Market power is one element that shapes bargaining between governments and firms. In the European Union, national data protection authorities are first line of recourse when individuals are unsatisfied with Google's ruling.

³⁵ Henry Farrell and Abraham L. Newman, *Of Privacy and Power: The Transatlantic Struggle over Freedom and Security* (Princeton: Princeton University Press, 2019).

³⁶ Peter Fleischer, "Three Years of Striking the Right (to Be Forgotten) Balance," *Google The Keyword* (blog), Google, May 15, 2017, <https://blog.google/around-the-globe/google-europe/three-years-right-to-be-forgotten-balance/>.

³⁷ Drummond, Opening Remarks.

³⁸ Drummond, "We Need to Talk about the Right to Be Forgotten."

³⁹ Peter Fleischer, "Adapting Our Approach to the European Right to Be Forgotten," *Google The Keyword* (blog), Google, March 4, 2016, <https://blog.google/around-the-globe/google-europe/adapting-our-approach-to-european-rig/>.

⁴⁰ Mark Scott, "Google Fights Effort to Apply 'Right to Be Forgotten' Ruling Worldwide," *Bits Blog* (blog), *New York Times*, July 30, 2015, <https://bits.blogs.nytimes.com/2015/07/30/google-fights-effort-to-apply-right-to-be-forgotten-ruling-worldwide/>.

⁴¹ Raymond Vernon, *Sovereignty at Bay: the Multinational Spread of U.S. Enterprises* (New York: Basic Books, 1971); Stephen J. Kobrin, "Sovereignty@ Bay: Globalization, Multinational Enterprise, and the International Political System," in *The Oxford Handbook of International Business*, 2nd edition, ed. Alan M. Rugman (Oxford: Oxford University Press, 2009).

National market size could play a role in the capacity of authorities to conduct oversight and the ability to threaten sanctions if Google fails to comply, creating differences in the way that Google adjudicates across markets.

Privacy rights before the EU General Data Protection Regulation (GDPR) were shaped by the Data Protection Directive, which allowed member states to unilaterally set the terms for implementation and enforcement.⁴² The GDPR attempted to increase the leverage that national oversight agencies possess.⁴³ Data Protection Authorities were granted supervisory powers under the Data Protection Directive of 1995, but the GDPR vastly expanded the ability of DPAs to sanction firms for non-compliance and investigate why Google did not delist links, with acceptable fines *up to four percent* of global yearly revenue or €20 million.⁴⁴ Although most scholars agree that DPAs are understaffed and underfunded, some may have greater resources to monitor how Google conducts balancing tests and review cases related to the RTBF.



Googleplex headquarters; photo credit: Gregory Varnum

The sanctions imposed by national Data Protection Authorities has been swift and stunning in magnitude. DPAs mobilized to hold Google responsible for decision-making related to human rights and privacy protections. In July 2020, Belgium's DPA fined Google €600 thousand for refusing to delete search results linked to a Belgian public official. Google argued for preserving the link to maintain right to information, given the official's role as a senior executive of a corporation with a significant degree of exposure to the media. However, the DPA found that several of the links could seriously damage the reputation of the citizen and critically did not "contribute to a debate of democratic society."⁴⁵ Notably, this fine was levied for a *single case* in which Google did not delist links from search results, representing a steep price for privileging freedom expression over privacy.

The Swedish DPA, known as Datainspektionen, found that Google had failed to comply with orders to remove listings. After conducting an audit in 2017 concerning how Google handles delistings, the Datainspektionen found that Google should have removed a greater number of links from search results, arguing that the firm takes a narrow interpretation of situations necessitating privacy protection. The judgement noted that the GDPR provides significantly higher authority, and the assessment was conducted through the strengthened powers provided by the regulation.⁴⁶ As a result, the Datainspektionen handed down an approximately €7 million fine for violations of privacy protections in 2019.

⁴² David Erdos, "European Union Data Protection Law and Media Expression: Fundamentally Off Balance," *International and Comparative Law Quarterly* 65, no. 1 (January 2016): 139–183.

⁴³ Brian Daigle and Mahnaz Khan, "The EU General Data Protection Regulation: An Analysis of Enforcement Trends by EU Data Protection Authorities," *Journal of International Commerce and Economics* (May 2020), https://www.usitc.gov/publications/332/journals/jice_gdpr_enforcement.pdf.

⁴⁴ European Union, General Data Protection Regulation, Regulation 2016/679 (2016), Article 83(5). See also the GDPR enforcement tracker for the fines imposed on firms at "GDPR Enforcement Tracker," CMS, n.d., <https://www.enforcementtracker.com/>.

⁴⁵ Case No. 37/2020, DOS-2019-03780 (Autorité de protection des données and Gegevensbeschermingsautoriteit (Belgian DPA), July 14, 2020), <https://www.autoriteprotectiondonnees.be/publications/decision-quant-au-fond-n-37-2020.pdf>.

⁴⁶ Case No. DI-2018-9274, 206/679 (Datainspektionen (Swedish DPA), March 10, 2020), <https://www.imy.se/globalassets/dokument/>

“Google provides anonymized examples and its decision, but it does not explain how it arrived at the decision to approve or reject the request, leaving the rationale of the firm and broader ‘jurisprudence’ around the RTBF outside of public scrutiny.”

IV. Policy Recommendations

In light of the potential threats to impartiality, many have called on Google to disseminate decision-making on the difficult and challenging cases and more broadly share anonymized details explaining how Google evaluates cases across EU member states, similar to judicial bodies. In an open letter to Google, over eighty academics called on Google to increase transparency around the balancing tests the company conducts between the rights to privacy and free expression,⁴⁷ and Google’s own Advisory Council supported transparency surrounding how the two fundamental rights are balanced.⁴⁸

Google took considerable strides to regularly publish a transparency report containing statistics⁴⁹ about its practices and the demand for the RTBF,⁵⁰ but improvements could be made specifically surrounding the balancing test Google conducts to better assess how the RTBF is implemented across countries and to evaluate the potential for bias. Google reports the average approval of requests is roughly 41 percent from 2014 to 2019 across member states. The highest compliance rating across member states is found in the Netherlands, with an average of 51 percent across five years, whereas Portugal obtains the lowest, with Google only approving 25 percent of individual requests for privacy under the right to be forgotten. Notably, even countries that obtain relatively high rates of approval still have nearly half of the applications from their citizens rejected by Google.

Researchers have limited means of disentangling variation in cross-country rates and determining whether bias exists. Google notes, “A few common material factors involved in decisions not to delist pages include the existence of alternative solutions, technical reasons, or duplicate URLs.”⁵¹ This raises the question of how to interpret the statistics aggregated at the country level. Does a 30-percent approval rate in country A versus 50 percent in country B indicate a larger number of mistakes in country A applications, or differences in oversight structures and the ability of DPAs to monitor private decision-making and demand Google privileges the requests from citizens? Are particular types of requests more likely to be rejected given the ideology of the firm, possibly prioritizing links to news articles? The exact guidelines that Google provides employees to evaluate requests are not public. Google provides anonymized examples and its decision, but it does not explain how it arrived at the decision to approve or reject the request, leaving the rationale of the firm and broader “jurisprudence” around the RTBF outside of public scrutiny.

[beslut/2020-03-11-beslut-google.pdf](#).

⁴⁷ Jemima Kiss, “Dear Google: Open Letter from 80 Academics on ‘Right to Be Forgotten,’” *The Guardian*, May 14, 2015, <http://www.theguardian.com/technology/2015/may/14/dear-google-open-letter-from-80-academics-on-right-to-be-forgotten>.

⁴⁸ Advisory Report, The Advisory Council to Google on the Right to be Forgotten, February 6, 2015, <https://static.googleusercontent.com/media/archive.google.com/en//advisorycouncil/advisement/advisory-report.pdf>.

⁴⁹ “Requests to Delist Content Under European Privacy Law,” Google Transparency Report, Google, n.d., <https://transparencyreport.google.com/eu-privacy/overview?hl=en>.

⁵⁰ Theo 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): 959–72, <https://doi.org/10.1145/3319535.3354208>.

⁵¹ Google, “Requests to Delist Content Under European Privacy Law.”

Greater transparency has precedent in European human rights case law. In *GC and Others*, the Court referred to the case law of the European Court of Human Rights acknowledging the right not only to be informed about events, but also to be able to conduct research.⁵² Only two percent of cases are appealed to the National Data Protection Authorities where greater transparency surrounding how the tension between free expression and privacy are resolved is published and filed in the public record.⁵³ Even the Article 29 Working Party recommended that data controllers should be as transparent as possible by providing the process and criteria used in delisting decisions. Greater levels of information about how Google arrives at decisions across countries and cases provide greater awareness in how the balancing tests are conducted by a corporation.

To correct for the lack of information surrounding the balancing tests conducted by a firm, the European Union could legislate that Google release information about decision-making procedures and private decision-making surrounding the right to be forgotten. This practice is not without precedent. In Germany, for example, transparency was legislated into the Network Enforcement Law (NetzDG) specifically mandating minimum reporting standards. Companies are required to report on the number of complaints, organization and human resources, the number of complaints where an external body was consulted, and the time span of deletion once Google was informed of a violation. Part of the law threatened to fine platform companies that failed to comply with the transparency requirements. As a result, Google's transparency report for the NetzDG is one of the most detailed and elaborate transparency reports.⁵⁴

It is likely that the European Union delegated authority to Google precisely because of the large volume of requests. Millions of applications are processed by Google to reduce the costs that courts or national DPAs would need to undertake to handle large volumes. However, the unique structure of the RTBF requires greater public oversight. As others have argued, it is the responsibility of governments to ensure "legal certainty and predictability in how transparency is provided."⁵⁵ The EU could establish a transparency structure that allows researchers, advocates, and officials the opportunity to analyze how the right balance between fundamental human rights is achieved by legislating how Google reports information. Greater transparency is not a panacea for ensuring that rights are appropriately balanced, but it is the first step towards increasing public understanding and oversight in how private corporations evaluate fundamental human rights and take on increasingly important roles in the information age.

⁵² *GC and Others*, paragraph 69.

⁵³ Michel José Reymond, "The Future of the European Union 'Right to Be Forgotten,'" *Latin American Law Review* 2 (2019): 81–98. Raymond notes, "In this sense, it might not be exaggerated to say that the main judge and architect of the RTBD is, as of today, Google itself."

⁵⁴ "Removals Under the Network Enforcement Law," Google Transparency Report, Google, n.d., <https://transparencyreport.google.com/netzdg/youtube?hl=en>.

⁵⁵ Ben Wagner et al., "Regulating Transparency? Facebook, Twitter and the German Network Enforcement Act," *Proceedings of the 2020 Conference on Fairness, Accountability, and Transparency* (2020): 261–71.

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