

The right to be forgotten – the road ahead

If we are serious about enabling individuals to have more and better control of their personal information online, we need to rethink online space in new, conceptual ways

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Google's advisory council held its fourth public consultation on 30 September in Warsaw, inviting experts and the public to discuss the outcome of the recent "right to be forgotten ruling" made by the European Court of Justice. Luciano Floridi is one of 10 people on the council and is documenting each consultation.

I closed my Paris report explaining that the ruling by the European Court of Justice (ECJ) against Google raises a complicated issue about territoriality. Several interesting contributions in Warsaw addressed this point.

The ECJ's ruling currently affects only search engines operating in Europe. The same personal information no longer accessible through European search engines, such as Google.co.uk, is still accessible through non-European search engines, such as Google.com or DuckDuckGo.

The ruling may seem as ineffective as closing the door of the house while leaving all the windows open. Yet the reality is more complicated, for at least three reasons.

First, consider the "power of default". Although users can easily bypass the restriction, according to Google very few do, preferring to rely on local services in their languages. So, if the ECJ's goal was to "slow down" the accessibility of personal information online that an individual wants to see de-linked, this, at least, seems to have been achieved.

Recall that now Google displays the removal notification at the bottom of the search results page for all name searches in Europe (except name searches for public figures, who the ruling specifies are not eligible for removals). As the ruling gets discussed and people start seeing removal notices at the end of searches about individuals, savvy users may develop new search strategies.

Second, it is debatable whether the scope of the ruling should be pan-European, as it is now, global, or just national. A global approach to de-linking would be more coherent with the ruling. We would be closing the door and all the windows as well. However, global de-linking is both unfeasible (because countries are not likely to agree) and dangerous (because illiberal countries should have no right to impose a global de-linking ban on personal information).

A national approach might be preferable. Google already deals with comparable cases of defamation complaints on a national basis only. Furthermore, we saw that the “power of default” works well at the national level. It might have been sufficient to de-link “Mario Costeja González” from Google.es only. De-linking it from other European search engines seems unnecessary because Spanish users are no more likely to use them than they are to use Google.com.

Third, any geographical solution may be outdated. The territoriality (or extraterritoriality) problem is due to a conflict between two kinds of spaces - one physical and the other logical.

The ECJ’s ruling is based on an offline physical space: the Westphalian system of sovereign states with controllable borders, which has served us so well for so long.

In contrast, search engines operate within an online logical space of nodes, links, protocols, resources, and services. It is a new space that we are still learning to manage. The difference between the two spaces is like the difference between the physical size of a chessboard and its logical structure of 64 squares in eight rows and eight columns arranged in two alternating colours.

A physical space can be *constrained* by rules: think about the problem of immigration across physical borders. But a logical space is *constituted* by rules. Think of a pawn, which can move in a given way on the chessboard because the rules say so, not because of some physical possibilities or impediments.

The accessibility of some personal information online belongs to a logical space. If there are problems in the logical space, this is probably where they should be solved.

I left Warsaw convinced that de-linking at the national or European level is a Westphalian solution to a post-Westphalian problem. This is unsurprising. We built the internet exactly in order to ensure that, as a logical network, it would withstand any degree of destruction of its physical infrastructure due to a nuclear attack.

If we are serious about enabling individuals to have more and better control of their personal information online, we need to think in terms of designing the right constitutive rules of the logical space of online information. Not easy, but policies about firewalls, robot.txt files, or IP addresses show that we have already begun the process.

The next question is who should be in charge of such deep transformations. I am curious to hear what experts may suggest about this in Berlin.

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