FUNDACIÓN PARA LA LIBERTAD DE PRENSA

To:

Court of Justice of the European Union

Luxemburg

November 27, 2017

Reference: Request for a preliminary ruling from the Conseil d'État (France) lodged on 21 August 2017 — Google Inc. v Commission nationale de l'informatique et des libertés (CNIL) (Case C-507/17)

The Foundation for Press Freedom (FLIP) is a non-governmental organization, with over 15 years of working experience on the defence of freedom of expression and Access to information. FLIP makes an ongoing monitoring on the violations against press freedom in Colombia. FLIP does research and training work, as well as incidence on the design of public policies, and also gives legal advice on violations against freedom of expression. FLIP is part of the civil society organizations registered with the OAS, is a member of International Freedom of Expression Exchange network (IFEX) and is a part of the Regional Alliance for Freedom of Expression and Information.

As a part of its work, FLIP has found interest in taking part in law matters that may turn into interferences to freedom of expression online. By this reason, during 2014, FLIP had an active participation in the process of "Gloria" against El Tiempo, which had Google Colombia as a third party with eventual interests[1]. Based on this, we filed an amicus curie to the Conseil d'Etat in order to bring some considerations that we hope to be of interest and use. As a result, we have been included as *other parties* in the referral made by the Conseil d'Etat to the Court of Justice of the European Union(CJEU).

This new submission will have the same purpose. We will address the questions that were referred to the Court through the lenses of the particularities of internet and the rules of international law. We invite the CJEU to take this considerations in order to: 1. Not harming the correct functioning of internet and; 2. Comply to rules of international law. The latter must be assessed in three different levels: 1. European Union level; 2. Council of Europe level; International level.

Question 1, concerning the territorial application of the 'right to de-referencing' as established by the CJEU in its judgment of 13 May 2014 outside the territorial scope of directive [95/46/EC] of 24 October 1995.

[1] Constitutional Court of Colombia, Judgment T 277 of 2015.

We believe that, in order to answer Question 1, the Court should take into account that the particularities of internet as an enhancing tool for human rights around the world requires that interferences within its functioning are undertaken carefully. Moreover, it has to been taken into account that acts like applying Right to de-referencing Measures are an interference to freedom of expression, as their purpose is to limit access to and diffusion of a content. This means an interference to the right to "receive and impart information and ideas" as is granted in articles 11 of the Charter of Fundamental Rights of The European Union, article 10 of the European Convention on Human Rights and the right to "seek, receive and impart information and ideas" as is granted in Article 19 of the International Covenant on Civil and Political Rights.

These interferences may be legally accepted in limited cases. An example of it is the interpretation given by the Court of Justice of the European Union(CJEU) in case C-131/12. In that sense, it is relevant to make reference to what was said by the United Nations (UN) Special Rapporteur on Freedom of Opinion and Expression, the Organization for Security and Co-operation in Europe (OSCE) Representative on Freedom of the Media, the Organization of American States (OAS) Special Rapporteur on Freedom of Expression and the African Commission on Human and Peoples' Rights (ACHPR) Special Rapporteur on Freedom of Expression and Access to Information in the Joint Declaration on Freedom of Expression and The Internet:

> When assessing the proportionality of a restriction on freedom of expression on the Internet, the impact of that restriction on the ability of the Internet to deliver positive freedom of expression outcomes must be weighed against its benefits in terms of protecting other interests.

Such a reasoning is compatible with what has been expressed by CJEU caselaw. The CJEU has recognized in GS Media BV v Sanoma Media Netherlands BV, Playboy Enterprises International Inc., Britt Geertruida Dekker (Case C-160/15) 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."

Taking this into account, the CJEU must consider which are the implications to the development of internet of a ruling that permits requests as the ones granted by case C-131/12 to have effect in countries different that the one in which the person of interest makes the request. A concern that may fall is whether this kind of decisions may affect the decentralized character of internet which, as said by Mark Poster[2]:

> The Internet is above all a decentralized communication system. Like the telephone network, anyone hooked up to the Internet may initiate a call, send a message that he or she has composed, and may do so in the manner of the broadcast system, that is to say, may send a message to many receivers, and do this either in "real time" or as stored data or both. The Internet is also decentralized at a basic level of

[2] Mark Poster, CyberDemocracy: Internet and the Public Sphere, University of Carolina, Irvine, 1995.

> organization since, as a network of networks, new networks may be added so long as they conform to certain communications protocols.

A decision that allows worldwide orders of Right to de-referencing will probably end this paradigm of decentralization. It would end up with a single country having control of which contents may be removed of search engines, turning the architecture of internet into a hierarchy, instead of a network.

The second matter that must be taken into account is related to international law principles. First of all, it must be remembered that Article 2(1) of the Charter of the United Nations states that "The Organization is based on the principle of the sovereign equality of all its Members". This provision is related to the principle by which each country is subject to its own authorities' jurisdiction, with exceptional limitations. The latter is strongly linked with the principle of non-intervention which, as said by the International Court of Justice in case Nicaragua v. United States of America[3]:

> [T]he principle forbids al States or groups of States to intervene directly or indirectly in internal or external affairs of other States. A prohibited intervention must accordingly be one bearing on matters in which each State is permitted, by the principle of State sovereignty to decide freely.

As a wrap up of the previous arguments, what has been said by Vaughan Lowe[4] about the principle of sovereignty may be of use:

> That principle of sovereignty underpins national legal systems: it answers the question, who's in charge here? It affirms the right of each State to be different, so that conduct that is lawful in one, such as smoking cannabis or stoning someone to death, may be punishable as a crime in another.

Neither Colombia, nor Spain, nor for that matter Google, should dictate what information about a person should be restricted within the territory of France. That is a matter for France. Likewise, it is for Colombia to decide what information about a person should be accessible in its own territory.

If question 1 were to be answered as granting a right to de-referencing outside of the territorial scope of directive [95/46/EC] of 24 October 1995, Google and European authorities would turn into global judges for de-referencing requests. Should Google or a judge in France decide on the de-referencing of a link to news articles about the massacres or the forced disappearance of people in Argentina, Chile, Colombia, Guatemala, Honduras, El Salvador, among others? Are these persons the ones entitled to de-reference a link relating to the coup d'états in Argentina, Brazil, el Salvador, Chile, Uruguay, Venezuela, among others? It is hard to find reasons for an affirmative answer. As happened to Europe in the 1950s and 1960s, Latin America has passed through a long and complex

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[3] International Court of Justice, Case concerning military and paramilitary activities in and against Nicaragua (Nicaragua v. United States of America), Judgment of 27 June 1986, para 205.

[4] Lowe, A. V., International Law, OUP Oxford, 2007.

process of strengthening its democracy during the last decades. Memory has played a fundamental part of that process.

Another regard that must be taken into account comes from the Vienna Convention on the law of treaties, which stablishes the principle of “pacta sunt servanda” in its Article 26. According to this, “Every treaty in force is binding upon the parties to it and must be performed by them in good faith”. Moreover, article 34 of the same convention states that “A treaty does not create either obligations or rights for a third State without its consent”. This principle would be affected if orders of de-referencing made in the European Union are deemed to have effect of the territorial scope of Directive [95/46/EC] of 24 October 1995. The latter finds its basis in the fact that third parties would be applying decisions based on treaties which they are not part of.

The reasoning of the CJEU should recognize the diversity that each legal system of different countries around the world have. Not all the countries give the same treatment to data protection as the European Union. An example of it is the decision given by the Colombian Constitutional Court in the case mentioned above, where was stated that the reasoning and ruling of case C-131/12 would be against the Colombian Constitution. The main ground for it is that, according to that Court, the guarantees of freedom of expression protected by article 20 of the Constitution, would be derogated. In the same sense, it must be recalled that the Inter American Court of Human Rights has reasoned that American Convention on Human Rights grants a higher level of protection to freedom of expression than the one contemplated in the European Convention on Human Rights[5].

> [T]he guarantees contained in the American Convention regarding freedom of expression were designed to be more generous and to reduce to a bare minimum restrictions impeding the free circulation of ideas.

By saying this, we don’t intend to bring a value judgment on which legal system is better or which one has the better reasoning. Our intention is to recall on the differences of legal systems as a decisive factor. An example can be seen by comparing two decisions regarding the application of prior restrains on freedom of expression.

The first case is Otto Preminger Institut v Austria. In this case, the movie *Council of Heaven* was forfeited for falling into the definition of the criminal offence of disparaging religious precepts. The European Court of Human Rights considered that there was no violation to freedom of expression under the European Convention on Human Rights. The grounds for this decision were that the Austrian authorities acted to ensure religious peace and prevent attacks on the catholic religious beliefs in the region where the movie was forfeited.

The second case is Olmedo Bustos et al. v Chile. In this case, the movie *The last temptation of Christ* was forbidden for public exhibition for being allegedly offensive to the figure of Jesus Christ. The Interamerican Court of Human Rights considered that there was

[5] I/A Court H.R., Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 American Convention on Human Rights). Advisory Opinion OC-5/85 of November 13, 1985. Series A No. 5. para. 50.

a prior censorship incompatible with freedom of expression under the American Convention on Human Rights.

It follows from the foregoing that the right to de-referencing, as established by the Court of Justice of the European Union in its judgment of 13 May 2014 on the basis of the provisions of Articles 12(b) and 14(a) of Directive [95/46/EC] of 24 October 1995 should not be interpreted as applying to searches initiated on the basis of the requester's name conducted from a place outside the territorial scope of Directive [95/46/EC] of 24 October 1995.

Question 2 and 3 regarding the application of the right to de-referencing in different Member States of the European Union

Questions 2 and 3, in the end, refer to the principle of respect of the different legal systems and traditions of the Member States. In our consideration, an application of a right to de-referencing in Member States were a request was not done would pose serious issues regarding that principle.

This principle can be found in Article 4(2) of the Treaty on the European Union(TEU), according to which:

> The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State.

In the same line, Article 67 (1) of the Treaty on the Functioning of the European Union (TFEU) establishes that

> The Union shall constitute an area of freedom, security and justice with respect for fundamental rights and the different legal systems and traditions of the Member States.

Cases regarding the right to de-referencing bring conflicts of the right to freedom of expression and the right of the public to access information against the rights to data protection and privacy. This conflict, as can be concluded from case C-131/12, must have an assessment of the role played by the data subject in public life in order to determine if the interference with that subject's rights is justified by a preponderant interest of the general public.

A particular issue regarding this assessment can be found in the Case Law of the European Court of Human Rights[6], which has referred that, according to Article 10 (2) of the European Convention on Human Rights, States have a margin of appreciation when implementing admissible restrictions to freedom of expression. The main reasoning behind

[6] See Handyside vs United Kingdom (Application no. 5493/72), September 7 1976

the margin of appreciation is that States fashion restrictions and penalties as envisioned in that article "in the light of the situation obtaining in their respective territories; they have had regard, inter alia, to the different views prevailing there about the demands of the protection of morals in a democratic society" [7].

This doctrine finds its relevance for the reasoning of the case n Article 6(3) TFEU, which establishes:

> Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.

Moreover, this doctrine can be complemented with Recital 9 of Directive [95/46/EC] of 24 October 1995, according to which "Member States will be left a margin for manoeuvre, which may, in the context of implementation of the Directive, also be exercised by the business and social partners". We recognize that the margin of appreciation doctrine is not exactly the same thing as the concept of margin of manoeuvre under European Union Law, but we believe that a conjunctive interpretation is not barred.

Based on the above, the application of a right to de-referencing in Member States different than the one where the request was done would imply several difficulties. First, the search engine or the data protection authority in which the request was done would have to assess whether the content is of a preponderant general public interest in the other Member States of the European Union, leaving aside for a moment other countries outside of Europe. Second, even if it is considered that such an assessment should be done, it would bar the intervention from other national authorities and societies of the European Union. Are the conditions for the removal of a specific link in France the same as in the Netherlands or Spain? Whether the question is yes or not, each authority and legal system are the ones to decide, since they have the first-hand view of the context for the particular link in their country. Otherwise, national legislation and authorities would end up in constant competition.

It follows from the foregoing that the right to de-referencing, as established by the Court of Justice of the European Union in its judgment of 13 May 2014 on the basis of the provisions of Articles 12(b) and 14(a) of Directive [95/46/EC] of 24 October 1995 should be interpreted as meaning that a search engine operator is required, when granting a request for de-referencing, only to 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 EU Member State in which the request is deemed to have been made. This should also be interpreted in the sense that the grant of a request for de-referencing should only have effects for searches on IP addresses deemed to be located in the Member State were the search was conducted.

We on FLIP believe in the democratic principles that build the European Union Law. Moreover, we understand that data protection and privacy are fundamental values for the European Union. This should also be coupled with the European Union's tradition of

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[7] Id., para. 57.

respect for other cultures and diversity. We think that a decision falling into the arguments mentioned above is possible and compatible with such democratic principles, values and tradition.

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