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Response to draft EDPB Guidelines on the right to be forgotten in search engine cases



Executive summary

The right to erasure is central to the General Data Protection Regulation's (GDPR) system of safeguards. Its application is particularly interesting following the *Costeja* judgment,¹ which has clarified its application to search engines. We therefore welcome the European Data Protection Board's (EDPB) draft Guidelines on the right to be forgotten (RTBF) in search engine cases, which build on previous guidance from the Article 29 Working Party (WP29).²

Our members' experience indicates that data protection authorities (DPAs) in most instances confirm the decisions taken *prima facie* by search engine providers when reviewing appeals lodged by data subjects, which represent a small fraction of all RTBF requests received. This shows that the criteria and delicate balance established by *Costeja*, and further fleshed out in DPA decisions and national case law, are working well.

DIGITALEUROPE hence welcomes the EDPB's confirmation that the right to request delisting under Arts 17 and 21 of the GDPR does not change the findings of the Court of Justice of the EU (CJEU) in *Costeja*. For the same reasons, we also welcome the acknowledgement that the criteria for delisting developed by the WP29 remain accurate and applicable to delisting requests.

In our submission, we highlight some aspects of the draft Guidelines that we find would benefit from additional clarity.

¹ Case C-131/12.

² WP 225, Guidelines on the implementation of the Court of Justice of the European Union judgment on 'Google Spain and inc v. Agencia Española de Protección de Datos (AEPD) and Mario Costeja González' c-131/121, November 2014.



Table of contents

- **Executive summary** 1
- **Table of contents** 2
- **Balance of interests** 3
- **Freedom of expression and information** 3
- **A person's name** 4
- **Notice to affected websites** 4
- **Child requests** 4
- **No longer necessary for the search engine's purposes** 5



Balance of interests

It is important to note that the GDPR has not introduced a change in approach to the RTBF following the *Costeja* ruling. In fact, *Costeja* already required search engine providers to balance the rights of the data subjects in light of their particular situation against the public interest in accessing information.³ Importantly, such public interest can constitute a compelling, overriding legitimate ground for the search engine provider to refuse the data subject's request under Art. 21(1).

In this context, we welcome the EDPB's acknowledgement of the relevance of case law from the European Court of Human Rights (ECHR) in press matters when assessing the balance between data subjects' privacy rights and the public's interest in accessing and imparting information.

Freedom of expression and information

In light of the above, we are confused by the draft Guidelines' blanket assertion that exceptions under Art. 17(3) are not suitable to delisting requests.⁴ Notably, such exceptions include processing that is necessary for exercising the right to freedom of expression and information (Art. 17(3)(a)).

As a matter of fact, Section 2.1 of the draft Guidelines directly contradicts this statement as it describes the balance recognised in both the *Costeja* and *Google 2*⁵ judgments and subsequently concludes, correctly, that 'depending on the circumstances of the case, search engine providers may refuse to delist ... content in the event where they can demonstrate that its inclusion in the list of results is ... necessary for protecting the freedom of information of internet users.'⁶

We urge the EDPB to provide a more granular examination of this ground for refusal in the final Guidelines, in particular noting that the *Google 2* judgment has discussed the specific relevance and role of Art. 17(3)(a) in terms of the balance between data subjects' rights and the right to freedom of expression in this context, as opposed to the balancing act under Art. 21(1).

³ See notably para. 81 in *Costeja*. The draft Guidelines, on the contrary, seem to imply otherwise when they state that 'delisting requests *now* imply to make the balance' (p. 8, emphasis added). We suggest this be corrected in the final version.

⁴ P. 10 of the draft Guidelines.

⁵ Case C-136/17.

⁶ P. 12 of the draft Guidelines. The draft Guidelines use the expression 'strictly necessary,' which we believe does not find any basis in either the GDPR or relevant case law.



A person's name

The CJEU's ruling in *Costeja* was clear that the RTBF only affects results obtained from searches made 'on the basis of a person's name' and does not require deletion of links from the indexes of the search engine altogether.

However, the draft Guidelines refer to searches performed 'as a main rule' on a person's name.⁷ If the EDPB's intention here is to emphasise that the RTBF applies to any search query that includes the data subject's name, e.g. name accompanied by another term or combination of terms, that should be clarified in the final Guidelines to avoid confusion. Nevertheless, we note that, after the *Costeja* ruling, courts in different Member States have in multiple cases rejected attempts by data subjects to extend the right to delisting to queries including other terms in addition to the person's name.⁸



Notice to affected websites

The EDPB's position regarding the lack of a legal basis for submitting removal notices about URLs affected by an RTBF delisting to webmasters seems to contradict the explicit requirements set out in other EU legislation.

In particular, the P2B Regulation requires online search engine providers, when altering the ranking order or delisting a particular website following third-party notification, to offer the possibility for the corporate website user to inspect the contents of the notification.⁹

We therefore urge the EDPB to clarify in the final Guidelines that there can be legal grounds under EU data protection law to provide notice to affected websites.



Child requests

The fact that the data subject making an RTBF request is a child is clearly an important factor to consider as part of the search engine's assessment, which balances the privacy rights and the child's special conditions against the right to freedom of expression and information. We consider that the rights of children will most likely outweigh other rights at stake, unless there is an unusually strong public interest at stake.

⁷ P. 4 of the draft Guidelines, which also uses 'in principle' and 'mainly based.' See also 'as a general rule' on p. 6, 'generally' on p. 13 and 'normally' on p. 14.

⁸ See, for instance, Landgericht Köln, judgment 28 O 45/15.

⁹ Art. 5(4), Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services.

However, we believe the draft Guidelines are incorrect in finding that the indexing of information by search engine providers constitutes the direct offering of information society services to a child, hence falling within the scope of Art. 8(1). A search engine's aim when indexing such information is not to offer a service *to the child*. In addition, the legal basis for such processing is not consent, which Art. 8 specifies in relation to children, as clearly recognised elsewhere in the draft Guidelines.¹⁰

The final Guidelines should clarify that, while in practice many RTBF requests involving children likely result in a delisting decision, such requests are assessed based on the requirements of Art. 17(1)(c), not Art. 17(1)(f).



No longer necessary for the search engine's purposes

As recognised by the EDPB's, search engines process data subjects' personal data for the purpose of making information more easily accessible for internet users.¹¹ The draft Guidelines also restate, as established in *Costeja*, that search engines are separate controllers in that the purpose for which they process the personal data is different from the purpose for which the personal data may have originally been published by the webmaster.

Therefore, it does not automatically follow that, if the purpose for which the personal data was originally published by the webmaster no longer exists, the purpose for which search engines process that information has also ceased to exist.

For these reasons, we believe that the ground under Art. 17(1)(a) is as a matter of fact unlikely to apply – the purpose of making information more easily accessible for internet users is still likely to be valid, while Art. 17(1)(a) may be invoked with the webmaster. In this context, the final Guidelines should reflect the fact that, if the webmaster takes action on the basis of Art. 17(1)(a) and removes the personal data from the web pages concerned, such action will automatically be reflected on the search results returned by search engines as soon as there is a recrawling of those pages.¹²

¹⁰ Pp. 6-7 and 12 of the draft Guidelines.

¹¹ P. 6 of the draft Guidelines.

¹² The same applies to consent, which the draft Guidelines correctly state is unlikely to be the legal basis for processing by the search engine provider. The final Guidelines (p. 7) could make it clear that, more than the publisher's action to inform the search engine pursuant to Art. 17(2) or the data subject's invocation of Art. 17(1)(c), it will be the search engine's recrawling of the relevant web pages that will achieve the necessary delisting.

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