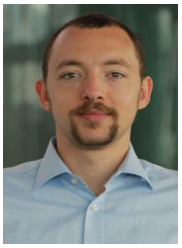
Implementing the right to be forgotten: towards a co-regulatory solution?



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Insufficient attention has been put into the enforcement of the Right To Be Forgotten as a measure of private regulation. In this working paper, we begin sketching a regulatory solution to the above challenges which builds upon the efficiency of private regulators, while at the same time aiming to ensure that these operate within a rule of law framework offering adequate safeguards for the pursuit of the public interest.

In *Google Spain*[1], the CJEU established a so called "right to be forgotten" (RTBF), i.e. for individuals to obtain the erasure from the results of search engines prompted by a search for their name, whenever the information linked in the results is "inadequate, irrelevant or no longer relevant, or excessive".[2] This judgment is revolutionary not only for the far-reaching consequences of the principle it affirms, but also because it leaves in the hands of a private entity (though subject to possible appeals) the responsibility of implementing such principle.

Yet, insufficient attention has been put into the enforcement of the RTBF as a measure of private regulation. Governance studies teach us that private regulators should operate within limits, designed to prevent potential abuses and adequately safeguard the public interest. A vast body of literature defines principles of good governance in the context of private regulatory solutions, such as access, openness, procedural fairness, transparency, participation and effectiveness.[3] A close observance of these principles is crucial when delegation of private law-making triggers extra-territorial effects, as is currently the case under the implementation of the RTBF taken by the French Data Protection Authority (DPA), the Commission Nationale de l'Informatique et des Libertés (CNIL).[4] In this working paper, we begin sketching a regulatory solution to the above challenges, which builds upon the efficiency of private regulators, while at the same time aiming to ensure that these operate within a rule of law framework offering adequate safeguards for the pursuit of the public interest.

I. THREE CONTROVERSIAL ISSUES IN THE IMPLEMENTATION OF THE RTBF

A. Discretion in adjudicating private claims

Despite the revolutionary nature of the obligation imposed on search engines to address individual requests for de-listing, major industry players such as Google, Mi-

1. CJEU Google Spain SL, Google Inc. v. Agencia Española de Protección de Datos (AEPD), Mario Costeja González, Case C-131/12, ECLI:EU:C:2014:317
2. Id., para. 94.
3. E.g. DC Esty, 'Good Governance at the Supranational Scale: Globalizing Administrative Law' (2006) 115 Yale Law Journal 1490; D Curtin and L Senden, 'Public Accountability of Transnational Private Regulation: Chimera or Reality?' (2011) 38 Journal of Law and Society 163; C Scott et al., 'The Conceptual and Constitutional Challenge of Transnational Private Regulation' (2011) 38 Journal of Law and Society 1.
4. See a summary of the relevant decisions at https://www.cnil.fr/fr/node/15790 and https://www.cnil.fr/en/right-delisting-google-informal-appeal-rejected-0; See also I Falque Pierrotin, 'Pour un droit au déréférencement mondial', Débats du Monde (29 December 2016), at https://www.cnil.fr/fr/pour-un-droit-au-dereferencement-mondial.

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crosoft Bing and Yahoo! implemented the ruling quite swiftly[5] , readily making available a web form for users to submit their requests. Despite some commonalities, the forms differ widely in terms of the substantive information they require in submission of a delisting request. For example, while Google and Yahoo provide a blank space in the form for individuals to explain how the page relates to the data subject and why its content is "unlawful, inaccurate, or outdated"[6] Microsoft Bing poses a number of additional questions. Specifically, claimants must indicate (1) whether they (and presumably anyone on behalf of whom the application is made) are public figures; and (2) whether they have or expect to have a role in the local community or more broadly that involves leadership, trust or safety.[7] Furthermore, claimants are asked to qualify the information that Bing is requested to "block" as (a) inaccurate or false; (b) incomplete or inadequate; (c) out-of-date or no longer relevant; or (d) excessive or otherwise inappropriate. They are also invited to indicate why their "privacy interest" should outweigh the public's interest in free expression and the free availability of information. Last, but not least, they are given the opportunity to upload supporting documentation.

Ostensibly, Microsoft Bing's procedures incorporate more safeguards to prevent the submission of imprecise, unfounded or unsubstantiated requests. Perhaps this contributes to the higher success rate of requests submitted to Microsoft Bing (67%) than those submitted to Google (43%). There are several factors however that influence the outcome of requests, and thus in the absence of the publication of more detailed statistics and of the criteria used by each search engine in the adjudication process (as "strongly recommended" by the Article 29 Working Pary (A29WP[8]), that remains a speculation. The discrepancy between web forms illustrates in simple terms a central problem in the implementation of the RTBF: a significant amount of discretion is left in the hands of search engines to determine the contours of the RTBF[9].

This discretion is problematic when it comes to balancing between conflicting rights at stake. The CJEU only gave some very general guidance as to how this balancing should be carried out, requiring a "fair balance" between the legitimate interests of searchers and the data subject's privacy and data protection rights. More controversially, the CJEU stated that the latter rights "override, as a rule, not only the economic interest of the operator of the search engine but also the interest of the general public in having access to that information upon a search relating to the data subject's name".[10] However- the Court continued- that would not be the case "if it appeared, for particular reasons, such as the role played by the data subject in public life, that the interference with his fundamental rights is justified by the preponderant interest of the general public in having, on account of its inclusion in the list of results, access to the information in question".

This formulation has been criticized for the insufficient attention given to freedom of expression[12] , in particular in casting the *right* to access to information merely as an *interest*, much like the economic interest of the search engine, rather than recognizing it as a constituent part of the fundamental right to freedom of expression protected under article 11 of the Charter of Fundamental Rights. More generally, it is arguable that the court could have recognized the instrumental role

5. According to press coverage, Google made its form available in June 2014, and Microsoft in July of the same year. It is less clear when the form first appeared on Yahoo!, although it was reported to be already in place on December 1st, 2014. See S Schechner, 'Google Starts Removing Search Results Under Europe's 'Right to be Forgotten', WSJ (June 26, 2014) at https://www.wsj.com/articles/google-starts-removing-search-results-under-europes-right-to-be-forgotten-1403774023; and A Griffin, 'Microsoft's Bing and Yahoo search engines have started to fulfil the controversial requests', The Independent (December 1st, 2014) http://www.independent.co.uk/life-style/gadgets-and-tech/news/microsoft-and-yahoo-join-google-in-deleting-search-results-under-right-to-be-forgotten-ruling-9896100.html
6. For Google, see https://www.google.com/webmasters/tools/legal-removal-request?complaint_type=rtbf&visit_id=1-636297647133257433-1626206613&rd=1; for Yahoo, see goo.gl/3qUdTe.
7. See https://www.bing.com/webmaster/tools/eu-privacy-request.
8. See Guidelines on the implementation of the Court of Justice of the European Union Judgment on "Google Spain and Inc v. Agencia Espanola de Proteccion de Datos (AEPD) and Mario Costeja Gonzales" C-131/12 (hereinafter, A29WP Guidelines).
9. See in this sense also J Powles, "The case that won't be forgotten» (2015) 47 Loyola University of Chicago Law Journal 583, 595.
10. Google Spain, supra n 1, para 97.
11. M Peguera, supra n 21, p. 551. S Kulk, F J Zuiderveen Borgesius. 'Google Spain v. González: Did the Court Forget About Freedom of Expression?', European Journal of Risk Regulation 5 (3) (2014), 389, 595; J Powles, supra n 9, 591; E Frantziou, 'Further Developments in the Right to be Forgotten: The European Court of Justice's Judgment in Case C-131/12, Google Spain, SL, Google Inc v Agencia Espanola de Proteccion de Datos', 14 Human Rights Law Review 761 (2014), 769; M L Rustad and S Kulevska, 'Reconceptualizing the Right To Be Forgotten To Enable Transatlantic Data Flow', 28 Harvard Journal of Law and Technology 349 (2015), 373-374.
12. N van Eijk, 'Search Engines: Seek and Ye Shall Find? The Position of Search Engines in Law', Iris Plus, 2 (2006) 1, 7

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of search engines for freedom of expression , including the right to free expression of search engine operators themselves.[13]

The A29WP guidelines tried to adjust the mark by recognizing the importance of the freedom of expression of users and original publishers at stake, and offering to DPAs a list of common criteria for handling complaints, which by implication should inform the way in which decisions are made by search engines in the first place. However well crafted, those criteria are far from exhaustive, as they fail to guide complex appreciations of balancing conflicting factors or interests. They thus leave search engines with a number of delicate choices having a substantial impact on the fundamental rights of individuals. This is perceived as problematic for the basic reason that search engines are not public courts, hence employees tasked with making these determinations will not have the same competence and standards of professional ethics and independence that bind members of the judiciary[14] . Relatedly, as private entities are conferred adjudicative power and wide discretion, the nature and depth of balancing may be affected by the economic incentives and the interest of those entities to conduct their business. For example, it is clear that a very probing inquiry into the circumstances of each case would impose serious costs on the search engine; similarly, it runs against the incentives of search engines operators to publish a detailed list of criteria for decisions, as that would make RTBF claims more sophisticated and more complex to decide.

These efficiency considerations should not come as surprise when the number of requests is as large as that reported by Google, reaching 1.265.825 since May 2014, meaning around 35.000 per month, and above 1.200 per day.[15] With these volumes, the RTBF has a taxing effect on search engines, which now need to employ several people specialized in taking care of this type of requests. That effect is likely to increase in the future, as more information is being put online and as the awareness over the existence and the application of the RTBF is likely to increase. Growing awareness is expected as a result of the forthcoming General Data Protection Regulation (GDPR), which enshrines the RTBF in its article 17 and provides for severe fines in case of violation or non-compliance. The GDPR also raises a fundamental question of expansion of the applicability of the RTBF to social media companies and other web hosts,[16] which could seriously hamper the viability of start-up businesses by forcing them to devote significant resources to a robust legal analysis of these claims.

B. Communication to the affected publisher

Another controversial issue addressed by the A29WP Guidelines concerns communications between the search engine and the publisher affected by the delisting. The position taken in the Guidelines is that search engine managers should not, as a general practice, inform the webmasters of the pages affected by de-listing. This position is contentious because, it sacrifices transparency to prevent original publishers from re-publishing the delisted links or the content of the affected pages[17] – a practice that risks undermining the purpose of the RTBF. t also runs against Google's established practice of notifying registered webmasters of affected websites after the delisting occurred.[18]

At a more fundamental level, the position is problematic because it highlights the one-sidedness of the obligation imposed on search engines operators, who are required to adjudicate RTBF claims on the basis of the allegations of data subjects, but not to hear the original publishers in the course of that process, or inform them after the fact. This evidently raises due process concerns, as it affects the publishers' freedom of expression without granting them the right to participate in the fact-finding. The Guidelines do concede that it *may be legitimate* (a far cry from being required) for search engine operators to contact original publishers prior to any decision about a de-listing request, in particularly difficult cases, when it is necessary to get a fuller understanding about the circumstances of the case. However, limiting

13. J van Hoboken, Search Engine Freedom. On the Implications of the Right to Freedom of Expression for the Legal Governance of Web Search Engines (Alphen aan den Rijn: Kluwer Law International, 2012), 351.
14. E Haber, 'Privatization of the judiciary', 40 Seattle U. L. Rev. 115 (2016).
15. Microsoft reports significantly lower numbers, with 18.101 received from May 2014 to December 2016, equal to 583 per month and thus merely around 18 per day. See https://www.microsoft.com/en-us/about/corporate-responsibility/crrr/
16. For an analysis of the possible scenario, see D Keller 'The Right Tools: Europe's Intermediary Liability Laws and the 2016 General Data Protection Regulation' Available at SSRN: https://ssrn.com/abstract=2914684.
17. For example, both the BBC and the Telegraph posted a list of removed links, which in the case of the Telegraph included details about the affected stories. See N McIntosh 'List of BBC web pages which have been removed from Google's search results', BBC (25 July 2014) http://www.bbc.co.uk/blogs/internet/entries/1d765aa8-600b-4f32-b110-d02fbf7fd379 and http://www.telegraph.co.uk/technology/google/11036257/Telegraph-stories-affected-by-EU-right-to-be-forgotten.html.
18. J Ausloos and A Kuczerawy, 'From Notice-and-Takedown to Notice-and-Delist: Implementing the Google Spain Ruling' 14 (2) Colorado Technology Law Journal, 219, 240.

these communications to cases that appear "difficult" is a dangerously elegant solution, as it neglects that it is often precisely by hearing the other side of a story, that one can cast doubts on the accuracy of the characterization of facts (for example, the role of a person as public figure in a community).

The A29WP's position is rooted on the belief that communications of delisting requests "in many cases" involve the processing of personal data, and that there is no valid legal basis for such processing. However, the latter conclusion is debatable: processing is lawful according to article 7(e) of the Data Protection Directive (DPD) (and GDPR) when "necessary for the performance of a task carried out in the public interest", which strikes as a fitting description of the kind of responsibility imposed on search engines to balance the interest of the claimant with those of the general public. To the extent hearing the other party is necessary to ensure that facts are accurately represented in RTBF claims, this ground for processing would appear to be a task carried out in the public interest, therefore justifying the communication of information.[19]

Google recently tried to defend his webmaster communication practice the Spanish DPA, Agencia Española de Protección de Datos (AEPD) on the basis that the communication was necessary for the legitimate interests of publishers, but the APED dismissed the claim contending that publishers do not have a legal right to have their contents indexed and displayed, or displayed in a particular order.[20]

Pivotal in the AEPD's decision to find the practice illegal was the consideration that the communication poses a significant risk of re-publication by original publishers, leading to the weight of the fundamental right to data protection overriding any possible legitimate interest that the communication would serve. However, it has been observed that this argument by the DPA lacks evidence, while on the other hand Google showed that the practice has actually led to a strengthening of data protection by prompting the addresses of the communication to anonymize the data in the affected page. If proved empirically, Google's assertion could perhaps support a reversal of the position so far taken by DPAs, especially if the search engine in question can show that it contractually binds publishers not to republish or further process those data.[22]

At the same time, it is worth noting that this debate over communication between different data controllers processing the same personal data for which erasure has been requested will be impacted by article 17 (2) of the GDPR, according to which "where the controller has made the personal data public and is obliged pursuant to paragraph 1 to erase the personal data, the controller, taking account of available technology and the cost of implementation, shall take reasonable steps, including technical measures, to inform controllers which are processing the personal data that the data subject has requested the erasure by such controllers of any links to, or copy or replication of, those personal data". In other words, the legitimation seems to have turned into an obligation, although mitigated by the definition of "reasonable steps", and applicable only to cases where the controller has made the personal data public- hardly an obstacle in the case of search engines.

C. Involvement of different jurisdictional interests

A third controversial issue is the tension generated by possible conflicts of interests between jurisdictions as a result of the scope of RTBF remedies. Specifically, it

19. It has also been suggested that publishers may need that information for purposes of intervening in administrative or court proceedings, and therefore this could be qualified as a legitimate interest for processing. However, this ground of processing would be significantly narrower, as limited to the cases in which the controller can initiate or intervene in legal proceedings on the basis of freedom of expression. See E Bougiakiotis, 'The Enforcement of the Google Spain ruling', 24 International Journal of Law and Information Technology, 2016, 311, 338.
20. See Resolucion R/02232/2016 in proceeding Procedimiento No PS/00149/2016, available at http://www.agpd.es/portalwebAGPD/resoluciones/procedimientos_sancionadores/ps_2016/common/pdfs/PS-00149-2016_Resolucion-de-fecha-14-09-2016_Art-ii-culo-10-16-LOPD.pdf. For an overview of the arguments of the parties, see D Erdos, 'Communicating Responsibilities: The Spanish DPA targets Google's Notification Practices when Delisting Personal Information', Inform Blog (21 March 2017) at https://inforrm.wordpress.com/2017/03/21/communicating-responsibilities-the-spanish-dpa-targets-googles-notification-practices-when-delisting-personal-information-david-erdos/ and M Peguera, 'Derecho al olvido: ¿el buscador puede informar a la fuente de la eliminación de un enlace', Responsabilidad en Internet (4 March 2017) at https://responsabilidadinternet.wordpress.com/2017/03/04/derecho-al-olvido-el-buscador-puede-informar-a-la-fuente-de-la-eliminacion-de-un-enlace/
21. Peguera, supra n 21.
22. The contractual obligation provides a supplementary safeguard to considered in the legitimate interest analysis, despite the fact that republication by the publisher is already likely to violate data protection rules. Whether republication may be justified on freedom of expression grounds will depend on the reconciliation between data protection and freedom of expression that is made by the relevant national law. See art 85 GDPR.

seems hard to reconcile the global nature of the Internet with the national basis of delisting requests, which can nonetheless affect the ability of users in other countries to access search results. As a result, the data protection interest of the originating country may clash with the interest of other counties to protect freedom of expression and information; but also more broadly, with the way in which the right to data protection may be protected in the legal system of those countries.

On the geographical scope of RTBF obligations, the A29WP Guidelines indicated that delisting should be made on all relevant domains, including ".com". This clashed with the stance previously taken by Google, to limit its delisting to EU domains, which in turn aligned with the suggestions made by Google's Advisory Council on the Right to Be Forgotten.[23] Once again, Google did not have to wait long (until June 2015) to receive push-back in litigation, most notably in a proceeding before CNIL and currently pending on appeal before the Counseil d'Etat[24]. On that occasion, CNIL took the view that global delisting is the only way to guarantee that "effective and complete protection" of the data subjects explicitly sought by the CJEU.

From an international law perspective, CNIL justified the extraterritorial effects by reference to connecting factors, such as the geographical origin of the search engine user, the language used for the search and in displaying the results, and the classification of results in the list. Perhaps in recognition of the validity of the jurisdictional link, Google committed in a letter sent to A29 WP during the course of the proceedings before CNIL to expand its delisting to .com domains whenever the search is conducted by a user that has been identified (through IP address) as coming from the country in which the request was made. CNIL acknowledged the improvement, but deemed it insufficient to bring Google in compliance by reasoning that IP-based solutions can be easily circumvented, and concluded that in any case "the protection of a fundamental right cannot vary depending on its beneficiary."[25]

From a coherence standpoint, the two different set of arguments made by CNIL are striking: on the one hand, the procedural justification for exertion of jurisdiction is the doctrine of effects, which constitutes an exception to the basic territoriality principle in international law.[26] Due to its exceptional nature, the effects doctrine should not be overstretched, for example extending jurisdiction in situations where the potential harm to the data subject is minimal.[27] Yet this is precisely what CNIL seems to be doing, in taking an absolutist position on the matter: according to CNIL, global delisting should apply even in cases where there is no targeting or purpose availment of the territory in question and the link with data subject is tenuous, for example simply that someone may conduct searches on the data subject from that country.

The undesirable consequences from overuse of the effects doctrine are limited by the doctrine of comity, according to which "one nation may recognize the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws."[28] However, there is no room for comity considerations in a system that predetermines the consequences to the establishment of a violation at the remedial stage: if delisting must be on a global basis, then it is not conceivable for the enforcing authority to even consider weighing the interests of other countries. A slightly more nuanced position on extraterritoriality was recently taken by the

23. Report of the Advisory Council on the Right to be Forgotten. Available at http://docs.dpaq.de/8527-report_of_the_advisory_committee_to_google_on_the_right_to_be_forgotten.pdf.
24. Délibération de la formation restreinte n° 2016-054 du 10 mars 2016 prononçant une sanction pécuniaire à l'encontre de la société Google Inc. Available at https://www.legifrance.gouv.fr/affichCnil.do?oldAction=rechExpCnil&id=CNILTEXT000032291946&fastReqId=273825503&fastPos=1.
25. See in this respect also the declarations made by the head of the DPA MS Isabelle Falque Pierrotin, supra n 4
26. D Svantesson, "A New Jurisprudential Framework for Jurisdiction: Beyond the Harvard Draft", 109 American Journal of International Law Unbound 67 (2015). See also N Zingales, Extraterritorial reach of the Marco Civil. A guide to interpretation of article 11′ s key criteria, <http://www.medialaws.eu/extraterritorial-reach-of-the-marco-civil-a-guide-to-interpretation-of-article-11s-key-criteria/> accessed 8 May 2017.
27. One should not confuse this statement concerning the practice of international law with the positive law of the EU, according to which "not necessary in order to find such a right that the inclusion of the information in question in the list of results causes prejudice to the data suwbject" (See Google Spain, para 96). Despite the incontrovertible nature of that rule, the A29WP itself recognized that evidence of such prejudice would be a strong factor in favour of de-listing. See A29WPGuidelines, p. 18.
28. Hilton v. Guyot, 159 U.S. 113, 163-64 (1895)). As defined in the introduction of the same paragraph, "'Comity» in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other". Id., 163.

Swedish DPA, who ruled on the geographical application of delisting in deciding a series of complaints on RTBF issues[29] . Unlike CNIL, the Swedish authority does not postulate the necessity of a global remedy to ensure the fundamental right to data protection. Rather, it recognizes that the scope may vary depending on the circumstances of the case, specifically on whether there is a "specific connection to Sweden and the data subject", for example "if the information on the webpage which is linked to is written in Swedish, addressed to a Swedish audience, contains information about a person that is in Sweden or if the information has been published on the Swedish domain .se".

This decision moves the debate a step forward, evoking flexibility in the application of the remedy[30], but still fails to fully account for the weighing exercise that comity principles would require. For example, what sort of remedy should the DPA impose when publication of information involving personal data of a Swedish citizen is required by law, as it was the for the auction notice in Google Spain? Arguably, the remedy should be designed to permit the application of that national law, as it is appears required under article 85 GDPR, which attributes to Member States the task to "[…] reconcile the right o the protection of personal data…with the right to freedom of expression and information". This question is likely to become even more controversial if the prevailing interpretation of art. 17 GDPR becomes that RTBF claims can be submitted to data controllers other than search engines.

II. BETWEEN THE SCYLLA AND CHARYBDIS OF PUBLIC AND PRIVATE

The challenges highlighted so far implicate that operationalizing the right to be forgotten requires a careful design. The need to balance conflicting fundamental values, the sheer number of requests that were already filed and can be expected in the future, the number of jurisdictions potentially affected all implicate that neither a private company nor a public agency or court can be expected to perform the job in a way that would satisfy various stakeholders and lead to socially acceptable results.
As noted above, the current EU solution whereby a private entity, notably a search engine, is asked to decide whether conditions for delisting are fulfilled while simultaneously considering the right to freedom of expression grants this entity broad discretionary powers. Both the conditions for delisting as well as the exceptions are framed in abstract terms, calling for a great degree of evaluative judgment in each instance of application. There can be real differences of view as to whether particular information is 'inadequate, irrelevant or no longer relevant, or excessive in relation to those purposes and in the light of the time that has elapsed' or to use the GDPR language 'no longer necessary in relation to the purposes for which they were collected'.[31] Even more so, there can be differences of views as to whether retaining a link is 'necessary for exercising the right of freedom of expression and information' not to mention evaluating whether the right to be forgotten is 'fair[ly] balance[ed]' against the public's right to the information. Neither the Court nor the A29WP nor the GDPR have offered much guidance on how to strike that balance.

From this perspective, a regime delegating decision-making process for delisting to search engines is problematic. Search engines cannot be just trusted to be objective in deciding whether to remove a link, because they necessarily have commercial interests tipping the scales towards delisting. At first sight, one could expect that competitive pressure should compel search engines to balance the right to be forgotten with the right to information well. After all, if they reject delisting requests too easily they may face criticism for providing insufficient privacy and data protection, as well as administrative penalties for any ascertained RTBF violations. On the other hand, however, search engines also have incentives not to delist links too lightly, because that would decrease the quality of its search results. In reality, competitive pressure cannot be expected to direct search engines towards balanced results. It is true that relevance of search results is an important quality dimension on which search engines compete.[33] However, since it is difficult to measure the quality of search results, consumers are hardly able to identify quality differences, and competitors have troubles signaling them in the market process. For this reason, it has been argued under current conditions of competition, the largest search engine has the ability and incentive to de-

29. Decision Tillsyn enligt personuppgiftslagen (1998:204)- Google Inc. och Google Sweden AB. Available at http://www.datainspektionen.se/press/nyheter/the-right-to-be-forgotten-may-apply-all-over-the-world/
30. In line with this approach (and proposing a more contextual balancing of interests), see B van Alsenoy and M Koekkoek, 'The Extra-Territorial Reach of the EU's 'Right to Be Forgotten'' International Data Privacy Law (2015) 5 (2) 105.
31. Article 17(1)(a) GDPR.
32. Article 17(3)(a) GDPR.
33. See European Commission Case No. COMP/M. 5727-Microsoft/Yahoo! (Feb. 18, 2010) (C 1077), para. 100.

- gest search engine has the ability and incentive to degrade the quality of its search results to the detriment of consumers[34] . This is because network effects actually increase the dominant engine's profits when it degrades search quality by providing more 'sponsored' results at the expense of organic results. Competitive pressure in this market is limited, considering the importance of scale in this market to create a "virtuous circle" leading to continuous better results and more users.[35]

Similar problems can be expected with regard to the choice concerning removal of links. Like any private undertaking, a search engine is driven by its own profits rather than public policy considerations. Accordingly, we can expect that it will prefer to err on the side of caution, and delist links even when a request is not justified. Or we can expect it to accept more readily delisting requests concerning its competitors' websites (for example, a service that is equivalent to 'Google News'). Under the current system, it will be extremely hard to detect this type of overreach, and nobody would have recourse against an overzealous RTBF delisting. By contrast, the GDPR requires that those who request delisting have full knowledge whether their request has been accommodated, and provides them in case of dissatisfaction with the possibility to start a legal proceeding against the data controller.

In light of all the rehearsed arguments against delegating the implementation of delisting to private entities, one might conclude that this power should rest with a public body. However, a public body would also face significant limitations in effective administration of the right to be forgotten. As mentioned, Google alone has reported 1.265.825 requests since May 2014, meaning around 35.000 per month, and above 1.200 per day.[36] While this has been a significant burden on Google, it would have even more paralyzing effect on a public agency disposing of a smaller budget, fewer staff and lesser expertise in processing large volumes of data in an efficient manner. We could expect a serious backlog in processing delisting requests, which would undermine the effectiveness of protection. Moreover, given the current institutional set up relating to the protection of privacy and data protection, attributing this competence in the first instance to the public sector would require the involvement of 28 DPAs with potentially significant duplicative costs (namely, in conducting the same type of analysis and dealing with similar requests), and most importantly, diverting their resources away from other important areas of enforcement of data protection law. Since neither private nor fully public architectures appear adequate to deal with RTBF adjudication, the ideal solution is a hybrid. To that end, we propose a co-regulatory solution where search engines would serve as 'front handlers' of delisting request, while a specialized public agency would be entrusted with task of reviewing their decisions, and empowered where necessary to initiate actions for reinstatement on public interest grounds.

III. THE NEED FOR AN AGENCY FOR FREEDOM OF EXPRESSION AND INFORMATION

Scholars and policy makers have extensively discussed and developed the principles of good governance that a public-private regulatory regime needs to meet to be considered legitimate in a policy based on the rule of law and to be effective in meeting its goals. While we draw from this literature, we consider that our primary resource should be the Principles of Better Self- and Co-regulation developed and committed to by the European Commission, and the right to good administration enshrined in Article 41 of the EU Charter of Fundamental Rights. In this short paper, we simply highlight the most relevant principles and how they inform the solution we propose.

A. Principles of Better Self- and Co-regulation

1) Participation

Participants in a self- or co-regulatory mechanism should represent as many stakeholders as possible. The requirement of broad participation aims to ensure that all relevant interests are properly represented and thus taken into account and given adequate weight in a decision-making process. This procedural safeguard is linked to a substantive concern, namely, ensuring that the affected are fairly or appropriately treated in the decision made.[37] At the same time, procedural regard should prevent excessive influence of overrepresented interests and resulting bias in their favour.

34. M Stucke and A Ezrachi, 'When Competition Fails to Optimize Quality: A Look at Search Engines' 18 Yale Journal of Law & Technology 70 (2016)
35. N Zingales, 'Product Market Definition in Online Search and Advertising' (2013) 9 (1) Competition Law Review 29
36. See supra note 13.
37. Richard B Stewart, 'Remedying Disregard in Global Regulatory Governance: Accountability, Participation, and Responsiveness' (2014) 108 (2) American Journal of International Law 211, 224.

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To achieve broader and effective participation, the general public could be given proper representation in delisting decisions through the establishment of a dedicated public agency: an agency for the right to information and freedom of expression. The agency, established in each EU member state, would review delisting decisions taken by a search engine and evaluate whether they may infringe the public right to information, being empowered to verify the accuracy of the information by establishing contact with the original publishers. If the agency concludes that the public right to information is violated to an extent justifying legal intervention, it shall inform the claimant and the respective DPA. It shall be then up to the claimant and the DPA to decide if they agree with the agency's point of view. If they do, the agency shall request the search engine to adopt the necessary measures. However, if either the DPA or the claimant disagrees with the agency the latter would then be entitled to initiate legal proceedings in national courts to protect the public interest of the right to information and freedom of expression. The court would finally decide whether a link should be re-listed, or whether the scope of delisting should be modified.

2) Openness and transparency

Transparency means public access to decision-making process. It can involve access to actual proceedings and to the relevant documentation. Transparency is crucial for understanding the reasons behind a decision taken and facilitates controlling its correctness. Thus, transparency is crucial for accountability. In our case, transparency is crucial for public control of whether delisting decisions fairly balance the right to data protection with the right to information. It needs to be ensured at both public and private stages of decision-making. Transparency can help ensuring that both search engines and agencies adhere to their obligations.

Transparency involves a number of different mechanisms, such as the holding of meetings in public, the provision of information and the right of access to documents. As regards proper operationalization of the right to be forgotten, transparency could involve the following elements:
- Statistics about delisting requests and their treatment by search engines, agencies, and DPAs respectively;
- Statistics about the rationales for either delisting or refusing to delist;
- Categories of requests and sources[38] , including a division by time elapsed since publication.
- A disclosure of the existence of any type of algorithm involved in filtering out delisting requests, and a general explanation of its functioning.
- Annual reports by the agencies explaining the rationale for their actions, including failure to act. In particular, the (anonymized) reports published by the agency should overtime provide guidance as to the type of requests that would justify delisting and those that would not.

3) Clear objectives

The objectives of the regulatory scheme should be set out clearly and unambiguously. In our case, the competences of the agency and the conditions under which it would be required to intervene should be specified with a certain level of precision to limit its discretion and enable accountability. If these competences are too vague, control can become elusive and both the right to data protection as well as the right to information can be undermined. Importantly, the mandate of the agency should include considering the right to freedom of expression and information in third countries that might be affected by delisting. This would enable the agency to give representation to the interests of those countries, and feed as much as possible comity principles into RTBF adjudication.

4) Financing

As the new agency would be a public body serving the public interest, it could be financed from public funds. Search engines and DPAs would however remain responsible for the processing costs on their side, namely the additional costs incurred due to litigation with the agency. While this arrangement implies at least in theory that one agency is funded to "cannibalize" the work of the other agency, the degree to which this occurs will largely depend on the legislation passed in Member States to give content to the general exception of article 86 GDPR.

38. See along these lines the letter signed by 80 academics requesting to Google more granular information. Ellen Goodman, 'Open Letter to Google From 80 Internet Scholars: Release RTBF Compliance Data', Medium (14 May 2015) at https://medium.com/@ellgood/open-letter-to-google-from-80-internet-scholars-release-rtbf-compliance-data-cbfc6d59f1bd.

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B) Right to good administration

Potential intervention by the agency represents an additional level of scrutiny of delisting requests and as such it would affect the exercise of the individuals' RTBF. Given the volumes of delisting requests, some preliminary screening mechanism appears necessary to limit the number of requests reviewed by the agency, and thus improve its ability to handle reviewed cases in a timely manner and with due care.

Filtering should ensure that only two types of cases are reviewed by the agency: (1) those were the right to information clearly prevails; (2) 'difficult cases', that is, requests involving a real conflict between two justified interests are reviewed by the agency. Cases where it is relatively 'clear' that the right to data protection should prevail or when the right to information is weak should be filtered out. Selection could be facilitated by:
(a) Standardized delisting request forms, including a breakdown of the type of interest invoked (as is currently the case for Microsoft Bing, but at a more granular level). Standardization actually provides an additional benefit of a "one stop shop" for claimants, which could simultaneously submit that form to any controller subject to RTBF obligations[39].

(b) An obligation on search engines to classify requests into different categories (along the lines of transparency reports), and to "flag" for review cases which appear complex, or where delisting would constitute a substantial interference with freedom of expression.

(c) An obligation for search engines to establish communication with the original publisher, under confidentiality agreement, in order to verify the accuracy of the facts alleged.

(d) The possiblity for publishers and members of the general public to lodge complaints with the agency.

(e) A penalty for frivolous or meritless RTBF claims.

The ability to initiate joint actions is another way to economize on administrative resources. The agency should therefore have the power to consolidate requests of the same type.

The requirement of giving reasons for the decisions made – another element of the right to good administration – is closely related to transparency. That is, it makes the decision-making process more transparent to the affected parties, so that they can know why a particular decision has been adopted. At the same time, the obligation to give reasons disciplines the exercise of discretion, helps ensuring that various interests at stake are duly considered and nudges the decision-maker to carry out a more careful analysis. Most importantly, the obligation to give reasons would enable claimants to appreciate the weight attributed to freedom of expression and information in a particular case.

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39. See also E Haber, supra n 16, 161. E Lee 'Recognizing Rights in Real Time: The Role of Google in the EU Right to Be Forgotten' 49 UC Davis Law Review 1017, 1086