Google
Submission to the public consultation on

Guidelines 5/2019 on the criteria of the Right to be Forgotten in the search engines cases under the GDPR (part 1)

Google is thankful for the opportunity to provide comments on the EDPB's draft guidelines (5/2019) on the criteria of the Right to be Forgotten in the search engines cases under the GDPR (part 1) ("**Guidelines**"). We welcome the Guidelines' contribution in ensuring a consistent and uniform application of the right to be forgotten ("**RTBF**") across Europe. Google has invested significant resources since 2014 in ensuring compliance with the judgement of the Court of Justice of the EU ("**CJEU**") in Case C-131/12 ("**Costeja**") and we have gained extensive experience in handling RTBF requests. As in the past, we are eager to share our insights from this long experience in the interests of contributing to the EDPB's reflections and prior to finalizing the Guidelines.

Google has always worked closely with European data protection authorities in implementing RTBF in Search. Shortly after the CJEU's ruling in *Costeja*, we met with the Article 29 Working Party ("**Working Party**") to discuss the challenges of implementing the decision. We also provided detailed responses to the Working Party's questionnaire addressed to search engine providers on RTBF[1] as well as contributed to the Working Party's consultation on the existing guidelines on the implementation of the CJEU's judgement on *Costeja* (WP 225) ("**Working Party Guidelines**")[2]. Given Google's unique pan-EU experience on handling RTBF requests and working with national regulators across the EU Member States, we also look forward to providing input on the announced forthcoming appendix with criteria for handling complaints for refusal to delisting. We very much hope the EDPB will present a draft appendix for public consultation before its adoption.

[1] Response to the Working Party questionnaire dated 31 July 2014, available at: https://docs.google.com/file/d/0B8syaai6SSfiT0EwRUFyOENqR3M/preview.
[2] Article 29 Working Party, Guidelines on the implementation of the Court of Justice of the European Union judgement on Google Spain and Inc v. Agencia Española de Protección de Datos (AEPD) and Mario Costeja González C-131/12, WP 225, 26 November 2014.

Before we provide our detailed comments on the Guidelines, we would like to make some general observations:

Following the CJEU's ruling in *Costeja* in 2014, Google moved quickly to establish a comprehensive compliance program implementing the judgement, working closely with the data protection authorities across Europe. This program includes: the launch of a dedicated webform that allows data subjects to submit a delisting request in a simple and effective manner and that ensures that Google has all of the necessary information required to assess the RTBF request, in particular the specific URL or URLs that are the subject of the delisting request[3]; the establishment of an advisory council comprised of prestigious international experts in different areas of knowledge (data protection authorities, academic scholars, media producers, civil society and technologists)[4]; hiring and forming a large team of specially trained reviewers for handling the requests in the languages of the EU; setting escalation paths to senior experts and regional counsels at Google who vet difficult and challenging delisting requests; and, finally, developing and regularly updating delisting policies and criteria following guidance from national data protection authorities and courts.

Google takes its obligations and responsibilities in operating the RTBF program seriously. In particular, we are acutely aware of all of the fundamental rights that are at stake in operating a successful RTBF program and believe that it is important that there is sufficient transparency over how the right is being exercised and enforced across Europe. To that end, Google's Transparency Report[5] discloses data on RTBF requests received and acted upon by Google in an effort to inform discussions about online content regulation.

In November 2019, Google published a paper "*Five Years of the Right to be Forgotten*" [6] in which we addressed the need for greater transparency by shedding light on how Europeans use the RTBF in practice. Our measurements covered over five years of RTBF delisting requests to Google Search. From a dataset of nearly 3.2 million URLs submitted at the time of review for delisting, we provided a detailed analysis of the

[3] Available at: https://www.google.com/webmasters/tools/legal-removal-request?complaint_type=rtbf.
[4] *See*, https://archive.google.com/advisorycouncil/.
[5] Available at: https://transparencyreport.google.com/eu-privacy/overview.
[6] Available at: https://storage.googleapis.com/pub-tools-public-publication-data/pdf/acb2ee7bae98250e41590012f8cd305df9b86d94.pdf.

countries and anonymized individuals that generated the largest volume of requests; the news, government, social media, and directory sites that are most frequently targeted for delisting; and the prevalence of extraterritorial requests that cross regional and international boundaries.

As set out in the Transparency Report, since 30 May 2014 to date Google has received almost 900,000 delisting requests including nearly 3.5 million URLs in total. Overall 46% of the URLs submitted to Google for delisting have been removed to date. To reveal the complexity of weighing personal privacy against public interest and also to provide an illustration of the types of RTBF requests that Google handles (including some received from European data protection authorities), a section of the Transparency Report is regularly updated with selected anonymized examples and their outcomes.

Our extensive experience in dealing with delisting requests since 2014 indicates that there is no harmonized approach across Europe when it comes to applying the delisting criteria by different national data protection authorities and courts even in cases that have very similar facts. We find that different sensitivities apply in different European countries, which is challenging to navigate for search engine operators handling RTBF requests across the EU. We are therefore grateful for the EDPB's efforts in developing and updating guidelines to ensure a consistent application of the RTBF.

Specific comments regarding the Guidelines

We would also like to provide comments regarding specific parts of the Guidelines. First and foremost, Google is grateful to the EDPB's confirmation in the Guidelines that the introduction of the GDPR has not altered RTBF as set out in *Costeja*. As noted above, Google has invested a significant amount of resources to ensure that our current RTBF process complies with the CJEU's judgement, the Working Party Guidelines and national regulatory and court decisions on individual RTBF cases. While Google's RTBF compliance program is not static and will change over time based on our own experience and additional guidance from data protection authorities, national courts and the CJEU, it is important to acknowledge that the basic principles of RTBF have not been changed by the coming into force of Articles 17 and 21 of the GDPR.

Google is also very pleased to see that the Guidelines refer to the case law of the European Court of Human Rights ("**ECtHR**") relating to press matters as an important source of guidance when carrying out the balancing exercise between the fundamental rights of privacy and freedom of expression and information.

There are, however, some aspects of the Guidelines that we think could be clarified or that would benefit from further context that Google, as a search engine provider handling a significant number of RTBF requests in the EU, can hopefully provide to the EDPB. For ease of reference, we are following the structure of the Guidelines in our comments:

INTRODUCTION

- Number of RTBF complaints

The Guidelines suggest that there has been an increase in the number of complaints concerning the refusal by search engine providers to delist links. We are not privy to the statistics that the EDPB's statement is based on, which is not consistent with Google's own experience. According to Google's Transparency Report, the percentage of URLs that Google has not delisted has not increased over the past 5+ years since the CJEU's ruling in *Costeja*.

We also note that the number of complaints brought against the decisions taken by Google continue to represent a very low percentage of the total number of delisting requests. Specifically, the number of requests and orders to delist URLs received by Google from national data protection authorities following a complaint by a data subject since the CJEU's ruling in *Costeja* represents much less than 1% of the total number of RTBF requests by data subjects handled by us. That is the case despite the fact that every decision to refuse to delist a URL expressly informs data subjects that they can appeal our decision to the relevant data protection authority. In fact, in Google's experience, when they are seized, national data protection authorities agree with Google's decisions in the vast majority of cases, therefore validating Google's initial balancing exercise.

- Scope of the right

Some of the language in the Guidelines could be interpreted to mean that the EDPB considers the RTBF to encompass searches based on terms other than the data

subject's name.[7] The CJEU expressly ruled in *Costeja*[8] that the RTBF is limited to results obtained from searches made against the individual's name and does not extend to other search terms. In addition, there have been several national court judgements that have ruled that RTBF does not encompass terms in addition to the data subject's name.[9] We therefore recommend that the language in the Guidelines is clarified to better align with the CJEU's judgement to avoid creating any confusion among search engine providers, data subjects and national data protection authorities regarding the scope of the RTBF.

At paragraph 10, it should be clarified that the search engine's duty to fully erase the personal data applies only in the exceptional circumstances in which the search engine provider would stop respecting robots.txt to prevent the crawling, or other exclusion protocols to prevent or restrict a page from appearing in search results (noindex directives, noarchive, nosnippet or other similar meta tags) implemented by the webmaster[10].

- Notices to webmasters

We respectfully disagree with the the EDPB's position in the Guidelines that suggests that there is a lack of legal basis for submitting removal notices on URLs affected by a RTBF-delising to webmasters. Firstly, such a position fails to take into account the fact that the notifications of delisted URLs to webmasters operating/owning those URLs do not involve the processing of "personal data". In particular, such notices do not include any data identifying the data subject who made the delisting request, but only the

[7] For example, there is language in the introductory part of the Guidelines stating that the RTBF applies to searches based on the data subject's name "as a main rule" and references to delisting that is "mainly" based on the data subject's name.
[8] *Costeja*, paras. [36], [37], [62[, [80], [82], [87], [89], [94], [96].
[9] See, e.g., Cologne Regional Court, 16 December 2015 [28 O 45/15], in a case in which the claimant was seeking the delisting of articles appearing upon a search for his name and the terms "proKöln" and "proNRW". In that case, the Court held that: "*in case of such a detailed search query, the connection between the Claimant and the parties "proKöln" and "proNRW" is already achieved by the user without the Respondent having produced this connection through its search results*". Along similar lines, see also Court of Perugia, 23 January 2016 in case 6255/14; and Spanish National Court, 22 July 2019 (Appeal 154/2018), in a case in which the data subject was seeking a delisting when searching for his family names (without including his name), available at: http://www.poderjudicial.es/search/AN/openDocument/efbefc6804365c80/20190909.
[10] Note that we use the term "webmaster" in this document to refer to the web publisher and to the operator or person responsible for a website or service.

URLs that have been delisted, and the fact that such delisting was granted as a result of a request made under European data protection law.

Secondly, to the extent that the provision of notifications to webmasters was deemed to constitute the processing of personal data, such processing would be necessary for the purposes of the legitimate interests of search engine providers, the affected webmasters[11] and internet users accessing information under Article 6(1)(f) of the GDPR. Specifically:

- Such notifications ensure that webmasters who have concerns about the interference being placed on the right to freedom of expression and information have sufficient transparency around RTBF decisions affecting their sites so that they can, if appropriate, challenge the delisting decision made by the search engine provider by providing further information or correcting errors or mistakes in the information that was made available to the search engine provider by the data subject at the time of making the delisting request. [12] These notifications therefore assist in ensuring that search engine providers are in a better position to strike a fair balance between the fundamental rights at stake, including the webmasters' and internet users' right to freedom of expression and information, taking into account that, in the vast majority of cases, the decision on whether or not to delist is made by search engines based only on the information provided by the data subject seeking the delisting. Such notices are particularly important in case of abusive or fraudulent delisting requests, which are extremely difficult for the search engine providers to detect but that webmasters are in a better position to identify and assist search engine providers to tackle.

[11] As stressed by the German Federal Constitutional Court in its order of 6 November 2019 - 1 BvR 276/17, when reviewing claims for injunctive relief against search engine operators, courts must take into account the freedom of expression afforded to publishers of online contents, available at: https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2019/bvg19-084.html.

[12] For example, the open manifesto signed by the main Spanish digital media alongside hundreds of journalists make clear that many webmasters seek a right to be involved in the RTBF process: "***The media has a right to know the impact of the "right to be forgotten" on the information that we decide to disseminate through the Internet***. *In particular, we have the right to be notified about content that is blocked or removed contents, upon the application of the "right to be forgotten" by search engines and other online platforms, such as social networks.* ***Once we have been informed of the measures adopted, we undertake to make a responsible use of such information***." See, http://libertadinformacion.cc/decalogo-sobre-periodismo-responsable/.

- The provision of the notices also allows the webmasters to revise the content of their own web pages, where appropriate (e.g., we are aware of several cases in which, as a result of the notices provided by Google, the relevant webmasters have removed all names or other personal data published on their websites).

We also question whether the position taken by the EDPB takes into account the legal requirements arising from 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. The Regulation includes a specific requirement for online search engine providers to offer corporate website users the opportunity to inspect the contents of any third-party notification that has led to the online search engine provider to alter the ranking order or delist a particular website (*see* Article 5.4).

Google also notes that the EDPB's position does not seem to take into consideration the recent decision by the Spanish National Court (the court with the most significant experience in hearing cases concerning RTBF requests, including the *Costeja* case referred to the CJEU and more than 250 proceedings since), which overturned a previous order by the Spanish data protection authority requiring Google to refrain from sending notices to webmasters when granting delisting requests.[13]

Moreover, from a holistic point of view, the EDPB's position fails to acknowledge that the webmaster notification systems are consistent with standard practice for various other types of illegal online content[14], including of more harmful nature such as hate

[13] Ruling delivered on 23 April 2019, Appeal 88/2017, available at: http://www.poderjudicial.es/search/AN/openDocument/3e264256be8041eb/20190524.

[14] *See*, e.g., the Digital Millennium Copyright Act; the German Network Enforcement Act, available at: https://www.bmjv.de/SharedDocs/Gesetzgebungsverfahren/DE/NetzDG.html; the Communication from the European Commission COM(2017)555 on Tackling Illegal Content Online, available at: https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:52017DC0555, which provides that *"In general, those who provided the content* [previously removed] *should be given the opportunity to contest this decision via a counter-notice." and "If the counter-notice has provided reasonable grounds to consider that the notified activity or information is not illegal, the platform provider should restore the content that was removed without undue delay or allow for the re-upload by the user, without prejudice to the platform's terms of service"*, paragraph [4.3.1]; and the European Commission Recommendation (EU) 2018/334 of the European Commission of 1 March 2018 on measures to

speech, defamation or terrorist propaganda[15], and is the preferred option in the majority of the most relevant policies, regulations and guidelines on similar matters.

GROUND TO REQUEST DELISTING

Google is very pleased that the Guidelines make it clear that the right to erasure and right to object pursuant to Articles 17 and 21 of the GDPR do not change the findings of the CJEU in *Costeja*. We also appreciate the fact that the Guidelines make it clear that, in practice, not all the grounds for erasing personal data set out in Article 17 of the GDPR will apply to RTBF requests in the context of search engine providers. These clarifications are helpful for search engine providers like Google who have invested significantly in putting in place a compliance program to ensure compliance with the RTBF based on *Costeja*.

However, in Google's view the Guidelines should more clearly recognise that the right to protection of personal data is not an absolute right (as recital 4 of the GDPR states) and that the rights of internet users that need to be balanced against the protection of individual requester's privacy are *fundamental* rights, as stated in several national rulings and by the ECtHR and the CJEU. For example, the CJEU ruled in Case C-507/17 that: *"*[...] *the* ***right to the protection of personal data is not an absolute right, but must be considered in relation to its function in society and be balanced against other fundamental rights****, in accordance with the principle of proportionality* [...] *Furthermore, the balance between the right to privacy and the protection of personal data, on the one hand, and the freedom of information of internet users, on the other, is likely to vary significantly around the world."* (paragraph [60] (emphasis added)).

In terms of the Guidelines' interpretation of the specific grounds to request delisting, we make the following comments:

- Ground 1: The Right to request delisting when the personal data are no longer necessary in relation to the search engine's processing

effectively tackle illegal content online, sections [9] to [13], available at: https://eur-lex.europa.eu/legal-content/GA/TXT/?uri=CELEX:32018H0334.

[15] A system of notifications to content providers or webmasters is also foreseen in Article 11 of the Proposal of Regulation on preventing the dissemination of terrorist content online, available at: https://ec.europa.eu/commission/sites/beta-political/files/soteu2018-preventing-terrorist-content-online-regulation-640_en.pdf.

Google agrees with the EDPB's acknowledgement that the purpose for which search engines process data subject's personal data in the context of displaying search results is different from the purpose for which the webmaster originally published the personal data. However, in our opinion, it follows from this acknowledgement that it is unlikely that data subjects will be able to invoke Ground 1 (i.e., Article 17(1)(a)) for delisting requests addressed to online search engines. This is because the search engine's purpose for processing the data is to make information on the internet more easily accessible for internet users, regardless of the purpose for which the webmaster may have published the data. Of course, if the purpose for which the webmaster processes the personal data no longer exists, this factor should be taken into account in the balancing exercise under Article 17(1)(c) when assessing whether the information is reasonably current and whether it has become inaccurate because it is out of date, in accordance with the Working Party Guidelines.[16] We would hope to see the final Guidelines making this distinction clearer.

- Ground 2: The Right to request delisting when the data subject withdraws consent where the legal basis for the processing is pursuant to Article 6.1.a or Article 9.2.a GDPR and where there is no other legal basis for the processing

Google agrees with the EDPB's statement that consent is unlikely a legal basis under which online search engines process personal data, which aligns with the CJEU's recent case law as well. Of course, if the data subject withdraws their consent vis-a-vis the webmaster and the webmaster accordingly removes the personal data from the relevant websites, there is no need for the data subject to take additional action to remove that same personal data from search results because such removal by the webmaster would automatically be reflected on the search engine search results after re-crawl of those pages.

- Ground 3: The Right to request delisting when the data subject has exercised his or her Right to object to the processing of his personal data

With regards to the statement of the EDPB that "*delisting requests **now** imply to make the balance between the reasons related to the particular situation of the data subject*

[16] Page [18] of the Working Party Guidelines.

and the compelling legitimate grounds of the search engine provider"[17] (emphasis added), we are concerned that such language in the Guidelines could be interpreted to mean that the RTBF in the context of search engine providers has been altered by the GDPR. Ever since *Costeja*, that right has required search engine providers to carry out a balancing exercise between the privacy rights of the data subject and the public interest in accessing and imparting information, taking into account the data subject's particular situation. We take the view that the public interest in accessing and imparting the information constitutes a compelling legitimate ground of the search engine provider under Article 21(1) of the GDPR.

While it is of course important to consider the particular situation of the data subject as part of the balancing test, including any potential detriment to the data subject's ability to obtain a new job, the Guidelines should more generally confirm that RTBF is not a right to rewrite history, erase certain parts of a professional career or build a tailored past. In that respect, we would respectfully point out that numerous court rulings (especially in Spain, but also in other Member States) have acknowledged that position.[18] In particular, the example given by the EDPB about the detrimental effect on a data subject's ability to find a new job[19] should be given more context to clarify that such a detrimental effect, while relevant to the balancing test, is not determinative given that there may be an overriding public interest in ensuring that the public have access to information about someone's past e.g., to protect themselves against professional misconduct.

It would also be helpful to clarify that, although it is relevant for the balancing exercise if a search result "*undermines* [a data subject's] *reputation in his or her personal life*"[20],

[17] Page [8] of the Guidelines.
[18] Among other judgements, *see* the Spanish Supreme Court ruling 545/2015 of 15 October 2015; and the Spanish National Court rulings of 11 May 2017 (Appeal 30/2016), 2 January 2018 (Appeal 46/2016), 27 November 2018 (Appeal 577/2017), 12 December 2018 (Appeal 476/2017), 2 November 2018 (Appeal 50/2017), 15 March 2019 (Appeal 125/2018) or 29 December 2019 (Appeal 386/2018). In all of the judgements it was stated that RTBF "*is not a right to build a tailored past, forcing website publishers and search engine operators to stop processing personal data linked to facts that are not considered positive. Furthermore, it does not justify* [...] *controlling speech about them, deleting from negative information from the Internet or ranking search results at their own discretion so that the most favorable ones are on top. If such a thesis was admitted, the information mechanisms established to allow citizens to decide in a democratic country would be seriously hampered*". *See* also, by mere way of example, Court of Paris, decision of 5 January 2016 (case 15/55733).
[19] Page [8] of the Guidelines.
[20] Ibid.

such an impact does not necessarily mean that the search results need to be delisted. As was explained in the Working Party Guidelines on the *Costeja* ruling: "*DPAs are generally not empowered and not qualified to deal with information that is likely to constitute a civil or criminal 'speech' offence against the complainant, such as hate speech, slander or libel.* [...] *The status of the information contained in a search result may also be relevant, in particular the difference between personal opinion and verified fact. DPAs recognise that some search results will contain links to content that may be part of a personal campaign against someone, consisting of 'rants' and perhaps unpleasant personal comments. Although the availability of such information may be hurtful and unpleasant, this does not necessarily mean that DPAs will consider it necessary to have the relevant search result delisted.*[21]"

Finally, we note that the current language in the Guidelines could be read to suggest that a search result leading to information containing verified facts should be considered as a factor in support of delisting[22]. As noted in the Working Party Guidelines, there is a distinction between search results that lead to information that relate to an individual's personal opinion and information that appears as a verified fact but the latter would only be a factor supporting delisting if that "verified fact" is actually factually *inaccurate*.[23] We suggest that the language in the Guidelines is amended to ensure that the messaging is clear and consistent with the Working Party Guidelines in this respect.

- <u>Ground 5: The Right to request delisting when the personal data have to be erased for compliance with a legal obligation</u>

The language of the Guidelines concerning Ground 5 (i.e., Article 17(1)(e)) would benefit from further clarity. For example, we understand that this ground could be invoked when a national court has issued an injunction requesting the erasure of personal data. If the EDPB is referring to an injunction issued *against the search engine provider* requiring it to delist the search results, the language of the Guidelines would benefit from clarification in this respect. On the other hand, if the EDPB is suggesting that Article 17(1)(e) could be invoked against a search engine provider also in

[21] Page [17] of the Guidelines.
[22] The Guidelines provide as an example of the classic criteria for handling delisting requests the fact that "*the information reflects clearly an individual's personal opinion and does not appear to be verified fact*", page [8] of the Guidelines.
[23] *See* page [17] of the Working Party Guidelines.

circumstances in which the relevant injunction has been issued *against the webmaster*, we respectfully disagree with such an interpretation of the wording of Article 17(1)(e).

Similarly, in the other example given by the EDPB as to a circumstance in which Article 17(1)(e) could be invoked[24], it is not entirely clear whether the EDPB is referring to the search engine or the webmaster being in breach of the retention period. In either case, it seems very unlikely that this scenario would ever arise in the context of RTBF requests. Specifically, given that search engine providers and webmasters are separate controllers and process the data for different purposes, it does not follow that, if the *webmaster* is in breach of its retention period obligation, a data subject would be able to invoke Article 17(1)(e) against the *search engine provider*.

- Ground 6: The Right to request delisting when the personal data have been collected in relation to the offer of information society services to a child

When we handle RTBF requests, Google always considers whether the data subject is a child and places great weight on the privacy rights and specific conditions of the child in the balancing exercise. In most instances, Google considers that the rights of the child override the other fundamental rights at stake, meaning that in many cases a delisting request concerning a child results in a delisting. However, Google is concerned that the language of the Guidelines could be misinterpreted to suggest that, if a child makes a RTBF request, that request would be assessed based on the criteria set out in Article 17(1)(f), instead of Article 17(1)(c). We do not think Article 17(1)(f) would apply to RTBF requests for two reasons: we respectfully disagree with the EDPB's statement that the processing carried out by a search engine provider likely constitutes the *direct* offering of information society services to a child as covered by Article 8(1) of the GDPR and, in any case, a search engine provider would not be relying on the child's consent as the lawful basis for processing their personal data in the context of delivering search results. We therefore recommend that the Guidelines are clarified to make clear that, while it is likely that RTBF requests concerning children will in most instances result in delisting, such delisting is made based on Article 17(1)(c) and not Article 17(1)(f) of the GDPR.

[24] See page [9] of the Guidelines, which states that: "*Compliance with a legal obligation may result from…the mere breach by the data controller of the retention period.*"

EXCEPTIONS TO THE RIGHT TO REQUEST DELISTING

Google has difficulty in understanding the basis on which the EDPB is taking the position that the exceptions under Article 17(3) do not apply in RTBF requests made against search engine providers. That position contradicts the CJEU's ruling in Case C-136/17 ("**Google 2 judgment**" as it is referred to in the Guidelines). We draw attention to the following paragraphs of the Google 2 judgement:

> [56] *"However, Article 17(3) of Regulation 2016/679 states that Article 17(1) of the regulation is not to apply to the extent that the processing is necessary on one of the grounds set out in Article 17(3). Among those grounds is, in Article 17(3)(a) of the regulation, the exercise of the right of freedom of expression and information."*
>
> [57] *"The circumstance that Article 17(3)(a) of Regulation 2016/679 now expressly provides that the data subject's right to erasure is excluded where the processing is necessary for the exercise of the right of information, guaranteed by Article 11 of the Charter, is an expression of the fact that the right to protection of personal data is not an absolute right but, as recital 4 of the regulation states, must be considered in relation to its function in society and be balanced against other fundamental rights, in accordance with the principle of proportionality (see also judgment of 9 November 2010, Volker und Markus Schecke and Eifert, C-92/09 and C-93/09, EU:C:2010:662, paragraph 48, and Opinion 1/15 (EU-Canada PNR Agreement) of 26 July 2017, EU:C:2017:592, paragraph 136)*".
>
> [59] "*Regulation 2016/679, in particular Article 17(3)(a), thus expressly lays down the requirement to strike a balance between the fundamental rights to privacy and protection of personal data guaranteed by Articles 7 and 8 of the Charter, on one hand, and the fundamental right of freedom of information guaranteed by Article 11 of the Charter, on the other.*"

The EBPB's position also contradicts post-GDPR case law by national courts, which have regularly taken into account Article 17(3) of the GDPR when deciding matters concerning delisting requests *vis-à-vis* search engines in relation to content from news publications. For instance:

- In rejecting a claim brought against Google for the delisting of articles from reputable news sources, the Frankfurt Court held: "*Art. 17(3) GDPR implements the general provision of the case law of the CJEU, pursuant to which the (fundamental right) protection of personal data of data subjects within the scope of the GDPR must always be appropriately balanced with the fundamental rights and interests of the controller and of third parties. These fundamental rights include, in particular, the freedom of expression, especially of journalists and scientists, artists and writers, and also the fundamental right of access to information pursuant to Art. 11 para. 1 Charter of Fundamental Rights of the EU*".[25] Among the factors considered by the court in deciding the case was the fact that the information that the claimant sought to delist concerned press articles that are protected by freedom of expression.

- The Brussels Court acknowledged on 4 November 2019 in case 19/2684/A concerning the request to delist links to old press articles discussing the claimant's past that: "*With regard specifically to the right to erasure, Article 17.3.a) GDPR states that it does not apply to the extent that such processing is necessary for exercising the right to freedom of expression and information. Article 17.3.a) GDPR therefore provides for a general exception to the right to erasure where processing is necessary for freedom of expression and information*".

- The Spanish National Court has also ruled in many decisions overturning previous delisting orders issued by the Spanish Data Protection Agency, including those of 2 January 2018 (Appeal 46/2016), 12 December 2018 (Appeal 476/2017), and 21 June 2019 (Appeal 106/2018), that: "*It should be noted that Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 expressly exempts, in Article 17(3), the right to be forgotten in cases where processing is necessary: (a) for exercising the right of freedom of expression and information*".

In addition to these general comments relating to the application of Article 17(3) to RTBF requests made against service engine providers, Google would like to make the following specific observations regarding the Guidelines:

[25] Frankfurt Court, decision of 6 September 2018 (16 U 193/17).

- Processing is necessary for exercising the right of freedom of expression and information

It should be clarified that the balancing act that is an inherent part of Article 17 of the GDPR includes not only the public's right to access information, but also the right to impart information by webmasters, including by means of search engines. This position has been confirmed by national courts, including most recently by the German Federal Constitutional Court:

> *"The assessment of the request for protection vis-à-vis a search engine operator requires a comprehensive balancing of the conflicting fundamental rights of the person concerned and the search engine operator,* ***including the fundamental rights of the content provider*** *and the public's interest in information.* [...] *the public's interest in information and above all* ***the fundamental rights of third parties to be included are of greater importance*****"**. *"In the present case, the freedom of expression of the content provider that is affected by the decision as a directly affected fundamental right is to be considered in the balancing*". *"* (paragraphs [120] and [121])[26]

The Guidance seems also to wrongly suggest that the data subject's right to privacy prevails in general over the fundamental rights of internet users to access information. The European and national case law has made clear that all fundamental rights at stake in the balancing exercise should be given equal weight. For instance:

- **The German Federal Constitutional Court has recently acknowledged that the conflicting fundamental rights must be balanced on an equal basis**. In particular, it held that "*there is no presumption of a primacy of the protection of the personality right here, but the equal rights have to be balanced on an equal footing*" and "*there is neither any indication in the Charter of Fundamental Rights itself nor in the case law of the European Court of Justice that a balance between the protection of personal rights on the one hand and freedom of*

[26] German Federal Constitutional Court, order of 6 November 2019 in 1 BvR 276/17, available at: https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2019/11/rs20191106_1bvr027617.html;jsessionid=B6EF7EF7E92EBF17A4C7EE433F612EF7.2_cid394.

expression is not fundamentally equal" [27].

- The High Court of England and Wales held in a judgment of 13 April 2018 that "*the balancing process in any individual delisting case is ordinarily, as a matter of principle, to be entered into with the scales in equal balance as between delisting on the one hand and continued processing on the other*"[28].

As mentioned above, Google welcomes the reference in the Guidelines to the balance operated by the ECtHR between freedom of expression and information on one hand and the right to respect one's private life on the other hand. However, in addition to discussing judgment *M.L. and W.W. vs Germany* of June 28th, 2018, the Guidelines would benefit from other examples of the ECtHR case law, such as the judgment in *Tamiz v. UK* of 19 September 2017, which recognised the important role of internet service providers in facilitating access to information and the debate on a wide range of political, social and cultural topics (paragraph [90]), and the judgment in *Magyar JETI Zrt v. Hungary* of 4 December 2018, which expressly acknowledged the role of the Internet, and hyperlinking in particular, in enhancing the public's access to news and information (paragraphs [73] and [74]).

- Processing is necessary for archiving purposes in the public interest, scientific or historical research purposes, or statistical purposes

Google considers that the EDPB goes too far when it suggests that the possibility that the suppression of search results could significantly affect research purposes or statistical purposes pursued by users of the search engine provider's service is not relevant for the application of this exemption.

Closing remarks

We look forward to continuing to work with the EDPB in refining the consistent implementation of RTBF across Europe. In particular, we look forward to contributing to the criteria for handling complaints for refusals by ensuring that such criteria takes into account complex areas in which the balance of interests is particularly

[27] German Federal Constitutional Court, order of 6 November 2019 in 1 BvR 276/17, already mentioned above, at paragraphs [121] and [141].
[28] High Court of England and Wales, 13 April 2018, [2018] EWHC 799 (QB), paragraph [132] available at: https://www.judiciary.uk/wp-content/uploads/2018/04/nt1-Nnt2-v-google-2018-Eewhc-799-QB.pdf.

challenging, as informed by Google's deep experience in handling a very significant number of delisting requests since 2014.

Respectfully submitted,

Google LLC