To:

Conseil d'Etat

France

Reference: Amicus Curie- CNIL vs. Google-France

The Foundation for Press Freedom (FLIP) is a non-governmental organization, with over 15 years of working experience on the defense 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 in 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. In the same order of ideas, FLIP submits this amicus curie to the Conseil d’Etat in order to bring some considerations that we hope to be of interest and use.

First of all, we would like to take reference to two subjects for the assessment of the case: The particularities of internet and the rules of international law. The decision that the Conseil d’Etat will take must take considerations of those matters 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.

As a starting point, it must be reminded 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 be forgotten Measures (whether removing or de-listing a content) is an interference to freedom of expression, as its 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 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, Google Spain SL, Google Inc. v Agencia Española de Protección de Datos (AEPD), Mario Costeja González. According to that decision, search engines, as parties who undertake “processing of personal data”, are “obliged to remove from the list of results displayed following a search made on the basis of a person’s name links to web pages, published by third parties and containing information relating to that person, also in a case where that name or information is not erased beforehand or simultaneously from those web pages, and even, as the case may be, when its publication in itself on those pages is lawful”.

At this point, it must be recalled 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.

Taking this into account, the Conseil d’Etat 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 lives. A concern that may fall is whether this kind of decisions may affect the decentralized character of internet which, as said by Mark Poster[1]:

> 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.

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

> The Internet is also decentralized at a basic level of 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 be forgotten 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 pyramid, 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[2]:

> [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.

This same principle can be found in Article 2(1) of the Treaty on the European Union, 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.

Moreover, this same principle can be seen in the Case Law of the European Court of Human Rights[3], 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. These rulings have special importance in states members of the Council of Europe, but must also

[2] 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.
[3] See Handyside vs United Kingdom (Application no. 5493/72), September 7 1976

be taken into account by those who are part of the European Union, given that, according to Article 6(3) of the Treaty on the Functioning of the European Union "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".

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.

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".

A conclusion of the exposed arguments will bring the following conclusions:

1. Orders of Right to be forgotten given by national authorities of Member States of the European Union with effect of other Member States would affect the autonomy of states. This would end up overruling principles of the Charter of the United Nations and the Treaty on the European Union. Moreover, it would affect the principle of margin of appreciation that each state has to determine the correct application of permitted interferences to freedom of expression.
2. The same orders with applicable effect in countries which are not Member States of the European Union but are part of bodies such as the Council of Europe would affect the same principles of the Charter of the United Nations and the margin of appreciation principle mentioned above.
3. Those orders, when applied to countries which are not part of the European Union, including those who are members of the Council of Europe, among others, would affect the principle of "pacta sunt servanda". The latter finds its basis in the fact that third parties would be applying decisions based in case law of a court with basis in treaties which they are not part of.

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

The Conseil d'Etat must 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 CNIL or even the CJEU do. 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.

We on FLIP believe in the democratic principles that build the European Institutions and the French legal system. We think that a decision falling into the arguments mentioned above is possible and compatible with them.

Sincerely yours,

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