IN THE COURT OF JUSTICE OF THE EUROPEAN UNION

CASE C-507/17

GOOGLE INC

Applicant

-v-

COMMISSION NATIONALE DE L'INFORMATIQUE ET DES LIBERTÉS (CNIL)

Defendant

ARTICLE 19 AND OTHERS

Intervening parties

WRITTEN OBSERVATIONS OF ARTICLE 19 AND OTHERS

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A. INTRODUCTION AND SUMMARY

1. Pursuant to Article 23 of the Protocol on the Statute of the Court of Justice, these written observations are submitted by: (1) ARTICLE 19; (2) Human Rights Watch; (3) Electronic Frontier Foundation; (4) Open Net (Korea); (5) Derechos Digitales; (6) La Clinique d'Intérêt Public et de Politique d'Internet du Canada; (7) Reporters Without Borders; (8) Pen International; and (9) the Centre for Democracy and Technology; (together, 'the NGO Interveners') on the questions referred for a preliminary ruling under Article 267 TFEU by the Conseil d'État in its decision handed down on 19 July 2017.

2. The NGO Interveners are organisations active in the defence of freedom of expression and the right of access to information, across a range of jurisdictions and constitutional traditions, including Canada, Latin America, South Korea, the United States, and the Member States of the EU.

3. The questions referred by the Conseil d'État relate to the extent of the obligation imposed on internet search providers to remove search results linked to a person's name, in compliance with the 'right to de-referencing' identified in Case C-131/12 *Google Spain*.[1] The questions arise in the context of a dispute between Google and the Commission nationale de l'informatique et des libertés ('CNIL'), the national data protection authority in France, relating to whether CNIL was lawfully entitled to require Google, in response to a valid request for de-referencing, to remove the links at issue, without geographical restriction, from all of Google's domain names worldwide.

4. By its questions, the Conseil d'État asks, essentially, whether the right to de-referencing requires a search operator:

   (1) to deploy de-referencing to all of the domain names used by its search engine, irrespective of the location from where a search is initiated;

[1] ECLI:EU:C:2014:317

(2) only to remove the links at issue from the results displayed on the search engine's domain name corresponding to the Member State in which the de-referencing request is deemed to have been made (or, more generally, on all of the domain names used by that search engine corresponding to Member States of the European Union); and/or

(3) to use a 'geo-blocking' technique to remove the links at issue in response to any searches deemed to be located in the State of residence of the person benefiting from the 'right to de-referencing' (or, more generally, from any IP address deemed to be located in one of the Member States of the European Union), regardless of the domain name used by the internet user conducting the search.

5. In summary, the NGO Interveners submit that, having regard to the need to weigh the important interests of freedom of expression and the right of access to information against the rights protected by Directive 95/46/EC:

(1) compliance with the 'right to de-referencing' obliges a search engine provider to remove the results displayed for searches made within the State of residence of the person exercising the 'right to de-referencing';

(2) it does not oblige a search engine operator to remove the results displayed on all of the domain names used by its search engine worldwide; and

(3) a search engine operator should only be required to de-reference results for searches made from within other Member States of the European Union where a national court or data protection authority is satisfied that such a step is necessary and proportionate in all the circumstances.

B. RELEVANT LEGAL PRINCIPLES

The importance of freedom of expression as a fundamental right

6. Freedom of expression is universally recognised as a fundamental right: see, e.g. Article 19 of the Universal Declaration of Human Rights ('UDHR'), Article 19 of the International Covenant on Civil and Political Rights ('ICCPR'), Article 10 of the European Convention on Human Rights ('ECHR') and Article 11 of the EU Charter of Fundamental Rights ('the Charter'). Art 11 of the EU Charter also specifically protects the right to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers, and the freedom and pluralism of the media.

7. Access to, and use of, the Internet is a fundamental aspect of freedom of expression: see e.g. the 2017 report of the UN Special Rapporteur on Freedom of Expression:

> *Individuals depend on digital access to exercise fundamental rights, including freedom of opinion and expression, the right to life and a range of economic, social and cultural rights* (§76, A/HRC/35/22, 30 March 2017).

8. The UN Human Rights Committee has similarly observed that:

> *Any restrictions on the operation of websites, blogs or any other internet-based, electronic or other such information dissemination system, including systems to support such communication, such as internet service providers or search engines, are only permissible to extent that they are compatible with paragraph 3 [of Article 19 ICCPR]* (General Comment No 34: Freedoms of opinion and expression, issued 29 July 2011 at §43).

9. For its part, the Committee of Ministers of the Council of Europe has stressed the need for states to protect and promote Internet freedom (which it defines as "*the exercise and enjoyment on the Internet of human rights and fundamental freedoms and their protection in compliance with the Convention and the International Covenant on Civil and Political Rights*", Recommendation CM/Rec(2016)5, 13 April 2016). Among other things, the Committee has urged its member states to ensure that:

Any measure taken by State authorities or private-sector actors to block or otherwise restrict access to an entire Internet platform (social media, social networks, blogs or any other website) or information and communication technologies (ICT) tools (instant messaging or other applications), or any request by State authorities to carry out such actions complies with the conditions of Article 10 of the Convention regarding the legality, legitimacy and proportionality of restrictions (ibid, §2.2.1)

10. In its 2014 annual study, the Conseil d'Etat expressed the view that access to the Internet was a basic right on par with freedom of expression itself:

given the present state of methods of communication and with a view to the general development of online communication services for the public, as well as a view to the importance of these services for participation in democratic life and the expression of ideas and opinions, [freedom of expression] implies the freedom to access these services.

11. The Court of Justice has also recognised the importance of the internet and electronic communications networks in the dissemination of information, and their importance to the exercise of the freedom of expression: see, e.g., Case C-131/12 *Google Spain*, §§36, 87; Joined Cases C‑293/12 and C‑594/12, *Digital Rights Ireland*, §28; Joined Cases C‑203/15 and C‑698/15 *Tele2 Sverige and Watson*, §§92-93, 101. In particular, in in Case C‑160/15 GS Media BV, §45, the Court observed:

…it should be noted that the internet is in fact of particular importance to freedom of expression and of information, safeguarded by Article 11 of the Charter, and that hyperlinks contribute to its sound operation as well as to the exchange of opinions and information in that network characterised by the availability of immense amounts of information.

No hierarchy of rights

12. The NGO Interveners note that the EU Charter of Fundamental Rights does not establish any hierarchy between the rights contained therein. Article 52(3) of the Charter, moreover, provides that:

> *In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention.*

13. As far as qualified Convention rights are concerned, the European Court of Human Rights has made clear that the Convention "*does not establish any a priori hierarchy between these rights … as a matter of principle, they deserve equal respect. They must therefore be balanced against each other*" (*Karaahmed v Bulgaria* [2015] ECHR 217, §92). In a succession of cases, the Strasbourg Court has stressed the need for national authorities to strike "*a fair balance*" between the rights freedom of expression and privacy where the two rights conflict, see e.g. *MGN v United Kingdom* (2011) 53 EHRR 5 at §142:

> *In addition, when verifying whether the authorities struck a fair balance between two protected values guaranteed by the Convention which may come into conflict with each other in this type of case, freedom of expression protected by Article 10 and the right to respect for private life enshrined in Article 8, the Court must balance the public interest in the publication of a photograph and the need to protect private life* (Hachette Filipacchi Associés v. France*, no. 71111/01, BAILII: [2007] ECHR 5567 , §43, ECHR 2007 VIII*).

14. In *Fuchsmann v Germany* [2017] ECHR 925, app no 71233/13, 19 October 2017, for instance, the applicant complained that the refusal of the German courts to grant an injunction against the website of the New York Times in respect of a story mentioning his alleged ties to organised crime had breached his right to privacy under art 8 ECHR. Among other things, the applicant relied on the Court of Justice's decision in *Google Spain,* arguing that "*the reasoning regarding the right to be forgotten could be transferred to the present case*" (§27). Notably:

    (1) The German courts had accepted that they had jurisdiction, because "*the online version of the newspaper was accessible from Germany, and because it mentioned a German businessman in the article*" (§13), although the consequences were limited because "*the online article was accessible only as a result of a directed search with an online search engine*" (§52). The German courts also accepted that the news article

"*interfered with the applicant's reputation and personality right*" (§15). However, the German courts held that it was necessary to balance such interests against that of press freedom and, in particular, the "*public interest in reporting on criminal offences, including the suspicion of their commission*" (§15). Ultimately, they concluded that "*the informational interest of the public outweighed the concerns of protecting the applicant's personality right, even taking into account that such reporting might seriously damage his private and professional reputation*" (§18, emphasis added).

(2) For its part, the Strasbourg Court held that the applicant's case required "*an examination of the question of whether a fair balance has been struck between the applicant's right to the protection of his private life under Article 8 of the Convention and the newspaper's right to freedom of expression as guaranteed by Article 10*" (§32), having regard to its established criteria in the context of balancing competing rights (§34).[2] The Strasbourg Court concluded that the German courts had properly taken the relevant criteria into account and there were no strong reasons for substituting its own view for those of the national courts (§54). Accordingly, there had been no violation of art 8 in the applicant's case (§55).

15. The same balancing approach applies in respect of these rights under EU law: see, e.g., Case C-112/00 *Schmidberger v Germany* ECLI:EU:C:2003:333, §§80-82 referring to the need to weigh, and strike a balance between, the rights of freedom of expression and freedom of assembly, and competing EU free movement rights.

16. In Case C-131/12 *Google Spain v Agencia Española de Protección de Datos* ECLI:EU:C:2014:317, however, the Grand Chamber did not expressly refer to

[2] Among other things, the Strasbourg Court noted: "*the substantial contribution made by Internet archives to preserving and making available news and information. Such archives constitute an important source for education and historical research, particularly as they are readily accessible to the public and are generally free (see Times Newspapers Ltd v. the United Kingdom (nos. 1 and 2), nos. 3002/03 and 23676/03, §45, ECHR 2009)*". (§39).

the right to freedom of expression,[3] nor any need for national authorities to strike a fair balance between that right and the rights to privacy and data protection. Instead, it referred to "*the legitimate interest of internet users potentially interested in having access to that information*", observing that "*in situations such as that at issue in the main proceedings a fair balance should be sought in particular between that interest and the data subject's fundamental rights under Articles 7 and 8 of the Charter*" (§81).

17. In other words, the Grand Chamber did not frame the issue in *Google Spain* as the need to strike a balance between two sets of competing fundamental rights, but only between the "*legitimate interest of internet users*" in particular information and "*the data subject's fundamental rights*". Although the Grand Chamber accepted that the provisions of the DPD "*in so far as they govern the processing of personal data liable to infringe fundamental freedoms, in particular the right to privacy, must necessarily be interpreted in the light of fundamental rights*" contained in the Charter (§68), it referred in terms only to articles 7 and 8 of the Charter (private life and data protection) but made no mention of article 11 (freedom of expression and information).

18. The NGO Interveners respectfully submit that the Grand Chamber's failure to give express consideration to the importance of freedom of expression, and access to information, as a fundamental right, has had an unfortunate effect on the development of EU law in relation to de-referencing. Specifically, it has devalued the rights of millions of persons – both within the EU and beyond its boundaries – to search for and access accurate information which has been legitimately placed in the public domain by reference to the names of particular individuals. In so doing, the case law has established an *a priori* hierarchy of rights under EU law without explanation and without any adequate legal foundation.

Any restriction on freedom of expression must be strictly proportionate

[3] The only reference to freedom of expression is that contained in art 9 DPD, set out at §9 of the Grand Chamber's judgment.

19. Union law provides that any limitation on fundamental rights for the sake of the protection of the rights and freedoms of others must not only be necessary to that end, but must also comply with the principle of proportionality: see art 52(1) of the Charter of Fundamental Rights. Any limitation must also "*respect the essence*" of the right so limited.

20. Moreover, art 53 of the Charter provides that the Charter shall not be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised by Union law and international law, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions.

21. It follows that any obligation on search engine providers to adopt de-referencing measures must observe the requirements of necessity, proportionality and consistency with the Convention right to freedom of expression. Neither the principle of effectiveness under Union law (see e.g. Case 33/76 *Rewe-Zentralfinanz eG* at §5) nor the right to effective judicial protection under art 47 of the Charter, moreover, authorise Member States or national courts to adopt remedies greater than those strictly required to protect the right in question.

The relevance of the margin of appreciation enjoyed by national authorities in striking a fair balance between competing rights

22. In respect of the balance between the rights to privacy and freedom of expression, the NGO Interveners note that the national authorities of Contracting Parties to the Convention are afforded a broad margin of appreciation when seeking to strike a fair balance between those rights: see e.g. *MGN v. United Kingdom,* cited above*,* §142:

> *The balancing of individual interests, which may well be contradictory, is a difficult matter and Contracting States must have a broad margin of appreciation in this respect since the national authorities are in principle better placed than this Court to assess whether or not there is a "pressing social need" capable of justifying an interference with one of the rights guaranteed by the Convention* (Chassagnou and Others v France *[GC], nos. 25088/94, 28331/95 and 28443/95, BAILII: [1999] ECHR 22 , §113, ECHR 1999 III).*

23. In *Satakunnan Markkinapörssi Oy and Satamedia Oy v Finland* [2017] ECHR 607, app no 931/13, 27 June 2017,[4] the applicant media companies had sought to publish tax data concerning individuals, which had been made available to the public by the relevant authorities. In Case C-73/07 *Tietosuojavaltuutettu*, EU:C:2008:727) the Court of Justice had concluded that the activities of the applicants constituted the "*processing of personal data"* within the meaning of art 3(1) of Directive 95/46 but that it was a question for the national courts as to whether the applicants' actions could be classified as "*journalistic activities*" within the derogation under art 9 of the Directive. The Finnish Supreme Administrative Court subsequently held that they were not. The Grand Chamber of the European Court of Human Rights concluded that the Finnish courts "*gave due consideration to the principles and criteria as laid down by the Court's case-law for balancing the right to respect for private life and the right to freedom of expression*" and that the Finnish authorities "*acted within their margin of appreciation in striking a fair balance between the competing interests at stake",* finding that there was no violation of the applicant companies' rights under art 10 ECHR (§§198-199).

24. Union law similarly recognises a margin of discretion for national authorities in determining whether a fair balance has been struck between competing rights: see e.g. Case C-112/00 *Schmidberger v Germany* ECLI:EU:C:2003:333 at §§80-82. In Case C-36/02 *Omega* ECLI:EU:C:2004:614, for example, the Court held that the assessment of whether a restriction on a particular economic activity (in this case, games of laser-tag) was proportionate did not require unanimity among Member States, noting, in particular, that it is not necessary for all member States to share the same conception of to *"the precise way in which the fundamental right or legitimate interest in question is to be protected*",

[4] ARTICLE 19, together with the Access to Information Programme and Társaság a Szabadságjogokért, were granted permission to intervene in the proceedings before the Grand Chamber's judgment, arguing that the Finnish Courts failed to strike the correct balance between the right to freedom of expression and the right to privacy. Among other things, the interveners noted that the CJEU had "*adopted a wide definition of journalism*" when deciding the preliminary reference in 2008 and that "*the public interest in publishing such information outweighed privacy considerations and, once publication had taken place, the information could no longer be regarded as inherently private*" (§§118-119).

and that "*the need for, and proportionality of, the provisions adopted are not excluded merely because one Member State has chosen a system of protection different from that adopted by another State*" (§§37-38).

25. In Case C-398/15 *Manni (Approximation of laws Data protection Freedom of establishment)* ECLI:EU:C:2017:197, the applicant had been the sole director of a company struck off the local register of companies in 2005 due to insolvency. Relying on the Grand Chamber's decision in *Google Spain*, he brought proceedings against his local chamber of commerce in order to remove from the companies register any reference to his involvement in the insolvent company. The chamber of commerce relied *inter alia* on the fact that its register was established by Italian law pursuant to Directive 68/151/EEC of 9 March 1968, arts 2 and 3 of which required the "*compulsory disclosure*" of various details concerning liquidated companies to be kept on the register. Following a request for a preliminary ruling, the Court noted the: "*considerable heterogeneity in the limitation periods provided for by the various national laws*" and the corresponding difficulty of identifying a single period from which the inclusion of such data in a companies register would no longer be necessary (§55). The Court found that there was no right for natural persons to obtain the erasure of their personal data from such a register as a matter of principle after a certain period of time, and that this did not amount to a disproportionate interference with fundamental rights under Articles 7 and 8 of the Charter (§57). While the Court noted that there might be specific situations which justify restricting access to personal data entered in such a register upon expiry of a sufficiently long period after the dissolution of the company in question, the availability of such a remedy "*on the basis of a case-by-case assessment*" was a matter for the national legislatures (§§60-61).

26. The corollary of this margin of appreciation enjoyed by national authorities in respect of the balance between the rights to privacy and protection of personal data, on the one hand, and the rights to freedom of expression and access to information, on the other hand, is that national authorities should be slow to require search engine providers to adopt de-referencing measures beyond the boundaries of the state where the affected person resides.

27. Whether or not national authorities are best-placed to assess the existence of a "*pressing social need*" capable of justifying an interference with the rights of internet users in a particular country, national authorities are – by their nature – poorly placed to strike a fair balance between the data protection interests of an individual within their territory and the fundamental rights of internet users in all jurisdictions other than their own. A requirement on search engine providers to adopt – as a matter of course – de-referencing measures on a global or EU-wide basis would interfere with the fundamental rights of internet users outside the national jurisdiction in question and would also abrogate the margin of appreciation enjoyed by the national authorities in those other jurisdictions. Such a requirement would be tantamount to imposing an EU-wide or global consensus, where none exists.

28. The absence of such an international consensus is clear when one considers the comparative approach to de-referencing in jurisdictions outside the EU:

    (1) In **the United States**, a right to de-reference publicly available information on data protection grounds would be unconstitutional: the First Amendment to the US Constitution guarantees the right of people to publish information on matters of public interest that they acquire legally, even in the face of significant interests relating to the private life of those involved (*Smith v. Daily Mail Publishing Co*. 443 US 97 (1979)). This reasoning extends to those situations where there is a significant governmental interest in maintaining the confidentiality of the information in question (*Oklahoma Pub. Co. v. Distr. Court* 430 US 308 (1977), where the information concerns judicial procedures (*Landmark Communications, Inc. v. Virginia* 435 US 829 (1978) and even where the publisher of the information knows that her or his source obtained the information illegally (*Bartnicki v. Vopper* 532 US 514 (2001). The First Amendment also guarantees the right to receive information, including by means of a search engine (see e.g. *Langdon v. Google* 474 F. Supp. 2d 622 (D. Del. 2007)). It is unsurprising, therefore, that United States courts have rejected a right to be forgotten (*Gates v. Discovery Communications Inc* 34 Cal.4th 679,

21 Cal.Rptr.3d 663). To the extent that individual states have adopted de-referencing measures, therefore, these remain extremely limited in scope: see e.g. the California law, called the "Eraser Law," effective as of January 2015,[5] which permits the deletion of content created by minors, and applies only to minors resident in California.[6] The incompatibility of broad de-referencing obligations with US law is especially relevant in the present case given that all major search providers are established in the US;

(2) In **Canada,** the Canadian courts have yet to address directly the question of whether the right to privacy under sections 7 and 8 of the Canadian Charter of Rights and Freedoms may afford a right to de-reference publicly-available information on data protection grounds. The Privacy Act 1983 and the Personal Information Protection and Electronic Documents Act 2000 (PIPEDA) provide the primary statutory framework for the protection of personal data in Canada. In *Alberta (Information and Privacy Commissioner) v. United Food and Commercial Workers, Local 401* [2013] 3 SCR 733*,* however, the Supreme Court of Canada considered whether a provincial privacy law that prohibited trade unions from gathering information on workers breaching a picket line struck "*a constitutionally acceptable balance between the interests of individuals in controlling the collection, use and disclosure of their personal information and a union's freedom of expression*" (§1). Although the Court agreed with concerns that "*new technologies give organizations an almost unlimited capacity to collect personal information, analyze it, use it and communicate it to others for their own purpose*", it concluded that broad restrictions on freedom of expression for the sake of data protection were "*not justified because they are disproportionate to the benefits the legislation seeks to promote*" (§20).

[5] Section 22581(a)(1) of the California Business and Professions Code (as amended by Senate Bill No 568) requires operators of internet services, applications and websites who have actual knowledge that a minor is using its service to permit that minor "*to remove or, if the operator prefers, to request and obtain removal of, content or information posted on the operator's Internet Web site, online service, online application, or mobile application by the user*". Operators are not required to erase such information where any of the conditions under section 22581(b) are met, including where "*any other provision of federal or state law requires the operator or third party to maintain the content or information*" (s22581(b)(1)).

[6] California Senate Bill No. 568, available at https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201320140SB568

A similar approach has been adopted by Canadian provincial courts and tribunals. In April 2016, for instance, La Commission d'accès à l'information du Québec rejected the request of a former employee of a law firm for the removal of all online references to her previous employment, noting that "*Le droit d'une personne de faire rectifier dans un dossier qui la concerne des renseignements inexacts, incomplets ou équivoques n'est pas de l'ordre du « droit à l'oubli » qui vise à effacer des informations des espaces publics*" (§65). If a right to be forgotten were to be recognised, Canadian law would require local courts to determine the scope of protection accorded to competing human rights such as privacy and freedom of expression based on the Canadian social and cultural context and domestic human rights framework (*Douez v Facebook Inc,* 2017 SCC 33, §§58-60).[7] Canadian courts would also expect other jurisdictions to treat Canadian remedies implicating human rights abroad in the same manner (*Google Inc v Equustek Solutions Inc*, 2017 SCC 34, §§45-46; *Google LLC v Equustek Solutions Inc*, Case No 5:17-cv-04207-EJD (2017, US, Calif, N Dist), p 5);

(3) In **Brazil**, in *No. 1.593.873 SMS v Google* (2016/0079618-1) the Superior Tribunal de Justiça rejected an application from a woman who wanted Google to de-reference search results which linked her name to naked images of her. Although the Court recognised that the applicant's rights to privacy and human dignity were engaged, it concluded that it would be inappropriate to require search engines to exercise such a degree of control over indexed content or engage in digital censorship. Instead, the obligations to remove such content must fall on the provider of the content itself.

(4) In **Chile**, the Supreme Court in ruling No. 76.421-2016 of November 22 2016 upheld Google's appeal against a Court of Appeal ruling that its search results – which related to an individual who had been identified as

[7] As the Supreme Court of Canada noted in *Douez*: "*local courts may be more sensitive to the social and cultural context and background relevant to privacy interests of British Columbians, as compared to courts in a foreign jurisdiction. This could be important in determining the degree to which privacy interests have been violated and any damages that flow from this*" (§60).

a gang member by a news website El Mercurio Online – were not protected by the right to freedom of expression. The Supreme Court reversed the Court of Appeal's order, which had required Google to de-index the information by reference to the plaintiff's name. More recently, in case No. 11.746-2017 of 9 August 2017, the Supreme Court upheld a lower court's decision to refuse a de-referencing request from an individual who had been convicted of sexual assault, theft and battery. The appellant had complained that, although his criminal record had been expunged in 2014, news reports from 2008 were still visible online. The Supreme Court explicitly concluded that "*there was a public interest in the information being known and that freedom of information prevails over the right to honor and privacy invoked by the appellant*" ("*es claro que existe un interés público en que la información sea conocida, razón por la cual, la libertad de información prevalece sobre el derecho a la honra y a la privacidad que invoca el recurrente*" (§7));

(5) In T-4296509 *Acción de tutela instaurada por Gloria contra la Casa Editorial El Tiempo* (14 July 2015), the Constitutional Court of **Colombia** declined to recognise a right to de-reference publicly-available information on data protection grounds. In proceedings brought against *El Tiempo*, the country's main newspaper, a Colombian citizen pointed out that his right to privacy had been violated by the publication and Google's subsequent indexing of a newspaper article in which the newspaper had mentioned his participation in a crime. The Constitutional Court, however, held that internet intermediaries such as Google are not responsible for breaches of basic rights by a third party such as a newspaper. Moreover, having accounted for possible offenses against freedom of expression, the Court concluded that ordering a search engine to block results would constitute a form of excessive intervention (*contrôle*) and would turn a search engine into a censor of content posted by the user; this blocking would infringe on the guiding principles of equality of access, of non-discrimination, and of diversity (*pluralisme*) that must be applied to the Internet;

(6) In **South Korea**, the Supreme Court in *Decision 2014Da235080,* decided on 17 August 2016, rejected an application by a university academic for the removal of details of his education and previous employment which had been posted by various third party websites. Among other things, the Court noted that the academic's personal information was already publicly available via his profile on his university's homepage. It therefore concluded that the actions of the third party websites in republishing this information did not breach either the academic's right to self-determation of his personal information nor the provisions of the Personal Information Protection Act;

(7) In **Japan**, the Supreme Court ruled in a case decided on 31 January 2017 that search engine operators were not obliged to de-reference search results of a man who had been arrested in 2011 for child prostitution. The Supreme Court ruled that the content of information, extent of damages, and the social status of the person affected must be considered in making a decision, and that, given all the circumstances of his case, "*the need for protecting individual privacy does not surpass the social significance of retaining search results*";

29. More generally, the NGO Interveners note that none of the other regional courts for the protection of human rights – the Inter-American Court of Human Rights, the African Court of Human and People's Rights, nor the Strasbourg Court – have yet recognised a right to require search engine providers to de-reference publicly-available information on privacy or data protection grounds. The same is true of the other regional systems for human rights protection more generally. The Council of Europe's 1981 Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, for instance, makes no provision for de-referencing.

30. In March 2017, the Office of the Special Rapporteur for Freedom of Expression for the Inter-American Commission on Human Rights noted that "*international human rights law does not protect or recognise the so-called 'right to be forgotten' in the terms outlined by the CJEU in the Costeja case*" and

expressed the view that "*the application to the Americas of a private system for the removal and de-indexing of online content with such vague and ambiguous limits is particularly problematic in light of the wide regulatory margin of the protection of freedom of expression provided by article 13 of the American Convention on Human Rights*".[8] The Special Rapporteur expressed particular concern about a proposed right to de-reference information in the regional context, noting that "[*i]n the Americas, after many years of conflict and authoritarian regimes, individuals and human rights groups have maintained a legitimate claim to access to information regarding governmental and military activity of the past and gross human rights violations. People want to remember and not to forget*".[9]

A general requirement to de-reference information on data protection grounds on an EU-wide or global basis would be inherently disproportionate

31. The NGO Interveners acknowledge that, under EU law, the rights to privacy and protection of personal data are fundamental rights alongside the rights to freedom of expression and access to information. They do not exclude the possibility that the de-referencing of publicly-available information on privacy grounds may in certain limited circumstances be proportionate, e.g. to facilitate the rehabilitation of a juvenile offender of petty criminal laws or to protect the dignity of a victim of crime whose injury attracted public attention against their will. The NGO Interveners nonetheless submit that a general requirement on search engine providers to de-reference publicly-available information on an EU-wide or global basis is an inherently disproportionate interference with freedom of expression as a fundamental right. Specifically:

    (1) As noted above, an obligation on search engine providers to de-reference information beyond the particular jurisdiction in which the request arose would necessarily abridge the possibility that national authorities in other

[8] Office of the Special Rapporteur for Freedom of Expression of the Inter-American Commission on Human Rights, *Standards for a Free, Open and Inclusive Internet* (15 March 2017) at §132.
[9] Ibid, §34.

jurisdictions may strike a fair balance between the competing rights in a different way;

(2) an obligation on search engine providers to de-reference information forecloses the possibility of adopting less-restrictive measures, such as a right to respond or to seek a correction. Such measures allow individuals to present their own version of a story or to rectify factual errors without making the information at issue more difficult—or even impossible—to locate. On the other hand, the right to de-reference permits individuals to remove (*supprimer*) information or make it much less accessible; this infringes the right to freedom of expression in an excessive manner;[10]

(3) in almost all cases, the information in question is likely to be of national relevance only. In the *Google Spain* case, for instance, it is unlikely that anyone outside of Spain (and indeed many people within Spain) would have been interested in the fact that the applicant in that case had been forced to sell his property in 1998 due to social security debts. The effective protection of his rights to privacy and data protection could, therefore, have been achieved by way of a simple national delisting. In such circumstances, a requirement to adopt an EU-wide or global measure as a matter of course would be disproportionate. In this context, the NGO Interveners note that 95% of search engine users use their national domain extension;

(4) such a sweeping measure would not only interfere with the freedom of expression of the publishers of the information subject to de-referencing, but also the right of internet users in every jurisdiction to access the

[10] The NGO Interveners accept that the measure at issue is the de-referencing of information by reference to a particular person's name rather than its outright removal. They are also mindful of the limits of such de-referencing, as highlighted by the High Court of England and Wales in *Cartier International AG and others v British Sky Broadcasting Limited and others* [2014] EWHC 3354 (Ch), in which that Court noted that "*even if search engine providers de-index the URL or even the entire website, it will remain accessible on the internet. In particular, it would remain accessible to consumers who had previously visited the website and either had it bookmarked or could remember its domain name. It would also remain accessible to new consumers who were sent the link either in spam emails or via social networks*" (§214). In most cases, however, the NGO Interveners consider that dereferencing amounts in practice to making the information in question unavailable.

information in question. The NGO Interveners recall that the right to conduct research and access information is a fundamental right,[11] of particular practical importance in States where citizens do not enjoy a high level of human rights protection. Nor does the right to protection of personal data guarantee to individuals the absolute right to control access to information concerning them: see e.g. *Manni,* cited above.

(5) In particular, individuals should not be empowered to restrict access to information concerning them published by third parties, except when this information has an essentially private or defamatory character or when the publication of the information is not justified for other reasons. In other words, personal information may equally "*belong*" to the public, in the sense that the public should be able to access it. For example, the fact that a person declared bankruptcy ten years ago is information concerning not only that person but also her/his debtors. A principle by which an individual would have the ultimate right to control this information does not take account of the broader right of the public to share and receive information even if that information is placed legally within the public domain. Furthermore, if a piece of information is already in the public domain, there exists an interest in preserving it and keeping it available for the goals of research and archiving. The authorities responsible for the protection of data themselves consider that the collection of historical and cultural data—including data of a personal character—must be encouraged and treated as a legitimate method of preserving data beyond the date of operational usefulness. In the opinion of the NGO Interveners, a general requirement on search providers to de-reference information on an EU-wide or global basis is likely to have a considerable and malign effect on the legitimate activities of numerous actors who use personal names over the course of their research—activities of newspapers or NGOs relating to the research of scandals, the denunciation of illegal practices, academic and historical research, or even the research of names of cases before the courts.

[11] See for instance International Federation of Library Associations and Institutions' (IFLA) statement on the impact of the 'right to be forgotten' on libraries: https://www.ifla.org/publications/node/10320

32. The NGO Interveners also consider that a general requirement under Union law to de-reference information on an EU-wide or global basis on data protection grounds, without due regard for freedom of expression or access to information, would set a dangerous precedent that may be adopted in jurisdictions in which such fundamental rights are already under threat. The NGO Interveners urge the Court to have regard not only to the consequences that its decision will have for the fundamental rights of citizens and residents of the Union, but the influence that its decision may have on the practices of regulatory authorities and the courts in numerous other countries, including countries that do not enjoy a high level of protection for fundamental rights.

33. The NGO Interveners also note that there is a practical risk in Union law adopting a sweeping requirement on search providers to de-reference information on an EU-wide or global basis. Courts in other jurisdictions may well decline to give effect to such measures, on public policy grounds.[12] Within the EU itself, the enforcement of the order of a national court obliging a de-referencing measure would be subject to the public policy exception under art 34(1) of Regulation No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters: cf. Case C-559/14 *Meroni v Recoletos Limited* ECLI:EU:C:2016:349 at §42; *Diageo Brands BV v Simiramida-04 EOOD* ECLI:EU:C:2015:471, at §50. Beyond the borders of the EU, the NGO Interveners note that a sweeping, extraterritorial de-referencing obligation adopted without regard to the fundamental right of freedom of expression is liable to be unenforceable on public policy grounds.[13]

C. CONCLUSION

[12] See Case No 5:17-cv-04207-EJD (2017, US, Calif, N Dist), p 5) cited above: a US federal court recently granted Google's request to declare a Canadian global de-indexing order unenforceable in the US. For an analysis of the decision, see here: https://www.eff.org/deeplinks/2017/11/us-federal-court-rejects-global-search-order

[13] See e.g. Article 34(1) of the Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters 2007: "*A judgment shall not be recognised … if such recognition is manifestly contrary to public policy in the State in which recognition is sought*".

34. For the reasons set out above, the NGO Interveners respectfully invite the Court to answer the questions referred as follows:

(1) The ‘right to de-referencing’ does not require a search engine operator, when granting a request for de-referencing, to apply the de-referencing to all of the domain names used by its search engine, irrespective of the place from where the search originated;

(2) The ‘right to de-referencing’ requires a search engine operator, when granting a request for de-referencing, to:

i. remove the links at issue from the results displayed following a search conducted on the basis of the requester’s name on the domain name corresponding to the Member State of residence of the person making the request; and

ii. to use a 'geo-blocking' technique to remove the links at issue in response to any searches deemed to originate from the State of residence of that person, regardless of the domain name used by the internet user conducting the search.

(3) A search engine operator is only required to de-reference such results for searches originating in all of the Member States of the European Union where a national data protection authority or court is satisfied that such a step is necessary and proportionate in all the circumstances.

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GERRY FACENNA QC
ERIC METCALFE
Barristers

29 November 2017